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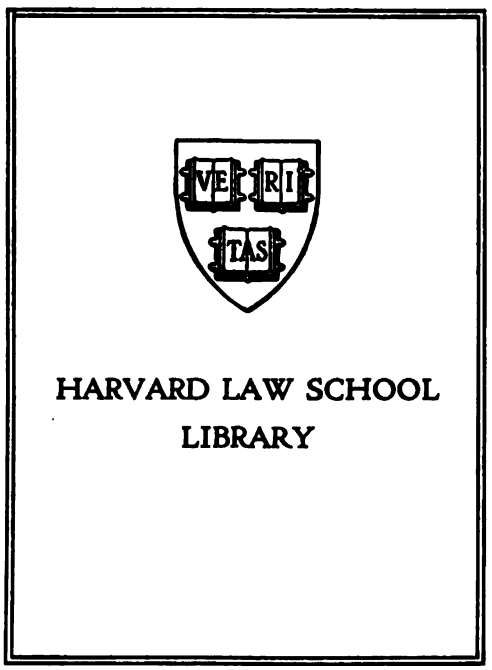

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CENTURY EDITION

OF THE

AMERICAN DIGEST

A COMPLETE DIGEST OF ALL REPORTED AMERICAN CASES FROM THE EARLIEST TIMES TO 1896

REPLACEMENT

VOL. 31
Judicial Sales—Landing

ST. PAUL
WEST PUBLISHING CO.
1902

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TABLE OF ABBREVIATIONS.

A

Abb. Adm.	Abbott's Admiralty (U. S.)
Abb. Dec.	Abbott's Decisions (N. Y.)
Abb. N. C.	Abbott's New Cases (N. Y.)
Abb. Prac.	Abbott's Practice (N. Y.)
Abb. Prac. (N. S.)	Abbott's Practice, New Series (N. Y.)
Abb. (U. S.)	Abbott's United States.
Adams	Adams (N. H.)
Add.	Addison (Pa.)
Aikens	Aikens (Vt.)
A. K. Marsh.	A. K. Marshall (Ky.)
Ala.	Alabama.
Alb. Law J.	Albany Law Journal.
Allen	Allen (Mass.)
Am. Dec.	American Decisions.
Am. Law J.	American Law Journal.
Am. Law Rec.	American Law Record (Cin.)
Am. Law Reg. (N. S.)	American Law Register, New Series.
Am. Law Reg. (O. S.)	American Law Register, Old Series.
Am. Law T. Rep.	American Law Times Reports.
Am. Rep.	American Reports.
Am. St. Rep.	American State Reports.
Anth. N. P.	Anthon's Nisi Prius Reports (N. Y.)
App.	Appleton (Me.)
App. D. C.	Appeal Cases (D. C.)
App. Div.	Appellate Division (N. Y.)
Ariz.	Arizona.
Ark.	Arkansas.
Ashm.	Ashmead (Pa.)
Atl.	Atlantic Reporter.

B

Bailey	Bailey (S. C.)
Bailey, Eq.	Bailey's Equity (S. C.)
Baldw.	Baldwin (U. S.)
Ban. & A.	Banning & Arden's Patent Cases (U. S.)
Barb.	Barbour (N. Y.)
Barb. (Ark.)	Barber (Ark.)
Barb. Ch.	Barbour's Chancery (N. Y.)
Barr	Barr (Pa.)
Baxt.	Baxter (Tenn.)
Bay	Bay (S. C.)
Beasl.	Beasley (N. J.)
Bee	Bee (U. S.)
Ben.	Benedict (U. S.)
Benn.	Bennett (Cal.)
Bibb	Bibb (Ky.)
Bin.	Binney (Pa.)
Biss.	Bissell (U. S.)
Black	Black (U. S.)
Blackf.	Blackford (Ind.)
Bland	Bland (Md.)
Blatchf.	Blatchford (U. S.)
Blatchf. Prize Cas.	Blatchford's Prize Cases (U. S.)
Blatchf. & H.	Blatchford & Howland (U. S.)
B. Mon.	B. Monroe (Ky.)
Bond	Bond (U. S.)
Bosw.	Bosworth (N. Y.)
Bradf. Sur.	Bradford's Surrogate (N. Y.)
Bradw.	Bradwell (Ill.)
Branch	Branch (Fla.)
Brayt.	Brayton (Vt.)
Breese	Breese (Ill.)
Brev.	Brevard (S. C.)
Brewst.	Brewster (Pa.)
Brightly, Elect. Cas.	Brightly's Leading Election Cases (Pa.)
Brightly, N. P.	Brightly's Nisi Prius Reports (Pa.)
Brock.	Brockenbrough (U. S.)
Brock. & H.	Brockenbrough & Holmes (Va.)
Brown, Adm.	Brown's Admiralty (U. S.)
Browne	Browne (Pa.)
Brunner, Col. Cas.	Brunner's Collected Cases (U. S.)
Burn.	Burnett (Wis.)
Busb.	Busbee (N. C.)
Busb. Eq.	Busbee's Equity (N. C.)
Bush	Bush (Ky.)

C

Caines	Caines (N. Y.)
Caines, Cas.	Caines' Cases (N. Y.)
Cal.	California.
Call	Call (Va.)
Cam. & N.	Cameron & Norwood's Conference (N. C.)
Car. Law Repos.	Carolina Law Repository (N. C.)
Cart.	Carter (Ind.)
Casey	Casey (Pa.)
C. C. A.	Circuit Court of Appeals (U. S.)
C. E. Green	C. E. Green (N. J.)
Chand.	Chandler (Wis.)
Chan. Sentinel	Chancery Sentinel (N. Y.)
Charlt., R. M.	R. M. Charlton (Ga.)
Charlt., T. U. P.	T. U. P. Charlton (Ga.)
Chase	Chase (U. S.)
Chest. Co. Rep.	Chester County Reports (Pa.)
Cheves	Cheves (S. C.)
Cheves, Eq.	Cheves' Equity (S. C.)
Chi. Leg. N.	Chicago Legal News (Ill.)
Chip., D.	D. Chipman (Vt.)
Chip., N.	N. Chipman (Vt.)
Cin. R.	Cincinnati Superior Court Reports (Ohio)
Cin. Super. Ct. Rep'r.	Cincinnati Superior Court Reporter (Ohio)
Cir. Ct. Dec.	Circuit Court Decisions (Ohio)
City Ct. R.	City Court Reports (N. Y.)
City Ct. R. Supp.	City Court Reports, Supplement (N. Y.)
City H. Rec.	City Hall Recorder (N. Y.)
Civ. Proc. R.	Civil Procedure Reports (N. Y.)
Clark	Clark (Pa.)
Clarke	Clarke (Iowa)
Clarke, Ch.	Clarke's Chancery (N. Y.)
Cleve. Law Rec.	Cleveland Law Recorder (Ohio)
Cleve. Law Rep.	Cleveland Law Reporter (Ohio)
Cliff.	Clifford (U. S.)
Code R. (N. S.)	Code Reports, New Series (N. Y.)
Code Rep.	Code Reporter (N. Y.)
Cold.	Coldwell (Tenn.)
Colem. Cas.	Coleman's Cases (N. Y.)
Colem. & C. Cas.	Coleman & Caines' Cases (N. Y.)

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[21 Am. Dig. Cent. Ed.]

Colo.	Colorado.
Colo. App.	Colorado Appeals.
Colo. Law Rep.	Colorado Law Reporter.
C. P. Rep.	Common Pleas Reporter (Pa.)
Comst.	Comstock (N. Y.)
Conf. R.	Conference Reports (N. C.)
Conn.	Connecticut.
Con. Sur.	Connolly's Surrogate (N. Y.)
Cooke	Cooke (Tenn.)
Cow.	Cowen (N. Y.)
Cox	Cox (Ark.)
Coxe	Coxe (N. J.)
Crabbe	Crabbe (U. S.)
Cranch	Cranch (U. S.)
Cranch, C. C.	Cranch's Circuit Court (U. S.)
Cranch, Pat. Dec.	Cranch's Patent Decisions (U. S.)
Cr. Law Mag.	Criminal Law Magazine (N. J.)
Ct. Cl.	Court of Claims (U. S.)
Curt.	Curtis (U. S.)
Cush.	Cushing (Mass.)
Cushm.	Cushman (Miss.)

D

Dak.	Dakota.
Dall. (Pa.)	Dallas (Pa.)
Dall. (U. S.)	Dallas (U. S.)
Dall. Dig.	Dallam's Digest and Opinions (Tex.)
Daly	Daly (N. Y.)
Dana	Dana (Ky.)
Day	Day (Conn.)
D. C.	District of Columbia.
D. Chip.	D. Chipman (Vt.)
Deady	Deady (U. S.)
Del.	Delaware.
Del. Ch.	Delaware Chancery.
Del. Co. R.	Delaware County Reports (Pa.)
Dem. Sur.	Demarest's Surrogate (N. Y.)
Denio	Denio (N. Y.)
Desaus.	Desaussure's Equity (S. C.)
Dev.	Devereux (N. C.)
Dev. Ct. Cl.	Devereux's Court of Claims (U. S.)
Dev. Eq.	Devereux's Equity (N. C.)
Dev. & B.	Devereux & Battle (N. C.)
Dev. & B. Eq.	Devereux & Battle's Equity (N. C.)
Dick.	Dickinson (N. J.)
Dill.	Dillon (U. S.)
Disn.	Disney (Ohio)
Doug.	Douglas (Mich.)
Dud.	Dudley (Ga.)
Dud. Eq.	Dudley's Equity (S. C.)
Dud. Law	Dudley's Law (S. C.)
Duer	Duer's Superior Court (N. Y.)
Dutch.	Dutcher (N. J.)
Duv.	Duvall (Ky.)

E

Edm. Sel. Cas.	Edmonds' Select Cases (N. Y.)
E. D. Smith.	E. D. Smith (N. Y.)
Edw. Ch.	Edwards' Chancery (N. Y.)
Eng.	English (Ark.)

F

Fairf.	Fairfield (Me.)
Fed.	Federal Reporter (U. S.)
Fed. Cas.	Federal Cases (U. S.)
Fish. Pat. Cas.	Fisher's Patent Cases.
Fish. Pat. Rep.	Fisher's Patent Reports.
Fish. Prize Cas.	Fisher's Prize Cases (U. S.)
Fla.	Florida.
Flip.	Flippin (U. S.)
Fost.	Foster (N. H.)
Freem.	Freeman (Ill.)
Freem. Ch.	Freeman's Chancery (Miss.)

G

Ga.	Georgia.
Ga. Dec.	Georgia Decisions.
Gall.	Gallison (U. S.)
George	George (Miss.)
Gil.	Gilfillan (Minn.)
Gill	Gill (Md.)
Gill & J.	Gill & Johnson (Md.)
Gilman	Gilman (Ill.)
Gilmer	Gilmer (Va.)
Gilp.	Gilpin (U. S.)
Grant, Cas.	Grant's Cases (Pa.)
Grat.	Grattan (Va.)
Gray	Gray (Mass.)
Green, C. E.	C. E. Green (N. J.)
Green, Cr. Law R.	Green's Criminal Law Reports (N. Y.)
Green, H. W.	H. W. Green (N. J.)
Green, J. S.	J. S. Green (N. J.)
Greene, G.	G. Greene (Iowa)
Greenl.	Greenleaf (Me.)

H

Hall	Hall's Superior Court (N. Y.)
Halst.	Halsted (N. J.)
Halst. Ch.	Halsted's Chancery (N. J.)
Ham.	Hammond (Ohio)
Hand	Hand (N. Y.)
Handy	Handy (Ohio)
Har. (Del.)	Harrington (Del.)
Har. (Mich.)	Harrington (Mich.)
Har. (N. J.)	Harrison (N. J.)
Hardin	Hardin (Ky.)
Harp.	Harper (S. C.)
Harp. Eq.	Harper's Equity (S. C.)
Harris	Harris (Pa.)
Har. & G.	Harris & Gill (Md.)
Har. & J.	Harris & Johnson (Md.)
Har. & McH.	Harris & McHenry (Md.)
Hask.	Haskell (U. S.)
Hawks	Hawks (N. C.)
Hayw. (N. C.)	Haywood (N. C.)
Hayw. (Tenn.)	Haywood (Tenn.)
Hayw. & H.	Hayward & Hazelton (U. S.)
Haz. Reg.	Hazard's Register (Pa.)
Head	Head (Tenn.)
Heisk.	Heiskell (Tenn.)
Hemp.	Hempstead (U. S.)
Hen. & M.	Hening & Munford (Va.)
Hill	Hill (N. Y.)
Hill, Eq.	Hill's Equity (S. C.)
Hill, Law	Hill's Law (S. C.)
Hill & D. Supp.	Hill & Denio, Lalor's Supplement (N. Y.)
Hilt.	Hilton (N. Y.)
Hoff. Ch.	Hoffman's Chancery (N. Y.)
Hoff. Land Cas.	Hoffman's Land Cases (U. S.)
Holmes	Holmes (U. S.)
Hopk. Ch.	Hopkins' Chancery (N. Y.)
Houst.	Houston (Del.)
Houst. Cr. Cas.	Houston's Criminal Cases (Del.)
How. (Miss.)	Howard (Miss.)
How.	Howard (U. S.)
How. Prac.	Howard's Practice (N. Y.)
How. Prac. (N. S.)	Howard's Practice, New Series (N. Y.)
Hughes (Ky.)	Hughes (Ky.)
Hughes	Hughes (U. S.)
Humph.	Humphrey (Tenn.)
Hun	Hun (N. Y.)

I

Idaho	Idaho.
Ill.	Illinois.
Ill. App.	Illinois Appellate Court Reports.
Ind.	Indiana.
Ind. App.	Indiana Appellate Court Reports.
Ind. T.	Indian Territory.

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Ins. Law J.	Insurance Law Journal (Pa.)
Interst. Com. R.	Interstate Commerce Reports.
Iowa	Iowa.
Ired.	Iredell's Law (N. C.)
Ired. Eq.	Iredell's Equity (N. C.)

J

Jeff.	Jefferson (Va.)
J. J. Marsh.	J. J. Marshall (Ky.)
Johns.	Johnson (N. Y.)
Johns. Cas.	Johnson's Cases (N. Y.)
Johns. Ch.	Johnson's Chancery (N. Y.)
Jones	Jones (Pa.)
Jones, Eq.	Jones' Equity (N. C.)
Jones, Law	Jones' Law (N. C.)
Jones & S.	Jones & Spencer (N. Y.)
Jour. Juris.	Journal of Jurisprudence.
Jud. Repos.	Judicial Repository (N. Y.)

K

Kan.	Kansas.
Kan. App.	Kansas Appeals.
Kelly	Kelly (Ga.)
Kern.	Kernan (N. Y.)
Keyes	Keyes (N. Y.)
Kirby	Kirby (Conn.)
Kulp	Kulp (Pa.)
Ky.	Kentucky.
Ky. Dec.	Kentucky Decisions.
Ky. Law Rep.	Kentucky Law Reporter.

L

La.	Louisiana.
La. Ann.	Louisiana Annual.
Lack. Jur.	Lackawanna Jurist (Pa.)
Lack. Leg. N.	Lackawanna Legal News (Pa.)
Lalor, Supp.	Lalor's Supplement to Hill & Denio's Reports (N. Y.)
Lanc. Bar	Lancaster Bar.
Lanc. Law Rev.	Lancaster Law Review.
Lans.	Lansing (N. Y.)
Lans. Ch.	Lansing's Chancery (N. Y.)
Law Rep.	Law Reporter (Mass.)
Law T. (N. S.)	Law Times, New Series.
Lea	Lea (Tenn.)
L. Ed.	Lawyers' Edition Supreme Court Reports.
Lee	Lee (Cal.)
Leg. Chron.	Legal Chronicle.
Leg. Gaz.	Legal Gazette (Pa.)
Leg. Gaz. R.	Legal Gazette Reports (Pa.)
Leg. Int.	Legal Intelligencer (Pa.)
Leg. Op.	Legal Opinions.
Leg. Rec. Rep.	Legal Record Reports.
Leg. Rep.	Legal Reporter (Tenn.)
Leg. & Ins. Rep.	Legal & Insurance Reporter.
Lehigh Val. Law Rep.	Lehigh Valley Law Reporter.
Leigh	Leigh (Va.)
Litt.	Littell (Ky.)
Litt. Sel. Cas.	Littell's Select Cases (Ky.)
Low.	Lowell (U. S.)
Lower Ct. Dec.	Lower Court Decisions (Ohio)
L. R. A.	Lawyers' Reports Annotated.
Luz. Law T.	Luzerne Law Times.
Luz. Leg. Obs.	Luzerne Legal Observer (Pa.)
Luz. Leg. Reg.	Luzerne Legal Register (Pa.)

M

McAll.	McAllister (U. S.)
MacArthur	MacArthur (D. C.)
MacArthur, Pat. Cas.	MacArthur's Patent Cases (U. S.)
MacArthur & M.	MacArthur & Mackey (D. C.)
Mackey	Mackey (D. C.)
McCahon	McCahon (Kan.)
McCart.	McCarter (N. J.)
McCarty, Civ. Proc.	McCarty's Civil Procedure Reports (N. Y.)
McCord	McCord's Law (S. C.)
McCord, Eq.	McCord's Equity (S. C.)
McCrary	McCrary (U. S.)
McGloin	McGloin (La.)
McLean	McLean (U. S.)
McMul.	McMullan (S. C.)
McMul. Eq.	McMullan's Equity (S. C.)
Man.	Manning (Mich.)
Man. Unrep. Cas.	Manning's Unreported Cases (La.)
Marsh., A. K.	A. K. Marshall (Ky.)
Marsh., J. J.	J. J. Marshall (Ky.)
Mart. (N. C.)	Martin (N. C.)
Mart. (N. S.)	Martin's New Series (La.)
Mart. (O. S.)	Martin's Old Series (La.)
Mart. & Y.	Martin & Yerger (Tenn.)
Marv.	Marvel's Reports (Del.)
Mason	Mason (U. S.)
Mass.	Massachusetts.
Md.	Maryland.
Md. Ch.	Maryland Chancery.
Me.	Maine.
Meigs	Meigs (Tenn.)
Metc. (Ky.)	Metcalfe (Ky.)
Metc. (Mass.)	Metcalf (Mass.)
Mich.	Michigan.
Mich. N. P.	Michigan Nisi Prius.
Miles	Miles (Pa.)
Mill, Const.	Mill's Constitutional Reports (S. C.)
Minn.	Minnesota.
Minor	Minor (Ala.)
Misc. Rep.	Miscellaneous Reports (N. Y.)
Miss.	Mississippi.
Mo.	Missouri.
Mo. App.	Missouri Appeals.
Mo. App. Rep'r.	Missouri Appellate Reporter.
Monag.	Monaghan (Pa.)
Mon., B.	B. Monroe (Ky.)
Mon., T. B.	T. B. Monroe (Ky.)
Mont.	Montana.
Month. Law Bul.	Monthly Law Bulletin (N. Y.)
Montg. Co. Law Rep'r	Montgomery County Law Reporter (Pa.)
Moore	Moore (Ark.)
Morris	Morris (Iowa)
Munf.	Munford (Va.)
Murph.	Murphey (N. C.)
Myr. Prob.	Myrick's Probate Court Reports (Cal.)

N

N. B. R.	National Bankruptcy Register (U. S.)
N. C.	North Carolina.
N. C. Term R.	North Carolina Term Reports.
N. Chip.	N. Chipman (Vt.)
N. D.	North Dakota.
N. E.	Northeastern Reporter.
Neb.	Nebraska.
Nev.	Nevada.
Newb. Adm.	Newberry's Admiralty (U. S.)
N. H.	New Hampshire.
N. J. Eq.	New Jersey Equity.
N. J. Law	New Jersey Law.
N. J. Law J.	New Jersey Law Journal.
N. M.	New Mexico.
Nisi Prius & Gen. T. Rep.	Nisi Prius & General Term Reports (Ohio)
Norris	Norris (Pa.)
Northam. Law Rep.	Northampton Law Reporter.
Northumb. Co. Leg. N.	Northumberland County Legal News.

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Nott & McC. ..... Nott & McCord (S. C.)
N. W. ..... Northwestern Reporter.
N. Y. ..... New York.
N. Y. Ann. Cas. ..... New York Annotated Cases.
N. Y. Cr. R. ..... New York Criminal Reports.
N. Y. Law J. ..... New York Law Journal.
N. Y. Leg. Obs. ..... New York Legal Observer.
N. Y. St. Rep. ..... New York State Reporter.
N. Y. Super. Ct. ..... New York Superior Court.
N. Y. Supp. ..... New York Supplement.

O

Ohio ..... Ohio.
Ohio Cir. Ct. R. ..... Ohio Circuit Court Reports.
O. C. D. ..... Ohio Circuit Decisions.
Ohio Dec. ..... Ohio Decisions.
Ohio Law J. ..... Ohio Law Journal.
Ohio Leg. N. ..... Ohio Legal News.
Ohio N. P. ..... Ohio Nisi Prius.
Ohio St. ..... Ohio State.
Ohio S. & C. P. Dec. ..... Ohio Superior and Common Pleas Decisions.
Okl. ..... Oklahoma.
Olcott ..... Olcott (U. S.)
Or. ..... Oregon.
Outerbridge ..... Outerbridge (Pa.)
Overt. ..... Overton (Tenn.)

P

Pac. ..... Pacific Reporter.
Pa. Co. Ct. R. ..... Pennsylvania County Court Reports.
Pa. Dist. R. ..... Pennsylvania District Reports.
Pa. ..... Pennsylvania State.
Paige ..... Paige's Chancery (N. Y.)
Paine ..... Paine (U. S.)
Pa. Law J. ..... Pennsylvania Law Journal.
Parker, Cr. R. ..... Parker's Criminal Reports (N. Y.)
Pars. Eq. Cas. ..... Parsons' Select Equity Cases (Pa.)
Pa. Super. Ct. ..... Pennsylvania Superior Court Reports.
Pat. & H. ..... Patton & Heath (Va.)
Pears. ..... Pearson (Pa.)
Peck (Ill.) ..... Peck (Ill.)
Peck (Tenn.) ..... Peck (Tenn.)
Penning. ..... Pennington (N. J.)
Penny. ..... Pennypacker (Pa.)
Pen. & W. ..... Penrose & Watts (Pa.)
Pet. ..... Peters (U. S.)
Pet. Adm. ..... Peters' Admiralty (U. S.)
Pet. C. C. ..... Peters' Circuit Court (U. S.)
P. F. Smith. ..... P. F. Smith (Pa.)
Phila. ..... Philadelphia (Pa.)
Phil. ..... Phillips' Law (N. C.)
Phil. Eq. ..... Phillips' Equity (N. C.)
Pick. ..... Pickering (Mass.)
Pickle ..... Pickle (Tenn.)
Pike ..... Pike (Ark.)
Pin. ..... Pinney (Wis.)
Pittsb. Leg. J. ..... Pittsburgh Legal Journal (Pa.)
Pittsb. R. ..... Pittsburgh Reports (Pa.)
Port. (Ala.) ..... Porter (Ala.)
Posey, Unrep. Cas. ..... Posey's Unreported Cases (Tex.)
Prob. R. ..... Probate Reports (Ohio)

Q

Quincy ..... Quincy (Mass.)

R

Rand. ..... Randolph (Va.)
Rawle ..... Rawle (Pa.)
Redf. Sur. ..... Redfield's Surrogate (N. Y.)
R. I. ..... Rhode Island.
Rice ..... Rice's Law (S. C.)
Rice, Eq. ..... Rice's Equity (S. C.)
Rich. Eq. ..... Richardson's Equity (S. C.)
Rich. Eq. Cas. ..... Richardson's Equity Cases (S. C.)
Rich. Law ..... Richardson's Law (S. C.)
Rich. (S. C.) ..... Richardson (S. C.)
Riley ..... Riley's Law (S. C.)
Riley, Eq. ..... Riley's Equity (S. C.)
R. M. Charlt. ..... R. M. Charlton (Ga.)
Rob. (N. Y.) ..... Robertson (N. Y.)
Rob. (La.) ..... Robinson (La.)
Rob. (Va.) ..... Robinson (Va.)
Robb, Pat. Cas. ..... Robb's Patent Cases (U. S.)
Root ..... Root (Conn.)

S

Sandf. ..... Sandford (N. Y.)
Sandf. Ch. ..... Sandford's Chancery (N. Y.)
Sawy. ..... Sawyer (U. S.)
Saxt. Ch. ..... Saxton's Chancery (N. J.)
S. C. ..... South Carolina.
Scam. ..... Scammon (Ill.)
S. D. ..... South Dakota.
S. E. ..... Southeastern Reporter.
Seld. ..... Selden (N. Y.)
Seld. Notes ..... Selden's Notes (N. Y.)
Serg. & R. ..... Sergeant & Rawle (Pa.)
Sheld. ..... Sheldon (N. Y.)
Shep. ..... Shepley (Me.)
Silvernail ..... Silvernail (N. Y.)
Smedes & M. ..... Smedes & Marshall (Miss.)
Smedes & M. Ch. ..... Smedes & Marshall's Chancery (Miss.)
Smith, E. D. ..... E. D. Smith (N. Y.)
Smith (Ind.) ..... Smith (Ind.)
Smith (N. H.) ..... Smith (N. H.)
Smith (N. Y.) ..... Smith (N. Y.)
Smith, P. F. ..... P. F. Smith (Pa.)
Sneed ..... Sneed (Tenn.)
South. ..... Southern Reporter.
Southard ..... Southard (N. J.)
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Speers, Eq. ..... Speers' Equity (S. C.)
Spencer ..... Spencer (N. J.)
Spr. ..... Sprague (U. S.)
Stew. (Ala.) ..... Stewart (Ala.)
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Stew. & P. ..... Stewart & Porter (Ala.)
Stiles ..... Stiles (Iowa)
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Z

Zab. ..... Zabriskie (N. J.)

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CENTURY EDITION

OF

THE AMERICAN DIGEST

VOLUME 31.

A COMPLETE DIGEST OF ALL REPORTED AMERICAN CASES FROM THE EARLIEST TIMES TO 1896.

Judicial Sales.

Scope-Note.

[INCLUDES sales under orders or judgments of courts in general; manner, conduct, validity, and effect of such sales; confirming or vacating, setting aside, etc., the sale, and resale; conveyances to purchasers, and title, rights, and liabilities of purchasers at such sales; and redemption therefrom.

[EXCLUDES sales in particular classes of proceedings or under particular writs, etc. (see *"Infants"*; *"Guardian and Ward"*, *"Executors and Administrators"*; *Mortgages*; *Attachment"*; *"Execution"*; *"Receivers"*; *"Partition"*; *"Insolvency"*; *"Bankruptcy"*; *"Taxation"*; and other specific heads).]

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JUDICIAL SALES.

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I. NATURE AND ESSENTIALS.

IN GENERAL, § 1.
PROPERTY WHICH MAY BE SOLD, § 2.
RIGHT TO HAVE PROPERTY RENTED, INSTEAD OF SOLD, § 3.
INJUNCTION AGAINST SALE, § 4.

§ 1. In general.

[a] (U. S. 1881) A sale under a decree of court is judicial.—Chew v. Hyman (C. C.) 7 Fed. 7.

[b] (Ga. 1871) A sale under an agreement of the parties, which is made the judgment of the court, is not a judicial sale.—Doyle v. Trustees of African Methodist Church, 43 Ga. 400.

[c] (N. Y. 1877) A conveyance by a religious corporation in pursuance of an order of court, obtained on its application, is not a judicial sale.—Christie v. Gage, 71 N. Y. 189.

[d] (Pa. 1850) A sale of lands under a decree of the orphans' court is a judicial sale.—Moore v. Shultz, 13 Pa. (1 Harris) 98, 53 Am. Dec. 446; Vandever v. Baker, 13 Pa. (1 Harris) 121.

[e] (Va. 1885) A sale by a debtor in his own name is not a judicial sale, though bonds for the purchase money were made payable to commissioners appointed to make sale of the property, and the sale was approved by the court.—Ware v. Starkey, 80 Va. 191.

§ 2. Property which may be sold.

[a] (Ala. 1848) A bond in the penal sum of $10,000, by which A. bound himself, on condition that B. would establish the claim of A. to a right of entry under the pre-emption laws of the United States, and pay to the United States the purchase money thereof, to deliver to B., his heirs and assigns, a good and sufficient deed of all his right and title to one-half of said lands, does not transfer such an estate or interest in land to B., though he had performed his part of the condition of the bond, as can be sold by order of the orphans' court, at the instance of his representatives, so as to vest in the purchaser the title of D., or to enable the commissioners appointed by the orphans' court to assign the bond to the purchaser.—Brown v. Chambers, 12 Ala. 697.

[b] (Ky. 1893) A sale of a defeasible fee in proceedings instituted by the holder of such title and her husband, conforming to the requirements of Gen. St. c. 63, art. 6, is valid.—Newman v. Ecton, 21 S. W. 526.

[c] (Va. 1835) It is a general rule that a court of equity ought not to decree a sale of an equitable title in land; but, if a decree for sale of the land be proper, it should first direct the legal title to be perfected, and then decree a sale of that.—Goare v. Beuhring, 6 Leigh, 585.

[d] (Va. 1889) The sale, to satisfy certain liens, of defendant's undivided interest in land before it was partitioned, is not erroneous, where no objection thereto is offered either at the sale or at the time the decree was entered, and nothing appears indicating that defendant was prejudiced thereby.—Thomas v. Farmers' Nat. Bank, 86 Va. 291, 9 S. E. 1122.

§ 3. Right to have property rented, instead of sold.

Ordering property to be rented pending sale, see post, § 5 [a].
Right of officer to rent property pending sale, see post, § 20 [e].
Setting aside decree to rent property and ordering sale thereof, see post, § 5 [f].

[a] In order to justify the sale of land to pay judgment liens, it should appear affirmatively that the rents and profits would not discharge the liens in five years.
—(Va. 1883) Muse v. Friedenwald, 77 Va. 57; (W. Va. 1867) Conaway v. Odbert, 2 W. Va. 25.

[b] (W. Va. 1877) Under the rule that a judicial sale should not be ordered, if the rents and profits of the land will satisfy the liens charged against it in a reasonable time, the question of what is a reasonable time is a matter of discretion with the court.—Rose v. Brown, 11 W. Va. 122.

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[c] (Va. 1894) Where there is no allegation in a bill that the rents for property will not discharge the liens against it in five years, and no evidence upon this question, there can be no decree for its sale.—Etter v. Scott, 90 Va. 762, 19 S. E. 776.

[d] (W. Va. 1869) It is error to order the sale of land to satisfy a judgment, when there is a junior trust deed of the premises, without ascertaining whether the rents and profits would be sufficient to pay the judgment within five years, if there are no averments in the pleadings touching the question, and no proof that the rents would not be sufficient.—Coal River Nav. Co. v. Webb, 3 W. Va. 438.

[e] (W. Va. 1877) Under the law, to have the real estate rented, rather than sold, is a privilege accorded to the debtor and others interested, and they must exercise it in the inferior court; and the decree must show that they asked a rental of the property, and it was refused, before the decree for that reason will be reviewed in the appellate court.—Rose v. Brown, 11 W. Va. 122.

[f] (W. Va. 1877) The discretion resting in a court to determine whether the rents and profits of the land sought to be sold will satisfy the liens charged against it in a reasonable time is not an arbitrary one, but a sound one, to be exercised in the interest of justice and prudence toward all the parties interested.—Rose v. Brown, 11 W. Va. 122.

[g] (W. Va. 1877) The court of appeals will not reverse a decree for a sale of lands to discharge judgment liens, on the ground that the liens might have been discharged by the rents and profits within five years, unless it appears that the court below was asked to determine this, and that it erred in the exercise of this discretion.—Rose v. Brown, 11 W. Va. 122.

[h] (W. Va. 1882) Where a creditors' bill is filed to subject the land of the debtor to the satisfaction of the judgments, his right to demand that the land be rented, rather than sold, cannot be asserted for the first time in the supreme court upon appeal. The demand must be made in the first instance to the inferior court, and the exercise of the discretion of that court will be reviewed only in case of its abuse.—Hill v. Morehead, 20 W. Va. 429.

§ 4. Injunction against sale.

Injunction against resale, see post, § 53.

Value of property as affecting jurisdiction on appeal in proceedings to enjoin sale, see "Appeal and Error," vol. 2, cc. 906, 907, § 212.

[a] (Ill. 1848) The circuit court, sitting as a court of chancery, may restrain by injunction a special commissioner in chancery from executing a decree of sale.—People v. Gilmer, 10 Ill. (5 Gilman) 242.

[b] (N. Y. 1815) A sale by a master under a decree, after an order staying the sale, but without notice of the order, is regular, and will carry a valid title to a bona fide purchaser.—Monell v. Lawrence, 12 Johns. 521.

[c] (Tenn. 1871) A purchase made pending an injunction upon the sale is void against the complainant's interest, but valid as to the vendor.—Greenwald v. Roberts, 51 Tenn. (4 Heisk.) 494.

[d] (Tex. 1885) Where by an order of sale the sheriff is to sell certain specific property, an injunction suspends the operation of process until the questions raised by the action in which it was issued are determined.—Seligson v. Collins, 64 Tex. 314.

[e] (Va. 1889) Equity will not stay the sale of land under a decree on a petition by the judgment debtor alleging that one H. had taken possession of a portion of the land, and that an action of unlawful detainer was pending concerning it, and that such possession would cause the sale to be made at a sacrifice, where the suit seems to be a mere contrivance for delay; the petition also alleging that the debtor was in a position to effect a desirable private sale, in spite of the possession of H.—Brown v. Lawson, 86 Va. 284, 9 S. E. 1014.

[f] (Va. 1891) In a suit to enjoin a sale of land under a decree, a contention that there is a defect in the title will not be considered, where the original case was fully investigated by a referee, and his report confirmed by the circuit court, and an appeal to the supreme court dismissed.—Hudson v. Yost, 88 Va. 347, 13 S. E. 436.

[g] (W. Va. 1869) That land is about to be sold at forced sale for cash at a time when money is scarce, and at a season when the inclemency of the weather would cause loss, is not ground for enjoining the sale.—Caperton v. Landcraft, 3 W. Va. 540.

II. JUDGMENT, ORDER, OR DECREE.

IN GENERAL, § 5.
POWER TO ORDER OR DECREE SALE, § 6.
—— TO RECALL ORDER, § 7.
INTERLOCUTORY ORDER, § 8.
FORM, REQUISITES, AND VALIDITY, § 9.
—— CONFORMITY TO PLEADINGS, § 10.
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DESCRIPTION OF PROPERTY TO BE SOLD, § 12.
COLLATERAL ATTACK ON JUDGMENT OR DECREE, § 13.

Defects or irregularities in judgment or decree as ground for setting aside sale, see post, § 74.

Appealability of decree ordering sale, see "Appeal and Error," vol. 2, c. 1366, § 786 [g].

Appeal and review, see "Appeal and Error," vol. 2, c. 1095, § 445; cc. 1129, 1130, § 479; c. 2655, § 2257 [m]; vol. 3, c. 1273, § 3556½.

Liability of sureties on appeal bond for rents, see "Appeal and Error," vol. 3, cc. 2749, 2750, § 4767.

Orders for sale under attachment, see "Attachment," vol. 5, cc. 917, 918, § 743.

Sufficiency of assignment of error on appeal from decree ordering sale, see "Appeal and Error," vol. 3, c. 899, § 3074 [s].

§ 5. In general.

[a] (Iowa, 1879) Where a judicial sale of farm lands is to be made, and the season is too far advanced to give sufficient time to advertise and sell them to advantage in the present spring, the court may order them to be leased for the cropping season of the current year, and the rent to be applied to payment of the debts.—Roe v. Wilmot, 51 Iowa, 689, 2 N. W. 539.

[b] (Ky. 1866) An order for the sale of real estate before the requisite affidavit is filed is premature and illegal.—Anderson v. Sutton, 63 Ky. (2 Duv.) 480.

[c] (Ky. 1887) Under Civ. Code, § 696, providing that every sale under an order of court must be public, and shall be made after such notice of time, place, and terms of sale as the order may direct, *held*, that a judgment directing a commissioner, before making sale, "to

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post notices of the time, place, and terms of sale, as sheriffs are required to do before selling land under execution," is sufficient; the duties of the sheriff in selling land under execution being specifically prescribed by statute.—Barnes v. Jackson's Adm'r, 85 Ky. 407, 3 S. W. 601.

[cc] (Ky. 1888) By Act April 9, 1878 (Gen. St. p. 972), before land is sold under any order or judgment, a valuation shall be made in writing, and, if the sale does not bring two-thirds of the valuation, defendant may redeem within a year, during which time he may remain in possession. A judgment of sale provided that the purchaser should be immediately put in possession. *Held*, that the judgment was improper.—Graves v. Long Ass'n, 87 Ky. 441, 9 S. W. 297.

[d] (Md. 1825) In the case of a decree against two joint and several obligors and for the sale of their land to satisfy the decree, it should direct a sale of sufficient of the land of each to satisfy one-half of the decree, if practicable, with power to sell sufficient afterwards to make up any deficiency, or to sell the whole in the first instance, if it appears to be absolutely necessary.—Hoye v. Penn, 1 Bland, 28.

[e] (Miss. 1896) In a suit to subject land conveyed by a debtor with intent to defraud his creditors to the payment of such creditors' claim, a decree ordering a sale of the land by the commissioner, and providing that the purchaser be put in possession on sale, instead of after confirmation of the sale by the court, is erroneous.—Adler v. Meyer, 73 Miss. 863, 19 South. 893.

[f] (Va. 1887) In proceedings to subject land to the payment of judgment liens a decree was entered directing the land to be rented; but subsequently, it appearing that the rents would be inadequate to pay all the judgment liens in five years, the decree was set aside, and an order of sale entered in its stead. *Held* no error.—Kennerly v. Swartz, 83 Va. 704, 3 S. E. 348.

[g] (W. Va. 1879) It is not proper, in a decree of sale of land, to direct that such sale shall be made "on some day fixed by law for judicial sales"; there being no such days fixed by law. But perhaps this may not be fatal to the decree.—McClaskey v. O'Brien, 16 W. Va. 791.

[h] (W. Va. 1886) Where, in a suit to sell a debtor's land, it appears that one of the tracts of land charged with the liens of the several judgments against such debtor is also charged with a specific lien exceeding in amount the value thereof, having priority over all other liens thereon, the court may properly decree the sale of other lands of the debtor, without decreeing a sale of the tract charged with such specific lien.—McCleary v. Grantham, 29 W. Va. 301, 11 S. E. 949.

[i] (W. Va. 1895) It was not error that a decree of sale omitted to provide for a sale on a court day.—Long v. Perine, 41 W. Va. 314, 23 S. E. 611.

[j] (Wis. 1854) A court of equity may decree a sale of lands without the intervention of a commissioner to decide upon the best method of selling, provided they have obtained the required information from other sources.—Tallman v. Truesdell, 3 Wis. 443.

§ 6. Power to order or decree sale.

[a] (Conn. 1891) Gen. St. § 1307, which provides that "courts of equitable jurisdiction may, upon complaint of any person interested, order the sale of any estate owned by two or more persons when in the opinion of the court a sale will better promote the interests of the owners," does not authorize courts to order the sale of property owned solely by a defendant for the purpose of paying a debt due from him to the plaintiff.—Vail v. Hammond, 60 Conn. 374, 22 Atl. 954, 25 Am. St. Rep. 330.

[b] (N. Y. 1824) The court of chancery has power to sell the subject of litigation, though no sale is prayed in the bill, whenever a sale becomes necessary to preserve the interests of the parties.—Crane v. Ford, Hopk. Ch. 114.

[c] (Pa. 1838) Want of jurisdiction of the orphans' court to order a sale of real estate must be established to invalidate the sale.—Gallaher v. Collins, 7 Watts, 552.

[d] (S. C. 1845) Chancery has power to order a sale of the fee simple of land against the will of a party interested.—Baker v. Baker, 1 Rich. Eq. 392.

§ 7. —— To recall order.

Failure to describe all the property ordered to be sold as ground for recalling order, see post, § 12 [d].

Vacating or setting aside, see "Judgments," vol. 30, cc. 895–1038, §§ 664–763.

[a] (Neb. 1896) The district court may recall an order of sale issued under a decree in a case still on the docket, in term time, without notice, and set aside an appraisement of property made thereunder.—Beatrice Paper Co. v. Beloit Iron Works, 46 Neb. 900, 65 N. W. 1059.

§ 8. Interlocutory order.

Decree in equity for sale, whether final or interlocutory, see "Equity," vol. 19, cc. 1508–1511, § 947.

[a] (Md. 1869) Under Code, art. 16, § 129, providing that where a suit is instituted for the sale of real or personal property, or where from the nature of the case a sale is the proper mode of relief, the court may order a sale of the property before final decree, if satisfied by proof at the final hearing that a sale will be ordered, when a case comes within the provisions of the section, the power is conferred on the court, upon satisfactory proof as therein prescribed, to pass an order of sale at any time after the bill has been filed, without waiting for the appearance or answers of the defendants.—Dorsey v. Garey, 30 Md. 489; Dorsey v. Dorsey, Id. 522, 96 Am. Dec. 633.

[b] (Md. 1872) The power to order a sale of real or personal property before final decree, conferred upon courts of equity by Code, art. 16, § 129, is one of an extraordinary character, and should never be exercised except in very plain and unexceptional cases. It should appear beyond reasonable doubt, either by proof or from the very nature of the case itself, that a sale must inevitably be decreed on final hearing, to justify the passing of the interlocutory order, especially if applied for by the complainant only, and before the appearance and answer of the defendants, who may be affected by the sale.—Cornell v. McCann, 37 Md. 89.

[c] (Va. 1855) In an interlocutory decree in a proceeding for the sale of real estate, it is not necessary to decree security from the plaintiff for performing the future orders and decrees of the court. It is sufficient, if done in the final decree.—Brockenbrough v. James River & K. Co., 1 Pat. & H. 94.

§ 9. Form, requisites, and validity.

Defects or irregularities in judgment or decree as ground for setting aside sale, see post, § 74.

Liability of purchaser under void judgment for rent, see post, § 96 [h].

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Propriety of judgment ordering purchaser to be put into immediate possession, see post, § 5 [cc].

Report of officer as curing defect in judgment, see post, § 57 [a].

Rights of purchaser under sale based on erroneous, defective, or invalid decree, see post, § 105.

[a] (Ind.) A judgment, valid upon its face, is prima facie sufficient to support a judicial sale.—(1881) Woolen v. Rockafeller, 81 Ind. 208. CONTRA, see (1866) Glidewell v. Spaugh, 26 Ind. 319.

[b] (Iowa, 1894) The fact that pending a suit to subject land to the payment of a judgment the judgment is satisfied of record does not deprive the court of further jurisdiction, so as to render a decree of sale void.—Oliver v. Riley, 92 Iowa, 23, 60 N. W. 180.

[c] (Neb. 1890) In the decree divorcing E. from her husband there was a provision conveying certain land possessed by him to her. Afterwards the decree was modified, and an order made for permanent alimony, and thereafter the husband conveyed the land to a third person. E. sued to have said conveyance declared fraudulent and void. Service was had by publication. There was no appearance by the third person, and a decree was rendered setting the conveyance aside, and the land was ordered sold to satisfy E.'s lien for alimony. There was no attempt to modify this decree. The sale was made and confirmed, and a deed ordered and made. *Held*, that the purchaser acquired title.—Reno v. Hale, 28 Neb. 646, 44 N. W. 996.

[d] (N. C. 1836) A justice's trial docket, with a memorandum of "order of sale" subscribed, is not such a judgment as will authorize a sale of land and pass a good title to the purchaser. —Ingram v. Kirby, 19 N. C. 21.

[e] (N. C. 1889) The statute requiring an order of sale to be signed by the clerk is only directory, and an order wanting his signature is valid.—Spencer v. Credle, 102 N. C. 68, 8 S. E. 901.

[f] (S. C. 1893) A decree in equity for the sale of land need not explicitly direct the execution of a conveyance by the master, as a direction to sell the land, and to take a bond and mortgage from the purchaser for part of the selling price, implies the duty of conveying. —Peake v. Young, 40 S. C. 41, 18 S. E. 237.

[g] (Tenn. 1858) Where the court possesses jurisdiction of the subject-matter and of the parties in proceedings for a judicial sale of property, its decree cannot be held void as to a purchaser at such sale.—Winchester v. Winchester, 88 Tenn. (1 Head) 460.

§ 10. —— Conformity to pleadings.

[a] (Tenn. 1890) A sale of real estate barring the equity of redemption cannot be decreed when the bill contains no application to bar redemption.—Turner v. Argo, 89 Tenn. 443, 14 S. W. 930.

§ 11. Determination of debts and liens and priorities thereof.

Right to have liens and incumbrances discharged out of purchase money, see post, § 93.

[a] It is premature and erroneous to order a judicial sale of land to satisfy incumbrances thereon, before ascertaining the liens binding the land, their amounts and priorities respectively.

—(Va. 1874) Moran v. Brent, 25 Grat. 104; (1884) Effinger v. Kenney, 79 Va. 551; (1887) Adkins v. Edwards, 83 Va. 300, 2 S. E. 435; (W. Va. 1876) White v. Drew, 9 W. Va. 695; (1877) Wiley v. Mahood, 10 W. Va. 206; (1878) Scott v. Ludington, 14 W. Va. 387; (1881) Beard v. Arbuckle, 19 W. Va. 135.

[b] (Ala. 1887) A decree ordering the register to ascertain amount due plaintiffs on a note, and at same time directing that, upon failure to pay amount so ascertained, defendants' land shall be sold therefor, will not be reversed, as having prematurely ordered a sale before amount due had been ascertained, where it appears that, after the report of the register, another decree was made, ordering the register to sell the land as directed in the former decree.—Simmons v. Jones, 84 Ala. 354, 3 South. 895.

[c] (Ga. 1873) Where there are conflicting claims to property, and the equities of the respective parties necessarily depend upon the facts which may be proven on the trial, it is right and proper that the same should be definitely settled by the decree of the court before the property is sold, so that it may bring its full value, and that the purchaser may know what he purchases at the sale.—Hall v. English, 47 Ga. 511.

[d] (Tenn. 1858) Where a reference has been made to state an account between the parties, it is error to order a sale of the debtor's property before the return of the referee's report. —Lewis v. Baker, 38 Tenn. (1 Head) 385.

[e] (Tenn. 1858) When it becomes necessary to order a sale of land to pay a debt, the exact amount due must be ascertained and stated in the decree, and a reasonable time given the defendant to pay the amount into the office of the master.—Lewis v. Baker, 38 Tenn. (1 Head) 385.

[f] (Va. 1887) Where a resale of property is ordered because of the purchaser's failure to comply with his bid, it is no objection that no account of liens on the property is taken before the order of resale, since such question was waived by the first sale, and the second sale was simply an enforcement of the first.— Redd v. Dyer, 83 Va. 331, 2 S. E. 283, 5 Am. St. Rep. 272.

[g] (W. Va. 1876) A debtor, part of whose lands are sold under a decree with his consent, has no right to object that the liens and priorities on each parcel of the land were not determined by the commissioner as directed by the decree.—White v. Drew, 9 W. Va. 695.

[h] (W. Va. 1876) It being necessary to sell all of one's lands to meet his debts, he is not prejudiced by the manner in which the debts and liens have been stated by the commissioners to whom the cause has been referred.— White v. Drew, 9 W. Va. 695.

[i] (W. Va. 1880) While the general rule requires that, when the court directs the sale of real property, it shall first ascertain the amounts of the lien debts and their respective priorities, and give a day for payment in the decree, still parties to the cause may waive compliance therewith, and cannot afterwards complain of that omission in the decree.—Parsons v. Thornburg, 17 W. Va. 356.

[j] (W. Va. 1884) A judicial sale of land cannot be decreed, without the amounts and priorities of the liens being definitely fixed, and, although so fixed before an original sale, a resale should not be ordered without determining the amounts and priorities of other liens not embraced in the prior determination.—Payne v. Webb, 23 W. Va. 558.

[jj] (W. Va. 1886) Where, in a suit to sell a debtor's land, there has been a commissioner's report, showing the lands owned by the debtor, the nature and priorities of the liens thereon,

which has been confirmed, and there is entered a decree that "the lands of said debtor, in said report named, shall all be severally sold to pay the liens on the same in the order of their priority, as set out in said report," without any further statement specifying the sums to be paid to the several creditors, the parcels of land on which they are chargeable, and the order of priority in which the proceeds of the sales of the several parcels of land shall be applied, such decree is erroneous, and will be reversed, unless, from the commissioner's report, and the face of the decree, it can be safely amended, in which case it will be so amended in the appellate court, and, when so amended, will be affirmed.—McCleary v. Grantham, 29 W. Va. 301, 11 S. E. 949.

[k] (W. Va. 1891) A decree which simply confirms a commissioner's report of debts, and directs a sale of lands therefor in default of payment, though that report specifies the debts and priorities, is erroneous, because the decree does not itself adjudicate and declare what debts are to be paid, and fix their order and priority as to the lands to be sold therefor.—Hull's Adm'r v. Hull's Heirs, 13 S. E. 49, 35 W. Va. 155, 29 Am. St. Rep. 800; Dudley v. Same, Id.

[l] (W. Va. 1893) Under Code, c. 139, § 7, which provides that, before the judicial sale of real estate is decreed, all lienholders shall be convened, and the priorities of their liens ascertained, it is error to decree such sale where there is an outstanding and undetermined claim, unless some good reason is expressly given or plainly appears.—Lough v. Michael, 37 W. Va. 679, 17 S. E. 181; Id., 17 S. E. 470.

§ 12. Description of property to be sold.

Effect of confirmation as curing error of description in decree, see post, § 66 [e].

Sufficiency of description of property in notice or advertisement of sale, see post, § 27.

[a] (Cal. 1854) Where a decree of sale refers to and describes a lease, and directs the leasehold interest to be sold, the nature of the interest to be sold is sufficiently ascertained.—Gaskill v. Moore, 4 Cal. 233.

[b] (Iowa, 1893) Where the petition in an action to set aside a fraudulent conveyance, and subject the land to a judgment rendered in an action aided by attachment of the land, misdescribes the land, though it states the facts of the attachment and judgment ordering a sale, and the sheriff's return to the writ of attachment and the incumbrance book contain a correct description, a decree subjecting the land, which follows the erroneous description in the petition, does not affect the title to the land, nor warrant a sale.—Boggs v. Douglass, 89 Iowa, 150, 56 N. W. 412.

[c] (Ky. 1877) A judgment directing a sale of land should be so certain and specific in the description of the land, as well as in the duties to be performed by the court's officer, as to enable the latter to perform such duties without reference to or inspection of any other paper or pleading in the cause.—Ross v. Adams, 76 Ky. (13 Bush) 370.

[d] (Neb. 1896) The fact that all the property made liable by a decree is not described in the order of sale issued thereunder is sufficient reason for the district court to recall the order and set aside the appraisement.—Beatrice Paper Co. v. Beloit Iron Works, 46 Neb. 900, 65 N. W. 1059.

[e] (Tex. 1881) An order for the sale of land spoke of the land as in a different county from what it really was, but the mistake did not render it impossible to ascertain its locality through the description given. *Held*, that the order was not void.—Lindsay v. Jaffray, 55 Tex. 626.

§ 13. Collateral attack on judgment or decree.

Collateral attack on sale, see post, § 89.

Requisites and validity of judgment or decree in general, see ante, §§ 9, 10.

[a] (U. S. 1883) After the lapse of more than 10 years a judgment of a probate court, where the record shows jurisdiction, will not, in an action to rescind a judicial sale made thereunder, be treated as a nullity.—Boyd v. Wyley (C. C.) 18 Fed. 355.

[b] (U. S. 1883) A purchaser at judicial sale, in Louisiana, need not look beyond the jurisdiction and decree of the court ordering the sale. The truth of the record concerning matters within its jurisdiction cannot be disputed collaterally.—Boyd v. Wyley (C. C.) 18 Fed. 355.

[c] (Ala. 1875) A decree ordering the sale of the defendant's lands, under Rev. Code, §§ 2224, 2225, rendered by a court having jurisdiction of the parties and the subject-matter, cannot be avoided, except on direct attack on appeal, because of irregularities in determining that certain depositions as to the necessity of the sale were taken as to chancery proceedings, or that they proved the necessity of the sale.—Bland v. Bowie, 53 Ala. 152.

[d] (D. C. 1892) A decree for the sale of land, made without jurisdiction, may be collaterally attacked.—Stansbury v. Inglehart, 19 Wash. Law Rep. 594.

[e] (Ky. 1893) A judgment in proceedings against nonresidents for the sale of land cannot be collaterally attacked on the ground that there was no affidavit for the warning order, where the record shows that the warning order was made.—Sears' Heirs v. Sears' Heirs, 95 Ky. 173, 25 S. W. 600.

[f] (N. Y. 1847) Where a purchaser at a master's sale under a decree is himself a party to the suit in which the decree was entered, he cannot in a collateral proceeding raise a question as to the regularity of the decree; but if the decree is irregular, so that such purchaser will not get a good title to the premises purchased by him, his remedy is to apply to the court directly to set aside the decree on that ground.—Concklin v. Hall, 2 Barb. Ch. 136.

[g] (N. C. 1888) A judgment in a special proceeding for the sale of land cannot be attacked for fraud in a collateral action, but only in an independent action to set it aside.—Spivey v. Harrell, 101 N. C. 48, 7 S. E. 693.

[h] (W. Va. 1876) A decree for sale of lands, and an order confirming such sale, made without jurisdiction, may be treated as nullities, even in a collateral proceeding.—Camden v. Haymond, 9 W. Va. 680.

III. APPOINTMENT, QUALIFICATION, POWERS, AND LIABILITIES OF OFFICER.

AUTHORITY TO APPOINT, § 14.
APPOINTMENT OF NEW OFFICER AFTER DEATH OF FIRST APPOINTEE, § 15.
PERSONS WHO MAY BE APPOINTED, § 16.
BOND OF OFFICER, § 17.

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COMPENSATION, § 18.
REMOVAL, § 19.
POWERS, DUTIES, AND LIABILITIES, § 20.

Appointment of commissioner, right of appeal by master in equity, see "Appeal and Error," vol. 2, c. 1453, § 919 [a, b].

§ 14. Authority to appoint.

[a] (Md. 1827) The court of chancery may appoint an agent or trustee to make a sale under its decree.—In re Gibson, 1 Bland, 138, 17 Am. Dec. 257.

[b] (Ohio, 1861) Under Code, §§ 611, 612, the court of common pleas has authority to appoint master commissioners, who by section 395 can convey real estate. By Swan & C. St. pp. 383, 384, § 23, it is provided that all laws granting powers to courts and judges thereof under the former constitution, not inconsistent with the Code of Civil Procedure, shall remain in full force. *Held* that, as sales by special commissioners had been held legal prior to the adoption of the Code, a special master can be appointed to sell and convey real estate after adoption of the Code.—Wick v. Mayer, 2 Ohio Dec. 579.

[c] (S. C. 1869) Although, when lands are sold by order of court, the sheriff is the proper person to make the sale, the court has discretionary power to appoint the clerk or other officer of the court, or any fit and proper person, to make the sale.—Meetze v. Padgett, 1 S. C. (1 Rich.) 127; Adams v. Kleckley, Id. 142.

§ 15. Appointment of new officer after death of first appointee.

[a] (La. 1893) Under Code Prac. art. 130, which provides that all judges possess the powers necessary for the exercise of their respective jurisdictions, though the same be not expressly given by law, and under Rev. Civ. Code, art. 21, which provides that, in all civil matters where there is no express law, the judge must proceed equitably, and an appeal is to be made to natural law and reason or received usage, where an auctioneer who has been appointed to make a judicial sale has made the adjudication, and executed his procès verbal of sale, and has died before passing the act of sale, the court may appoint a new auctioneer to complete the execution of its decree.—Covas v. Bertoulin, 45 La. Ann. 160, 11 South. 874.

§ 16. Persons who may be appointed.

Sale by attorney obtaining judgment, in connection with inadequacy of price, as justifying setting aside sale, see post, § 78 [k].

[a] (Md. 1827) A female or other competent person may be appointed trustee to make sale under a chancery decree, on the recommendation of the parties in interest; but a person under disability, or a nonresident, will not be appointed, or one whose interest or office is incompatible with the trust.—In re Gibson, 1 Bland, 138, 17 Am. Dec. 257.

[b] (N. Y. 1891) The fact, undisclosed to bidders, that the auctioneer officiating at a judicial sale is a party to the action, and interested in the property sold, renders the sale voidable, at the option of the purchaser, though no actual fraud or bad faith is shown, and though the auctioneer's interest was only that of tenant by the curtesy.—Smith v. Harrigan (Sup.) 15 N. Y. Supp. 852, 27 Abb. N. C. 322.

[c] (S. C. 1885) Sales made under order of court in counties where there is no master may be ordered made by the sheriff.—Childs v. Alexander, 22 S. C. 169.

[d] (Va. 1873) It is no objection to a judicial sale that one of the commissioners to sell was a plaintiff in the original suit, and also had an interest in the land, both in his own right, and as trustee of another, and as next friend of infants.—Teel v. Yancey, 23 Grat. 691.

[e] (Va. 1894) It is error to direct a sale of property by a commissioner who is assignee and owner of one-half of the debt for which the sale is made.—Etter v. Scott, 90 Va. 762, 19 S. E. 776.

§ 17. Bond of officer.

Failure to give bond as affecting validity of sale, see post, § 68 [ww, x, y].

—— *as ground for vacating confirmation of sale, see* post, § 73 [o, z].

Liability on administration bond arising on sales by order of court, see "Executors and Administrators," vol. 22, cc. 3365–3368, §§ 2381, 2382.

[a] (Ky. 1891) Gen. St. p. 941, § 10, provides that the parties may be permitted to select a special commissioner to perform the duties of the master commissioner, and section 11 that such commissioner shall be sworn and shall give bond, as is required of a master commissioner. *Held*, that the provisions of section 11 applied to all special commissioners, whether selected by the parties or not.—Phelps v. Jones, 91 Ky. 244, 15 S. W. 668.

[b] (Md. 1863) The office of a trustee's bond, under a decree for sale of real estate, is not for the benefit or protection of the purchaser as such. The qualification and sufficiency of sureties is matter for the court or officer authorized to approve, which being done, it is not competent for the purchaser to review the action of the court.—Bolgiano v. Cooke, 19 Md. 375.

[c] (Va. 1888) Where the decree ordering sale of land directs the commissioner to give bond and fixes the penalty of the bond, failure to require security is not reversible error, though Acts 1883–84, p. 213, provide that the commissioner shall give bond and personal security to be approved by the clerk.—Cooper v. Daugherty, 85 Va. 343, 7 S. E. 387.

[d] (W. Va. 1879) It is irregular and dangerous in practice for the court to authorize its special commissioner, appointed for the purpose, to sell lands for cash in hand, in whole or in part, without requiring such commissioner, in its decree, to give bond with good personal security before receiving any money.—McClaskey v. O'Brien, 16 W. Va. 791.

[e] (W. Va. 1885) Acts 1882, c. 142, provides that a special commissioner, appointed to make a sale, shall give bond before making such sale, and that every notice of such sale shall have annexed to it the certificate of the clerk that bond has been given by the commissioner. Such statute also provides that such commissioner shall not receive money under a decree or order until he gives bond, and that any commissioner receiving money without executing a bond will be deemed guilty of contempt. *Held*, that a decree appointing a commissioner to make a sale which in terms dispenses with such bond is erroneous.—Neeley v. Ruleys, 26 W. Va. 686.

[f] (W. Va. 1885) The plaintiff in the suit in which a commissioner is appointed to make a sale of land cannot waive the bond of such commissioner, as required by Acts 1882, c. 142.—Neeley v. Ruleys, 26 W. Va. 686.

[g] (W. Va. 1886) A decree for a sale of land will be reversed, where it does not require the commissioner appointed to make the sale

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to first execute a bond.—Parker v. Valentine, 27 W. Va. 677.

§ 18. Compensation.

Fees of clerk, see "Clerks of Courts," vol. 10, cc. 106, 107, §§ 50, 51 [e].

Right to appeal from order fixing compensation, see "Appeal and Error," vol. 2, c. 1453, § 919 [a].

[a] (Ky. 1895) A court commissioner is not entitled to a commission for selling lands where the property was sold to the person from whom the debt was due, the commissioner not having received the purchase money or disbursed it.—Roundtree v. England, 32 S. W. 744.

[b] (La. 1896) Under Rev. St. § 160, fixing the commission of the auctioneer on the sale of succession property at 1 per cent. on all sums under $2,500, and, on all sums over that, one-half of 1 per cent., in case of the sale of succession property in several lots, the auctioneer is entitled to 1 per cent. on the first $2,500 and one-half of 1 per cent. on the excess of the amount of the entire sales over $2,500.—Succession of Von Hoven, 48 La. Ann. 620, 19 South. 766.

[c] (La. 1896) In the sale of succession property, advertised to be sold under an order of court, in the matter of the succession of a certain person, bids being offered and accepted on the faith that the sale is of the character represented by the advertisement, the fact that the heirs stipulated as to the manner in which the advertisement of the sale should be made does not render the sale a conventional sale, as distinguished from a judicial sale, for the purpose of determining the fees of the auctioneer.—Succession of Von Hoven, 48 La. Ann. 620, 19 South. 766.

[d] (Md. 1827) A trustee appointed to sell property under a chancery decree is entitled to compensation for his services in the shape of fees; but the general established rule in respect to them may be departed from according to the circumstances.—In re Gibson, 1 Bland, 138, 17 Am. Dec. 257.

[e] (Md. 1855) On a resale in chancery, the trustee is not allowed increase of commissions or any counsel fee; otherwise when, instead of resale, the purchase money is collected by suits at law.—Farmers' & Planters' Bank v. Martin, 7 Md. 342, 61 Am. Dec. 350.

[f] (N. Y. 1881) A referee appointed "to sell real property, pursuant to a judgment in an action" other than a foreclosure suit upon a mortgage, is entitled to sheriff's fees; that is, 2½ per cent. of the proceeds not exceeding $250, and 1 per cent. upon the residue. He is further entitled, upon distribution, to one-half of an executor's commissions upon proceeds actually distributed or applied.—Maher v. O'Conner, 61 How. Prac. 103.

[g] (Va. 1887) Under Code c. 174, § 6, providing that court officers, under any decree or order of sale, shall be allowed 5 per cent. on the first $300 received by them, and 2 per cent. on all sums above that amount, full commissions will not be allowed on a sale of land for $14,000 where the sum received was only $1,400, nor $150 additional for extraordinary efforts made in effecting the sale.—Womack v. Glasgow, 84 Va. 9, 5 S. E. 550.

§ 19. Removal.

[a] (W. Va. 1892) Where special commissioners are appointed to sell lands, and an unusual delay occurs on their part in carrying out the decree, and making their report, the court will ordinarily award a rule against them, requiring them to account for the delay, before removing them and appointing other commissioners to execute the decree.—Connell v. Wilhelm, 36 W. Va. 598, 15 S. E. 245.

§ 20. Powers, duties, and liabilities.

Authority of commissioner to receive Confederate money in payment of bid, see post, § 47.

Discretion of officer to sell in parcels or in gross, see post, § 37 [a].

Liability of officer and his sureties for proceeds of sale and enforcement thereof, see post, § 125.

[a] Trustees appointed by decrees of a court of equity to sell real estate are agents of the court. Sales so made are transactions between the court and the purchaser, and as such are regulated by all the principles of equity applicable to judicial sales.
—(Md. 1847) Gibbs v. Cunningham, 1 Md. Ch. 44; (1848) Sewall v. Costigan, 1 Md. Ch. 208; (1848) Harrison v. Harrison, 1 Md. Ch. 331; (1851) Hurt v. Stull, 4 Md. Ch. 391; (1863) Bolgiano v. Cooke, 19 Md. 375;
(Neb. 1878) Parrat v. Neligh, 7 Neb. 456.

[b] (U. S. 1831) Where a decree directs an officer of the court to sell property and empowers him to sell on credit, and where the bonds for deferred portions of the purchase money are made payable to such officer, he has a right to collect them and will be considered, as a trustee for the parties, entitled to the proceeds of the sale; but he has no right to discount legal interest and receive only a part of the money in discharge of the debt.—Wallis v. Thornton, Fed. Cas. No. 17,111 [2 Brock. 422].

[c] (Ky. 1859) Where a sale of land by commissioners in satisfaction of a judgment is decreed in equity, the commissioner has discretionary power, subject to revision by the court, to determine what part of the land shall be sold to satisfy the judgment, where the whole is not needed.—Vanbussum v. Maloney, 59 Ky. (2 Metc.) 550.

[d] (Md. 1831) Where a judicial sale has been confirmed, and a note taken for the purchase price, it is not within the authority of the trustee making the sale to release the purchaser from liability on the ground of a total failure of consideration.—Wampler v. Shipley, 3 Bland, 182.

[e] (Md. 1831) Where land has been decreed to be sold, the trustee appointed to make the sale may be authorized to lease or rent the property until a sale can be effected.—In re Williams, 3 Bland, 186.

[f] (Neb. 1878) A decree for the sale of property is a sufficient warrant of authority to the officer to sell.—Parrat v. Neligh, 7 Neb. 456.

[g] (N. Y. 1857) A sheriff, master, or other officer, selling property under a process, decree, or judgment of the court, cannot make a valid agreement with a purchaser to convey any other estate than such as the decree or judgment will warrant.—Ryan v. Dox, 25 Barb. 440.

[h] (Ohio, 1859) A decree in the supreme court that the sheriff sell certain lands upon receiving an order for that purpose, which is sent by mandate to the common pleas for execution, gives the sheriff no authority to sell merely upon receiving from the clerk a certified copy of this decree without any order thereon.—Rhonemus v. Corwin, 9 Ohio St. 366.

[i] (S. C. 1808) Where a master in chancery sold land under a decree of court, giving no di-

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rections as to terms and security, and took a bond of the purchaser, and a mortgage of the land sold, it was *held* that he was not liable for a loss by the insolvency of the purchaser and a depreciation of the land.—Fenwicke v. Gibbes, 2 Desaus. 629.

[j] (S. C. 1824) On a rule against the master to show cause why he had not sold certain property, the court refused to examine the regularity of a prior sale of the land by the master.—Ex parte Stanyarne's Creditors, 1 Harp. Eq. 20.

[k] (S. C. 1830) A commissioner in equity is entitled to complete, after the expiration of his term, sales ordered by the court and advertised by the commissioner during his term.—Hunt v. Elliott, 1 Bailey, Eq. 90.

[l] (S. C. 1834) Commissioners of the chancery court may, under the order of court, sell land out of their own district.—Bank v. Trapier, 2 Hill, Eq. 25.

[m] (S. C. 1858) Commissioners have a discretionary right, subject to the control of the court, to withdraw property temporarily from sale when they see that it would result in a sacrifice of the property.—Miller v. Law, 10 Rich. Eq. 320, 73 Am. Dec. 92.

[n] (S. C. 1868) A chancellor ordered a sale by a master of testator's realty, on the terms one-third cash, residue in one, two, and three years. It was further ordered that testator's debts should be paid out of the proceeds of that sale, and that the residue of said proceeds should abide the future order of the court. *Held*, that an additional order was not necessary to give the master power to receive payment of the bonds given for the purchase money under the original order.—McPherson v. Lynah, 14 Rich. Eq. 121.

[o] (Tenn. 1871) A special commissioner for the sale of lands cannot lend out funds in his hands without an order of the court directing him.—Somerville v. Somerville, 52 Tenn. (5 Heisk.) 160.

[p] (W. Va. 1874) An order that a sheriff sell personal property, and, in case that prove insufficient to satisfy a judgment, then to sell real estate, but with a condition that the plaintiff is not to have the benefit of the order until he shall give bond, without evidence that the personal property was sold or was insufficient to satisfy the judgment, or that the bond was given, does not prove authority to the sheriff to sell the real estate, or at all sustain such a sale.—Houston v. McCluney, 8 W. Va. 135.

IV. APPRAISAL OF PROPERTY.

IN GENERAL, § 21.
PERSONS WHO MAY ACT AS APPRAISERS, § 22.
OATH OF APPRAISERS, § 23.
SETTING ASIDE APPRAISEMENT, § 24.

Erroneous appraisal as ground for setting aside sale, see post, § 73 [11].
Validity of sale under statute without appraisement, see post, § 68 [1].
Impairment of obligation of contract by statutes relating to appraisal of land sold at judicial sale, see "Constitutional Law," vol. 10, cc. 1920, 1921, § 496.

§ 21. In general.

[a] (Ind. 1859) A judgment and sale without appraisement was made upon an agreement waiving the benefit of the appraisement laws. It was presumed on appeal that the agreement was made under Act 1843, §§ 3, 4, authorizing such agreements.—Lemasters v. Johnson, 12 Ind. 385.

[b] (Iowa, 1875) Judicial sales made under judgments rendered since the Code must, in accordance with its provisions, be made without appraisement.—Babcock v. Gurney, 42 Iowa, 154.

[c] (Ky.) The statute requiring land sold under an execution to be valued does not apply to land sold by a commissioner under a decree in chancery.—(1833) Blakey v. Abert, 31 Ky. (1 Dana) 185; (1849) Haggin's Heirs v. Peck, 49 Ky. (10 B. Mon.) 210.

[d] (Ky. 1891) Gen. St. c. 63, art. 8, provides for an appraisal of land sold under judgment or order of court, and that, if it sells for less than two-thirds of its valuation, there shall be the same right to redeem as from sales on execution. *Held*, that when a defendant bids in land sold under judgment against him, but fails to pay the purchase money, and the land is resold under order of court, there is no right to redeem from the second sale, and hence no appraisement is necessary.—McKee v. Stein's Guardian, 15 S. W. 519; Id., 91 Ky. 240, 16 S. W. 583.

[e] (Neb. 1879) Where the sheriff causes real estate to be appraised under an order of sale, he should forthwith deposit a copy of the appraisement with the clerk of the district court. He must do so before the sale.—Jones v. Null, 9 Neb. 254, 2 N. W. 350.

[f] (Neb. 1880) The appraisers must appraise the property at its value in money, and deduct the liens therefrom, specifically enumerating each lien and the amount due thereon. It is not sufficient to appraise the interest of the debtor therein.—Rosenfield v. Chada, 10 Neb. 421, 6 N. W. 630.

[g] (Ohio, 1824) Lands decreed by a court of chancery to be sold must be valued as upon executions at law.—Wiles v. Baylor, 1 Ohio (1 Ham.) 509.

§ 22. Persons who may act as appraisers.

[a] (U. S. 1890) Rev. St. Ohio, § 5389, which requires three "disinterested freeholders" to appraise lands before a judicial sale thereof, does not disqualify a distant relative of one of the creditors of a corporation, whose claim represents only a small portion of its aggregate indebtedness, from acting as an appraiser on a judicial sale of its property for the benefit of all its creditors.—Lake Superior Iron Co. v. Brown, Bonnell & Co. (C. C.) 44 Fed. 539.

§ 23. Oath of appraisers.

[a] (Ky. 1891) The appraisement of land sold under a decree showing that the appraisers were sworn by the commissioner, the supreme court cannot presume that he swore them as an examiner from a statement to that effect in his amended reports.—Phelps v. Jones, 91 Ky. 244, 15 S. W. 668.

[b] (Ky. 1891) Under Act April 9, 1878, providing that, on a sale of land under any decree, the commissioner shall cause it to be valued under oath of any two householders, the appraisers cannot make a valid appraisement unless sworn, and, if they can be sworn by the commissioner at all, this cannot be done by a commissioner who has not himself taken the prescribed oath.—Phelps v. Jones, 91 Ky. 244, 15 S. W. 668.

§ 24. Setting aside appraisement.

[a] (Ohio, 1879) Where the appraisers, in appraising a certain house, failed to go through it, and afterwards the testimony of persons who have gone through the building estab-

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lishes a higher value, the first appraisement will be set aside.—Mills v. Life Ass'n of America, 6 Ohio Dec. 827.

[b] (Va. 1808) A valuation by commissioners of property to be sold ought not to be set aside merely because they afterwards become dissatisfied with their valuation, unless it appears that they acted under some mistake.—Spencer v. Carter, 4 Hen. & M. 402.

V. NOTICE.

IN GENERAL, § 25.
SUFFICIENCY IN GENERAL, § 26.
DESCRIPTION OF PROPERTY TO BE SOLD, § 27.
TIME OR DURATION OF NOTICE, § 28.
EFFECT OF FAILURE TO GIVE NOTICE, § 29.
DEFECTS AND OBJECTIONS AND CURE THEREOF, § 30.

Effect of confirmation as curing irregularity in publication of notice, see post, § 66 [m].

Necessity for giving notice of postponement, see post, § 35.

Notice of resale, see post, § 50 [t].

Provision in judgment as to notice, see ante, § 5 [c].

Want or insufficiency of notice as ground for refusal to confirm sale, see post, § 64.

§ 25. In general.

[a] (U. S. 1870) Act Cong. March 2, 1867, § 7 (14 Stat. 466), prescribing the manner in which the advertising for the departments of the United States government shall be done, applies only to such advertisements as are published in behalf of the government and paid for out of the federal treasury, and does not affect advertisements for sale of lands under judicial process in suits between individuals.—Moncure v. Zunts, 78 U. S. (11 Wall.) 416, 20 L. Ed. 181.

[b] (Pa. 1888) Act April 18, 1853, providing that the orphans' court may order the sale of land of an owner who has been absent and unheard from for seven years, under circumstances from which the law presumes his death, and further prescribing that all parties in being, having any interest in the land, shall have notice, either personal or by publication, does not authorize the sale without notice of any kind, and a sale so made conveys no title, as against the owner, who afterwards returns.—Taylor v. Hoyt, 15 Atl. 892.

§ 26. Sufficiency in general.

Defective or insufficient notice as ground for setting aside sale, see post, § 73 [k, vvv].

[a] (U. S. 1892) On the expiration of a mining company's charter, a party of the stockholders desired to organize a new company, while another party desired a sale of the mine and a division of the proceeds. The controversy was carried to the courts, and after seven years' litigation an order of sale was affirmed by the United States supreme court. The date of sale was fixed at about nine months thereafter, but was twice postponed, and the sale was finally made more than a year after the affirmance, and after ample advertisement. *Held*, that there could be no pretense of lack of personal and general notice.—Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732.

[b] (Ala. 1846) The remark of the president of an incorporated bank to a master in chancery, who informed him that the sale of certain property in which the corporation was interested had been postponed, that he had acted properly, amounts to nothing more than the approbation of what the master had done; but it cannot be inferred that he was informed when the property would be again offered, or that he regarded the master's communication as a notice, or approved a subsequent sale, even conceding that the president, in virtue of his general powers, was authorized to act in the premises.—Branch Bank of State v. Hunt, 8 Ala. 876.

[c, d] (Ky. 1859) The commissioner was directed to advertise the sale of land at the court house door and two other places in the county of Henderson. He posted notices at the court house door and at two other places in the city of Henderson, which is in the county of Henderson. This was *held* not to be a compliance with the spirit and meaning of the directions.—Vanbussum v. Maloney, 59 Ky. (2 Metc.) 550.

[e, f] (Md. 1868) A decree for the sale of land to pay debts directed the trustees appointed therefor to give at least three weeks' previous notice of the sale by advertisement in the newspapers printed in a certain place, "and such other notice as they should think proper." The trustees offered the land for sale by advertisement in various places besides the one specified, but failed to receive a bid. It was then offered a second time, and sold; but no notice was given, except in the newspapers before mentioned. *Held*, that the notice was sufficient, and the sale valid.—Farmers' Bank v. Clarke, 28 Md. 145.

[g] (Neb. 1878) Where the officer appointed to conduct a judicial sale has caused public notice of the time and place of the sale to be given for at least 30 days before the day of the sale by advertisement in a newspaper printed in the county, it is unnecessary for him also to post notices of the time and place of sale.—Parrat v. Neligh, 7 Neb. 456.

[h] (Pa. 1883) An advertisement of the sale of land in a newspaper and by handbills, made by an assignee, unknown to a party claiming an interest therein, does not amount to notice to him.—Weaver v. Craighead, 104 Pa. 288.

§ 27. Description of property to be sold.

Description of property to be sold in decree or judgment, see ante, § 12.

Insufficient description in connection with inadequacy of price as ground for setting aside, see post, § 78 [m, o].

[a] (U. S. 1880) Where the notice of sale referred to papers on file in the office of the court for a more certain and full description of the interest advertised for sale, such interest passes, notwithstanding an otherwise erroneous description.—In re King (D. C.) 3 Fed. 839.

[b] (Ind. 1862) In the advertisement of lands to be sold at judicial sale, the description of the land as "the w hf of the n w qr of sec. 25, in t 23 n, of r 4 w, containing 80 acres, in T. county, and mortgaged to L. F.," is sufficient.—Bansemer v. Mace, 18 Ind. 27, 81 Am. Dec. 344.

[c] (Md. 1856) The following advertisement of a trustee to make a judicial sale of property: "All that lot, etc., situate on the south side of Lombard street, in the city of Baltimore, at the distance of 391 feet or thereabouts from the southwest corner or intersection of Lombard and Canal streets," etc., does not sufficiently indicate the property.—Kauffman v. Walker, 9 Md. 229.

[d] (Mich. 1876) Under a decree authorizing a sale of land by a commissioner on public notice "according to the course and practice" of the court, a sale on a notice which fails to give any description of the lands is unwarranted.—Griswold v. Fuller, 33 Mich. 268.

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[e] (Ohio, 1878) Where the advertisement of a master's sale correctly gives the lot number and the map, plat, and subdivision, but incorrectly describes the lot by metes and bounds, a motion to set aside the sale by the debtor, with no affidavit, will be overruled, where there is no difficulty in ascertaining the land to be sold from the description as correctly given, nor in ascertaining from the advertisement itself that the boundaries were correctly stated. —Kotch v. Sieplein, 4 Ohio Dec. 88, 1 Cleve. Law Rep. 17.

§ 28. Time or duration of notice.

[a] (La. 1848) Civ. Code, § 2584, provides that in all cases of judicial sales, if the purchaser does not pay the price at the time required, the seller may at the end of 10 days, after the customary notice, again expose the property for sale. *Held*, that the 10 days refer exclusively to the duration of the advertisement, and not to the period at which it is commenced; and hence the fact that the advertisement of resale was published more than 10 days cannot affect the sale.—Duncan v. Armant, 3 La. Ann. 84.

[b] (La. 1848) Under Civ. Code, art. 2589, providing that, if the purchaser at a sale does not pay the price at the time required, the seller may at the end of 10 days again expose the property to public sale, the second sale need not be advertised more than 10 days, provided the customary notice is given within that time. —Duncan v. Armant, 3 La. Ann. 84.

[c] (La. 1860) Thirty days' notice is requisite to the validity of a judicial sale of landed property and slaves.—Gernon v. Bestick, 15 La. Ann. 697.

[cc] (Md. 1848) A decree required the trustees to give "at least three weeks' previous notice, inserted in some newspaper or papers, and such other notice as they might think proper, of the time, place, manner, and terms of sale." *Held*, that an advertisement of this sale, inserted once a week for three weeks, and once on the day of sale, in two daily newspapers, was sufficient notice, and that the trustees were not bound to advertise the property daily for three weeks previous to the sale.—Johnson v. Dorsey, 7 Gill, 269.

[d] (Miss. 1843) In case of a decree of sale of property, the court will allow counsel to designate the time of notice, without limiting it, taking care that it be reasonable and fair. —Guise v. Middleton, 1 Smedes & M. Ch. 89.

[e] (Neb.) Where the required time for notice of a judicial sale intervenes between the date of the first publication and the date of sale, the notice is sufficient.—(1890) Carlow v. C. Aultman & Co., 28 Neb. 672, 44 N. W. 873; (1894) Von Dorn v. Mengedoht, 41 Neb. 525, 59 N. W. 800.

[f] (W. Va. 1891) Under Code, p. 863, c. 139, § 7, providing that, in a suit in equity to enforce against real estate a judgment lien, "no decree for the distribution of the proceeds of such real estate shall be made until a notice to all persons holding liens on the real estate of the judgment debtor be posted and published under a decree of the court," the notice is not required before a sale is ordered, and it is sufficient, if it is given before the distribution of the proceeds.—McNeel's Ex'rs v. Auldridge, 34 W. Va. 748, 12 S. E. 851.

§ 29. Effect of failure to give notice.

[a] Noncompliance with the provisions of statute directing judicial sales to be advertised in the official journal does not impair the title of a purchaser at the sale, though it may render the sheriff liable.

—(Miss. 1870) Hanks v. Neal, 44 Miss. 212;

(Tex. 1873) Thulemeyer v. Jones, 37 Tex. 560.

[b] (Ky. 1836) Where a commissioner was directed to sell land after advertising, but neither his report nor the record showed that any advertisement was made, it was *held* that the report and sale should be set aside.—Clark v. Bell, 34 Ky. (4 Dana) 15.

[c] (Md. 1851) A decree directed the trustee to give three weeks' notice by publication in a newspaper, and such other notice as he might think proper, of the time, place, and terms of the sale. On the day appointed the trustee postponed the sale for a subsequent date, without advertising the sale as directed by the decree. *Held*, that the failure to give the notice prescribed by the decree was a fatal objection to the validity of the sale.—Glenn v. Wootten, 3 Md. Ch. 514.

[d] (Miss. 1870) The validity of a sale made by an officer of court under a decree is not affected by a failure to give the notice required by statute.—Hanks v. Neal, 44 Miss. 212.

[e] (S. C. 1857) Where a commissioner sells land without having advertised it for sale for the time prescribed by the order, the sale is invalid and will be set aside.—Baily v. Baily, 9 Rich. Eq. 392.

§ 30. Defects and objections and cure thereof.

Effect of confirmation as curing defective notice of sale, see post, § 66.

[a] (La. 1877) By appointing an appraiser, the debtor cures any defect in the advertisement of a judicial sale.—Howard v. Schmidt, 29 La. Ann. 129.

[b] (Minn. 1860) Error in a notice of a judicial sale, to be fatal, must be one in a material particular, and of a character to produce injury.—Dana v. Farrington, 4 Minn. 433 (Gil. 335).

[c] (Ohio, 1875) A defective notice of a statutory sale published in one paper does not vitiate a regular and sufficient notice in another, where the statute requires but one notice, and there is no proof that any one was misled by the defective notice.—Sealing v. Lawrence, 27 Ohio St. 441.

[d] (S. C. 1892) Gen. St. § 2424, puts a sale of land by order of the court on the same footing as a sale under execution, so that a failure to comply strictly with the statutes regulating the time and mode of advertising such a sale is a mere irregularity, and does not vitiate the sale.—Alexander v. Messervey, 35 S. C. 409, 14 S. E. 854.

[e] (Tenn. 1878) Objection to the master's mode of advertising a sale of land, if the mode was conformable to the statute and the decree, cannot be made by exception.—Goddard v. Cox, 69 Tenn. (1 Lea) 112.

[f] (Va. 1892) The fact that land was not advertised to be sold free from dower, as provided by the decree for sale, does not affect the validity of the sale where the land does not appear to have been sold for less than its value.—Strayer v. Long's Ex'r, 89 Va. 471, 16 S. E. 357.

VI. MODE AND CONDUCT OF SALE.

IN GENERAL, § 31.
MODE OF SALE, § 32.
PLACE, § 33.
TIME, § 34.
POSTPONEMENT, § 35.
ORDER OF OFFERING FOR SALE, § 36.

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SALE IN PARCELS OR IN GROSS, § 37.
TERMS AND CONDITIONS, § 38.
BOND OR OTHER SECURITY OF PURCHASER, § 39.
PERSONS WHO MAY PURCHASE, § 40.

Application of statute of frauds to sales, see "Frauds, Statute of," vol. 23, cc. 2120–2123, § 134.

Memorandum required by statute of frauds by officer conducting judicial sale, see "Frauds, Statute of," vol. 23, cc. 2219–2221, § 203; cc. 2307, 2308, § 260.

§ 31. In general.

[a] (Ky. 1842) Where a party to whom land has been fraudulently conveyed forbids a sale made under a decree of court, it does not absolve either the commissioner or complainant's counsel from conducting the sale fairly.—Busey v. Hardin, 41 Ky. (2 B. Mon.) 407.

[b] (N. Y. 1850) A purchaser at a judicial sale must have the property separated and delivered to him by the officer, or at least pointed out to him, so that it can be distinguished from the residue of the owner's property, or he will acquire no title by virtue of the sale.—Stevens v. Eno, 10 Barb. 95.

[c] (Ohio, 1847) A sale of land under a decree may be made by the sheriff or his deputy.—Craig v. Fox, 16 Ohio, 563.

§ 32. Mode of sale.

Ratification of sale made in mode different from that prescribed in decree, see post, § 70.

[a] (U. S. 1894) Act Cong. March 3, 1893, regulating manner in which property shall be sold under decree of the court, is prospective in its operation.—Central Trust Co. of New York v. Sheffield & Birmingham Coal, Iron & Ry. Co. (C. C.) 60 Fed. 9; Alabama Iron & Ry. Co. v. Anniston Loan & Trust Co., Id.

[b, c] (Iowa, 1872) If property which should have been sold at public judicial sale is irregularly sold at private sale instead, with the acquiescence of one interested, he will thereby be estopped from questioning the validity of the proceeding.—City of Maquoketa v. Willey, 35 Iowa, 323.

[d] (Ky. 1869) A sale of land under a judgment must be made in the manner prescribed in the judgment.—Bethel v. Bethel, 69 Ky. (6 Bush) 65, 99 Am. Dec. 655.

[e] (Md. 1827) Where a trustee has brought the property into the market by advertisement as prescribed by the decree, without effecting a sale, he may sell at private sale or otherwise, in his discretion.—In re Gibson, 1 Bland, 138, 17 Am. Dec. 257.

[f] (Md. 1847) In Andrews v. Scotton (1830) 2 Bland, 629, it was decided "that, if a trustee directed to sell by decree at a public sale sell at private sale, the sale will be confirmed, if satisfactory reasons are given for so doing, and no objection is made." These latter words mean objections of sufficient force to outweigh the reasons given for deviating from the terms of the decree.—Cunningham v. Schley, 6 Gill, 207.

[g] (Md. 1847) Where a trustee did not undertake to sell at private sale until a fruitless effort had been made at public sale, according to the terms of the decree, and even after such failure kept the property in the market by advertisements offering it at private sale, and procured a greater price than he had been offered at public sale, the court will not consider his conduct a substantial deviation from the decree, but only one offered from necessity.—Cunningham v. Schley, 6 Gill, 207.

[gg] (Md. 1847) A communication by a trustee appointed to make a judicial sale to the auctioneer employed by him of his limit as to price, and a direction, if he got no bid above such limit, to strike it off to A., does not make the sale a private one, since it does not prevent any person from bidding a larger amount.—Cohen v. Wagner, 6 Gill, 236.

[h] (Mo. 1870) When a statute requires that a sale of land by the sheriff under an order of court shall be made "at public vendue to the highest bidder," a sale made privately is invalid; and it is immaterial that the order of court did not require a public sale.—Hutchinson v. Cassidy, 46 Mo. 431.

[i] (Pa. 1841) A statute authorizing a sale of real estate by a trustee to be appointed by the orphans' court, the court to prescribe the time, place, and manner of sale, contemplates a future public sale; and a private sale made before the passage of the statute is invalid, although approved by the orphans' court.—Ellet v. Paxson, 2 Watts & S. 418.

[j] (Va. 1895) The court has power to authorize a commissioner to sell at private or public sale.—Cox v. Price, 22 S. E. 512.

[k] (W. Va. 1888) Where a decree requires land to be sold at public sale, a private sale by the commissioner is void.—Hutson v. Sadler, 31 W. Va. 358, 6 S. E. 920.

§ 33. Place.

Sale at different place than that specified in advertisement as ground for refusing confirmation, see post, § 64 [d].

[a] (U. S. 1814) Where it appears to be for the interest of all the parties that the property should be sold in another district, and the parties agree thereto, the court will consent to such removal and sale, but will protect the marshal in his right to his fees.—The San Jose Indiano, Fed. Cas. No. 12,323 [2 Gall. 311].

[b] (Ala. 1877) A sale of land at the court house door by a register, pursuant to a decree of sale, is not invalid by reason of the failure of the decree to designate the place of sale.—Hooper v. Young, 58 Ala. 585.

[c] (N. Y. 1846) Where a sale was decreed to be made by a master in New York City, and it was made by a master in Kings county, the sale was set aside after the purchaser had received his deed.—Yates v. Woodruff, 4 Edw. Ch. 700.

[d] (Tex. 1873) Where the place of a judicial sale is prescribed by law, and the sheriff sells at a different place, the sale is void.—Grace v. Garnett, 38 Tex. 156.

[e] (Va. 1819) If a tract of land, advertised to be sold on the premises, be sold, not immediately on the premises, but within 80 yards of the dwelling house, within full view of it, and 15 or 20 steps from the boundary line (it being believed by some present that they were on the premises), such sale will not be set aside, if it is regular in other respects, and no fraud appears.—Ferguson v. Franklins, 6 Munf. 305.

[f] (Va. 1849) Where a decree for the sale of land directs the commissioners to make the sale upon the premises, it is irregular for them to make it elsewhere, especially after advertisement that it is to be made there.—Talley v. Starke's Adm'x, 6 Grat. 339.

[g] (Va. 1849) Where a commissioner appointed to sell property has conducted the sale at a different place from that specified in the decree, the purchasers will not be compelled to complete their purchases.—Talley v. Starke's Adm'x, 6 Grat. 339.

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§ 34. Time.

Provision in decree as to time of sale, see ante, § 5 [g, i].

[a] A judicial sale of property is not void because made on election day; and it is not the business of a court, within the meaning of the statute prohibiting the opening or transaction of business by any court on the day of election in any city or town.
—(N. Y. 1867) King v. Platt, 37 N. Y. 155, 3 Abb. Prac. (N. S.) 434, 35 How. Prac. 23.
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(Ohio, 1879) Banning v. Pendery, 4 Wkly. Law Bul. 912.

[b] (U. S. 1892) On the expiration of a mining company's charter a party of the stockholders desired to organize a new company, while another party desired a sale of the mine and a division of the proceeds. The controversy was carried to the courts, and after seven years' litigation an order of sale was affirmed by the United States supreme court. The date of sale was fixed at about nine months thereafter, but was twice postponed, and the sale was finally made more than a year after the affirmance, and after ample advertisement. *Held*, that there could be no pretense of undue haste.—Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; Marcus v. Same, Id.

[c] (U. S. 1892) On the expiration of a mining company's charter a party of the stockholders desired to organize a new company, while another party desired a sale of the mine and a division of the proceeds. The purpose of the complaining party was to convey the mine to their proposed new corporation for $50,000, and the decrees ordering the sale contained the provision that no sale should be made for less than $50,000 in excess of the company's debts at the time of the sale, and also directed that the cause should be referred to a master to report upon the amount of assets and debts before making the sale. *Held*, that the purpose of the reference was merely to ascertain the debts in order to fix the upset price, and, it appearing that all the debts due up to the expiration of the charter had been paid, it was not necessary to delay the report and sale until various claims arising afterwards, and which were in course of litigation, were determined. The sale having been made for an amount far in excess of $50,000 above all pending claims, no complaint could be made on this ground.—Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; Marcus v. Same, Id.

[d] (Cal. 1892) Code Civ. Proc. §§ 681, 683, provide that a person in whose favor judgment is given may have a writ of execution for its enforcement, returnable at any time not less than 10 nor more than 60 days. Section 684 provides that, when a judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, and directing the sale. *Held*, that a writ issued under said section 684 is not an execution, and the sale, therefore, is not invalidated by being made after the time limited for the return.—Southern California Lumber Co. v. Ocean Beach Hotel Co., 94 Cal. 217, 29 Pac. 627, 28 Am. St. Rep. 115.

[e] (Ill. 1842) It is not irregular to appoint a commissioner with power to sell land in vacation, unless the money decreed to be paid shall have been paid.—Grubb v. Crane, 5 Ill. (4 Scam.) 153; Delahay v. McConnel, 5 Ill. (4 Scam.) 156.

[f] (Ill. 1889) A second sale of land under judicial process will not be permitted within the time allowed for redemption from a previous sale.—Herdman v. Cooper, 29 Ill. App. 589.

[g] (Ky. 1865) The court should fix the time for a decretal sale, instead of leaving it to the commissioner to appoint.—Perry v. Seitz, 63 Ky. (2 Duv.) 122.

[h] (Md. 1847) Where property is offered for sale under a decree on a Saturday, the Sabbath of a party interested, and who is thereby prevented from making arrangements to purchase the same, and he knew of the day fixed for the sale several weeks before it took place, it was his duty to have applied to the trustee to change the day. Omitting to do this, his failure must be regarded as a waiver of all objection to the day of sale as being his Sabbath, and he must abide the consequences of his omission.—Cohen v. Wagner, 6 Gill, 236.

[i] (Mo. 1893) Where, under an order of sale in an equitable proceeding to construe a will, declare a trust, and to convert the real estate of deceased into money, the sheriff sold part of the land, and reported such sale to the court, and afterwards sold the remainder of the land within five years from the date of the order, such sale was not void because there was no renewal of the order to sell.—Hamer v. Cook, 118 Mo. 476, 24 S. W. 180.

[j] (S. C. 1893) Where the decretal order for a sale of land fixes the date thereof, a sale made at any other time is unauthorized and void.—Tompkins v. Tompkins, 39 S. C. 537, 18 S. E. 233.

[k] (Tenn. 1880) The discretion of the clerk in fixing the day on which a decree for the sale of lands shall be executed can be controlled by the court only in case of a clear abuse of discretion.—Myers v. James, 72 Tenn. (4 Lea) 370.

[l] (Tex. 1873) Where the time of a public sale is prescribed by law, and the sheriff sells at a different time, the sale is void.—Grace v. Garnett, 38 Tex. 156.

§ 35. Postponement.

Necessity of showing postponement in officer's return, see post, § 57 [g].

[a] (Ill. 1863) Where a judicial sale is adjourned, the same notice thereof must be given as was originally required.—Thornton v. Boyden, 31 Ill. 200.

[b] (Ill. 1863) It is the right and duty of an officer appointed to conduct a judicial sale to adjourn the sale, whenever from any cause a reasonably advantageous price cannot be had, and when it is necessary to prevent a sacrifice of the property.—Thornton v. Boyden, 31 Ill. 200.

[c] (Md. 1859) A trustee has no power to agree to delay the sale authorized by the decree, and such an agreement cannot be enforced on behalf of the defendants.—Ward v. Hollius, 14 Md. 158.

[d] (N. J. 1874) It is not necessary to advertise in the newspapers an adjournment of a sale of realty under a public statute for any period not exceeding one week; a formal adjournment of the sale from week to week being sufficient.—Hewitt v. Montclair Ry. Co., 25 N. J. Eq. (10 C. E. Green) 392.

[e] (S. C. 1824) Where a sale of land was decreed upon a bill taken pro confesso, the sale was postponed until the expiration of the time allowed by law for the defendant to come in and make defense.—Magwood v. Butler, 1 Harp. Eq. 265.

[f] (Va. 1842) Where a sale of land of a defendant is decreed to be made in case he shall

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fail to pay the amount decreed against him, and after the sale is made, but before it is confirmed, the defendant dies, and the suit is revived against his administrator, the sale of the land ought to be suspended until an account of the assets of the deceased has been taken, to ascertain if the land may be relieved by the application of the assets to satisfy the decree.—Cocke's Adm'r v. Gilpin, 1 Rob. 20.

§ 36. Order of offering for sale.

[a] (Ill. 1873) A decree for the payment of a sum of money was made a charge on two tracts of land, either one of which was sufficient to satisfy the decree. After such decree was entered, and before sale, the debtor conveyed one of the tracts to A., who failed to give any notice of his purchase, and the master in chancery sold the same tract in satisfaction of the decree. *Held*, on a bill by the heirs of A. to set aside the sale and to redeem, that the objection that the other tract of land was not sold first came too late after confirmation.—Watt v. McGalliard, 67 Ill. 513.

[b] (Tenn. 1866) Where a particular order for selling is indicated in a decree for the sale of land, a departure from such order by the commissioner, not excepted to before confirmation, will not render such sale invalid as to bona fide purchasers, in the absence of fraud.—McGavock v. Bell, 43 Tenn. (3 Cold.) 512.

§ 37. Sale in parcels or in gross.

Discretion of officer to determine quantity to be sold, see ante, § 20 [c].

Failure to sell in parcels in connection with inadequacy of price as ground for setting aside, see post, § 78 [j].

Setting aside sale without indemnity because made in mass to the prejudice of debtor, see post, § 84 [d].

Constitutional provision for subdivision of lands sold, not self-executing, see "Constitutional Law," vol. 10, c. 1268, § 32 [n, o].

Subdivision of land and lots, retrospective operation of constitutional provisions, see "Constitutional Law," vol. 10, c. 1242, § 20 [qq].

[a] Where the premises consist of a single property, bought together, and always controlled by a single person, all lying together, contiguous, and adjoining, and no part in any wise separated from any other part, it is in the discretion of the referee to sell together or in parcels.

—(Ind. 1868) Wright v. Yetts, 30 Ind. 185;
(N. Y. 1862) Whitbeck v. Rowe, 25 How. Prac. 403;

[b] (U. S. 1872) A judicial sale of land lying in the outer part of a town may be made in lump, and not in parcels, although it be known to the commissioner for the sale that a company had been formed for its purchase in lump, which might prevent competition between bidders.—Johns v. Slack, Fed. Cas. No. 7,363 [2 Hughes, 467].

[c] (U. S. 1894) A sale of property as a whole instead of in parcels will be confirmed, where no objection was made to the decree directing that it be sold as a whole, and there is no offer to pay higher price in case the bidding be reopened.—Central Trust Co. of New York v. Sheffield & Birmingham Coal, Iron & Ry. Co. (C. C.) 60 Fed. 9; Alabama Iron & Ry. Co. v. Anniston Loan & Trust Co., Id.

[d] (Ark. 1892) Where the decree condemns land to be sold as one tract, and no objection is made by defendant, he cannot, after sale, insist that it should have been sold in subdivisions.—Nix v. Draughon, 56 Ark. 240, 19 S. W. 669.

[e] (Ill. 1868) Where contiguous parcels of land are sold under an order of court, and no bids are made for the lands when offered in separate parcels, they may be sold together.—Martin v. Hargardine, 46 Ill. 322.

[f] (Ill. 1868) The court refused to set aside a sale made under Rev. St. p. 302, § 10, which requires that, "if the property be susceptible of division, it shall be sold in such quantities as may be necessary to satisfy the debt," on complaint that the property was not properly divided, where it did not appear that the debtor made any request for a division, or that a different mode of sale from that pursued would have brought a better price.—McMullen v. Gable, 47 Ill. 67.

[g] (Ill. 1872) An officer, failing to find any bidders for land put up in separate parcels, may properly sell the land en masse.—Van Valkenburg v. Trustees of Schools, 66 Ill. 103.

[h] (Ill. 1889) It is improper to offer three several tracts in gross, after a failure to sell them separately, without first attempting to sell two of them together.—Cohen v. Menard, 31 Ill. App. 503, affirmed (1890) 136 Ill. 130, 24 N. E. 604.

[i] (Ind. 1868) To warrant a court in setting aside a heavy sale of real property upon the ground that it was not sold in parcels, as required by 2 Gav. & H. St. p. 249, § 466, it must be made to appear that the action of the officer was fraudulent.—Wright v. Yetts, 30 Ind. 185.

[j] (Ky. 1868) A commissioner at a decretal sale must pursue the advertisement, if it is announced that the land will be sold in gross, and a sale in parcels in such case will be ground for setting aside the sale.—Jarboe v. Colvin, 67 Ky. (4 Bush) 70.

[k] (Ky. 1890) Where land sold under a judgment could have been sold in parcels, the sale of the whole tract, without an attempt to make less of the land pay the debt, was erroneous.—McLaughlin v. Schmied, 12 S. W. 1061.

[l] (Ky. 1890) Where land sold under a judgment could have been sold in parcels, a sale of the whole tract, without an attempt to make less of the land pay the debt, will be set aside on appeal from the order confirming the commissioner's report of the sale.—McLaughlin v. Schmied, 12 S. W. 1061.

[m] (Ky. 1890) A judgment which directs the sale en masse of a considerable tract of land to satisfy a lien for an amount less than half the value of the land, when there is nothing to show that the land is not susceptible of division, is erroneous.—Skaggs v. Hill, 14 S. W. 363.

[n] (Ky. 1893) Where, in an action to enforce a lien on two tracts of land, judgment is rendered directing a sale of the land, such land should, if susceptible of advantageous division, be divided, and sold in lots.—Sebree v. Coleman, 22 S. W. 852.

[o] (La. 1833) The rule that a debt cannot be divided without the consent of both debtor and creditor applies to a sale of a debt under legal process.—Kelso v. Beaman, 6 La. 87.

[p] (La. 1876) A sale of two lots of land in one parcel was *held* not irregular, where they adjoined, and had been described together, and there was proof that the mode of sale adopted was advantageous.—Succession of McCall, 28 La. Ann. 713.

[q] (Mich. 1876) Under a decree authorizing a sale of lands by a commissioner "in such con-

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venient and reasonable parcels" as in his opinion shall be most conducive to the interest of all the parties, a sale by putting up and striking off numerous distinct tracts on one offer and bid is unwarranted.—Griswold v. Fuller, 33 Mich. 268.

[r] (Mo. 1881) The mere fact that property at public sale is sold in gross is not per se sufficient to avoid the sale. There must be some attendant fraud, unfair dealing, or abuse of confidence, in order to obtain the aid of a court of equity to devest title so acquired.—Chase v. Williams, 74 Mo. 429.

[s] (N. J. 1869) There is no rule which requires that at judicial sales each article of personal property should in all cases be sold separately. The general rule is that unless the value of the articles, or a considerable part of it, consists in their constituting one establishment, and where there would naturally be purchasers to bid on them separately, they should be sold separately; but where their value, as constituting a whole establishment, is greater than if separated, and the articles when separated would not excite competition, they should be sold as a whole.—National Bank of Metropolis v. Sprague, 20 N. J. Eq. (5 C. E. Green) 159.

[t] (N. J. 1889) Where a master in chancery has recommended, on sufficient proof, that land be sold in parcels, and a decree has been entered confirming such report, without objection, the sale will not be set aside on the ground that the land should have been sold as an entirety.—Morrisse v. Inglis, 46 N. J. Eq. (1 Dick.) 306, 19 Atl. 16.

[u] (N. Y. 1841) Where land to be sold under a decree consists of several distinct parcels, it is the duty of the master to sell the parcels separately, unless it is evident that the land will be much more valuable in one parcel than in several.—American Ins. Co. v. Oakley, 9 Paige, 259.

[v] (N. Y. 1850) Upon judicial sales of real estate, it is the duty of the officer conducting them to sell the property in such parcels as will be best calculated to produce the highest aggregate price.—Delaplaine v. Lawrence, 3 N. Y. (3 Comst.) 301.

[vv] (N. Y. 1887) The purchaser at a judicial sale of real property cannot raise the question that two lots were sold together as a defense to a motion to compel him to take title.—Duer v. Dowdney, 11 N. Y. St. Rep. 301.

[w] (N. Y. 1887) The irregular sale of two lots together, instead of separately, is cured by an order directing the purchaser to complete the sale.—Duer v. Dowdney, 11 N. Y. St. Rep. 301.

[ww] (N. Y. 1891) Where a referee sold certain lots in one parcel under a judgment which did not direct a sale in that manner, and the court is satisfied that the property would have produced a much greater sum if the sale had been in lots, the same will be set aside, and a resale ordered.—Larkin v. Brouty, 60 Hun, 585, 15 N. Y. Supp. 509.

[x] (Pa.) In general, where several houses are to be sold at judicial sale, they should be offered separately.—(1850) Tate v. Carberry, 1 Phila. 133; (1851) Connell v. Hughes, Id. 225.

[xx] (Pa. 1851) That a creditor has purchased houses sold together at a judicial sale does not estop her from objecting to a resale of the houses in lump.—Connell v. Hughes, 1 Phila. 225.

[y] (Tenn. 1869) Where land and slaves are sold by the master in a collective mass, and no exception is presented to his report of the sale on that ground, its confirmation will not be disturbed.—Lasell v. Powell, 47 Tenn. (7 Cold.) 277.

[yy] (Tex. 1876) Const. 1869, art. 12, § 40, providing that all sales of landed property made under decrees of court shall be offered to bidders in lots of not less than 10 nor more than 40 acres, except in towns, etc., did not render void a sale not actually made in lots of 40 acres or less, or a decree not directing the sale to be so made.—Cook v. Brown, 45 Tex. 73.

[z] (Tex. 1879) Disregard of the statutory direction that a judicial sale of lands be in parcels of 40 acres is no ground for setting aside the sale, where the defendant, although present, did not demand compliance therewith, and no greater price could have been obtained.—Atcheson v. Hutchison, 51 Tex. 223.

[zz] (Va. 1877) Whether a whole or only a part of the land should be sold, or whether as a whole or in parcels, must be referred to the discretion of the chancellor who orders the sale, and his act will not be disturbed by the court, unless plainly erroneous.—Long v. Weller's Ex'r, 29 Grat. 347.

§ 38. Terms and conditions.

Authority of court to change terms of sale where resale is ordered, see post, § 50 [vv, zz].
Violation of terms of sale as to credit as ground for setting aside, see post, § 73 [l].

[a] (Ark. 1876) A judicial sale must be on a credit of not less than three, nor more than six, months.—Williams v. Ewing, 31 Ark. 229.

[b] (Ark. 1881) Where a decree ordered real property to be sold, without saying on credit, *held*, that a sale for cash was meant, and that the decree was therefore erroneous.—Fry v. Street, 37 Ark. 39.

[c] (Ark. 1889) The confirmation of a sale under a decree will not be disturbed, where it appears that there has been due and legal notice of time, terms, and place of sale, though it was made on a credit of three months, instead of four, as the decree directed; the defendant showing no injury resulting from the departure from the direction, and the trial court being satisfied that none had resulted therefrom.—Johnson v. Campbell, 52 Ark. 316, 12 S. W. 578.

[d] (Ky. 1869) A sale of land under a judgment must be made on the terms prescribed in the judgment.—Bethel v. Bethel, 69 Ky. (6 Bush) 65, 99 Am. Dec. 655.

[e] (La. 1852) The law will not permit judicial sales to be made lotteries at the bidding, and sources of confusion and strife afterwards, as where purchasers are required in substance by the terms of a sale to take the property subject to so much of the antichresis as might be due, and such of the recorded mortgages as, on investigation, should turn out to be bona fide.—Pickersgill v. Brown, 7 La. Ann. 297.

[f] (La. 1866) The terms announced at a judicial sale bind the purchaser.—Backen v. Hamilton, 18 La. Ann. 553; Trichel v. Myers, Id. 567.

[g] (Minn. 1888) The conditions of a sale announced at the opening affect a purchaser, though he did not come on the ground until after the announcement, and though the sale had been suspended for a short time.—Cable v. Byrne, 38 Minn. 534, 38 N. W. 620, 8 Am. St. Rep. 696.

[h] (Miss. 1850) Where a sale is to be made by statute on a credit of six months, it is an error in a decree to direct a sale for cash, though it can be made for cash or on a longer

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credit if all the parties consent thereto.—Morse v. Clayton, 21 Miss. (13 Smedes & M.) 373.

[i] (Neb. 1894) A judicial sale must be made in accordance with the decree of court, the terms of which cannot be changed by agreement of parties or counsel unless incorporated into the record.—Nebraska Loan & Trust Co. v. Hamer, 40 Neb. 281, 58 N. W. 695.

[j] (Neb. 1894) The officer conducting a sale is not required to entertain any bids coupled with conditions not in conformity with the terms of the decree.—Nebraska Loan & Trust Co. v. Hamer, 40 Neb. 281, 58 N. W. 695.

[k] (N. J. 1869) A master, charged with the conduct of a judicial sale, has a considerable latitude of discretion in prescribing such terms of sale as will exclude puffers and fraudulent bidders, and secure the confidence of real purchasers in offering their bids.—National Bank of Metropolis v. Sprague, 20 N. J. Eq. (5 C. E. Green) 159.

[l] (N. C. 1835) A master in possession of property under a decree must dispose of it according to the terms of the decree, and cannot notice the claims of strangers to the decree.—Arnold v. Arnold, 21 N. C. 111.

[m] (S. C. 1836) Where the commissioner, under an order of court to sell and take a bond and mortgage for the price, neglected to take the mortgage, it was *held* that the party entitled, by receiving the bond, waived his right to claim a mortgage.—McCauley v. Heriot, Riley, Eq. 19.

[n] (Va. 1882) The court may change the terms of the sale of property to be made under its decree at any time while the property and the sale remain under control of the court and the sale itself remains unconfirmed.—Tebbs v. Lee, 76 Va. 744.

§ 39. Bond or other security of purchaser.

[a] (Ky. 1851) Where a deputy sheriff was appointed by a decree in chancery to sell certain property and take a bond for the purchase money, and the bond so taken ran to him as deputy sheriff, it was *held* to be no ground for quashing the bond.—Leavitt v. Goggin, 50 Ky. (11 B. Mon.) 229.

[b] (Ky. 1870) A purchaser at a decretal sale cannot be compelled to execute his bond for the consideration bid by him until defects in the title have been supplied.—Ormsby v. Terry, 69 Ky. (6 Bush) 553.

[c] (Ky. 1877) After the marshal of the court of chancery, on making a sale, has accepted and attested the purchaser's bond for the payment of his bid, he has no power to demand another bond with additional security in lieu of the one thus accepted.—Reamer v. Judah, 76 Ky. (13 Bush) 206.

[d] (Ky. 1877) Where a purchaser at a judicial sale executes a bond with insufficient surety, the court may, on suggestion of that fact, refuse to confirm the bid until further security is given.—Reamer v. Judah, 76 Ky. (13 Bush) 206.

[e] (Ky. 1877) Where a marshal of the court of chancery, on making a sale, has accepted and attested the purchaser's bond for the performance of his bid, a resale of the property cannot be ordered for the purchaser's refusal to give another bond, even though the first surety is deemed insufficient.—Reamer v. Judah, 76 Ky. (13 Bush) 206.

[f] (Ky. 1888) A bond given for the whole purchase price of lands sold in parcels, under order of court, is sufficient.—Preston v. Breckinridge, 86 Ky. 619, 6 S. W. 641.

[g] (Ky. 1888) A purchaser of mortgaged lands at judicial sale gave bonds for a price sufficient to satisfy the mortgage and accrued taxes. Being unable to pay the bonds, he and his surety surrendered the lands into court to be resold. On the second sale, the amount realized was insufficient to pay the mortgage and taxes. *Held*, that the mortgagee's failure to issue execution upon the bonds for the deficiency within one year after maturity did not release the surety; the delay having been at the latter's instance, to enable him to contest the claim for taxes, and he having agreed in writing to remain bound.—City of Louisville v. Kaye, 8 S. W. 869.

[h] (Ky. 1888) The court may order a purchaser at commissioner's sale under a decree in equity to execute a bond for the price, the purchaser having been summoned to show cause why such rule should not issue, and having failed to present any excuse or defense.—Brassfield v. Burgess, 10 S. W. 122.

[i] (Md. 1892) Where two trustees appointed to sell lands could not agree, after sale, as to the security to be given by the purchaser, and each reported, and the matter in question between them was submitted to the court on such reports and the answer of the purchaser, it was not an abuse of discretion for the court to order the purchaser to give security satisfactory to, and to be approved by, only one of the trustees.—Hopper v. Williams, 75 Md. 191, 23 Atl. 352.

[j] (N. C. 1879) A refusal of the court to order the cancellation of the bond of a purchaser at a judicial sale, without giving reasonable time to perfect the pleadings and bring in necessary parties, was not an error of which the purchaser can justly complain under Code, § 207.—Capel v. Peebles, 80 N. C. 90.

[k] (S. C. 1810) A master in chancery is not bound to take security upon a sale of land, unless security is required by the decree of sale; and his advertising that security will be required does not preclude him from dispensing with it.—Thompson v. Wagner, 3 Desaus. 94.

§ 40. Persons who may purchase.

Purchase by complainant's counsel in connection with inadequacy of price as justifying setting aside sale, see post, § 78 [f].

Purchase by attorney adversely to client, rights and liabilities of third persons, see "Attorney and Client," vol. 5, c. 1733, § 263.

—— *constructive trust for client, see* "Attorney and Client," vol. 5, cc. 1722–1725, §§ 251, 252.

—— *effect of client's consent, see* "Attorney and Client," vol. 5, cc. 1728, 1729, § 254.

—— *existence or termination of professional relation, see* "Attorney and Client," vol. 5, cc. 1726–1728, § 253.

—— *right to reimbursement from client, see* "Attorney and Client," vol. 5, c. 1731, § 259.

—— *validity of purchase, see* "Attorney and Client," vol. 5, cc. 1720–1722, § 250.

Purchase by bankrupt at sale in bankruptcy, see "Bankruptcy," vol. 6, cc. 436, 437, § 372.

—— *by executor or administrator at judicial sale of decedent's property, see* "Executors and Administrators," vol. 22, cc. 957–965, §§ 623, 624.

Right of guardian ad litem or next friend to purchase at sale of infant's property, see "Infants," vol. 27, cc. 1281, 1282, § 243.

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[a] Commissioners appointed by the court to sell an estate cannot, directly or indirectly, become the purchasers at their own sale.
—(Ala. 1837) Saltmarsh v. Beene, 4 Port. 283, 30 Am. Dec. 525;
(Ill. 1850) McConnel v. Gibson, 12 Ill. (2 Peck) 128;
(W. Va. 1883) Winans v. Winans, 22 W. Va. 678.

CONTRA, see
(S. C. 1880) Black v. Childs, 14 S. C. 312.

[b] A purchase of real estate at a judicial sale by one who, at the appraisement under which such sale was made served as an appraiser, is not, under the provisions of Code, § 441, strictly void, but is voidable only, and will "be considered fraudulent and void" only on an interposition or proceeding by a party in interest directly for the purpose of avoiding such sale.
—(Ohio, 1862) Terrill v. Auchauer, 14 Ohio St. 80.

CONTRA, see
(Neb. 1890) Reno v. Hale, 28 Neb. 646, 44 N. W. 996.

[c] (U. S. 1892) A sale by a special master under the direction of a court of chancery of corporate property in the course of litigation between stockholders is not a sale by either of the parties to the litigation, and they stand in no such fiduciary relation to the property as will prevent them from becoming purchasers either for themselves or others.—Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; Marcus v. Same, Id.

[d] (U. S. 1892) On the expiration of a mining company's charter a party of the stockholders desired to organize a new company, while another party desired a sale of the mine and a division of the proceeds. The controversy was carried to the courts, and a sale was adjudged. *Held*, that the facts that the parties who advocated the sale were acting in the interest of a company owning an adjacent mine, and that they finally purchased the property and conveyed to it, constituted no objection to the sale, especially when their adversaries had full knowledge of their purposes.—Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; Marcus v. Same, Id.

[e] (Ky. 1867) An attorney who becomes a purchaser at a judicial sale made for the benefit of his client is not a bona fide purchaser without notice.—Salter v. Dunn, 64 Ky. (1 Bush) 311.

[f] (Mich. 1842) Where a sale of real estate was ordered by a judge of probate, and it appeared that he himself became interested in the purchase, the sale was set aside, and a resale was ordered to be made under the direction of the court.—Walton v. Torrey, Har. 259.

[g] (Pa. 1857) Where, in trespass for the sale of property in transitu against a sheriff, the goods are sold pending the suit, the parties agreeing it should not affect their right, the plaintiff has as good a right to purchase as any person, and is like a stranger to the transaction.—Eby v. Schumacher, 29 Pa. (5 Casey) 40.

[h] (S. C. 1876) A purchase at a judicial sale, made by a solicitor in the cause for the benefit of himself and the commissioner making the sale, will be set aside without asking for proof of fraud, on the ground that the parties have a position and duties at the sale which forbid their becoming purchasers.—McCelvey v. Thomson, 7 S. C. (7 Rich.) 185.

[i] (W. Va. 1885) If a person selling land as a commissioner of a court becomes himself the purchaser, or has any understanding at the time of the sale that he is to have any interest in the purchase of the sale, the sale will be set aside at the instance of any party interested in the land.—Ayers v. Blair, 26 W. Va. 558.

VII. BIDS.

(A) IN GENERAL, §§ 41-48.
(B) FAILURE TO COMPLY WITH BID, §§ 49-56.

(A) IN GENERAL.

IN GENERAL, § 41.
PUFFING, § 42.
AGREEMENTS TO STIFLE BIDDING OR DISCOURAGE COMPETITION, § 43.
ACCEPTANCE OR REJECTION, § 44.
ASSIGNMENT OF BIDS, § 45.
WITHDRAWAL OF BID, § 46.
PAYMENT, § 47.
—— PURCHASE BY CREDITOR, § 48.

Price received at judicial sale as evidence of value, see "Evidence," vol. 20, cc. 390–392, § 280.
Refusal to accept security offered by bidder, survival of cause of action, see "Abatement and Revival," vol. 1, c. 192, § 257 [e].

§ 41. In general.

[a] (Ill. 1880) Where one empowered to make a public sale of land received by letter a bid of a certain amount, for which the land was struck off to such bidder, the bid being openly announced, and the sale in all respects regularly and fairly conducted, *held*, that no ground was shown for setting aside the sale.—Wenner v. Thornton, 98 Ill. 156.

[b] (Ky. 1875) Public sales are governed by the same law as private contracts. The parties thereto must assent or agree, and the agreement must be obligatory and mutual.—Grotenkemper v. Achtermeyer, 74 Ky. (11 Bush) 222.

[c] (Ky. 1889) At a decretal sale, H. and C., contestants for the property to be sold, made the same bid at the same time. The commissioner making the sale heard only the bid of H. and after crying it the hammer fell, and the commissioner announced that the property was sold to H., and the latter's name was written down as the purchaser. C. then claimed that he was the purchaser. *Held*, that it was proper for the commissioner while both parties were present, to again offer the property for sale.—Head v. Clark, 88 Ky. 362, 11 S. W. 203.

[d] (La. 1852) The debtor has a legal right to have his property sold for a certain price, and when the price is uncertain, as when the bid is not for so much over the mortgages stated in the certificate, but for so much, subject to the amounts which might be actually due under them, the sale is null.—Pickersgill v. Brown, 7 La. Ann. 297.

[e] (Md. 1847) A stranger called on the trustee of a court, about to offer property at public sale, and inquired what was his limit of sale, and was informed from $12,000 to $15,000, and the stranger said he would give $13,000, or find a purchaser at that sum; and the auctioneer, the agent of the trustee, casually heard, in a conversation between bystanders, that either A. or the trustee remarked that A. would give $13,000 for the property. The auctioneer then said to his clerk, who was in fact conducting the biddings, "You have a bid for $13,000," the purchaser's name not being announced, and the clerk, after crying the property for some time,

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receiving no advance upon the bid from the company, struck off the property to A., who agreed thereto. *Held*, that whether the bid was made by A. or some other person acting for him was immaterial; it not being necessary or usual to announce the name of the bidder, or necessary to be known.—Cohen v. Wagner, 6 Gill, 236.

[f] (Tenn. 1883) An offer to bid at a judicial sale, if an assurance of a good title can be given, cannot be entertained.—Irby v. Irby, 79 Tenn. (11 Lea) 165.

[g] (Va. 1888) Refusal to allow one not a party to the creditors' suit to file his petition, offering for the land to be sold $800—$125 cash, balance in one, two, and three years, without interest,—is not error; the master having reported it to be worth $900, and it having cost $1,200 without improvements.—Cooper v. Daugherty, 85 Va. 343, 7 S. E. 387.

§ 42. Puffing.

Puffing at auction sale, see "Auctions and Auctioneers," vol. 5, cc. 2058–2060, § 22.

[a] (N. J. 1869) In the case of a judicial sale, for creditors in whose behalf the sale is made to employ puffers, for the purpose of increasing the price by fictitious bids, is a fraud upon honest bidders; and a buyer whose bid immediately followed one made by a puffer may be relieved from his purchase.—National Bank of Metropolis v. Sprague, 20 N. J. Eq. (5 C. E. Green) 159.

[b] (S. C. 1818) The employment of a person to bid at a public sale on the part of the vendor, so as to run the price up, does not vitiate the sale.—Jenkins v. Hogg, 2 Tread. Const. 821.

§ 43. Agreements to stifle bidding or discourage competition.

Act of hiring another not to bid against purchaser as ground for vacating sale, see post, § 78 [e].

Right of one who has entered into agreement to stifle bidding to have the sale set aside on the ground that he was thus prevented from bidding, see post, § 73 [u].

Agreements to stifle bidding at auction sale, see "Auctions and Auctioneers," vol. 5, cc. 2060–2062, § 23.

Forbearance from bidding at judicial sale as consideration for contract, see "Contracts," vol. 11, c. 283, § 323.

Validity of contracts to stifle bidding at public sales in general, see "Contracts," vol. 11, cc. 620–622, § 655.

[a] A combination to prevent bidding at a sale of real estate is fraudulent, and will raise a constructive trust.

—(Ill. 1886) Devine v. Harkness, 117 Ill. 145, 7 N. E. 52;

(Iowa, 1878) Fleming's Heirs v. Hutchinson, 36 Iowa, 519;

(Mo. 1879) Baier v. Berberich, 6 Mo. App. 537, affirmed (1883) 77 Mo. 413;

(N. J. 1869) National Bank of Metropolis v. Sprague, 20 N. J. Eq. (5 C. E. Green) 159;

(Va. 1873) Underwood v. McVeigh, 23 Grat. 409.

[b] The doctrine that it is illegal for persons intending to purchase at a judicial sale to combine not to bid against each other does not apply to cases where several creditors, no one of whom would be willing to purchase a property of so large value as that offered, unite to purchase, since such a union is calculated to enhance the price, and not to depreciate it.

—(N. J. 1869) National Bank of Metropolis v. Sprague, 20 N. J. Eq. (5 C. E. Green) 159;

(S. C. 1850) Holmes v. Holmes, 3 Rich. Eq. 61.

[c] (Ill. 1867) A person is not entitled to protection as a bona fide purchaser at a judicial sale who, after falsely representing to the party in interest that it has been postponed, combines with the sheriff to forestall competition by selling as secretly as possible, and bids off the property at a very inadequate price, in this case, one-thirtieth of the actual value.—Dutcher v. Leake, 44 Ill. 398.

[d] (Ill. 1894) While a sale was in progress, one of the bidders made arrangements with the others, whereby, in consideration of various agreements made by him, they ceased to bid, and he obtained the property for less than its market value. *Held*, that the sale was voidable.—Ingalls v. Rowell, 149 Ill. 163, 36 N. E. 1016.

[e] (Miss. 1875) Where lands were sold under a decree of chancery by a commissioner, and a portion of the distributees combined and agreed not to bid against each other, and they prevented competition at the sale by promising to divide their purchase with other bidders, if they would not bid, and thereby prevented bidding, and became the purchasers of the land at a price far below its value, *held*, that the sale should not be confirmed.—Swefford v. Garmon, 51 Miss. 348.

[f] (Pa. 1885) Where a lien creditor agreed to bid for and purchase his debtor's property, at a sale by order of the orphans' court, at a sum sufficient to cover prior liens, in satisfaction of his claim, a stipulation that the debtor should not compete in the bidding is not contrary to the rule of public policy which avoids agreements to abstain from bidding at a public sale.—Neely v. McClure (Com. Pl.) 1 Atl. 719.

[g] (S. C. 1845) Any agreement or combination, the object and effect of which is to chill a judicial sale and stifle competition, is illegal, and no party to the agreement or combination can derive any benefit from the sale.—Hamilton v. Hamilton, 2 Rich. Eq. 355, 46 Am. Dec. 58.

[h] (S. C. 1845) Property was about to be sold at judicial sale. A. had determined to bid at the sale. B. proposed that A. should not bid, and that B. should purchase the property with a view to a resale for the benefit of A. and B., who were sureties of the judgment debtor, thereby to indemnify them for their liabilities. B. also bought a judgment against the execution debtor to prevent the creditor from being present at the sale. On the application of creditors, the agreement between A. and B. was *held* illegal, and the sale set aside.—Hamilton v. Hamilton, 2 Rich. Eq. 355, 46 Am. Dec. 58.

[i] (S. C. 1850) To render a purchase at a public sale under a decree in chancery void, because the biddings were joint or there was a partnership among the bidders, it must appear that there was a fraudulent intent to depress and chill the sale, to get the property at an undervalue, or to obtain other undue advantages.—Holmes v. Holmes, 3 Rich. Eq. 61.

[j] (S. C. 1886) Land belonging to a decedent was sold and bid in by M., the decedent's son, payment to be made in two annual installments. The bond for the price was signed by M. and his three sisters, who were all living on the land. Most of the payments were made by the sisters, but they were entered as

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for M., and the deed was made to him individually. The brother and sisters continued to live together until two of the sisters had married. M. died, leaving a widow and children. The widow administered on his estate, and a debt was recovered against her as administratrix. On M.'s death the sisters commenced suit in probate court for partition, claiming that they and M. had equally paid for it. The probate court ruled against the sisters, and, pending their appeal to the court of common pleas, the judgment obtained against M.'s administratrix was levied on the whole land, and it was sold as M.'s land. It was bid in by one of the sisters, and the sheriff's deed made to all of them. At such sale, the attorney for the sisters gave notice of their claim. Afterwards M.'s widow died, and his children brought this action for the land, claiming that the whole land was M.'s; that the sheriff's sale should be set aside as void, on the ground that the sisters combined to chill the bidding, etc. *Held*, that the notice by their attorney at the sale was made in good faith, and was not sufficient to avoid the sale on the ground of an attempt to chill the bidding.—Reagan v. Bishop, 25 S. C. 585.

[k] (S. C. 1886) The combination by the sisters to purchase the property jointly was not unlawful, there being no intention to prevent free competition.—Reagan v. Bishop, 25 S. C. 585.

[l] (Tenn. 1855) Where several parties desire different parts of land to be sold at a chancery sale, neither of them desiring the whole, an agreement to purchase it jointly and make division is not a fraudulent combination to avoid competition, and will not vitiate the sale.—McMinn's Legatees v. Phipps, 35 Tenn. (3 Sneed) 196.

§ 44. Acceptance or rejection.

[a] (U. S. 1889) The acceptance or rejection of a bid at a sale under a chancery decree is within the sound discretion of the court, to be exercised with due regard to the special circumstances of the case.—Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608.

[b] (U. S. 1885) The purchaser at a judicial sale cannot be compelled to complete his purchase until his bid has been in some form accepted by the court, which stands in place of a vendor, using the master merely to receive and report bids.—Mayhew v. West Virginia Oil & Oil Land Co. (C. C.) 24 Fed. 205.

[c] (U. S. 1894) Where, at a sale for cash, the purchaser gives a check for less amount than the price, offering to pay the balance next day, he cannot complain where his bid is rejected, and a sale made to the next lowest bidder.—United States v. The Haytian Republic (D. C.) 64 Fed. 214.

[d] (Ky. 1859) Bids for property sold by order of the chancellor are mere propositions, to be rejected by him in the exercise of a reasonable discretion, if the sale has not been perfectly fair, or if an unconscientious advantage has been obtained by the purchaser.—Vanbussum v. Maloney, 59 Ky. (2 Metc.) 550.

[e] (Ky. 1888) The commissioner refused to accept the bid of the debtor, but subsequently the chancellor granted him the privilege of giving bond, and taking the property at his bid, which he failed to do. *Held*, that exceptions to the commissioner's report were properly overruled, as the debtor had the full benefit of his offer.—Creutz v. Knecht, 6 S. W. 717.

[f] (Md. 1830) To prevent a person from baffling the court by becoming the highest bidder at a sale under a decree when he is wholly unable to comply with his contract, the court may direct that the bid of such person shall not be received, and that the trustee report the two highest bidders, so that, in case the highest bidder fails to comply with the terms of sale, the next highest bidder shall be received and considered as the purchaser.—In re Murdock, 2 Bland, 461, 20 Am. Dec. 381.

[g] (Pa. 1881) The bid of the highest bidder at a master's sale in chancery is but an offer to purchase, subject to the approval of the court, and the court may or may not accept it, in its discretion.—Church v. Bailee, 2 Leg. Rec. Rep. 169, 29 Pittsb. Leg. J. 20.

§ 45. Assignment of bids.

Champertous nature of assignment of bid after sale is set aside, see "Champerty and Maintenance," vol. 9, c. 2055, § 84 [i].

[a] A bidder at a sale of a clerk and master in equity may assign his bid, and a deed to such assignee passes the title.
—(N. Y. 1836) Proctor v. Farnam, 5 Paige, 614; (N. C. 1858) Campbell v. Baker, 51 N. C. (6 Jones, Law) 255.

[b] (N. Y. 1836) Where the purchaser at a master's sale assigns his bid before receiving a deed, the court will, on application by the assignee, direct the execution of a conveyance directly to him.—Proctor v. Farnam, 5 Paige, 614.

[c] (N. Y. 1890) Where the purchaser at a referee's sale makes the cash payment, and assigns his bid with the understanding that his assignee is to procure a loan to complete the purchase, which he fails to do, the assignee acquires no title to the cash payment.—Flint v. George, 55 Hun, 604, 8 N. Y. Supp. 221.

[d] (S. C. 1876) A purchaser at a sale under the decree of an ordinary cannot escape liability by transferring his bid to a third person.—Reynolds v. Timmons, 7 S. C. (7 Rich.) 486.

[e] (S. C. 1876) Where a purchaser at a sale under the decree of an ordinary transfers his bid to a third party, the fact that the ordinary takes security from such transferee does not discharge the bidder.—Reynolds v. Timmons, 7 S. C. (7 Rich.) 486.

[f] (Tenn. 1870) The assignment of a bid by the bidders to whom property was sold at a judicial sale, after the sale has been set aside and other bids opened and a sale had, is a sale of a pretended claim, and is illegal.—Newland v. Gaines, 48 Tenn. (1 Heisk.) 720.

§ 46. Withdrawal of bid.

[a] (Neb. 1894) After the acceptance of a bid, it cannot be withdrawn or changed, except under such circumstances as would justify the rescission or reformation of other contracts.—Nebraska Loan & Trust Co. v. Hamer, 40 Neb. 281, 58 N. W. 695.

[b] (N. J. 1869) When a bidder at a master's sale discloses to the master that he is not prepared to comply with the terms of sale, it is not improper for the master to refuse his application for leave to withdraw his bid, and to direct the property to be struck off to him, and thereby compel him to announce openly that he cannot comply.—National Bank of Metropolis v. Sprague, 20 N. J. Eq. (5 C. E. Green) 159.

§ 47. Payment.

Authority of master to receive payment of bonds given for purchase price, see ante, § 20 [n].
Necessity for payment of bid before conveyance, see post, § 119 [l].

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[a] Where a purchaser at judicial sale pays the price to the commissioner before the commissioner has given and the clerk has approved the bond required by the decree, he pays at his own risk, and, if the commissioner misappropriates the money, the land continues liable for the price; and this though the purchaser made inquiry of the clerk, who misinformed him that the bond had been given.
—(Va. 1875) Hess v. Rader, 26 Grat. 746; (1877) Lloyd v. Erwin's Adm'r, 29 Grat. 598; (1891) Whitehead v. Bradley, 87 Va. 676, 13 S. E. 195; (1895) Shumate v. Williams, 22 S. E. 808;
(W. Va. 1882) Donahue v. Fackler, 21 W. Va. 124.

[b] A special commissioner, appointed by a court to sell land, with power to take notes payable to himself, took Confederate money in payment of such notes. *Held*, that the payments were good as between him and the payors of the notes.
—(S. C. 1868) McPherson v. Lynah, 14 Rich. Eq. 121;
(Tenn. 1871) Matthews v. Thompson, 49 Tenn. (2 Heisk.) 588; (1873) Sharp v. Harrison, 57 Tenn. (10 Heisk.) 573.
CONTRA, see
(N. C. 1867) McNeill v. Shaw, 62 N. C. 91.

[c] (U. S. 1889) Where a decree required that a judicial sale should be made for cash on the day of the sale, payment in cash on that day is a condition precedent to the right of the purchaser to demand a confirmation.—Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608.

[d] (Ala. 1883) A delay by register for two days to collect the money bid on a sale under a decree will not avoid the sale if no injury resulted from the delay.—Chilton v. Alabama Gold Life Ins. Co., 74 Ala. 290.

[e] (Ark. 1859) In case of a sale of lands under a decree ordering a sale thereof to satisfy liens thereon for cash, though the plaintiff is entitled, stricti juris, to payment in specie, still, since in ordinary business transactions it is not usually required, payment should be allowed by certified check or other means recognized in ordinary business transactions.—Penn's Adm'r v. Tolleson, 20 Ark. 652.

[f] (Ark. 1876) A purchaser of lands under a decree requiring them to be sold for cash acquires no title thereto until payment by him of the amount of his bid.—Phelps v. Jackson, 31 Ark. 272.

[g] (Ky. 1835) Where a decree directed a sale to be made for bank notes, and the commissioner reported that he had sold for a certain number of dollars, and the report referred directly to the decree, and stated that the sale was made in pursuance of the decree, it was *held* that there was sufficient evidence to show that the words were used to express a sum in bank notes, and not in specie.—Riley v. Wiley, 33 Ky. (3 Dana) 75.

[h] (Ky. 1870) A payment by the purchaser at a decretal sale does not discharge him from his liability unless the court has by its order directed the collection and receipt of the funds. But if payment is made to one to whom the court might have ordered it to be paid, such payment may be afterward recognized and sanctioned.—Herndon v. Lancaster's Adm'rs, 69 Ky. (6 Bush) 483.

[i] (N. Y. 1835) A resale of premises sold by a master was decreed, provided a certain sum should be bid therefor; and in pursuance of the order the premises were put up at auction and struck off to the petitioner for the sum specified in the order, whereupon the master, for the first time, in compliance with the direction of a party interested in the sale, informed the petitioner that the purchase money must be paid in specie; and though the petitioner offered to pay the amount of his bid in current bank bills, or by a draft upon the bank in which the money was to be deposited by the master, the premises were again put up to sale on the terms of immediate payment in specie, and, no one being able to comply with those terms, the master declared the sale closed, and reported that the condition of the resale had not been complied with. *Held*, that the conduct of the master was unjustifiable and oppressive; and his report was set aside, and he was ordered to convey to the petitioner on payment by him of the amount of his bid.—Baring v. Moore, 5 Paige, 48.

[j] (Tenn. 1883) When a judicial sale is made by a master, and he has reason to doubt the good faith of a bidder, he may demand an immediate compliance with the terms of sale.—Irby v. Irby, 79 Tenn. (11 Lea) 165.

[k] (Va. 1871) Where a judicial sale of land was made in 1863, an order authorizing the commissioner to collect the purchase money presumptively authorized the collection thereof in Confederate currency.—Dixon v. McCue's Adm'x, 21 Grat. 373.

[l] (Va. 1873) Where the terms of a judicial sale provided that a portion of the purchase money should be on credit to be paid in the currency in use when the payment fell due, and at the time the bond of the purchaser given therefor fell due, the currency of the United States was in use, *held* that it must be paid in the latter money, although Confederate currency was in use at the time of the sale and execution of the bond.—Teel v. Yancey, 23 Grat. 691.

[m] (Va. 1874) In August, 1860, D., as commissioner, sold to M. certain land on a credit of one, two, and three years, taking his bonds for the purchase money. In October, 1861, M., under authority of court, deposited in a bank the amount of his first and second bonds. Subsequently D. collected the third bond, depositing the money in the same bank, and reporting his action to the court, which report was confirmed. *Held*, that it must be presumed that the court upon confirmation of this report knew that the deposits were made in Confederate money, and therefore neither M. nor D. was bound to repay the amount.—Mead v. Jones, 24 Grat. 347.

[n] (Va. 1875) M. bought land at a judicial sale in 1859, and gave his bonds payable annually down to 1863. He paid all but the last bond, and paid on that $2,000 in Confederate money; and a few days afterwards offered to pay the balance to the commissioner in Confederate money, who refused to receive it. M. then filed his petition, stating that he owed this balance, and that the commissioner refused to receive it; that he was ready to pay it, and asking that he might be authorized to pay it, and that the commissioner might be directed to convey the land to him. The court decreed that M. be authorized to pay to the general receiver the balance due, stating the amount, and upon its payment a commissioner named should convey the land to M. *Held*, that the decree did not authorize M. to pay in Confederate money, and a payment to the receiver in that money was not a discharge of M.'s debt.—Myers v. Nelson, 26 Grat. 729.

[o] (Va. 1880) During the Rebellion, a purchaser gave to a commissioner at a sale under an order of court, in part payment of the purchase price, a check upon a party who admitted his indebtedness to the drawer, but did not pay it, of which the purchaser had notice. *Held*, that this was not a valid payment, and that the

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purchaser must account for such part of the price, at the scaled value thereof at the day of sale, with interest from the end of the six months' credit allowed by the commissioner at the sale.—Finney v. Edwards, 75 Va. 44.

[p] (Va. 1885) Where, under a judicial sale, the purchaser's liability is to pay money, it cannot be discharged in any other thing, against the wish of any party in interest.—Frazier v. Hendren, 80 Va. 265.

[q] (Va. 1888) A purchaser at judicial sale who pays the price to a receiver before the latter has given bond, as ordered by the court, may be made to pay again, on the receiver's failure to account for the money, though the latter afterwards gave bond.—Woods v. Ellis, 85 Va. 471, 7 S. E. 852.

[r] (Va. 1895) Where the purchaser at a judicial sale pays the purchase money to the commissioner before the latter has given bond as required by the order of sale, he is not exonerated from liability to pay a second time by reason of the fact that the commissioner was attorney for the judgment creditor.—Shumate v. Williams, 22 S. E. 808.

§ 48. —— Purchase by creditor.

[a] (U. S. 1889) Where a judicial sale is directed to be for cash, and the property is purchased by a trustee of part of the creditors, the court is not bound to depart from the terms of the sale and apply their claims in payment of the purchase money.—Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608.

[b] (La. 1884) On a judicial sale of real estate of a succession, a judgment creditor of the heir becoming the purchaser must pay to the sheriff as much of the amount of adjudication as may be required to meet judicial mortgages registered previous to his own, if such mortgagees have, by third opposition, duly claimed preference. In default thereof the sheriff must immediately resell; otherwise, he will be held responsible for consequent loss.—Dobard v. Bayhi, 36 La. Ann. 134.

(B) FAILURE TO COMPLY WITH BID.

IN GENERAL, § 49.
RESALE, § 50.
—— VALIDITY AND EFFECT OF RESALE, § 51.
—— LIABILITY OF PURCHASER FOR DEFICIENCY ON RESALE AND ENFORCEMENT THEREOF, § 52.
—— INJUNCTION AGAINST RESALE, § 53.
LIABILITIES OF BIDDERS AND THEIR SURETIES, § 54.
SUMMARY PROCEEDINGS TO COMPEL PAYMENT, § 55.
ACTIONS ON BIDS, § 56.

§ 49. In general.

[a] (Ky. 1891) Land was sold at decretal sale at a stated sum per acre. The master commissioner told the purchaser that he would have the land surveyed the next day, at which time the purchaser could give bond for the price. The next day, the surveyor having made a mistake, the commissioner deferred taking the bond until a resurvey could be had. He told the purchaser that this would be done in 8 or 10 days, and that he would then notify the purchaser, so that the bond could be given. The notice was not given until 52 days thereafter. *Held*, that the delay was unreasonable, and justified a refusal to complete the purchase.—Arnett v. Anderson's Adm'r, 15 S. W. 855.

[b] (La. 1858) If the purchaser at a judicial sale refuses to comply with the terms, he is considered as never having been owner; saving to the vendor his right to compel a specific performance of the contract.—Washburn v. Green, 13 La. Ann. 332.

[c] (La. 1888) The failure of the adjudicatee at a judicial sale to pay the price gives the vendor the right to demand the rescission of the sale, though the property may have passed from the possession of the adjudicatee.—McKenzie v. Bacon, 40 La. Ann. 157, 4 South. 65.

[d] (Miss. 1843) Where a purchaser at a judicial sale fails to comply with the conditions, the property remains in the hands of the commissioner unsold, and he cannot receive from a third person a bond for the amount bid by the purchaser, and convey to him.—Vanneerson v. Cord, 1 Smedes & M. Ch. 345.

[e] (S. C. 1844) The neglect of the purchaser for cash, at an official sale, to pay the purchase money for any considerable time (two months in this case) is a forfeiture of his right to enforce the sale.—Seymour v. Preston, Speers, Eq. 481.

[f] (Va. 1877) Where a purchaser at a judicial sale relies on a mistake as ground for failure to complete his purchase, the objection to the sale should be made to the court as soon as the mistake is discovered by the purchaser.—Long v. Weller's Ex'r, 29 Grat. 347.

§ 50. Resale.

Charging purchaser with costs of resale, see post, § 126 [a, d].

Confirmation of resale, see post, § 64 [c].

Determination of debts and liens on resale, see ante, § 11 [f, j].

Resale for failure of bidder to give additional security, see ante, § 39 [e].

—— *on vacation or setting aside, see* post, § 87.

Sale in parcels or in gross on resale, see ante, § 37 [xx].

Terms and conditions of sale in general, see ante, § 38.

Appealability of order making absolute rule to show cause why resale should not be ordered, see "Appeal and Error," vol. 2, c. 1369, § 794 [b].

[a] Where the purchaser at a judicial sale fails to comply with his bid, it is proper for the court, after due notice, to order a resale of the property.
—(Ark. 1876) Phelps v. Jackson, 31 Ark. 272;
(La. 1876) Succession of Haggerty, 28 La. Ann. 87;
(N. C. 1879) In re Pettillo, 80 N. C. 50.

[b] Where a resale of the property is deemed beneficial to the parties, and the purchaser has neglected to comply with the terms of sale within a reasonable time, a resale will be ordered over such purchaser's objection.
—(N. C. 1879) In re Pettillo, 80 N. C. 50;
(W. Va. 1878) Hyman v. Smith, 13 W. Va. 744.

[c] Before a resale is had for failure of the purchaser to comply with his bid, a notice should be served on him to show cause why he has not complied, and notifying him that on his default the property will be resold at his risk.
—(Ill. 1871) Hill v. Hill, 58 Ill. 239.
CONTRA, see
(Va. 1878) Thornton v. Fairfax, 29 Grat. 669.

[d] (U. S. 1889) Where the bidder at a judicial sale refuses to pay the amount of his bid, the court may, without confirming the sale by a formal rule, order a resale at his risk both in respect to the expenses of the resale and any

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deficiency resulting therefrom.—Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608.

[e] (U. S. 1827) If the purchaser of lots at a sale under a decree of court neglects to pay the purchase money, and suffers them to be sold for taxes, the court will, upon the petition of the trustee, order so much of the property to be resold as will pay the taxes and redeem the residue.—Hearne v. Barry, Fed. Cas. No. 6,303 [3 Cranch, C. C. 168].

[f] (Ga. 1878) The commissioner of the superior court offered certain land, which was in litigation, for sale in parcels. A. bid off the first parcel, and B. the second. A. failed to pay in cash, and the whole land was resold at a higher price. The court sustained the sale, but offered to order a resale if B. would petition for it, but he would not, and excepted. *Held*, that the decision should be sustained.—Walters v. Hargrove, 61 Ga. 267.

[g] (Ind. 1843) Commissioners appointed by the court to sell land, who sell the same, and take a note of the purchaser for a part of the price, cannot file a bill to have the land sold to pay such note.—West v. Thornburgh, 6 Blackf. 542.

[h] (Ky. 1848) Where land was sold under a decree in equity and bonds given for the purchase money, and the conditions of the bonds were broken, and an order of resale made after great delay caused by the purchaser, but the order for the resale did not specify the exact sum due, there having been several payments, it was *held* that the court had full power to make an order of resale, but that it ought to specify the balance due.—Page v. Hughes, 48 Ky. (9 B. Mon.) 115.

[i] (Ky. 1889) Where a judicial sale was rightly set aside, the court resumed absolute control of the property, and had the power, by a supplemental order, to direct a resale.—Johnson v. Johnson, 88 Ky. 275, 11 S. W. 5.

[j] (Ky. 1890) In the absence of notice to the purchaser that the sale bond given by him would be quashed because of the insolvency of the surety, a second sale of the property is invalid.—Butts v. Alderson, 14 S. W. 493.

[k] (Ky. 1891) Where a purchaser at a sale of land by a commissioner in equity refuses to pay the purchase money, and an execution issued against him on the purchase-money bonds is returned, "No property found," the chancellor may direct a resale of the land as the land of the purchaser.—Dean v. Gritton, 15 S. W. 1061.

[l] (Md. 1828) Where property has been sold under a decree of the court of chancery, the court, as vendor for those interested, retains an equitable lien thereon for the purchase money, which may be enforced by a resale.—Anderson v. Foulke, 2 Har. & G. 346.

[m] (Md. 1869) Where a party purchased real estate under the decree of a court of equity, and having made the cash payment, gave to the trustee his bond, with approved security, for the payment of the balance of the purchase money, *held* that, upon default in making the credit payments as they became due, the court might, upon petition by the trustee, order a resale of the property at the risk of the purchaser.—Stephens v. Magruder, 31 Md. 168.

[n] (Md. 1881) Where property is sold under order of court in an equity suit, and afterwards resold because of the failure of the purchaser to make the deferred payments, although he is not entitled to demand that the cash installment paid by him be refunded, such installment is not forfeited because it is allowed as a credit.—Brundige v. Morrison, 56 Md. 407.

[o] (Md. 1881) Where one bids off property at a sale under order of court in an equity suit, and, after paying one installment of the purchase money, dies, his administrator is properly ordered to pay the balance into court upon a petition filed for that purpose, and after failure to make such payment accordingly, an order of resale at the risk of the estate of the deceased purchaser is properly granted.—Brundige v. Morrison, 56 Md. 407.

[p] (Miss. 1843) Where the purchaser at a judicial sale fails to comply with his bid, the commissioner may advertise and sell again, and continue to do so until a sale is effected, unless prohibited by the decree on its face, or his authority is limited in time.—Vannerson v. Cord, 1 Smedes & M. Ch. 345.

[q] (Neb. 1879) Where a purchaser at a judicial sale refuses to comply with his bid, the officer may at once resell the property, but he cannot wait until the sale is closed, and the bidders have departed, before again offering the property for sale.—Jones v. Null, 9 Neb. 254, 2 N. W. 350.

[r] (N. Y. 1839) Upon a sale by a master, if the bidder to whom the property is struck off refuses to complete the purchase, the master should not allow another person to take the property at the former bid, but should order a resale.—Thompson v. Dimond, 3 Edw. Ch. 298.

[s] (N. Y. 1839) By the conditions of a master's sale the biddings were to remain open until the deposit was paid. The bidder to whom the property was struck off refused to complete the sale, and his name was not booked by the auctioneer, and he did not sign the memorandum of sale. *Held*, that no order was necessary to authorize a resale.—Hewlett v. Davis, 3 Edw. Ch 338.

[t] (N. Y. 1842) An order for a resale of premises sold by a master, made without notice to a defendant who has appeared in the suit, and who has an interest in the property, is irregular.—Robinson v. Meigs, 10 Paige, 41.

[u] (N. C. 1862) Where a court of equity is resorted to for the sale of land, after the sale is ordered to be confirmed (by which the bid becomes accepted), if the master informs the court that the bidder refuses to comply with the terms of the sale, no order prejudicing the rights of the bidder can be made until he is made a party to the proceedings by the service of a rule upon him to show cause.—In re Yates, 59 N. C. 306.

[uu] (N. C. 1879) A surety upon a note for the purchase money of land sold under a decree of court has the right, on default of his principal, to require a resale in exoneration of his liability.—Ex parte Pettillo, 80 N. C. 50.

[v] (Pa. 1850) Where defendant suffered a resale of property to go on without notice to him of proceedings to set aside the original sale, he could have no relief on account of the irregularity.—Ingersol v. Sherry, 1 Phila. 68.

[vv] (Pa. 1858) Where a judicial sale falls through because of the default of the buyer, and there is ground for believing that the purchase was made without any intention to pay for it, in pursuance of a preconcerted scheme, it is within the power of the court to make the terms of the second sale cash (though the terms of the first had been credit), and to require the whole or part of the price to be paid down at the time of the bid.—Whilden v. Singerly, 3 Phila. 218.

[w] (S. C. 1832) The terms of a commissioner's sale of negroes were a credit of one, two, and three years, the purchaser giving a

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bond and mortgage, "the titles to be made, but not delivered until the payment of the first installment, and on nonpayment the commissioner shall resell for cash at the risk of the former purchaser." The purchaser, though taking possession, gave neither bond nor mortgage. Shortly after the sale he sold the negroes to plaintiff, with notice of the incumbrance, in whose possession they were afterwards seized and resold by the commissioner, under the terms of the order requiring a resale on nonpayment of the first installment. On trover brought by plaintiff against the commissioner, *held* that he could not recover, as the commissioner, by permitting the negroes to go into the possession of the purchaser, had not waived the right to resell on nonpayment of the first installment.—Singleton v. Heriott, 3 Rich. Law, 321.

[ww] (Tenn. 1872) On default of a purchaser at a judicial sale to pay the balance due, the chancellor may, on motion, and without notice, render decree against him, directing the land to be advertised and resold for cash, and without the right of redemption, if the balance due is not paid within 60 days from the rendition of the decree.—Munson v. Payne, 56 Tenn. (9 Heisk.) 672; Mosby v. Hunt, Id. 675.

[x] (Tenn. 1890) Where a purchaser at master's sale refuses to pay his bid, and the court thereupon refuses to release him and orders a resale at his risk and expense, he is not entitled to any benefit from the resale in case the property brings a larger price than before.—Chase v. Joiner, 88 Tenn. (4 Pickle) 761, 14 S. W. 331.

[xx] (Va. 1857) Where there has been a sale of land under a decree of a court of chancery, and the purchaser has complied with the terms of the sale, and there is no necessity for a speedy collection of the purchase money, and no proof of the insolvency of the purchaser or his sureties, the court will not order a resale.—Gross v. Pearcy, 2 Pat. & H. 483.

[y] (Va. 1859) A decree ordered land to be sold to be paid for by installments, the title to be retained by the commissioner as security until all was paid; upon nonpayment the purchaser was ruled to show cause why the land should not be sold for payment, and therefore a sale be decreed.—Clarkson v. Read, 15 Grat. 288.

[yy] (Va. 1877) Where a judicial sale of land is made upon a credit, and the title retained as a security, upon a rule against the purchaser to show cause why the land should not be resold for his failure to pay the purchase money, before making a decree for the sale, the court should ascertain how much of the purchase money is due, and should, in the decree, give him a day in which to pay it; and, if not paid in that time, the commissioner to sell.—Long v. Weller's Ex'r, 29 Grat. 347.

[z] (Va. 1885) The court may order a resale for a default in payment, without first exhausting collaterals deposited with the commissioner by the purchaser, especially when the collaterals cannot be made available without a suit.—Mosby v. Withers' Ex'rs, 80 Va. 82.

[zz] (Va. 1890) Under Code 1887, § 3397, providing that a court may order the sale of property upon such terms as it may deem best, an order of resale of land which shortens the terms of credit from one, two, and three years, allowed in the first sale, to six, twelve, and eighteen months, is neither harsh nor inequitable, where it appears that the judgment debtor bought in the land at the first sale, and has made default in payment of the purchase money, thus rendering a resale necessary.—Dickinson v. Clement, 87 Va. 41, 12 S. E. 105.

§ 51. —— Validity and effect of resale.

[a] (La. 1858) Where the refusal of a purchaser at a judicial sale to comply with the contract is recognized by a final judgment ordering the property to be resold at the risk of the purchaser, it is a complete divestiture of any right under the first adjudication, and this effect will be produced even if the purchaser be a mortgagee or privileged creditor of the succession.—Washburn v. Green, 13 La. Ann. 332.

[b] (S. C. 1888) On the failure of the purchaser at a judicial sale to comply with its terms, the court made an order requiring him to show cause. The purchaser failed to do so, but filed with the master his written consent that the lands should be resold at his risk, and during the pendency of the proceeding to compel the purchaser to comply with said terms, and without any new order of sale, the master resold the lands for an inadequate price. *Held*, that the master had no power to make the latter sale, and that it was invalid and must be set aside.—Paulk v. Paulk, 28 S. C. 481, 6 S. E. 330.

[c] (Tenn. 1878) A resale of land by a master to enforce a lien for the purchase money is not invalidated by any irregularities in the proceedings preliminary to the original sale.—Lucas v. Moore, 70 Tenn. (2 Lea) 1.

§ 52. —— Liability of purchaser for deficiency on resale and enforcement thereof.

Right of purchaser to be compensated for deficiency on account of defects in title, see post, § 100.

Waiver of claim for deficiency, see post, § 103 [a, b].

[a] Where a resale of property is ordered because of the purchaser's failure to comply with his bid, he will be charged with any deficiency which may arise.

—(Ga. 1885) Sproull v. Seay, 74 Ga. 676;
(Ky. 1896) Tyler v. Guthrie, 33 S. W. 934;
(N. C. 1879) In re Pettillo, 80 N. C. 50;
(Tenn. 1871) Fulton v. Davidson, 50 Tenn. (3 Heisk.) 614.

[b] In order to hold an adjudicatee, who refuses to comply with his bid, responsible for a deficiency, under a sale à la folle enchère, the property offered at the second offering must be identical in substance and in description, and the conditions must be the same and on the same terms as they were at the first offering.

—(La. 1882) Labauve v. McCabe, 34 La. Ann. 183;
(N. J. 1845) Shinn v. Roberts, 20 N. J. Law (Spencer) 435, 43 Am. Dec. 636;
(Pa. 1882) Weast v. Derrick, 100 Pa. 509.

[c] (U. S. 1889) It is not necessary that a judicial sale should have been confirmed in order to render a purchaser liable for a deficiency arising on a resale because of his failure to comply with his bid.—Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608.

[d] (U. S. 1889) At a sale under order of court for the benefit of creditors, the sale to be for "cash in hand," C.'s bid was accepted, but, instead of paying cash, he offered a contract between himself and certain of the creditors, whereby he was to buy the land, apply their claims in payment of the price, and hold the land as trustee. The sale was reported, and the court offered to confirm it, provided C. would pay the amount of his bid in cash. This he refused to do, relying upon his con-

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tract with the creditors, whereupon the court ordered a resale, and subsequently entered a decree against C. for the deficiency between his bid and the proceeds of the resale, and for the extra costs. *Held*, that a formal confirmation of the sale to C. was not necessary in order to fix his liability for the deficiency.—Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608, affirming Mayhew v. West Virginia Oil & Oil Land Co. (C. C. 1885) 24 Fed. 205.

[dd] (Ark. 1895) Relief under Mansf. Dig. §§ 3058, 3059, providing that, if any person refuses to pay the amount bid for any property struck off to him, the officer may resell the same and recover the loss by summary proceedings, is obtainable, if at all, in a court of law.—Harder v. Sayle-Stegall Commission Co., 61 Ark. 66, 31 S. W. 979.

[e] (Ga. 1875) A purchaser of property at judicial sale, who fails to comply with the terms of sale, and is sued for the "deficiency of the proceeds of a second sale," cannot set up as a reason for his noncompliance that the property (a city lot) was sold by the front foot, and that he made a mental mistake as to what his bid would amount to.—Alexander v. Herring, 54 Ga. 200.

[f] (Ga. 1885) The liability of a debtor who fails to comply with his bid for a deficiency on resale is not affected by the fact that there was an intermediate sale which was ineffective.—Sproull v. Seay, 74 Ga. 676.

[g] (Ga. 1885) A bidder who fails to comply with his bid is not relieved from liability for a deficiency arising on resale because of a delay in making the resale, where such delay was caused by his request or agreement.—Sproull v. Seay, 74 Ga. 676.

[h] (Ga. 1885) In an action against a debtor for a deficiency arising on resale of the property because of his failure to comply with his bid, it is not necessary to make one who was a bidder at an intermediate sale, which was ineffective, a party.—Sproull v. Seay, 74 Ga. 676.

[i] (Ga. 1893) To render the successful bidder on land at a sale liable for the difference between his bid and what the land brought at a subsequent sale, made necessary by his refusal to comply with his bid, he must have had notice, before the second sale, of the owner's election to resell.—Green v. Ansley, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110.

[j] (Ky. 1866) One who has purchased land at a commissioner's sale, and afterwards refused to take it, and induced the court to declare the sale void under the statute of frauds, is estopped from setting up the validity of that sale in answer to a judgment for the difference between his bid and the price brought by the land upon a resale.—Watson's Adm'r v. Violett, 63 Ky. (2 Duv.) 332.

[k] (Ky. 1896) In an action against a purchaser of land at a decretal sale for the difference between his bid and the price received on a resale, the purchaser cannot claim that the sale was invalid because there was no appraisement, as such objection, if available, should have been made on exceptions to the sale.—Tyler v. Guthrie, 33 S. W. 934.

[l] (Md. 1825) Where a person allowed himself to be reported by the trustee appointed to make a sale under a decree as the highest bidder, but without any design to delay or baffle the proceedings, and afterwards declared his inability to comply with the terms of the sale, he was discharged, on payment of costs, from his liability in case of a loss by a resale.—Deaver v. Reynolds, 1 Bland, 50.

[m] (Miss. 1890) Where one who bids in land at a public judicial sale refuses to comply with his bid, on which the officer appointed by the court to make the sale, without reporting the sale to the court for confirmation, resells, at public vendue, for a less price than that bid at the first sale, and the second sale is confirmed by the court on a report showing all the facts, the purchaser at the first sale is not liable for the difference in price, as the first sale was not completed until confirmation, and the purchaser was not in default.—Campe v. Saucier, 68 Miss. 278, 8 South. 846, 24 Am. St. Rep. 273.

[n] (N. J. 1845) Where commissioners have sold land under a decree of the orphans' court, and owing to the failure of the purchaser to comply with his contract the property has been resold, the proceedings in the orphans' court and the report of the commissioners are not competent evidence of the number of acres sold, in an action against the purchaser to enforce his liability for a deficiency on resale.—Shinn v. Roberts, 20 N. J. Law (Spencer) 435, 43 Am. Dec. 636.

[o] (Pa. 1856) Where, in a suit against a purchaser at judicial sale for loss on resale of the property, the difference in price and the legal costs of the second sale is under $100, the district court has no jurisdiction.—Lelar v. Gault, 2 Phila. 78.

[p] (Pa. 1858) Where a judicial sale falls through because of the default of the buyer, and there is ground for believing that the purchase was made without any intention to pay for it, in pursuance of a preconcerted scheme, the fact that the court in ordering a resale changed the terms from credit to cash, and required a part of the price to be paid down, does not release the first purchaser from liability for the deficiency on such resale.—Whilden v. Singerly, 3 Phila. 218.

[q] (Pa. 1873) Where a purchaser at judicial sale pays a part of the price and then abandons the sale, the measure of damages for his failure to comply with his bid is the difference between his bid and the bid obtained at the sale.—Appeal of Tindle, 77 Pa. (27 P. F. Smith) 201.

[r] (S. C. 1787) Where the purchaser at a master's sale under a decree refused to comply with the terms of sale, he was ordered to show cause why the property should not be resold; holding such purchaser answerable for the deficiency.—Haig v. Commissioners of Confiscated Estates, 1 Desaus. 144.

[s] (Va. 1887) The liability of the surety on a bond for the price of land sold under a decree of court cannot be enforced, on default of payment, by a rule to show cause why decree should not be entered for the difference between such price and the amount it brought under a subsequent sale; and a decree so entered is void.—Anthony v. Kasey, 83 Va. 338, 5 S. E. 176, 5 Am. St. Rep. 277.

[t] (W. Va. 1895) A purchaser at judicial sale, to be held liable for the difference between his bid and the amount for which the property was sold to another on his refusal to purchase, must be served with a rule, awarded after the sale is reported, to show cause why he should not complete his purchase, or, in default, the property be sold at his expense and risk.—Stout v. Philippi Mfg. & Mercantile Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

§ 53. —— Injunction against resale.

[a] (Ala. 1876) Where lands are sold by the register in chancery, the purchaser's remedy to prevent a resale is by petition for a confirmation of the original sale, and not by an original bill to enjoin.—Haralson v. George's Ex'r, 56 Ala. 295.

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[b] (La. 1872) Where a purchaser of real estate at a judicial sale has failed to pay the price bid by him, he cannot maintain an injunction to restrain another sale of the property, on the ground that he is the owner.—Losee v. Santon, 24 La. Ann. 370.

[c] (La. 1894) One who has failed to comply with his bid at judicial sale, which has been declared forfeited by a judgment of court not suspensively appealed from, is without interest to enjoin the subsequent sale made necessary by such failure.—Boyer v. Cannon, 46 La. Ann. 767, 15 South. 86.

§ 54. Liabilities of bidders and their sureties.

Liabilities of purchasers and their sureties in general, see post, § 111.

—— *on assignment of bid, see* ante, § 45.

Nonperformance by purchaser, liabilities, see "Action on the Case," vol. 1, cc. 1530, 1531, § 36 [m].

[a] One at whose instance land is sold at judicial sale to a company for which he acts throughout as an agent incurs no personal liability as purchaser.

—(Va. 1885) Frazier v. Hendren, 80 Va. 265.

CONTRA, see

(Wis. 1860) Atkinson v. Richardson, 14 Wis. 157.

[b] (U. S. 1838) A purchaser on a sale under a decretal order in equity will not be let off from his purchase by submission to a forfeiture of his deposit.—Wood v. Mann, Fed. Cas. No. 17,954 [3 Sumn. 318].

[c] (Ky. 1873) A purchaser at a judicial sale is not excused from compliance with his purchase by the fact that between the date of sale and its confirmation the property was partially destroyed by fire.—Vance's Adm'r v. Foster, 72 Ky. (9 Bush) 389.

[d] (La.) The surety of a purchaser at a judicial sale is not bound in solido with the principal.—(1847) Dees v. Tildon, 2 La. Ann. 412; (1854) Tildon v. Dees, 9 La. Ann. 250.

[e] (N. Y.) A purchaser at a master's sale will not be compelled to complete the purchase in case it would not be perfectly just and conscientious in an individual to insist upon specific performance, if the sale had been made by him.—(1832) Veeder v. Fonda, 3 Paige, 94; (1833) Laight v. Pell, 1 Edw. Ch. 577.

[f] (N. Y. 1845) An announcement by the master, after the property has been struck off at a sale made by him, that if the purchaser does not comply with the terms of the sale it will be resold at his expense, does not discharge the purchaser from his bid.—National Fire Ins. Co. v. Loomis, 11 Paige, 431.

[g] (S. C. 1881) One who buys property at a judicial sale is liable for interest on the unpaid portion of the amount that was required by the order of sale to be paid in cash.—Childs v. Frazee, 16 S. C. 612.

§ 55. Summary proceedings to compel payment.

Enforcement of liability for deficiency on resale, see ante, § 52.

[a] A purchaser under a decree submits himself to the jurisdiction of the court as to all matters connected with the purchase so that he may be proceeded against by motion in the cause, without the institution of original proceedings.

—(Md. 1830) Andrews v. Scotton, 2 Bland, 629;

(N. J. 1875) Silver v. Campbell, 25 N. J. Eq. (10 C. E. Green) 465;

(S. C. 1827) Gordon v. Saunders, 2 McCord, Eq. 151;

(Tenn. 1852) Blackmore v. Barker, 32 Tenn. (2 Swan) 340; (1866) Dibrell v. Williams, 43 Tenn. (3 Cold.) 528;

(Va. 1859) Clarkson v. Read, 15 Grat. 288.

[b] Where a purchaser at judicial sale refuses without cause to make his bid good, he may be compelled to do so by an attachment issuing from the court under whose decree the sale was had.

—(U. S. 1889) Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608;

(N. Y. 1817) Brasher v. Cortlandt, 2 Johns. Ch. 505;

(S. C. 1784) Haig v. Commissioners of Confiscated Estates, 1 Desaus. 112.

[c] (U. S. 1838) In the case of a covenant with surety to pay the purchase money given by the purchaser on a sale under a decretal order, a court of equity will by attachment compel performance as against both principal and surety.—Wood v. Mann, Fed. Cas. No. 17,954 [3 Sumn. 318].

[d] (Ala. 1875) The chancery court has no jurisdiction to render a decree against one not a party to the suit, and connected with it merely as prochein ami, for the amount bid by the complainants for lands sold under order of the court and reported as paid by the register, who, under agreement of parties, had accepted the draft of the prochein ami in satisfaction of the bid. Execution issued on such a decree is void.—Moore v. Randolph, 52 Ala. 530.

[e, f] (Ky. 1882) A purchaser at a decretal sale failing to sue out injunction, or to deposit the amount of his sale bond in court, had no right to retain the money until another suit was decided, and was therefore properly ruled to pay the same into court.—Greer v. M. M. Sav. Bank Ass'n of Newport, 3 Ky. Law Rep. 539.

[g] (Md. 1828) Land was sold under a decree, and the sale ratified after opposition by the purchaser, but neither notes nor bonds for the purchase money were received by the trustee, and the period for payment having expired, the chancellor ordered the purchaser to pay to the trustee, or to bring into court, the purchase money, and interest, before a given day, or to show good cause to the contrary. The purchaser having failed to comply, the chancellor ordered an attachment against him to enforce obedience to his first order. *Held*, on appeal, that under the circumstances of the case, this power was properly exercised.—Anderson v. Foulke, 2 Har. & G. 346.

[h] (Md. 1831) Where a sale has been made under a decree in chancery and no bond or security is given for the purchase money, the purchaser may, after confirmation, be compelled to complete his purchase by an order on him, in a summary way, to pay the money into court, since the order of confirmation amounts to a decree for the payment of the purchase money, and like other decrees may be summarily enforced in equity.—Richardson v. Jones, 3 Gill & J. 163, 22 Am. Dec. 293.

[i] (Md. 1831) Where a sale has been made under a decree in chancery and a bond given for the purchase price, the liability of the purchaser cannot be enforced by summary judgment against him, since there is a full and perfect remedy at law on the bond.—Richardson v. Jones, 3 Gill & J. 163, 22 Am. Dec. 293.

[j] (Miss. 1845) Since a bill of sale is not necessary to convey title to the purchaser of personal property at a judicial sale, the fact that a bill of sale in such case is defective is

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not cause for enjoining execution on the sale bond.—Conger v. Robinson, 12 Miss. (4 Smedes & M.) 210.

[k] (N. C. 1867) A court ordering a judicial sale has power to make a decree for the money, after 10 days' notice thereof.—Ex parte Cotten, 62 N. C. 79.

[l] (N. C. 1876) Under Rev. Code, c. 31, § 129, a summary judgment may be rendered against the purchaser of land at a judicial sale, and his sureties only upon the order of the court.—Mauney v. Pemberton, 75 N. C. 219.

[m] (N. C. 1878) The only remedy for the collection of notes for the purchase money of land sold under a decree of the probate court, the notes being secured by mortgage on the land, is by motion in such court, and not by an independent action on the notes.—Hoff v. Crafton, 79 N. C. 592.

[n] (Tenn. 1849) The jurisdiction of the court to summarily enforce payment of the purchase money paid at a judicial sale continues until there has been a final disposition of the original cause.—Vanbibber v. Sawyers, 29 Tenn. (10 Humph.) 81, 51 Am. Dec. 694.

[o] (Tenn. 1849) Where property is sold on credit under a decree, the purchaser becomes a party to the suit, and the court may enforce payment of the purchase money.—Vanbibber v. Sawyers, 29 Tenn. (10 Humph.) 81, 51 Am. Dec. 694.

[p] (Tenn. 1858) Where a purchaser at judicial sale executes a note for the price, he can appeal from a judgment rendered against him, on the maturity of the note.—Eagan v. Phister, 37 Tenn. (5 Sneed) 298.

[q] (Tenn. 1865) A. bought land at a sale made by a decree of the circuit court, and gave B. and C. as sureties on the note for the purchase money. A. died before the notes were paid. *Held*, that the clerk or commissioner could, by motion, obtain judgment against B. and C. without notice, as by becoming sureties they became subject to all orders of court, and were in court.—Whiteside v. Latham, 42 Tenn. (2 Cold.) 91.

[r] (Tenn. 1866) Though a scire facias is the more regular proceeding against a personal representative of the purchaser at judicial sale to compel payment of the purchase money, a notice which informs the party of the nature of his liability, and the time and place at which, and manner in which, the plaintiff seeks to enforce it, is sufficient.—Dibrell v. Williams, 43 Tenn. (3 Cold.) 528.

[s] (Tenn. 1866) Though a purchaser at a master's sale is not a party to a cause in such a way as to make it necessary on his death to revive against his personal representatives, a motion for judgment on the purchase money note cannot be prosecuted against his personal representatives without notice or scire facias.—Dibrell v. Williams, 43 Tenn. (3 Cold.) 528.

[t] (Tenn. 1866) A purchaser at a master's sale is not a party to the cause so as to make it necessary at his death to revive against his personal representatives, but a judgment for the purchase money may be had by motion.—Dibrell v. Williams, 43 Tenn. (3 Cold.) 528.

[u] (Tenn. 1866) The death of the purchaser at a judicial sale, or of one of the parties to the note given for the purchase money, does not defeat the power of the court to summarily enforce payment of the purchase money.—Dibrell v. Williams, 43 Tenn. (3 Cold.) 528.

[v] (Utah, 1889) A purchaser at a sale under a decree of court becomes a quasi party to the suit, and the sale need not be confirmed before proceeding against him to compel him to make good his bid.—Kershaw v. Dyer, 21 Pac. 1000.

[w] (Va. 1857) A purchaser of land at a sale ordered by the court of chancery may be compelled to comply with the terms of sale and complete his purchase by paying cash, if it be a cash sale, or giving bond and security, if it be on time, either by process of contempt, or by a rule to show cause why the land should not be resold.—Gross v. Pearcy, 2 Pat. & H. 483.

[x] (Va. 1882) The purchaser of land at a judicial sale may be proceeded against by rule to compel the payment of an unpaid installment of the purchase money; and it makes no difference that, by fraud or mistake, he has obtained a deed of the land.—Williams v. Blakey, 76 Va. 254.

§ 56. Actions on bids.

Enforcement of liability for deficiency on resale, see ante, § 52.

[a] (Ky. 1886) The purchaser at a judicial sale buys at his peril, and, after confirmation of sale, cannot set up want of title as a defense for nonpayment of the purchase money.—Humphrey's Ex'r v. Wade, 84 Ky. 391, 1 S. W. 648.

[b] (La. 1869) A party having purchased property at probate sale during the war cannot set up in defense to the payment of his obligations that the sale was made on the basis of the value of Confederate notes at the time of the sale, and obtain a reduction of the price to that extent.—Bordelon v. Coco, 21 La. Ann. 671.

[c] (Neb. 1879) Where a purchaser at a judicial sale refuses to comply with his bid, the officer may bring an action for the purchase money.—Jones v. Null, 9 Neb. 254, 2 N. W. 350.

[d] (N. J. 1845) Commissioners who have sold lands under a decree of the orphans' court may bring an action in their own names against a purchaser who has failed to comply with the conditions of sale.—Shinn v. Roberts, 20 N. J. Law (Spencer) 435, 43 Am. Dec. 636.

[e] (Ohio, 1877) In an action to recover the price bid by a purchaser at a master's sale, the buyer cannot set up fraud practiced by co-lien holders by which he was induced to bid more than the property was worth, where the sale has been confirmed, and no effort was made to have it set aside or its confirmation refused.—White v. Raymond, 4 Ohio Dec. 79, 1 Cleve. Law Rep. 6.

[f] (S. C. 1894) A purchaser of property at judicial sale, not made under compulsory process, can set up eviction by paramount title as a defense to an action for the purchase money.—Latimer v. Wharton, 41 S. C. 508, 19 S. E. 855, 44 Am. St. Rep. 739.

[g] (W. Va. 1887) Where a commissioner who made sale of land under decree brings suit, and avers in his bill that the sale had been confirmed, and that he had been appointed commissioner to collect the sale bonds, and exhibits with his bill a decree, which, though not in express terms, authorizes him to collect the sale bonds, the bill and decree will be treated as sufficient to sustain the suit.—Blair v. Core, 29 W. Va. 477, 2 S. E. 826.

VIII. REPORT OR RETURN.

IN GENERAL, § 57.
ERRORS IN REPORT, AND AMENDMENT OR CORRECTION THEREOF, § 58.

§ 57. In general.

[a] (Ky. 1867) The report of a commissioner authorized to make a sale that the sale was

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made at the court house on a county court day, after sufficient notice, cures a defect in the judgment in not prescribing the time and place of sale, if such omission can be deemed an error.—Doughty v. Moss, 64 Ky. (1 Bush) 161.

[b] (Ky. 1889) A commissioner's report, which does not show for what price the land sold, or that he offered to sell less than the whole tract to pay the debts for which it was liable, will be set aside.—Haney v. McClure, 88 Ky. 146, 10 S. W. 427.

[c] (Ky. 1893) Though Civ. Code, § 696, provides that every "notice" of sale made under an order of court must state for what sum of money the sale is to be made, the "report" of the sale need not contain such statement. —Vissman v. Bryant, 21 S. W. 759.

[d] (La. 1821) The procès verbal of a sale by the parish judge is valid, though in French, as the sale might have been made by any other auctioneer, as which, merely, the parish judge, in such case, is to be regarded.—Melancon's Heirs v. Duhamel, 10 Mart. (O. S.) 225.

[e] (La. 1850) A recital in a procès verbal that the land sold belonged to a succession, referring directly to the adjudication, forms against all parties to it a presumption juris et de jure.—Blanchard v. Allain, 5 La. Ann. 367, 52 Am. Dec. 594.

[f] (La. 1854) A purchaser cannot be compelled to complete a sale in conformity to a procès verbal, which differs from the advertisement and order of sale.—Burke v. His Creditors, 9 La. Ann. 1.

[g] (Me. 1880) When the sale of an equity of redemption is postponed, it should appear in the officer's return that he deems it for the interest of all concerned to postpone the sale, and that he has given notice of the time of such adjournment by public proclamation, as required by Rev. St. c. 76, § 34.—Wilson v. Bucknam, 71 Me. 545.

[h] (Md. 1825) The report of a sale by the trustee appointed to sell property being ratified by the court is conclusive of the terms of sale, in the absence of fraud or mistake.—Brown v. Wallace, 2 Bland, 585.

[i] (Md. 1848) The report of a sale by the trustee is not absolutely necessary to perfect the title of the purchaser.—Harrison v. Harrison, 1 Md. Ch. 331.

[j] (N. Y. 1895) Where a purchaser at a judgment sale is, on motion of his counsel, permitted by an order of the court to pay off taxes on the land and take assignments of the tax leases, the referee's report stating that money for such purpose had been paid to the purchaser, and containing the voucher showing the payment of the taxes, is, in the absence of all contradiction, evidence that the money was paid by such purchaser, as provided in the order.—Oliphant v. Burns, 146 N. Y. 218, 40 N. E. 980.

[k] (Va. 1877) The decree in an action at equity directed the commissioner to sell the land mentioned in the bill, or such a part thereof as might be necessary to satisfy the purposes of the decree. The commissioners reported the sale of a tract which was described in the bill and lying partly in two different counties, but did not show whether the whole of such tract, or only a part lying in one of the counties, was sold. *Held*, that the sale should be set aside for uncertainty in the report.—Barger v. Buckland, 28 Grat. 850.

[l] (Va. 1877) A commissioner appointed by the court to make a sale of property must make a report of his proceedings, under the decree by which he is appointed, to the court from which he derives his authority, as a basis for the further action of the court.—Crockett v. Sexton, 29 Grat. 46.

[m] (Va. 1893) Where it appears that both commissioners made the second sale, after failure of the bidder at the first sale to comply with its terms, the validity of the second sale cannot be affected by the fact that one of the commissioners declines to join in the report thereof, and himself makes a report asking that the sale to the bidder at the first sale be confirmed, and also for a rule against such bidder to show cause why it should not be done.—Hildreth v. Turner, 89 Va. 858, 17 S. E. 471.

§ 58. Errors in report, and amendment or correction thereof.

[a] (Ohio, 1880) The title of a purchaser at a judicial sale, as a general rule, cannot be impeached, in equity, for errors or irregularities in the proceedings; but where a tract of land not in fact sold, and for which no consideration was paid, or intended to be paid, is, by mistake, included in the report of sales, such mistake may be corrected, in equity, as against the purchaser or his heirs, even after confirmation and deed in pursuance thereof. Such mistake may be proved by parol.—Stites v. Wiedner, 35 Ohio St. 555.

[b] (Va. 1877) Where the report of a commissioner appointed to make the sale of property is incomplete, insufficient, or in any way imperfect, he may be required to make a further report, and if, after he has made such report, and it has been received and accepted, at any time before final action on it, he discovers any material mistake, omission, or ambiguity, he may by leave of the court (and it will be his duty to) file an amended, conditional, or supplemental report, correcting the mistake, supplying the omission, or explaining the ambiguity.—Crockett v. Sexton, 29 Grat. 46.

IX. CONFIRMATION.

IN GENERAL, § 59.
AUTHORITY TO CONFIRM, § 60.
PROCEEDINGS FOR CONFIRMATION, § 61.
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Necessity of confirmation in order to fix bidder's liability for deficiency on resale, see ante, § 52 [d].

§ 59. In general.

[a] A judicial sale of land must be confirmed by the court decreeing the sale to devest the title out of the former owner and render valid the commissioner's deed to the purchaser.
—(U. S. 1885) Mayhew v. West Virginia Oil & Oil Land Co. (C. C.) 24 Fed. 205;
(Ala. 1846) Branch Bank of State v. Hunt, 8 Ala. 876; (1875) Bland v. Bowie, 53 Ala. 152;
(Ky. 1842) Busey v. Hardin, 41 Ky. (2 B. Mon.) 407; (1861) Taylor v. Gilpin, 60 Ky. (3 Metc.) 544; (1866) Egard v. Chearnly, 64 Ky. (1 Bush) 12;
(Md. 1828) Anderson v. Foulke, 2 Har. & G. 346; (1847) Wagner v. Cohen, 6 Gill, 97, 46 Am. Dec. 660;
(Miss. 1842) Tooley v. Kane, 1 Smedes & M. Ch. 518;
(N. C. 1881) Foushee v. Durham, 84 N. C. 56;

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(Tenn. 1852) Childress v. Hurt, 32 Tenn. (2 Swan) 487; (1859) Ex parte Moore. 40 Tenn. (3 Head) 171; (1872) Atkison v. Murfree, 1 Tenn. Ch. 51; (1872) Rogers v. Breen, 56 Tenn. (9 Heisk.) 679; (1873) Jones v. Hollingsworth, 57 Tenn. (10 Heisk.) 653;

(W. Va. 1876) Kable v. Mitchell, 9 W. Va. 492.

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(Cal. 1888) Kimple v. Conway, 75 Cal. 413, 17 Pac. 546.

[b] A court of chancery will not compel a purchaser of real estate under a decree to complete his purchase, until a report of the sale has been made and confirmed.

—(Ind. 1845) Laverty v. Chamberlain, 7 Blackf. 556;

(W. Va. 1881) Beard v. Arbuckle, 19 W. Va. 135.

[c] (U. S. 1892) On the filing of a master's report of a sale it is proper to enter an order that, unless cause to the contrary is shown within eight days, the sale will be confirmed.—Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; Marcus v. Same, Id.

[d] (Ark. 1892) A decree awarded to the plaintiff a specific sum of money, declared the amount a lien on certain land, and directed that the land be sold in satisfaction thereof. A sale was made by a commissioner, in accordance with the decree, but the sale was never confirmed. *Held*, that the land might be sold under a general execution issued on such decree.—Stotts v. Brookfield, 55 Ark. 307, 18 S. W. 179.

[e] (Ky. 1853) If a chancellor authorizes land to be sold at private sale, the deed of the commissioner is not valid until approved by the court.—Dickerson's Heirs v. Talbot's Ex'rs, 53 Ky. (14 B. Mon.) 60.

[f] (Ky. 1861) The confirmation of a judicial sale depends on the sound equitable discretion of the court.—Taylor v. Gilpin, 60 Ky. (3 Metc.) 544.

[ff] (Md.) Where a trustee has once offered the property for sale in the mode prescribed by the decree, and, having been unable to sell it, disposes of it in a different mode, it is within the discretion of the court to affirm or disaffirm such sale.—(1828) Anderson v. Foulke, 2 Har. & G. 346; (1851) Glenn v. Wootten, 3 Md. Ch. 514.

[g] (Md. 1830) A trustee, in the year 1795, under a decree of the court of chancery, sold certain real estate, and returned a report of the sale and proceedings, upon which the chancellor passed the usual order of confirmation, nisi. In 1803 the trustee executed a deed to the purchaser, which recited the sale, its ratification, and the payment of the purchase money. It did not appear, from the proceedings in chancery, that the sale had been finally ratified. The deed of the trustee being relied upon as evidence of title, in 1826, it was *held* that the jury might, and ought to, presume that the return of the sale as reported by the trustee had been finally ratified and confirmed.—Shilknecht v. Eastburn's Heirs, 2 Gill & J. 114.

[h] (Md. 1863) Before the ratification of a sale made by authority of a court of equity, it must appear to be in all respects fair and proper, or it cannot receive the sanction of the court.—Bolgiano v. Cooke, 19 Md. 375.

[i] (Miss. 1848) Great lapse of time may be equivalent to confirmation of a judicial sale.—Gowan v. Jones, 18 Miss. (10 Smedes & M.) 164.

[j] (Miss. 1852) Although a sale made by a commissioner under a decree of court has not been confirmed by the court, yet the parties to the sale may act so as to give it validity without confirmation.—Henderson v. Herrod, 23 Miss. (1 Cushm.) 434.

[k] (N. Y. 1838) Where an order of sale authorized the trustee to sell, or to mortgage, or to convey the premises in satisfaction of any debt owing by him, requiring that every sale, and mortgage, and conveyance in satisfaction should be approved by a master, and a sale for cash took place, and a deed was executed without the approval of the master obtained, it was *held* that the approval of the master was necessary only in the third alternative, and that a deed executed on a sale for cash was valid without such approval.—Cochran v. Van Surlay, 20 Wend. 365, 32 Am. Dec. 570.

[l] (Ohio, 1860) The court may confirm or set aside a judicial sale, but cannot modify its terms or the price bid, and then affirm it.—Ohio Life Ins. & Trust Co. v. Goodin, 10 Ohio St. 557.

[m] (Tenn. 1867) A sale of real estate under order of a court of chancery is not complete until the confirmation of the master's report, and the purchaser at such sale derives no benefit from his bid until such confirmation. The same rule applies where it is sought to compel a purchaser to complete his purchase, or where the latter seeks to enforce the contract.—Eakin v. Herbert, 44 Tenn. (4 Cold.) 116.

[n] (Va. 1889) After the commissioner's report ascertaining liens had been confirmed without exception, and a sale ordered to satisfy the same, a further account of outstanding liens was directed. The report of the sale, afterwards made, showed that the land sold for an unusually high price, and was confirmed without objection from any creditor, but no distribution was ordered. The amount of liens reported greatly exceeded the price for which the land sold. *Held*, that the sale was properly confirmed without a further account of liens.—Utterback v. Mehlinger, 86 Va. 62, 9 S. E. 479.

[o] (W. Va. 1876) The re-entry of an order of confirmation, after the granting of plaintiff's motion, made without notice, to set aside the order as first entered, and allow the commissioner's report to be amended as to the name of the security in the bond of the purchaser at a judicial sale, is void as to the rights of the parties.—McKinney v. Kirk, 9 W. Va. 26.

[p] (W. Va. 1882) A judicial sale will be affirmed or not, upon a due consideration of all the circumstances of the case.—Hughes v. Hamilton, 19 W. Va. 366.

[q] (W. Va. 1883) That a release from persons interested in land to a commissioner who has purchased such land at his own sale may operate as a confirmation of the purchase, it must be shown that such release was obtained without fraud, and given with the full knowledge of all the facts rendering the sale voidable.—Winans v. Winans, 22 W. Va. 678.

§ 60. Authority to confirm.

[a] (Ark. 1887) An order confirming a commissioner's sale of land, made by a person acting, by agreement of parties, as special judge, is utterly void.—Trotter v. Neal, 50 Ark. 340, 7 S. W. 384.

[b] (Ky. 1887) Before the creation of the Louisville law and equity court, the vice chancellor having had jurisdiction of such matters as the chancellor of the Louisville chancery court submitted to him, an order of the chancellor, confirming a sale decreed by the vice

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chancellor, is not void as coram non judice.—Dunn v. German Sec. Bank, 3 S. W. 425.

[c] (Pa. 1894) A sale by the sheriff on process issued out of the orphans' court cannot be confirmed in the common pleas, or in any other court but the orphans' court which awarded the writ.—In re Oviatt's Estate (Orph. Ct.) 3 Pa. Dist. R. 620.

§ 61. Proceedings for confirmation.

Payment of bid as condition precedent to right to demand confirmation, see ante, § 47 [c].

[a] (Ala. 1846) Confirmation of a judicial sale can be regularly made only after notice to the parties adversely interested.—Branch Bank of State v. Hunt, 8 Ala. 876.

[b] (D. C. 1888) All parties interested in property sold by a trustee appointed by a court of equity are entitled to a hearing before the sale is confirmed.—Edwards v. Maupin, 7 Mackey, 39.

[c] (La. 1838) The monition law of 1834, giving purchasers at judicial sales the right to apply for confirmation thereof, is a remedial statute, intended to prevent the mass of litigation growing out of invalid judicial sales, and hence applies as well to sales made before as since its passage.—State v. Bermudez, 12 La. 352.

[d] (La. 1838) In proceedings for the confirmation of a judicial sale, a petitory action cannot be interposed as a reconventional demand.—Pannell's Heirs v. Overton, 12 La. 555.

[e] (La. 1843) Where, on application by the purchaser at a sheriff's sale for confirmation of his title, it was alleged by the opposing party that the advertisements required by law were not made, the burden of proof was on the petitioner.—Ex parte Murray, 6 Rob. 74.

[f] (La. 1845) The benefit of Act March 10, 1834, enabling purchasers at judicial sales to protect themselves from the results of informalities by moving for a confirmation of the sale, was extended to their vendees by Act March 11, 1837.—Beale v. Walden, 11 Rob. 67.

[g] (La. 1848) Where one applies for a monition, he must bring himself within the act of 1834, and show that proper notice was given to all parties by publication.—In re Johnson, 3 La. Ann. 656.

[h] (La. 1854) Where a party publishes a monition, under the act of 1834, for the assurance of titles acquired at judicial sale, and an opposition is filed to the homologation of the sale, plaintiff in monition cannot discontinue or dismiss the suit.—McDonough v. Copeland, 9 La. 308.

[i] (N. Y. 1849) A court of chancery, when applied to to confirm a sale of real estate made by order of a surrogate who had jurisdiction of the matter, must confine itself, under 2 Rev. St. p. 111, § 65, to the investigation of the fairness and good faith of the sale, and it cannot inquire into the regularity of the proceedings anterior to it.—Bostwick v. Atkins, 3 N. Y. (3 Comst.) 53.

[j] (N. Y. 1849) Where an application is made to confirm a judicial sale of real estate, and a decree is made favorable to the applicant, it should confirm the sale only in respect to the defect or irregularity, to cure which the proceeding is had, and the parties interested adversely to the sale should not be precluded by the decree from contesting it on other grounds. —Bostwick v. Atkins, 3 N. Y. (3 Comst.) 53.

[k] (Va. 1893) Where a bidder fails to comply with the terms of sale, and is a nonresident, the court has no jurisdiction to compel her to show cause why the sale should not be confirmed to her.—Hildreth v. Turner, 89 Va. 858, 17 S. E. 471.

[l] (W. Va. 1873) A sale of slaves having been made by a commissioner of the court, but no report of said sale made and returned to the court until after a period of between four and five years thereafter, during which period the papers in the cause are absent from the clerk's office, precluding the purchasers from knowing what was done, or what it was proposed to do in the cause, and the order directing the sale not authorizing the delivery of the slaves to the purchasers,—it was error to make an order confirming said sale, without notice to the purchasers.—Boner v. Boner, 6 W. Va. 377.

§ 62. Postponement of confirmation.

[a] (Va. 1896) The denial of a petition to suspend proceedings, and postpone confirmation of a sale of land, until certain matters in controversy set up in the petition are adjudicated in other pending suits, should be without prejudice.—Houghton v. Mountain Lake Land Co., 93 Va. 149, 24 S. E. 920.

[b] (Va. 1896) Where a petition is sought to be filed, asking that proceedings be suspended, and the confirmation of the sale of land be postponed, until certain matters of controversy set up by the petition are adjudicated in other pending suits, the proper practice is to permit the petition to be filed, and then, after rule against the other party, and the taking of evidence, to hear the petition on its merits.—Houghton v. Mountain Lake Land Co., 93 Va. 149, 24 S. E. 920.

§ 63. Objections to confirmation, and hearing thereof.

Effect of confirmation as curing objections, see post, § 66.

[a] (U. S. 1892) Where, on the filing of a master's report of a sale, an order was entered on February 7th that, unless cause to the contrary was shown within eight days, the sale would be confirmed, and exceptions were filed on February 13th, and heard after due notice on March 2d, at which time the sale was confirmed, no objection could be made on the ground of undue haste.—Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732.

[b] (U. S. 1892) General equity rule 83, allowing one month for filing exceptions to a master's report, applies only to matters heard and determined by the master, and not to a report of a sale under direction of the court.—Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; Marcus v. Same, Id.

[c] (Ala. 1886) Where a party to an action resulting in a judicial sale of property complained of fraud perpetrated at the sale whereby a less price was realized than might have been obtained, he may have relief by entering objections to the confirmation of the sale on that ground.—Phillips v. Benson, 82 Ala. 500, 2 South. 93.

[d] (Ala. 1888) Though affidavits stating that the interest of a decedent in land sold is only one-half are not the best evidence of the extent of his title, when received upon exceptions to a report of sale without objection, they will be considered.—Glennon v. Mittenight, 86 Ala. 455, 5 South. 772.

[e] (Ill. 1890) It is not reversible error to refuse to allow the introduction of oral testimony on the hearing of objections to the confirmation of a master's sale, where it is not shown that a fair presentation of the matter cannot be made in the usual way by affidavits,

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or that the proposed testimony is material.—Barling v. Peters, 134 Ill. 606, 25 N. E. 765.

[f] (Ky. 1889) A purchaser of land at judicial sale should not be allowed an attorney's fee as part of his costs, upon the overruling of exceptions to the report of sale, as after the filing of exceptions he occupies the same position respecting costs as any party litigant.—Van Meter v. Van Meter's Assignee, 88 Ky. 448, 11 S. W. 80, 289.

[g] (La. 1838) If the opponents to a monition set up title in the nature of a petitory action, and the other party chooses to join issue on the merits, the court will proceed to try the case on the titles as in a petitory action.—Pannell's Heirs v. Overton, 12 La. 555.

[h] (La. 1843) An opposition to the confirmation of a judicial sale, on the ground that it had not been regularly advertised, cannot be dismissed without proof that it had been properly advertised.—Fortier v. Zimpel, 5 Rob. 189.

[i] (La.) Where a debtor or other person interested opposes the homologation of a sale, the burden of proving a compliance with the formalities required by law is on the party who applies for its homologation.—(1843) Ex parte Murray, 6 Rob. 74; (1844) Lamorandier v. Meyer, 8 Rob. 152.

[j] (La. 1883) One opposing, in a monition proceeding, a confirmation of sale, need not make an antecedent tender.—In re Fazende, 35 La. Ann. 1145.

[k] (Md. 1847) Where a defendant whose title is decreed to be sold knows of any fact which would disperse a cloud on the title decreed to be sold, and omits to communicate it to the trustee in due time, it does not become him, when a sale has been made, to interpose it as an objection to the ratification of the sale against purchasers.—Cunningham v. Schley, 6 Gill, 207.

[l] (Md. 1863) The objection to the ratification of a sale of real estate under decree of court, of a want of due notice, like all others of fact, must be supported by preponderating evidence sufficient to set aside the report of the trustee; for this is made under the sanction of an oath, and is entitled to full faith and credit, unless contradicted by conclusive testimony.—Bolgiano v. Cooke, 19 Md. 375.

[m] (Md. 1876) Persons who are not parties to a judicial sale will not be heard to object to its ratification.—Griffith v. Hammond, 45 Md. 85.

[n] (Md. 1879) A purchaser at a judicial sale may avail himself as an objection to the ratification of the sale that the bill did not authorize the sale.—Fox v. Reynolds, 50 Md. 564.

[o] (Tenn. 1872) The burden is upon the party making exception to show the irregularity of a clerk and master's report of sale.—Childress v. Harrison, 60 Tenn. (1 Baxt.) 410.

[p] (Va. 1876) Where there is reason to believe that fraud or mistake has been committed in a sale by commissioners under a decree of court, to the detriment of the owner or purchaser, or that the officer conducting the sale has been guilty of any wrong or breach of duty, to the injury of the parties interested, the court will withhold a confirmation of the sale, upon the objection of either a party or the purchaser.—Brock v. Rice, 27 Grat. 812.

§ 64. Grounds for refusal to confirm.

Failure of purchaser to furnish sufficient security as ground for refusing to conform, see ante, § 39 [d].

Grounds for setting aside sale, see post, §§ 72-87.

[a] (Ky. 1859) Land was sold at a commissioner's sale at a great sacrifice, and the directions of the judgment were not pursued by the commissioner in advertising the time and place of sale. *Held*, that the sale was properly disaffirmed by the chancellor.—Vanbussum v. Maloney, 59 Ky. (2 Metc.) 550.

[b] (Ky. 1873) Only upon a clear showing of unfairness will the chancellor refuse to confirm the sale made by his commissioner.—Stump v. Martin, 72 Ky. (9 Bush) 285.

[c] (Ky. 1886) The commissioner conducting a decretal sale must be the judge of the length of time he will allow the purchaser for perfecting his bond, and his refusal to allow the time asked is not a sufficient reason against the confirmation of a purchase on a resale.—Hughes v. Swope, 88 Ky. 254, 1 S. W. 394.

[d] (Md. 1848) It will not always be a valid objection to the confirmation of a sale proved to have been well attended and fair in other respects that it was made on a different day and at a different place from those mentioned in the advertisement.—Harrison v. Harrison, 1 Md. Ch. 331.

[dd] (Md. 1851) A decree directed a trustee to sell land at public auction, after having given notice in a specified manner. One attempt to sell at such sale was made, which proved ineffectual, no one offering $17 per acre, the price then fixed upon by the trustee and the owner of a life estate in the land, who acted also as the next friend of his minor children, in whom was the estate in remainder. Shortly afterwards the trustee sold the land at private sale for $17 per acre; but it appeared that a better price could then have been had at a public sale, and that there was a misunderstanding between the trustee and the owner of the life estate, with whom the trustee had been in the habit of advising, as to the price to be put upon the land upon its being again offered for sale. It was *held* that the sale ought not to be ratified.—Latrobe v. Herbert, 3 Md. Ch. 375.

[e] (Md. 1863) It is no objection to the ratification of a sale made under a decree that a bill was depending at the time of the sale to vacate the decree, where the grounds for impeaching it are not stated, and it does not appear that any order was passed to restrain the proceedings of the trustee.—Bolgiano v. Cooke, 19 Md. 375.

[f] (Ohio, 1847) A court of equity may refuse to confirm a sale made under its decree, although its order, in respect to notice, has been literally complied with, where in fact sufficient notice has not been given.—Craig v. Fox, 16 Ohio, 563.

[g] (Va. 1883) That a purchaser at a judicial sale has made a good bargain is no ground for refusing to confirm the sale.—Langyher v. Patterson, 77 Va. 470.

[h] (Va. 1889) Where defendant's undivided interest in certain lands is sold to satisfy certain liens, and no upset bid is offered at the sale, and it does not appear that the price paid was inadequate, and no guaranty is given that a higher price would be realized by a resale, such sale is properly confirmed, notwithstanding a certificate filed by defendant that, in the opinion of the several affiants therein, defendant's interest in such land, if severed, would command a higher price, but without stating the facts on which such opinion is based.—Thomas v. Farmers' Nat. Bank, 86 Va. 291, 9 S. E. 1122.

[i] (Va. 1892) A special commissioner offered for sale one of two equal tracts of land, and then the other, neither to be sold until both were offered as a whole, and, if a higher price

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should thus be obtained, then to be sold as a whole. At the offering of the first tract the special commissioner, thinking those interested in the land would not sell it for less than $25 per acre, asked a by-stander to bid $20, telling him that the property would not be left on his hands. This was done, and the second tract was then put up, and $30 was offered, the bidder therefor being influenced by the price offered for the first tract. The whole land was then offered, the commissioner starting it at $25 per acre. While this price was being cried, the commissioner absented himself temporarily, and during his absence, without his permission, the estate as a whole was taken down, and the first tract offered at $20, and knocked off to the by-stander, who had bid at the commissioner's request. This bidder did not want the property, and at the reoffer of the first tract had paid no attention to the proceedings. The second tract was cried off to the bidder at $30. The commissioner made no report of a sale to the court, but continued the sale to a subsequent term of court. *Held*, that the court below properly refused to confirm the sales.—Carr v. Carr, 88 Va. 735, 14 S. E. 368.

[j] (W. Va. 1878) Where action on the report of the special commissioners making a judicial sale has been delayed an unreasonable time without any fault of the purchaser, and the property has depreciated in value, a court of equity will, at his instance, refuse to confirm the sale. So *held* where three years had intervened after the date of sale, and the sale had taken place five years after the decree of sale.—Hyman v. Smith, 13 W. Va. 744.

§ 65. Rights and liabilities of parties pending confirmation.

[a] If the purchaser has not assumed the responsibility of protecting property sold under a decree of the court of chancery, by taking possession of it, any loss that may be sustained by its injury or deterioration in the interval between the sale and the final ratification falls upon the vendor.

—(Md. 1847) Wagner v. Cohen, 6 Gill, 97, 46 Am. Dec. 660;
(Tenn. 1867) Eakin v. Herbert, 44 Tenn. (4 Cold.) 116.

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(Tenn. 1871) Saunders v. Stallings, 52 Tenn. (5 Heisk.) 65.

[b] (Md. 1847) A party interested in the proceeds of property decreed to be sold, although his right in the property is merged in the decree, retains such an interest as will enable him to apply to the court which rendered the decree to protect and preserve the estate from injury and waste pending confirmation.—Wagner v. Cohen, 6 Gill, 97, 46 Am. Dec. 660.

§ 66. Effect of confirmation.

[a] An order of the court confirming a sale of real property by a referee cures any irregularity committed by the referee when conducting the sale.

—(La. 1838) Pannell v. Overton, 12 La. 555; (1841) Cordeville v. Hosmer, 16 La. 590;
(N. Y. 1887) Duer v. Dowdney, 11 N. Y. St. Rep. 301.

[b] (U. S. 1880) An order of confirmation of a judicial sale may cure all irregularities in the course of the proceeding, but can add nothing to the authority of the officer to make it.—Wills v. Chandler (C. C.) 2 Fed. 273.

[c] (Ala. 1847) Where the report of a sale by a register in chancery is confirmed, the confirmation relates back to the time of the sale, so that an action instituted between the two periods, founded upon a contract by the complainant to make good what the sale failed to produce short of a certain sum, is not prematurely brought.—Brown v. Isbell, 11 Ala. 1009.

[d] (Ala. 1880) Objections which might be urged against the confirmation of a sale by a register in chancery, as that it was made at an improper time or place, are waived if not made before the confirmation of the sale, and cannot afterwards be set up in an action at law by the purchaser, or one claiming under him, to impeach the validity of the sale.—Cargile v. Ragan, 65 Ala. 287.

[e] (Ala. 1884) An error of the chancellor in substituting other numbers of land in his decree of sale from those contained in the petition without notice to defendant is cured by a subsequent consent decree of confirmation of the sale.—Kemp v. Lyon, 76 Ala. 212.

[f] (La.) St. 1834, enabling a purchaser at judicial sale to cure defects in his title resulting from informalities in the proceedings by requiring all persons concerned to show cause why the sale should not be confirmed, relates only to informalities in decrees ordering, or proceedings connected with, judicial sales, and extends to matters of form only.—(1838) Pannell's Heirs v. Overton, 12 La. 555; (1841) Cordeville v. Hosmer, 16 La. 590.

[g] (La. 1843) Where, after opposition to the confirmation of a judicial sale, on the ground that it was not properly advertised, has been dismissed, the sale is confirmed on a subsequent showing of proper advertisement, such confirmation cannot prejudice the opponent, whose opposition was thus improperly dismissed.—Fortier v. Zimpel, 5 Rob. 189.

[h] (La. 1845) The homologation of a monition sued out, before Act No. 64 of 1837, by one to whom the deed was executed, on an admission at the foot of the auctioneer's procès verbal by the adjudicatee that he bought as the former's agent, will not cure any irregularities in the sale.—Beale v. Walden, 11 Rob. 67.

[i] (Md. 1828) A trustee, appointed to sell lands by the court of chancery, made the sale and reported it to the court, where it was ratified, after objections by the purchaser, and the ratification on appeal was sanctioned by the appellate court. *Held*, that it was no longer competent for the purchaser to contest the propriety or validity of the sale, nor to object that he was not reported to the court in the usual way as the purchaser of the property sold.—Anderson v. Foulke, 2 Har. & G. 346.

[j] (Md. 1830) Where the purchaser of land at a sale under a decree filed his petition against the ratification of the sale by the court, which recited that he had contracted with the trustee appointed to make the sale for the purchase of certain land, and the trustee in his answer set out the contract of sale executed by both parties, which sale it appeared was ratified by the court, it was *held* that it was too late for the purchaser to object that the trustee did not report him to the court as the purchaser.—Andrews v. Scotton, 2 Bland, 629.

[k] (Md. 1848) It is the established doctrine that a sale made by a trustee under a decree of a court of chancery is a transaction between the court and the purchaser; and the report of the trustee, and the order of the court ratifying the sale, must be regarded as the evidence of the contract between the parties.—Goldsborough v. Ringgold, 1 Md. Ch. 239.

[l] (Md. 1855) The ratification of a judicial sale is final and conclusive, unless irregularly made by the court, or unless the purchaser was prevented by misrepresentation, surprise, or fraud, from making his objection to the rati-

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fication in due time; and it must further appear that such misrepresentation, surprise, or fraud resulted from some act or conduct on the part of the trustees, or on the part of those interested in the proceedings.—Brown v. Gilmor's Ex'rs, 8 Md. 322.

[m] (Neb. 1884) An irregularity in the publication of notice of a judicial sale is cured by the order of confirmation.—Neligh v. Keene, 16 Neb. 407, 20 N. W. 277.

[n] (Neb. 1886) The confirmation of a sale cures all irregularities in the proceedings.—McKeighan v. Hopkins, 19 Neb. 33, 26 N. W. 614.

[o] (Neb. 1891) The statute, to prevent a debtor's land from being sacrificed at judicial sales, provides for the appraisement of the debtor's interest therein, and that it shall not be sold at less than two-thirds of its appraised value. *Held*, that an order confirming a sale of land by a court having jurisdiction of the parties and subject-matter, in the absence of fraud, cures all defects and irregularities in the appraisement, and is conclusive upon all the parties to the suit, and those claiming under them, until reversed or set aside.—Watson v. Tromble, 33 Neb. 450, 50 N. W. 331.

[p] (Ohio, 1876) A decree ordering the sale of real estate by the sheriff or master commissioner of the county did not name the master. The sale was afterwards made by a master. *Held*, that after confirmation of the sale no objection could be made on account of uncertainty of the order.—Mechanics' Sav. & Bldg. Loan Ass'n v. O'Connor, 29 Ohio St. 651.

[q] (Tenn. 1855) The effect of confirming the report of a sale of real estate in chancery is nothing more than the completion of the contract, and does not pass the legal title.—Webster v. Hill, 35 Tenn. (3 Sneed) 333.

[r] (Tenn. 1873) Where a sale of land is confirmed without objection, and the proceeds thereof received, it will be considered as satisfactory to the parties, even though one of the parties has been induced to assent by the payment of an extra bonus.—Goodlett v. Campbell, 1 Tenn. Ch. 200.

[s] (Va. 1849) An interlocutory decree directed certain commissioners to sell a tract of land, but did not authorize them to execute a deed to the purchaser. But they did execute a deed after the sale, and several years later reported their proceedings to the court, when they were ratified and confirmed by final decree. *Held*, that the order of confirmation gave full effect and validity to the deed, and related back to the time of its date, so as to invest the grantee with the legal title to the land.—Evans v. Spurgin, 6 Grat. 107, 52 Am. Dec. 105.

[t] (Va. 1883) Confirmation of a judicial sale cures all errors except such as arise from want of jurisdiction.—Langyher v. Patterson, 77 Va. 470.

[u] (W. Va. 1889) After a commissioner's sale is confirmed it relates back to the date of the sale, and the purchaser is considered the owner from and after that date.—Cale's Adm'r v. Shaw, 33 W. Va. 299, 10 S. E. 637.

§ 67. Review.

Appealability of order confirming sale, see "Appeal and Error," vol. 2, cc. 1041, 1042, § 381 [e, k]; c. 1259, § 638 [a]; cc. 1369, 1370, § 794 [a, c, i, n].

Appeal from decree confirming sale, review of decree ordering sale, see "Appeal and Error," vol. 3, c. 1274, § 3557.

—— *from order discharging purchaser, right to stay of proceedings, see* "Appeal and Error," vol. 2, c. 2649, § 2251 [p].

Jurisdiction of trial court over property in controversy pending appeal, see "Appeal and Error," vol. 2, cc. 2576–2578, § 2204.

Review, by certiorari, of order confirming sale, see "Certiorari," vol. 9, c. 1767, § 22 [i].

Sufficiency of assignment of error on appeal from decree confirming sale, see "Appeal and Error," vol. 3, c. 899, § 3074 [r].

[a] (U. S. 1880) Where a motion made five years after a judicial sale for a vacation of the order confirming the sale was denied, and no ground for denial appeared in the record, it would be presumed on appeal to have been denied because made too late.—Wills v. Chandler (C. C.) 2 Fed. 273, 1 McCrary, 276.

[b] (La. 1848) Where a record certified as containing all the evidence offered in proceedings for the confirmation of a judicial sale is silent as to the publication of notice of such proceedings, a judgment of dismissal will be affirmed.—In re Johnson, 3 La. Ann. 656.

[c] (Md. 1850) On affirmance of an order confirming a judicial sale, the appellate court may allow interest and damages for the detention of the property, payable out of the proceeds of the sale, without requiring the appellee to first proceed against the sureties on the appeal bond.—Barnum v. Raborg, 2 Md. Ch. 516.

[d] (Neb. 1878) A party, whose motion to refuse confirmation of a judicial sale has been overruled, may appeal to the supreme court.—Parrat v. Neligh, 7 Neb. 456.

[e] (Neb. 1890) An objection to a confirmation of sale that was not made in the lower court will not be considered in the supreme court.—Runge v. Brown, 29 Neb. 116, 45 N. W. 271.

[f] (Tenn. 1869) The purchaser of property at a master's sale, who executes his notes for the price bid, and does not except to the report of the master, or object to the confirmation of the sale, cannot be heard to complain of it on appeal.—Lasell v. Powell, 47 Tenn. (7 Cold.) 277.

[g] (Va. 1849) Where in a case of sale of lands under a decree, when there was an informality in the sale, there are several purchasers of distinct parcels, some of whom are willing to perfect the sale, and some not, and there are infants interested who may at any time avoid the sale, an appellate court will set aside the whole decree of the court below confirming the sales.—Talley v. Starke's Adm'r, 6 Grat. 339.

[h] (Va. 1887) On an appeal from the confirmation of a sale of land, on the ground that the court erred in refusing to accept the advanced bid, an objection that the record fails to show that any money was actually tendered the court for the cash payment cannot be made for the first time in the appellate court.—Withers v. Coles' Ex'r, 83 Va. 525, 5 S. E. 673.

[i] (Va. 1890) After the confirmation of a sale of an insolvent company's property pursuant to a decree rendered in a creditor's suit instituted by a lien claimant, an objection that the land had not been advertised for sale as prescribed in the lien, and that the sale had been made before the liens were ascertained, cannot be taken for the first time on appeal.—Karn v. Rorer Iron Co., 86 Va. 754, 11 S. E. 431.

[j] (W. Va. 1876) Upon a decree confirming a court commissioner's sale, an appeal and

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supersedeas will be dismissed by the appellate court, unless it appears that application was made to the circuit court to correct the same, as provided in Code, c. 134, § 5.—Hartley v. Roffe, 12 W. Va. 401.

[k] (W. Va.) A debtor who has taken no steps in the trial court, before confirmation, to review a decree ordering a sale of real estate, on the ground of error therein, is not entitled to have the decree of confirmation reversed.—(1881) Beard v. Arbuckle, 19 W. Va. 135; (1881) Dick v. Robinson, Id. 159; (1884) Park v. Petroleum Co., 25 W. Va. 108.

[l] (W. Va. 1882) A decree confirming the sale of the debtor's realty will not be reversed for errors in the decree ordering the sale, where the purchaser is a stranger.—Hughes v. Hamilton, 19 W. Va. 366.

[m] (W. Va. 1882) An objection that the name of the purchaser at a commissioner's sale was incorrectly given in the decree of confirmation cannot be raised for the first time on appeal.—McMullen v. Eagan, 21 W. Va. 233.

X. VALIDITY OF SALE.

IN GENERAL, § 68.
PERSONS WHO MAY QUESTION VALIDITY, § 69.
RATIFICATION OF INVALID SALE, § 70.
AMENDMENT AND CORRECTION OR CURE OF ERRORS, § 71.

Failure or insufficiency of notice as affecting validity of sale, see ante, § 28.
Liability of purchaser at void sale for rent, see post, § 96 [c].
Rights of purchaser under invalid sale, see post, § 90 [e].
Validity of sale under erroneous decree, see post, § 105.
Retention of possession by seller as rendering sale fraudulent, see "Fraudulent Conveyances," vol. 24, cc. 640, 641, § 445.
Right of appeal by judgment creditor from illegal sale, see "Appeal and Error," vol. 2, c. 1485, § 947 [u].
—— *by purchaser, see* "Appeal and Error," vol. 2, cc. 1464–1466, § 931; c. 1498, § 957 [j].
Validity of sale in bankruptcy, see "Bankruptcy," vol. 6, cc. 429, 430, § 366.
Weight and sufficiency of evidence of fraud as to creditors in judicial sales, see "Fraudulent Conveyances," vol. 24, cc. 1312, 1313, § 878.

§ 68. In general.

[a] It is the policy of the law to sustain judicial sales, and they should not be declared void or voidable for slight and minute defects in preparation.
—(Ky. 1847) Benningfield v. Reed, 47 Ky. (8 B Mon.) 102; (1864) Thornton v. McGrath, 62 Ky. (1 Duv.) 349; (1887) Scott's Ex'r v. Scott, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423;
(Pa. 1875) Appeal of Craig's Adm'rs, 77 Pa. (27 P. F. Smith) 448.

[b] (U. S. 1844) A sale ordered by a court in a case where it had not jurisdiction must be considered as inadvertently done, or as an unauthorized proceeding, and is a nullity.—Shriver's Lessee v. Lynn, 43 U. S. (2 How.) 43, 11 L. Ed. 172.

[c] (U. S. 1890) A judicial sale of the property of a corporation is not rendered invalid by the receiver's announcement at such sale that the purchaser would also have the right, at his election, to take certain land, not covered by the order of sale, and acquired by the receiver during his administration of the corporate property.—Lake Superior Iron Co. v. Brown, Bonnell & Co. (C. C.) 44 Fed. 539.

[d] (Ark. 1886) A sale by a sheriff, by order of a court of equity, of a cotton gin and condenser, together with the gin house, made at the court house door, is not void because the property was not present; the property being a fixture, is in the nature of real estate, and may be sold as such.—Morrow v. McGregor, 49 Ark. 67, 4 S. W. 49.

[e] (Ga. 1852) Sales made by order of courts of limited jurisdiction must show on their face that the prerequisites of the law have been strictly complied with.—Brooks v. Rooney, 11 Ga. 423, 56 Am. Dec. 436.

[f] (Ill. 1874) The fact that a sale under a decree of court is conducted by an agent of the commissioner authorized by the decree to make it, and in the absence of the commissioner, is not such an irregularity as impairs the jurisdiction of the court.—Chambers v. Jones, 72 Ill. 275.

[g] (Ill. 1874) After lapse of 20 years all intendments should be made to sustain a judicial sale.—Whitman v. Fisher, 74 Ill. 147.

[gg] (Ky. 1833) Where a commissioner directed to sell as much land as will be necessary to pay a certain debt sells the whole for an amount more than sufficient for that purpose, such sale is void.—Blakey v. Abert, 31 Ky. (1 Dana) 185.

[h] (Ky. 1856) Civ. Code, § 812, provides that in the sale of a small portion of real estate, under execution, if the defendant does not require less than the whole to be sold, where less will produce the debt, the officer making the sale may exercise his discretion and sell the whole. *Held*, that where a decree in chancery directed how much of the property should be sold, the commissioner had no authority to sell more than the amount specified in the decree, and where he did so the sale was void.—Gathwright v. Hazard, 56 Ky. (17 B. Mon.) 557.

[i] (Ky. 1859) That there were but two purchasers present does not prove fraud in the sale, if it was duly advertised, and there is no proof of any attempt to keep away purchasers.—Mitchell v. Berry, 58 Ky. (1 Metc.) 602.

[j, k] (Ky. 1873) A sale under a decree of court is a judicial act, the commissioner being but the agent of the court; and although he may exceed his authority by selling more land than is necessary, the sale, upon confirmation by the court, is voidable only, and not void.—Dawson v. Litsey, 73 Ky. (10 Bush) 408.

[l] (Ky. 1888) Under Act April 9, 1878 (Gen. St. p. 972), providing that land sold under an order or judgment shall be valued before sale, and that if it fails to bring two-thirds of the value the owner may redeem within a year, a sale without such valuation is void, though the price received may be more than two-thirds of the value of the property.—Graves v. Long Ass'n, 87 Ky. 441, 9 S. W. 297.

[m] (Ky. 1895) A commissioner's sale of lands in which there are remainder interests for reinvestment, under Civ. Code, § 491, is not invalid on the ground that some of the remainder interests are contingent, and that until the death of the life tenant it cannot be known who will be entitled to take in remainder, if the person in being in whom the remainder interest would have vested if the contingency had happened before the com-

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mencement of the action be properly before the court.—Luttrell v. Wells, 97 Ky. 84, 30 S. W. 10.

[n] (La. 1847) A sale under a judgment, in an action in which there is no defendant, is a nullity, without being pronounced so judicially.—Morris v. Covington, 2 La. Ann. 259.

[o] (Md. 1847) A communication of the trustee's limit as to price, made by him to the auctioneer employed to make a sale, and if he got no bid above that, to strike it off to A., is no objection to a sale.—Cohen v. Wagner, 6 Gill, 236.

[p] (Md. 1847) The validity or invalidity of a judicial sale must depend on the facts and circumstances existing at the time it was made.—Gibbs v. Cunningham, 1 Md. Ch. 44.

[q] (Miss. 1881) A commissioner's sale will be confirmed, if otherwise regular, although it was made by an auctioneer during the commissioner's absence from the state.—Swan v. Smith, 58 Miss. 875.

[r] (Mo. 1886) Where a decree directs the sale of separate tracts of land to pay stated portions of the judgment, said stated sums, amounting, in the agregate, to the whole of the judgment, and the order of sale and sheriff's deed recite simply the aggregate amount of the judgment, this is not such a variance as to render the sale void.—Lewis v. Morrow, 89 Mo. 174, 1 S. W. 93.

[s] (N. C. 1875) Lands devised to a husband were, after his death, assigned to his widow for dower, and were subsequently sold to pay the debts of the testator; the widow not being made a party to the petition. *Held*, that the sale was void as to her.—Simonton v. Brown, 72 N. C. 46.

[t] (Tenn. 1851) Where, during a suit in chancery, a sale is decreed, and one of the defendants interested therein dies, and there is no revivor against his heirs, the sale is not void, but communicates to the purchaser a good title to the interest of the other heirs.—Whitley v. Davis' Lessee, 31 Tenn. (1 Swan) 833.

[u] (Tenn. 1865) The confirmation and regularity of a sale of land made under a decree pronounced by a court of competent jurisdiction, in the absence of all countervailing proof, will be presumed; and this is especially so where the parties in interest at the time recognized its validity.—Tipton v. Powell, 42 Tenn. (2 Cold.) 19.

[v] (Tex. 1857) A sale appearing on the record to have been directed and sanctioned by a judge with probate authority (alcalde), will be presumed to be good, though the record does not show that all the requisites were complied with. Records at that time (1834) were not carefully kept, nor was that the purchaser's fault, and their silence will not rebut the presumption that the judge did his duty in the premises.—Baker v. Coe, 20 Tex. 429.

[w] (Tex. 1878) An order of sale directing a sale for gold, and for 10 per cent. interest, where the decree was for "dollars," and interest at 8 per cent., does not render the sale void.—Hughes v. Driver, 50 Tex. 175.

[ww] (Va. 1875) A decree appointing W. a commissioner to sell certain lands at public auction provided that he should not act under the decree until he had given bond for the performance of that and any future decrees made in the cause. Without executing the bond, he sold the land to H., and the sale was confirmed by the court. *Held*, a judicial sale binding the purchaser.—Hess v. Rader, 26 Grat. 746.

[x] (Va. 1892) Where a decree directing the sale of the debtor's real estate by three commissioners provided that the commissioners giving the bond might sell the land, and a sale by two commissioners, one of whom had given bonds, was made, it was immaterial that the third commissioner died prior to the day the advertisement of the sale first appeared.—Strayer v. Long's Ex'r, 89 Va. 471, 16 S. E. 357.

[y] (Va. 1892) Where a decree directing the sale of a debtor's real estate by three commissioners provides that the commissioners giving the bond might sell alone, a sale by two commissioners, one of whom gave the bond, is valid.—Strayer v. Long's Ex'r, 89 Va. 471, 16 S. E. 357.

[z] (W. Va. 1884) A sale of real estate under a decree of court by a commissioner, which has been confirmed without exception, is not void because the commissioner had no authority to make it.—Core v. Strickler, 24 W. Va. 689.

§ 69. Persons who may question validity.

Persons who may object to title under judicial sale, see post, § 102.

[a] (Ga. 1885) Purchasers at a commissioner's sale of exempt property, under the chancellor's order, cannot attack its validity or regularity.—Sirmans v. Sirmans, 74 Ga. 541.

[b] (La.) A judicial sale ought not to be disturbed, unless the party suing can show an injury resulting to him from the sale, as well as an interest in the result of the suit.—(1851) Stockton v. Downey, 6 La. Ann. 581; (1869) Gilmer v. Nicholson, 21 La. Ann. 589.

[c] (La. 1852) A party who procures a sale cannot complain of any ambiguity in its terms.—Gauche v. Trautman, 7 La. Ann. 610.

[d] (La. 1881) A mortgage creditor has no interest to contest the validity of a public sale when, if the sale were set aside, a prior mortgage would more than absorb the value of the property.—Dufour v. Leftwich, 33 La. Ann. 1471.

[e] (Md. 1832) Where a trustee, acting under a decree directing him to sell as much property as may be necessary to discharge debts due from A. to B., sells more than is actually necessary, a purchaser cannot object to the sale on that account.—Brown v. Wallace, 4 Gill & J. 479.

[f] (Md. 1868) A purchaser at a sale of real estate under the order of the probate court is not a proper party to inquire into the regularity of the proceedings under which the sale was ordered.—Shultz v. Houck, 29 Md. 24.

[g] (Neb. 1890) Though a judicial sale of land to one who acted as appraiser is void as against the judgment debtor, third persons who have no interest in the matter cannot object.—Reno v. Hale, 28 Neb. 646, 44 N. W. 996.

[h] (N. Y. 1845) Where a sale is to be had under a decree for the benefit of some of the defendants, as well as for the benefit of the complainant in the suit, and the complainant has no interest in the execution of the decree, or consents that the sale be made under the direction of the defendants, a stranger to the suit cannot object on the ground that the decree was delivered to the master by defendants' solicitor to be executed.—Watt v. Crawford, 11 Paige, 470.

[i] (Ohio, 1876) The original owner of lands sold under process of law cannot be heard to object that, by reason of defects in the proceedings, the purchaser will not get a good title, unless, perhaps, where the defect may have diminished the price bid.—Wilson v. Scott, 29 Ohio St. 636.

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[j] (S. C. 1882) An acceptance of service of an irregular summons by adult defendants, who make no objection to further proceedings thereunder, estops them to deny the court's jurisdiction and the validity of the sale, as against a purchaser of lands at a judicial sale had in such proceedings.—Finley v. Robertson, 17 S. C. 435.

[k] (W. Va. 1894) One who causes his land to be sold for his own benefit, under a judicial proceeding which turns out to be void, and receives and retains the proceeds of sale, is estopped to question its validity.—Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222.

§ 70. Ratification of invalid sale.

Dismissal of bill asking for annulment of sale and also for proceeds thereof, see post, § 83 [n].

[a] (Ky. 1886) In an equitable proceeding, under Civ. Code, § 491, by the owner of a life estate, against the owners of the remainder for sale of the land, it appeared that two tracts of land were directed to be sold, one of which was held by petitioner in fee simple, which the court had no power to sell. *Held* that, before setting aside the sale, the petitioner will be given a reasonable time within which to tender a deed to the purchaser.—Munnell v. Orear, 84 Ky. 452, 1 S. W. 725.

[b] (Ky. 1886) Where a title in fee simple is sold in an equitable proceeding, and it appears that the court had no power to direct such sale, if the owner elects to tender a conveyance to the purchaser, the sale will be ratified.—Nunnell v. Orear, 84 Ky. 452, 1 S. W. 725.

[c] (La. 1847) An allegation that a judicial sale is null does not consist with a claim to be paid by preference out of the proceeds. If it is null, the claimant must exercise his privilege on the property.—Bank of Louisiana v. Delery, 2 La. Ann. 648.

[d] (La. 1849) A want of title to land, arising from the fact that a sale thereof made by a probate judge while in office was authenticated by him after he ceased to hold office, cannot be cured by acts of the parties tending to show a ratification of the sale.—Bradford v. Cook, 4 La. Ann. 229.

[e, f] (La.) One who claims the proceeds of a sale judicially affirms the validity of the sale, and cannot afterwards attack the sale for nullity, unless it be shown that the judicial admission was made through an error of fact.—(1869) Tarleton v. Kennedy, 21 La. Ann. 500; (1877) Boubede v. Aymes, 29 La. Ann. 274; (1879) Factors' & Traders' Ins. Co. v. De Blanc, 31 La. Ann. 100; (1882) Mather v. Knox, 34 La. Ann. 410; (1889) Massie v. Brady, 41 La. Ann. 553, 6 South. 536.

[g] (Md. 1847) A trustee, after making fruitless efforts to sell lands according to the terms of the decree, sold them at private sale, at a price greatly exceeding the best offer he could get for them at public sale. *Held*, that upon the principle that chancery will ratify an act when done, which upon previous application would have been authorized to be done, the objection to the act of the trustee, founded upon the form of sale, could not prevail.—Gibbs v. Cunningham, 1 Md. Ch. 44.

[h] (Md. 1848) Though the trustee depart from the special directions of the decree, a subsequent ratification by the court will render it as binding as if he had pursued in all respects those directions.—Harrison v. Harrison, 1 Md. Ch. 331.

[i] (Md. 1848) The court in confirming the acts of its agents, who have not followed their authority, will see that no injustice is done to the parties interested, and that they have an opportunity to be heard before their rights are decided upon.—Harrison v. Harrison, 1 Md. Ch. 331.

[j] (Md. 1887) Complainants sought to set aside a sale of land under a decree, on the ground of inadequacy of price. At the time they insisted that the sale should be made it was ratified at their instance, and they received and gave releases for their share of the proceeds. *Held*, that it could not be set aside.—Presstman v. Mason, 68 Md. 78, 11 Atl. 764.

§ 71. Amendment and correction or cure of errors.

[a] (N. C. 1875) Lands devised to a husband were, after his death, assigned to his wife for dower, and subsequently sold to pay the debts of the husband; the widow not being a party to the petition. *Held* that, the sale being void as to her, it could not be validated by any subsequent amendment, making her a party.—Simonton v. Brown, 72 N. C. 46.

[b] (W. Va. 1881) Where a judicial sale of land is erroneously decreed before the amounts and priorities of the liens are determined, the error is not cured because the creditor whose lien was not ascertained assents to the sale.—Beard v. Arbuckle, 19 W. Va. 135.

XI. OPENING, VACATING, AND SETTING ASIDE.

IN GENERAL, § 72.
GROUNDS IN GENERAL, § 73.
ERRONEOUS, DEFECTIVE, OR INVALID JUDGMENT, ORDER, OR DECREE, § 74.
FRAUD OR MISREPRESENTATION, § 75.
MISTAKE, SURPRISE, OR ACCIDENT, § 76.
INADEQUACY OF PRICE, § 77.
INADEQUACY OF PRICE IN CONNECTION WITH OTHER OBJECTIONS, § 78.
ADVANCE ON BID, § 79.
APPLICATION AND PROCEEDINGS THEREON, § 80.
—— TIME OF APPLICATION AND LACHES, § 81.
HEARING AND DETERMINATION, § 82.
ACTIONS TO SET ASIDE, § 83.
SECURITY OR OTHER CONDITIONS, § 84.
AGREEMENTS TO SET ASIDE, § 85.
RIGHTS OF DEBTOR, § 86.
RESALE ON SETTING ASIDE, § 87.

Rights of purchaser on opening or vacation of sale, see post, § 110.

—— *on vacation of judgment or decree, see* post, § 109.

Setting aside report of sale as insufficient, see ante, § 57 [b].

Equitable relief against judicial sale dependent on inadequacy of legal remedy, see "Equity," vol. 19, c. 261, § 152 [aa].

Jurisdiction of federal court to set aside sales by state courts, see "Courts," vol. 13, c. 3153, § 1368.

—— *of one court to annul judicial sale made in another court of concurrent jurisdiction, see* "Courts," vol. 13, cc. 3070, 3071, § 1285.

Laches in attacking, see "Equity," vol. 19, c. 339, § 191 [n]; cc. 400–407, § 217.

Limitation of action by assignee to set aside sale of bankrupt's property, see "Bankruptcy," vol. 6, cc. 491, 492, § 435; cc. 493–496, § 439.

Review of discretion of trial court to set aside sale, see "Appeal and Error," vol. 3, cc. 1738, 1739, § 3880 [a, f, h, k–m, q].

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Right of purchaser to appeal from order setting aside confirmation of sale, see "Appeal and Error," vol. 2, c. 1364, § 783.

Setting aside, necessity of motion for new trial to review ruling on motion to set aside, see "Appeal and Error," vol. 2, c. 2046, § 1719.

—— *sufficiency of record to present questions for review, see* "Appeal and Error," vol. 3, c. 765, § 2948 [o–q].

Vacating sale in bankruptcy, see "Bankruptcy," vol. 6, cc. 433–436, § 370.

§ 72. In general.

[a] (Ky. 1886) The power of the court to set aside a decretal sale, and order another one, is not an arbitrary one, and can be exercised only for cause shown.—Hughes v. Swope, 88 (Ky.) 254, 1 S. W. 394.

[b] (Ky. 1887) Civ. Code, § 521 (Myers' Code, § 582), providing that a judgment shall not be vacated until it be adjudged that there is a valid defense to the action in which the judgment is rendered, is not intended to make the power of the court to vacate, after the expiration of the term, an order confirming a judicial sale dependent upon the existence of a valid defense to the cause of action or claim sued on. The judgment and order confirming the sale are distinct and independent of each other; the one may stand although the other is set aside.—Bean v. Hoffendorfer, 84 Ky. 685, 3 S. W. 138.

[c] (Ky. 1889) Plaintiffs failed to attend a sale of land on a judgment obtained by them, owing to the fact that they were not notified of the sale in time by the court commissioner, and the land, by reason of their absence, did not bring as much as their debt. Their attorney alleged that he was unable to appear and oppose the confirmation, owing to the sickness of his wife, but it appeared that the sale was confirmed by direction of another of plaintiffs' attorneys, and there was no evidence that this was the result of collusion. *Held*, that no "unavoidable casualty" preventing plaintiffs' counsel from appearing and opposing the confirmation was shown, within the meaning of Civ. Code, § 518, subsec. 7, prescribing that a judgment may be vacated after the term at which it was rendered, where a party was prevented from appearing by unavoidable casualty.—Kincaid v. Tutt, 88 Ky. 392, 11 S. W. 297.

[d] (Md. 1839) The fact that a cloud rests upon the title to property sold under a decree is not an objection to setting aside the sale for cause shown, because it may bring a less price on a resale for that reason; the purchaser at such sale purchasing at his own risk.—Glenn v. Clapp, 11 Gill & J. 1.

[e] (Md. 1847) While the chancellor would consider it his duty to vacate sales made by officers of his appointment, under the influence of error, fraud, misrepresentation, or injurious mistake, still it would be fatal policy to be astute in finding out objections to them.—Cunningham v. Schley, 6 Gill, 207; Gibbs v. Cunningham, 1 Md. Ch. 44.

[f] (Md. 1848) The English practice of opening biddings, as a matter of course, before the ratification of the master's report, has not been adopted in this state, and it is not expedient to introduce it.—Johnson v. Dorsey, 7 Gill, 269.

[g] (N. Y. 1886) The discretionary power of the court to vacate a sale should not be exercised when the rights of bona fide purchasers who are not made parties to the motion have intervened.—Prior v. Prior, 41 Hun, 613.

[h] (N. C. 1857) A court of equity has power to set aside a sale made under its order as well at the instance of the purchaser as of the owner of the property.—Clayton v. Glover, 56 N. C. 371.

[hh] (N. C. 1869) Where a judicial sale is set aside because of inadequacy of price, the court will not accept a higher bid made since the sale, and decree a sale to such advance bidder, but will order the bids to be reopened.—Wood v. Parker, 63 N. C. 379.

[i] (Pa. 1857) A judicial sale will not be set aside after a deed of the property is acknowledged and recorded, unless the case is one without a shade of doubt upon it.—Chadwick v. Patterson, 2 Phila. 275.

[j] (Tenn. 1844) Whether a judicial sale should be set aside rests in the discretion of the chancellor, and the discretion will not be controlled, except for palpable error.—Owen's Adm'r v. Owen, 24 Tenn. (5 Humph.) 352.

[k] (Tenn. 1876) Where, after a sale of a married woman's separate property to satisfy a decree, the purchaser allowed the married woman, through her next friend, to take the property on an advance sufficient to pay the decree, the court may, during the term, set aside a resale to a third person, after it has been confirmed.—Mayo v. Harding, 3 Tenn. Ch. 237.

[l] (Va. 1883) The discretion of the court to set aside a judicial sale is not an arbitrary one, but will be exercised only for good cause shown. —Langyher v. Patterson, 77 Va. 470.

[m] (Va. 1888) A sale of land to satisfy judgments was confirmed, half the purchase money paid, and a writ of possession awarded. Two sons of the former owner, 15 months after the sale, filed a bill claiming portions of the land under oral contracts with their father, accompanied by full payment and possession, and conveyances made during the proceedings under which the sale was made. The only direct testimony of the sale was complainant's own, which was materially contradicted by written evidence. They pretended to have paid part of the money to their father's assignee in bankruptcy, but neither the assignee's nor the father's testimony was taken. One son was a defendant to the suits in which the sale was had, and present at the sale, but never set up any claim to the land, and the father admitted ownership in his answer. Both complainants were in the vicinity pending these proceedings and must have known of them. *Held*, that this evidence would not sustain the bill.—McGee v. Johnson, 85 Va. 161, 7 S. E. 374.

§ 73. Grounds in general.

Failure to give notice of sale as ground for setting aside, see ante, § 29.

Grounds for refusal to confirm sale, see ante, § 64.

Purchase by improper party, ground for setting aside, see ante, § 40.

Setting aside sale because made in parcels instead of in gross, see ante, § 37.

Uncertainty in report as ground for setting aside sale, see ante, § 57 [k].

[a] Mere informalities or irregularities in a judicial sale are not sufficient ground for setting it aside.

—(U. S. 1896) Nalle v. Young, 160 U. S. 624, 16 Sup. Ct. 420, 40 L. Ed. 560;

(Pa. 1867) In re Grove's Estate, 2 Woodw. Dec. 182.

[b] After a judicial sale has been confirmed by the court which ordered it, it will not be set aside, except for causes which would be deemed sufficient to justify relief if the sale

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had been made by the parties in interest instead of by the court.
—(Va. 1881) Berlin v. Melhorn, 75 Va. 639; (1883) Hickson v. Rucker, 77 Va. 135.

CONTRA, see
(Tenn. 1850) Morton v. Sloan, 30 Tenn. (11 Humph.) 278.

[c] (U. S. 1834) Md. Acts 1875, c. 72, § 8, authorizing a sale of real estate of deceased debtors, requires the sale to "be notified to and confirmed by the chancellor." *Held*, that where a decree directing such sale did not require a confirmation, and the sale thereunder was not in fact confirmed, it would be set aside.—United States Bank v. Ritchie, 33 U. S. (8 Pet.) 128, 8 L. Ed. 890.

[d] (Ala. 1882) Upon proper application, and proof that the applicant has with proper diligence resisted confirmation, a court of equity will set aside a sale of land under its process, if such sale is shown to be illegal, unconscionable, or inequitable.—Sayre v. Elyton Land Co., 73 Ala. 85.

[e] (Ga. 1892) A person wishing to purchase land at a judicial sale commits a fraud by hiring another not to bid against him, and, on discovery of the fraud after the sale has been consummated, the purchase money paid, and a conveyance executed, the sale will be set aside.—Barnes v. Mays, 88 Ga. 696, 16 S. E. 67.

[f] (Ill. 1853) A sale made under a decree will not be set aside on motion, as to innocent purchasers, because the commissioner named in the decree to sell the premises, who was also sheriff, sold upon execution issued with, and in conformity to, the decree, if the proceedings under such execution were in all respects regular and in compliance with the decree, if the return also shows that the officer sold under the authority of the decree as well as of the execution.—Lavender v. Latimer, 15 Ill. (5 Peck) 80.

[g] (Ill. 1873) Where the judgment under which a sale of land is made is reversed, the sale may be set aside, on motion, after the expiration of 12 months, when no deed has been taken out and the judgment debtor is still in possession.—Hays v. Cassell, 70 Ill. 669.

[h] (Ill. 1874) A decree setting aside a sale by a master in chancery, because the master made a deed prematurely, is erroneous, and must be reversed. The irregularity in making the deed does not impair the sale. The relief granted should have been confined to so much of the report as involved the deed.—Burke v. Weaver, 71 Ill. 359.

[i] (Ill. 1874) Where a sale under a decree of court is conducted by an agent of the commissioner authorized by the decree to make the sale, and in his absence, and a deed is made by the commissioner, this is an irregularity that vitiates the sale, and authorizes the parties interested to have it set aside, if no rights of an innocent purchaser have intervened.—Chambers v. Jones, 72 Ill. 275.

[j] (Ill. 1875) Where a purchaser at judicial sale has made valuable improvements on the premises, the sale will not be set aside for slight and trivial causes.—Wilson v. Kellogg, 77 Ill. 47.

[k] (Ill. 1878) A decree ordered the sale of property, and required the master to give notice by publication three successive weeks and by posting up written or printed notices in three public places. No notices were in fact posted, and publication was made for only two weeks. *Held*, that the sale would be set aside.—Augustine v. Doud, 1 Ill. App. (1 Bradw.) 588.

[kk] (Ky. 1866) The simple fact that a confirmation of a judicial sale would sacrifice the interests of those entitled to the protection of the court affords sufficient ground for setting aside the sale.—Egard v. Chearnly, 64 Ky. (1 Bush) 12.

[l] (Ky. 1871) Where a commissioner is ordered to sell land on credits of 6, 12, and 18 months, a sale by him on the credit of 1, 2, and 3 years will be set aside.—Cofer v. Miller, 70 Ky. (7 Bush) 545.

[ll] (Ky. 1888) A sale under decree cannot be set aside on the ground that the land was not appraised at its true value before the sale, where the appraisal is not attacked for fraud or unfairness.—Harris v. Gunnell, 9 S. W. 376.

[m] (Ky. 1888) Where a judgment, under which land in the hands of defendant's grantees has been sold to plaintiff, an insolvent, is reversed, and plaintiff found to be indebted to defendant, the sale will be set aside.—Baker v. Baker, 87 Ky. 461, 9 S. W. 382.

[mm] (Ky. 1889) Where a sale is confirmed after decision, on appeal, reversing the judgment, and directing that appellant's interest be protected in the sale, and the sale has been made, without securing appellant's rights, on 6 months' credit, instead of 12, as directed by the judgment, the order of confirmation will be set aside.—Musgrave v. Parrish, 12 S. W. 709.

[n] (Ky. 1893) The commissioner appointed to sell land of a judgment debtor agreed to accept from the debtor, who wished to purchase at the sale, certain persons as sureties on the sale bond; but he afterwards refused to do so, without giving the debtor sufficient time to procure other sureties before the sale, in consequence of which the land was sold to another. *Held*, that the sale should be set aside for misconduct of commissioner.—Passmore v. Moore, 22 S. W. 325.

[nn] (Ky. 1894) A sale under judgment in several consolidated actions will not be set aside after 10 years for the reason that the warning order in one case does not show proof of plaintiff's nonresidence, where it appears that such proof was made in one of the other cases.—Farris v. Perkins, 26 S. W. 188.

[o] (Md. 1846) Where the decree for a sale ordered the appointed trustee to give bond in the penalty of a prescribed sum, and he gave bond for a less sum, which was accepted by the court and approved, and he proceeded to make and report a sale, it was *held* that this was no ground to vacate an order of final ratification.—Dawes v. Thomas, 4 Gill, 333.

[oo] (Md. 1847) An advertisement for the sale of lands by a trustee stated that "by virtue of a decree of the high court of chancery there will be sold certain real estate," naming the tracts and giving their locality, "of which A. died seised and possessed," but did not state the names of the parties to the suit in which the decree passed, nor the several incumbrances upon the property. *Held*, that the sale would not on this account be vacated, in the absence of proof that competition in the purchase was prevented or the sale in any respect prejudiced thereby.—Cunningham v. Schley, 6 Gill, 207; Gibbs v. Cunningham, 1 Md. Ch. 44.

[ooo] (Md. 1847) Where a trustee's bond is not stamped, but is filed and approved by the chancellor, and the trustee proceeds to make the sale as decreed, this is not a ground for vacating the sale; but the chancellor, on application, will require the trustee to file the bond.—Cunningham v. Schley, 6 Gill, 207.

[p] (Md. 1848) Where it appeared that the defendant, a German, and imperfectly acquaint-

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ed with the English language, called upon the trustee a few days before the sale, for information as to the day of the sale; that either the trustee incautiously misinformed him on the subject, or that he misunderstood the trustee, owing to his imperfect knowledge of the language; and that a bidder, who would have given nearly twice the amount for which the property was struck off, was kept from attending the sale by the information which he received from the defendant,—upon these circumstances, and the concurrence of the plaintiff in the application, the sale was set aside.—Hintze v. Stingel, 1 Md. Ch. 283.

[pp] (Md. 1848) Where the decree under which a judicial sale has been had is appealed from, and an approved appeal bond filed, of which the trustee had notice prior to the sale, the sale will be set aside.—Chesapeake Bank v. McClellan, 1 Md. Ch. 328.

[q] (Md. 1856) Judicial sales will not be set aside for causes that the parties in interest might, with a reasonable degree of diligence, have avoided.—Kauffman v. Walker, 9 Md. 229.

[qq] (Md. 1878) A sale made by a substituted trustee will not be set aside for the misconduct of his predecessor.—Dungan v. Vondersmith, 49 Md. 249.

[r] (Neb. 1894) The courts cannot interpose to set aside judicial sales to satisfy debts, because of depression in business or financial stringency.—Nebraska Loan & Trust Co. v. Hamer, 40 Neb. 281, 58 N. W. 695.

[rr] (N. J. 1880) A sale under a decree in chancery may be set aside, even after deed delivered, by an order made in the original cause, either for impropriety in the sale, or for the purpose of letting in a defense to the action.—Mutual Life Ins. Co. v. Sturges, 33 N. J. Eq. (6 Stew.) 328.

[s] (N. J. 1881) A judicial sale made in violation of a promise to adjourn to a future day will be set aside, upon petition, if application is properly made, although the deed has been delivered.—Mutual Life Ins. Co. v. Goddard, 33 N. J. Eq. (6 Stew.) 482.

[ss] (N. Y. 1866) The court will not set aside a judicial sale on the ground that the guardian of infants, who are interested, failed to attend the sale, unless it be shown that in consequence of such nonattendance the property sold at a less price than it would have brought if the guardian attended.—Stryker v. Storm, 1 Abb. Prac. (N. S.) 424.

[t] (N. Y. 1867) Where a judicial sale of property was made, against the defendant's remonstrance, on a day most unfavorable to a large gathering, and in an order which induces a reasonable belief that it was detrimental to his interests, and under circumstances giving rise to apprehension that free competition was interfered with, the court is justified in ordering a new sale.—King v. Platt, 37 N. Y. 155, 2 Abb. Dec. 527, 35 How. Prac. 23, 3 Abb. Prac. (N. S.) 174, 434.

[tt] (N. C. 1877) An allegation, on the part of a purchaser at a judicial sale, that the boundaries of the land cannot be furnished with any accuracy, may be ground for ordering a survey to locate and identify the land, but not for setting aside the sale, until some such attempt to locate the land has been made.—Shields v. Harrison, 77 N. C. 115.

[u] (N. C. 1891) Where two persons enter into a scheme to prevent competitive bidding at a judicial sale of land which others are interested in having sold for a fair price, and one of such persons purchases the land, and takes title in his own name, the sale will not be set aside at the instance of the other on the ground that he was prevented from bidding by the promises of the purchaser.—Harrell v. Wilson, 108 N. C. 97, 12 S. E. 889.

[uu] (Ohio, 1859) Where a decree, entered in the supreme court, that the sheriff sell certain land on receiving an order for that purpose, is sent by mandate to the common pleas for execution, and the sheriff sells on receiving a certified copy of this decree from the clerk, without any order to sell, the sale is so irregular that it may be set aside on motion.—Rhonemus v. Corwin, 9 Ohio St. 366.

[v] (Ohio, 1859) A judicial sale of the whole property will not be set aside on the opinion of witnesses that it would have brought more if parceled in lots, since such objection should have been made to the sheriff at the time of the sale.—Hartshorne v. Reeder, 3 Ohio Dec. 109.

[vv] (Ohio, 1874) Where a judicial sale has been made on void process, the court may, while the purchase money remains in the hands of the sheriff, on the application of the purchaser, set aside the sale and order the purchase money to be refunded.—Dowell v. Goode, 25 Ohio St. 390.

[vvv] (Pa. 1857) Failure of the advertisement for the sale of certain lots to describe an outlet on the alley, which was a very important advantage to such lots, is sufficient to justify setting aside the sale.—Chadwick v. Patterson, 2 Phila. 275.

[w] (Pa. 1879) A sale of land under order of court, advertised as free from incumbrances, may be set aside because of the existence of a right of way previously unknown to the purchaser.—In re Whiteman's Estate, 13 Phila. 249.

[ww] (S. C. 1830) A judicial sale will not be set aside, on the ground that the commissioner neglected to take a mortgage as required by the order of sale, where it appears that the purchaser was always ready and willing to execute the mortgage; but the court will require the purchaser to comply with this condition.—Young v. Teague, Bailey, Eq. 13.

[x] (Va. 1814) Where, at a commissioner's sale, they proclaimed that the time of bidding for certain land would be limited to 15 minutes, which time was several times extended, the court refused to set aside the sale because of such limitation.—Fairfax v. Muse's Ex'rs, 4 Munf. 124.

[xx] (Va. 1857) A sale of land by a commissioner, under a decree of the chancery court, was set aside because the day was so inclement as to deter several persons from attending who intended to be present, and only one bidder was present, and she lived at the place.—Roberts v. Roberts, 13 Grat. 639, 70 Am. Dec. 435.

[xxx] (Va. 1873) It is no just cause for vacating a judicial sale that only a few bidders were present.—Hudgins v. Lanier, 23 Grat. 494.

[y] (Va. 1889) A sale of land in which plaintiff was interested as tenant in common was ordered by the court, and a bid made by defendant was accepted, and the sale absolutely confirmed, the terms of the sale being part cash, and two deferred payments. *Held*, that a petition by plaintiff for the rescission of the sale should not be granted because the terms of the sale had not been complied with upon its confirmation, or because the value of the land had considerably increased before such compliance on account of the discovery of certain mineral deposits in adjacent land; no fraud being shown on the part of defendant, and the latter tendering, the day before the first deferred payment fell due, the cash payment, with interest from the date of the sale, and offering to comply with the requirements as to the deferred payments.—

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Virginia Fire & Marine Ins. Co. v. Cottrell, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108.

[yy] (Va. 1891) The fact that the attorney of the owner of land sold at a judicial sale died about two weeks before the confirmation of the sale, and that the owner had notice of motion for confirmation only from Saturday until Monday, are not sufficient grounds for vacating such confirmation, when the owner had several days' notice of the death of his attorney, and lived only three or four hours' ride from the place where the motion was made.—Allison v. Allison, 88 Va. 328, 13 S. E. 549.

[z] (W. Va. 1885) Under Code, c. 132, § 1, providing that a special commissioner appointed by the court to make a sale shall not receive any money under a decree or order until he gives bond before the court or its clerk, a sale made by such commissioner cannot be set aside merely because the commissioner failed to give the bond.—Sommerville v. Sommerville, 26 W. Va. 479.

§ 74. Erroneous, defective, or invalid judgment, order, or decree.

Proceedings for relief, because of defects in or invalidity of judgment or decree, see post, § 107.

[a] (Ky. 1859) That a final judgment under which a sale of land is made by commissioner was erroneous is no ground for quashing the sale.—Vanbussum v. Maloney, 59 Ky. (2 Metc.) 550.

[b] (Ky. 1867) A commissioner's sale will not be set aside for a defect in the decree in not directing the commissioner to sell only so much as would satisfy the judgment, if the entire tract of land decreed to be sold did not sell for as much as the debt.—Doughty v. Moss, 64 Ky. (1 Bush) 161.

[c] (Ky. 1867) Where the court had jurisdiction to order a sale, such sale would not be set aside, however erroneous the judgment may be, unless the purchaser had obtained an unfair advantage.—Lusk v. Salter, 65 Ky. (2 Bush) 201.

[d] (Ky. 1889) The exception that no judgment should have been rendered against the debtor on the merits is no ground for invalidating the sale.—Vanmeter v. Vanmeter's Assignee, 88 Ky. 448, 11 S. W. 80, 289.

[e] (Tenn. 1871) If the transcript fails to show that the county court had jurisdiction to order a sale of a decedent's lands, which is sought to be set aside, the sale will be declared void.—Martin v. Turner, 49 Tenn. (2 Heisk.) 384.

§ 75. Fraud or misrepresentation.

[a] A judicial sale of land may be set aside, where fraud or misrepresentation has been practiced.

—(Md. 1828) Anderson v. Foulke, 2 Har. & G. 346;

(Neb. 1886) McKeighan v. Hopkins, 19 Neb. 33, 26 N. W. 614;

(N. Y. 1856) Le Fevre v. Laraway, 22 Barb. 167;

(Pa. 1838) Gallaher v. Collins, 7 Watts, 552.

[b] (Ala. 1886) A decree for the sale of complainant's land having been obtained, his attorney bought in the land for $500, and shortly afterwards resold it to B. for $600; but, with intent to defraud complainant, he induced the register to make a deed for the land to B. directly, and to report the sale as made to B. for $500. *Held*, that the collusion between the attorney and B. operated as a constructive fraud on the rights of the complainant, and was a sufficient ground to confer equity jurisdiction to set aside the sale.—Phillips v. Benson, 82 Ala. 500, 2 South. 93.

[c] (Ark. 1859) On a sale of lands by the master under a decree, one of the complainants, a preferred creditor to a large amount, controlled the master as to the terms of sale, requiring him to announce, before the sale, that the terms should be payment down in specie at the close of the sale. On the remonstrance of the bidders, the master, after a conversation apart with the preferred creditor, extended the time of payment to five minutes before 3 o'clock of the same day, and refused to vary the terms. The terms so announced by the master operated as a surprise upon the bidders present, who declined to bid, stifled competition, and the creditor, who was the only bidder, bought the lands at less than her own debt, though she was prepared to bid more, and for about half their value. *Held*, that the conduct of the purchaser was such as the law characterizes as fraudulent, and that a court of equity would not hold such a sale valid.—Penn's Adm'r v. Tolleson, 20 Ark. 652.

[d] (Md. 1851) If the trustee at a sale of land makes any promise or representation to the bidders that the estate shall be, or is, clear of all incumbrances, or that the title is better or different from that which would flow from the proceedings, and the promise or representation cannot be complied with, or turns out to be erroneous, the sale will be set aside.—Speed v. Smith, 4 Md. Ch. 299.

[e] (N. Y. 1843) False representations made at a master's sale by a defendant in the suit as to the situation of the property and the amount of the rental, although such representations were disavowed by the master, will, if the purchaser be deceived thereby, be a sufficient ground for his being discharged.—American Ins. Co. of New York v. Simers, 3 Chan. Sentinel, 70.

[f] (Pa. 1894) Where an auctioneer at an orphans' court sale inaccurately states that the ground rent the property is subject to is redeemable, the purchaser is relieved from performing his contract.—In re Howe's Estate (Orph. Ct.) 3 Lack. Jur. 270, 14 Pa. Co. Ct. R. 574, 3 Pa. Dist. R. 267.

[g] (Va. 1881) In suit by a creditor, a sale of the debtor's real estate for a small sum was made by a commissioner; but the purchaser never complied with the terms of sale, and before the commissioner made any report to the court A. and B. offered him an advance bid of 10 per cent., which was accepted, and the sale confirmed by the court; but, before the purchase money was paid, creditors applied by petition to have the order confirming the sale set aside, on the ground that A. and B. had fraudulently concealed the fact that there was a cave under the tract which gave it great value. *Held*, that as the purchasers, having discovered the cave, used means to conceal it, and made false representations in relation to it, the order would be set aside.—Merchants' Bank v. Campbell, 75 Va. 455.

§ 76. Mistake, surprise, or accident.

Mistake or accident in connection with inadequacy of price, see post, § 78 [q, t, u].

[a] A sale of land under an order of a court of chancery may be set aside, where some injurious mistake has been made.

—(Md. 1828) Anderson v. Foulke, 2 Har. & G. 346;

(W. Va. 1881) Beard v. Arbuckle, 19 W. Va. 135.

[b] (U. S. 1837) The court that ordered a sale of real estate will set the sale aside,

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where it appears that from a misapprehension at the sale the persons present were induced not to bid for the property.—Bank of Alexandria v. Taylor, Fed. Cas. No. 854 [5 Cranch, C. C. 314].

[c] (Ala. 1846) Where a sale is made by the master in virtue of a decree, but under a misconception of the wishes and intentions of the parties in interest, the sale may be set aside, if it has not been subsequently assented to or acquiesced in for such a long time as to warrant the inference that it was assented to.—Branch Bank of State v. Hunt, 8 Ala. 876.

[d] (Ky. 1867) A sale by a commissioner will not be set aside for an error in computing interest, if it appears that the excess is too slight to justify the presumption that, had the true amount been adjudged, the debtor would have paid the amount and thereby prevented a sale, or if neither the debtor nor any one else at the sale offered as much as was due without such excess.—Doughty v. Moss, 64 Ky. (1 Bush) 161.

[e] (Ky. 1887) Error or mistake of judgment on the part of appraisers, appointed to fix the value of land to be sold at judicial sale, is no ground for setting aside the sale.—Kincheloe v. McCain's Ex'rs, 3 S. W. 3.

[f] (Md. 1848) A sale regularly conducted and fairly made under the authority of a court of chancery, where a third party, a stranger to the proceedings, becomes the purchaser, cannot be disturbed on the ground of mistake, unless such mistake has been caused by the conduct of the purchaser, or can be traced to the creditor for whose use the property was sold or to the trustee.—Johnson v. Dorsey, 7 Gill, 269.

[g] (Md. 1870) Where a purchaser at a judicial sale bought under the impression and belief that he was buying the property free of all incumbrances, except a ground rent, he is entitled to have the sale set aside on the discovery of a prior incumbrance on the property.—Hunting v. Walter, 33 Md. 60.

[h] (N. J. 1878) A purchaser at a judicial sale, who buys without examination or inquiry, will not be relieved from the sale because of a misapprehension as to the legal effect of the decree for sale and the character and extent of the title he will acquire; such mistake being a mistake of law, and due to the carelessness of the purchaser himself. While such contracts are made with the court itself, and therefore the court may exercise a greater power over them than over any other class of contracts, it cannot rescind them without an equitable or legal reason sufficient to justify such action.—Hayes v. Stiger, 29 N. J. Eq. (2 Stew.) 196.

[i] (N. J. 1886) Where confirmation of a master's sale is refused, by consent of parties, for admitted irregularity and surprise, and subsequently, on ex parte statements of counsel, the sale is confirmed, and a deed made, the court will, on an application of the party alleging irregularity and surprise, showing that she intended to resist confirmation on that ground, and that she had no notice of the confirmation, and that the sale operated as a fraud on her, set aside the order of confirmation, and declare the deed void.—Barker v. Richardson, 41 N. J. Eq. (14 Stew.) 656, 7 Atl. 637.

[j] (N. J. 1891) The fact that petitioner was present at the judicial sale, intending to bid, and failed to do so because he thought the bid made by another person was not bona fide, is not such a mistake as would justify setting aside the sale.—Fiske v. Weigel (Ch.) 21 Atl. 452.

[k] (N. Y. 1856) A judicial sale will be vacated where the conduct of the purchaser or of any other person interested in the sale has been such as to result in surprise or misapprehension affecting the sale.—La Fevre v. Laraway, 22 Barb. 167.

[l] (N. C. 1890) Though the purchase money for land ordered to be sold by a commissioner was not paid before the commissioner gave a deed, as required by the order, yet, as the court acted on the supposition that it had been paid, and gave judgment disposing of the funds, the error, if any, was fraud, and not a mistake which would authorize a motion to set aside the proceedings.—Smith v. Fort, 105 N. C. 446, 10 S. E. 914.

[m] (Ohio, 1883) Where a purchaser at a judicial sale has mistaken the identity of the property to be sold, supposing it to be the next-door house, and sends his agent to bid under that supposition, and receives the property, he will be released from his purchase on payment of costs.—Fallis v. Loughhead (Super. Ct. Cin.) 11 Wkly. Law Bul. 56, 9 Ohio Dec. 128.

[n] (S. C. 1830) It is not a sufficient ground for setting aside a judicial sale that one of the parties interested intended to bid higher, but was prevented by a mistake from doing so, if neither the commissioner nor purchaser contributed to the mistake, and the sale was fair and regularly conducted.—Young v. Teague, 1 Bailey, Eq. 13.

[o] (Tenn. 1869) Mere mistake or error in computing the amount of the purchase money of land sold under an order of court is not a ground for declaring the sale a nullity, in the absence of any allegation of fraud.—Cowan v. Anderson, 47 Tenn. (7 Cold.) 284.

§ 77. Inadequacy of price.

Inadequacy of price in connection with other objections as ground for vacation of sale, see post, § 78.

Restraining purchaser from taking title to property on account of inadequacy of price, see post, § 119 [a].

[a] In the absence of any showing of fraud or irregularity, mere inadequacy of price will not justify the court in setting aside a judicial sale.

—(Ark. 1859) Brittin v. Handy, 20 Ark. 381, 73 Am. Dec. 497; (1884) Fry v. Street, 44 Ark. 502; (1892) Nix v. Draughon, 56 Ark. 240, 19 S. W. 669;
(Colo. 1890) Conway v. John, 14 Colo. 30, 23 Pac. 170;
(Ill. 1868) McMullen v. Gable, 47 Ill. 67; (1868) Comstock v. Purple, 49 Ill. 158; (1869) Duncan v. Sanders, 50 Ill. 475; (1878) O'Callaghan v. O'Callaghan, 91 Ill. 228;
(Ind. 1853) Benton v. Shreeve, 4 Ind. 66; (1861) Sowle v. Champion, 16 Ind. 165;
(Ky. 1888) Harris v. Gunnell, 9 S. W. 376; (1893) Passmore v. Moore, 22 S. W. 325;
(Md. 1847) Cohen v. Wagner, 6 Gill, 236; (1847) Gibbs v. Cunningham, 1 Md. Ch. 44; (1848) Johnson v. Dorsey, 7 Gill, 269; (1848) Hintze v. Stingel, 1 Md. Ch. 283; (1853) House v. Walker, 4 Md. Ch. 62;
(Mo. 1872) Wagner v. Phillips, 51 Mo. 117;
(N. J. 1856) Eberhart v. Gilchrist, 11 N. J. Eq. (3 Stockt.) 167; (1866) Marlatt v. Warwick, 18 N. J. Eq. (3 C. E. Green) 108;
(N. Y. 1830) Duncan v. Dodd, 2 Paige, 99;
(S. C. 1843) White v. Floyd, Speers, Eq. 351;
(Tenn. 1880) Myers v. James, 72 Tenn. (4 Lea) 370;
(Tex. 1879) Agricultural, Mechanical & Blood-Stock Ass'n v. Brewster, 51 Tex. 257; (1889) McKennon v. McGown (Sup.) 11 S. W. 532;

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(Va. 1893) Harman v. Copenhaven, 89 Va. 836, 17 S. E. 482.

CONTRA, see

(Ala. 1876) Cockrell v. Coleman's Adm'r, 55 Ala. 583;

(Md. 1847) Cohen v. Wagner, 6 Gill, 236;

(N. C. 1869) Wood v. Parker, 63 N. C. 379;

(W. Va. 1876) Kable v. Mitchell, 9 W. Va. 492; (1878) Hartley v. Roffe, 12 W. Va. 401; (1881) Beaty v. Veon, 18 W. Va. 291; (1882) Hughes v. Hamilton, 19 W. Va. 366.

[b] (U. S. 1892) Where a sale has been made after prolonged litigation it will not be set aside on the ground that it was ordered at a time of financial depression in the particular industry, when it appears that it was once postponed on this ground at the instance of the complaining party, and there are controverting affidavits which render the fact of depression doubtful.—Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; Marcus v. Same, Id.

[c] (U. S. 1890) The mere fact that the receiver, on taking possession, inventoried the property at a sum considerably greater than that fixed by the appraisers on a judicial sale thereof eight years afterwards, is not a ground for setting aside the sale for inadequacy of price.—Lake Superior Iron Co. v. Brown, Bonnell & Co. (C. C.) 44 Fed. 539.

[d] (U. S. 1893) Expression of a well-founded opinion by a witness that property would, on resale, bring a much higher price, is not sufficient ground for setting aside a judicial sale.—Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co. (C. C.) 54 Fed. 26.

[e] (Ala. 1852) A court will never permit its process to be improperly used to work injustice or oppression. If such use be made of it, the court will, by virtue of its power over its officers, suitors, and counsel, rectify the abuse. Thus, where property worth $1,000 was sold at judicial sale for $6, it was *held* to be the duty of the court to set aside the sale.—Lankford v. Jackson, 21 Ala. 650.

[f] (Ill. 1873) The fact that land worth $3,500 was sold for $385, subject to redemption, in the absence of any showing of unfairness in the sale or of bad faith in the purchaser, *held* to be insufficient ground for setting aside the sale.—Watt v. McGalliard, 67 Ill. 513.

[g] (Ind. 1861) The existence of subsequent judgment liens on land judicially sold is not a material circumstance to set aside the sale for inadequacy of price, for these liens are not constructive notice to the purchaser.—Sowle v. Champion, 16 Ind. 165.

[h] (Ky. 1890) Where land sold under a decree is appraised and sold for two-thirds of its value, and a report of the sale filed and confirmed, the sale will not be set aside upon a showing by affidavits that the land was sold for less than its actual value, where no advance bid, or offer to pay the debt, has been made.—Byrne v. Henderson, 13 S. W. 909.

[i] (Md. 1847) Where a sale reported was of a private sale, made for a much larger sum than could be obtained at an offer at public sale duly made by a trustee, inadequacy of price is no objection to the private sale.—Cunningham v. Schley, 6 Gill, 207.

[j] (Md. 1847) An event which happens subsequently to a reported sale, and which, in the opinion of many persons, has enhanced the value of the property sold, ought not to affect such reported sale.—Cunningham v. Schley, 6 Gill, 207.

[k] (Md. 1847) A fair sale of property for $13,000, alleged to be worth $15,000 or $20,000, will not be vacated.—Cohen v. Wagner, 6 Gill, 236.

[l] (Md. 1847) Where a judicial sale is objected to on the ground of inadequacy of price, and it appears that the inadequacy was caused by doubts concerning the title, which no diligence on the part of the officer could remove, the sale will not be set aside.—Cunningham v. Schley, 6 Gill, 207; Gibbs v. Cunningham, 1 Md. Ch. 44.

[m] (Md. 1848) The land in this case sold for $12,422.25. *Held*, that the court would not be authorized to vacate the sale upon the single ground of inadequacy of price, even assuming the property to be worth $20,000, the estimate placed upon it by the exceptant.—Johnson v. Dorsey, 7 Gill, 269.

[n] (N. J. 1889) Where a judicial sale has been conducted in exact compliance with the law governing such sales, and the land has been sold to the highest bidder, without collusion, accident, or mistake, the sale will not be set aside on the ground that a greater price would be obtained by a resale, especially where the expected increase amounts to only about 10 per cent. of the price obtained.—Morrisse v. Inglis, 46 N. J. Eq. (1 Dick.) 306, 19 Atl. 16.

[o] (N. J. 1891) A judicial sale of property for $4,000 will not be set aside, on the ground of inadequacy of price, on the testimony of three persons that they valued it at $5,000 and were willing to pay that sum for it, where it appears that such persons were well acquainted with the property and knew it was to be in the market for sale, but failed to attend.—Fiske v. Weigel (Ch.) 21 Atl. 452.

[p] (N. Y. 1839) Where a purchase at a master's sale is fair and free from fraud, a resale will not be ordered because of inadequacy of price, or to allow a second mortgagee to purchase at such sale, where the purchaser has acquired a subsequent lien which will be periled by a resale.—Gardiner v. Schermerhorn, 1 Clarke, Ch. 101.

[q] (N. Y. 1845) A court of chancery cannot set aside a public sale made by an officer, who is not acting under the direction of the court, on the ground of inadequacy of the sum paid by the purchaser, however gross or startling it may be.—March v. Ludlum, 3 Sandf. Ch. 35.

[r] (N. C. 1853) Leave to open the biddings at a judicial sale on the ground of inadequacy of price will not be granted after the lapse of a year, in the absence of an allegation of fraud.—Ashbee v. Cowell, 45 N. C. 158.

[s] (Ohio, 1878) Where it appears from affidavits that property sold at judicial sale was valued at $16,000, but was bought at the sale for $7,000, the sale will be set aside.—Banning v. Pendery, 4 Wkly. Law Bul. 913.

[t] (Tex. 1878) Where lands are sold for 28 cents per acre, and they are worth from $2 to $5 per acre, the sale should be set aside.—Hardin v. Smith, 49 Tex. 420.

[u] (Va. 1877) Code 1873, c. 174, § 4, provides that where, at judicial sales, land does not bring at the first and second exposure to sale three-fourths of the last official assessment made for the purpose of taxation, it shall not be sold. *Held*, that it was error to set aside a judicial sale of land at a price but little more than 8 per cent. below the assessed value.—Curtis v. Thompson, 29 Grat. 474.

[v] (Va. 1883) That a purchaser at a judicial sale has made a good bargain is no reason for setting aside the sale.—Langyher v. Patterson, 77 Va. 470.

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[w] (Va. 1891) The confirmation of a judicial sale for about $4,000 will not be vacated on the ground that the price was grossly inadequate, when, on two prior sales within two years preceding such sale the land, after wide advertisements, brought $1,560 and $2,650, respectively, and the purchaser at the last sale agreed to sell the land to a third person for $5,000.—Allison v. Allison, 88 Va. 328, 13 S. E. 549.

[ww] (W. Va. 1871) A sale of 1,700 acres of land for less than $5,000 was set aside for inadequacy of price, upon affidavits of 10 persons that the actual value was twice or thrice that sum.—Sinnett v. Cralle's Adm'r, 4 W. Va. 600.

[x] (W. Va. 1882) A decree ordering a sale of land failed to fix the amounts and priorities of the various liens thereon, whereby the land brought less than otherwise would have been the case. *Held*, that the court was justified in refusing to confirm the sale.—Trimble v. Herold, 20 W. Va. 602.

[xx] (W. Va. 1882) Three sales under a decree were successively set aside,—the first for inadequacy of price, the second because of a cloud on the title, and the third on an upset bid. *Held*, that the fourth sale would not be set aside for mere inadequacy of price.—Trimble v. Herold, 20 W. Va. 602.

[y] (W. Va. 1887) It is proper to refuse to set aside a sale for inadequacy of price where there had been two sales of the property,—one under a deed of trust, and the other at a judicial sale,—made not far from each other in point of time, both at $2,000, and affidavits were filed, stating that the property was worth, at that time, from $3,000 to $3,500, and "affiants believed that in the near future said property could be sold for an advance of from $500 to $1,000 over the price of $2,000," and another affidavit showed it sold for a fair price.—Moran v. Clark, 30 W. Va. 358, 4 S. E. 303, 8 Am. St. Rep. 66.

[z] (W. Va. 1892) A judicial sale may be set aside before confirmation for gross inadequacy of price, but, if it be attempted to establish this by parol evidence only, the proof must be very clear, especially if a great length of time elapsed between the sale and its confirmation, and during this time no advance bid has been made to the court.—Cornell v. Wilhelm, 15 S. E. 245.

§ 78. Inadequacy of price in connection with other objections.

Inadequacy of price in general as ground for vacation or setting aside of sale, see ante, § 77.

[a] While mere inadequacy of price is not sufficient of itself to set aside a judicial sale, yet, where the inadequacy is gross, slight additional circumstances only are required to authorize setting it aside; and where defendant, by casualty or misfortune, has been prevented from appearing in the action, and preventing a sacrifice of the property, it should be set aside.
—(U. S. 1896) Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721;
(Ky. 1887) Bean v. Hoffendörfer, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138.

[b] Mere inadequacy of price will have its weight, where there are other grounds for setting aside a judicial sale.
—(Ind. 1853) Benton v. Shreeve, 4 Ind. 66;
(Md. 1839) Glenn v. Clapp, 11 Gill & J. 1.

[c] (Ala. 1873) A showing that bystanders were prevented from bidding at a judicial sale of lands by irregularities committed by the sheriff in conducting the sale, and that the lands were bid in at a grossly inadequate price, is sufficient to require the setting aside of such sale on motion.—Hurt v. Nave's Adm'r, 49 Ala. 459.

[d] (Ill. 1865) Where land is sold by order of the court of chancery under a will, inadequacy of price may be considered, with other evidence, on the question of confirming the sale.—Sowards v. Pritchett, 37 Ill. 517.

[e] (Kan. 1896) Where interested parties attack the title of property offered at a judicial sale, in such a way as to deter bidders and depress values, and where the price paid for the property is greatly inadequate, the sale should be set aside.—Wood v. Drury, 56 Kan. 409, 43 Pac. 763.

[f] (Ky. 1842) When property has been sold by a commissioner under a decree at a very inadequate price, insufficient to satisfy the debt, and is bought by complainant's counsel, and the commissioner has not used proper efforts to obtain the best price, it is no reason to refuse to set aside the sale that the purchaser has agreed to satisfy the decree in favor of his client.—Busey v. Hardin, 41 Ky. (2 B. Mon.) 407.

[g] (Ky. 1864) Where a commissioner appointed to sell land to satisfy a judgment failed to advertise the sale in the manner directed, and the land was sold for less than its real value, it was error to confirm such sale.—Williams v. Woodruff, 62 Ky. (1 Duv.) 257.

[h] (Ky. 1887) Even if it be a true rule that, when time is allowed to redeem land sold at judicial sale, mere inadequacy of price is no ground of exception to the sale, yet the rule does not apply where two lots are improperly sold, when either may be worth, and at a fair sale would bring, more than enough to satisfy the judgment, leaving the other lot unincumbered.—Bean v. Hoffendorfer, 84 Ky. 685, 3 S. W. 138.

[i] (Ky. 1888) When the judgment ordering the sale directs that notice be posted at the court house door, and at three or more public places near the land, and the commissioner states in his report that notice has been given as required, but when called as a witness states that he posted a notice at the court house, and sent copies to be posted near the land, but does not know whether they were received, and it is not shown that they were all posted, and it appears that the owner did not know of the sale until shortly before he moved to set it aside, and that the land did not bring its fair value, it is proper to order a resale.—Harris v. Gunnell, 9 S. W. 376.

[j] (Ky. 1889) Under Code, § 694, requiring property to be sold in parcels when it can be done without injury to the property, where the court orders a sale, without directing a sale in parcels, and on exceptions to the confirmation it appears that the land did not bring its full value, the court should set aside the sale and order, and direct a resale. Such an order is not an erroneous judgment merely, but an error as to the manner of sale over which the court has control until after confirmation.—Vanmeter v. Vanmeter's Assignee, 88 Ky. 448, 11 S. W. 80, 289.

[k] (Ky. 1892) Gen. St. c. 75, p. 942, prohibits any master commissioner from acting as such in any case in which he is or shall become interested as attorney or otherwise. *Held*, that a sale of land, made by the attorney who obtained the judgment on which it was based, as special commissioner, will be set aside on exceptions of the debtor showing that the sale was made for an inadequate price, though the commissioner, after his appointment, renounced his employment as attorney, and there is

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no allegation that he acted in bad faith.—Adkinson v. Ransdall, 93 Ky. 310, 20 S. W. 199, 14 Ky. Law Rep. 258.

[l] (Ky. 1895) A commissioner's sale of a debtor's residence, appraised at $4,000, to the debtor's wife, for $2,700, will not be set aside because persons would not bid against her, knowing the family were distressed over the debtor's failure, and sympathized with them.—Alms & Doepke Co. v. Gates, 32 S. W. 1088.

[m] (Md. 1856) Where the advertisement of a judicial sale did not sufficiently describe the property, and the property was sold for less than its value, the sale will be set aside.—Kauffman v. Walker, 9 Md. 229.

[n] (Md. 1882) Land was ordered to be sold at public sale; but, a satisfactory bid not being obtained, it was sold at private sale. It appeared that the price agreed upon was considerably below the value of the land, that a higher price had been offered subsequently, and the trustee himself thought that more could be obtained at public sale. *Held*, that the sale would not be ratified.—Kelso v. Jessop, 59 Md. 114.

[o] (Md. 1895) The failure of the trustee to advertise the sale as required by the decree, coupled with the fact that the land was sold for much less than its real value, authorizes the court to set aside the sale, as against the purchaser.—Conroy v. Carroll, 82 Md. 127, 33 Atl. 423.

[p] (Miss. 1871) When, upon the sale of land under a decree in equity, the defendant conspires with a third party to bring on the sale without the knowledge of the complainant, whereby such third party is enabled to buy the property at a grossly inadequate price, the chancellor is justified in setting aside such sale.—Pattison v. Josselyn, 43 Miss. 373.

[q] (N. J. 1856) Though mere inadequacy of price is not sufficient to vacate a judicial sale, yet, when coupled with some mistake or accident beyond the control of the injured party, the sale may be vacated.—Eberhart v. Gilchrist, 11 N. J. Eq. (3 Stockt.) 167.

[r] (N. J. 1893) Where several tracts of land, worth in the aggregate at least $2,500, are sold in a lump, and in the absence of the parties interested, for $50, the inadequacy of the price is so great as to shock the conscience, and warrant the court in setting aside the sale.—Daly v. Ely, 51 N. J. Eq. (6 Dick.) 104, 26 Atl. 263.

[s] (N. Y. 1845) A court of chancery cannot set aside a public sale regularly made by an officer not acting under the direction of this court, notwithstanding the price was grossly inadequate and the party chiefly interested did not know that it was to take place.—March v. Ludlum, 3 Sandf. Ch. 35.

[t] (N. Y. 1862) Surprise and gross inadequacy of price are sufficient grounds for setting aside a judicial sale of real estate, upon fully indemnifying the purchaser.—Griffith v. Hadley, 23 N. Y. Super. Ct. (10 Bosw.) 587.

[u] (N. Y. 1863) The court will interfere to set aside a judicial sale for an inadequate price, where there was accident and surprise on one side, and advantage taken of it on the other.—Gould v. Gager, 24 How. Prac. 440, 18 Abb. Prac. 32.

[v] (Pa. 1874) Plaintiff in proceedings resulting in a judicial sale himself conducted the sale and represented to the bidders present on the first day that the proposed sale was without legal authority and would vest no title in the purchaser. The truth was merely that he was not authorized to sell on that particular day. On the second day of the sale the plaintiff knocked down the property to himself for $20, though it was worth about $1,500. *Held*, that the sale was void, and would be set aside since his representation on the first day would have the effect of deterring bidders from attending the further offer of the property.—Brotherline v. Swires, 81 Leg. Int. 325.

[w] (Tenn. 1870) That the price was grossly inadequate; that the parties interested did not attend the sale, one because he was attending on a sick member of his family, and the other because he had no notice; that the property was sold at the court house, when it would have brought a better price on the premises; and that it was sold without notice in the proper newspapers,—are reasons which will support an application to set aside a judicial sale before confirmation.—Newland v. Gaines, 48 Tenn. (1 Heisk.) 720.

[x] (Va. 1873) A judicial sale of land will be set aside, where it appears that the land was sacrificed, that one of the commissioners to sell was interested in the purchase, that a material advance was offered by a substantial bidder, and there was no memorandum of the sale.—Teel v. Yancey, 23 Grat. 691.

[y] (W. Va. 1877) At a judicial sale R. became the purchaser of a tract of 100 acres of land at $26 per acre. Affidavits in the cause, which were uncontradicted, showed that the land was worth at least $40 per acre. There was a misunderstanding as to whether or not the growing crop on the land was being sold with it. The auctioneer either bid himself, or received sham bids. *Held*, that under these circumstances the sale was invalid and ought not to have been confirmed.—Hilleary v. Thompson, 11 W. Va. 113.

[z] (Wis. 1859) A sale under order of the court, where the complainant, being the only bidder present, purchases for a price grossly inadequate, will not be sustained.—Pierce v. Kneeland, 7 Wis. 224.

§ 79. Advance on bid.

[a] As it is the duty of the court to see that property sold at a chancery sale be sold for the best price that can be had, it is allowable to open the biddings merely upon the offer of a higher price, if the advance is sufficient to furnish an inducement, under all the circumstances, for a resale of the property.

—(Pa. 1881) Church v. Bailee, 2 Leg. Rec. Rep. 169, 29 Pittsb. Leg. J. 20;
(Tenn. 1872) Atkison v. Murfree, 1 Tenn. Ch. 51; (1873) Wilson v. Shields, 62 Tenn. (3 Baxt.) 65;
(W. Va. 1885) Stewart v. Stewart, 27 W. Va. 167.

CONTRA, see
(Ky. 1888) Harris v. Gunnell, 9 S. W. 376;
(Tenn. 1858) Houston v. Aycock, 37 Tenn. (5 Sneed) 406, 73 Am. Dec. 131; (1860) Coffin v. Corruth, 41 Tenn. (1 Cold.) 194; (1867) Johnson v. Quarles, 44 Tenn. (4 Cold.) 615.

[b] The practice of setting aside sales merely for the sake of an advance on the price has not been adopted in this country.

—(Ark. 1859) Penn's Adm'r v. Tolleson, 20 Ark. 652;
(Md. 1830) Andrews v. Scotton, 2 Bland, 629; (1847) Cohen v. Wagner, 6 Gill, 236.

[c] Bidding at a master's sale may be opened a second time, before confirmation, at the instance of the original purchaser, upon an advance of 10 per cent. and a satisfactory excuse for not bidding before the master.

—(Pa. 1881) Church v. Bailee, 2 Leg. Rec. Rep. 169, 29 Pittsb. Leg. J. 20;

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(Tenn. 1877) Vaughn v. Smith, 3 Tenn. Ch. 368.

CONTRA, see

(Tenn. 1878) Atchison v. Murfree, 3 Tenn. Ch. 728.

[d] (U. S. 1892) A master's sale of a mine having been set for Saturday, January 24th, the master received, on the night of the 23d, a telegram from a stranger in a distant city, requesting a postponement, at his expense, saying that he was a large stockholder; that he had but just received notice of the sale, and wished to bid, but was a Jew, and could do no business on Saturday. The mine was sold for $710,000, and two days later the stranger telegraphed offering $720,000. The sale was confirmed on March 2d, and on the following day the stranger filed an intervening petition to set it aside, setting up these facts, offering to pay the expenses of a resale, and to bid $900,000. *Held*, that the master properly ignored the telegrams; that it was the stranger's duty to intervene before confirmation; and that, as the selling price was not grossly inadequate, the sale should not be set aside.—Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; Marcus v. Same, Id.

[e] (U. S. 1880) Under equity rule 19, adopting the practice of England so far as it is consistent with "our local circumstances and conveniences," a third person can intervene and have a sale set aside, upon offering a sufficient advance in price and paying all the expenses incurred by the previous purchaser.—Blackburn v. Selma R. Co. (C. C.) 3 Fed. 689.

[f] (U. S. 1880) On application to set aside a sale on the offering of an advanced bid on the price, it is essential that such advanced bid be absolute and unconditional.—Blackburn v. Selma R. Co. (C. C.) 3 Fed. 689.

[g] (U. S. 1880) Under the nineteenth rule of equity, permitting one who offers an advanced bid to have a judicial sale set aside, it seems that the advanced bid should so exceed the bid price at the sale as to afford substantial evidence that the property was undersold and the buyer gained, not only a fair margin of profit, but an unconscionable advantage over the party for whose benefit the sale was made.—Blackburn v. Selma R. Co. (C. C.) 3 Fed. 689.

[h] (U. S. 1880) In an application to set aside a judicial sale upon the ground of gross inadequacy of price, it is not essential that the amount of the advance bid should be actually paid into court.—Blackburn v. Selma R. Co. (C. C.) 3 Fed. 689.

[i] (U. S. 1880) Where application has been made to set aside a sale on the offering of an advanced bid, the first purchaser is entitled to increase his bid in open court to the amount of the advanced bid and claim a preference; but such preference cannot be extended on a still further advance of the bid.—Blackburn v. Selma R. Co. (C. C.) 3 Fed. 689.

[j] (Ky. 1889) Land was sold by a commissioner under a decree and order of sale which were regular, and the sale was in accordance with the order. The price obtained was three-fourths of the admitted value of the land, which, being unsusceptible of division, was sold as a whole. The report of sale was confirmed without exceptions. The judgment debtors moved at the same term to set aside the sale, assigning as their sole ground that they were nonresidents, and that they failed to receive their attorney's letter advising them of the sale until it was too late to be represented by a bidder, and tendered an advance bid of $100. It did not appear that the debtors had been proceeded against as nonresidents, and their own attorney represented them in the case. *Held*, that it was error to set aside the confirmation, and order a resale.—Lawson v. Hill, 11 S. W. 606.

[k] (Ky. 1891) Land having been sold under a decree of court for $5,650, the sale will not be set aside on an offer of an advance of $1,800 made by a party to the suit, who did not ascertain that a sale had been ordered, "because he was too much engaged in his private affairs to attend to his interest in the suit or to make inquiry about it."—Beam v. Johnson, 16 S. W. 140.

[l] (Ky. 1895) A debtor's residence, appraised at $4,000, but claimed by the creditors to be worth much more, was sold at commissioner's sale to the debtor's wife for $2,700. The creditors had knowledge of, and their attorneys were present at, the sale, and they were not prevented from bidding by fraud, mistake, or surprise. *Held*, that the sale would not be set aside at the instance of such creditors for inadequacy of price, on their offering to pay $3,500 for the property.—Alms & Doepke Co. v. Gates, 32 S. W 1088.

[m] (Md. 1847) Where a sale was made for $3,000, it was *held* that an offer of $4,000, made subsequently to the sale, and after the value of the property had been enhanced, could have but little weight in determining whether the property was previously sold at a price so much below its value as to indicate a want of reasonable judgment in the trustee.—Gibbs v. Cunningham, 1 Md. Ch. 44.

[n] (N. J. 1891) A master's sale will not be set aside on the ground of mistake and inadequacy of price, because of the subsequent offer of petitioner to give more than the price at which it was sold.—Fiske v. Weigel (Ch.) 21 Atl. 452.

[o] (N. Y. 1856) Upon a sale in chancery in this state, a resale will not be ordered, either before or after the confirmation of the report of sale, upon an offer of an increased price alone. Special circumstances must in all cases exist, where the sale is not void, to justify an order for a resale.—Le Fevre v. Laraway, 22 Barb. 167.

[p] (N. Y. 1877) Where property has been sold at a judicial sale, the court will not, when the sale has been well advertised and a large attendance of buyers secured, and there has been no surprise, misunderstanding, or fraud, and no binding offer from any responsible party to pay a large sum upon a resale, refuse to confirm such sale merely because some persons say they will pay a larger price hereafter, especially when such an opportunity has been fairly afforded and refused.—People v. Bond St. Sav. Bank, 53 How. Prac. 336.

[q] (N. C. 1879) A judicial sale set aside, and a resale had to the owner, at his advance bid of 10 per cent.; he having been prevented from attending by the inclemency of the weather.—Pritchard v. Askew, 80 N. C. 86.

[r] (N. C. 1882) Though the court looks with jealousy upon the application of one who was a bidder at a judicial sale to reopen the biddings, yet the advance price offered by him will be taken as a compensation for any loss that may have arisen from a want of competition at the sale.—State v. Roanoke Nav. Co., 86 N. C. 408.

[rr] (N. C. 1883) A judicial sale will be confirmed where the price is adequate, unless before confirmation an increase of 10 per cent. is bid.—Vass v. Arrington, 89 N. C. 10.

[s] (N. C. 1885) On a showing that advanced bids had been made after a sale of land by order of court, the court may order a resale.—Hinson v. Adrian, 92 N. C. 121.

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[ss] (N. C. 1885) Where a consent order directs a sale, the mere fact that after the sale an advance of 10 per cent. is offered does not require that the bidding should be opened.—Vaughan v. Gooch, 92 N. C. 524.

[t] (N. C. 1887) Under the state practice, an advanced bid of 10 per cent. before confirmation is, when properly secured, sufficient ground for reopening the biddings in commissioner's sale of land.—Dula v. Seagle, 98 N. C. 458, 4 S. E. 549.

[tt] (Pa. 1881) A sale of real estate by a master in chancery will be set aside, and the biddings reopened, if, before confirmation, a higher price is offered; but the biddings will not be so opened, except upon a reasonable advance and payment of the bidder's expenses.—Church v. Bailee, 2 Leg. Rec. Rep. 169, 29 Pittsb. Leg. J. 20.

[ttt] (Pa. 1898) An orphan's court sale of 119 acres of real estate, at $65 per acre, will be set aside for inadequacy of price, on exceptions, accompanied by a bond to bid $75 per acre at a resale.—In re Herr's Estate (Orph. Ct.) 12 Pa. Co. Ct. R. 622.

[u] (S. C. 1830) The English practice of opening the bidding on an offer of an advance at any time before the confirmation of a judicial sale does not apply to sales by commissioners in South Carolina, where such commissioners are authorized to complete the contract by executing a conveyance to the purchaser.—Young v. Teague, 1 Bailey, Eq. 13.

[uu] (Tenn. 1852) The report of a master of the sale of land not being confirmed, it is competent for the court on the petition of a creditor to open the biddings; it being shown to the satisfaction of the court that the land was sold for a price much below its value, and was purchased with a view to favor the debtor, provided the petitioning creditor will agree to advance on the amount bid such sum as may, in the estimation of the court, authorize the biddings to be opened.—Childress v. Hurt, 32 Tenn. (2 Swan) 487.

[v] (Tenn. 1874) A court of chancery, upon the master's reporting a subsequent written bid in advance of the highest at the sale, may decree that the advanced bid be confirmed, and that, if the bidder fails to comply with the terms, the land be resold, and he charged with the deficit thereon, if any.—Allen v. East, 63 Tenn. (4 Baxt.) 308.

[vv] (Tenn. 1877) After confirmation of a resale, the biddings will not again be opened at the instance of the owner, who was present at the resale, upon a mere offer of an advance of 10 per cent. on the previous bid.—Bradford v. Hamilton, 3 Tenn. Ch. 344.

[vvv] (Tenn. 1878) Where the court orders a resale of land by a master, and it appears that since the first sale a dispute has arisen as to the title, and an action of ejectment is pending against the purchaser thereat, it is not proper for the court to entertain a proposition that, "if the court will open the biddings and settle the title of said property, I hereby guaranty an advance of 10 per cent. on the sale now reported, and will secure the same."—Lucas v. Moore, 70 Tenn. (2 Lea) 1.

[w] (Tenn. 1880) The court will open the biddings, against the objection of the purchaser of land sold under order of court to settle an estate, if an advance of nearly 100 per cent. is offered, and will change the terms from cash to a credit of one, two, and three years; no creditor objecting, and the contest being between the heirs and the purchaser only.—Reese v. Copeland, 74 Tenn. (6 Lea) 190.

[ww] (Tenn. 1882) Where a clerk and master has made a sale of land under a chancery decree, but before its confirmation the bid is raised, the court may, in its discretion, open the biddings, and receive any bids offered, rather than sell over again after public notice.—Dupuy v. Gorman, 77 Tenn. (9 Lea) 144.

[x] (Va. 1879) Under a decree of court, commissioners sold land at public auction at a fair price to the agent of three parties, with the understanding that each wanted certain parts of the land, as it was situated contiguous to their other lands, and that each should comply with the terms of the sale for his respective part. Another party then presented a petition offering a higher bid, with sureties to make it good. *Held*, that it was within the discretion of the court to reopen the bidding, but that a fair sale would never be set aside, especially when there was reason to believe that the higher offer was made out of malice.—Roudabush v. Miller, 32 Grat. 454.

[xx] (Va. 1882) No fixed rule can be laid down as to the amount of an upset bid which will cause the court to set aside a judicial sale. Confirmation must depend upon the circumstances of each particular case.—Hansucker v. Walker, 76 Va. 753.

[y] (Va. 1887) Where the court refuses to accept an advance bid of 30 per cent. of the price for which certain land sold, and confirms the sale, the decree will be reversed, and a resale ordered.—Withers v. Coles' Ex'r, 83 Va. 525, 5 S. E. 673.

[yy] (Va. 1888) Where land has been sold under a decree in a creditors' suit, and reported to the court the same day as sold to the highest bidder for $10,000, whereupon a third person asks to put in an upset bid of 10 per cent. advance, the upset bid should be allowed, the bidding being open again to all.—Todd v. Gallego Mills Mfg. Co., 84 Va. 586, 5 S. E. 676; Ewald v. Crockett, 85 Va. 299, 7 S. E. 386.

[z] (Va. 1888) Where land was sold under a decree for $10,000, and a third person asked to be allowed to put in an upset bid of 10 per cent. advance, and the former bidder did not ask leave to withdraw his bid, it was proper to allow 20 days for perfecting the upset bid by depositing money and furnishing bonds.—Ewald v. Crockett, 85 Va. 299, 7 S. E. 386.

§ 80. Application and proceedings thereon.

Actions to set aside, see post, § 83.

Failure to give notice of setting aside of sale as ground for relief against resale, see ante, § 50 [v].

[a] A judicial sale should not be set aside against a purchaser who has complied with the conditions on a mere motion, but the complainant should be left to his remedy by suit.—(N. C. 1853) Ashbee v. Cowell, 45 N. C. 158; (S. C. 1876) Orr v. Orr, 7 S. C. (7 Rich.) 381.

[b] (Ala. 1886) Where a party to an action resulting in a judicial sale of property complains of fraud perpetrated at the sale, whereby a less price was realized than might have been obtained, he may have relief by a motion to set aside the sale.—Phillips v. Benson, 82 Ala. 500, 2 South. 93.

[c, d] (Ill. 1876) Notice of any motion to set aside a judicial sale must be given to the purchaser, but need not be given to an assignee of the certificate of sale. He stands in the position of the purchaser, and is subject to whatever may be ordered against him.—Roberts v. Clelland, 82 Ill. 538.

[e] (Iowa, 1856) A record that an application to set aside a judicial sale "was signed by counsel" does not show either notice to or appear-

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ance by the opposite party.—Wright v. Leclaire, 8 Iowa (8 Clarke) 221.

[f] (Neb. 1878) In an equity cause, as in an action of law, if a party desires to oppose the confirmation of a sale of real estate, he must file a motion in the district court, setting forth the ground upon which he seeks to set the sale aside.—Parrat v. Neligh, 7 Neb. 456.

[g] (N. C. 1890) A motion was made informally ore tenus to set aside a sale of land by a commissioner, for fraud in the deed and judgment. New parties were brought in on notice. No pleadings were filed alleging the grounds of the motion or a cause of action, and there was no answer or demurrer to the supposed petition. *Held*, that it was error to treat the motion as a new action brought, and, though no exception was taken thereto, the supreme court will, ex mero motu, take notice of it, and reverse the ruling.—Smith v. Fort, 105 N. C. 446, 10 S. E. 914.

[h] (N. C. 1890) In a suit for specific performance of a contract for sale of land, judgment was rendered for plaintiffs for rents, etc., and judgment was rendered against plaintiff for the balance of the purchase money on the land. A commissioner was appointed to sell the land, and afterwards reported it sold. Judgment was then rendered that the amount due plaintiff be paid; that fees and costs of suit be paid; and that the balance be paid into court, or bond given for the proper disposition thereof. *Held*, that the judgment was a final one, and the sale could only be set aside for fraud on new action brought, and not on motion.—Smith v. Fort, 105 N. C. 446, 10 S. E. 914.

[i, j] (Va. 1857) When application is made to set aside a chancery sale, it is not necessary to ask that the biddings may be begun at a substantial advance on the price reported.—Roberts v. Roberts, 13 Grat. 639, 70 Am. Dec. 435.

[k] (W. Va. 1886) A bill by proper allegations should show on its face that proper parties are made to the suit, and if it demands to have set aside a sale made under a decree in another suit, which is ended, for fraud or other reasons, and that a resale should be made, and the proceeds distributed among those entitled, so much of the substance of such suit and the decrees in it as will fully show its character and objects and the parties interested in the suit and proceeds of the sale, if made by the court, should be set out, so as to give the court definite information as to these matters.—McKay v. McKay, 28 W. Va. 514.

§ 81. —— Time of application and laches.

[a] (Ala. 1890) In the absence of excuse for the delay, a motion to set aside a judicial sale of lands made 13 years after the sale, will not be entertained, though the purchasers have never obtained possession, and though a suit instituted by them for possession 11 years after the sale has never been brought to trial. Qualifying Abercrombie v. Conner (1846) 10 Ala. 293.—Powder v. Cheeves, 90 Ala. 117, 7 South. 512.

[b] (Iowa, 1864) Acquiescence in a judicial sale may be inferred from delay, but not where no intervening rights have attached, and the purchaser, who moves to have it set aside, did not know the state of the title.—Chambers v. Cochran, 18 Iowa, 159.

[c] (Miss. 1852) Where a commissioner's sale has been confirmed by the chancery court, it is too late to apply at a subsequent term to set it aside for any causes which existed at the time of the confirmation, and which were known to the party, or which by reasonable diligence he might have ascertained, unless fraud or inevitable accident prevented him.—Henderson v. Herrod, 23 Miss. (1 Cushm.) 434.

[d] (Pa. 1847) A decree to set aside a sale made under order of court, five years after its confirmation, is void.—Lockhart v. John, 7 Pa. (7 Barr) 137.

[e] (S. C. 1886) Where parties know of an illegal combination to chill the bidding at a judicial sale, they cannot, after long acquiescence, have the sale set aside.—Baggott v. Sawyer, 25 S. C. 405.

§ 82. Hearing and determination.

Appealability of order denying application to set aside sale, see "Appeal and Error," vol. 2, c. 1041, § 381 [d]; c. 1369, § 794 [e].

—— *setting aside a purchase at decretal sale, see* "Appeal and Error," vol. 2, c. 843, § 122 [a, f].

—— *vacating sale, see* "Appeal and Error," vol. 2, c. 1369, § 794 [d].

Costs on vacation, see "Costs," vol. 13, c. 292, § 259 [e].

Discretion of court on motion relating to judicial sales, see "Appeal and Error," vol. 2, cc. 1220, 1221, § 592.

[a] (Ill. 1875) A judicial sale will not be set aside by a court of equity without clear and satisfactory proof, especially after the lapse of several years.—Wilson v. Kellogg, 77 Ill. 47.

[b] (Ky. 1869) After a decretal sale of property, a court of equity will not reinstate the owner, on the ground that the purchaser by his fraudulent conduct deterred the bystanders from bidding, unless the proof is of a definite and unquestionable character to establish the fraud and resulting trust.—Crutchfield v. Thurman, 67 Ky. (4 Bush) 498.

[c] (N. Y. 1873) A provision in an order denying relief upon a summary application to set aside a sale, which assumes to limit the rights of the parties to bring an action for relief, either by prescribing terms or limiting the time for the commencement of such an action, is erroneous.—Howell v. Mills, 53 N. Y. 322.

[d] (N. C. 1859) Where a petition for the sale of land, in a court of equity, described one tract as "the mountain tract, containing about 100 acres," a sale was decreed of the lands mentioned in the pleadings, and the sale confirmed. On a bill to set aside the master's deed on the ground of fraud, it was *held* that it would require full and incontestable proof to satisfy the court that only a part of the 100 acres had been intended to be sold by the master.—Adderton v. Surratt, 58 N. C. 119.

[e] (Pa. 1857) On an application to set aside a judicial sale, the applicant will not be confined to matters set out in his affidavit.—Chadwick v. Patterson, 2 Phila. 275.

[f] (Tenn. 1859) If, upon an application to a court of equity by a purchaser of land sold under a decree of court, to set aside the sale, it appear to the court that the sale was merely irregular, but not void, and a confirmation thereof would promote the interests of the parties, some of whom are minors, the purchaser will be compelled to comply with the terms of sale, and his title will be perfected by a divestiture of title.—Swan v. Newman, 40 Tenn. (3 Head) 288.

[g] (Tex. 1884) A purchaser, not made a party to proceedings for the vacation of an order of sale, is not affected by a judgment vacating such order and the sale thereunder.—Burks v. Bennett, 62 Tex. 277.

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[h] (Utah, 1884) Upon an application to set aside a judicial sale made pursuant to and in full compliance with a valid decree of a court directing it, objections to the sale, based upon errors in the decree, or committed by the court anterior to it, cannot be considered.—Meyer v. Utah & P. V. Ry. Co., 3 Pac. 393.

[i] (Va. 1890) A judicial sale of land for $1.50 per acre more than it was assessed for will not be set aside on a petition alleging that it was sold for an inadequate price, and that many bidders were kept away by inclement weather, where the only evidence of inadequacy of price is the opinions of neighbors, and it is not shown that any probable bidder was kept away from the sale except one who was bought off.—Tucker v. Tucker, 86 Va. 679, 10 S. E. 980.

[j] (W. Va.) In sales made by commissioners under decrees and orders of the court, the purchaser who bids off the property, and pays the deposit in good faith, has inchoate rights which entitle him to a hearing upon the question whether the sale shall be set aside.—(1882) Hughes v. Hamilton, 19 W. Va. 366; (1892) Connell v. Wilhelm, 36 W. Va. 598, 15 S. E. 245.

§ 83. Actions to set aside.

Action to annul sale, right to assert new grounds for relief in appellate court, see "Appeal and Error," vol. 2, c. 1590, § 1070, [jj].

[a] (U. S. 1880) Though a motion for vacation of a judicial sale was made too late for the court in which the order was granted to give relief, it does not follow that it is too late for a court of equity to grant such relief as plaintiff is entitled to.—Wills v. Chandler (C. C.) 2 Fed. 273, 1 McCrary, 276.

[b] (Ala. 1882) Where property was sold under a decree against a nonresident within six months, no bond being given by the plaintiff, the facts that such property brought its full value and that the proceeds were applied to the debt on which the decree was founded were no defense to an action to set aside the sale.—Sayre v. Elyton Land Co., 73 Ala. 85.

[c] (Ala. 1882) After an order confirming a sale under a decree in equity has been made, the proper remedy to impeach it or set aside the sale is by an original bill.—Sayre v. Elyton Land Co., 73 Ala. 85.

[d] (Ala. 1882) A proceeding to impeach a judicial sale must be instituted within a reasonable time, and what constitutes a reasonable time depends on the circumstances of the particular case.—Sayre v. Elyton Land Co., 73 Ala. 85.

[e] (Ala. 1886) Since a sale made by a register under the direction of the chancery court is under the control of the court until it has been confirmed, where a party complained of fraud perpetrated at the sale, whereby a less price was realized than might have been obtained, it is not proper for him to file an original bill in a new suit to obtain relief, but his objection should be by motion in the original proceeding.—Phillips v. Benson, 82 Ala. 500, 2 South. 93.

[f] (Ala. 1888) A bill to set aside a judicial sale on the ground that the decree ordering it, though not superseded, had been reversed on appeal, alleged that the solicitor of record of the party in whose favor the decree was rendered was in fact the purchaser. The record showed that the register made a conveyance to B., and reported that B. was the purchaser, and the sale to B. was confirmed. The register testified that T., who bid off the land, told him to make the deed to the solicitor, and call at the bank and get his money. This was denied by both T. and D., who testified that T. bid off the land for D., who paid the register's costs, and had given his note to the solicitor for the purchase money, and that there was no arrangement with the solicitor in regard to the purchase. *Held*, that the sale would not be set aside.—Phillips v. Benson, 85 Ala. 416, 5 South. 78.

[ff] (Ark. 1876) Gantt, Dig. § 4116, which provides that all actions against the purchaser for lands bought at a judicial sale shall be brought within five years, does not apply to a proceeding instituted for the purpose of having a judicial sale of land set aside, and the property resold, or a trust established in the plaintiff's favor, and title to one-half the land vested in him, on account of the fraudulent conduct of the purchaser; for it is not a suit for the recovery of the land, or within the provisions of section 4116 of Gantt's Digest, which provides that all actions against the purchaser for lands bought at judicial sale shall be brought within five years.—Phelps v. Jackson, 31 Ark. 272.

[g] (Fla. 1872) In a suit to set aside as fraudulent a judicial sale in reference to real or personal property, all persons should be made parties who were parties to such proceedings or who claim a present interest in the property.—Howse v. Moody, 14 Fla. 59.

[h] (Ga. 1892) In an action to set aside a judicial sale on the ground of the purchaser's fraud in hiring another not to bid against him, evidence of the amount which the suppressed competitor intended to bid is admissible to show that the fraud was injurious.—Barnes v. Mays, 88 Ga. 696, 16 S. E. 67.

[i] (La.) An action of redhibition is not allowed in judicial sales.—(1824) Boissier's Syndics v. Belair, 3 Mart. (N. S.) 29; (1825) Abat v. Casteres, Id. 220; (1825) Gould v. Bridgers, Id. 692.

[j] (La. 1852) Objection to judicial sale on the ground of invalidity of the judgment under which it was made, because of defect in the citation, cannot be entertained when made for the first time on appeal from a judgment against plaintiff in an action to annul the sale.—Barret v. Emerson, 8 La. Ann. 503.

[k] (La. 1854) Where one deters others from bidding for the property, which is sold to him for a trifling sum, the creditor may sue to annul the sale or hold him liable for the judgment; but he must choose his remedy. He cannot claim both.—Wood v. Hennen, 9 La. Ann. 264.

[l] (La. 1872) Where the purchaser at a judicial sale has paid mortgages against the property, it is necessary, in an action to annul the sale on the ground of irregularities in the proceedings, that a tender be made to the purchaser of the sum so paid.—Barelli v. Gauche, 24 La. Ann. 324.

[m] (La. 1878) The purchaser at a judicial sale is a necessary party to a suit to annul it.—Dowling v. Gally, 30 La. Ann. 328.

[n] (La. 1878) A suit to annul a judicial sale will be dismissed, if plaintiff asks for the proceeds of the sale; the demands being inconsistent.—Dowling v. Gally, 30 La. Ann. 328.

[o] (La. 1887) A real tender is a condition precedent to authorize a suit to rescind a judicial sale. When it is alleged, denied, and not proved, the plaintiff's action must be dismissed.—Farquhar v. Iles, 39 La. Ann. 874, 2 South. 791.

[p] (Miss. 1850) In an action to set aside a judicial sale where the fairness of the sale appears doubtful and suspicious, the burden will

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be upon the purchaser to show the fairness of it.—White v. Trotter, 22 Miss. (14 Smedes & M.) 30, 53 Am. Dec. 112.

[q] (N. Y. 1863) An action to set aside a judicial sale for irregularity cannot be maintained, even by one who was not a party to the original action. His remedy is by application to the court in the original action.—Gould v. Mortimer, 26 How. Prac. 167, 16 Abb. Prac. 448.

[r] (N. C. 1882) A commissioner, making sale of land under an order of court and receiving the purchase money, is not a necessary party to an action to impeach the decree.—Gilbert v. James, 86 N. C. 244.

[s] (Tenn. 1855) Application to set aside a chancery sale, on account of a fraudulent combination to suppress competition, should be made by original bill, setting forth the grounds, and not by mere suggestion or motion, especially after the sale has been confirmed.—McMinn's Legatees v. Phipps, 35 Tenn. (3 Sneed) 196.

[t] (Tex. 1888) In an action to set aside a judicial sale the tender of the purchase money in the pleadings, followed by a payment into court of the money bid at the sale, and paid by the purchaser, is a sufficient tender.—Weaver v. Nugent (Sup.) 10 S. W. 458.

[u] (Tex. 1892) In a suit to set aside a deed of land sold under order of court, plaintiff need not tender the purchaser the amount bid by him for the land, where such sale was procured through the purchaser's fraud.—Storer v. Lane, 1 Tex. Civ. App. 250, 20 S. W. 852.

[v] (W. Va. 1876) In an action to set aside a commissioner's sale, an offer, with security, to bid a higher price at the second, is the best evidence that the price bid at the first was inadequate.—Kable v. Mitchell, 9 W. Va. 492.

§ 84. Security or other conditions.

Costs and expenses on opening sale to let in advance bid, see post, § 126 [a, d].

[a] Judicial sales should not be annulled without a previous proffer of a full indemnity to the bona fide parties whose interests are affected.

—(La. 1851) Stockton v. Downey, 6 La. Ann. 581;

(N. Y. 1830) Duncan v. Dodd, 2 Paige, 99.

[b] (Ark. 1859) Where the purchase at a chancery sale is not bona fide, it is not necessary, in order to set aside the sale on the application of the parties injured, that an advance on the bid, or any sum whatever, should have been deposited in court.—Penn's Adm'r v. Tolleson, 20 Ark. 652.

[c] (Ky. 1890) Where land sold under a decree of court is situated in another county from that in which the action is brought, and the decree is procured at the instance of the owners who receive the benefit of it, they will not be allowed to vacate the decree, and recover the land, without any offer to restore the purchase money.—Best's Ex'r v. Vanhook's Adm'r, 13 S. W. 119.

[d] (N. Y. 1862) The sale of several distinct and separate parcels of land, greatly exceeding the debt to be collected, in one mass, to the prejudice of the debtor, is a sufficient ground for setting aside a sale of real estate, even without indemnity to the purchaser.—Griffith v. Hadley, 23 N. Y. Super. Ct. (10 Bosw.) 587.

[e] (S. C. 1830) A commissioner's sale will not be set aside to let in a higher bid, except upon condition that a deposit be made, or some adequate security given, by the proposed bidder.—Young v. Teague, 1 Bailey, Eq. 13.

[f] (Wis. 1859) Where a sale is made in violation of an order staying proceedings, duly served, the defendant can have it set aside, even after confirmation by the court, without a tender of the amount bid by the plaintiff who bought at the sale.—Campbell v. Smith, 9 Wis. 305.

§ 85. Agreements to set aside.

[a] (W. Va. 1896) Land was sold under a decree, but before the sale was confirmed it was agreed, at the instance of the purchaser, between him and a creditor under the decree entitled to a part of the proceeds of sale, that if the latter would agree to the setting aside of the sale, he, the purchaser, would save the creditor harmless from all loss which he might sustain by reason of setting the sale aside and having the property again offered. *Held*, such contract is not per se a fraud upon the due administration of justice, and, unless such fact is made to appear, it is binding upon and enforceable against the purchaser. — Wick v. Dawson, 42 W. Va. 43, 24 S. E. 587.

§ 86. Rights of debtor.

Liability of purchaser for rent on vacation of sale, see post, § 96 [i].

Rights of purchasers on reversal of judgment or decree, see post, § 108.

[a] (Ky. 1887) Upon the reversal of a judgment appointing a receiver, and ordering a sale, the title to land and personalty sold under it having in the meantime passed to a purchaser for value, so that the property cannot be recovered in specie, the original owner may bring an action to recover damages against those who procured the erroneous judgment; and the measure of damages is the value of the property on the day it was sold, with the reasonable rents up to the day of sale, or to the time the purchaser obtained possession, it having been placed in the hands of a receiver, and then with interest from that time, and ordinary costs, not including attorney's fees, subject to a credit by any debts that may have been paid out of the sale money to creditors who had filed their claims.—Hays v. Griffith, 85 Ky. 375, 8 S. W. 431, 11 S. W. 306.

[b] (W. Va. 1888) Where money from the sale of property has, by order of the court, been paid, and the decree ordering the sale was void, the person whose property was sold to raise the money may recover the same from the person to whom it was illegally paid.—Sturm v. Fleming, 31 W. Va. 701, 8 S. E. 263.

§ 87. Resale on setting aside.

Resale because of purchaser's failure to comply with bid, see ante, §§ 50–53.

[a] (U. S. 1880) When a judicial sale has been set aside on the offering of an advanced bid, it seems that the resale should conform to the method of the original sale, upon such notice as the court may prescribe, having in view to advertise the fact that the former bids have not been accepted and that a resale will be had, commencing at the amount of the advanced bid.—Blackburn v. Selma R. Co. (C. C.) 3 Fed. 689.

[b] (Md. 1838) Where trustees, appointed to make a sale of lands under a decree, make an agreement with the purchaser, beneficial to him, which is rejected by the court, a resale cannot be ordered at the risk of the purchaser; but the first sale must be rescinded, and a new one directed on the terms of the original decree.—Randall v. Swann, 10 Gill & J. 313.

[c] (Miss. 1886) One who procures a resale under the act of February 28, 1884, "in relation to confirmation of sales under decrees in

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chancery," assures the court that the property shall bring the amount stipulated in the bond required to be given, renders himself liable to the court as a bidder, and is to be treated as starting the bidding at that sum, for all which the bond is intended as security. If there is not a better bid, this party is to become purchaser, and be dealt with as such; and, if the property sells for less than at the former sale, the former sale cannot be confirmed on motion of the former purchaser.—Mason v. Martin, 64 Miss. 572, 1 South. 756.

[d] (N. Y. 1841) Where land sold under a decree has been sacrificed by the neglect or mistake of the master, the parties injured are entitled to a resale, or such other relief as can be given without doing injustice to bona fide purchasers.—American Ins. Co. v. Oakley, 9 Paige, 259.

[e] (S. C. 1893) After a purchaser at judicial sale had paid into court a part of the price bid by him, and the money so paid had, by order of court, been used for the purposes of the action, the sale was declared void, as having been made at an unauthorized time. *Held*, that it was proper to order another sale, subject to the condition that if no bid was made, greater than the price paid at the former sale, the former sale should be confirmed, and that if there were such bid the former sale should be declared void, and the money paid thereon be returned to the purchaser.—Tompkins v. Tompkins, 39 S. C. 537, 18 S. E. 233.

[f] (Tenn. 1882) Where the biddings at a judicial sale are reopened, the purchaser at the resale should be required to execute his notes for the purchase money as of the date of the original sale.—Mabry v. Churchwell, 77 Tenn. (9 Lea) 488.

[g] (Tenn. 1896) A purchaser at a judicial sale, who allows a cash payment made by him on the property to remain in the hands of the officer selling after the sale has been set aside, does so at his own risk, and he is not entitled to be credited with the amount on a subsequent purchase of the property when resold by another officer.—Head v. Moore, 96 Tenn. 358, 34 S. W. 518.

[h] (Va. 1885) A decree for a resale, rendered in proceedings to which the purchaser at the original sale was not made a party, is a nullity as to him.—Ogden v. Davidson, 81 Va. 757.

XII. OPERATION AND EFFECT.

IN GENERAL, § 88.
COLLATERAL ATTACK, § 89.

Effect as to insurance of property sold, see "Insurance," vol. 28, cc. 1484, 1485, § 813.
—— *of sale under junior attachment, see* "Attachment," vol. 5, cc. 726, 727, § 547.

§ 88. In general.

[a] (Pa. 1854) A judicial sale of one's interest in land is not constructive notice, or any notice at all, unless the fact is actually made known to the person sought to be affected with notice.—Wright v. Wood, 23 Pa. (11 Harris) 120.

§ 89. Collateral attack.

Collateral attack on judgment or decree ordering sale, see ante, § 13.
Parol evidence to impeach sale, see "Evidence," vol. 20, cc. 2385–2387, § 1696.

[a] (Ala. 1887) Under Code 1886, §§ 3489–3495, providing that a decree for the sale of land without personal service of process on defendant, or appearance by him, shall not become absolute until 18 months after its rendition, unless a copy be personally served, when the period will be 6 months from the service, and that execution shall not issue, within 18 months, unless plaintiff give bond to account for the value, rents, and profits of the land if the decree be set aside, a sale of the land of a nonresident defendant, under a decree pro confesso, after service by publication, will not be held void in a collateral action brought seven years thereafter, though the requirements as to bond and service of a copy of the decree were not complied with.—Seelye v. Smith, 85 Ala. 25, 4 South. 664.

[b] (D. C. 1891) A judicial sale, decreed without jurisdiction of the subject-matter, confers no title, and can be attacked collaterally.—Stansbury v. Inglehart, 20 D. C. 134.

[c] (Ill. 1882) Under a proceeding instituted in the circuit court by a widow and her husband's heirs, dower was assigned her, and the rest of the land ordered sold. A. derived title under the sale and his title was collaterally questioned. *Held*, that the fact that a mistake was made in describing the land set off to the widow did not affect the validity of the sale, nor did the fact that the sale was not confirmed by the court.—Miller v. McMannis, 104 Ill. 421.

[d] (La. 1876) A judicial sale cannot be annulled in a collateral proceeding in which the vendee is not a party.—Succession of Fontelieu, 28 La. Ann. 638.

[e] (La. 1877) The purchaser of unmortgaged property, sold under the decree of a court of competent jurisdiction, rendered in a suit where the proper parties were duly represented, is not liable to have his title to the property assailed in any collateral manner.—O'Hara v. Booth, 29 La. Ann. 817.

[f] (Md. 1868) Sales ratified by a court having jurisdiction over them should be upheld by every legal presumption, when collaterally called in question.—Cockey v. Cole, 28 Md. 276, 92 Am. Dec. 684.

[g] (Tex. 1893) Where a deed of land sold by a commissioner under order of the commissioners' court is silent as to the manner of making the sale, it will be presumed, on a collateral attack on such deed 30 years after its execution, that the power granted the commissioner was properly exercised.—Riley v. Pool, 5 Tex. Civ. App. 346, 24 S. W. 85.

[h] (Va. 1884) A sale to a bona fide purchaser under a decree of a court of competent jurisdiction upon service by publication against defendant as a nonresident cannot be collaterally impeached on the ground that defendant was dead at the time when suit was brought.—Wilcher v. Robertson, 78 Va. 602.

[i] (Wis. 1864) After confirmation of a sale made under a decree, the regularity of the appointment of the person (other than the sheriff) by whom the sale and the report thereof were made will be presumed; and courts will not inquire into it collaterally for the sake of impeaching the sale.—Eaton v. White, 18 Wis. 517.

XIII. TITLE, RIGHTS, AND LIABILITIES OF PURCHASERS.

(A) IN GENERAL, §§ 90-94.
(B) POSSESSION, RENTS, AND PROFITS, §§ 95, 96.

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(C) DEFECTS IN TITLE OR PROPERTY AND RELIEF THEREFROM, §§ 97-106.
(D) DEFECTS OR IRREGULARITIES IN PROCEEDINGS, JUDGMENT, DECREE, ORDER, OR SALE, §§ 104-107.
(E) REVERSAL OR VACATION OF JUDGMENT, DECREE, OR ORDER, §§ 108, 109.
(F) OPENING OR VACATION OF SALE, § 110.
(G) LIABILITIES OF PURCHASERS AND THEIR SURETIES, § 111.

Misapplication of proceeds of sale as affecting title of purchaser, see post, § 123 [c].

Adverse possession by and against purchaser, see "Adverse Possession," vol. 1, cc. 2170, 2171, § 209; c. 2186, § 218 [x]; cc. 2259, 2260, § 309; cc. 2298, 2299, § 348; c. 2374, § 444; c. 2528, § 610 [k].

Appealability of orders relating to rights of purchasers at judicial sale, see "Appeal and Error," vol. 2, c. 1370, § 795 [a, b, e].

Effect on title of purchaser of failure to appoint guardian ad litem in proceedings for sale of infant's property, see "Infants," vol. 27, c. 1295, § 251.

Insurance by purchaser, avoidance for misrepresentation or breach of warranty as to title, see "Insurance," vol. 28, cc. 1239, 1240, § 616.

Liability to execution of property purchased, see "Execution," vol. 21, cc. 416–418, §§ 124, 125.

Permitting improvements or expenditures by purchaser at judicial sale as ground of estoppel, see "Estoppel," vol. 19, cc. 2374, 2375, § 271.

Purchase of corporate property at judicial sale by officers of corporation, see "Corporations," vol. 12, cc. 1374–1376, § 1384.

Purchasers as necessary parties in appeals, see "Appeal and Error," vol. 2, cc. 2156, 2157, § 1832.

Renunciation of or failure to assert title at judicial sale, see "Estoppel," vol. 19, cc. 2148, 2149, § 178.

Rights affected by lapse of time, see "Equity," vol. 19, cc. 400–407, § 217.

Rights of purchaser of negotiable note sold under process, see "Bills and Notes," vol. 7, c. 1007, § 750.

—— *to recover in action on note, see* "Bills and Notes," vol. 7, cc. 1030, 1031, § 768.

Right to assert invalidity of fraudulent conveyances, see "Fraudulent Conveyances," vol. 24, cc. 1006–1008, § 651.

Subrogation of purchaser to rights of creditor, see "Subrogation."

Title of purchaser at sale by assignee in bankruptcy, see "Bankruptcy," vol. 6, cc. 438–440, § 374.

(A) IN GENERAL.

IN GENERAL, § 90.
TITLES AND INTERESTS WHICH PASS UNDER SALE IN GENERAL, § 91.
LIENS, CHARGES, AND INCUMBRANCES, § 92.
RIGHT TO HAVE LIENS AND INCUMBRANCES DISCHARGED OUT OF PURCHASE MONEY OR ABATEMENT OF PRICE ON ACCOUNT THEREOF, § 93.
ACTIONS BY OR AGAINST PURCHASERS, § 94.

§ 90. In general.

[a] (U. S. 1875) The title of a purchaser at a judicial sale is not affected by an order of the court concerning the investment of the purchase money.—Knotts v. Stearns, 91 U. S. 638, 23 L. Ed. 252.

[b] (U. S. 1882) The protection extended in equity to a bona fide purchaser belongs only to the purchaser of the legal title without notice of an outstanding equity, and not to the purchaser of an equitable title.—Latham v. Barney (C. C.) 14 Fed. 433.

[c] (U. S. 1887) Purchasers at a judicial sale of property subject to certain receiver's certificates previously issued have no interest in the trust fund represented by the certificates, and therefore cannot resist the payment on the ground that the receiver negotiated them collusively.—Central Nat. Bank v. Hazard (C. C.) 30 Fed. 484.

[d, e] (D. C. 1891) A purchaser at an unauthorized judicial sale, though an innocent purchaser for value, has not an equity that is superior to that of the original owner, and takes no title to the lands sold to him.—Stansbury v. Iglehart, 19 Wash. Law Rep. 594.

[f] (Ga. 1884) One may be a bona fide purchaser of property sold under order of court, though he is notified that it is being sold illegally and that whoever buys it will get with it "a first-class lawsuit."—Wilson v. Garrick, 72 Ga. 660.

[g] (Ky. 1861) A creditor gave an attorney general authority to collect a debt. The attorney proceeded to enforce a lien upon real estate, for which the debt was contracted, by judgment and sale. The creditor complained that he had given no authority for such proceedings. *Held*, that as against third parties, the purchaser and assignees, the general authority given to the attorney would shield them from responsibility to the creditor and protect them in any rights they had acquired by purchase under the judgment, if matters were otherwise regular.—Taylor v. Gilpin, 60 Ky. (3 Metc.) 544.

[h] (Ky. 1893) Defendant in an execution sale of lands had no legal title thereto, but was merely a purchaser at a decretal sale thereof. Attorneys who had a lien on the land purchased it at the execution sale, and, after obtaining a writ of possession and a sheriff's deed, conveyed it to plaintiff. Later defendant in the execution obtained by an order of court a commissioner's deed for the land under his purchase and a writ of possession. *Held*, that he was entitled to the land as against the grantee of the purchaser at the execution sale.—Whitaker v. Cornett, 21 S. W. 645.

[i] (La. 1850) A claim to land founded on a judicial sale duly recorded will defeat a claim founded on a prior judicial sale not recorded.—Cotton v. Stacker, 5 La. Ann. 677.

[j] (La. 1858) The purchaser at a judicial sale acquires such a vested right to the property by the adjudication that it cannot be taken from him unless he refuses to comply with the terms of the sale.—Washburn v. Green, 13 La. Ann. 332.

[k] (La. 1880) A purchaser at a probate sale regularly made is protected by the decree and the prescription of 10 years against an attack based on the fact that the attorney for the heirs had absented himself from the state before the conclusion of the mortuary proceedings.—Porter v. Hornsby, 32 La. Ann. 337.

[l] (La. 1885) A purchaser at an execution sale who negligently fails to comply with the requirements of the law, and leaves the record title in the execution debtor, is estopped by his laches from setting up his title against a subsequent purchaser at a judicial sale of the premises as the property of the debtor.—Thistle v. Irosen, 37 La. Ann. 170.

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[m] (La. 1894) The adjudication of property at a judicial sale is itself a complete title, which cannot be devested unless the purchaser refuses to comply with the terms.—Interdiction of Onorato, 46 La. Ann. 73, 14 South. 299.

[n] (Md. 1847) A judicial sale gives to a purchaser an inchoate and equitable title, which becomes complete on confirmation.—Wagner v. Cohen, 6 Gill, 97, 46 Am. Dec. 660.

[o] (Md. 1856) The purchaser takes subject to the ratification of the sale by the court.—Kauffman v. Walker, 9 Md. 229.

[p] (Md. 1863) Jurisdiction having been acquired by the court, it follows as a legal consequence that the title of the purchaser to the interest of the parties decreed to be sold cannot be affected by any apparent defect of proof.—Bolgiano v. Cooke, 19 Md. 375.

[q] (Miss. 1854) In 1845, A. purchased of B., C., D., and others a tract of land, paying a part of the price in cash and giving four notes for the balance, to which notes a condition was annexed that they were not to be paid until A. should obtain a title to the land by virtue of a sale to be made under a decree of the superior court of chancery in a case depending therein, in which B. and C. were complainants and D. and others were defendants. The decree being made, the sale was advertised, and E., who had acquired the title of A., attended for the purpose of buying the land under the decree and paying the four notes given by A., two of which were then held by F. and two by B.; but, hearing that a suit had been instituted for the land, which might succeed, he declined having the sale made under the decree B., however, instructed the commissioner to proceed, when F. purchased the land for $100, not one-fifteenth of its value. The suit for the land failed to succeed. *Held*, that F., having purchased the land, knowing the circumstances under which E. had bought it, acquired no title to it.—Petrie v. Pincard, 27 Miss. (5 Cushm.) 624.

[r] (Miss. 1887) Plaintiffs in ejectment showed title under sheriff's deed pursuant to decree of the chancery court against defendants, and that the latter had title at the time the decree was rendered. Defendants introduced conveyances from one of them, through intermediate conveyances, to his children. *Held*, that plaintiffs should recover.—Tatum v. Caston, 65 Miss. 488, 4 South. 549.

[s] (Miss. 1894) A purchaser of the fee at a void chancery sale, who, out of the price,—$533,—pays more than $300 in an account and past-due note against the life tenant, has not bought in good faith, and paid the price, within the protection of the one-year statute (Code 1871, § 2173) against the remainder-men.—Wilson v. Parker, 14 South. 264.

[t] (Mo. 1845) Where a decree is obtained setting aside a deed of trust as fraudulent and ordering a sale of the property conveyed to satisfy a judgment, the title of a purchaser at such sale is not affected by fraud or collusion in obtaining the decree; he not being a party thereto.—Jones v. Talbot, 9 Mo. 121.

[u] (Mo. 1845) Where, on a bill to set aside a deed as fraudulent, a sale of the land is decreed, a purchaser under the decree is not affected by the fraud in the deed.—Jones v. Talbot, 9 Mo. 121.

[v] (Neb. 1894) The title of a purchaser of land at judicial sale, duly confirmed, cannot be assailed because of fraud in a prior transfer of the decree under which the sale was had, if the sale itself was free from fraud.—J. T. Robinson Notion Co. v. Foot, 42 Neb. 156, 60 N. W. 316.

[vv] (N. Y. 1858) Titles to real estate cannot be successfully assailed, where they have been acquired under judicial sales, on the ground that some one who was originally a defendant in the suit, claiming an interest in or lien upon the land, had become a bankrupt or an insolvent during the progress of the suit, and his assignee had not been made a party.—Cleveland v. Boerum, 27 Barb. 252.

[w] (N. Y. 1892) Under the provision of Laws 1890, c. 275, authorizing the sale of certain land by the supreme court, that the title of the purchaser at such sale shall be valid in fee simple against all persons who shall join or acquiesce in the proceedings, assent of the adult parties is sufficiently shown by their appearance by attorney, their acquiescence in the order of sale, and their failure to object to or resist the proceedings.—In re Field, 131 N. Y. 184, 30 N. E. 48, affirming (Sup. 1891) 17 N. Y. Supp. 19.

[ww] (N. Y. 1893) At the time of a judicial sale the premises were in possession of a tenant, and the purchaser offered to complete his purchase, but the referee who made the sale told him that he could not deliver possession. The purchaser could not ascertain, either from the lessors or the tenant, under what terms the tenant held. He then demanded a return of the money paid by him, and purchased other property. *Held*, that the purchaser could not be compelled to complete his purchase on a surrender of the premises by the tenant two months later.—Remsen v. Reese, 72 Hun, 370, 25 N. Y. Supp. 350.

[x] (N. C. 1867) Where a party advanced a balance due from plaintiff on a contract for the purchase of land, and took title to himself under an agreement to convey to plaintiff on payment of the purchase price, and upon his death the land is sold by a clerk and master under a petition by his representatives, the purchaser cannot, before payment of the purchase money, on execution of title, claim to be either a purchaser for valuable consideration or a purchaser without notice.—Cohn v. Chapman, 62 N. C. 92, 93 Am. Dec. 600.

[xx] (N. C. 1883) Title under a judicial sale after confirmation dates from the day of the sale.—Vass v. Arrington, 89 N. C. 10.

[y] (Tenn.) After a purchaser at a judicial sale has obtained title to the land and paid the purchase price, he is not affected by subsequent proceedings in the cause wherein the sale was ordered.—(1874) Warren v. Farquaharson, 63 Tenn. (4 Baxt.) 484; (1886) Greenlaw v. Greenlaw, 84 Tenn. (16 Lea) 435.

[z] (Va. 1883) A purchaser at a judicial sale becomes a party to the action from the date of his purchase and submits himself to the jurisdiction of the court in all subsequent proceedings relative to such sale.—Hickson v. Rucker, 77 Va. 135.

[zz] (W. Va. 1883) A purchaser of land sold under a decree of court becomes a party to the suit from the time of his purchase and is subject to the orders of the court in all subsequent proceedings.—Haymond v. Camden, 22 W. Va. 180.

§ 91. Titles and interests which pass under sale in general.

Unaccrued rent reserved in lease, see post, § 96 [e, f, o].

Title which purchaser may be required to take, see post, § 99.

Conveyance or transfer of covenant by judicial sale, see "Covenants," vol. 14, cc. 137-139, § 86.

[a] (Ill. 1874) A decree, entered in a suit by creditors to subject the equitable interests of

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A. and B. in land to the payment of their debts as members of a firm, recited that the master should, on sale of said premises, or any part thereof, execute to the purchaser a deed conveying all rights in said premises "conveyed by the said A. in and by the several trust deeds set forth in said original and cross bills herein." *Held*, that the direction to the master did not render the decree one for the sale of A.'s interest only, and that the purchaser under the decree acquired the interest of both A. and B.—Mason v. Patterson, 74 Ill. 191.

[b] (Ill. 1883) The rule that one cannot by a sale transfer the right of property in a chattel which he does not own applies to a judicial sale.—McCully v. Hardy, 13 Ill. App. (13 Bradw.) 631.

[c] (Ky. 1828) A decree and conveyance by a commissioner thereunder passes all the title the party had, though not sanctioned by the suit.—Logan v. Steele's Heirs, 23 Ky. (7 T. B. Mon.) 101.

[d] (Ky. 1868) The purchaser of real estate sold under a decree of court, in pursuance of Act Aug. 23, 1862, by complying with the terms of the sale prescribed in the decree, becomes vested with all the title of the present and future or contingent claimants to the real estate, and, when the real estate is sold for reinvestment, he cannot be prejudiced by the failure of the court to provide for the securing and reinvestment of the proceeds of sale, and securing the title to all who may be interested. —O'Neal v. Bannon, 67 Ky. (4 Bush) 23.

[e] (Ky. 1886) Where, at a judicial sale of land a tract containing 128 acres was, by mistake, sold as 40 acres, equity will compel the purchaser to elect from which portion of the tract he will take the 40 acres, or allow him to take the whole, paying at the rate of his bid. —Miller v. Craig, 83 Ky. 623.

[f] (Ky. 1890) Where one has purchased a dower interest in land, and already owns an undivided interest in the remainder dependent thereon, a sale under a decree of "his undivided interest in the dower" passes his remainder.—Gill v. Buckner, 13 S. W. 908.

[g] (Md. 1881) The purchaser of land sold by order of court in an equity suit is entitled to the interest of all the parties to the suit, and to the interest of those who have purchased pendente lite from any of such parties.—Harryman v. Starr, 56 Md. 63.

[h] (N. Y. 1887) Where a sale is made under a special decree ordering a sale of the land itself, free and clear of all claims of the debtor or those claiming under him, the purchaser gets such a title as is ordered to be transferred.—Wallace v. Berdell, 105 N. Y. 7, 11 N. E. 274, affirming order (1886) 41 Hun, 444.

[i] (Ohio, 1851) Where a judgment attached as a lien on land, including an easement appurtenant thereto, consisting of water privileges connected with a mill and dam, the sale of the land with the mill under such judgment carries with it the full benefit of the easement also, though the description in the levy is by metes and bounds, and the easement is not expressly described or alluded to therein, on the principle that it attaches to the land and mill as a part thereof.—Morgan v. Mason, 20 Ohio, 401, 55 Am. Dec. 464.

§ 92. Liens, charges, and incumbrances.

Right of purchaser to have liens and incumbrances discharged out of purchase money, see post, § 93.

Effect on right of dower, see "Dower," vol. 17, cc. 1289–1305, §§ 145–153.

Rights of purchaser at sale free from incumbrances, see "Bankruptcy," vol. 6, cc. 428, 429, § 365.

—— *at sale of bankrupt's property as affected by liens on property sold, see* "Bankruptcy," vol. 6, cc. 441–444, §§ 376, 377.

—— *at sale subject to lien, see* "Bankruptcy," vol. 6, c. 428, § 364.

[a–c] (U. S. 1884) Where one who buys land, which is subject to a mortgage, at a probate sale under an order directing it to be sold "clear and discharged of all liens," pays only the amount of his bid in excess of the mortgage, and accepts a deed reciting that fact, he is estopped from denying that he took title subject to the mortgage, on the ground that it is provided by statute (Act Pa. April 18, 1853; 2 Brightly's Purd. Dig. [10th Ed.] p. 1242, § 5) that at "public sale the premises sold shall be discharged from all liens."—Gibson v. Lyon, 115 U. S. 439, 6 Sup. Ct. 129, 29 L. Ed. 440.

[d] (Ga. 1874) A judicial sale of property upon which a mechanic's lien is claimed, pending a suit to establish such lien, discharges it from the lien.—De Give v. Meador, 51 Ga. 160.

[e] (Ky. 1837) Where the creditors at whose instance a judicial sale is obtained had no notice of a lien on the property, the purchaser at such sale will not be affected by such lien.—Case v. Woolley, 36 Ky. (6 Dana) 17.

[f] (Ky. 1884) A purchaser of land at a decretal sale cannot complain of the enforcement of a lien thereon against him, on the ground that he purchased without notice of the lien, where the deed filed in the case showed that there were lien notes on the land which had never been released.—Branham v. Long, 6 Ky. Law Rep. 451.

[g] (La. 1846) The purchaser at a judicial sale is bound for nothing beyond the price of his adjudication, and the sheriff is bound, after applying the price as the law directs, to give him a release from subsequent mortgages of every description, whether they be general or special mortgages.—Theard v. Prieur, 1 La. Ann. 16.

[h] (La. 1890) Under Rev. St. § 2519, judicial sales do not cancel liens, privileges, and mortgages for taxes.—Succession of Girardey, 42 La. Ann. 497, 7 South. 673.

[i] (Md. 1848) A judgment creditor may prosecute his lien against property in the hands of a purchaser at a judicial sale.—Duvall v. Speed, 1 Md. Ch. 229.

[ii] (Md.) Chancery sales are made subject to all incumbrances on the property, unless there is an express stipulation to the contrary. —(1855) Farmers' & Planters' Bank v. Martin, 7 Md. 342, 61 Am. Dec. 350; (1880) Sansbury v. Belt, 53 Md. 324.

[j] (Md. 1880) Purchasers of land sold under a decree of court are charged with notice of prior unpaid judgment liens thereon.—Sansbury v. Belt, 53 Md. 324.

[k] (N. J. 1873) The act authorizing the chancellor to direct land limited over to be sold in fee does not authorize a sale free from incumbrances.—Cool's Ex'rs v. Higgins, 23 N. J. Eq. (8 C. E. Green) 308.

[l] (N. Y. 1839) A sale of land under a decree will not devest the lien of a stranger upon the land, though the decree provides for the payment of his incumbrance, if the amount due is not actually paid.—Jackson v. Edwards, 7 Paige, 386.

[m] (N. Y. 1840) The terms of a sale by a master were that the land was sold free from

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incumbrances, and that all taxes and assessments thereon should be paid out of the purchase money. *Held*, that the purchaser could not be compelled to take the land subject to an assessment for a street, laid out and used by the public prior to the sale, though the assessment had not been formally confirmed until afterwards, it appearing that the purchaser supposed such assessment included in the terms of sale; and a resale was ordered.—Post v. Leet, 8 Paige, 337.

[n] (N. Y. 1868) If a referee, selling property under a decree, irregularly sells it free from a lien which he promises to pay off out of the proceeds, instead of selling it subject to the lien, as directed by the decree, the purchasers cannot be compelled to pay into court the amount of the lien in addition to their bid; but, if the terms of sale were prejudicial to any party, the remedy is by an application for a resale.—Hotchkiss v. Clifton Air Cure, 2 Abb. Dec. 406.

[o] (N. Y. 1896) A purchaser at judicial sale of property which the notice stated was subject to a mortgage, without specifying in what money it was payable, cannot be relieved therefrom merely because the mortgage is payable in "gold coin of the United States, * * * of the present standard of weight and fineness."—Blanck v. Sadlier, 5 App. Div. 81, 38 N. Y. Supp. 817.

[p] (N. C. 1877) A sale of land was made pursuant to a regular decree of court, and the auctioneer announced that certain back taxes were to be paid by the purchaser. *Held*, that it was a part of the contract between the vendor and vendee that the land was sold subject to the incumbrance of the tax.—Shields v. Harrison, 77 N. C. 115.

[q] (N. C. 1877) A sale of land was made pursuant to a regular decree of a court directing a sale subject to the widow's dower, and at the time of the sale the auctioneer announced the terms of the sale in conformity to such decree. *Held*, that a purchaser was affected with notice, and cannot be heard to deny his knowledge that the land was sold subject to dower.—Shields v. Harrison, 77 N. C. 115.

[r] (N. C. 1887) The purchaser at a judicial sale cannot claim to be without notice of a mortgage on the premises, when there is evidence showing that all the successive occupants of the land recognized the mortgagee's rights therein; that the purchaser's husband was present at negotiations for renting the land by the mortgagee's agent; that it was publicly announced at the sale that only a certain person's interest in the land was to be sold; and that the price paid was so grossly inadequate to the real value of the land as to put her on inquiry.—Durant v. Crowell, 97 N. C. 367, 2 S. E. 541.

[s] (Ohio, 1846) A judicial sale of "a water craft," under the statute authorizing proceedings against the same by name, vests in the purchaser the title, devested of all liability to be again proceeded against under the statute for a claim existing at the time of the sale.—Jones v. The Commerce, 14 Ohio, 408.

[t] (Pa. 1837) The judicial sale of land charged with a legacy, payable in annual installments, devests it of the lien of the installments not due and payable at the time of the sale.—In re Lobach, 6 Watts, 167.

[u] (Pa. 1845) The lien of registered taxes in the city and county of Philadelphia, under the act of February 3, 1824, is devested by a judicial sale.—Janney v. Harlan, 5 Pa. Law J. 116.

[uu] (Pa. 1846) The purchaser of lands at a judicial sale takes subject to the lien created by a recognizance of the sheriff taken pursuant to Act April 13, 1834.—In re McKenzen's Appropriation, 3 Barr, 156.

[v] (Pa. 1861) Under Act April 5, 1844, making municipal assessments in Allegheny county prior liens, a judicial sale of the property on which they are assessed devests the liens.—Appeal of Allegheny City, 41 Pa. (5 Wright.) 60.

[vv] (Pa.) A purchaser at a judicial sale takes subject to arrears of ground rent.—(1870) Inland Ins. & Deposit Co. v. Burrows, 2 Lanc. Bar, No. 15, p. 2; (1879) In re Terry's Estate, 13 Phila. 298.

[w] (Pa. 1876) The word "lien," in the act of March 23, 1867, providing that the liens of first mortgages shall not be devested by judicial or other sales, is not to be taken in technical sense, but rather in the broad sense of embracing any charge or right upon the land by means of which a sale thereof could be compelled, such as the execution of a power of sale in a will or the right which a co-owner of land has to compel partition.—Wright v. Vickers, 81 Pa. (31 P. F. Smith) 122.

[ww] (Pa. 1876) Where a ground rent is created (prior to the passage of Act April 3, 1872, for better securing the lien of taxes in South Chester) in South Chester, a judicial sale of the lands for the ground rent devests all taxes assessed subsequent to the date of the ground rent, up to the day of sale, whether the proceeds of the sale should be sufficient to pay them or not.—South Chester v. Weigand, 1 Del. Co. R. 64.

[x] (Pa. 1876) A judicial sale devests all liens, except such as are saved by statute or are incapable of being reduced to a sum certain in money by mere calculation.—Reilly v. Elliott, 1 Del. Co. R. 77.

[xx] (Pa. 1876) The term "judicial sale," as used in Acts 1867, p. 44, entitled "An act relating to judicial sales and the preservation of the liens of mortgages," means such sale as would transfer the title to the special and particular estate mortgaged.—Wright v. Vickers, 81 Pa. (31 P. F. Smith) 122.

[y] (Pa. 1879) A purchaser at judicial sale takes the property subject to accrued interest on a mortgage against it.—In re Terry's Estate, 13 Phila. 298.

[yy] (Pa. 1887) In the city of Allegheny, Pa., a judicial sale devests the lien of taxes accruing subsequent to the incumbrance under which the sale is had, and prior to the sale.—Shaw v. City of Allegheny, 115 Pa. 46, 7 Atl. 770.

[z] (S. C. 1884) Where property is sold in a suit by subsequent creditors, not having notice of any mortgage on the property, a purchaser at the sale acquires good title, though he himself had notice of the mortgage.—Herring v. Cannon, 21 S. C. 212, 53 Am. Rep. 661.

[zz] (Tenn. 1889) Acts 1871, c. 68, provides that, when land is sold under decree, it shall be the judge's duty, before confirmation of sale, to direct a reference to ascertain whether, on the day of sale, there were any taxes due and unpaid which were a lien on the land, and, if there were, there shall be a decree that the clerk pay the taxes out of the first money collected from the sale. *Held* that, where no such order was made, the lien for taxes continued against the property in the hands of the purchaser.—State v. Hill, 87 Tenn. 638, 11 S. W. 610.

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§ 93. Right to have liens and incumbrances discharged out of purchase money or abatement of price on account thereof.

Application of proceeds to debts, liens, and incumbrances, see post, § 124.

Compensation for deficiency or defect in property or abatement in price on account thereof, see post, § 100.

Determination of debts and liens and priorities thereof before sale, see ante, § 11.

Effect of sale on liens and incumbrances, see ante, § 92.

[a] In general, a purchaser at a judicial sale takes subject to liens and cannot claim to deduct from the price bid the amount required to discharge the land from taxes or prior incumbrances.

—(U. S. 1876) Osterberg v. Union Trust Co., 93 U. S. 424, 23 L. Ed. 964;

(Ill. 1876) Roberts v. Hughes, 81 Ill. 130, 25 Am. Rep. 270;

(Neb. 1876) Vaughn v. Clark, 5 Neb. 238.

CONTRA, see

(Tenn. 1872) Kirk v. Jones, 55 Tenn. (8 Heisk.) 829.

[b] (Ky. 1878) A purchaser at a judicial sale cannot have a rebate of price on discovering liens against the property unknown to him before confirmation of the sale.—Farmers' Bank v. Peter, 76 Ky. (13 Bush) 591.

[c] (Ky. 1888) A purchaser of mortgaged lands at judicial sale bid a price sufficient to satisfy the mortgage and accrued taxes, and executed bonds with surety for the purchase money. Being unable to pay the bonds, the lands were surrendered into court to be resold. On the second sale the amount realized was insufficient to pay the mortgage and taxes. The purchaser at the second sale excepted to the report of sale because of the accrued tax, and an order was entered that he pay the purchase money into court, where a sum sufficient to pay the taxes would be held. The city of L., claiming the taxes as due to itself, was then allowed, on application, to withdraw the fund. *Held*, that the city, not being a party to the suit, had no right to withdraw the fund, and was properly required to return the same.—City of Louisville v. Kaye, 8 S. W. 869.

[d] (Md. 1848) A trustee, selling under a decree of the court of chancery, as a general rule sells the title of the parties to the suit, and nothing more; and though a purchaser, discovering a defect in his title at the proper time, may be relieved from his purchase by asking a rescission of the sale, he cannot be permitted, while holding onto his purchase, to insist upon having his title perfected by the application of the proceeds of the sale to the extinguishment of the claims of incumbrancers not parties to the suit.—Duvall v. Speed, 1 Md. Ch. 229.

[e] (Md. 1852) Where the purchaser at a chancery sale knew of an incumbrance for ground rent upon the premises, he cannot be allowed a credit for such incumbrance paid by him.—Farmers' & Planters' Bank v. Martin, 3 Md. Ch. 224.

[f] (N. Y. 1829) Where there is a sale of land under a decree, and the master is ordered to discharge incumbrances out of the purchase money, the purchaser cannot insist upon a discharge of the incumbrances before the purchase is completed.—Sears v. Hyer, 1 Paige, 483.

[g] (Ohio, 1862) Swan & C. St. p. 1465, provides that, whenever real estate is sold at judicial sale, "the court shall order the taxes and penalties and the interest thereon against such lands to be discharged out of the proceeds of such sale." *Held* to relate only to such taxes and penalties as were standing unsatisfied on the tax duplicate.—Ketcham v. Fitch, 13 Ohio St. 201.

[h] (Ohio, 1879) An order of the court that the sheriff shall pay taxes that are a lien on the property sold at sheriff's sale does not impose an extra official duty, and a purchaser who has been compelled to pay the taxes may recover from the sheriff the amount.—Springmeier v. Blackwell, 6 Ohio Dec. 705.

[i] (Ohio, 1896) The rights of a purchaser at a judicial sale as to the payment of taxes out of the proceeds are fixed by the date of the sale, and, after confirmation, refer back to that date.—Scheid v. Scheid, 7 Ohio N. P. 538, 5 Ohio S. & C. P. Dec. 559.

[j] (Tenn. 1872) A purchaser at a judicial sale may look to the owner for taxes due, but cannot abate the price agreed to be paid for the benefit of creditors by unpaid taxes; nor will the fact that the decree of sale was consented to make any difference.—Staunton v. Harris, 56 Tenn. (9 Heisk.) 579.

[k] (Tenn. 1882) A statute makes it the duty of the court, when real estate is sold under its decree, to make a reference to a master before confirmation of the sale, to find out if there were any unpaid taxes which, on the day of sale, were a lien on the land, and, if so, to decree that the master pay said taxes out of the first money coming to him from the sale. Where such reference was omitted, and the money paid over to creditors, *held*, that the court might, at the same term of court, order the same to be refunded for the payment of taxes.—Williams v. Whitmore, 77 Tenn. (9 Lea) 262.

[l] (Tenn. 1889) Acts 1871, c. 68, provides that, when land is sold under a decree, it shall be the judge's duty, before confirmation of sale, to direct a reference to ascertain whether, on the day of sale, there were any taxes due and unpaid which were a lien on the land, and, if there were, there shall be a decree that the clerk pay the taxes out of the first money collected from the sale. *Held* that, where the court in a judicial sale fails to make the order before confirmation, the purchaser at such sale may protect himself by applying for it before the money passes out of the jurisdiction of the court.—State v. Hill, 87 Tenn. 638, 11 S. W. 610.

[m] (Va. 1885) The court will not decree the sale of land, while incumbered for the purchase money due from plaintiff, without providing for payment of such incumbrance.—Yost v. Porter, 80 Va. 855.

§ 94. Actions by or against purchasers.

Equity jurisdiction of suit by heir against purchaser of lands at sale by probate court, see "Equity," vol. 19, cc. 270, 271, § 153 [jj].

[a] Forcible entry and detainer lies by a purchaser at a sheriff's sale made under a decree in chancery.

—(Ill. 1866) Rucker v. Wheeler, 39 Ill. 436;

(Ohio, 1847) Barto v. Abbe, 16 Ohio, 408.

[b] (U. S.) A bill in equity by the owner of property sold at a public judicial sale, for an account and reconveyance, will lie against the purchaser who by fraudulent representation has obtained such property at less than its value.—(1867) Slater v. Maxwell, 73 U. S. (6 Wall.) 268, 18 L. Ed. 796; (1868) Cocks v. Izard, 74 U. S. (7 Wall.) 559, 19 L. Ed. 275.

[c] (Ga. 1875) A possessory warrant will not lie against a purchaser at judicial sale, made

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as prescribed by law, on the ground that a trespass was committed by the levying officer in taking possession; the purchaser not being particeps in the tort.—Finney v. Fechtner, 54 Ga. 501.

[d] (Ill. 1863) When a remedy by an action of forcible entry and detainer is sought under the second clause of the act of 1861, it is not restricted to the nominal party against whom the decree was rendered, but may be employed against any one who, even after the expiration of the time of redemption from the sale under the decree, and after the execution and delivery of the master's deed to the purchaser, by collusion with the defendant in the decree, obtains and holds the possession of the premises without the knowledge or consent of the purchaser.—Jackson v. Warren, 32 Ill. 331.

[e] (Ky. 1869) In an action to recover property sold at a decretal sale, on the ground that the purchaser, by fraudulently stating that he was bidding for the benefit of plaintiff (then the owner), prevented competition and bought the property at too low a price, it appeared that the property was sold for a fair and full price, that the evidence as to the fraudulent statements was conflicting, and that the petition did not allege a tender or make an offer of reimbursement. *Held*, that the decree of the chancellor dismissing the petition should not be reversed.—Crutchfield v. Thurman, 67 Ky. (4 Bush) 498.

[f] (Mich. 1894) How. Ann. St. § 8698, subd. 1, limiting to five years the bringing of actions against persons claiming under judicial sales, applies only when the validity of the title acquired by the sale itself is in controversy.—Donovan v. Ward, 100 Mich. 601, 59 N. W. 254.

[g] (Mo. 1841) Dig. 1835, p. 278, § 8, providing for an action of forcible detainer when defendant lawfully and peaceably obtains possession, but unlawfully holds over by force, contemplates a case where plaintiff has been in lawful possession; and therefore a purchaser at judicial sale cannot maintain the action against the original owner.—Hatfield v. Wallace, 7 Mo. 112.

[h] (N. C. 1886) A purchaser at a judicial sale must enforce his rights under the purchase by motion in the suit in which the sale is made, and not by an independent suit.—Long v. Jarratt, 94 N. C. 443.

[i] (Pa. 1858) Where a farm was sold by the orphans' court, and the tenant of the farm delivered the landlord's share of the growing crops to the former owner, the purchaser of the farm, having the right to a share of the growing crops reserved as rent, may maintain replevin.—Burns v. Cooper, 31 Pa. (7 Casey) 426.

[j] (Tenn. 1840) Where a tract of land intended to be sold was laid off into lots, with streets intersecting each other, for the benefit of purchasers, and, so divided, was sold under a decree in chancery upon a credit which had not expired, the purchasers being in the possession under the sale, the property was sub judice, and the purchasers quasi parties, and a petition by any purchaser was the proper mode of application to the court for the relief against obstructions placed on certain streets by other of the purchasers, and could be abated in the name of the complainants.—Leake v. Cannon, 21 Tenn. (2 Humph.) 169.

[k] (Va. 1885) At a judicial sale of land in a creditors' suit, A. bought one parcel and B. another. *Held*, that A. could not maintain a suit against B. to compel a conveyance of part of the parcel bought by B., on the ground of a mistake in the commissioner's deed; there being no privity between A. and B. in the matter.—Garnett v. Loven, 80 Va. 456.

(B) POSSESSION, RENTS, AND PROFITS.

RIGHT TO POSSESSION AND ENFORCEMENT THEREOF, § 95.
RENTS AND PROFITS, § 96.

§ 95. Right to possession and enforcement thereof.

Provision in decree as to delivery of possession, see ante, § 5 [e].
Character of possession of purchaser, see "Champerty and Maintenance," vol. 9, cc. 2036, 2037, § 66.

[a] The authority of the court to put the purchaser of land under its decree in possession, by an order based on the petition of the purchaser, is restricted to those cases in which the parties holding the possession are either parties to the proceedings or those who go into possession pendente lite, claiming title under the parties to the bill or some of them.
—(Ala. 1841) Creighton v. Paine, 2 Ala. 158;
(1845) Trammel v. Simmons, 8 Ala. 271;
(Md. 1847) Oliver v. Caton, 2 Md. Ch. 297.

[b] Where property is sold under a decree of court, and the report of the sale is duly confirmed, the purchaser is entitled to possession of the property from the time of such confirmation, unless the decree contains an express direction to the contrary.
—(Tenn. 1874) Shields v. Thompson, 63 Tenn. (4 Baxt.) 227;
(Va. 1877) Hudgins v. Marchant, 28 Grat. 177;
(W. Va. 1881) Beard v. Arbuckle, 19 W. Va. 135.

[c] (Ala. 1841) Where possession after a judicial sale is withheld, the purchaser should petition the court, setting forth his purchase and the deed under which he claims, and by whom the possession is withheld, and that notice has been given of the application.—Creighton v. Paine, 2 Ala. 158.

[d] (Ala. 1884) Plaintiff purchased at a sale under decree, and the register was ordered to execute a deed upon plaintiff's crediting the amount of the purchase money on the decree. *Held*, that after the execution of the deed the burden was on defendant, resisting an application for writ of assistance, to show that the credit was not entered.—Kemp v. Lyon, 76 Ala. 212.

[e] (Cal. 1855) The statute allowing a redemption of real property sold at judicial sales contemplates that the possession shall not change to the purchaser until the expiration of the time prescribed as a limit to the redemption.—Guy v. Middleton, 5 Cal. 392.

[f] (Ill. 1873) A delay of five years in taking possession *held* not to estop a purchaser at a judicial sale from asserting title, on bill against him to set aside the sale. In such case, the decree is notice to all parties, and his delay will not be regarded in equity as an undue concealment of any facts which he was bound to communicate.—Watt v. McGalliard, 67 Ill. 513.

[g] (Ky. 1888) The court directed the sale of whatever interest defendant, or those claiming under him, who were parties to the suit or purchasers pendente lite, might have in certain property, reserving the power to put the purchaser in possession of the land sold. The title to a part of the land failed by reason of the

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adverse possession of others than parties and pendente lite purchasers. *Held*, that the reservation referred only to that part of the land sold, the title to which was good.—Preston v. Breckinridge, 86 Ky. 619, 6 S. W. 641.

[h, i] (Ky. 1893) Defendant in an execution sale of lands had no legal title thereto, but was merely a purchaser at a decretal sale thereof. Attorneys who had a lien on the land purchased it at the execution sale, and, after obtaining a writ of possession and a sheriff's deed, conveyed it to plaintiff. Later defendant in the execution obtained by an order of court a commissioner's deed for the land under his purchase, and a writ of possession. *Held*, that he should not be given possession of the land without satisfying the lien debts thereon, of which the grantee of the attorneys was virtually the owner.—Whitaker v. Cornett, 21 S. W. 645.

[j] (Md. 1828) The purchaser of land at a sale on process from the chancery court is entitled to a writ in the nature of a writ habere facias possessionem to obtain possession, unless cause be shown against it within the first four days of the term to which the execution is returnable.—Dorsey v. Campbell, 1 Bland, 356.

[k] (Md. 1829) Where A. purchased property at a sale under a decree, and gave his notes for the purchase money, with B. as surety, who was afterwards obliged to pay the notes, and A. then executed a deed of the same property to B., which was left with C. as an escrow, to be delivered up on a condition which did not appear to have been performed, it was *held* that A. could not be ousted by an order from the court of chancery.—Gowan v. Sumwalt, 1 Gill & J. 511.

[l] (Md. 1847) Possession obtained by a purchaser from a trustee acting under a decree, though before ratification, is not unlawful.—Wagner v. Cohen, 6 Gill, 97, 46 Am. Dec. 660.

[m] (Md. 1866) Where a purchaser at a sale under a decree, after having fully complied with the terms of the sale, is withheld from possession of the premises by a party to the suit, or by one claiming under such a party, by a title accruing after the suit was commenced, an order will be granted whereby such purchaser may obtain possession of the premises on proper process.—Applegarth v. Russell, 25 Md. 317.

[n] (Miss. 1849) A purchaser of land at a commissioner's sale under a decree of the superior court of chancery, who is no party to the original suit in which the decree of sale was made, cannot obtain in his own name a writ of assistance from the chancellor to turn parties out of the possession of the purchased premises, and put him in. The purchaser can only proceed by getting the vendor to make application for the process.—Wilson v. Polk, 21 Miss. (13 Smedes & M.) 131, 51 Am. Dec. 151.

[o] (N. Y. 1843) The court has no power to put the purchaser at a master's sale into possession of the premises by a summary proceeding, unless he is party to the suit or has come into possession, subsequently to the commencement of the suit, under or with the assent of a party.—Boynton v. Jackway, 10 Paige, 307.

[p] (N. Y. 1861) A purchaser at a judicial sale, under a judgment which directs that the purchaser be put in possession, is entitled to a writ of assistance, notwithstanding the death of the plaintiff, after judgment, and before the sale. A revival of the action is not necessary.—Lynde v. O'Donnell, 21 How. Prac. 34, 12 Abb. Prac. 286.

[q] (Or. 1881) The right to possession of a purchaser at a judicial sale is not affected by the fact that the person in possession appeals from the order of confirmation of sale, and that his undertaking on appeal provides for payment for the use and occupation, if the decree be affirmed.—British Columbia Bank v. Harlow, 9 Or. 338.

[r] (S. C. 1870) When land is sold by a commissioner in equity under a decree of court, an attachment cannot issue to compel the party in possession to surrender the premises until after the commissioner's report of the sale has been confirmed.—Crotwell v. Boozer, 1 S. C. (1 Rich.) 271.

[s] (Tenn. 1857) A court of chancery will carry into full effect sales made under its authority, by putting the purchaser into possession, so long as the court retains control over the subject-matter and parties.—Planters' Bank v. Fowlkes, 36 Tenn. (4 Sneed) 461.

[t] (Va. 1877) Since one purchasing land under a chancery decree becomes a party to the cause in which the decree is rendered, so far as his rights as a purchaser are concerned, the court may enter a decree for the delivery of the possession of the property to him.—Hudgins v. Marchant, 28 Grat. 177.

[u] (Va. 1877) Where, by virtue of an express direction in the decree confirming the sale of property, the purchaser is put in possession before appeal from the decree is perfected, he is entitled to retain possession until the case is determined by the appellate court.—Hudgins v. Marchant, 28 Grat. 177.

[v] (Va. 1877) Where an appeal has been perfected from a decree of court confirming the sale of property before the purchaser has taken possession, he is not entitled to possession until after the decision on the appeal.—Hudgins v. Marchant, 28 Grat. 177.

§ 96. Rents and profits.

Liabilities of purchasers and their sureties in general, see post, § 111.

Rights of purchaser at bankrupt's sale to rents and profits, see "Bankruptcy," vol. 6, cc. 440, 441, § 375.

[a] A purchaser at judicial sale is entitled to the rents and profits arising from the premises during the period from the sale to its confirmation.

—(D. C. 1876) Huntington v. Walker, 9 D. C. (2 MacArthur) 479;

(Md. 1847) Wagner v. Cohen, 6 Gill, 97, 46 Am. Dec. 660.

CONTRA, see

(Tenn. 1871) Armstrong v. McClure, 51 Tenn. (4 Heisk.) 80.

[b] (U. S. 1838) The principal and surety in a covenant for payment of the purchase price on a master's sale in chancery have no claim upon the rents and profits of the estate except from the time when the conveyance is completed.—Wood v. Mann, Fed. Cas. No. 17,954 [3 Sumn. 318].

[c] (Ark. 1890) A purchaser at a void judicial sale of the mortgaged land, who went into possession and improved the land with notice from the beginning of litigation affecting his title adversely, was liable for the rents during the entire period of his possession.—Jefferson v. Edrington, 53 Ark. 545, 14 S. W. 99.

[d] (Ill. 1892) An order to sell land, entered at the August term, provided that 10 per cent. of the price should be paid cash, the balance the following February 1st, without interest; deed to be delivered on payment. The sale was had October 31st, and approved December 7th. A week later, the purchaser induced the master to deliver him the deed, giving for it a cer-

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tified check, payable February 1st. *Held*, that the master's action was unauthorized, and the purchaser, knowing that no title was to pass till February 1st, had no claim on the rent corn remaining on the premises on December 14th.—Argo v. Oberschlake, 48 Ill. App. 289.

[e] (Iowa, 1877) Unaccrued rent reserved in a lease will pass with the land at judicial sale, notwithstanding the fact that notice in an action of attachment against the land was served by publication, or that the land was not appraised prior to the sale.—Townsend v. Isenberger, 45 Iowa, 670.

[f] (Iowa, 1877) Rent reserved, but not accrued, under a lease, passes with a conveyance of the premises, and a purchaser thereof at judicial sale becomes entitled to such rent.—Townsend v. Isenberger, 45 Iowa, 670.

[g] (Ky. 1881) A purchaser of real estate at a decretal sale is not entitled to recover rents from the date of sale to the confirmation and conveyance by the court, against defendant in possession.—Elliott's Adm'r v. Bush, 3 Ky. Law Rep. 466; Brown v. Berkley, Id. 469.

[h] (La. 1872) A purchaser at a judicial sale under a void judgment is liable for rents.—Walworth v. Stevenson, 24 La. Ann. 251.

[i] (Md. 1847) Where a sale under a decree is vacated, the purchaser, having been let into possession by the trustee and enjoyed the use, is responsible for rents and profits.—Wagner v. Cohen, 6 Gill, 97, 46 Am. Dec. 660.

[j] (Md. 1876) Land was sold under a decree in equity, and the trustee reported to the court that he sold the same "subject to the right of the tenant to cut and secure the growing crop." The sale, as reported, was ratified by the court. The purchasers and the tenant were parties to the proceedings for the sale of the land. The tenant cut and sold the crop of wheat which was growing at the time of the sale, and received the money therefor. In an action by the purchasers against the tenant to recover the value of the crop which he had sold, *held*, that plaintiffs were estopped from claiming the crop of wheat or its value.—Bruner v. Ramsburg, 43 Md. 560.

[k] (S. C. 1877) Where, in an action to set aside a judicial sale on the ground of fraud, the validity of the sale was sustained, but the purchasers were required to account for the difference between the price they bid for the land and the enhanced price at which they had sold it, they were not liable for rent.—Mars v. Comers, 9 S. C. (9 Rich.) 70.

[l] (Tenn. 1855) Acts 1850, c. 121, providing that a debtor, left in possession of land sold subject to redemption, shall not be liable for rent during the interval between the sale and time of redemption, applies to all sales under a decree in chancery, as well as to those under execution and deeds of trust.—Freeland v. Harris, 35 Tenn. (3 Sneed) 264.

[m] (Tenn. 1874) A purchaser at a master's sale, being entitled to possession at the date of confirmation, may recover the rents of the property from that time.—Shields v. Thompson, 63 Tenn. (4 Baxt.) 227.

[n] (Tenn. 1883) One who purchases land under a judicial sale is entitled to rent only from the time of the accrual of his right of possession, when this is postponed by the decree.—Latta v. Pierce, 79 Tenn. (11 Lea) 267.

[o] (Va. 1839) On the 30th of October, 1834, a decree was made for the sale of a tract of land, on a credit of 6, 12, and 18 months. Before the decree there had been a contract to rent the land, and pursuant to that contract a lease was made for a year, commencing the 25th of December, 1834, and ending the 25th of December, 1835. During this year, on the 10th of January, 1835, sale was made under the decree, which sale was confirmed and a conveyance executed to the purchaser. *Held*, that the purchaser must be considered complete owner from the date of the sale, and entitled to the rent which became due afterwards.—Taylor v. Cooper, 10 Leigh, 317, 34 Am. Dec. 737.

[p] (Wis. 1855) The purchaser at a chancery sale buys subject to the final order or decree of the court, and, if he take possession after the sale at which he purchased has been set aside and the order of confirmation vacated, he is a trespasser, and is liable for all the mesne profits which accrue from the time of his entry till his eviction, and for all the crops and produce on the estate at the time of his entry.—Lupton v. Almy, 4 Wis. 242.

(C) DEFECTS IN TITLE OR PROPERTY AND RELIEF THEREFROM.

IN GENERAL, § 97.
DEFECTS AGAINST WHICH RELIEF MAY BE HAD, § 98.
TITLE WHICH PURCHASER MAY BE REQUIRED TO TAKE, § 99.
COMPENSATION FOR DEFICIENCY OR DEFECT, OR ABATEMENT IN PRICE ON ACCOUNT THEREOF, § 100.
RECOVERY BACK OF PURCHASE MONEY ON DISCOVERY OF DEFECT IN TITLE, § 101.
PERSONS WHO MAY OBJECT TO TITLE, § 102.
WAIVER OF OBJECTIONS TO AND DEFECTS IN TITLE, § 103.

Want of title in vendor as defense to action for purchase money, see ante, § 56 [a, f].

§ 97. In general.

[a] The purchaser of land at a judicial sale buys at his risk, so far as title is concerned; the rule of caveat emptor applying to such sales.—(Ala. 1875) Bland v. Bowie, 53 Ala. 152; (1877) Fore v. McKenzie, 58 Ala. 115;
(Ark. 1877) Guynn v. McCauley, 32 Ark. 97; Black v. Walton, Id. 321;
(Ill. 1875) Holmes v. Shaver, 78 Ill. 578; (1875) Wing v. Dodge, 80 Ill. 564; (1882) Bridges v. Tilley, 11 Ill. App. (11 Bradw.) 353, affirmed (1883) Tilley v. Bridges, 105 Ill. 336;
(Ky. 1888) Williams v. Glenn's Adm'r, 87 Ky. 87, 7 S. W. 610, 12 Am. St. Rep. 461;
(Md. 1828) Anderson v. Foulke, 2 Har. & G. 346; (1830) Brown v. Wallace, 2 Bland, 585; (1832) Id., 4 Gill & J. 479; (1855) Farmers' & Planters' Bank v. Martin, 7 Md. 342, 61 Am. Dec. 350; (1863) Bolgiano v. Cooke, 19 Md. 375; (1865) Slothower v. Gordon, 23 Md. 1;
(Pa. 1840) Freeman v. Caldwell, 10 Watts, 9;
(Tenn. 1873) Hously v. Lindsay, 57 Tenn. (10 Heisk.) 651;
(Va. 1816) Stone v. Pointer, 5 Munf. 287; (1887) Smith v. Wortham's Heirs, 82 Va. 937, 1 S. E. 331;
(W. Va. 1877) Capehart's Ex'r v. Dowery, 10 W. Va. 130.

[b] (U. S. 1872) A purchaser at a judicial sale is a "purchaser" within the recording acts of Illinois, providing that unrecorded deeds shall take effect as to "subsequent purchasers" without notice, after the time for filing the same for record, and not before.—McNitt v. Turner, 83 U. S. (16 Wall.) 352, 21 L. Ed. 341.

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[c] (U. S. 1882) A court of equity will relieve the purchaser from complying with his bid made at a judicial sale, where the title is defective.—Dunscomb v. Holst (C. C.) 13 Fed. 11.

[d] (Ala. 1844) Where the purchaser of land at a sale under the order of the orphans' court, which had no jurisdiction to direct such sale, goes into possession, and so remains for two years, exercising ownership by cultivation, etc., he cannot rescind the contract of sale, unless the heirs are unable or unwilling to give a good title.—Lamkin v. Reese, 7 Ala. 170.

[e] (Fla. 1854) A court of equity will relieve a purchaser of real estate, sold under a decree of court, where time has been allowed to perfect title, and 10 years have elapsed and the title is not perfected.—Myers v. Nourse, 5 Fla. 516.

[f] (Ill. 1851) A sale of real estate of A. had taken place under a decree of the circuit court of the United States for the Illinois circuit. B. became the purchaser of a piece of land, and paid the purchase money to the plaintiffs, but, discovering that A. had no title thereto, made application to the court to have the purchase money reimbursed out of moneys of the plaintiffs in court. *Held*, in the absence of fraud and unfair dealing, that this could not be done, but, that being a judicial sale, B. must take the consequences of a defect or failure of title.—United States v. Duncan, 12 Ill. (2 Peck) 523.

[g] (Ky. 1878) After confirmation of a judicial sale, no relief will be granted the purchaser, on the ground of defect of title, in the absence of fraud.—Farmers' Bank v. Peter, 76 Ky. (13 Bush) 591.

[h] (La. 1859) When property is sold at sheriff's sale, and the party causing the sale to be made is not able to put the purchaser in the enjoyment of the premises, nor of the rents, he has a right to refuse payment of the price.—Hernandez v. His Creditors, 14 La. Ann. 337.

[i] (Md. 1832) Where the trustee, at the time of a judicial sale, expressly declared that he only sold the estate, right, and interest which the parties to the decree had in certain land, and that, if they had no right, he sold none, it is not necessary in determining the rights of the purchaser, to determine whether the maxim caveat emptor applies to such sale.—Brown v. Wallace, 4 Gill & J. 479.

[j] (Md. 1832) Where a trustee appointed to make a sale under a decree expressly declared, at the time of sale, that he only sold the estate, right, and interest of the parties to the decree, and, if they had no right, he sold none, there can be no pretense of warranty of title.—Brown v. Wallace, 4 Gill & J. 479.

[k] (Md. 1863) A purchaser discovering a defect of title of real estate, sold by decree of a court of equity at a proper time, may be relieved from his purchase by asking a rescission of the sale.—Bolgiano v. Cooke, 19 Md. 375.

[l] (Md. 1895) Where a purchaser at a sale by a trustee under order of court was fully cognizant of a defect in the title, equity will not relieve him from liability to comply with the terms of the sale, on the ground that the defect renders the title unmarketable.—Stewart v. Devries, 81 Md. 525, 32 Atl. 285.

[m] (N. Y. 1856) A creditor buying the property at a public sale, though all his bid, except enough to pay the expenses, went to pay the debt, is a purchaser for valuable consideration, within the recording acts (1 Rev. St. p. 738, § 137), protecting bona fide purchasers against unrecorded deeds.—Wood v. Chapin, 13 N. Y. (3 Kern.) 509, 67 Am. Dec. 62.

[n] (N. Y. 1877) Where, at auction sale under a decree of court, there is sold only the "estate, right, title, and interest" of the owner or supposed owner, the purchaser cannot refuse to complete the purchase on the ground that the title is defective.—Mott v. Mott, 68 N. Y. 246.

[o] (N. C. 1877) Where a particular piece of land is sold under an order of court, a good title is deemed to be offered; and a purchaser will not be compelled to complete his purchase, by payment of the price, if it appear that a good title cannot be made. It is otherwise in cases where the sale is ordered merely of the estate of a person, named in the land.—Shields v. Allen, 77 N. C. 375.

[p] (N. C. 1879) A purchaser at a judicial sale, knowing of an adverse claim to the property, the strength of which he cannot determine until the same has been judicially ascertained, may buy in the rival claim, and deduct for it, or, if the money has been paid into court, demand the return of a proportional part of it.—Etheridge v. Vernoy, 80 N. C. 78.

[q] (N. C. 1879) The purchaser at a judicial sale will not be compelled to pay his money and take a title substantially defective, unless the sale be made of an estate or interest short of the entire title, and so mentioned in the decree, or clearly implied from the nature of the sale.—Edney v. Edney, 80 N. C. 81.

[r] (N. C. 1886) Where the pleadings and proceedings purport to sell a perfect title, a purchaser will not be required to pay the money and take the land, if the title is imperfect; but, where the true state of the title is set out in the pleadings, he will not be released from his bid, if the title is not good.—Eccles v. Timmons, 95 N. C. 540.

[s] (Pa. 1856) The rule of caveat emptor applies to a purchaser at a judicial sale only as to open defects. Against secret defects in a title apparently good he will be protected.—Banks v. Ammon, 27 Pa. (3 Casey) 172.

[t] (S. C. 1860) Where a commissioner of the court of equity, at his sale of personal property, gives notice that there is no warranty of the soundness of the property, the rule caveat emptor applies, and the purchaser will be bound to pay, though the property should prove unsound.—Parker v. Partlow, 12 Rich. Law, 679.

[u] (Tenn. 1858) Where slaves are sold by a commissioner, under order of court, with a warranty of title and soundness, the purchase and payment of the purchase price is a sufficient consideration to support the warranty.—Kearly v. Duncan, 38 Tenn. (1 Head) 397, 73 Am. Dec. 179.

[v] (Va. 1845) A purchaser of land at a judicial sale can only obtain relief for defects in the title, or incumbrances on the property, by resisting a confirmation of the sale, on the report of the commissioner. Afterwards a court of equity will not enjoin a judgment against him for the purchase money.—Threlkelds v. Campbell, 2 Grat. 197, 44 Am. Dec. 384.

[w] (Va. 1882) It is no ground for a refusal to carry out the terms of a judicial sale that the court refused to refer the question of title to a commissioner. Such a course cannot be demanded as of right.—Thomas v. Davidson, 76 Va. 388.

[x] (Va. 1894) Where a court has three times ordered property to be sold without ordering an account of the liens on the property, and the title to the same is uncertain, a purchaser should not be required to complete his purchase.—Etter v. Scott, 90 Va. 762, 19 S. E. 776.

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[y] (W. Va. 1873) Where a court of equity appoints special commissioners to make sale of land in a pending cause for the purposes thereof, and the sale is made accordingly, such court should not entertain a bill of injunction to enjoin the collection of a judgment at law rendered upon a bond given to the commissioners for the purchase money, upon allegations that the commissioners have no title to the land, and that no deed has been made or filed as an escrow for the same, and that the title to the land is in another person, especially where such person is a party to the suit in which the decree of sale is made.—Shields v. McClung, 6 W. Va. 79.

§ 98. Defects against which relief may be had.

[a] (U. S. 1882) Where, after a judicial sale of land, it is discovered that the defendant in such proceedings has not a title in fee thereto, the purchaser at the sale will be relieved from complying with his bid, and a resale of such interest in the land as the defendant has will be ordered.—Dunscomb v. Holst (C. C.) 13 Fed. 11.

[b] (Ky. 1890) Where more than half a century has elapsed since the conveyance of the land by a remote vendor in a deed wherein his wife joined, but which was ineffectual to convey her inchoate dower right, the court will not assume, in favor of a purchaser at a judicial sale, who fails to comply with the terms of sale, that the wife is still alive, and may yet assert her rights.—Southwick v. Greuzenbach, 14 S. W. 344.

[c] (Ky. 1891) An island in the Ohio river was sold under a chancellor's decree. The decree and advertisements described the land by metes and bounds. The description (taken from the patent) showed that the island contained 198 acres, when in fact it only contained 27¾ acres, and the boundary embraced the channel of the river. *Held* proper to release the purchasers from liability on their bid.—Pope v. Erdman, 17 S. W. 145.

[d] (Ky. 1891) The purchaser of a lot having a front of 110½ feet, at judicial sale, cannot claim that he was deceived because he afterwards discovered that the lot was not a parallelogram, one of the side lines running obliquely, so as to make the back line only 82 feet, where this back line was stated in the advertisement of the lot to be "100 feet, more or less."—Williams v. Duncan, 92 Ky. 125, 17 S. W. 330.

[e] (Md. 1828) A trustee appointed by a court of chancery sold an entire tract of land at a certain price per acre, and the sale was ratified. At the time of the sale it was known to the trustee and purchaser that a bill was pending for the recovery of an interest in the same land, in opposition to those whose title the trustee was about to sell; and, by the final decision upon that bill, it was decreed that the complainants were entitled to one-fourth of the tract. After this decision the purchaser filed a petition in the same court, setting it forth, and claiming to vacate the sale to himself, on account of the apprehended interruption of a road, alleged to lead through the premises which he intended to purchase from his estate, which, together with the proximity of the two estates, he alleged to have been his only inducement to purchase. The existence of the road was not proved, and it appearing that the quantity of land to be obtained from the trustee was not a material consideration in the purchase, that the trustee could give a good title under the original decree to three-fourths of the whole tract, that the petitioner had secured for himself three-fourths of the remaining quarter, and that the trustee was enabled, by a deed from the party entitled to the remainder, to convey that also, which, if the petitioner accepted it, would secure to him the entire object of the purchase without loss, it was *held* that the purchaser could not be discharged from his contract, as its enforcement, subject to a proportionate deduction for that portion of the land which he had purchased from others, would do him no injury.—Weems v. Brewer, 2 Har. & G. 390.

[f] (Md. 1828) A purchaser of land sold under a decree of the court of chancery, claiming to be discharged from his contract, should make out a fair and plain case for relief, and not every defect in the subject sold, or variation from the description, will avail him.—Weems v. Brewer, 2 Har. & G. 390.

[g] (N. Y. 1831) Where a purchaser at a master's sale, under a decree against heirs and devisees for a debt due from their testator, was assured that a perfect title should be given, and it appeared that certain judgment creditors of the heirs and devisees had not been made parties to the suit, it was *held* that the purchaser was not bound to complete the purchase.—Morris v. Mowatt, 2 Paige, 586, 22 Am. Dec. 661.

[h] (N. Y. 1832) Land sold under a decree was described, in the notice of sale by the master, as containing 20 acres, "more or less," but it in fact contained but 13 acres; and one of the trustees of the fund to be raised by the sale was present at the sale, and, knowing of the mistake in quantity, concealed it, and urged the purchaser and others to bid. *Held*, that the purchaser could not be compelled to complete the purchase.—Veeder v. Fonda, 3 Paige, 94.

[i] (N. Y. 1834) A purchaser at a sale by a master is authorized to object to the title only when it is probable that some third person has a valid claim or lien upon the premises.—Dunham v. Minard, 4 Paige, 441.

[j] (N. Y. 1873) Where the terms of sale provide that existing incumbrances will be allowed to the purchaser out of the purchase money, on his producing vouchers therefor, the existence of incumbrances which he might have thus paid off is no reason for refusing to fulfill his purchase.—Lenihan v. Hamann, 14 Abb. Prac. (N. S.) 274.

[k] (N. Y. 1877) Where a tract of land divided into city lots is put up and sold at auction under a decree of court in separate and independent parcels, a defect in the title to one parcel, or to a lot included therein, will not avoid or affect the sale of another parcel; but a defect in the title to any one of several lots put up and sold as one parcel avoids the sale of the whole parcel.—Mott v. Mott, 68 N. Y. 246.

[l] (N. Y. 1887) A purchaser at a judicial sale cannot be relieved from completing his purchase on the ground that the quantity of the land was falsely represented as 31 acres, when in fact it was less than 25 acres, when the only representations consisted of the description in a deed referring to the quantity as 31 acres, "more or less" which was also the amount specified in the advertisements, and the metes and bounds were properly given, and a lump sum was bid for the tract, as there is no warranty as to quantity under such circumstances.—Dennerlein v. Dennerlein, 46 Hun, 561.

[m] (N. Y. 1892) A power of attorney executed by a married woman to her husband authorized him to sell and convey all or any lands belonging to her individually or jointly with another, and "for the purpose aforesaid" and in her name, as her act and deed, to execute

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all necessary or proper "deeds, conveyances, releases, releases of dower, and right of dower, or other instruments for the conveying, surrendering, and relinquishing all or any part of my estate, right, title, and interest, whether vested or contingent, choate or inchoate." *Held*, that whether the instrument by its terms authorized the husband to execute a release of dower in his lands for the wife was a question of such reasonable doubt as entitled a purchaser of land at a judicial sale to relief from his bid, on discovery that in the chain of title to the land dower was released by a husband under such a power.—Wronkow v. Oakley, 64 Hun, 217, 19 N. Y. Supp. 51, 16 L. R. A. 209; In re Wolff, Id.

[n] (Ohio, 1876) Where real estate sold at a judicial sale was advertised by the officer, through mistake, as dry land, while in fact a part thereof was covered with water, a purchaser, who believed the property to be dry, but was not misled by any act or representation of the officer, was bound by the sale.—Mechanics' Sav. & Bldg. Loan Ass'n v. O'Connor, 29 Ohio St. 651.

[o] (Pa. 1851) Where burial lots were sold by special agreement in lump, and it appeared that the numbers of the lots had been given in the advertisement to sell (though transposed), the sale will not be set aside, though there were three or four lots less than advertised.—Monument Cemetery Co. v. Potts, 1 Phila. 251.

[p] (Pa. 1890) Where a person purchases property at a sale under an order of the orphans' court, which property is burdened with an easement in favor of adjacent lots, of which the purchaser had no notice, he will not be compelled to complete the purchase.—In re Morgan's Estate (Orph. Ct.) 9 Pa. Co. Ct. R. 119.

[q] (Tenn. 1872) The fact that land sold at a chancery sale has been previously sold at a tax sale, and bought in by the state or city, does not entitle the purchaser at the chancery sale to be relieved from his purchase, if the state or city is not proceeding upon the sale, but is treating it merely as a means of securing the taxes.—Kirk v. Jones, 55 Tenn. (8 Heisk.) 829.

[r] (Tenn. 1873) Where a purchaser of land at a chancery sale has received a deed, a petition by him alleging that within the limits of the land conveyed, "as he is informed and believes," there is a certain number of acres in adverse possession of another and in litigation, but which does not allege that the title acquired by him is invalid, shows no ground for equitable relief.—Foster v. Bradford, 1 Tenn. Ch. 400.

[s] (Tenn. 1874) A lot was advertised as fronting on a certain street 62 feet, and sold at a master's sale for $12,815 in gross. On petition brought by the purchaser before confirmation of the decree, it appeared that the frontage was in fact only 60 feet and 3 inches. *Held*, that he was not entitled to relief.—Shields v. Thompson, 63 Tenn. (4 Baxt.) 227.

[t] (Va. 1895) Where property sold under decree of court is correctly represented by a plat which discloses an encroachment of about 2½ feet on a street, which plat is referred to in the advertisement of sale, and exhibited on the day of sale, a purchaser cannot plead ignorance of said encroachment.—Carneal v. Lynch, 91 Va. 114, 20 S. E. 959, 50 Am. St. Rep. 819.

[u] (W. Va. 1882) Where land has been sold under the direction of a court of equity by certain designated boundaries, the purchaser having been shown the land prior to the sale, and put into possession of all the tract shown him, with good title thereto, the court may compel him to pay the full purchase price, although the designated boundaries include land to which the vendor had no title.—Crislip v. Cain, 19 W. Va. 438.

§ 99. Title which purchaser may be required to take.

Titles and interest which pass under judicial sale in general, see ante, § 91.

[a] (U. S. 1882) A title acquired under the following devise in a will, "I bequeath to my daughter [the land in question] for her and her children's sole and separate use, free from any claim or control of her husband," is not of such clear and indisputable character as the purchaser at a judicial sale has a right to demand.—Dunscomb v. Holst (C. C.) 13 Fed. 11.

[b] (D. C. 1888) Adverse possession of lands for such length of time as will bar an action for their recovery constitutes a good title thereto, which the purchaser at a judicial sale will be required to take.—Cox v. Cox, 7 Mackey, 1.

[c] (La. 1883) A purchaser at a judicial sale is entitled to an unincumbered title before being compelled to comply with the term of the adjudication.—Roberts v. Bauer, 35 La. Ann. 453.

[d] (N. J. 1893) Purchasers at a judicial sale are not entitled to a "merchantable title," but only to such a title as the proceedings show that they will get.—Boorum v. Tucker, 51 N. J. Eq. (6 Dick.) 135, 26 Atl. 456.

[e] (N. Y. 1830) A purchaser at a master's sale is bound to complete the purchase, where the vendor shows a prima facie title against which there are no reasonable grounds of suspicion.—In re Browning, 2 Paige, 64.

[f] (N. Y.) A purchaser at a master's sale, under the assurance that he is to receive a perfect title, will not be compelled to complete the purchase, unless a title, good both in law and equity, can be given.—(1831) Morris v. Mowatt, 2 Paige, 586, 22 Am. Dec. 661; (1840) Coster v. Clarke, 3 Edw. Ch. 428.

[g] (N. Y. 1839) The court, in giving title to the purchaser at a master's sale under a decree, only assumes to give such a title as a purchaser at a private sale would be bound to receive.—Spring v. Sandford, 7 Paige, 550.

[h] (N. Y. 1868) A purchaser at a judicial sale cannot be compelled to take title, when a person, who, if living, would have an interest in the property, is not proven to be dead, merely because such person has been absent, unheard of, for seven years. The presumption of death, arising from such absence, is not a sufficient basis for the title.—McDermot v. McDermot, 3 Abb. Prac. (N. S.) 451.

[i] (N. Y. 1884) A purchaser at a judicial sale will not be compelled to complete his purchase, where a link in the title consists in a special guardian's purchase of property sold by him as such guardian.—People v. Globe Mut. Life Ins. Co., 33 Hun, 393.

[j] (N. Y. 1885) A purchaser at a judicial sale will not be compelled to take a title, a chain in which consists of a deed executed 50 years before by two only of three executors, who all qualified, and who, unless the one not joining renounced the trust, should all have joined in the deed, the question of renunciation depending on inferences and presumptions by no means incontrovertible; the question of whether the title of the testator's children, all of whom, save one, joined in a quitclaim deed, was an absolute or a determinable fee, being a question of law and in doubt, and it not being certain that a possession relied on as constituting a bar

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had certainly continued for a sufficient length of time to cut off all rights.—Fleming v. Burnham, 100 N. Y. 1, 2 N. E. 905.

§ 100. Compensation for deficiency or defect, or abatement in price on account thereof.

Liability for excess over amount which could properly be sold, see post, § 111 [c].

—— *of purchaser for deficiency on resale, see* ante, § 52.

Liens, charges, and incumbrances in general, see ante, § 92.

Right of purchaser to have liens and incumbrances discharged out of purchase money, see ante, § 93.

[a] (U. S. 1812) A judgment for the purchase price of lands sold by commissioners at a public sale by the acre, as directed by a decree of the court, will be enjoined to the extent of any deficiency, though the commissioners declared that the purchaser must buy at his own risk, both as to quantity and title.—Strodes v. Patton, Fed. Cas. No. 13,538 [1 Brock. 228].

[b] (Ga. 1882) A qualification of the quantity of the lot of land sold as "more or less" will cover any deficiency not so gross as to justify the suspicion of willful deception or mistake amounting to fraud; and this, without regard to existence of legal fraud, as defined in Code, § 3174.—Wylly v. Gazan, 69 Ga. 506.

[c] (Ky. 1888) An abatement of the purchase price will not be allowed for a failure of title to a part of the land, by reason of an outstanding title not within the scope of the decree, where the land actually acquired is worth much more than the purchase price, and the purchasers have refused an offer of the holder of their purchase price bond to cancel it and set aside the sale.—Preston v. Breckinridge, 86 Ky. 619, 6 S. W. 641.

[d] (Ky. 1890) Where plaintiff, as commissioner, sells a tract of land, giving a bond conditioned, among other things, that the purchaser should be put in full possession of the land, and it appears that a portion of the tract is in the adverse possession of another person, the purchaser is entitled to have the value of that portion deducted from the purchase price of the tract.—Aiken v. Underwood, 12 S. W. 1061.

[e] (La. 1848) A judicial purchaser may claim, if there is a deficiency in the quantity of the land sold, a proportional diminution of the price.—Hall v. Nevill, 3 La. Ann. 326.

[f] (Md. 1828) Where the purchaser at a judicial sale gets substantially what he bargained for, he will be compelled to take compensation for a deficiency.—Weems v. Brewer, 2 Har. & G. 390.

[g] (Md. 1832) At a judicial sale a certain lot was represented as containing 143 acres, for which the purchaser offered $23 per acre. *Held* to be a sale by the acre, and that the purchaser applying to the court, within a reasonable time, would be allowed for a deficiency in the number of acres.—Brown v. Wallace, 4 Gill & J. 479.

[h] (Md. 1851) Where a tract of land sold by a trustee appointed by a court of equity contains a less number of acres than the trustee represented that it did, and the deficiency becomes known before ratification, the vendee should proceed by petition to such court, for an abatement of the price, and not by original bill, though the sale be not impeached for fraud.—Marbury v. Stonestreet, 1 Md. 147.

[i] (Md. 1851) Where a tract of land sold by a commissioner under a decree was advertised as containing 669 acres, but in fact contained only 530 acres, the purchaser was entitled to an abatement in the price.—Marbury v. Stonestreet, 1 Md. 147.

[j] (Md. 1865) Purchasers from a trustee in chancery sought, by petition, an abatement of the purchase money, on the ground of a deficiency in the quantity of the land. It appeared that the land had been advertised and described by the trustee as a cotton factory, etc., "with 187 acres of land, more or less, attached thereto," and the advertisement further stated that the property could be examined by any person desiring. *Held*, that the qualifying words, "more or less," gave sufficient notice to the purchasers that quantity did not enter into the essence of the contract, warning them to ascertain the true quantity at their own risk.—Slothower v. Gordon, 23 Md. 1.

[k] (Md. 1865) Where a trustee in chancery sells real estate consisting, in part, of machinery, which he describes as being "in good running order and now in use," it will be presumed that he believed the condition of the machinery to be such as he represented, and an abatement in price, on account of inferior quality, will not be allowed in the absence of proof of fraud.—Slothower v. Gordon, 23 Md. 1.

[l] (Md. 1874) A purchaser, with a good opportunity of examining the premises, purchased at a sale made under an order of the orphans' court certain leasehold property described in the advertisement of sale as "fronting on A street 50 feet, with an even depth of 123 feet." After the confirmation he found that the lot tapered from 50 feet frontage to a width of only 40 feet in the rear. None of the buildings were on the deficiency. *Held*, that the court properly allowed a proportionate abatement from the purchase money, and refused to rescind the sale.—Carmody v. Brooks, 40 Md. 240.

[m] (N. J. 1890) A tract of land described by metes and bounds, and stated to contain 121 acres, more or less, was sold by order of court, after having been offered twice, the purchaser being present on both occasions, and a week elapsing between the two. With this opportunity to investigate the quantity of land before bidding, he purchased the tract for a lump sum. *Held*, that a shortage of 10 acres in the quantity is not such a discrepancy as to entitle him to a diminution in the price.—Close v. Brown (Err. & App.) 20 Atl. 674.

[n] (S. C. 1852) At a commissioner's sale of land, the plat exhibited represented a river as running through the tract, and covering a portion of the land. The land was sold by the acre. The river, at a place where it ran through the tract, contained obstructions to the navigation, but was navigable for boats above and below that place. *Held*, that the purchaser was not entitled to a credit on his bond for the purchase money for that portion of the land forming the bed of the river.—Shands v. Triplet, 5 Rich. Eq. 76.

[o] (S. C. 1892) Land was advertised for sale as all that tract or parcel known as the "Anderson Quarry Tract," and the number of acres (1,266⅔) was mentioned as part of the description. *Held*, that the sale thereunder not being by the acre, and the chief element of value being the granite, which the advertisement stated was found on the land in inexhaustible quantities, no abatement in the purchase price would be made because of a deficiency of about 200 acres, in the absence of fraud and intentional misrepresentation, and evidence that the purchaser failed to get all that he valued in the purchase.—Lyles v. Haskell, 35 S. C. 391, 14 S. E. 829.

[p] (Tenn. 1873) Where a purchaser of land at a chancery sale receives a deed correctly re-

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citing the boundaries of the land purchased, he is not entitled to compensation for a deficiency in the number of acres called for within such boundaries.—Foster v. Bradford, 1 Tenn. Ch. 400.

[q] (Tenn. 1880) A purchaser of land at a judicial sale is entitled to an abatement of the price, where it appears that the amount actually conveyed was less than that represented to have been conveyed at the sale.—Myers v. Lindsay, 73 Tenn. (5 Lea) 331.

[r] (Va. 1811) Under the rule that where land is sold by metes and bounds, exhibited to the purchaser before he put in his bid, with a qualification that the sale was made whether the land included a certain number of acres, "more or less," the purchaser cannot recover compensation for a deficiency, though subsequent articles of agreement, under seal, referred to the terms of sale, and the quantity of ground mentioned in the advertisement is specified, omitting the words "more or less."—Grantland v. Wight, 2 Munf. 179.

[s] (W. Va. 1882) Where land has been sold by certain designated boundaries, the purchaser having been shown the land prior to the sale, and put into possession of all the tract shown him, with good title thereto, he will not be entitled to an abatement of the purchase price, though the designated boundaries included land to which the vendor had no title.—Crislip v. Cain, 19 W. Va. 438.

§ 101. Recovery back of purchase money on discovery of defect in title.

Recovery of purchase price because of error or defect in decree or order of sale, see post, § 107 [c, d, e].

[a] (U. S. 1850) The purchaser at a judicial sale, who has paid the money to the judgment creditor, cannot, on discovering a defect of title, call on him for repayment, but his remedy, if any, is against the judgment debtor.—United States v. Duncan, Fed Cas No. 15,003 [4 McLean, 607].

[b] (Tenn. 1847) Where a purchaser at a master's sale discovers a defect in the title, after paying the price, he may recover it back at any time before a conveyance is made, by a petition in the cause in which the sale was ordered.—Read v. Fite, 27 Tenn. (8 Humph.) 328.

§ 102. Persons who may object to title.

Persons who may question validity of sale, see ante, § 69.

[a] (U. S. 1838) The surety in a covenant by the purchaser at a sale under a decretal order to pay the purchase money cannot take any exceptions to the title, where the principal has failed to do so.—Wood v. Mann, Fed. Cas. No. 17,954 [3 Sumn. 318].

[b] (Tenn. 1877) The surety on notes given for land bought at a judicial sale cannot maintain a suit in equity to avoid the sale, on the ground of a defect of title.—Lillard v. Puckett, 68 Tenn. (9 Baxt.) 568.

§ 103. Waiver of objections to and defects in title.

[a, b] (Ky. 1871) The failure of a person to object to the confirmation of the sale of land bought by him at a commissioners' sale is a waiver of his right to resist the payment of the purchase price on the ground that suit had been brought against him to recover a part of the land, where process therein has been served on him before the commissioners' report of sale was confirmed.—Huber v. Armstrong's Heirs, 70 Ky. (7 Bush) 590.

[c] (Ky. 1886) A purchaser of land sold under decree of court, who has neither resisted the order confirming the sale nor attempted, during the term, to have that order set aside, may, after the term has closed, institute a suit to enjoin the collection of a bond given by him for the purchase money, where the title to the land is not good, and the description is so vague that it cannot be identified, and he has been led by the conduct of the parties in the sale proceedings to postpone a motion to have the order ratifying the sale set aside until after the term of court has come to a close.—Morrow v. Wessell, 1 S. W. 439; Id., 2 S. W. 251.

[d] (Md. 1832) Where a judicial sale was made in 1812, and the purchaser, after being privy to a survey of the land, gave his bond, took possession, and used the property, without making complaint until 1818, he thereby forfeited all claims of an allowance for a deficiency in the number of acres.—Brown v. Wallace, 4 Gill & J. 479.

[dd] (Va.) If the purchaser at a judicial sale would object to the title, he should do so before confirmation. After confirmation he can, ordinarily, have no relief, except for fraud or mistake.—(1852) Young's Adm'r v. McClung, 9 Grat. 336; (1877) Long v. Weller's Ex'r, 29 Grat. 347; (1882) Thomas v. Davidson, 76 Va. 338; (1882) Boyce v. Strother, Id. 862; (1883) Hickson v. Rucker, 77 Va. 135.

[e] (Va. 1858) The purchaser at a public sale of lands was informed immediately after the sale that the title to a portion thereof was vested in infants, and could not be obtained, except by a suit in chancery. The purchaser, however, manifested his intention to proceed with the purchase, taking a conveyance for that portion which could be made at once, and to look to a court of chancery for title to the other portion. *Held*, that the purchaser waived any objection which he might have made to the title.—Goddin v. Vaughn's Ex'x, 14 Grat. 102.

[f] (Va. 1877) The general rule that objections by purchasers to judicial sales for defect of title must be made before the sale is confirmed by the court, and that objections afterwards come too late, does not apply to the equity of a purchaser arising from after-discovered mistakes, fraud, or other like matter.—Watson v. Hoy, 28 Grat. 698.

[g] (Va. 1877) The title to an easement is necessarily connected with the title to the land to which it is appurtenant; and, as a purchaser at a judicial sale of land cannot be heard to object for want or defect of title after the confirmation of the sale, no such objection in respect to an easement appurtenant to such land can be raised after confirmation of the sale.—Long v. Weller's Ex'r, 29 Grat. 347.

[h] (Va. 1877) An objection by a purchaser at judicial sale, taken after the sale has been confirmed, that, owing to his misinformation as to the boundaries of the land, he does not get certain water privileges which he would have had if he had been correctly informed as to the said boundaries, can only be sustained on the ground of fraud or mistake; and, if mistake is relied upon, it must be the mistake of both parties.—Long v. Weller's Ex'r, 29 Grat. 347.

[i] (Va. 1887) The purchaser at a duly-confirmed judicial sale, having paid the cash down and the first installment of the deferred payments, according to the terms of sale, withheld the second and last installment, and to a rule to show cause answered that the property was subject to an adverse claim of title, contrary to the representations of the commissioner, and asked for an order to deposit said second installment to await the determination of said adverse claim. The commissioner denied

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making such representations, and a resale was ordered, and the payment of certain debts thereon out of the proceeds. The resale was advertised, but enjoined by the purchaser. On hearing, the commissioner answering as before, the adverse claimants also filing their cross bill, the injunction was dissolved without prejudice to a new suit by the claimants, and the property ordered resold, unless the balance of the purchase money were paid within 30 days. The purchaser appealed on the ground that the adverse claim should have been determined before a resale was ordered. *Held* that, the rule of caveat emptor applying, the purchaser could not object to the title after the sale was confirmed; fraud or mutual mistake not being averred.—Redd v. Dyer, 83 Va. 331, 2 S. E. 288, 5 Am. St. Rep. 272.

(D) DEFECTS OR IRREGULARITIES IN PROCEEDINGS, JUDGMENT, DECREE, ORDER, OR SALE.

IN GENERAL, § 104.
ERRONEOUS, DEFECTIVE, OR INVALID JUDGMENT, ORDER, OR DECREE, § 105.
IRREGULARITIES AFFECTING SALE, § 106.
PROCEEDINGS FOR RELIEF, § 107.

Validity of sale in general, see ante, §§ 68–71.

§ 104. In general.

[a] (Ala. 1875) A purchaser of land at a sale under an order of the probate court cannot be heard to complain of lapse of time between the rendition of the decree and the sale under it.—Bland v. Bowie, 53 Ala. 152.

[b] (D. C. 1888) The purchaser at a judicial sale cannot question the regularity of the proceedings had before the decree of sale was entered.—Cox v. Cox, 7 Mackey, 1.

[c] (Pa. 1887) Where the jurisdiction of the court has attached in proceedings for the sale of property, the purchaser's title is unprejudiced, as against all persons who were made parties, by any error in the proceedings.—Morrison v. Nellis, 115 Pa. 41, 7 Atl. 768.

§ 105. Erroneous, defective, or invalid judgment, order, or decree.

Defects and irregularities in judgment or decree as ground for setting aside sale, see ante, § 74.

Form, requisites, and validity of judgment or decree in general, see ante, §§ 9, 10.

[a] Where the court rendering a decree for the sale of property has jurisdiction, the purchaser at such sale will be protected, though the judgment may be erroneous or invalid.

—(U. S. 1844) Grignon's Lessee v. Astor, 43 U. S. (2 How.) 319, 11 L. Ed. 283; (1834) Bank of the United States v. Voorhees, Fed. Cas. No. 939 [1 McLean, 221], affirmed Voorhees v. Bank of the United States (1836) 35 U. S. (10 Pet.) 449, 9 L. Ed. 490;

(Ind. 1849) Taylor's Heirs v. Parker, Smith, 225;

(La. 1840) Brosnaham v. Turner, 16 La. 433.

[b, c] The purchaser at a judicial sale, without notice, actual or constructive, will be protected, though the decree for the sale was obtained by fraud.

—(Ala. 1879) Dunklin v. Wilson, 64 Ala. 162;

(N. Y. 1857) Clarke v. Davenport, 14 N. Y. Super. Ct. (1 Bosw.) 95.

[d] A purchaser at a judicial sale is bound to look to the jurisdiction of the court granting the order of sale, but the truth of the record concerning matters within its jurisdiction cannot be disputed by him.

—(La. 1892) Successions of Theze, 44 La. Ann. 46, 10 South. 412;

(Tex. 1881) Stegall v. Huff, 54 Tex. 193.

[e] (D. C. 1892) A decree of sale of land made by a court without jurisdiction gives the purchaser no title.—Stansbury v. Inglehart, 19 Wash. Law Rep. 594.

[f] (Ga. 1853) If a court has jurisdiction, no error or irregularity in the mode of its exercise can affect the purchaser's title under a judicial sale.—Walker v. Morris, 14 Ga. 323.

[g] (Ga. 1874) Ejectment was brought against defendant for a certain tract of land. The latter had made advances for the benefit of the plaintiffs and of the property sought to be recovered, and had purchased the land in satisfaction of such indebtedness, at a sale made under the order of the chancellor. This order was attacked by the plaintiffs as illegal. *Held*, that even if the order was unauthorized, yet defendant, having purchased the property in good faith, under color of legal proceedings, might set up the facts aforesaid by an equitable plea, and claim to be reimbursed before a recovery could be had.—Askew v. Patterson, 53 Ga. 209.

[h] (Ill. 1841) Where the facts necessary to give the court jurisdiction appear on the face of proceedings resulting in a judicial sale, the purchaser will be protected, though the judgment may be erroneous.—Buckmaster v. Jackson, 4 Ill. (3 Scam.) 104.

[i] (Ill. 1875) If the court ordering a sale of real estate has jurisdiction of the subject-matter and of the parties, no mere errors can have any effect upon the sale or the title under it. Until reversed, the decree confers power to sell and pass the title, if there was jurisdiction, however erroneous the decree may be.—Wing v. Dodge, 80 Ill. 564.

[j] (Ky. 1878) One does not, by virtue of his purchase at a sale made under a void judgment, acquire a lien on the thing sold for the amount of the debt paid by the sale.—Grigsby v. Barr, 77 Ky. (14 Bush) 330.

[k] (La. 1829) A possessor, under a sale by order of a court with jurisdiction ratione materiæ, though not ratione personæ, is a possessor in good faith.—Donaldson v. Dorsey's Syndic, 7 Mart. (N. S.) 376.

[l] (La. 1872) A purchaser at a judicial sale obtains no title if the judgment, under which he purchases, is absolutely void for want of citation.—Walworth v. Stevenson, 24 La. Ann. 251.

[m] (La. 1879) Innocent third persons who purchase property at a public sale held under the decree of a court of competent jurisdiction cannot be affected by any irregularities in the decree, subsequently ascertained.—Wisdom v. Parker, 31 La. Ann. 52.

[n] (La. 1888) Although a purchaser may be protected by the order of a court directing a sale in a matter over which it has jurisdiction, he has the right to inquire into the proceedings conducive to the order of sale, to ascertain whether, under the showing made, the court had the power to make the order, and may refuse to comply with his bid, whenever such proceedings and order are unauthorized.—Succession of Dumestre, 40 La. Ann. 571, 4 South. 328.

[o] (La. 1888) Where an order of court for the sale of succession property is not justified

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by the face of the papers, and is therefore illegal, the purchaser may demand the return of money paid by him to the auctioneer.—Succession of Dumestre, 40 La. Ann. 571, 4 South. 328.

[p] (La. 1888) An order of court for the sale of succession property, not justified by the face of the papers, is illegal, and an adjudicatee may refuse to comply with his bid.—Succession of Dumestre, 40 La. Ann. 571, 4 South. 328.

[pp] (La.) A purchaser at a public sale in pursuance of an order of court, is not bound to look beyond the decree in order to ascertain its necessity.—(1889) Massie v. Brady, 41 La. Ann. 563, 6 South. 536; (1896) Munday v. Kaufman, 48 La. Ann. 591, 19 South. 619.

[q] (Mich. 1876) A bill to remove a cloud from the title to lands, which deduces complainant's title through a judicial sale, cannot be sustained, where the proceedings resulting in the decree of sale, and upon which the validity of complainant's title depends, are shown to be void for jurisdictional defects.—Griswold v. Fuller, 33 Mich. 268.

[r] (Miss. 1857) A sale made in execution of a decree irregularly obtained by the complainants confers no title to a trustee purchasing for their benefit.—Goff v. Robins, 33 Miss. 153.

[s] (Miss. 1876) Under Act Feb. 11, 1873, providing that a purchaser of land at a sale made under a void or voidable decree of the probate court shall have a lien on the land for the repayment of his purchase money "paid in good faith," the term, "good faith," means that the purchase money shall have been genuinely paid, without any knowledge or suspicion of fraud on the part of the purchaser.—Cole v. Johnson, 53 Miss. 94; Gaines v. Kennedy, Id. 103.

[t] (N. C. 1876) A plaintiff can claim no benefit from a purchase of land at a sale under a decree entered in the cause against one in possession claiming title to the land, when he knows at the time of the purchase that the person so in possession was not in fact made a party to the action.—Chambers v. Brigman, 75 N. C. 487.

[u] (S. C. 1886) A purchaser at a judicial sale is not affected by errors in the judgment.—Tederall v. Bouknight, 25 S. C. 275.

[v] (Tex. 1858) If a judgment is void, a sale under it passes no title to the vendee.—Bowers v. Chaney, 21 Tex. 363.

[vv] (Tex. 1858) Where a judgment ordering a sale of property is not void, but merely erroneous, the title acquired under it is valid, and cannot be impeached in a collateral proceeding.—Bowers v. Chaney, 21 Tex. 363.

[w] (Tex. 1881) Where a title derived through a judicial sale was defective for want of jurisdiction in the court, but the proceedings were regular on their face, and the jurisdiction of the court, which was a court of general jurisdiction, was not questioned at the time, *held*, that the purchaser should be reimbursed for necessary repairs made and taxes paid.—French v. Grenet, 57 Tex. 273.

[x] (Tex. 1883) Jurisdiction existing to order a sale, the purchaser's title cannot be affected by collateral facts which, if known to the court, would have prevented the order, such, for instance, as the pendency of a suit elsewhere.—Edwards v. Halbert, 64 Tex. 667.

§ 106. Irregularities affecting sale.

[a] (Mich. 1869) A purchaser at a judicial sale has a right to presume that it is conducted according to the provisions of the public law; and, if good according to that law, he will be protected, notwithstanding the existence of a private statute, authorizing the sale, of which he had no knowledge, and the provisions of which were not regarded.—Browning v. Howard, 19 Mich. 323.

[b] (Miss. 1837) A sale of property in any other manner than that prescribed by law vests no title in the vendee.—Cable v. Martin, 2 Miss. (1 How.) 558.

[c] (Mo. 1874) Where a judicial sale of land is made under the authority of a court having power to order it, and there is no pretense of fraud, the title of the purchaser will not be affected by slight irregularities in the sale, especially after a considerable lapse of time.—Pattee v. Thomas, 58 Mo. 163.

[d] (Tex. 1889) Mere irregularities in a judicial sale of personalty will not affect the title of a purchaser in good faith.—Huckins v. Kapf (App.) 14 S. W. 1016.

§ 107. Proceedings for relief.

Recovery back of purchase money on discovery of defect in title, see ante, § 101.

[a] (Tenn. 1873) A party asking the rescission of a judicial sale, on the ground of alleged errors, must prove such errors, since the presumption of law is in favor of the validity of the sale.—Puckett v. Jenkins, 61 Tenn. (2 Baxt.) 484.

[b] (Tenn. 1895) A petition for relief from a purchase of land at a judicial sale, alleging that at the time the suit was brought, and "for some time afterwards," one of the parties, a married woman, was a minor, and that the process was not served on her by an officer, but that she was in court by the acknowledgment of the service of process, is insufficient, as at the time of the acknowledgment of service she may have been of age.—Ward v. West (Ch. App.) 35 S. W. 563.

[c] (Va. 1887) In an action to recover back the purchase price of property bought at a judicial sale under a void decree, it is a misjoinder to join as a party plaintiff one who purchased at such sale, but who has conveyed to plaintiff all his interest in the property, and become a bankrupt.—Abernathy v. Phillips, 82 Va. 769, 1 S. E. 113.

[d] (Va. 1887) A person who, under order of court, has made a deed of certain lands purchased at a judicial sale, and parted thereby with whatever interest he may have held in the land, is not a proper party to a suit by the purchaser to recover from the beneficiaries of the sale the purchase price paid, on account of the nullity of the decree; and it is a misjoinder to make him a party plaintiff with the purchaser.—Abernathy v. Phillips, 82 Va. 769, 1 S. E. 113.

[e] (Va. 1887) Purchasers at a judicial sale under a void decree are at law entitled to recovery of the purchase price, with interest from the time of eviction; and therefore a bill for relief based on these facts will not be entertained in equity, in the absence of special facts showing the necessity for an accounting.—Abernathy v. Phillips, 82 Va. 769, 1 S. E. 113.

(E) REVERSAL OR VACATION OF JUDGMENT, DECREE, OR ORDER.

REVERSAL OF JUDGMENT OR DECREE, § 108.
VACATION OF JUDGMENT OR DECREE, § 109.

Modification of order of sale, see "Appeal and Error," vol. 3, cc. 2509, 2510, § 4494.

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§ 108. Reversal of judgment or decree.

Reversal of judgment as ground for setting aside sale, see ante, § 73 [g, m].

Rights of debtor on reversal of judgment, see ante, § 86.

—— of vendee of purchaser taking after reversal of decree, see post, § 114 [a].

[a] A judicial sale, made pursuant to the decree or judgment of a competent court having jurisdiction of the subject-matter and of the parties, passes title to the purchaser, even though the judgment should afterwards be reversed or set aside for error or irregularity.

—(U. S. 1863) Gray v. Brignardello, 68 U. S. (1 Wall.) 627, 17 L. Ed. 693;

(Cal. 1850) Loring v. Illsley, 1 Cal. 24;

(Fla. 1892) Garvin v. Watkins, 29 Fla. 151, 10 South. 818;

(Ill. 1876) Barlow v. Stanford, 82 Ill. 298;

(Ind. 1840) Noble v. Swiggett, 5 Blackf. 328;

(Ky. 1827) Parker's Heirs v. Anderson's Heirs, 21 Ky. (5 T. B. Mon.) 445; (1836) Clark v. Bell, 34 Ky. (4 Dana) 15; (1836) Clarey v. Marshall's Heirs, 34 Ky. (4 Dana) 95; (1843) Shackleford v. Hunt, 43 Ky. (4 B. Mon.) 262; (1857) Gossom v. Donaldson, 57 Ky. (18 B. Mon.) 230, 68 Am. Dec. 723;

(Md. 1859) Ward v. Hollins, 14 Md. 158; (1887) Newbold v. Schlens, 66 Md. 585, 9 Atl. 849; (1892) Benson v. Yellott, 76 Md. 159, 24 Atl. 451;

(Miss. 1847) Helm v. Natchez Ins. Co., 16 Miss. (8 Smedes & M.) 197;

(N. Y. 1861) Holden v. Sackett, 12 Abb. Prac. 473;

(N. C. 1882) Sutton v. Schonwald, 86 N. C. 198, 41 Am. Rep. 455; (1883) Morris v. Gentry, 89 N. C. 248;

(Tenn. 1858) Lewis v. Baker, 38 Tenn. (1 Head) 385.

CONTRA, see

(Ark. 1879) Fishback v. Weaver, 34 Ark. 569;

(N. Y. 1853) Wambaugh v. Gates, 8 N. Y. (4 Seld.) 138.

[b] Where one is put in possession of land, under a decree in chancery, and sells the land to a bona fide purchaser, his title will not be affected by a subsequent reversal of the decree on error.

—(Ind. 1843) McCormick v. McClure, 6 Blackf. 466, 39 Am. Dec. 441;

(Ohio, 1828) Taylor's Lessee v. Boyd, 3 Ohio (3 Ham.) 337, 17 Am. Dec. 603.

[c] (U. S. 1863) The rule that purchasers at judicial sale will be protected, though the decree be subsequently reversed, applies only when the power to make the sale is expressly given.—Gray v. Brignardello, 68 U. S. (1 Wall.) 627, 17 L. Ed. 693.

[d] (U. S. 1863) The doctrine that all the rights acquired under a judicial sale will be protected, even though the decree be subsequently reversed, does not apply to a sale under an interlocutory decree.—Gray v. Brignardello, 68 U. S. (1 Wall.) 627, 17 L. Ed. 693.

[e] (U. S. 1873) The title of an attorney, purchasing property at a judicial sale decreed in proceedings in which he acted as an attorney, falls by the law of California with the reversal of the decree directing the sale, independent of defects in the proceedings.—Galpin v. Page, 85 U. S. (18 Wall.) 350, 21 L. Ed. 959.

[f] (Ala. 1877) A sale, made under a judgment or decree that is afterwards reversed for error, is avoided only when the judgment or decree was void.—Lesslie v. Richardson, 60 Ala. 563.

[g] (Ala. 1880) When a party purchases lands under a judgment or decree, whether he be the original plaintiff in the suit or an assignee of the judgment or decree, he acquires only a defeasible title, liable to be defeated by a subsequent reversal of the judgment or decree; and this rule obtains whether the reversal is based on an amendable defect or on one which is incurable.—McDonald v. Mobile Life Ins. Co., 65 Ala. 358.

[h] (Ala. 1886) Where complainant's wife purchases at a judicial sale, complainant entering a credit on his decree for the amount of the purchase money, and the transaction showing nothing more than a gift to her by him, she is not a bona fide purchaser; and, on a reversal of the decree, her title will be set aside, and the parties restored to their rights.—Ivie v. Stringfellow's Adm'r, 82 Ala. 545, 2 South. 22.

[i] (Cal. 1860) A sale was had in a particular manner under a decree. Upon appeal the decree was reversed, and the sale ordered to be made differently,—in separate lots instead of in one. *Held* that, upon the question whether the sale should stand or restitution be had, the partial reversal was the same as a total reversal.—Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

[j] (Ill. 1871) The rights of persons not parties to the record, acquired under judicial sales, when the court had jurisdiction, will not be affected by a subsequent reversal of the decree under which they were acquired.—Hobson v. Ewan, 62 Ill. 146.

[k] (Ind. 1843) If a person, having obtained a decree in chancery for certain land and been put into possession, sell the land to a bona fide purchaser for value, before a suit in error to reverse the decree is commenced, the title of such purchaser, or of those claiming under him, will not be affected by a subsequent reversal of the decree; and if, after such decree is reversed and the bill dismissed, a writ of restitution be opposed on the ground, supported by affidavit that the facts are as above stated, the writ will be refused.—McCormick v. McClure, 6 Blackf. 466, 39 Am. Dec. 441.

[l] (Kan. 1879) The provision of Comp. Laws, p. 664, § 467, that reversal of judgment shall not defeat the title of the purchaser, does not refer to a party himself obtaining an erroneous judgment, and becoming the purchaser of property thereunder.—Hubbard v. Ogden, 22 Kan. 671.

[m] (Ky. 1821) Where a conveyance was made under a decree in chancery, and the decree was afterwards reversed, but the reversal was not consummated by a reconveyance, it was *held* that the conveyance was still good in law.—Porter's Heirs v. Robinson, 10 Ky. (3 A. K. Marsh) 253, 13 Am. Dec. 153.

[n] (Ky. 1847) Where property is sold under a chancellor's decree, and the money paid to the complainant, on the decree being reversed and the property held not subject to the complainant's demand, the chancellor may order its repayment, either to the defendant to whom the property belonged or to any other person who is entitled to the funds.—Kane v. Pilcher, 46 Ky. (7 B. Mon.) 651.

[o] (Ky. 1867) If an appeal, in order to set aside a judicial sale, is prosecuted before the sale is fully completed, by a conveyance offered by the court, and before the collection and disbursement of the purchase money, the court and the purchaser at such sale are chargeable with notice of such appeal; and if, notwithstanding such notice, the court completes the

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sale, without objection on the part of the purchaser, he cannot be regarded as a bona fide purchaser, without notice, but may be compelled to release his title acquired under such sale to the owner of the land, if the decree is reversed and the sale set aside.—Miller v. Hall, 64 Ky. (1 Bush) 229.

[p] (Ky. 1867) A purchaser at a judicial sale, which is set aside on appeal, has a lien on the land purchased, for money paid before the appeal was prosecuted.—Miller v. Hall, 64 Ky. (1 Bush) 229.

[q] (Ky. 1887) A judgment directing land to be sold free of lien was appealed from, and reversed; but, no supersedeas having been executed, the land was sold in the meantime. *Held*, as the judgment was reversed because erroneous, but not void, the purchaser at the sale acquired a good title, and the successful appellant was not entitled to a lien on the land, even though the plaintiff in the action was the purchaser, but he was entitled to a personal judgment against the plaintiff for the amount of his claim.—Stewart v. Hoskins, 3 S. W. 124.

[r] (Ky. 1887) The reversal of a judgment does not affect the validity of a sale made under it, although the plaintiff in the action was the purchaser, and no deed had been made to him at the time of reversal, the sale having been confirmed, and no appeal taken from the order of confirmation.—Dunn v. German Sec. Bank, 3 S. W. 425.

[s] (Md.) Where no appeal bond is filed to stay the execution of a decree ordering a sale of land, the rights of the purchasers under the sale will not be disturbed or affected by a reversal, unless it can be shown that there was collusion or unfairness at the sale.—(1885) Lenderking v. Rosenthal, 63 Md. 28; (1891) Garritee v. Popplein, 73 Md. 322, 20 Atl. 1070.

[t] (N. Y. 1858) A decree directed lands to be sold, and how the proceeds should be appropriated, but the sale was enjoined. In another suit, brought in the nature of a cross bill, the decree directed the sale of the lands as well under the first as the second decree. The master, who made the sale, had in his hands the second decree only. *Held*, that the sale was made on that decree only, and a reversal thereof nullified it.—Wambaugh v. Gates, 8 N. Y. (4 Seld.) 138.

[u] (Ohio, 1828) Where a party, having title to land under a decree in chancery, conveys in good faith, before a citation in error is served, a reversal of the decree does not devest the purchaser's title.—Taylor's Lessee v. Boyd, 3 Ohio (3 Ham.) 337, 17 Am. Dec. 603.

[v] (Tenn. 1886) The purchaser's title is not affected by a reversal of the decree, for error of law apparent upon the face of the record; such purchaser not being the person at whose instance the sale was made.—Micou v. Davis, 84 Tenn. (16 Lea) 257.

[w] (Va. 1887) Where commissioners assumed to sell certain lands under a decree in a creditors' bill pending appeal, and such sale was not confirmed, and the decree was subsequently annulled, the purchasers at such sale, who went into possession thereunder, cannot be treated as receivers, and allowed the commissions of the sale, or the expenses of, or compensation for, the management of the lands.—Strayer v. Long, 83 Va. 715, 3 S. E. 372.

[x] (Va. 1891) Where payments of purchase money at a judicial sale are void, because made to an unbonded commissioner, proceedings against the purchasers to show cause why the property should not be resold are not within Code, § 3425, which declares that the purchaser's title at a sale made under a decree six months after the date thereof, and confirmed, shall not be affected by a subsequent reversal, since the object of such proceedings is not to set aside the sale, but to compel the purchasers to comply with their respective contracts.—Whitehead v. Bradley, 87 Va. 676, 13 S. E. 195.

[y] (W. Va.) A purchaser at a judicial sale, upon reversal of the decree, is not protected by Code, c. 132, § 8, providing that such reversal shall not affect such purchaser, when the record shows that necessary parties interested in the land, having liens thereon, were not parties when the sale was ordered and confirmed.—(1884) Underwood's Ex'r v. Pack, 23 W. Va. 704; (1893) Turk v. Skiles, 38 W. Va. 404, 18 S. E. 561.

§ 109. Vacation of judgment or decree.

Rights of purchaser on opening or vacation of sale, see post, § 110.

[a] Where a stranger, in good faith, purchases property at a judicial sale, a subsequent vacation of the judgment under which the sale was had does not devest his title.
—(Ark. 1882) Moore v. Woodall, 40 Ark. 42; (Tex. 1889) Huckins v. Kapf (Tex. App.) 14 S. W. 1016.

[b] (Mich. 1876) A purchaser under a decree must ascertain at his peril whether the decree was warranted or not; and, though the time for appealing from the decree had expired when he purchased, he cannot claim immunity, as a bona fide purchaser, from the effects of a subsequent order without notice to him, setting the decree aside as unwarrantably entered.—Ritson v. Dodge, 33 Mich. 463.

(F) OPENING OR VACATION OF SALE.

Liability of purchaser for rents and profits on setting aside sale, see ante, § 96.
Opening, vacating, or setting aside sale in general, see ante, §§ 72–87.
Rights of purchaser on vacation of judgment or decree, see ante, § 109.

§ 110. In general.

[a] (D. C. 1894) Where a sale by a court trustee, after ratification, is set aside, on application of the interested parties, for fraud, a purchaser at such sale, who had paid money to the trustee, but who received only a portion of it back, after vacation of the sale, cannot claim a repayment of the balance due him from the proceeds of the resale made by a substituted trustee.—Kenaday v. Waggaman, 3 App. D. C. 412.

[b] (Md. 1884) Innocent bona fide holders of property purchased by them at a judicial sale, and who, acting under the belief that they have good title to the property, have made beneficial improvements thereon, are entitled to compensation for such improvements, upon the sale being annulled by claimants who were not made parties to the proceeding in which the sale was decreed.—Long v. Long, 62 Md. 33.

[c] (Neb. 1880) The doctrine that all rights acquired under a judicial sale, made while the judgment is in force, should be protected, though the sale be subsequently set aside, is properly applicable only when the power to make the sale is clearly given.—State Bank v. Green, 10 Neb. 130, 4 N. W. 942.

[d] (Tex. 1892) A sale by the purchaser at judicial sale of a part of the land for more than the amount bid by him for the whole is

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a bar to his rights to the purchase money paid by him, on setting aside the sale to him.—Storer v. Lane, 1 Tex. Civ. App. 250, 20 S. W. 852.

[e] (W. Va.) On setting aside a sale made under a void decree, a purchaser is entitled to be substituted to the rights of the creditor, and to a decree charging the land with the amount of the debt paid by him, less the rents, profits, and taxes he has received while in possession.—(1883) Haymond v. Camden, 22 W. Va. 180; (1891) Hull's Adm'r v. Hull's Heirs, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800; Dudley v. Same, Id.

(G) LIABILITIES OF PURCHASERS AND THEIR SURETIES.

Liabilities of bidders as such, see ante, § 54.
Liability of purchaser for rents and profits, see ante, § 96.
—— *on assignment of bid, see* ante, § 45.

§ 111. In general.

[a] The purchaser of real estate sold under an order of court must pay interest on the deferred payments from the day when the premises were struck off to him.
—(D. C. 1876) Huntington v. Walker, 9 D. C. (2 MacArthur) 479;
(Md. 1847) Wagner v. Cohen, 6 Gill, 97, 46 Am. Dec. 660.

[b] (Md. 1811) A purchaser at a sale under a decree of court is bound to pay interest on the purchase money, according to the terms of the sale, whether he obtains possession or not.—Brown v. Wallace, 2 Bland, 585.

[c] (Md. 1848) A purchaser at a sale under order of court cannot be obliged to pay for an alleged excess of land over that which could properly be sold, merely on evidence founded on a survey ordered by the court on an ex parte application of the petitioner, which differed from the survey according to which the land was sold.—Goldsborough v. Ringgold, 1 Md. Ch. 239.

[d] (Miss. 1852) Where property is sold on a credit under a decree in chancery, the decree is satisfied to the extent of the amount of the sale, and a new contract is made between the purchaser and the complainant, and the purchaser is bound by the terms of that contract.—Shotwell v. Webb, 23 Miss. (1 Cushm.) 375.

[e] (Tex. 1889) In an action for the wrongful taking and detention of a horse, which defendant had purchased at a judicial sale without notice of plaintiff's claim, the measure of damages is the market value of the horse at the time it came into the purchaser's hands, with interest from that date. No special damages can be recovered for the value of its hire while in defendant's possession.—Huckins v. Kapf (App.) 14 S. W. 1016.

[f] (Va. 1880) Where a commissioner was appointed to sell land on credit (bonds to be taken for the several deferred payments, and the title to be retained), and such sale was made, the bonds taken, and the sale reported to the court, but there did not appear to have been a decree confirming the sale, and afterwards, as the bonds fell due, the purchaser paid the money to one of the commissioners, and he deposited it, as collected, in a bank to his credit as commissioner, not using it or mingling it with his own, and it was finally lost through the failure of the bank, *held*, that the purchaser was bound to pay the purchase money again.—Tyler v. Toms, 75 Va. 116.

[g] (Va. 1887) A commissioner sold lands to defendant, but failed to give bond, or account for the money. Defendant was required to pay the price again, and plaintiff, as receiver in the cause, took judgment against defendant and his security, and sued out execution, which was returned not satisfied. Before the judgment was obtained, the commissioner executed a deed of trust to indemnify defendant. After the return of the execution, the receiver filed his petition in chancery to enforce his execution lien against the fund secured to defendant in the trust deed. Defendant resisted it, because he claimed the fund as a homestead, and because he had assigned the same. The receiver then brought suit to enforce his judgment lien against the lands of defendant and his security. The commissioner was insolvent, and not a party. *Held*, as the proceeding to enforce the execution lien against the trust fund was uncertain, that plaintiff had a right to enforce his judgment lien against defendant's lands.—Eggleton v. Whittle, 84 Va. 163, 4 S. E. 222.

XIV. PERSONS CLAIMING UNDER PURCHASERS.

IN GENERAL, § 112.
ASSIGNEES OF CERTIFICATES OF SALE, § 113.
GRANTEES OF PURCHASERS, § 114.

§ 112. In general.

[a] (Ky. 1891) A deed of land by one F. to plaintiffs' ancestor was set aside as in fraud of the grantor's creditors, and the land was ordered to be sold. At the commissioner's sale plaintiffs' ancestor became the purchaser, and gave bond for the purchase money; but there was no report of the sale to the court, no confirmation of it, or other steps taken by the court, nor any payment of the purchase money, so far as was shown by the record. *Held*, that plaintiffs could not recover possession of the land from the heirs of F.—Penn v. Fightmaster, 17 S. W. 334.

§ 113. Assignees of certificates of sale.

Assignment of certificate before period of redemption has elapsed consideration for promissory note, see "Bills and Notes," vol. 7, c. 286, § 178 [a].

[a] (Ill. 1876) The assignee of the purchaser at a judicial sale before the execution of a deed takes the certificate charged with all the defenses which could be interposed against the purchaser.—Roberts v. Clelland, 82 Ill. 538.

[b] (Ill. 1892) Under Rev. St. c. 77, § 29, which makes certificates of judicial sales assignable by indorsement, so as to give the assignee "the same benefits therefrom" as the assignor would otherwise have had, a transfer of such a certificate by means of an assignment written on another piece of paper merely vests the assignee with the equitable title thereto.—Chytraus v. Smith, 141 Ill. 231, 30 N. E. 450.

[c] (Ill. 1892) One who purchases a master's certificate of sale after the holder has made a valid contract to sell it to another takes the certificate subject to the contract.—Chytraus v. Smith, 141 Ill. 231, 30 N. E. 450.

[d] (W. Va. 1877) A commissioner's deed, made, by direction of the purchaser at the commissioner's sale, to his assignee, is a valid defense in ejectment by the debtor against the assignee to recover the property.—Hall v. Hall, 12 W. Va. 1.

§ 114. Grantees of purchasers.

Conveyance to grantee of purchaser, see post, § 119 [q].
Effect of reversal of decree on title of grantee of purchaser, see ante, § 108 [b, j, k, u].

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Right of grantee of purchaser to file bill to compel a conveyance, see post, § 119 [d].

—— *to move for confirmation, see* ante, § 61 [f].

[a] (U. S. 1873) A conveyance by an attorney who has purchased at a judicial sale passes no title, when made after reversal of the decree under which the sale was had.—Galpin v. Page, 85 U. S. (18 Wall.) 350, 21 L. Ed. 959.

[b] (U. S. 1887) Persons acquiring title through the purchasers at a judicial sale of property subject to certain receiver's certificates previously issued have no interest in the trust fund represented by the certificates, and therefore cannot resist their payment on the ground that the receiver negotiated them collusively.—Central Nat. Bank v. Hazard (C. C.) 30 Fed. 484.

[c] (Ill. 1887) One who has purchased from the accepted bidder at a master's sale before a duplicate of the certificate of purchase has been filed for record, as required by the decree and by Rev. St. c. 77, § 17, and before the confirmation of the sale, cannot object to the subsequent action of the court in approving or disapproving the sale.—Harwood v. Cox, 26 Ill. App. 374.

[d] (Ill. 1893) Purchasers in good faith from one claiming title through a master's deed executed in pursuance of a decree against unknown heirs of one supposed to be dead take good title, as against the grantee of one who claims title through an unrecorded deed from the person found by the court to be dead, where such decree is not attacked during the three years allowed by statute for attacking decrees rendered on constructive service, even though such purchasers bought before expiration of such three years, since the provision of Rev. St. 1891, c. 30, § 30, that unrecorded deeds shall be void as to subsequent purchasers without notice, applies also to subsequent purchasers from heirs.—Burton v. Perry, 146 Ill. 71, 34 N. E. 60.

[e] (Ind. 1884) A complaint to set aside an alleged fraudulent conveyance, which shows that defendant's grantor was a bona fide purchaser for value at a judicial sale, is demurrable, even though the conveyance to defendant was without consideration.—Moore v. Trimble, 94 Ind. 153.

[f] (Ky. 1815) A. obtained land by virtue of a conveyance made under a decree of court, which decree was afterwards reversed. B., the devisee of A.'s grantor, brought a bill for a reconveyance. It appearing that C., a purchaser from A., had notice of B.'s equity, it was decreed that he should surrender to them the title.—Thompson v. Mason, 7 Ky. (4 Bibb) 195.

[g] (Ky. 1846) The fraudulent conduct of a purchaser at a commissioner's sale will not affect a bona fide purchaser from him, not participating in the fraud or having knowledge of it, and his title will be protected.—Vaughn v. Hann, 45 Ky. (6 B. Mon.) 388.

[h] (Ky. 1862) Where property described by metes and bounds as containing 174 acres, but really containing 214 acres, is sold at judicial sale, the vendee of the purchaser, who, without notice of the error, has purchased and paid for all of the land, including the surplus, will be protected.—Jennings v. Monk's Ex'r, 61 Ky. (4 Metc.) 103.

[i] (Ky. 1867) Where an attorney becomes a purchaser at a judicial sale made for the benefit of his client, and conveys to his minor children the land thus purchased in consideration of love and affection, they are not bona fide purchasers without notice.—Salter v. Dunn, 64 Ky. (1 Bush) 311.

[j] (La. 1835) A first purchaser at a judicial sale cannot repudiate the title he gives his grantee; and his averment in a petition that the proceedings under which the title was originally acquired were null cannot avail third persons, particularly when the ultimate object of such petition was to strengthen the title.—Poultney's Heirs v. Cecil's Ex'r, 8 La. 321.

[k] (Miss. 1877) One who purchases land from the purchaser at a sale under a decree in chancery is unaffected by irregularities in the proceedings, of which he did not have notice.—Davis v. Watson, 54 Miss. 679.

[l] (Miss. 1893) Where a commissioner, appointed by the court, sells personal property on credit, and the purchasers afterwards resell the property, and leave the state without paying their bid, the purchasers' vendees are not subject to an order to either pay the bid of their vendors or surrender the property to the commissioner, because they were not parties to the original suit; but, if the vendees had no title because the bidders had none, the commissioner's remedy was by an action for a recovery of the property.—Weaver v. Nelson, 12 South. 597.

[m] (N. C. 1845) Where a purchaser at a judicial sale conveyed the land to another, who had notice that the purchase money was unpaid, the lien on the land in favor of the original owners still subsisted against the property in the hands of such vendee.—Barnes v. Morris, 39 N. C. 22.

[n] (N. C. 1885) The fact that a judicial sale was fraudulent and liable to be set aside as to the original purchaser will not defeat the title of a subsequent bona fide purchaser from the original purchaser.—Fowler v. Poor, 93 N. C. 466.

[o] (Ohio, 1844) Land fraudulently transferred by a judicial sale descended to the heirs of the alienee, who assigned the same in partition to one of their number, who took possession, paid taxes, and made valuable improvements. *Held*, in an action to set aside the transfer for fraud, that the heir was entitled to be equitably compensated for his expenditures and improvements out of the proceeds of sale to be ordered.—Bomberger v. Turner, 13 Ohio St. 263, 82 Am. Dec. 438.

[p] (S. C. 1867) The court will not order a rule and attachment to compel a defendant to deliver possession to the grantee of a purchaser at the commissioner's sale.—Meng v. Houser, 13 Rich. Eq. 210.

[q] (S. C. 1882) A purchaser of lands, having notice of the defect of title from one who bid them off at a judicial sale, but who failed to comply with his bid and received no deed, cannot hold them as against a subsequent purchaser thereof at a resale duly ordered in the original action.—Jones v. Cathcart Co., 17 S. C. 592.

[qq] (Tenn. 1880) The vendee of a purchaser of land, sold under a decree directing that a lien be reserved for the payment of the purchase money, cannot defeat the lien by pleading the statute of limitations.—Ex parte Spence, 74 Tenn. (6 Lea) 391.

[r] (Va. 1884) Under a decree of sale of land by parcels, without reservation of right of way, the sale was so advertised, but the auctioneer proclaimed such reservation, and A. and B. bought; B. supposing that he was securing right of way over A.'s parcel. The commissioners' report of the sale did not allude to any reservation save in an addendum by one commissioner acting solely, which spoke of such reservation. This commissioner conveyed to A. and B., without any reservation, and, after A. had conveyed to C., B. filed petition, alleging that the omission of the reservation

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was a mistake and asking for its correction. *Held*, that C. was not affected by the addendum, which was no part of the report, and that B. could not complain of any mistake after waiting till the rights of third persons had intervened.—Shirley v. Rice, 79 Va. 442.

XV. REDEMPTION.

IN GENERAL, § 115.
TIME TO REDEEM, § 116.
PAYMENT OF CLAIMS, § 117.
ACTIONS TO REDEEM, § 118.

Application of statute of frauds to contracts for redemption, see "Frauds, Statute of," vol. 23, cc. 2106–2108, § 126.
From sale for enforcement of local assessments and special taxes, see "Municipal Corporations," IX. (F).
—— *of ward's property, see* "Guardian and Ward," vol. 25, c. 616, § 394.
—— *to foreclose liens in general, see* "Liens."
From sale under assignments for benefit of creditors, see "Assignments for Benefit of Oreditors," vol. 4, c. 2179, § 795.
—— *attachment, see* "Attachment," vol. 5, c. 847, § 652.
—— *execution sale, see* "Execution," vol. 21, cc. 1599–1673, §§ 829–900.
—— *foreclosure of chattel mortgages, see* "Chattel Mortgages," vol. 9, cc. 2941–2955, §§ 581–590.
—— *foreclosure of liens and mortgages on railroads, see* "Railroads," VIII. (B).
—— *foreclosure of liens on street railroads, see* "Street Railroads," I.
—— *foreclosure of mechanics' liens, see* "Mechanics' Liens," VII.
—— *foreclosure of mortgage or trust deed, see* "Mortgages," XI.
—— *foreclosure of vendor's lien, see* "Vendor and Purchaser," VI. (A).
From tax sale, see "Taxation," X.
Impairment of obligation of contract by statute relating to redemption, see "Constitutional Law," vol. 10, cc. 1928–1931, §§ 500, 501.

§ 115. In general.

[a] (Ala. 1892) Code, § 1885, authorizing one creditor to redeem from another creditor who has himself redeemed from the purchaser at a sale under a decree, authorizes such redemption from a redemptioner only by a judgment creditor, and no other class of creditors has the right to redeem from one who has acquired the property by redemption under the statute.—Owen v. Kilpatrick, 96 Ala. 421, 11 South. 476.

[b] (Colo. 1890) The right of redemption from a judicial sale of personal property does not exist.—Conway v. John, 14 Colo. 30, 23 Pac. 170.

[c] (Ill. 1851) The right of redemption does not extend to all sales made under a decree in chancery.—Farnsworth v. Strasler, 12 Ill. (2 Peck) 482.

[d] (Ill. 1857) The statute which allows redemptions from sales on execution, and under decrees directing the sale of mortgaged lands, does not extend to ordinary chancery sales.—West v. Flemming, 18 Ill. (8 Peck) 248, 68 Am. Dec. 539.

[e] (Ill. 1873) Under the rule that one's right to redeem depends on the decree, and not on recitals in the notice or deed, no right to redeem existed where the master's posted notice recited that the sale would be subject to redemption, but the notice by publication that it would be without redemption, and where, also, his deed misrecited the term of court at which the decree was rendered.—Watt v. McGalliard, 67 Ill. 513.

[f] (Ill. 1874) Where one purchases an entire tract of land at a master's sale, and afterwards assigns an undivided interest therein, there can be no legal redemption of the interest so assigned.—Groves v. Maghee, 72 Ill. 526.

[g] (Ill. 1884) A clause in a decree for the sale of land, declaring that such a sale shall be made absolute, does not bar the statutory right of a judgment creditor to redeem.—Fitch v. Wetherbee, 110 Ill. 475.

[h] (Ill. 1893) Where land is sold by a master, and a subsequent incumbrancer purchases the certificate of redemption after the expiration of 12 months from sale, such purchase does not operate as a redemption from the sale, but merely as an assignment of the right to obtain the master's deed, which right is subject to redemption by judgment creditors during the 3 months following the 12 months.—Boynton v. Pierce, 49 Ill. App. 497, affirmed (1894) 151 Ill. 197, 37 N. E. 1024.

[i] (Ill. 1894) Where a person entitled to redeem from a master's sale procures an assignment of the certificate of purchase to himself, instead of redeeming, such assignment does not constitute a redemption, and does not prevent redemption by other parties.—Boynton v. Pierce, 49 Ill. App. 497, affirmed (1894) 151 Ill. 197, 37 N. E. 1024.

[j] (Ind. 1869) The right to redeem lands sold at a judicial sale must be governed by the statute in force at the time of the sale.—Moor v. Seaton, 31 Ind. 11.

[k] (N. Y. 1889) It is in the inherent power of a court of equity, on ordering the sale of land to satisfy the lien of a collector's bond, to require it to be sold subject to the same right of redemption by the owner or by junior lienholders as if the sale were made under judgment; there being no special statutory provision governing such sales.—Crisfield v. Murdock, 55 Hun, 143, 8 N. Y. Supp. 593, judgment modified (1891) 127 N. Y. 315, 27 N. E. 1046.

[l] (Tenn. 1855) Since Act 1833, c. 47, § 2, the right of redemption exists in all cases when land is sold on a credit by order of the chancery court, unless the credit is given on application of the complainant, and that fact appears in the decree, and the specific land to be sold is also set forth in the decree; and it should appear also in the decree, in explicit terms, that the chancellor in ordering the sale intended that no right of redemption should exist.—Burrow v. Henson, 34 Tenn. (2 Sneed) 658.

[m] (Tenn. 1870) Under sections 2124 and 4489 of the Code, which provides that in certain cases the court may sell land on credit, and without the right of redemption by the debtor, if the court require the payment of a material proportion of the value of the land in cash, the equity of redemption will not be barred.—McBee v. McBee, 48 Tenn. (1 Heisk.) 558.

[n] (Tenn. 1883) The purchaser at a judicial sale of land subject to redemption may claim the value of improvements put by him on the land with the consent of the owner of the equity of redemption, so far as the value of the land has been permanently enhanced by the improvements, subject to account for rents

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and profits.—Paul v. Williams, 80 Tenn. (12 Lea) 215.

[o] (Tenn. 1891) The claim for alimony in a wife's bill for divorce is not a debt; and a sale of the husband's lands under a decree, directing one-half the proceeds to be paid over to the wife as alimony, is not a sale made to satisfy a debt, and is not subject to redemption, under Code, § 2124, providing that "real estate sold for debt shall be redeemable at any time within two years."—White v. Bates, 89 Tenn. 570, 15 S. W. 651.

[p] (Va. 1892) Where the judgment debtor had 103 days, exclusive of the time the cause was pending in the supreme court, in which he might have redeemed, and his failure to redeem resulted from inability, and not from lack of time, and neither he nor his creditors could have been benefited by further delay, the claim that the commissioners did not wait for the 90 days allowed by the decree for redemption to expire cannot prevail.—Strayer v. Long's Ex'r, 89 Va. 471, 16 S. E. 357.

[q] (W. Va. 1877) It is error to decree a sale of real estate without giving the defendant a day to redeem the property, by paying the amount charged thereon.—Wiley v. Mahood, 10 W. Va. 206.

§ 116. Time to redeem.

[a] (U. S. 1875) Where a junior judgment creditor enforces his judgment first, and the prior judgment creditor enforces his judgment later, by bill in equity, to which the junior judgment creditor is not made a party, the latter, in equity, will be allowed to redeem, even after the statutory period of redemption has expired.—Howard v. Milwaukee & St. P. Ry. Co., Fed. Cas. No. 6,761 [7 Biss. 73], affirmed (1879) 101 U. S. 837, 25 L. Ed. 1081.

[b] (Ill. 1876) A party holding a certificate of the purchase of lands sold under a decree may lawfully give the former owner further time in which to redeem, and may properly impose his own terms.—Ross v. Sutherland, 81 Ill. 275.

[c] (Ky. 1888) Defendant bid in land, appraised at $1,200, for $473.80, at a judicial sale, under an agreement with plaintiffs, who were pendente lite purchasers, that they might redeem it by paying the purchase money and interest. Plaintiffs retained possession nearly two years, and improved the land. *Held*, in an action to enjoin defendant's writ of possession, and to have him declared trustee for plaintiffs' benefit, that the time of redemption was not material, and that plaintiffs might redeem upon bringing the purchase money, interest, and costs, into court.—Fishback v. Green, 87 Ky. 107, 7 S. W. 881.

[d] (Tenn. 1843) A tender of money to redeem property sold at a master's sale, under a decree in chancery, if made before the confirmation of the sale, is premature, and does not authorize a decree for its redemption.—Wood v. Morgan, 23 Tenn. (4 Humph.) 371.

[e] (Tenn. 1847) Where a parol agreement was made that one person should purchase property at a chancery sale, and permit a redemption, and no time was fixed at which the right to redeem should expire, it was *held* that such agreement would be held not to limit the time allowed by law, but to enlarge it, and that the right of redemption was favored in law, and it would be decreed in equity, if asserted in a reasonable time.—Haywood v. Ensley, 27 Tenn. (8 Humph.) 460.

§ 117. Payment of claims.

[a] (Ill. 1867) A judgment creditor, wishing to redeem lands formerly belonging to his debtor and sold by a master in chancery under a decree, paid the redemption money to the master instead of to the sheriff, in whose hands his execution was, as required by Scates' Comp. pp. 607, 608. *Held*, that the redemption was invalid, and could not be ratified by the sheriff, as the master did not act as the sheriff's agent in receiving the money.—Littler v. People, 43 Ill. 188.

[b] (Ill. 1876) Where lands have been sold under circumstances such that the court will permit redemption from the sale, the highest equity is the purchaser's right to have the purchase money refunded.—Smith v. Knoebel, 82 Ill. 392.

[c] (N. Y. 1840) A payment to a master, for the redemption of premises sold under a decree, made in bills of a specie-paying bank, current at the place of payment, is a good payment.—Augur v. Winslow, 1 Clark, Ch. 258.

[d] (Tenn. 1894) Thomp. & St. Code, § 2136, as amended by Acts 1889, c. 83, § 2, providing that, when the purchaser of land subject to redemption resides out of the county where the land lies, the party entitled to redeem may pay the redemption money to the clerk of the circuit court of the county in which the land lies, to be held for the person entitled thereto, applies to sales under a decree of the chancery court.—Maupin v. Blanton, 93 Tenn. 422, 25 S. W. 99.

[e] (Tenn. 1895) Redemption from judicial sale may be made in paper currency issued by authority of the United States, whether legal tender or not, unless the officer whose duty it is to receive the money objects to receiving anything but legal tender.—Rogers v. Rogers (Ch. App.) 35 S. W. 890.

§ 118. Actions to redeem.

[a] (Ill. 1890) Under Rev. St. c. 77, § 18, which provides for redemption from judicial sales by payment to the purchaser or the officer who made the sale of the purchase price, with interest, a bill to redeem which does not allege that the complainant has paid or tendered the redemption money to any one authorized to receive it is demurrable, even though the sale was made under a decree directing a sale without redemption, since the right to redeem and the mode of doing so are governed solely by the statute.—Hyman v. Bogue, 135 Ill. 9, 26 N. E. 40.

[b] (Tenn. 1850) Where a bill is filed to redeem real estate sold at a chancery sale, on the ground of a tender of the redemption money and refusal, the bill should tender the money; and it should appear to the court, before any decree for redemption is made, that the money has been paid into court subject to the order of the defendant.—Simmons v. Marable, 30 Tenn. (11 Humph.) 436.

[c] (Tenn. 1850) A chancery court has no power to vest the title in a complainant who has filed his bill for the redemption of land from a chancery sale, on the ground of tender and refusal, and order the land to be sold, if the redemption money be not paid at a given time.—Simmons v. Marable, 30 Tenn. (11 Humph.) 436.

XVI. CONVEYANCE OR DELIVERY TO PURCHASER.

IN GENERAL, § 119.
FORM, REQUISITES, AND VALIDITY, § 120.
OPERATION AND EFFECT, § 121.
CORRECTION OF ERRORS IN CONVEYANCE, § 122.

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Conveyance to assignee of bid, see ante, § 45 [b].
Necessity for provision in decree directing conveyance to purchaser, see ante, § 9 [f].
Acknowledgment of deed, see "Acknowledgment," vol. 1, cc. 850, 851, § 77 [a]; c. 985, § 231 [d].
Cancellation of deed in equity, see "Cancellation of Instruments," vol. 8, c. 1783, § 17 [e].
Champertous nature of conveyance at judicial sale, see "Champerty and Maintenance," vol. 9, cc. 2068–2070, §§ 107, 108.

§ 119. In general.

[a] (U. S. 1887) Where title to property worth many thousands of dollars was purchased at a judicial sale for $100, the purchaser will be restrained from taking any title by the purchase, where the facts show that the sale was made under adverse circumstances, when creditors jointly interested were not parties, and that the decree was procured, and the sale made, in a court distant from that in which the land was situated.—Hunt v. Fisher (C. C.) 29 Fed. 801.

[b] (Ala. 1845) Commissioners being ordered by the court to make a conveyance, according to a sale by them, are in no default by not looking up the purchaser to tender him a conveyance. It is sufficient if they deliver the deed on demand.—Perkins' Ex'rs v. Winter's Adm'x, 7 Ala. 855.

[c] (Ala. 1845) Where commissioners appointed to conduct a judicial sale refuse to execute a deed according to the order of the orphans' court, that court has power to cause a conveyance to be made.—Perkins' Ex'rs v. Winter's Adm'x, 7 Ala. 855.

[d] (Ala. 1876) Where the purchaser of property at a judicial sale sold and conveyed to a third person, and the original notes for the purchase money, being partly unpaid, were claimed by different persons, the subpurchaser could file a bill in equity against such claimants to compel a conveyance.—Todd v. Flournoy's Heirs, 56 Ala. 99, 28 Am. Rep. 758.

[e] (Ill. 1881) Where, during defendant's lifetime, his land was sold under a decree in the suit, the master's deed may be executed after defendant's death, without reviving the suit against his heirs.—Dugger v. Oglesby, 99 Ill. 405.

[f] (Ky. 1810) One applying for an order for the appointment of commissioners, to convey in pursuance of a decree, should show that he has an interest in the land to be conveyed; and, where he claims as assignee of the party in whose favor the decree was rendered, he should file his assignment, or submit proofs of its existence.—Yocom v. Chapline, 5 Ky. (2 Bibb) 156.

[g] (Ky. 1893) At a sale of land under a judgment to satisfy debts owing S. and P., the debtor became the purchaser, executing three purchase money bonds in payment. During the litigation for the sale, the debt of P., which had precedence over that of S., was assigned to B. The bonds not having been paid, judgment was rendered that the property be sold to satisfy only the last bond, and for the benefit alone of S. Judgment was then rendered that the property be conveyed to H., the purchaser at the last sale, "free of lien." *Held*, that this was erroneous, and prejudicial to B., who, by reason of his interest in the first two bonds through the assignment to him of the debt of P., had a lien on the property, and his rights should be determined before such conveyance.—McKee v. Hilpp, 24 S. W. 429.

[h] (La. 1878) Where property sold at public sale is bought by three persons in indivision, each being entitled, by agreement among themselves, to a certain undivided portion of the property, any one of the common owners, who has paid his share of the adjudicated price, has a right to demand from the sheriff a deed of sale for his undivided portion; and no one of the coproprietors is entitled to oppose the demand on the ground that the taxes on the property have not been paid.—Montross v. Jamison, 30 La. Ann. 172.

[i] (Md. 1823) If a sale of property is bona fide made under an order of the orphans' court, and the purchaser complies with, or offers to comply with, the terms of sale, or pays the purchase money, the property vests in the purchaser without an actual delivery.—Scott v. Burch's Adm'x, 6 Har. & J. 67.

[j] (Miss. 1845) In judicial sales of personal property, as in others, the property passes by delivery, and a bill of sale is not necessary.—Conger v. Robinson, 12 Miss. (4 Smedes & M.) 210.

[k] (Neb. 1871) A person who purchases land at a judicial sale becomes a party thereto, and he is entitled of right to an order from the court directing a conveyance to be made to him.—Phillips v. Dawley, 1 Neb. 320.

[l] (N. C. 1881) The authority conferred upon a commissioner to make a deed of land sold under decree of court, retaining title until the payment of the purchase money, can only be exercised when the same is actually paid, not when it is secured by note.—In re Macay, 84 N. C. 59.

[m] (N. C. 1885) Unless the principal is insolvent, land sold at a master's sale will not be ordered conveyed to the surety who pays the purchase money.—Dawkins v. Dawkins, 93 N. C. 283.

[n] (Tenn. 1847) The purchaser of real estate at a chancery sale becomes, by virtue of his purchase, quasi a party to the proceedings; and, where the purchase is made on a credit, the court will see that the money is fairly paid to those entitled before the purchaser will be invested with the title.—Deaderick v. Watkins, 27 Tenn. (8 Humph.) 520.

[o] (Tenn. 1850) The purchaser at a master's sale is entitled to a deed, unless there be some special circumstances to authorize the biddings to be opened.—Morton v. Sloan, 30 Tenn. (11 Humph.) 278.

[p] (Va. 1891) Where the commissioner who makes a judicial sale is directed by decree to execute deeds to such of the purchasers as have complied with the terms of sale, and take deeds of trust for the deferred payments, failure of a purchaser to take a deed from the commissioner, and to give back a deed of trust, though an irregularity, will not vitiate his title.—Whitlock v. Johnson, 87 Va. 323, 12 S. E. 614.

[q] (W. Va. 1883) A. bought land at a special commissioner's sale. After confirmation of the sale, but before the execution of the deed, A. gave to the special commissioner a power of attorney, authorizing him to sell the land. The special commissioner signed a contract of sale as such special commissioner and as A.'s attorney in fact. *Held*, that the contract purported that the subpurchaser was entitled to a deed from the special commissioner with the assent of A., and that he, therefore, could demand a deed with special warranty of title only, not with full covenants of warranty.—Tavenner v. Barrett, 21 W. Va. 656.

§ 120. Form, requisites, and validity.

[a] (U. S. 1864) A defendant whose property is sold at a judicial sale need not join in the

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conveyance to the purchaser.—Miller v. Sherry, 69 U. S. (2 Wall.) 237, 17 L. Ed. 827.

[b] (U. S. 1887) A master's deed, for property sold by him after he filed his report, is void.—McBride v. Gwynn (D. C.) 83 Fed. 402.

[c] (Ill. 1836) Where a statute requires that a deed of land sold by order of court should set out the order at large, it is not sufficient to set it out in substance.—Doe v. Hileman, 2 Ill. (1 Scam.) 323.

[d] (Ky. 1821) A deed made in pursuance of a decree in chancery is good, although no other consideration is expressed.—Porter's Heirs v. Robinson, 10 Ky. (3 A. K. Marsh.) 258, 13 Am. Dec. 153.

[e] (Ky. 1832) A deed made by a commissioner ordered by decree of the court to convey the title of nonresident heirs to land is valid, whether he subscribe to it his own name as commissioner, or that of the person whose title he conveys.—Nesbit v. Gregory, 30 Ky. (7 J. J. Marsh.) 270.

[f] (Ky. 1832) A deed made by a commissioner, conveying the title of nonresident heirs to land, is not void, although the decree under which it was made did not allow the heirs time to make the deed in their own proper persons.—Nesbit v. Gregory, 30 Ky. (7 J. J Marsh.) 270.

[g] (Ky. 1862) In a judicial sale and conveyance to the purchaser by a commissioner of a tract of land, described by metes and bounds as containing 174 acres, made in a proceeding to satisfy the debts of the owner, where the tract turns out to contain 214 acres, the commissioner's deed is not void as to the surplus, but passes the legal title to the whole tract.—Jennings v. Monks' Ex'r, 61 Ky. (4 Metc.) 103.

[h] (Ky. 1863) A commissioner's deed to a house and the ground on which it was situated is invalid, where the commissioner advertised and sold the house only.—Jarboe v. Colvin, 67 Ky. (4 Bush) 70.

[i] (Md. 1883) Where a trustee appointed by the court to sell land executes a deed before payment of the purchase money, and before ratification of the sale by the court, such deed is an absolute nullity, and not a mere irregularity, which may be waived.—Johnson v. Hines, 61 Md. 122.

[j] (Miss. 1845) Since a bill of sale is not necessary to convey title to the purchaser of personal property at a judicial sale, the fact that a bill of sale is defective is not cause for rescinding the contract.—Conger v. Robinson, 12 Miss. (4 Smedes & M.) 210.

[k] (Miss. 1845) Where slaves are sold by a commissioner in chancery, and the slaves sold are delivered to the purchaser, it is immaterial by what name the slaves are described in the bill of sale.—Conger v. Robinson, 12 Miss. (4 Smedes & M.) 210.

[l] (N. J. 1858) A purchaser at a judicial sale, refusing to accept a deed merely on account of its form, must make such objection at the time the deed is tendered.—Stryker v. Vanderbilt, 27 N. J. Law (3 Dutch.) 68.

[m] (N. C. 1890) A deed of land sold by a commissioner on order of court recited the substance of the order of sale, that a sale was made, the order of confirmation, and that the deed was made in consideration of the sum bid for the land. *Held*, that the failure to state the receipt of the price was not such an irregularity as to authorize a motion, after the final judgment, to set aside the proceedings.—Smith v. Fort, 105 N. C. 446, 10 S. E. 914.

[n] (N. C. 1896) Where a commissioner, appointed by the court for the purpose, sold land, and after a confirmation of the sale executed a deed therefor, reciting the facts, and purporting to convey the property by virtue of such sale, the fact that he added no designation to his signature to indicate that it was not made in his individual capacity will not affect the validity of the deed; it appearing that he had no interest of his own in the property.—Exum v. Baker, 118 N. C. 545, 24 S. E. 351.

[o] (Tex. 1893) Rev. St. art. 4564, providing that, in case of the sale of stock running on the range, no title shall pass unless the bill of sale be duly recorded, does not apply to a judicial sale of such stock, and a purchaser at such sale, having rounded up and taken possession of the stock, does not fail to acquire title because the bill of sale, for want of an acknowledgment under seal, cannot be properly recorded.—Holloway v. Cabell, 3 Tex. Civ. App. 320, 22 S. W. 531.

§ 121. Operation and effect.

[a] (U. S. 1864) When chancery has full jurisdiction as to both persons and property, and decrees that a master of the court sell and convey real estate, the subject of a bill before it, a sale and conveyance in conformity to such decree is as effectual to convey the title as the deed of a sheriff, made pursuant to execution on a judgment at law.—Miller v. Sherry, 69 U. S. (2 Wall.) 237, 17 L. Ed. 827.

[b] (U. S. 1887) Where the deed to purchasers at a judicial sale provides that such sale is "subject to certain certificates of indebtedness," such purchasers, and all persons claiming under them, are estopped by the deed from denying the lien of the certificates for the whole principal and interest due upon them.—Central Nat. Bank v. Hazard (C. C.) 30 Fed. 484.

[c] (Ala. 1833) A deed of conveyance, under a decree in chancery authorizing the sale of land of a person, is evidence of the grantee's title to such person's interest in the land, against all the world.—Ryder v. Innerarity, 4 Stew. & P. 14.

[d] (Iowa, 1889) In a deed executed by a commissioner to convey lands in pursuance of a decree of a court of general original jurisdiction, recitals of facts supporting the validity of the decree and of other matters affecting the validity of the conveyance are sufficient, prima facie, to establish the same; jurisdiction of the subject-matter being presumed.—Henderson v. Robinson, 76 Iowa, 603, 41 N. W. 371.

[e] (Ky. 1830) If a defendant die before a decree, the deed of the commissioner, made under the decree, does not bind the decedent.—Langford's Heirs v. Stuart, 27 Ky. (4 J. J. Marsh.) 576.

[f] (Ky. 1834) The deed of a commissioner, appointed to convey land under a decree, can pass the title only to the land embraced by the decree.—Moss v. Scott, 32 Ky. (2 Dana) 271.

§ 122. Correction of errors in conveyance.

[a] (Ill. 1886) Where a conveyance is made by a master or other person in pursuance of a decree, and it is afterwards discovered that such conveyance and decree both proceed upon a mistake of fact, mutual between the parties thereto, the mistake in the conveyance cannot be corrected without first correcting the decree.—Rose v. Shankland, 115 Ill. 526, 4 N. E. 843.

[b] (Pa. 1896) A mistake in a deed made by a trustee of an orphans' court may be corrected by such court, where intervening rights will not be prejudiced.—In re Nimick (Orph. Ct.) 26 Pittsb. Leg. J. (N. S.) 283.

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XVII. PROCEEDS, FEES, AND EXPENSES.

IN GENERAL, § 123.
APPLICATION TO DEBTS, LIENS, AND INCUMBRANCES, § 124.
LIABILITY OF OFFICER AND HIS SURETIES FOR PROCEEDS AND ENFORCEMENT THEREOF, § 125.
EXPENSES, § 126.

Allowance by appellate court of interest and damages out of proceeds for detention of property pending appeal, see ante, § 67 [c].

Attachment of proceeds of sale, see "Attachment," vol. 5, c. 707, § 530.

Surplus proceeds of sale of land subject to dower, see "Dower," vol. 17, cc. 1133–1139, §§ 31–33.

§ 123. In general.

[a] (U. S. 1831) Where a decree directs an officer of the court to sell property "and bring the proceeds of sale into court," and the sale is on a credit of one, two, and three years, and bonds are given for the payment of the installments, these bonds are the immediate proceeds of sale; and the creditor may require that they shall be brought into court.—Wallis v. Thornton, Fed. Cas. No. 17,111 [2 Brock. 422].

[b, c] (D. C. 1889) The fact that a trustee, or officer of a court, executing a decree for a sale of lands, misapplies or fails to account for the proceeds, will not affect the title of the purchaser, unless such misapplication is the result of a preconcerted plan to which he is a party, or chargeable with notice thereof before the purchase.—Marshall v. Wheeler, 7 Mackey, 414.

[d] (Ky. 1895) Land was sold by order of a court, and price paid to the master commissioner. One of the parties entitled to a share of the proceeds failing to call for his share, it was, by order of the court, loaned to the purchaser, who gave the master commissioner his indorsed note as security. *Held*, that the master commissioner acquired no lien on the land.—Lilly v. Northern Bank, 29 S. W. 736.

[e] (Md. 1831) No trustee appointed to make a sale of property under a decree in the usual form, directing the proceeds to be brought into court, can be allowed, in any manner, to dispose of them, without the express previous sanction of the court.—Tilly v. Tilly, 2 Bland, 436.

[f] (Md. 1848) The court has incontestable power to pass an order directing the trustee appointed to make a judicial sale to bring the proceeds into court, to be disposed of under its direction.—Sewall v. Costigan, 1 Md. Ch. 208.

[g] (Md. 1883) In case of a sale made after the passage of an act regulating the investment of the proceeds of such sales, but under a decree made before the passage, the act controls.—Gill v. Wells, 59 Md. 492.

[h] (N. Y. 1832) A party may apply to the court in the first instance to correct an error by the master in paying over the proceeds of a sale by him.—Lawrence v. Murray, 3 Paige, 400.

[i] (N. Y. 1892) The provisions of Laws 1890, c. 276, authorizing the supreme court to sell certain real estate in the city of New York, conveyed by B. for life and in remainder, that the proceeds of the sale shall be brought into court, and shall retain the legal character of real estate, and be held by the court for the determination of the rights of all persons entitled, fully protect the possible and contingent interests of persons not in being, who shall at any time have or claim an interest in said property.—In re Field, 131 N. Y. 184, 30 N. E. 48, affirming (Sup. 1891) 17 N. Y. Supp. 19.

[j] (Tenn. 1871) A special commissioner for the sale of lands gave bond to the state for the use of ten beneficiaries named therein, and the guardian of two of them made a motion upon notice in the court, appointing the special commissioner, though not in the case then pending for the sale of the lands, for the share of money due to her wards from sales made by commissioner; there having been no decree or order of the court ascertaining the amount of shares due said wards. *Held*, the motion would not lie, although, had the motion been for all the beneficiaries in the bond, it would have been a proper remedy.—Somerville v. Somerville, 52 Tenn. (5 Heisk.) 160.

[k] (Tenn. 1876) An order of the court, directing that the proceeds of property sold under a decree in one cause be held subject to the orders of the court in another cause, is void.—Mayo v. Harding, 3 Tenn. Ch. 237.

[l] (Va. 1895) It is usual to order a commissioner to deposit funds from sale of land in a solvent bank, to await the further order of court, without taking security.—Cox v. Price, 22 S. E. 512.

§ 124. Application to debts, liens, and incumbrances.

Right of purchaser to have liens and incumbrances discharged out of purchase money, see ante, § 93.

[a] (U. S. 1890) As the state has a paramount lien for taxes on realty, when a judicial sale was made subject thereto, such taxes would not be ordered paid out of the proceeds.—George v. St. Louis Cable & W. Ry. Co. (C. C.) 44 Fed. 117.

[b] (Ala. 1884) Where lands are sold under decree in chancery, subject to all liens held by persons not parties to the suit, a lien for municipal taxes assessed and unpaid is not entitled to be paid out of the proceeds of sale.—State v. Vincent, 78 Ala. 233.

[bb] (Ark. 1859) Where the terms of the sale of land are that the proceeds "will, after payment of costs, be applied to pay" certain specified creditors, the master will not be authorized to pay them over till further order of court.—Penn's Adm'r v. Tolleson, 20 Ark. 652.

[c] (Ind. 1850) Where neither party, before a trial in which the question is involved, has made application of the proceeds of a judicial sale, the court will direct them to be applied pro rata to the debts for which the sales were made.—Russell v. Metzgar, 2 Ind. (2 Cart.) 345.

[cc] (Ky. 1886) A decree directing the sale of land to pay—First, the debt of A.; second, the debt of B.; third, the debt of C.; and, fourth, the costs of the case,—does not settle finally the priority of liens, particularly when no issue is made as to priority; and when the sale is made the court may, in the distribution of the proceeds, disregard the judgment, in so far as it attempts to determine the question of priority.—Bank of Kentucky v. Allen, 8 Ky. Law Rep. 36.

[d] (La. 1893) When the property of a tutrix is sold at judicial sale, and adjudicated to the heir holding the ranking mortgage, the proceeds must be attributed thereto, and any other imputation, with the consent of the adjudicatee, will not bind a third possessor of another portion of the property mortgaged, who is proceeded against in an hypothecary action.—Smith v. Lewis, 45 La. Ann. 1457, 14 South. 221.

[e] (Md. 1828) A trustee appointed to make a sale of property, who applies a portion of the

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proceeds to pay a creditor of the estate to which the proceeds belong, cannot come in claiming as equitable assignee of so much, and to have it set off against the share of him to whom it was paid.—Mackubin v. Brown, 1 Bland, 410.

[f] (Md. 1831) A purchaser at a sale made under a decree of court is not bound to see the application of the purchase money.—Coombs v. Jordan, 3 Bland, 284, 22 Am. Dec. 236.

[g] (Md. 1848) The court is not disposed to look with favor upon the appropriations by its trustees of the proceeds of sales, without its previous authority; and such conduct will be viewed with especial jealousy where married women and children are concerned, and the property, or fund raised by the sale, is subject to marriage settlements designed for the support of families.—Sewall v. Costigan, 1 Md. Ch. 208.

[h] (Md. 1853) The fact that a decree appointing a trustee to sell property contained no direction that he should bring the proceeds of the sale into court cannot be construed as granting authority to him to disburse the fund.—Dent v. Maddox, 4 Md. 522.

[i] (Md. 1870) When property is sold under a decree in equity, the taxes due by the person whose property is sold must be first satisfied out of the proceeds.—Tuck v. Calvert, 33 Md. 209.

[j] (Md. 1878) By a decree for the sale of real estate, the property was divided into two parts, and the incumbrances on each, in the order of their priority, distinctly designated. The division was made by providing that the net proceeds of sale of that portion of the said real estate which is not covered by the said decrees under which a party had become the purchaser should be applied to the payment of certain designated claims, and the proceeds of the remaining portion which was so covered should be applied to pay certain other claims. The decree in conclusion provided that in order to ascertain the relative values respectively of the two portions "the said trustees should first offer the said portions of the said real estate separately, and then, if they should deem the same advisable, they should offer the whole together for an advanced price, and report to the court the same respective amounts as offered for the same two portions of the said real estate, as well as the whole amount for which the whole may be sold, in order to enable the court to ascertain what proportions of the proceeds of sale shall be considered as arising from each portion of said real estate respectively." The property was offered for sale as directed by the decree, first in separate portions, and then as a whole. The amounts bid not being deemed adequate, the property was withdrawn, and was again offered for sale in the same manner as before, and sold at the price then offered for the whole. *Held*, that the auditor, in distributing the net proceeds of sale, might average the bids for the separate portions made at the sale, and when the property was previously offered, and apportion the proceeds accordingly, in the manner required by the decree. The same reason which would make the bona fide bids for the several parts a standard of value when the sale of the whole was actually made would lead the court to adopt, as a means of valuation, the average of bids bona fide made on several occasions, by analogy to the practice adopted in chancery of averaging the opinions of witnesses to ascertain the value of property or improvements.—Cornell v. McCann, 48 Md. 592.

[k] (Md. 1889) Act 1874, c. 483, § 63, which provides that, where a sale of property has been made by any ministerial officer under judicial process, all sums in arrear for taxes from the party whose property is sold shall first be paid, does not deprive one whose property has been sold by trustees appointed by the court of the right to resist, on the distribution, the payment of a tax levied more than four years before the sale; section 91 of the said act providing that taxes levied and not collected for four years shall be barred.—Perkins v. Gaither, 70 Md. 134, 16 Atl. 531.

[l] (Md. 1889) A trustee in equity for the sale of property has no right to retain the share of the proceeds awarded to a distributee, for the payment of a simple contract debt due to him by the distributee, in the absence of a special assignment or assent to such appropriation.—Poe v. Snowden, 70 Md. 383, 17 Atl. 377.

[m] (Mo. 1895) The surplus, after paying a lien under which real estate is sold, belongs in equity to the next subsequent lien in the order of priority of several liens thereon.—Abbe v. Justus, 1 Mo. App. Rep'r, 145.

[n] (N. Y. 1887) The rule that, upon a sale of the right, title, and interest of the debtor, under execution, the debtor is entitled to have the proceeds applied in satisfaction of the judgment, even though the purchaser's title fails, does not apply where the sale is under a special decree ordering a sale of the land itself, free and clear of all claim of the debtor, or those claiming under him.—Wallace v. Berdell, 105 N. Y. 7, 11 N. E. 274, affirming order (1886) 41 Hun, 444.

§ 125. Liability of officer and his sureties for proceeds and enforcement thereof.

Powers, duties, and liabilities of officer in general, see ante, § 20.

[a] (N. C. 1878) The only remedy against a commissioner appointed to make a judicial sale is in an action by the parties entitled to the money collected by him.—Smith v. Moore, 79 N. C. 82.

[b] (S. C. 1824) Under a rule against a master to show cause why he had not paid over the proceeds of certain sales, the court refused to hear evidence to contradict the affidavit of the master, denying that he had sold or been ordered to sell.—Ex parte Perry, 1 Harp. Eq. 50.

[c] (Tenn. 1860) A petition against a commissioner, appointed by court to sell property, and his sureties, to enforce their liability for property or money which the commissioner has received and failed to account for, may be treated as a motion for judgment against them to enforce such liability; that being the remedy provided by statute in such a case.—Smith v. Woods, 41 Tenn. (1 Cold.) 535.

[d] (Tenn. 1860) Where a special commissioner appointed by court to sell property fails to pay over money or property received while acting in that capacity, his personal representative will, on motion after his death, be liable with the sureties to a judgment therefor.—Smith v. Woods, 41 Tenn. (1 Cold.) 535.

[e] (Tenn. 1860) A special commissioner appointed by the court to sell property is liable, on motion, to a judgment against him and his sureties, in case of failure to pay over any money or property received by him in that capacity.—Smith v. Woods, 41 Tenn. (1 Cold.) 535.

§ 126. Expenses.

[a] (U. S. 1880) On opening the biddings and setting aside a sale on the offering of an advanced bid, the costs and expenses are to be paid, and the first purchaser indemnified by the

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advance bidder; but what particular items are to be comprised in such costs and charges will depend upon the circumstances of each case.—Blackburn v. Selma R. Co. (C. C.) 3 Fed. 689.

[b] (La. 1896) Under Act 1877, No. 49, providing that the cost of the advertisement for judicial sales shall not exceed 70 cents per square for first insertions and 25 cents for each subsequent insertion, the charge for such insertions is 70 cents for the first insertion and 25 cents for subsequent insertions, whether made consecutively or not.—Succession of Von Hoven, 48 La. Ann. 620, 19 South. 766.

[c] (N. Y. 1877) Laws 1876, c. 439, relating to the expenses of judicial sales in the county of Kings, is not unconstitutional, as violative of the prohibition against increasing the fees of public officers during their terms, since it applies only to future officers.—Kerrigan v. Force, 68 N. Y. 381, affirming (1876) 9 Hun, 185.

[d] (N. Y. 1891) Where a purchaser at judicial sale is relieved from the purchase on account of a mistake made by him, he should be charged with the costs of the resale.—Vingut v. Vingut, 62 Hun, 622, 17 N. Y. Supp. 159.

Judicial Separation.

See "Divorce," vol. 17, cc. 359–1041.

Judiciary.

See "Courts," vol. 13, cc. 1826–3227; "Judges," vol. 29, cc. 1562–1822; "Justices of the Peace," vol. 31, cc. 836–1976.

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—— *in criminal prosecutions, see* "Criminal Law," vol. 14, cc. 713–836, §§ 112–218.
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—— *affecting judgment as res judicata, see* "Judgment," vol. 30, c. 1890, § 1151.
—— *in criminal prosecution, see* "Criminal Law," vol. 14, cc. 713–836, §§ 112–218.
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—— *liability for false imprisonment, see* "False Imprisonment," vol. 23, cc. 531, 532, § 24; cc. 550, 551, §§ 41, 42.
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—— *disobedience of injunction granted without jurisdiction, see* "Injunction," vol. 27, cc. 2223, 2224, § 439.
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Jury.

Scope-Note.

[INCLUDES bodies of persons sworn to inquire into and determine matters of fact in judicial proceedings, more particularly petit juries or trial juries, selected and sworn to try issues of fact, in civil or criminal proceedings, on the evidence presented; nature and constitution of different kinds of juries; qualifications, exemption, selection, summoning, and compensation of jurors in general; competency of jurors, and challenges and trial thereof; impaneling and swearing jury for trial of particular cause; and right to trial by jury and waiver thereof in general.

[EXCLUDES constitution of grand jury, and qualifications, selection, summoning, compensation, and proceedings of grand jurors (see "*Grand Jury*"; "*Indictment and Information*"); exclusion from jury by reason of race, color, etc. (see "*Civil Rights*"); proceedings at trials by jury, province of court and jury and instructions to jury, and finding, entry, and effect of verdict either in civil cases (see "*Trial*"; and titles of particular forms and causes of action), or in criminal prosecutions (see "*Criminal Law*"; and titles of particular crimes); and misconduct of or affecting jury as ground for new trial of civil cases (see "*New Trial*"), or reversal of judgment on verdict (see "*Appeal and Error*"), or for new trial or reversal of conviction in criminal cases (see "*Criminal Law*").]

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—— *of verdict based on inspection by jury, see* "Appeal and Error," vol. 3, c. 1822, § 3939.
—— *presumptions as to custody and conduct of jury, see* "Appeal and Error," vol. 3, c. 1489, § 3725.
Right to complain of exclusion of women from jury, see "Constitutional Law," vol. 10, c. 1288, § 39 [zz].
Rules of court in relation to trial by jury, see "Courts," vol. 13, cc. 2115, 2116, § 285.
Sheriff's jury to determine claims of third persons in attachment, see "Attachment," vol. 5, cc. 1140, 1141, § 1075; cc. 1161–1170, §§ 1114–1130.

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Sheriff's jury to determine claims of third persons in execution, see "Execution," vol. 21, cc. 1115–1121, §§ 575–578.
Special and local legislation respecting constitution of juries, see "Statutes," II.
Submission of issues to jury in equity, see "Equity," vol. 19, cc. 1297–1351, §§ 788–820.
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Verdict, impeachment by affidavits or testimony of jurors, see "New Trial," III.
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JURY.

I. NATURE AND CONSTITUTION OF JURIES, §§ 1-13.
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I. NATURE AND CONSTITUTION OF JURIES.

NATURE AND FUNCTIONS IN GENERAL, § 1.
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Constitutional guaranty of equal protection of laws as applied to statutes discriminating in constitution of juries, see "Constitutional Law," vol. 10, cc. 2141–2143, §§ 724, 725 [c].

§ 1. Nature and functions in general.

[a] A jury is a body of men sworn to declare the facts of a case as they are proven from the evidence placed before them.
—(Ind. 1882) Hunnel v. State, 86 Ind. 431;
(Wash. 1895) State v. Voorhies, 12 Wash. 53, 40 Pac. 620.

[b] (Nev. 1876) The terms "jury" and "trial by jury," as used in the constitution, mean twelve competent men, disinterested and impartial, not of kin, nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impaneled and sworn to render a true verdict according to law and the evidence.—State v. McClear, 11 Nev. 39.

§ 2. Constitution in general.

[a] (Colo. 1892) Where proceedings to condemn land for town waterworks are tried at a regular term of court, instead of in vacation, the trial must be before the jury drawn and selected in the ordinary way.—Warner v. Town of Gunnison, 2 Colo. App. 430, 31 Pac. 238.

§ 3. Number of jurors.

Concurrence of less than whole number, see post, § 224.
Denial or infringement of right, see post, §§ 221–225.
Effect of provision for trial on appeal by jury of twelve, see post, § 241 [d, f, i, n].
In condemnation proceedings, see post, § 116 [p].
Right to demand jury of twelve, see post, § 154 [c, d–f].
Waiver in civil cases, see post, § 189.
—— *in criminal cases, see* post, § 201.
Agreement to abide by verdict of less than twelve jurors as a submission to arbitration, see "Arbitration and Award," vol. 4, c. 12, § 5.
Right of appeal from verdict by jury of less than twelve, see "Appeal and Error," vol. 2, c. 1348, § 750 [d].

[a] (Ill. 1873) The term "jury" means a panel of 12 men, unless a different number is designated in the statute; as where a city charter provides that the assessment for certain public improvements shall be made by a jury.—Bibel v. People, 67 Ill. 172.

[b] (Miss. 1838) A jury must consist of 12 men; no other number is known to the law.—Dixon v. Richards, 3 Miss. (2 How.) 771.

[c] (Mo. 1862) Juries in all courts of record must consist of 12 persons.—Foster v. Kirby, 31 Mo. 496.

[d] (N. J. 1819) A trial cannot be had before a jury of six men only, where the amount pending exceeds $50.—Ashcroft v. Clark, 5 N. J. Law (2 Southard) 577.

[e] (Tenn. 1827) While 20 jurors are to be summoned in proceedings before justices of the peace for forcible entries and detainers, 12 or more will be sufficient to try the issue.—Clements v. Clinton, 8 Tenn. (Mart. & Y.) 198.

[f] (Va. 1795) The jury upon an inquest of office respecting property escheated to the commonwealth previous to the act of 1794 might have been composed of 12 men, or a greater or less number.—Bennet v. Commonwealth, 2 Wash. 154.

§ 4. —— Constitutional provisions.

[a] (Ala. 1889) Const. 1875, art. 1, §§ 7, 12, which provide that "the right of trial by jury shall remain inviolate," and that in all prosecutions by indictment the accused shall have "a speedy public trial, by an impartial jury" of the county or district in which the offense was committed, contemplates a common-law jury of twelve men, and Acts 1888–89, p. 501, prescribing that in Barbour county a jury for the trial of a misdemeanor on an indictment shall con-

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sist of eight men, is unconstitutional.—Collins v. State, 88 Ala. 212, 7 South. 260.

[b] (Fla. 1877) Under a constitutional provision that the number of jurors for the "trial of causes" may be fixed by law, the legislature may provide for a trial of criminal cases by a jury of six, without violating "the right of trial by jury" within the meaning of the bill of rights.—Gibson v. State, 16 Fla. 291.

[c] (Mich. 1866) An amendment to the city charter of Detroit, which reduced the number of jurors to be summoned for assessing damages for land taken for streets to twelve, and the number to be sworn as jurors to six, was *held* to be unconstitutional.—Campau v. City of Detroit, 14 Mich. 276.

[d] (N. Y.) The constitution leaves the trial of all cases of misdemeanor to be provided for by the legislature, by a jury of twelve, six, or any other number, or without a jury.—(1855) People v. Fisher, 20 Barb. 652, 11 How. Prac. 554. 2 Parker, Cr. R. 402. CONTRA, see (1856) Wynehamer v. People, 13 N. Y. (3 Kern.) 378.

[e] (N. Y. 1855) The words "trial by jury," in the state constitution, mean a jury of 12 men.—People v. Kennedy, 2 Parker, Cr. R. 312.

[f] (Ohio, 1854) The term "jury," as used in article 1, § 19, of the constitution, providing that compensation for the taking of land for public roads shall be assessed by a jury, means a body of 12 men in a court of record.—Lamb v. Lane, 4 Ohio St. 167.

[g] (Pa. 1888) The legislature may provide trial by jury different from that contemplated by the constitution at its adoption for offenses not then provided for, and the trial of such offenses may be by such number of jurors as the legislature may determine; and where parties, having committed the offenses provided for by this kind of trial, voluntarily place themselves within the requirements of the law, and accept the trial, such trial for such offenses has been *held* good.—Commonwealth v. Byers (Quart. Sess.) 5 Lanc. Law Rev. 270.

[h] (S. C. 1867) Under Const. 1865, art. 9, § 7, providing that the general assembly shall have power to determine the number of persons who shall constitute a jury in the inferior and district courts, it is competent for the legislature to limit the number of jurors in the district court to eight.—State v. Starling, 15 Rich. Law, 120.

[i] (Wis. 1853) Rev. St. c. 86, § 16, is unconstitutional because it deprives the suitor of the right to a trial by a jury of 12 men, secured to him by article 1, § 5, of the constitution.—Norval v. Rice, 2 Wis. 22.

[j] (Wis. 1854) The word "jury," as used in the constitution of this state, means a jury of 12 men.—May v. Milwaukee & M. R. Co., 3 Wis. 219.

§ 5. —— Statutory provisions.

[a] (Ga. 1880) The law of 1878, as to impaneling of twelve jurors, does not apply to the city court of Atlanta: its jurisdiction being coextensive with the limits of the county. The law allowing a jury of five continues in force as not inconsistent with the new constitution.—Downing v. State, 66 Ga. 110.

[b] (N. Y. 1855) Act 1813, § 95, relating to the district courts of New York City (2 Rev. Laws 1813, p. 374), prescribes that twelve jurors shall be summoned, and six impaneled, to try a cause, and this part of the act never having been repealed or altered, there was no error in summoning twelve, and drawing six, to try a cause in such court.—City of New York v. Mason, 1 Abb. Prac. 344.

[c] (Ohio, 1877) Where, after the selection and summoning of a jury of 12 men for the trial of a cause before a justice of the peace, under a statute providing for that number of jurors, such statute is repealed, before the day set for trial, by an act providing for a jury of 6 men for such trials, the latter act governs the case, and it is error for the justice to submit it to a jury of 12 men.—Warner v. Baltimore & O. R. Co., 31 Ohio St. 265.

[d] (Tex. 1877) Const. 1876, art. 5, § 13, allowing a verdict in civil cases to be rendered on the concurrence of nine members of the jury, was in force until the passage of Act Aug. 1, 1876, restoring the old rule, and a verdict rendered in a civil suit one month before the passage of the latter act, on the concurrence of ten jurors, was valid.—Bowen v. Davis, 48 Tex. 101.

§ 6. —— In federal courts.

Adoption of practice in state courts in general, see "Courts," vol. 13, cc. 2703–2706, §§ 929, 930.

[a] (U. S. 1795) The provision of the judiciary act adopting state laws respecting juries applies to the mode of selection and to qualifications, but not to the number of jurors to be summoned, which is to be determined, under the common law, by a consideration of all the circumstances.—United States v. Insurgents, Fed. Cas. No. 15,443.

[b] (U. S. 1873) Neither the act of 1789 (1 Stat. 73) nor the act of 1840, in respect to the selection of jurors for federal courts, fix the number of jurors to be selected, but leave the matter in the discretion of the court, to be determined by rule, if the court deems it best to make a rule on the subject.—United States v. Gardner, Fed. Cas. No. 15,187.

§ 7. —— In inferior courts.

[a] (Ga. 1892) Under Code, §§ 298, 299c, on a trial in the county court on an indictment transferred from the superior court, the accused is not entitled to a jury of 12, but to a jury of 6.—Grant v. State, 89 Ga. 393, 15 S. E. 488.

[b] (Ill. 1883) Under Const. art. 2, § 13, providing that compensation for property taken for public use shall be ascertained by "a jury," and article 2, § 5, providing that the trial of civil cases before justices of the peace by a jury of less than twelve men may be authorized by law, an assessment of damages by a justice and six men, as authorized by the legislature, is constitutional.—McManus v. McDonough, 107 Ill. 95.

[c] (Iowa, 1857) The state law may make offenses of inferior grades originally cognizable by inferior courts, and the state constitution may provide that the general assembly may authorize trial by a jury of a less number than 12 men, in such inferior courts.—State v. Bryan, 4 Iowa (4 Clarke) 349.

[d] (La. 1860) A jury formed before the recorder's court, under a special statute, does not fall under the constitutional clause in respect to an impartial trial by a jury of the vicinage, and any number of jurors that the legislature may deem proper to fix may compose the jury.—State v. Gutierrez, 15 La. Ann. 190.

[e] (Mich. 1885) Under Const. art. 6, § 28, declaring that the number of jurors shall be 12, except in courts not of record, a conviction in the recorder's court of Kalamazoo, which is a court of record (Local Acts 1883, p. 677), by a jury of 6 men, will be quashed.—People v. Luby, 56 Mich. 551, 23 N. W. 218.

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[f] (N. Y. 1869) The provision of the constitution securing the trial by jury "in all cases in which it has heretofore been used" does not prevent the legislature from authorizing trials to be had otherwise than by a common-law jury of 12, in civil courts of local jurisdiction, in the case of actions in which the amount claimed does not exceed the limit of such jurisdiction, as it was established before the constitution took effect.—People v. Lane, 6 Abb. Prac. (N. S.) 105.

[g] (N. Y. 1872) The word "jury," as used in the constitution, does not mean a jury of 12 men exclusively. A jury of 6 men, in a justice's court, is as much a jury, in the eye of the law, as a jury of 12 men in a court of record; and is the jury which had been "heretofore used" in that tribunal at the adoption of the constitution. — Knight v. Campbell, 62 Barb. 16.

[h] (N. Y. 1878) The constitution of this state, giving trial by jury "in all cases in which it has been heretofore used," means a common-law jury of 12 men; and does not apply to the trivial offenses triable before a court of special sessions.—People v. Justices of Court of Special Sessions, 74 N. Y. 406.

§ 8. Apportionment of jurors.

Mode of selecting as infringing right to jury of the vicinage, see post, § 229.

[a] (U. S. 1883) Under Rev. St. § 802, providing that jurors shall be returned from such parts of the district from time to time as the court shall direct, so as to be most favorable to an impartial trial, or so as not to incur unnecessary expense, or unduly burden the citizens of any part of the district with such service, the circuit court for the Eastern district of Virginia properly directed the clerk to draw 12 names from the Alexandria box, 12 names from the Norfolk box, and only 6 from the Richmond box; this being no discrimination against Richmond.—United States v. Munford (C. C.) 16 Fed. 164.

[b] (U. S. 1889) Under Rev. St. § 802, permitting jurors to be returned on an order of court from parts of a district, a plea to an indictment that the jurors were drawn from an alleged division of the district, and not from the entire territory within the district, is bad, as there is no injury or prejudice averred.—United States v. Chaires (C. C.) 40 Fed. 820.

[c] (U. S. 1889) A plea is also bad which set forth that defendants are and were citizens of L. county, in said district; that the offense charged was committed, if at all, in said L. county; and that none of the names placed in the jury box from which the grand jury was drawn were citizens of said L. county.—United States v. Chaires (C. C.) 40 Fed. 820.

[d] (Colo. 1873) Jurors to sit in a case to be tried in a judicial district covering several counties need not be drawn from the county in which the offense is alleged to have been committed.—Beery v. United States, 2 Colo. 186.

[e] (Colo. 1873) Where an officer is directed to summon petit jurors from the body of the district, the jurors must be drawn from the judicial district to which the court belongs.—Beery v. United States, 2 Colo. 186.

[f] (Iowa, 1874) Where the list of jurors had been destroyed by fire, the court caused a precept to be issued to the sheriff directing him to summon a new panel; and 24 jurors were accordingly selected from 10 of the 20 townships of the county. *Held* a sufficient compliance with section 2738 of the Revision, requiring their selection from the body of the county.—State v. Arthur, 39 Iowa, 631.

[g] (Kan. 1895) A challenge to the array of jurors, on the ground that the proper officer of one township in the county failed to return a list of names of persons suitable to act as jurors, and that no jurors from such township were included in the panel, the jurors constituting the panel having been legally returned, drawn, and summoned, was properly overruled.—State v. Frazier, 54 Kan. 719, 39 Pac. 819.

[h] (Mass. 1863) It is not necessary, in summoning a sheriff's jury, to take any jurors from the town nearest the land in controversy; but it is enough if they are all taken from towns within the county, and adjoining the town in which the land lies.—Shattuck v. Stoneham Branch R. Co., 88 Mass. (6 Allen) 115.

[i] (Mass. 1878) Errors in preparing the list of jurors in one city of a county afford no ground for challenge to the array.—Commonwealth v. Walsh, 124 Mass. 32.

[j] (Mich. 1869) The requirement of Const. art. 18, § 2, that the jury shall be of the "vicinage," does not require the jurors in condemnation proceedings to be drawn from the city where the land lies; it being sufficient if they come from the county.—Convers v. Grand Rapids & I. R. Co., 18 Mich. 459.

[k] (Mich. 1878) It is not ground of challenge to the array that no jury list for the year was returned from one town.—Thomas v. People, 89 Mich. 309.

[l] (Mich. 1885) The jury in condemnation proceedings brought by a municipality should be chosen from the body of the county, and not merely from the township or village interested in the condemnation.—Houghton Common Council v. Huron Copper Min. Co., 57 Mich. 547, 24 N. W. 820.

[m] (Mich. 1886) Under How. Ann. St. §§ 7554, 7555, 7567, 7575, it is not ground for a challenge to the array in a criminal case that from one township no list of jurors was returned.—People v. Coffman, 59 Mich. 1, 26 N. W. 207.

[n] (Mich. 1887) The defendant in a prosecution for murder challenged the array because two townships of the county (including the vicinage of the crime) were not represented on the panel. The order in this case directed a jury to be drawn from the body of the county, as authorized by How. Ann. St. § 7578. It was not shown that the officers who drew the jury had arbitrarily left out the townships from which jurors were not drawn, nor that the lists of such townships had not already been exhausted. *Held*, that the challenge was properly overruled.—People v. Coughlin, 67 Mich. 466, 35 N. W. 72.

[o] (Mo. 1887) Rev. St. 1879, § 2777, provides that every juror shall be a resident of the county. Section 2778, provides that no exception to a juror on the ground of nonresidence shall be allowed after the jury is sworn. *Held*, that a challenge by the state, in a murder trial in the St. Louis criminal court, on the ground that the juror was not a resident of St. Louis, was properly sustained.—State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330.

[p] (Neb. 1880) The failure of the county commissioners to select jurors from the several precincts in the county in proportion to the number of persons therein competent to serve on grand and petit juries, as required by Code Civ. Proc. § 658, is good cause for challenge to the array.—Clark v. Saline County Com'rs, 9 Neb. 516, 4 N. W. 246.

[q] (Neb. 1882) Where unorganized territory is attached to a county for "judicial purposes," under Comp. St. p. 193, § 146, it is within the criminal jurisdiction of the district court sitting

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in such county (section 147); and the county commissioners, in selecting juries, may draw from such unorganized territory according to its proportion.—In re Crawford, 12 Neb. 379, 11 N. W. 494; State v. Page, 12 Neb. 386, 11 N. W. 495.

[r] (N. Y. 1866) Laws 1864, p. 248, incorporating the city of Elmira from parts of the towns of Elmira and Southport, provides, in section 5, that the city shall be regarded as a town, under the provisions of the Revised Statutes, in regard to the making, return, and filing of jury lists. No provision is made by such charter for return of any jury list from the city except in accordance with the Revised Statutes. 2 Rev. St. p. 333, § 17, provides that persons returned on a jury list shall be competent for three years and until other lists are returned. *Held* that, in a criminal trial in April, 1866, jurors were properly drawn from the list returned for the town of Elmira in July, 1863.—Gardiner v. People, 6 Parker, Cr. R. 155.

[s] (N. Y. 1888) Laws 1822, c. 137, § 3, which is unrepealed, divides Seneca county into two jury districts, and enacts that the clerk of the county shall keep the names of the jurors in such districts separate, and the jurors shall be drawn for each court from the district in which the court is to be held; and Code Civ. Proc. § 3347, declares that the provisions of Code Civ. Proc. §§ 1027, 1062, regarding the drawing of jurors, do not affect "any special provisions of law remaining unrepealed after May, 1877, whereby * * * a county is divided into two or more jury districts." *Held*, that a challenge to the jury as not drawn from the body of the county, as provided by Code Cr. Proc. § 358, enacting that a trial jury shall be formed "as provided by the Code of Civ. Proc.," is properly refused.—People v. Johnson, 110 N. Y. 134, 17 N. E. 684.

[t] (Pa. 1796) A court cannot direct the sheriff to take a jury from any particular part of the county.—Hartshorne's Lessee v. Patton, 2 Dall. 252, 1 L. Ed. 369.

[u] (Tenn. 1892) The fact that Code, § 4805, gives the court power to order a special jury, and designate the persons to be summoned, does not authorize it to exclude a certain class as the residents of a certain city.—City of Jackson v. Pool, 91 Tenn. (7 Pickle) 448, 19 S. W. 324.

[v] (Va. 1846) Act Feb. 24, 1846, requiring the venire in cases of felony to summon jurors residing remote from the place of the commission of the offense, instead of from the neighborhood, was applicable to all cases tried after the passage of the act, even though a venire had been issued under the former law.—Perry v. Commonwealth, 3 Grat. 632.

§ 9. Special or struck juries.

As infringement of right, see post, § 226 [f, i].
Competency of jurors, see post, § 404.
Right to challenge for cause, see post, § 553.
Waiver of right, see post, § 191.
As class legislation, see "Constitutional Law," vol. 10, c. 2091, § 673 [l].
Review of discretion of court, see "Appeal and Error," vol. 3, cc. 1665–1667, § 3843 [c, zz].

[a] (U. S. 1895) In a civil action in the court for the Indian Territory, the court is bound, on request of either party, to have drawn a list of 18 competent jurors, from which the jury is to be selected by each party striking three names, in accordance with Mansf. Dig. Ark. §§ 4013–4015, which are expressly put in force in the territory by act of congress (26 Stat. 81); and a refusal to grant such a request on the ground that, according to the rule established by the court since its organization, exceptions should be taken to the 12 men called into the box, is reversible error.—Gulf, C. & S. F. Ry. Co. v. Shane, 157 U. S. 348, 15 Sup. Ct. 641, 39 L. Ed. 727.

[b] (U. S. 1892) Mansf. Dig. Ark. § 4013, provides that if either party to an action shall desire a panel, the court shall cause the names of 24 competent jurors to be placed in the box, from which 18 shall be drawn and entered on a list, and section 4014 provides that each party shall be furnished with a copy of this list, from which each may strike the names of 3 jurors, and the 12 remaining shall constitute the jury. These acts were by Act Cong. May 2, 1890, § 31, extended over the Indian Territory. *Held*, that refusal to allow a defendant in a civil case in the Indian Territory to have the jury drawn and impaneled in the mode described therein was error.—Gulf, C. & S. F. R. Co. v. Washington, 49 Fed. 347, 1 C. C. A. 286, 4 U. S. App. 121; Same v. Campbell, 49 Fed. 354, 1 C. C. A. 293, 4 U. S. App. 133; Same v. Martin, 49 Fed. 359, 1 C. C. A. 298, 4 U. S. App. 198.

[c] (Mo. 1896) A special jury, under the common law, is one nominated and selected by the proper officer, by the exercise of judgment and discretion, and not drawn by lot or chance, as in case of ordinary juries.—State ex rel. St. Louis, K. & N. W. Ry. Co. v. Withrow, 133 Mo. 500, 36 S. W. 43.

[d] (Mo. 1896) Laws 1891, p. 173, provides that panels of jurors shall be drawn from the jury box on requisition by the court, and section 7 provides that the name of every juror drawn for a special venire shall be returned to the box or wheel, unless the judge shall order to the contrary. *Held*, that the act was intended to govern the selection of special juries as well as juries in general, and hence does not take away by implication the right to a special jury given by Rev. St. 1879, § 2802, and Rev. St. 1889, § 6089.—State ex rel. Kansas City & S. Ry. Co. v. Slover, 134 Mo. 607, 36 S. W. 50.

[e] (Ohio, 1894) Under Rev. St. § 79, providing that when a statute is repealed or amended, and such repeal or amendment relates to the remedy, the repeal or amendment shall not affect pending cases unless so expressed, Act May 18, 1894, repealing Rev. St. §§ 5185–5188, providing for struck juries, did not affect cases pending at its passage; struck juries being part of the remedy, and the repealing act making no reference to pending cases.—McDonald v. Lane, 32 Wkly. Law Bul. 150, 5 Ohio S. & C. P. Dec. 37.

[f] (Va. 1890) Under Code, § 3168, providing that a court "may allow a special jury," the allowance of a special jury is not a matter of right, but rests in the sound discretion of the court.—Atlantic & D. R. Co. v. Peake, 87 Va. 130, 12 S. E. 348.

§ 10. —— Nature of actions in which allowed.

[a] (La. 1812) A special jury of merchants will not be allowed to try the question whether a conveyance was made in fraud of creditors.—Emerson v. McCullough's Syndics, 2 Mart. (O. S.) 297.

[b] (La. 1876) A special jury was proper in an action involving extensive accounts of a public officer; both parties having assented.—Kellogg v. Clinton, 28 La. Ann. 674.

[c] (N. Y. 1805) The fact that the government of the United States is interested in a cause does not make it of such importance as to warrant the granting of a struck jury.—Hartshorn v. Gelston, 3 Caines, 84.

[d] (N. Y. 1805) Where a town contributes to the expense of a suit, it is a good ground for

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moving for a struck jury to be taken from another county.—Stryker v. Turnbull, 8 Caines, 103.

[e] (N. Y. 1806) In an action by a public officer for a libel in relation to an official trust, a struck jury will be allowed.—Livingston v. Cheetham, 1 Johns. 61.

[f] (N. Y. 1806) On the affidavit of counsel in a cause stating that, in his opinion, it was a cause of importance, and that a large sum of money was depending, a struck jury was allowed.—Livingston v. Smith, 1 Johns. 141.

[g] (N. Y. 1806) A special jury was granted in an action against a person for opening a highway near a trunpike gate, to avoid it.—New Windsor Turnpike Co. v. Ellison, 1 Johns. 141.

[h] (N. Y. 1806) A special jury was not granted on an affidavit stating that the action was on a policy of insurance and involved questions of intricacy and importance, and that another cause on the same policy had been tried and the jury discharged because they were unable to agree on a verdict.—Anonymous, 1 Johns. 314.

[i] (N. Y. 1807) A struck jury was refused in an action on a policy, where the plaintiff claimed a total loss to the amount of $27,500.—Wright v. Columbian Ins. Co., 2 Johns. 211.

[j] (N. Y. 1807) A struck jury was denied in an action for libel by a person who was recorder of Albany and member of the assembly; it not appearing that the libel was concerning his official character.—Van Vechten v. Hopkins, 2 Johns. 373.

[k] (N. Y. 1809) Where the subject-matter of a libel related to a remote transaction, and though concerning the conduct of a foreign minister resident here, but who had long been superseded, a struck jury was not allowed.—Genet v. Mitchell, 4 Johns. 186.

[l] (N. Y. 1809) Where a representative in congress is libeled in respect to his official conduct, a struck jury may be awarded.—Thomas v. Rumsey, 4 Johns. 482.

[m] (N. Y. 1809) A struck jury will not be granted in an action for a libel against a person who is a public officer, unless the libel relates to his official misconduct.—Thomas v. Croswell, 4 Johns. 491.

[n] (N. Y. 1829) The fact that the controversy excites much speculation and interest in the county where it is tried does not render the case so important as to require a struck jury.—Poucher v. Livingston, 2 Wend. 296.

[o] (N. Y. 1829) The fact that the question brought before a jury is the genuineness of the signature to a note does not render the case so complicated as to require a struck jury.—Poucher v. Livingston, 2 Wend. 296.

[p] (N. Y. 1853) In an action under the statute by the representatives of a deceased person killed by the alleged negligence of defendant, a struck jury will not be granted on account of the alleged disposition of ordinary jurors to give excessive damages.—Murphy v. Kipp, 8 N. Y. Super. Ct. (1 Duer) 659.

[q] (N. Y. 1859) Under 2 Rev. St. p. 514, providing that the court shall order a special jury when it shall appear that a fair and impartial trial will be more likely to be obtained by having a struck jury, or that the importance or intricacy of the cause requires such a jury, a motion for such a jury is properly denied in New York City, where the court is of the opinion that a fair and impartial trial will be less likely to be obtained by such a jury.—Nesmith v. Atlantic Ins. Co., 8 Abb. Prac. 423.

[r] (N. Y. 1864) The court will not order a struck jury in an action on a policy of marine insurance, where the allegation that the grounds of defense are intricate and difficult is only substantiated by showing that the defense turns on the unseaworthiness of the vessel at the time she sailed, and on the fact that the master was chargeable with a want of competency and seamanship in not making a near port of distress at the time when the water was alleged to have been gaining upon and disabling his vessel; which he might and ought to have done in season to prevent her loss.—Walsh v. Sun Mut. Ins. Co., 25 N. Y. Super. Ct. (2 Rob.) 646, 17 Abb. Prac. 356.

[s] (N. Y. 1872) A quo warranto to try title to the office of justice of the district court of New York City is not an extreme case, requiring a special jury.—People v. McGuire, 43 How. Prac. 67.

[t] (N. Y. 1892) Plaintiff in ejectment claimed as heir at law, and defendant claimed under a will of plaintiff's ancestor, which plaintiff attacked as having been obtained by fraud and undue influence. There had been a similar action between other parties, in which the jury failed to agree. The case was of no public importance, had excited no public interest, there was no fear of any inability to obtain an impartial jury, and no claim of unfairness on the former trial was made. *Held*, that plaintiff's motion for a special jury was improperly granted.—Ives v. Ranger, 65 Hun, 622, 20 N. Y. Supp. 32.

[u] (N. Y. 1893) Where, in an action for libel, the affidavits used on a motion for a struck jury state only that the defenses are a general denial, justification, and facts in mitigation of damages, and that the action involves the official misconduct of public officers, one of whom affiants believe is the brother of the commissioner of juries, it is not sufficient showing to bring the case within the provisions of Code, § 1063, which provides that the court may order a struck jury where it appears a fair or impartial trial cannot be had without, or that the importance or intricacy of the case requires, one.—Adams v. Morgan, 67 Hun, 649, 21 N. Y. Supp. 1057.

§ 11. —— Criminal prosecutions.

[a] (N. J. 1838) A rule for a struck jury entered on motion of the state after the venue had been changed to another county was discharged on motion of the prosecutor.—Anonymous, 16 N. J. Law (1 Har.) 398.

[b] (Ohio, 1839) A struck jury may be demanded in a criminal, as well as a civil, case.—Sutton v. State, 9 Ohio (9 Ham.) 133.

[c] (Ohio, 1859) A refusal to grant, when duly demanded, a struck jury, authorized by Swan's Rev. St. p. 492, under certain conditions, is fatal to a conviction, unless the record shows a waiver of the right thereto.—Whitehead v. State, 10 Ohio St. 449.

[d] (Ohio, 1859) Under the statute the prisoner or the state may have a struck jury as of right, except in cases where either party is entitled to more than two peremptory challenges.—Whitehead v. State, 10 Ohio St. 449.

[e] (Ohio, 1889) Under Rev. St. § 5184, providing that any party to an action may demand a struck jury for the trial of any issue of fact, an accused, in a prosecution in a police court, is not entitled to a struck jury, since such section applies only to procedures in the courts of common pleas, district and supreme courts.—State v. Ermston, 2 O. C. D. 431.

[f] (Ohio, 1891) Under Rev. St. § 7276, providing that in all cases other than capital

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cases the jury shall be summoned and impaneled according to the provisions of the law relating to the summoning and impaneling of jurors in other cases, the state, in a prosecution under the "compulsory school attendance" law, is entitled to a struck jury.—Quigley v. State, 5 Ohio Cir. Ct. R. 638.

[g] (Pa. 1885) Act June 23, 1885, amending Act April 14, 1834, § 140, by providing that the names of 20 jurors shall be drawn from the box and listed by the clerk, and that plaintiff and defendant shall alternately strike 1 name therefrom till each has stricken 4 names, and that the remaining 12 jurors shall be the trial jury, is applicable to all criminal trials in which defendant is not entitled to more than four peremptory challenges.—Commonwealth v. Carling, 1 Lehigh Val. Law Rep. 110.

[h] (Pa. 1886) Act April 14, 1834, § 140, provides that 12 names shall be drawn from the box, and that if any jurors so drawn do not appear, or shall be challenged or set aside, further names shall be drawn till 12 shall appear and be approved, who, being sworn as the law directs, shall be the trial jury. Section 141 directs that such jury shall be sworn to try the issue between the "plaintiff" and "defendant," and a true verdict to give, unless dismissed by the court, or the cause be withdrawn by the parties. Act March 29, 1860, § 1, gives each party to a civil suit four peremptory challenges. Cr. Proc. Act March 31, 1860 (Purd. Dig. p. 384), § 36, grants to the defendant in cases of treason, murder, rape, and other crimes named, the right to challenge 20 jurors peremptorily, and in other criminal trials limits that right to four challenges. Act June 23, 1885, amending Act 1834, § 140, provides that the names of 20 jurors shall be drawn from the box and listed by the clerk, and that "plaintiff" and "defendant" shall alternately strike 1 name therefrom till each has stricken 4 names, and that the remaining 12 jurors, being sworn "as the law directs," shall be the jury. *Held*, that Act 1885 was only applicable to civil actions.—In re Calling Jurors, 1 Pa. Co. Ct. R. 644.

[i] (W. Va. 1873) Code, c. 116, § 21 (re-enacted by Laws 1870, c. 20), providing that any court may allow a special jury in any case, does not apply in cases of felony.—State v. Miller, 6 W. Va. 600.

[j] (W. Va. 1891) The offense of giving intoxicating drink to a voter at an election, in violation of Code, c. 5, § 10, providing as a penalty therefor a fine of not less than $10 nor more than $50, being a misdemeanor, defendant, on an indictment therefor, is not entitled to a special jury, under Code, c. 116, § 21, authorizing the court to allow a special jury in any civil case.—State v. Pearis, 35 W. Va. 320, 13 S. E. 1006.

§ 12. Foreign juries.

Open venire to another jurisdiction, see post, § 325 [z].

Summoning talesmen to fill vacancies on foreign jury, see post, § 377 [c].

[a] (Ill. 1884) No statutory authority exists for the selection of grand and petit jurors in one county to serve in another county.—Buckrice v. People, 110 Ill. 29.

[b] (Ky. 1891) Cr. Code, § 194, provides that, if the judge be satisfied, after having made a fair effort for that purpose, that from any cause it will be impracticable to obtain a jury free of bias in the county where the prosecution is pending, he may order the sheriff to summon jurors from some adjoining county. *Held* that, on a trial for homicide, the fact that defendant had extensive relations, and had received three former trials, was sufficient to justify an order to the sheriff to summon jurors from an adjoining county.—Brafford v. Commonwealth, 16 S. W. 710.

[c] (Ky. 1893) Error cannot be predicated, in a criminal cause, on the court's refusal to grant defendant's motion to have the jury summoned from an adjoining county on the ground that the prosecutors were people of influence, and were using money to secure a conviction, as by Cr. Code, § 194, the court must satisfy itself, by making a fair effort, that it will be impracticable to obtain a jury free of bias in the county where the cause is pending before authorizing the summons of a jury from another county.—Roberts v. Commonwealth, 94 Ky. 499, 22 S. W. 845.

[d] (Ky. 1896) Under Cr. Code, § 194, providing that, if the judge is satisfied that an impartial jury cannot be obtained in the county where the prosecution is pending, he may summon jurors from an adjoining county in which he shall believe there is the greatest probability of obtaining an impartial jury, the fact that former juries in the case had been summoned from a certain county did not establish the fact that an impartial jury could not have been gotten from that county, or that the judge did not believe that there was the greatest probability of obtaining an impartial jury from that county.—Massie v. Commonwealth, 36 S. W. 550.

[e] (N. J. 1809) Where it appeared that an impartial jury could not be had in the county where the action was brought, on account of the great influence of the parties, a foreign jury was granted.—Bell v. Van Riper, 3 N. J. Law (2 Penning.) 510.

[f] (Va. 1853) The regular term of the court having nearly expired, and only one of the jurymen summoned to try a prisoner being found free from objection, such juror was discharged by the court, which, being of opinion that jurors qualified to serve could not be gotten in the county, made an order directing the sheriff to summon 30 persons from each of two counties, to attend as jurors for the trial of the prisoner at a special term of the court appointed to be held, and to which time the court adjourned. *Held*, that it was not necessary to issue another venire for summoning jurors from the county, returnable to the special term, before making the order to summon jurors from abroad, and that it was not error to direct jurors to be summoned from two counties at the same time.—Wormeley v. Commonwealth, 10 Grat. 658.

[g] (Va.) A corporation court has authority to direct jurors to be summoned from without the limits of the corporation for the trial of a prisoner indicted in that court, when an impartial jury cannot be obtained within the corporation.—(1871) Chahoon v. Commonwealth, 21 Grat. 822; (1872) Sands v. Same, Id. 871; (1873) Craft v. Commonwealth, 24 Grat. 602.

[h] (Va.) Under a statute requiring a jury to be made up of persons residing remote from the scene of the crime, a jury summoned from the body of the county anywhere outside the limits of the municipality wherein the crime was committed is properly constituted.—(1873) Craft v. Commonwealth, 24 Grat. 602; (1886) Lawrence v. Commonwealth, 81 Va. 484.

[i] (Va. 1887) On a criminal trial it is not error for the court to refuse to cause a venire to be summoned from another county, because of prejudice against the accused, until an effort has been made to obtain a jury, free from exception, from the venire already summoned.—Puryear v. Commonwealth, 83 Va. 51, 1 S. E. 512.

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§ 13. Mixed jury or jury de medietate linguæ.

Absence or presence of negroes on jury, see post, § 226 [b, d, k–m].

Demand for jury, see post, § 158 [e].

[a] (U. S. 1824) A foreigner in Virginia is entitled to a jury de medietate linguæ.—United States v. Carnot, Fed. Cas. No. 14,726 [2 Cranch, C. C. 469].

[b] (U. S. 1835) A foreigner is not entitled to a jury de medietate, in Washington county, D. C.—United States v. McMahon, Fed. Cas. No. 15,699 [4 Cranch, C. C. 573].

[c] (Cal. 1877) The jury de medietate linguæ is not known to the laws of California.—People v. Chin Mook Sow, 51 Cal. 597.

[d] (La. 1850) If the right of trial by a jury de medietate linguæ ever existed in Louisiana, it was abolished by the statutes prescribing the qualifications of jurors and the manner in which juries should be composed.—State v. Fuentes, 5 La. Ann. 427.

[e] (N. C. 1825) An alien is not entitled to a jury de medietate.—State v. Antonio, 11 N. C. 200.

[f] (Pa. 1783) The statute of 28 Edw. III. c. 13, granting trials per medietatem linguæ to foreigners, is in force in Pennsylvania.—Respublica v. Mesca, 1 Dall. 73, 1 L. Ed. 42.

[g] (Pa. 1783) Evidence that a foreigner accused of crime was allowed to have foreigners on the jury that tried him is sufficient to show an adoption of the statute of 23 Edw. III. c. 13, by which a foreigner indicted for a criminal offense is entitled to a jury de medietate linguæ.—Respublica v. Mesca, 1 Dall. 73, 1 L. Ed. 42.

[h] (Va. 1841) The statute (1 Rev. Code, c. 75, § 13) that "juries de medietate linguæ may be directed by the courts respectively" is not imperative that they shall direct such a jury in cases, even of a criminal nature, in which aliens are parties, but confers a discretionary power on the courts to direct such jury, if to them it appear proper.—Richards v. Commonwealth, 11 Leigh, 690; Brown v. Same, Id. 711.

II. RIGHT TO TRIAL BY JURY.

(A) IN GENERAL, §§ 14-26.
(B) CIVIL ACTIONS AND PROCEEDINGS, §§ 27-133.
(C) CRIMINAL PROSECUTIONS AND PROCEEDINGS, §§ 134-153.
(D) ENFORCEMENT OF RIGHT, §§ 154-175.
(E) LOSS AND WAIVER OF RIGHT, §§ 176-203.
(F) DENIAL OR INFRINGEMENT OF RIGHT, §§ 204-242.

Denial or infringement of right, see post, §§ 204–242.

Foreign jury, see ante, § 12.

Mixed jury, see ante, § 13.

Special or struck jury, see ante, §§ 9–11.

Constitutional guaranty against abridgment of privileges of citizens as applied to trial by jury, see "Constitutional Law," vol. 10, c. 2066, § 646 [b].

—— *against deprivation of property as applied to statutes affecting right to trial by jury, see* "Constitutional Law," vol. 10, cc. 2341, 2342, § 933.

Necessity of jury on entry of judgment after ruling on demurrer, see "Pleading," V.

—— *by default, see* "Judgment," vol. 30, cc. 311–318, § 224.

Persons triable by courts-martial for offenses against militia and draft laws, see "War."

Review as dependent on aspect of record on appeal in criminal prosecutions, see "Criminal Law," vol. 15, cc. 673–676, § 2927 [c].

—— *of discretion of court, see* "Appeal and Error," vol. 3, cc. 1664–1667, § 3843.

Statutory provisions for appeal to jury after trial before justice of the peace, see "Justices of the Peace," vol. 31, cc. 1344, 1345, § 372.

Trial by court without jury, see "Trial," X.

(A) IN GENERAL.

NATURE AND SCOPE IN GENERAL, § 14.
STATUTORY PROVISIONS, § 15.
APPLICATION OF CONSTITUTIONAL PROVISIONS IN GENERAL, § 16.
PERSONS ENTITLED, § 17.
RIGHT TO SEPARATE JURY TRIALS, § 18.
COURTS IN WHICH TRIAL BY JURY IS REQUIRED—IN GENERAL, § 19.
—— PROBATE COURTS, § 20.
—— FEDERAL COURTS OR TRIBUNALS, § 21.
—— COURTS-MARTIAL, § 22.
—— APPLICATION OF PROVISIONS OF FEDERAL CONSTITUTION TO STATE COURTS, § 23.
—— JURISDICTION OF INFERIOR COURTS OF CASES IN WHICH TRIAL BY JURY IS GUARANTIED, § 24.
AMOUNT OR VALUE IN CONTROVERSY, § 25.
ACTIONS BY OR AGAINST THE UNITED STATES, § 26.

§ 14. Nature and scope in general.

[a] (U. S. 1882) In a proceeding at common law a citizen of the United States cannot be devested of his property except by verdict of a jury, in a proceeding in which he is in some manner a party, having opportunity to be heard, and having a day in court.—The J. W. French (D. C.) 13 Fed. 916.

[b] (Miss. 1826) The wager of law has been abolished by the constitutional provisions securing the right of trial by jury in all cases.—Jennings v. Gibson, 1 Miss. (Walk.) 234.

[c] (Mo. 1888) Whether under Rev. St. art. 6, c. 21, § 896, provision is only made for a jury trial when a new appraisement is ordered, is immaterial, as the constitutional right to a jury trial is not lost by the lack of legislation prescribing the mode of its exercise.—Kansas City, C. & S. R. Co. v. Story, 96 Mo. 611, 10 S. W. 203.

[d] (N. Y. 1856) Where a will is admitted to probate upon the verdict of a jury, a party to the proceedings is not entitled to a jury trial, in an action subsequently brought against him, to enforce the provisions of the will. Such a trial would be substantially a second trial of an issue, which was never a matter of right.—Nichols v. Romaine, 3 Abb. Prac. 122.

§ 15. Statutory provisions.

[a] (Iowa) The rights of the parties with respect to trial by jury are determined by the law in force at the time of the commencement of the action, and are not affected by a subsequent change of statute.—(1875) Wadsworth v. Wadsworth, 40 Iowa, 448; (1877) Wormley v. Hamburg, 46 Iowa, 144.

[b] (N. C. 1874) Acts 1866–67, c. 59, § 2, providing for the submission of issues arising in

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the administration of the ward's estate to a jury, was repealed by Revisory Acts 1868–69, c. 201.—State v. Brown, 70 N. C. 27; Keener v. Finger, Id. 35.

§ 16. Application of constitutional provisions in general.

Application of federal constitution to state courts, see post, § 23.

Civil cases in general, see post, § 27½.

Criminal prosecutions in general, see post, § 134.

Misdemeanors and minor offenses, see post, § 145.

Violation of municipal ordinances, see post, § 152.

[a] A constitutional requirement, that the right of trial by jury shall remain inviolate, does not confer the right where it did not exist before the adoption of the constitution.
—(Ala. 1855) Tims v. State, 26 Ala. 165;
(Fla. 1884) Blanchard v. Raines' Ex'x, 20 Fla. 467;
(Ill. 1852) Ross v. Irving, 14 Ill. (4 Peck) 171;
(Ind. 1877) Allen v. Anderson, 57 Ind. 388; (1878) Reynolds v. State, 61 Ind. 392;
(Miss. 1858) Isom v. Mississippi Cent. R. Co., 36 Miss. 300;
(Nev. 1876) State v. McClear, 11 Nev. 39;
(N. Y. 1847) People v. Phillips, 1 Edm. Sel. Cas. 386;
(Or. 1895) Raymond v. Flavel, 27 Or. 219, 40 Pac. 158;
(Tenn. 1869) Trigally v. City of Memphis, 46 Tenn. (6 Cold.) 382.

[b] (Ga. 1848) The provision in the constitution that "trial by jury, as heretofore used, shall remain inviolate," means that it shall not be taken away in cases where it existed when the constitution was adopted, in 1798, and not that there must be a jury in all cases.—Flint River Steamboat Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248.

[c] (Ind. 1857) The legislature may prescribe the trial by jury in cases where the constitution does not give it as a right; but they cannot withhold it in cases where it is so given.—Lake Erie, W. & St. L. R. Co. v. Heath, 9 Ind. 558.

[d] (Minn. 1860) Const. art. 1, § 4, adopts without change the right of trial by jury as it existed in the territory of Minnesota at the time of the adoption of the state constitution, and it relates only to civil matters.—Whallon v. Bancroft, 4 Minn. 109 (Gil. 70).

[e] (N. Y. 1855) The phrase "the trial by jury," as used in Const. art. 1, § 2, refers as well to all other incidents of the trial as to the number of men necessary to constitute the jury.—People v. Fisher, 20 Barb. 652, 11 How. Prac. 554, 2 Parker, Cr. R. 402.

[f] (N. Y. 1865) The constitution of 1846 does not limit or restrict the authority of the legislature to legislate in respect to the right of trial by jury, except only as to the particular right guarantied.—Walter v. People, 32 N. Y. 147.

[g] (Pa. 1862) The constitutional provision relative to trial by jury was intended to preserve that right as it existed at the formation of our state government, and not to increase or extend it, and must be construed with reference to the statutes that were in force in England and in the province of Pennsylvania at the adoption of the first constitution of the state.—Byers v. Commonwealth, 42 Pa. (6 Wright) 89.

§ 17. Persons entitled.

Condemnation proceedings, see post, §§ 116–119.

Denial of jury trial to county on account of pecuniary interest of inhabitants, see post, § 228 [i].

Proceedings under fugitive slave laws, see post, § 131.

Right of state in criminal prosecutions, see post, § 154 [a].

—— *to challenge for cause, see* post, §§ 551–555.

—— *to peremptory challenges, see* post, §§ 599–606.

[a] (Iowa, 1885) Since Code 1873, par. 2793, providing that a trial may proceed with 10 or 11 jurors when the jury has been reduced by sickness to that number, is unconstitutional, such objection may be raised by a municipal corporation, in a suit to which it is a party, as well as by a natural person.—Kelsh v. Town of Dyersville, 68 Iowa, 137, 26 N. W. 38.

[b] (Ky.) The right of trial by jury did not belong to public debtors before the adoption of the constitution, nor is it extended to them by that instrument.—(1802) Caldwell v. Commonwealth, 2 Ky. (Ky. Dec.) 129; (1828) Harris v. Wood, 22 Ky. (6 T. B. Mon.) 641.

[c] (La. 1825) Under a statute providing that the plaintiff or defendant in an action shall be entitled to a jury on demand, an intervening party, while technically speaking neither a defendant nor a plaintiff, is entitled to a trial by jury on any issue which is properly triable by jury.—Lacroix v. Menard, 3 Mart. (N. S.) 339, 15 Am. Dec. 161.

[d] (La. 1844) Slaves charged with capital offenses are entitled to be tried by an impartial jury.—State v. George, 8 Rob. 535.

[e] (La. 1849) Article 107, Const. 1845, which guaranties a speedy public trial by an impartial jury of the vicinage, does not apply to slaves.—State v. Dick, 4 La. Ann. 182.

[f] (Md. 1883) Parties are not entitled as of right to have an issue of fact in equity tried by a jury; and there is no exception in favor of an heir at law.—Chase v. Winans, 59 Md. 475.

[g] (Miss. 1844) A statute confiding the trial of slaves for larceny, etc., to justices of the peace, in order to fix the liability of the master for the value of the property stolen, is constitutional.—Dowell v. Boyd, 11 Miss. (3 Smedes & M.) 592.

[h] (N. H. 1882) Trial by jury is not secured to a town by the constitution, and a cause to which it is a party may be submitted to referees without its consent.—Wooster v. Town of Plymouth, 62 N. H. 193; Kimball v. Bridgewater, Id. 694; Sargent v. Littleton, Id.

[i] (Pa. 1865) An heir at law of a deceased mortgagor who denies the validity of a mortgage is not entitled to an issue to try disputed facts, under the act of April 20, 1846 (Purd. Dig. p. 446), giving the right to such an issue to "persons interested," since the statute applies to lien creditors only.—Appeal of Housekeeper, 49 Pa. (13 Wright) 141.

[j] (Pa. 1866) A municipal corporation has no constitutional right to a trial by jury.—Appeal of Borough of Dunmore, 52 Pa. (2 P. F. Smith) 374.

[k] (R. I. 1895) The legislature has power to give the state a right to jury trial in proceedings to condemn land for state purposes.—In re Condemnation of Certain Land for New State House, 19 R. I. 326, 33 Atl. 448.

[l] (R. I. 1895) Since the statutes relating to condemnation of land in force prior to the

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adoption of Const. art. 1, § 15, providing that "the right of jury trial shall remain inviolate," did not uniformly give both parties the right to a jury trial, but in many cases gave it to the landowners only, the state cannot claim a jury trial, as a constitutional right in proceedings under Pub. Laws, c. 1201, to condemn land for a state house.—In re Condemnation of Certain Land for New State House, 19 R. I. 326, 33 Atl. 448.

§ 18. Right to separate jury trials.

[a] (Md. 1891) Act 1878, c. 143 (Code Pub. Loc. Laws, art. 4, § 806), gives the city of Baltimore full power to provide for opening or widening any street, and for granting appeals to the city court from the decision of the commissioners as to damages caused or benefits accruing to property owners, and for securing "to every such owner * * * the right * * * to have decided by a jury trial whether any damage has been caused or any benefit has accrued to them." *Held*, that this secures to each owner the right to a separate jury trial if he should demand it, and it is error to consolidate the appeals of several owners over their objection.—Friedenwald v. City of Baltimore, 74 Md. 116, 21 Atl. 555.

[b] (Mass. 1852) Where several stockholders in a corporation are summoned to answer in a suit against the corporation, pursuant to St. 1851, c 315, § 1, requiring such service in order that execution may issue against them on a judgment against the corporation, and severally deny their liability, they are not entitled to a separate trial by different juries.—Holyoke Bank v. Goodman Paper Mfg. Co., 63 Mass. (9 Cush.) 576.

§ 19. Courts in which trial by jury is required—In general.

Effect of denial in one court where allowed in another, see post, § 236 [f].

Splitting cause of action to bring within jurisdiction of inferior court, see post, § 206 [m].

[a] (U. S. 1826) Act New York March 24, 1897, entitled "An act to settle disputes concerning the titles to lands in the county of Onondaga," which provides for the appointment of commissioners to determine disputes, does not constitute such commissioners a court, within the meaning of the constitution, inasmuch as their award is in no way binding upon the parties; and therefore said act is not unconstitutional in that it does not require such commissioners to proceed according to the course of the common law or by a jury trial.—Barker v. Jackson, Fed. Cas. No. 989 [1 Paine, 559].

[b] (Ala. 1883) The provision of the general law creating the county court and clothing it with jurisdiction of misdemeanors that, if a trial by jury is not demanded, "the judge shall determine both the law and the facts, without the intervention of a jury, etc.," (Code, § 4718) applies to the jurisdiction of the county court of Wilcox as enlarged by the special statute of Feb. 23, 1881 (Pamph. Acts 1880, p. 265).—Bell v. State, 75 Ala. 25.

[c] (Ga. 1877) The provisions of Const. 1868, as to rendering judgment without a jury trial where there is no issuable defense on oath, apply to cases transferred by the operation of said constitution to the superior court, in consequence of the abolition of the county court.—Redd v. Davis, 59 Ga. 823.

[d] (Mass. 1872) St. 1871, c. 391, provides that the First district court of Southern Worcester shall have the same jurisdiction as the existing police courts, except the municipal courts of Boston and Worcester, and shall have original concurrent jurisdiction with the superior court in the county of Worcester in all personal actions in which the debt or damages demanded, or property replevied, does not exceed $300, in which jury trials may be had. Gen. St. c. 150, §§ 9, 18, gives jurisdiction to justices of the peace and police courts, where the amount involved does not exceed $100, and provides for jury trials therein as in other civil cases. *Held*, that such First district court has authority to impanel a jury of 12 men, to try the issues in a petition, under Gen. St. c. 150, to enforce a mechanic's lien; the amount involved not exceeding $100.—Ward v. Edmunds, 110 Mass. 340.

[e] (N. Y. 1810) The laws as to trial by jury in other courts apply to trials in justices' courts.—Blackley v. Sheldon, 7 Johns. 32.

[f] (N. Y. 1878) The organization of the court of special sessions in the city of New York, where defendant in a criminal prosecution is tried without a jury, if he elects that court, is constitutional.—People v. Justices of Court of Special Sessions, 74 N. Y. 406.

[g] (N. Y. 1894) One tried before a police justice of Newtown for Sabbath breaking is entitled to a jury, as provided by the Code of Criminal Procedure, in case of proceedings in courts of special sessions (Laws, 1873, c. 159, § 2), which allows him to try all criminal cases that may be tried by a justice of the peace, provided that he shall do this only "as a court of special sessions."—Erbe v. Monteverde, 18 Misc. Rep. 404, 35 N. Y. Supp. 102.

[h] (N. C. 1855) The act of the legislature, giving power to a county court to abolish the trial by jury in such court, is not unconstitutional.—Thompson v. Floyd, 47 N. C. 313.

[i] (N. C. 1860) The acts of 1844 and 1846, abolishing trials by jury in the county court of Rutherford, etc., embrace an action of assumpsit, begun by attachment, as well as one commenced by a common writ ad respondendum.—Harriss v. Hampton, 52 N. C. 597.

[j] (S. C. 1848) The constitution, in preserving the trial by jury, "as heretofore used," does not interfere with those tribunals which, at the time of its adoption, proceeded to judgment without the intervention of a jury.—Commissioners v. Seabrook, 2 Strob. 563.

[k] (S. C. 1886) Where a town charter invests the intendant with the power and jurisdiction of trial justices generally, in prosecutions for the violation of town ordinances, one so prosecuted is entitled to a trial by jury and to an appeal.—Beaufort v. Ohlandt, 24 S. C. 158.

[l] (S. C. 1895) Under 16 St. at Large, p. 467, § 2, conferring on the recorder of the city of Charleston all the authority of a trial justice in criminal matters, and Code Cr. Proc. § 20, providing that every person charged with an offense before a trial justice shall be entitled, on demand, to a trial by jury, a person charged before the recorder of Charleston with violation of an ordinance is entitled, on demand, to a jury trial.—State v. Larkins, 44 S. C. 362, 22 S. E. 409.

[m] (Tenn. 1831) Acts 1829, c. 95, creating a special court for the determination of suits commenced by the bank of the state of Tennessee against her officers and other defaulters to said institution, and authorizing such court to determine the causes according to the principles of a court of equity, is unconstitutional, as violating the right of trial by jury.—State Bank v. Cooper, 10 Tenn. (2 Yerg.) 599, 24 Am. Dec. 517.

§ 20. —— Probate courts.

On appeal in probate matters, see post, § 97.

[a] (Ala. 1847) The orphans' court has no authority to impanel a jury to ascertain a disputed fact, save only where there is a con-

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test about a will, and one or two other special cases, unless there is a doubt in relation to the controverted fact which requires a cross-examination to elicit the truth; and, in a case not coming within the exception, the necessity of a jury must appear on the record, by setting out the testimony, so as to enable an appellate court to revise the order directing a jury to be impaneled.—Reynolds' Adm'rs v. Reynolds' Distributees, 11 Ala. 1023.

[b] (Ill. 1887) Under the drainage act of 1885, an appeal from the decision of the commissioners could be taken to any term of the county court. The county court had a probate term. A jury trial was held to be a matter of right to the appellant. *Held* that, in cases cognizable at the probate term, the court had power to impanel a jury.—Mascall v. Drainage Com'rs, 122 Ill. 620, 14 N. E. 47.

[c] (Ind. 1860) Under Rev. St. 1843, p. 666, parties in the probate court can claim a trial by jury as a matter of right, and the court is bound by the verdict, which can only be set aside as any other verdict may be.—Clem v. Durham, 14 Ind. 263.

[d] (Mo. 1891) Rev. St. 1889, § 2131, providing for the trial of certain issues of fact by jury "in an action for the recovery of money only, or of specific real or personal property," does not apply to proceedings in the probate court; and in that court there can be no trial by jury in the absence of statutory provision therefor.—Bradley v. Woerner, 46 Mo. App. 371.

§ 21. —— Federal courts or tribunals.

Crimes committed within jurisdiction of the United States, see post, § 137.
Effect of provision for jury trial on appeal, see post, § 241 [a, b].
Nonsuit as infringing right to trial by jury, see post, § 235 [a, b].
Number of jurors, see ante, § 6.
Reference of cause as infringing right to trial by jury, see post, § 215 [a].
Removal from state to federal court as converting legal into equitable action, see post, § 65.
Adoption of practice of state courts, see "Courts," vol. 13, cc. 2705, 2706, § 930.

[a] (U. S. 1880) The provision of the act of March 3, 1863 (Rev. St. §§ 1059–1061), authorizing the court of claims, without the intervention of a jury, to hear and determine claims against the government, and also any set-off, counterclaim, claim for damages, or other demand on the part of the government against the claimant, does not violate the seventh amendment of the constitution.—McElrath v. United States, 102 U. S. 426, 26 L. Ed. 189.

[b] (U. S. 1888) Const. art. 3, § 2, providing that "the trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state the trial shall be at such place or places as the congress may by law have directed;" and the sixth amendment, declaring that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district," etc.,—extend the guaranty of jury trial to the District of Columbia equally with the states.—Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223.

[c] (U. S. 1890) The constitution of the United States, securing to citizens the right of trial by jury, and requiring an indictment by a grand jury, does not give a citizen or a temporary subject the right to claim the guaranty when tried before a consul or tribunal, in accordance with a treaty for offenses committed in a foreign country. Affirming (1890) 44 Fed. 185.—Ross v. McIntyre, 140 U. S. 453, 35 L. Ed. 581, 11 Sup. Ct. 897.

[d] (D. C. 1884) Act Cong. 1870, vesting in the judge of the police court the power to convict persons charged with offenses against the criminal laws of the United States, without a trial by jury, will not now be held to be in conflict with Const. art. 3, § 2, providing that "the trial of all crimes, except in cases of impeachment, shall be by jury," as this jurisdiction of the police court has been acquiesced in for nearly 14 years; but, if the police court were just entering upon its existence, we should feel bound to consider the question, and would do so, perhaps, with some prepossession against the jurisdiction.—In re Fry, 3 Mackey, 135.

[e] (D. C. 1888) Act Cong. March 3, 1865, § 4, providing that "issues of fact in civil cases in any circuit court of the United States" may be tried by the court without a jury when the parties or their attorneys stipulate to that effect, does not apply to the supreme court of the District of Columbia.—Cunkle v. Heald, 6 Mackey, 485.

[f] (Okl. 1893) Const. U. S. Amend. 7, providing that in suits at common law involving more than $20 the right of trial by jury shall be preserved, applies to territorial courts.—Bradford v. Territory, 1 Okl. 366, 34 Pac. 66.

§ 22. —— Courts-martial.

[a] (Me. 1841) The power given to courts-martial to punish by fine is not within the provision of the constitution of the United States, securing a trial by jury.—Rawson v. Brown, 18 Me. (6 Shep.) 216.

§ 23. —— Application of provisions of federal constitution to state courts.

State law infringing federal constitution, see post, § 206 [f].
Where affected by amount in controversy, see post, § 25 [b, g].

[a] The seventh amendment to the United States constitution, giving the right to a trial by jury in all suits at common law where the amount in controversy shall exceed $20, relates only to proceedings in the United States courts.
—(U. S. 1877) Pearson v. Yewdall, 95 U. S. 294, 24 L. Ed. 436;
(Colo. 1880) Huston v. Wadsworth, 5 Colo. 213;
(Conn. 1837) Colt v. Eves, 12 Conn. 243;
(Ga. 1876) Foster v. Jackson, 57 Ga. 206;
(La. 1873) State ex rel. Morgan v. Kennard, 25 La. Ann. 238; (1873) Woodruff v. Lobdell, Id. 658;
(N. Y. 1831) Livingston v. City of New York, 8 Wend. 85, 22 Am. Dec. 622; (1891) In re Newcomb (Sup.) 18 N. Y. Supp. 16;
(R. I. 1895) In re Condemnation of Certain Land for New State House, 19 R. I. 326, 33 Atl. 448;
(Vt. 1893) Hall v. Armstrong, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366.

[b] The constitution of the United States does not forbid the states from restricting the use of trial by jury in the state courts.
—(U. S. 1875) Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678;
(Ala. 1850) Boring v. Williams, 17 Ala. 510;
(La. 1818) Maurin v. Martinez, 5 Mart. (O. S.) 432.

[c] (U. S. 1885) The fourth, fifth, sixth, and seventh amendments to the federal constitution,

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guarantying the right to a trial by jury, do not place any restrictions on the powers of the states. They refer only to questions arising in the federal courts.—Kansas v. Bradley (C. C.) 26 Fed. 289.

[d] (U. S. 1892) The provision of the federal constitution that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by a jury of the state and district wherein the crime shall have been committed," etc., qualifies the judicial powers granted to the United States, and has no application to the powers exercised by the states.—In re King (C. C.) 51 Fed. 434.

[e] (La. 1811) That part of the federal constitution which requires a trial by jury relates only to crimes against the United States.—Territory v. Hattick, 2 Mart. (O. S.) 88.

[f] (La. 1874) The provisions of the federal constitution relating to trials by jury apply only to the federal courts.—State v. Carro, 26 La. Ann. 377.

[g] (N. M. 1893) Const. Amend. U. S. art. 7, which provides that the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, applies only to powers exercised by the government of the United States, and not to those of states and territories.—Walker v. New Mexico & S. P. R. Co., 34 Pac. 43.

[h] (N. Y. 1824) 2 Rev. Laws, pp. 507, 508, creating a special session of justices for the trial of petit larceny without a jury, is not repugnant to U. S. Const. art. 3, § 2, providing that all trials for crime shall be by jury, as such provision only applies to federal courts.—Murphy v. People, 2 Cow. 815; Jackson v. Wood, 2 Cow. 819.

[i] (N. Y. 1824) Const. U. S. Amend. 6, giving to the accused the right of trial by jury in all criminal prosecutions, does not apply to the individual states, but restricts the power to the general government only.—Jackson v. Wood, 2 Cow. 819, note.

[j] (W. Va. 1892) Const. U. S. art. 3, § 3, declaring that the trial of crimes shall be held in the state where they shall have been committed, and Const. Amend. 6, declaring that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, apply only to offenses against the United States, and proceedings in its courts, and not to an offense against a state and a prosecution therefor in the state courts.—Ex parte McNeely, 36 W. Va. 84, 14 S. E. 436, 32 Am. St. Rep. 831, 15 L. R. A. 226.

§ 24. —— Jurisdiction of inferior courts of cases in which trial by jury is guaranteed.

Effect of provision for jury trial on appeal, see post, § 238.

Right to jury trial on appeal from justice of the peace, see post, § 96.

Jurisdiction of justices of the peace in actions where party has right to trial by jury, see "Justices of the Peace," vol. 31, c. 1050, § 176 [e].

[a] (Ala. 1870) An act of the legislature extending the jurisdiction of an inferior court to cases in which the parties litigant are entitled, at common law, to a trial before a jury, is unconstitutional, if it does not provide for a jury trial, and there is no provision in the general law by which a jury trial may be had in such court.—Thomas v. Bibb, 44 Ala. 721.

[b] (Ky. 1801) That part of the statute of 1792, prohibiting dealing with slaves without their owners' consent, which provides that the owner may recover four times the value of the commodity transferred, by the judgment of a justice of the peace, if it be under five pounds, is unconstitutional, as it deprives the party of a trial by jury.—Enderman v. Ashby, 2 Ky. (Ky. Dec.) 53.

[c] (N. Y. 1868) The act of 1861 (Laws 1861, c. 158), extending the jurisdiction of justices in actions on contract, *held* not to be in violation of the provisions of the state constitution respecting the right of trial by jury, because the right of trial by jury remained unimpaired.—Dawson v. Horan, 51 Barb. 459.

[d] (Ohio, 1858) The act of May 1, 1854, "to extend the jurisdiction of justices of the peace in civil cases," is not unconstitutional for the reason that it does not provide for a trial by jury.—Norton v. McLeary, 8 Ohio St. 205.

[e] (S. C. 1805) The act of assembly of 1801, extending the jurisdiction of justices of the peace to $30, was unconstitutional, under Const. 1790, art. 9, § 6, providing that trial by jury as heretofore used in the state shall remain inviolate.—White v. Kendrick, 1 Brev. 469.

§ 25. Amount or value in controversy.

Effect of provision for jury trial on appeal, see post, § 238 [b, c, e].

In proceedings to enforce municipal regulations, see post, § 107 [a].

Necessity of demand for jury, see post, § 155 [f].

Number of jurors as infringing right, see post, § 222 [o].

Restrictions on right of appeal, see post, § 212 [b, c, e, h, j].

Splitting cause of action as denial of right, see post, § 206 [m].

[a] (U. S. 1831) If a jury is required, and denied by the justice, when the sum exceeds ten dollars, it is an error for which his judgment should be set aside, under Geyer, Dig. Ark. p. 387, § 12, giving a right to a jury trial if the sum demanded exceeds $10.—Miles v. James, Fed. Cas. No. 9,543a [Hemp. 98].

[b] (U. S. 1849) The seventh amendment to the federal constitution, which provides that in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, etc., is a provision exclusively for cases at common law.—Motte v. Bennett, Fed. Cas. No. 9,884 [2 Fish. Pat. Cas. 642].

[c] (Ala. 1830) Where a demand is under $20 when the warrant issues, but is increased to more than that sum by interest during the pendency of the appeal, the issue is properly tried by a jury.—McGrew v. Adams, 2 Stew. 502.

[d] (Ala. 1850) Where, on the trial of an appeal from a justice's to the circuit court, the sum in controversy is less than $20, a jury is not necessary; but, if the cause of action be an open account, the court cannot render judgment final until the demand has been established by proof.—Witherington v. Brantley, 18 Ala. 197.

[e] (Ala. 1885) Where the sum claimed on appeal from a justice of the peace exceeds $20, an issue must be made up, under the direction of the court, and tried by a jury.—Lehman v. Hudmon, 79 Ala. 532.

[f] (Mass. 1857) Whether "the damages demanded exceeded $20," and thus entitle either party to demand a trial by jury before a justice of the peace, under St. 1852, c. 314, is to be de-

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termined by the ad damnum in the writ.—Trees v. Rushworth, 75 Mass. (9 Gray) 47.

[g] (Minn. 1860) Article 7 of the amendments to the constitution of the United States proposed in 1789, does not prevent a state legislature from extending the right of jury trial to cases at law involving less than $20.—Whallon v. Bancroft, 4 Minn. 109 (Gil. 70).

[h] (N. J. 1893) In an action under the supplement to the district court act of March 27, 1882, to recover a claim over $200, defendant may demand a trial by jury, since Const. art. 1, par. 7, declares that the right of trial by jury shall remain inviolate.—Raphael v. Lane, 56 N. J. Law (27 Vroom) 108, 28 Atl. 421.

[i] (S. C. 1857) The recorder of the city of Charleston has jurisdiction of an action to recover a penalty not exceeding $20, for the violation of an ordinance of the city council, without the aid of a jury, even if the defendant should demand one.—City of Charleston v. Stelges, 10 Rich. Law, 438.

§ 26. Actions by or against the United States.

Impairment of right, see post, § 206 [a].

[a] (U. S. 1890) In an action against a collector to recover duties paid under protest, the importer has no constitutional right to trial by jury as to the value of the goods, since the government has authority to prescribe the terms upon which it may be sued, through its collector, to recover duties paid.—Auffmordt v. Hedden, 137 U. S. 310, 11 Sup. Ct. 103, 34 L. Ed. 674, affirming (C. C. 1886) 30 Fed. 360.

[b] (U. S. 1876) The seventh amendment to the constitution of the United States, securing trial by jury, does not extend to suits against the government. They are not suits at common law.—McElrath v. United States, 12 Ct. Cl. 312.

(B) CIVIL ACTIONS AND PROCEEDINGS.

1. NATURE OF CAUSE OF ACTION OR ISSUE IN GENERAL, §§ 27-34.
2. LEGAL OR EQUITABLE ACTIONS OR ISSUES, §§ 35-83.
3. PARTICULAR PROCEEDINGS IN CIVIL ACTIONS, §§ 84-94.
4. TRIAL ON APPEAL OR OTHER PROCEEDINGS FOR REVIEW, §§ 95-98.
5. PARTICULAR FORMS OR KINDS OF CIVIL ACTIONS, §§ 99-103.
6. CIVIL PROCEEDINGS OTHER THAN ACTIONS, §§ 104-132.

1. NATURE OF CAUSE OF ACTION OR ISSUE IN GENERAL.

IN GENERAL, § 27.
APPLICATION OF CONSTITUTIONAL PROVISIONS IN GENERAL, § 27½.
STATUTORY PROVISIONS, § 28.
ISSUES OF FACT OR LAW IN GENERAL, § 29.
—— CONTRACTS LIQUIDATING DEBT OR DAMAGES, § 30.
DEFENSES IN GENERAL, § 31.
PLEA OF NUL TIEL RECORD, § 32.
PLEA OF PAYMENT, § 33.
SET-OFF OR COUNTERCLAIM, § 34.

§ 27. In general.

[a] (Ga. 1848) The right of trial by jury, though essential in criminal cases, is not so much so in civil cases.—Flint River Steamboat Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248.

[b] (La. 1843) In an action of settlement between partners, either may submit all matters in controversy to a jury.—Gridley v. Conner, 4 Rob. 445.

[c] (La. 1847) A bank obtained a judgment on two mortgages, subscribed by defendant D. and indorsed by two other defendants. The mortgaged land was sold to satisfy the judgment, and a third person claimed the price in the hands of the sheriff, by the way of a third opposition, on the ground that he had a superior mortgage on the property. To this defendant excepted, and plaintiff filed a general denial and prayed for a trial by jury. *Held*, that he was entitled to a jury.—Bank of Louisiana v. Delery, 2 La. Ann. 648.

[d] (La. 1855) Several creditors having seized property, the plaintiff, claiming a superior right on the proceeds to all but the first, sued the rest with the debtor, alleging that their judgments were fraudulent. By an ex parte order the sheriff was directed to hold the surplus of the sale, after satisfying the first seizure. Defendants answered to the merits, agreeing that until a decision no execution should issue on the 12 months' bond for the surplus of the sale. *Held*, that defendants were entitled to a jury trial.—Stewart v. Scudder, 10 La. Ann. 216.

[e] (La. 1857) In a suit for damages, where one of the defendants is charged with aiding and abetting the other in the commission of a wrong or injury, he has a right to demand trial by jury.—Fonda v. Broom, 12 La. Ann. 768.

[f] (Vt. 1848) The statute (Rev. St. c. 26, § 33) which secures to either party the right of a trial by jury, if demanded, refers to that trial of the issue which precedes the judgment.—Brown v. Irwin, 21 Vt. 68.

§ 27½. Application of constitutional provisions in general.

[a] A constitutional provision "that the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy," simply adopts the law as it existed at the time of the adoption of the constitution, and does not operate to extend the right of trial by jury to cases where it did not before exist.
—(Minn. 1860) Whallon v. Bancroft, 4 Minn. 109 (Gil. 70);
(Wis. 1863) Mead v. Walker, 17 Wis. 189.

[b] (U. S. 1830) The seventh amendment of the constitution of the United States, which declares that "in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved," may, in a just sense, be construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever peculiar form they may assume to settle legal rights.—Parsons v. Bedford, 28 U. S. (3 Pet.) 433, 7 L. Ed. 732.

[c] (Ga. 1876) The provision in the constitution of 1868, giving the judge power to render judgment without the intervention of a jury, where no issuable defense is filed on oath, is not retroactive; hence, where an appeal was entered prior to the adoption of the constitution, the court should not render judgment against a principal and surety without submitting the case to the jury.—Walker v. Bivins, 57 Ga. 322; Birdsong v. Woodward, Id. 354.

[d] (Ill. 1870) Constitutional provisions which declare that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law," and that "no freeman shall be deprived of his property but by the judgment of his peers," entitle a party to a jury in all cases in which it was authorized at the time of the

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adoption of the organic law.—Whitehurst v. Coleen, 53 Ill. 247.

[e] (Ind. 1857) Not every case which is not a criminal case is a civil one, wherein, by the constitution, "the right of trial by jury shall remain inviolate;" but that term embraces such as were treated as civil cases in this state when the constitution was adopted.—Lake Erie, W. & St. L. R. Co. v. Heath, 9 Ind. 558.

[f] (La. 1842) The trial by jury, guarantied in criminal cases by the constitution, rests in civil cases with the legislature alone; but its importance, as a legal right and political institution, the court will not undervalue nor overlook.—Dabbs v. Hemken, 3 Rob. 123.

[g] (La. 1873) The fourteenth amendment of the constitution of the United States does not make any change on the subject of jury trials in civil suits.—State ex rel. Morgan v. Kennard, 25 La. Ann. 238; Woodruff v. Lobdell, Id. 658.

[h] (La. 1875) The legislature is not under constitutional obligation to accord trial by jury in all civil causes.—Sauvinet v. Walker, 27 La. Ann. 14.

[i] (Vt. 1860) Any law which destroys or materially impairs the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury, is contrary to article 12 of the bill of rights, section 31 of the constitution.—Plimpton v. Somerset, 33 Vt. 283.

§ 28. Statutory provisions.

[a] (U. S. 1879) The provision of law of 1875 (18 Stat. 470, § 3), as to removal of a cause from a state court to a federal court, does not repeal that of Rev. St. § 649, authorizing the court to try, upon the stipulation of the parties, issues of fact without the intervention of a jury.—Phillips v. Moore, 100 U. S. 208, 25 L. Ed. 603.

§ 29. Issues of fact or law in general.

In mandamus, see post, § 106.

In proceedings against officers, see post, § 120 [g].

—— *relating to administration of decedents' estates, see* post, § 110.

In quo warranto, see post, § 105.

Issue of adultery in divorce, see post, § 103.

Re-examination of issues of fact tried by jury, see post, § 220.

Reference as infringing trial by jury, see post, § 215.

Practice in trial of special issues by jury, see "Trial," X. (A).

[a] (U. S. 1835) The right of trial by jury, secured by the federal constitution, is the trial according to the course of common law, and is confined to matters of fact only. Therefore Act Feb. 12, 1793 (1 Stat. 302), which provides for the seizure of a fugitive from labor, and his examination before a magistrate, is not unconstitutional, as denying the right to a trial by jury, for, so far as the question of slavery is involved upon such examination, it is a question of law, and not a question of fact.—In re Martin, Fed. Cas. No. 9,154 [2 Paine, 348].

[b] (Ala. 1828) In a summary proceeding against an officer, for failure to return a writ, where there is a material issue on controverted matter in pais, he has the right of trial by jury.—Pope v. Stout, 1 Stew. 375.

[c] (Cal.) The constitutional provision securing the right of trial by jury applies only to civil and criminal cases in which an issue of fact is joined.—(1860) Koppikus v. State Capitol Com'rs, 16 Cal. 248; (1862) People v. Blake, 19 Cal. 579.

[d] (Ill. 1883) Where objection is made to the commission's report of survey, under Act March 25, 1869, "to provide for the permanent survey of lands," denying its correctness, an issue of fact is formed, on which any party to the record is entitled to a jury trial.—Atkins v. Huston, 106 Ill. 492, reversing (1879) 5 Ill. App. 326.

[e] (Ky. 1853) Issues of fact, arising in actions by ordinary proceedings for the recovery of money or of specific real or personal property, shall be tried by jury, unless a jury trial is waived.—Smith v. Moberly, 54 Ky. (15 B. Mon.) 70.

[f] (La. 1825) Where, in a case involving long accounts, plaintiff asks for a jury, and defendant, when the trial comes on, for a reference, the court is not bound to grant it, under acts 1804, No. 2, § 2; No. 26, § 20.—Caulker v. Banks, 3 Mart. (N. S.) 532.

[g] (Mass. 1829) The requirements of article 15, in the declaration of rights, relative to trial by jury, are satisfied by having all controverted facts essential to the trial passed upon by a jury, if required by either party; and the court must determine whether the facts proposed to be so tried are essential or not.—Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 24 Mass. (7 Pick.) 344.

[h] (Mass. 1891) Where a deputy game commissioner illegally seizes and carries away rabbits exposed for sale, in an action for conversion, where there is no evidence of a consent to the taking, the deputy is not entitled to have the issue submitted to a jury.—Averill v. Chadwick, 153 Mass. 171, 26 N. E. 441.

[i] (Miss. 1854) It is the right of a party, on the trial of questions of fact, to demand and have a trial by jury.—Scott v. Nichols, 27 Miss. (5 Cushm.) 94, 61 Am. Dec. 503.

[j] (Mo. 1860) On trial of issues raised in an action to recover money only, which is governed by the practice act of 1849, it is improper to submit portions of the issues to the jury and reserve the remainder for the determination of the court.—Ragan v. McCoy, 29 Mo. 356.

[k] (N. Y. 1869) A reference may be ordered in a case pending in a New York county court, under the general provisions of the Code authorizing references, notwithstanding the requirement (Code, § 366) that issues of fact in county courts shall be tried by jury.—Coy v. Rowland, 40 How. Prac. 385.

[l] (N. Y. 1883) The court will not direct the framing of issues for trial by jury, where the points involved are numerous, complex, and confusing.—Rutty v. Person, 12 Abb. N. C. 352.

[m] (N. C. 1872) In all actions where legal rights are involved and issues of fact are joined by the pleadings, the plaintiff is entitled to a trial by jury.—Andrews v. Pritchett, 66 N. C. 387.

[n] (N. C. 1874) Const. art. 11, § 18, provides "that in all issues of fact joined in any court the parties may waive the right to have the same determined by a jury, in which case the findings of the judge upon the facts shall have the force and effect of a verdict of a jury." *Held* that, in an action on a guardian's bond, the defendants were entitled to have issues of fact submitted to a jury, though a reference of the cause had been made, under Code Civ. Proc. tit. 10, § 219, since a reference is but ancillary to the powers of the court, and the constitutional provision is not necessarily confined to issues raised by the pleadings.—State v. Brown, 70 N. C. 27; Keener v. Finger, Id. 35.

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[o] (N. C. 1876) A defendant in a bastardy proceeding, who alleges that he has paid the mother of the child a certain sum, for which he exhibits her receipt, which receipt, the mother charges, was obtained from her by fraud, is entitled to have the issue thus joined tried by a jury; and for the court below to refuse a trial by jury, when demanded by the defendant, is error.—State v. Beasley, 75 N. C. 211.

[p] (Ohio, 1861) Code Civ. Proc. § 87, provides that defendant may demur to a petition on the ground that the plaintiff has no legal capacity to sue. Section 89 provides that when the defect mentioned in section 87 does not appear on the face of the petition the objection may be taken by answer. In an action by persons claiming to be trustees of an incorporated religious society to recover possession of land, defendants answered, denying that plaintiffs were such trustees, and claiming that they, the defendants, were the trustees of such society, and praying for affirmative relief as against plaintiffs. *Held*, that an issue was thereby raised as to who were the legal trustees, which was properly triable by jury on the demand of either party, and it was error to decide that issue on a motion filed by defendants to dismiss the action on the ground that plaintiffs were not the trustees of such society.—First Presbyterian Soc. v. Smithers, 12 Ohio St. 248.

[q] (Pa. 1851) A rule for judgment will be discharged, where it appears from plaintiff's affidavit, and from the statement of the balance by the plaintiff, that some of the collaterals deposited by defendant have been realized, for which defendant is entitled to an accounting, since defendant is entitled to a trial by jury.—Krantler v. United States Bank, 1 Phila. 213.

[r] (Pa. 1855) Upon motion for summary relief against abuse of the process of court, by entering judgment under a warrant of attorney, the court may examine the fact whether such judgment was unduly entered, without sending the matter to a jury.—Banning v. Taylor, 24 Pa. (12 Harris) 289.

[s] (Pa. 1858) To support the demand of an issue in the orphans' court, it must be shown that there exists in regard to the claim some disputed fact for the determination of which the intervention of a jury is necessary.—In re Beehler's Estate, 3 Phila. 254, 15 Leg. Int. 350.

[t] (Pa. 1890) Where, in a suit to determine the right of a public officer to compensation, there is no dispute as to the facts, an issue should not be awarded.—City of Scranton School Dist. v. Simpson, 133 Pa. 202, 19 Atl. 359, 25 Wkly. Notes Cas. 517.

[u] (Pa. 1894) A case merely involving conflicting evidence as to whether services rendered by a daughter to her father were performed under his express promise to pay her therefor is for the jury.—Glone v. Arleth, 162 Pa. 550, 29 Atl. 862.

[v] (S. C. 1843) Where a poor debtor was arrested under sundry writs of ca. sa., and filed a schedule, which was opposed and issue joined, it was *held* that, under the statute of 1788, the judge had no power, although the facts were undisputed, to decide, without the intervention of a jury upon the intention, that the facts did not constitute undue preference.—Weed v. Evans, 2 Speers, 232.

[w] (Wash. 1875) The court may not try a cause involving an issue of fact where there is no waiver of jury trial, as provided by statute.—Johnson v. Goodtime, 1 Wash. T. 484.

[x] (W. Va. 1890) The submission of "particular questions of fact" to the jury is, under Code, c. 131, § 5, discretionary with the court; and such discretion is properly exercised where the questions proposed are immaterial or irrelevant.—Wheeling Bridge Co. v. Wheeling & B. Bridge Co., 34 W. Va. 155, 11 S. E. 1009.

[y] (W. Va. 1893) An issue to be determined by inspection of the record must be tried by the court, not by a jury.—State v. Martin, 38 W. Va. 568, 18 S. E. 748.

[z] (Wyo. 1883) Comp. Laws, p. 67, § 263, provides that in actions for the recovery of real property "the issues of fact arising therein shall be tried by a jury, unless a jury trial is waived." Other statutes provide that in case a jury is waived the trial may be by the court. *Held*, that where, in an action for the recovery of a mining claim, part of the material facts alleged in the petition were admitted and part denied in the answer, it was error to dismiss the action on motion and affidavits supporting defendant's claim, and deny plaintiff the right to a trial on the issues.—Friend v. Oggshaw, 3 Wyo. 59, 31 Pac. 1047.

§ 30. —— Contracts liquidating debt or damages.

[a] (Ala. 1831) The statute providing that final judgment may be given on default, in actions on promissory notes, without the intervention of a jury, does not apply to a written agreement to pay a certain sum of money for 50,000 staves, subject to a deduction for any number not taken, at a certain rate.—Martin v. Woodall, 1 Stew. & P. 244.

[b] (Ala. 1856) Where final judgment by default, without the intervention of a jury, was rendered for unpaid calls for stock, it was *held* the judgment was erroneous, as unpaid calls for railroad stock are not "instruments of writing, ascertaining the plaintiff's demand." Code, § 2366.—Connoly v. Alabama & T. R. R. Co., 29 Ala. 373.

[c] (Ala. 1887) In an action on a note containing a provision for 10 per cent. attorney's fees, the amount of plaintiff's demand, on default, is sufficiently "ascertained" by the instrument itself (Code, § 2740), so that no jury is necessary to ascertain the amount.—Wood v. Winship Mach. Co., 83 Ala. 424, 3 South. 757, 3 Am. St. Rep. 754.

[d] (Ark. 1843) Rev. St. § 81, provides that in all cases of interlocutory judgments or instruments in writing, when the damages are not fixed by the instrument, they shall be assessed by a jury impaneled for that purpose. Section 98 provides that all issues of fact "joined in any suit at law" shall be tried by the court, where neither party demand a jury trial. *Held*, that in an action on a bond, where the damages were not fixed, and the defendant was in default and made no appearance, a failure to impanel a jury to assess the damages was error, although the record stated that "neither party required a jury."—Wallace v. Henry, 5 Ark. (5 Pike) 105.

[e] (Ga. 1851) On the trial of a scire facias against the principal and his securities upon a bail bond, the defendants are not entitled to a jury trial unless they file such an issuable plea as will require the intervention of a jury to try it.—Davidson v. Carter, 9 Ga. 501.

[f] (Ga. 1872) Const. art. 5, § 13, provides that the right of trial by jury, except where it is otherwise provided, shall remain inviolate. Section 3, par. 3, gives the court authority to render judgment without the verdict of a jury, in all civil cases founded on contract, where an issuable defense is not filed on oath. *Held*, that a judgment rendered by the judge of the superior court, without the verdict of a jury, in a civil case founded on contract, where an issuable defense is filed on oath, will be set aside.—Erambert v. Scarborough, 46 Ga. 398.

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[g] (Ga. 1875) A verdict, in a civil case, founded on contract, where no issuable defense is filed on oath, is illegal. The court must take the responsibility of rendering judgment without a jury. Under the constitution, an issuable defense, on oath, is required to put the case before the jury, or to give them any power whatever to deal with it.—Lester v. Piedmont & A. Life Ins. Co., 55 Ga. 475.

[h] (Ga.) In an attachment, as in other cases founded on contract, where no issuable defense on oath is made, the court should render judgment without a jury.—(1877) Mehring v. Charles, 58 Ga. 377; (1878) Taylor v. Bell, 62 Ga. 158.

[i] (Ga. 1887) The entry of judgment by a plaintiff's attorney, in pursuance of an order of court authorizing him to do so, in a case where no issuable defense has been filed, is a sufficient compliance with Const. 1868, art. 5, § 3, par. 3, which provides that the court shall render judgment without the verdict of a jury in all cases founded on contract when no issuable defense is filed.—Tift v. Keaton, 78 Ga. 235, 2 S. E. 690.

[j] (Ga. 1887) Const. art. 6, § 4, par. 7, provides that the court shall render judgment without the verdict of a jury, in all civil cases founded on unconditional contracts in writing, where an issuable defense is not filed under oath or affirmation. Plaintiff brought suit on three promissory notes bearing even date, and falling due on January 1, 1886–87–88, respectively. They were collateral to a bond conditioned that if the first note was not paid at maturity, then the other notes should become due. *Held*, that the notes and bond constituted an entire, conditional contract, and the judge could not try the case without a jury.—Dye v. Garrett, 78 Ga. 471, 3 S. E. 692.

[k] (Ga. 1888) Under Code, § 5145, providing that the court shall render judgment without a verdict in civil cases founded on unconditional contracts in writing, etc., a judgment should be so rendered where the contract is wholly unconditional as to the existence and amount of the debt, though there may be a condition as to the vesting in the debtor of title to the property for which the debt was incurred.—Craig v. Herring, 80 Ga. 709, 6 S. E. 283.

[l] (Ga. 1889) Where no issuable defense under oath or affirmation is filed, judgment is properly rendered by the court without the verdict of a jury; the contract declared upon being an unconditional contract in writing.—Stansell v. Corley, 81 Ga. 453, 8 S. E. 868.

[m] (Ga. 1893) A written contract to pay $250, which amount, in a certain event, is to be reduced to $200, but containing no stipulation to pay less than the latter amount in any event, is an unconditional contract in writing for $200; and in a suit on the contract to recover the $250, where no defense was made, a judgment for $200 rendered by the court, without the intervention of a jury, is valid.—Knox v. Yow, 91 Ga. 367, 17 S. E. 654; Yow v. Knox, Id.

[n] (Ga. 1893) Where, in an action by the second indorser against the first indorser of a note, the declaration, besides setting forth the note with its indorsements, alleges facts not apparent on the instrument itself, which rendered protest for nonpayment necessary to bind the indorsers, the case is one for a verdict by a jury, and not one for judgment by the court without a jury, though no issuable defense on oath has been filed.—Everett v. Westmoreland, 92 Ga. 670, 19 S. E. 37.

[o] (Ind. 1845) If a demurrer to a declaration on a bill of exchange be overruled, the court may assess the damages, so far as the amount due on the bill of exchange is concerned; but in respect to the costs of protest, if chargeable at all, there should be a jury of inquiry.—Phipps v. Addison, 7 Blackf. 375.

[p] (Iowa, 1859) The plaintiff claimed a certain sum to be due as a balance on several promissory notes. The defendant denied that this sum was due, and the plaintiff replied, admitting the truth of the defendant's allegation. *Held*, that there was no issue made up on which a trial by jury could be claimed.—Mann v. Howe, 9 Iowa, 546.

[q] (Iowa, 1878) In an action on a promissory note providing for "attorney's fees and other costs and charges, if the same is not paid when due," such fees should be treated as part of the costs. Accordingly, under the Code, the defendant is not entitled to a jury.—Musser v. Crum, 48 Iowa, 52.

[r] (Ky. 1823) In cases of debt or covenant, where the amount is liquidated by the act or deed of the parties, a court may proceed, without a jury, to assess damages, such having been the law before the constitution; and, on this principle, the court may decide on fee bills issued by clerks, without the intervention of a jury.—Harrison v. Chiles, 13 Ky. (3 Litt.) 194.

[s] (Ky. 1860) Where defendant to a suit on a promissory note controverts none of the facts, but only alleges in his answer that plaintiff is no longer owner or holder of said note, but has assigned it, and then fails to support this allegation by proof, the court should proceed to render judgment on the merits, and the intervention of a jury is unnecessary.—Vanbuskirk v. Levy, 60 Ky. (3 Metc.) 133.

[t] (La. 1880) A suit against the husband on a note drawn by the wife, and signed by him only for the purpose of authorizing her, although given for the price of a purchase for account of the community, and after he has assumed her debt, is not upon an unconditional obligation to pay a sum of money, so as to entitle the defendant to a jury, without the oath required by Code, art. 494.—State ex rel. Leeds v. Third District Judge, 32 La. Ann. 542.

[u] (La. 1880) A stipulation by the maker of a note that he will pay "such counsel fees as is customary," in case of legal proceedings, etc., is not an unconditional obligation to pay a specific sum of money, which deprives him of his right to a trial by jury.—Boagni v. Anderson, 32 La. Ann. 920.

[v] (La. 1892) Code Prac. § 494, provides that actions on notes shall be tried without a jury unless defendant shall make oath that his signature to the note is not genuine, or that he expects to prove that it was obtained through fraud or error, or want or failure of consideration, or where he sets up a plea of compensation or reconvention, and makes oath to the truth of all the allegations. *Held*, that the holder of a note, which bears interest, by its terms, from maturity, cannot claim that he is entitled as a matter of absolute right to a trial without a jury, where, in suing the maker, he claims interest from its date under an allegation of error, and where, averring that payment of the note is secured by a privilege, he seeks to have that privilege recognized and enforced through pleadings which disclose the fact that the existence of the privilege is a matter still in pais, requiring to be established by parol evidence.—State ex rel. Whitney Iron Works Co. v. Judge of Twenty-Second Judicial Dist. Court, 44 La. Ann. 1085, 11 South. 684.

[w] (N. Y. 1873) In an action upon a policy of insurance covering a stock in trade consisting of fireworks and other "hazardous" and "extra hazardous" merchandise, *held*, that the defendant was entitled to have the question whether the risk was increased by the addition

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of a certain species of fireworks tried by a jury.—Jones v. Firemen's Fund Ins. Co., 51 N. Y. 318, affirming (1868) 2 Daly, 307.

[x] (Ohio, 1879) Where a defense to an action against an indorser is that, on sale of property securing the note, it brought a larger amount than was sufficient to satisfy the note, but plaintiff negligently permitted second lien holders to obtain a portion of the fund, thereby preventing full payment of the note, defendant is entitled to a jury trial.—Clarke v. Huff, 6 Ohio Dec. 771.

[y] (Pa. 1857) Defendant was entitled to a trial by jury, in an action against him on a note, where he interposed an affidavit of defense, setting forth "that the said note was placed fraudulently in circulation, and neither the defendants nor the drawer received any consideration therefor, and that the said note was given to a certain note bearer to have discounted for said defendants, since which time neither the note nor any proceeds thereof have ever been received."—Rifer v. Reed, 2 Phila. 342.

[z] (S. C. 1818) By an act of assembly, where a bond is for other than the payment of money, the plaintiff may be compelled to submit the condition of the bond and the special circumstances to a jury, to assess the damages.—Cowan v. McCullough, 2 Mill, Const. 165.

[zz] (Tex. 1867) In a proceeding upon a forfeited bail bond, where the defendant sought to put in issue the legitimacy of the state government and the authority of the officers acting thereunder, as a defense, *held*, that he was not entitled to a jury to try such issue.—Shrader v. State, 30 Tex. 386.

§ 31. Defenses in general.

Affidavit of defense as prerequisite to right, see post, § 168.

Application of constitutional provisions as to legal and equitable suits, see post, § 37 [f].

Requiring affidavit of defense as infringement of right; see post, § 209.

[a] (U. S. 1872) Where a seizure of goods has been made on land for an infringement of the internal revenue laws, the claimant is entitled to a trial by jury, if he appears and files an answer denying the facts charged in the information; and the court cannot strike out his answer, thus depriving him of his right to trial by jury.—Garnharts v. United States, 83 U. S. (16 Wall.) 162, 21 L. Ed. 275.

[b] (Ala. 1838) A denial, in a case in admiralty, of the allegations of the petition, and concluding to the country, is the tender of an issue to a jury, and cannot be tried by the court.—Gayle v. Preston, 8 Port. 291.

[c] (Fla. 1869) A respondent in an information to try his title to an office can claim no trial by jury until he tenders an issue of fact.—State v. Gleason, 12 Fla. 190.

[d] (Ill. 1892) Where objections to an application for judgment for delinquent taxes show upon their face that the matters alleged constitute no defense to the application, the court may overrule them without submitting the issues of fact to a jury.—Scott v. People, 142 Ill. 291, 33 N. E. 180.

[e] (Iowa, 1868) The question whether a release taken by a defendant of "all causes of action," etc., on settlement of his appeal from a justice's judgment, included the costs of the suit, is one of law for the court, and on which he cannot call a jury.—Packer v. Packer, 24 Iowa, 20.

[f] (Kan. 1892) Where the answer in an action against the surety on a note does not state a defense, defendant's request for a jury trial is properly refused.—Goodacre v. Skinner, 47 Kan. 575, 28 Pac. 705.

[g] (Ky. 1846) Under act 1831 (1 St. Laws, 357), which gives a remedy, by motion, against public officers, for failing to pay up the revenue in their hands, where the amount to be recovered on such motion is liquidated, no jury is necessary, unless rendered so by the nature of the defense set up.—Rodes v. Commonwealth, 45 Ky. (6 B. Mon.) 359.

[h] (Me. 1823) In assumpsit by plaintiff, as indorsee of a note, defendants pleaded the general issue. When the case was called for trial, counsel for defendants appeared and demanded a trial by jury. The court asked defendants' counsel if his clients had a substantial defense, to which the counsel replied that he did not know as he had not seen his clients, but had received a letter from them, from which it might be fairly inferred that they had a substantial defense. *Held*, that it was error to call on plaintiff to prove his demand, and to enter a default against defendants.—Frothingham v. Dutton, 2 Me. (2 Greenl.) 255.

[i] (Mo. 1884) Under Rev. St. § 3000, giving trial by jury "in an action," etc., the test is plaintiff's suit, not the defense set up or the issue developed in a cause.—Smith v. St. Louis Beef Canning Co., 14 Mo. App. 522.

[j] (Ohio, 1879) In an action for money only, where there was an issue of fact joined which defendant was entitled to have tried by a jury, it was error to refuse one.—Clarke v. Huff, 8 Am. Law Rec. 26.

[k] (Pa. 1852) On exceptions to a sheriff's return, setting forth that the mortgage upon which plaintiff claims the proceeds of the sale "was given without any considerations whatever, and with the intention of hindering and delaying the exceptants, and other just creditors of the defendant, and preventing the payment of his debts and liabilities," the exceptants are entitled to a jury trial.—Lippincott v. Lippincott, 1 Phila. 396.

[l] (Pa. 1860) In an action on a duebill, signed by an agent of the defendant, if the affidavit of defense expressly denies the authority of the agent, the defendant is entitled to a jury trial, although a partial payment may be indorsed on the instrument.—Hunter v. Reilly, 36 Pa. (12 Casey) 509.

[m] (Tex. 1853) Where the action is on a liquidated demand, and the answer tenders only an issue of law, there is no necessity for a jury trial.—Richardson v. Ellett, 10 Tex. 190.

§ 32. Plea of nul tiel record.

[a] (U. S. 1869) Where the record of a foreign court is denied by the plea of nul tiel record, the issue is to be tried by a jury, because the existence of the record to be inspected must first be made by proof, which it may be necessary to submit to a jury.—Basset v. United States, 76 U. S. (9 Wall.) 38, 19 L. Ed. 548.

[b] (Ky. 1830) An issue on a plea of nul tiel record is properly triable by the court.—Carson v. Pearl, 27 Ky. (4 J. J. Marsh.) 92.

[c] (Mo. 1884) On a proceeding by scire facias to revive a judgment, the defendant is not entitled to have a plea of nul tiel record tried by a jury.—Simpson v. Watson, 15 Mo. App. 425.

[d] (N. Y. 1869) The issue formed by the plea of nul tiel record is an issue of fact, which either party has a right to have tried by a jury.—Fasnacht v. Stehn, 53 Barb. 650, 5 Abb. Prac. (N. S.) 338.

[e] (Pa. 1846) The plea of nul tiel record to an alderman's judgment on scire facias against

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the bail on appeal, made in trial de novo on appeal, is triable by the record, and not by a jury.—Oliver v. Foster, 3 Clark, 388.

[f] (R. I. 1889) In an action on an appeal bond, binding the principal and sureties severally, where defendant pleads nul tiel record, a jury trial is properly refused.—State v. Sutcliffe, 16 R. I. 410, 16 Atl. 710.

§ 33. Plea of payment.

[a] (N. Y. 1889) Under Code Civ. Proc. § 968, providing that issues of fact in actions for money judgment shall be tried by a jury, unless a jury trial is waived or a reference directed, an action by a legatee against an executor, for an alleged unpaid balance of a legacy, the defenses being that the alleged balance was paid out as a legacy tax, and that the question of defendant's liability was res judicata, is triable by a jury.—Kennagh v. McColgan, 53 Hun, 635, 6 N. Y. Supp. 244, 17 Civ. Proc. R. 287.

[b] (N. C. 1874) Jury trial in a case involving plea of payment is matter of right, if demanded in due season; and a refusal to allow it is reversible error.—Isler v. Murphy, 71 N. C. 436; Rowland v. Thompson, Id. 467.

[c] (Tex. 1894) Where, in an action on a verified account for goods sold, defendant demanded a jury and paid the jury fee, and filed a general demurrer and denial, and, objections thereto having been sustained, filed an amended answer consisting of a general denial and plea of part payment, he was entitled to a trial by jury.—Mullaly v. Goggan (Civ. App.) 25 S. W. 666.

§ 34. Set-off or counterclaim.

[a] (La. 1874) Where a reconventional demand is pleaded in a suit not triable by jury, it is not error to refuse to submit such demand to the jury.—Pool v. Alexander, 26 La. Ann. 669.

[b] (La. 1880) The maker and indorser of a promissory note are not entitled to plead an unliquidated claim in compensation against the holder, nor, by swearing to the plea, are they entitled to a trial by jury.—Burbridge v. Anderson, 32 La. Ann. 877.

[c] (N. Y. 1889) In an action by an overseer of the poor before a justice, for a statutory penalty of $50 for illegally selling liquor, a counterclaim alleging that plaintiff owes defendant $100 for money advanced to him officially, under a promise to refund it if he should sue defendant for such a penalty, is not authorized by Code Civ. Proc. § 501, allowing counterclaims; and such plea creates no issue requiring a jury trial, under section 3068, which provides for such a trial in the county court on an appeal from a justice, when an issue of fact was joined in the justice's court, and the judgment demanded exceeds $50.—Moore v. Trimmer, 52 Hun, 612, 6 N. Y. Supp. 480, 17 Civ. Proc. R. 99.

2. LEGAL OR EQUITABLE ACTIONS OR ISSUES.

(a) IN GENERAL, §§ 35-65.
(b) PARTICULAR ACTIONS OR PROCEEDINGS, §§ 66-83.

Administration of decedents' estates, see post, § 110.
Mandamus, see post, § 106.
Procedure in equity as denial of right, see post, § 207.
Proceedings for probate or contest of wills, see post, § 111.
Trial of appeals from probate courts, see post, § 97.
Review of findings of court against verdict of jury in equitable action, see "Appeal and Error," vol. 3, cc. 1893, 1894, § 3995½.

(a) IN GENERAL.

IN GENERAL, § 35.
POWER TO REGULATE, § 36.
APPLICATION OF CONSTITUTIONAL PROVISIONS IN GENERAL, § 37.
STATUTORY PROVISIONS, § 38.
ISSUES OF FACT IN EQUITABLE ACTIONS, § 39.
— SET-OFF AND COUNTERCLAIM, § 40.
— FRAUD, § 41.
— QUESTION OF TITLE, § 42.
— ASSESSMENT OF DAMAGES, § 43.
— PARTITION, § 44.
— QUIETING TITLE AND DETERMINATION OF ADVERSE CLAIMS, § 45.
— FORECLOSURE OF LIENS AND MORTGAGES, § 46.
— CANCELLATION AND REFORMATION OF INSTRUMENTS, § 47.
— CREDITORS' BILL AND FRAUDULENT CONVEYANCES, § 48.
— INJUNCTION AND ABATEMENT OF NUISANCES, § 49.
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— SPECIFIC PERFORMANCE, § 51.
JOINDER OF LEGAL AND EQUITABLE ISSUES, § 52.
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— DENIAL OF EXECUTION OF WRITING, § 58.
EQUITABLE DEFENSE TO LEGAL ACTION, § 59.
— EXAMINATION OF LONG ACCOUNT, § 60.
INTERPLEADER OR INTERVENTION, § 61.
PARTICULAR PROCEEDINGS IN EQUITABLE ACTIONS, § 62.
— CONTEMPT PROCEEDINGS, § 63.
— RIGHTS OF OCCUPYING CLAIMANTS, § 64.
EFFECT OF REMOVAL FROM STATE TO FEDERAL COURT, § 65.

Statutory provisions, see post, § 38 [c, e, f].

§ 35. In general.

[a] (U. S. 1874) Though, by the organic act of the territory of Montana, common law and chancery jurisdiction is exercised by the same court, and, by legislation of the territory, all distinctions in pleadings and modes of procedure in common law actions and in equity are abolished, the relief which the law affords must be administered through the intervention of a jury, unless a jury be waived.—Basey v. Gallagher, 87 U. S. (20 Wall.) 670, 22 L. Ed. 452.

[b] (Ga. 1857) In this state all equity cases are tried by a special jury, under direction of the court as to the law.—Brown v. Burke, 22 Ga. 574.

[c] (Ind. 1889) Whenever the cause of action is one that can only be enforced by invoking the equitable powers of the court, then the right of trial by jury does not obtain, but, if the cause of action does not depend on the equity jurisdiction of the court, a jury may be demanded.—Martin v. Martin, 118 Ind. 227, 20 N. E. 763.

[d] (Mont. 1872) Under the Code of Procedure, cases in equity in which equitable relief is demanded, and actions at law in which an equitable defense is made, cannot be tried by a jury, as at law, but the decree must be rendered by the judge, sitting as a chancellor in a

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court of chancery.—Gallagher v. Basey, 1 Mont. 457.

[e] (N. Y. 1895) The fact that an equitable action will involve a conflict of evidence is not ground for granting a trial by jury.—Cantoni v. Forster, 12 Misc. Rep. 343, 33 N. Y. Supp. 565.

[f] (N. C. 1884) The right to a jury exists as well when the issue involves equitable elements as when they are legal only.—Worthy v. Shields, 90 N. C. 192.

[g] (Pa. 1882) It was never intended by the grant of equity jurisdiction to take away the common-law right of trial by jury in cases in which, by the ordinary practice, it is competent to determine the rights of parties in that manner.—Gerard Bank v. Maguire (Com. Pl.) 39 Leg. Int. 168.

[h] (Tenn. 1885) Suits in chancery are not suits "triable by jury," within the meaning of that term in Code, §§ 3602–3605.—Cooper v. Stockard, 84 Tenn. (16 Lea) 140.

§ 36. Power to regulate.

[a] (Mich. 1867) It is not, it seems, in the power of the legislature, under the constitution of the state, to provide for the trial of titles to land in equity, in cases which were triable at law before the present constitution, unless it shall first make provision for having the case tried by jury if the defendant shall so elect.—Tabor v. Cook, 15 Mich. 322.

[b] (Pa. 1873) The legislature cannot give a tribunal, acting without a jury, power to determine legal rights, unless there be some equitable ground of relief.—Appeal of Haines, 73 Pa. (23 P. F. Smith) 169.

§ 37. Application of constitutional provisions in general.

[a] (U. S. 1855) Const. Amend. 7, providing that, in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, does not affect the exclusive jurisdiction of courts of equity, nor that which they have exercised concurrent with courts of law, so as to effect a right to sue in equity in Iowa, to enforce a decree rendered in favor of complainants in Kentucky.—Shields v. Thomas, 59 U. S. (18 How.) 253, 15 L. Ed. 368.

[b] (U. S. 1886) If a case made by a bill is one of equity cognizance, the right of trial by jury is not guarantied either by the federal or state constitution.—Buford v. Holley (C. C.) 28 Fed. 680.

[c] (Ark. 1887) Under the seventh section of the Arkansas declaration of rights, providing that "the right of trial by jury shall remain inviolate, and extend to all cases at law, without regard to the amount in controversy," the right is confined to cases which at common law were properly so triable before, and does not affect the discretion of a court of chancery to dispense with jury trial.—State v. Churchill, 3 S. W. 352.

[d] (Cal. 1855) The parties to a suit in chancery are not entitled to a trial by jury.—Walker v. Sedgwick, 5 Cal. 192.

[e] (Cal. 1855) In chancery cases the parties have no right to demand a trial by jury, but in all cases at law it is a right which can be insisted upon and enforced.—Cahoon v. Levy, 5 Cal. 294.

[f] (Ga. 1877) The provision of the constitution that "the court shall render judgment without the verdict of a jury in all civil cases founded on contract, where an issuable defense is not filed on oath," refers to common-law, and not to equity, trials. The words, "civil cases," have been so construed (Gilbert v. Thomas [1847] 3 Ga. [3 Kelly] 575); and the word. "judgment," is appropriate to proceedings at law, and not to equity.—Isaacs v. Tinley, 58 Ga. 457.

[g] (Ill. 1885) The constitutional right to a trial by jury is confined to actions at law.—Flaherty v. McCormick, 113 Ill. 538.

[h] (Ind. 1883) The constitutional right to a trial by jury does not extend to equity cases.—Helm v. First Nat. Bank, 91 Ind. 44.

[i] (N. H. 1876) In proceedings in equity there is no constitutional right of trial by jury.—Bellows v. Bellows, 58 N. H. 60.

[j] (N. Y. 1847) Under Const. art. 1, § 2, providing that "trial by jury in all cases in which it has been heretofore used shall remain inviolate forever," a trial by a justice of the supreme court at a special term of an equity case without a jury is proper, since the practice of the court of chancery before the adoption of the constitution dispensed with trial by jury.—Rathbun v. Rathbun, 3 How. Prac. 139.

[k] (Wis. 1861) The provision in the constitution preserving the jury trial does not extend to equity cases, in which the party has never been entitled thereto as of right.—Stilwell v. Kellogg, 14 Wis. 461.

§ 38. Statutory provisions.

[a] (Mass. 1866) The provisions of St. 1862, c. 181, and St. 1863, c. 249, relating to ratifying assessments by mutual insurance companies, that all questions that may arise shall be heard and determined as in other equity cases, sufficiently provide for a hearing by jury.—Hamilton Mut. Ins. Co. v. Parker, 93 Mass. (11 Allen) 574.

[b] (Mich. 1889) The act regulating the practice in chancery courts (Laws 1887, p. 358) provides that either party shall be entitled to a jury trial, to be demanded in the same manner as in a suit at law, and the verdict of such jury on any question of fact shall have the same force and effect in the circuit court in chancery, and in the supreme court on appeal, as the verdict in an action at law. Whenever a jury is demanded, an issue or issues shall be framed under the direction of the court, if the court deems it necessary to submit such issue, and in all cases of trial in open court, whether with or without a jury, the court shall rule upon all questions of admissibility of testimony in like manner, and with like effect, as in a suit at law. When the cause has been tried by a jury the parties shall be entitled to make and settle a case, in which it shall be necessary to set out only so much of the testimony as may be necessary to an understanding of the questions raised; and an appeal may be taken as in ordinary chancery cases. *Held*, that the changes are so entirely in conflict with the rights of parties and the remainder of the chancery system that it cannot be carried into effect, as it permits the interests of the several parties to be decided partly by a jury and partly in some other way.—Brown v. Kalamazoo Circuit Judge, 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226.

[c] (N. Y. 1891) Laws 1844, c. 220, applying only to the city of New York, provided that, in the foreclosure of mechanics' liens, the issue should be joined and the judgment enforced in the same manner as in actions of assumpsit. Const. 1846, art. 1, § 2, declared that trial by jury should, "in all cases in which it has heretofore been used, remain inviolate forever." *Held*, that this does not render unconstitutional the mechanic's lien act of 1885, c. 342, applying to New York city as well as to the state generally, providing that the manner and form of instituting and prosecuting to judgment actions to foreclose mechanics' liens shall be the

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same as in actions to foreclose mortgages, and thus taking away the right to a trial by jury in such actions.—Riggs v. Shannon (Com. Pl.) 16 N. Y. Supp. 939, 27 Abb. N. C. 456, 21 Civ. Proc. R. 434.

[d] (N. Y. 1891) Code Civ. Proc. § 970, provides that "where a party is entitled, by the constitution, or by express provision of law, to a trial by jury of one or more issues of fact," the court must, on motion, cause "those issues to be distinctly and plainly stated for trial accordingly." Laws 1891, c. 208, amending this section, extends this right so as to embrace all actions "where one or more questions arise on the pleadings as to the value of property, or as to the damages which a party may be entitled to recover." *Held*, that this amendment applies to actions pending when it took effect as well as to actions subsequently brought.—Underhill v. Manhattan Ry. Co. (Sup.) 18 N. Y. Supp. 43, 27 Abb. N. C. 478, 21 Civ. Proc. R. 441; Eggers v. Same (Super. N. Y.) 18 N. Y. Supp. 181, 27 Abb. N. C. 463, 21 Civ. Proc. R. 403.

[e] (N. Y.) Laws 1844, c. 220, relating to mechanics' liens in New York city, merely provided that liens may be filed where work has been done or materials furnished on buildings in that city; that foreclosure proceeding should be commenced by the service of a notice on the owner; and that issue should be joined on the appearance of the parties and tried as in action of assumpsit. Laws 1885, c. 342, relating to mechanics' liens, applies to the entire state, and provides that, in an action to foreclose, all persons having a lien on the property must be made defendants, and that the court may settle and determine the equities of all the parties thereto; and section 12 provides that the issues joined must be tried the same as other issues are tried. *Held*, that the act of 1885 does not violate Const. 1846, art. 1, § 2, which provides that "trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever," since the issues of fact in an action to foreclose a mechanic's lien are still triable by jury.—(1891) Schillinger Fire Proof Cement & Asphalt Co. v. Arnott (Sup.) 14 N. Y. Supp. 326; (1895) Id., 86 Hun, 182, 33 N. Y. Supp. 343.

[f] (Wis. 1883) Under Rev. St. § 3323, providing that any issue of fact in an action for a mechanic's lien shall, on demand of either party, be tried by a jury, there cannot be a peremptory reference, under section 2864, providing for reference in all cases involving the examination of a long account; the general law being controlled by the special provision.—Druse v. Horter, 57 Wis. 644, 16 N. W. 14.

§ 39. Issues of fact in equitable actions.

Effect of equitable defense to legal action, see post, §§ 59, 60.

—— *of joinder of legal and equitable issues, see* post, § 52.

—— *of legal defense to equitable action, see* post, §§ 54–58.

Re-examination of issues of fact tried by jury, see post, § 220 [d].

Reference as infringing trial by jury, see post, § 215.

Statutory provisions, see ante, § 38.

[a] Where an issue is properly in equity, a party is not entitled as of right to have an issue of fact tried by a jury.
—(U. S. 1860) Ely v. Monson & Brimfield Mfg. Co., Fed. Cas. No. 4,431 [4 Fish. Pat. Cas. 64]; (1864) Goodyear v. Providence Rubber Co., Fed. Cas. No. 5,583 [2 Cliff. 351, 2 Fish. Pat. Cas. 499]; (1882) Herdsman v. Lewis (C. C.) 9 Fed. 853, 20 Blatchf. 266;
(Ariz. 1878) Cole v. Bean, 1 Ariz. 377, 25 Pac. 538;
(Fla. 1857) Smith v. Croom, 7 Fla. 180;
(Ind. 1885) McBride v. Stradley, 103 Ind. 465, 2 N. E. 358;
(Ky. 1886) Bailey v. Nichols, 8 Ky. Law Rep. 64;
(Neb. 1895) Sharmer v. McIntosh, 43 Neb. 509, 61 N. W. 727;
(N. Y. 1861) McCarty v. Edwards, 24 How. Prac. 236;
(Pa. 1868) Appeal of Frank, 59 Pa. (9 P. F. Smith) 190; (1877) Genet v. Delaware & H. Canal Co., 6 Luz. Leg. Reg. 73;
(S. C. 1874) Lucken v. Wichman, 5 S. C. (5 Rich.) 411.

[b] (Ala. 1843) It is competent for the chancellor to determine the question of lunacy, when raised by the pleadings, without directing an issue.—Alexander v. Alexander, 5 Ala. 517.

[c] (Ark. 1883) Gantt's Dig. § 4642, provides that "all other issues of fact [after specifying certain ones that must be tried by jury] * * * shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury." *Held* not to enlarge the right of trial by jury, but to apply only to cases so triable before.—Williams v. Citizens, 40 Ark. 290.

[d] (Ga. 1822) Although it is the practice to associate a jury with the court in the determination of chancery causes, yet there is no law requiring it.—McGowan v. Jones, R. M. Charlt. 184.

[e] (Ga. 1852) In causes in equity the facts are to be submitted to a special jury, who have the exclusive right to pass upon them, and the court alone is to determine all questions of law.—Mounce v. Byars, 11 Ga. 180.

[f] (Iowa, 1868) A party in an equitable action triable by the first method of trying equitable actions cannot, as a matter of right, demand that the issues be tried by a jury.—State v. Orwig, 25 Iowa, 280.

[g] (Iowa, 1871) In an equitable proceeding, triable, under Revision, §§ 2998, 2999, by the second method of trial for equitable causes, either party is entitled to a jury to try the facts put in issue by the pleadings.—Benedict v. Hunt, 32 Iowa, 27.

[h] (Kan. 1890) Under Code Civ. Proc. §§ 266, 267, 289, 291, 292, while all issues of fact in the district court may be tried by a jury, in some cases they must be so tried, unless the parties waive a jury; but, in others, it is within the discretion of the court whether they shall be so tried.—Smith v. Wise, 44 Kan. 742, 25 Pac. 204.

[i] (Me. 1876) Under Act 1873, c. 130, it is imperative on the law court, on motion of either party, to frame issues for a jury trial in suits in equity.—Call v. Perkins, 65 Me. 439.

[j, k] (Mo. 1860) The trial of the issues raised in an action for the recovery of money only, to which the practice act of 1849 is applicable, is for the jury, unless a jury trial is waived.—Ragan v. McCoy, 29 Mo. 356.

[l] (Mo. 1879) In chancery cases the right of trial by jury does not exist, although the chancellor may direct certain isues of fact to be tried by a jury, but in such a case he will not bound by their finding.—Gay v. Ihm, 69 Mo. 584.

[m] (N. H. 1838) Under Bill of Rights, art. 22, in a chancery case, where there is a controversy about a matter of fact, defendant has a right to have the issue tried by a jury.—Marston v. Brackett, 9 N. H. 336.

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[n] (N. H. 1846) A party to a bill in equity has a constitutional right to require a trial by jury of a contested matter of fact, if he asserts that right at a proper stage of the cause.—Holtt v. Burleigh, 18 N. H. 389.

[o] (N. Y. 1821) The question of lunacy may be decided by the court without the aid of a jury.—Smith v. Carll, 5 Johns. Ch. 118.

[p] (N. Y. 1863) In an action of an equitable nature, under the Code of Procedure, a party is not entitled as of right to a trial of issues by a jury, on the ground that the case is one in which courts of equity were formerly accustomed to award issues.—Moffat v. Moffat, 23 N. Y. Super. Ct. (10 Bosw.) 468; Same v. Mount, 17 Abb. Prac. 4.

[q] (N. Y. 1871) In an action by an attorney for various services, which required an examination of a long account and a reference, the items being denied, if the answer allege payment, that question must be disposed of before the accounts can be examined, and, as that is an issue which either party may require to be tried by a jury, a compulsory reference cannot be ordered till that issue is disposed of.—Schermerhorn v. Wood, 4 Daly, 158.

[r] (N. C. 1822) In this state issues of fact must be decided by a jury in equity as well as at law.—Taylor v. Person, 9 N. C. 298.

[s] (N. C. 1887) Issues of fact arising in the progress of an inquiry by commissioners appointed to allot a homestead claimed under execution, which issues arise not upon the pleadings, but merely upon exceptions to the findings of fact by the commissioners, are not such issues of fact as entitle the parties to a trial by jury.—Beavans v. Goodrich, 98 N. C. 217, 3 S. E. 516.

[t] (Or. 1895) Hill's Ann. Laws, § 396, providing that whenever, in an equity case, it becomes necessary or proper to inquire of any fact by the verdict of a jury, the court may direct a statement thereof, and a jury may be formed to inquire of the same, is merely declaratory of the common-law equitable procedure, and in such an action the submission of a question of fact to a jury is within the sound discretion of the court.—Raymond v. Flavel, 27 Or. 219, 40 Pac. 158.

[u] (Pa. 1861) Where the answer of a respondent avers an assignment of complainant's interest in the concern, under which his right to an account is denied, the assignment becomes thereby a preliminary question, to be disposed of by a jury, unless the parties prefer a master or a referee.—Collyer v. Collyer, 38 Pa. (2 Wright) 257.

§ 40. —— Set-off and counterclaim.

[a] (Iowa, 1889) Code 1873, § 2517, provides that, in actions which have been "properly commenced by ordinary proceedings," either party shall have the right to have equitable issues tried to the court. Section 2740 provides that issues of fact in actions begun by ordinary proceedings must be tried to a jury, unless waived. "All other issues shall be tried by the court," unless referred. *Held*, that a defendant, in an equitable action to foreclose a mortgage, who sets up a counterclaim on which a legal issue is framed, is not entitled to have such issue tried to a jury.—Ryman v. Lynch, 76 Iowa, 587, 41 N. W. 320.

[b] (Ky. 1893) Plaintiff sued in equity for the price of repairs made by him on defendants' flouring mill, and asked that a lien be declared and enforced on the mill for such price. Defendants admitted the contract under which the work was done, but claimed that it was not properly done, and asked damages. *Held* that, as the right to a lien depended on the decision of legal issues, it was error to refuse to transfer the case to the common-law docket, to be tried by a jury.—Carder v. Weisengburg, 95 Ky. 135, 23 S. W. 964.

[c] (N. Y. 1888) The refusal of a request by defendant, who has pleaded a counterclaim, in an action to foreclose a mortgage, for leave to apply at special term for the framing of issues for a jury, is discretionary.—MacKellar v. Rogers, 109 N. Y. 468, 17 N. E. 350.

[d] (N. Y. 1888) A defendant in foreclosure, who counterclaims money due and damages for breach of a contract, asking an affirmative judgment thereon, cannot demand a jury trial of the issues thus raised as of course under Code Civ. Proc. § 974, providing that "where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact arising thereupon is the same as if it arose in an action brought by the defendant against the plaintiff for the cause of action stated in the counterclaim, and demanding the same judgment;" as the action, being for other than a money judgment, is not within Code, § 968, providing that an issue of fact in an action for a money judgment only must be tried by a jury.—MacKellar v. Rogers, 109 N. Y. 468, 17 N. E. 350, affirming (1885) 52 N. Y. Super. Ct. (20 Jones & S.) 468.

[e] (N. Y. 1893) In an action to enforce a mechanic's lien, it is imperative on the court, under Code, §§ 970, 974, to grant an application, seasonably made, for trial by jury of questions of fact arising on a counterclaim for damages.—Deeves v. Metropolitan Realty Co. of City of New York (Com. Pl.) 6 Misc. Rep. 91, 26 N. Y. Supp. 23, judgment affirmed (1894) 141 N. Y. 587, 36 N. E. 739.

[f] (N. Y. 1894) Where defendant interposed a common-law counterclaim, he thereupon became entitled to trial by jury, and his motion to frame issues for trial by jury should be granted of course, unless plaintiff asks for a reference, and shows that the case is referable.—Roslyn Heights Land & Imp. Co. v. Burrowes, 76 Hun, 62, 27 N. Y. Supp. 622.

§ 41. —— Fraud.

Cancellation for fraud, see post, § 47 [a].
Fraudulent conveyances, see post, § 48.
In action by receiver, see post, § 74 [g].

[a] (Md. 1835) The chancellor, upon an allegation of fraud in obtaining a deed, is not bound to send the facts to be tried by a jury, if he can determine the matter himself, to his own satisfaction, upon the evidence.—Stewart v. Iglehart, 7 Gill & J. 132, 28 Am. Dec. 202.

[aa] (Minn. 1868) St. 13 Eliz. c. 5, and the statute of this state, rendering void certain conveyances made with a fraudulent intent, are but declaratory of the common law; and where, in an action for the recovery of specific personal property, such fraudulent intent is in issue, it must, under Gen. St. p. 478, § 199, be tried by a jury or referred.—Blackman v. Wheaton, 13 Minn. 326 (Gil. 299).

[b] (Mo. 1867) Whether certain promises were fraudulently given, and were the sole ground of plaintiff's action, to his injury and to defendant's gain, should be submitted to a jury on an issue directed on that question.—Rutherford v. Williams, 42 Mo. 18.

[c] (N. Y. 1845) Where a motion to set aside proceedings in a suit in chancery was founded on a release executed by the opposite party, and was opposed on the ground that the release was obtained by fraudulent representations, it was *held* that the court could determine the question of fraud without the inter-

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vention of a jury.—Ferris v. Crawford, 2 Denio, 595.

[d] (N. Y.) In an action to foreclose a mortgage, defendant is not entitled, as a matter of right, to a trial by jury of a defense of fraud.—(1876) Knickerbocker Life Ins. Co. v. Nelson, 8 Hun, 21; (1890) Stephens v. Humphries, 57 Hun, 587, 10 N. Y. Supp. 455.

[e] (N. Y. 1888) The trial by a referee of the question of an overcharge of the cost of property purchased by defendant with the funds of his associates does not necessarily involve a question of fraud entitling defendant to a jury trial, as his liability results from his failure to expend the moneys intrusted to him by his associates in the purchase of such property.—King v. Barnes, 109 N. Y. 267, 16 N. E. 332.

§ 42. —— Question of title.

Effect of equitable defense to legal action, see post, §§ 59, 60.

—— *of legal defense to equitable action, see* post, § 56 [a, d].

In partition, see post, § 44.

Power to regulate, see ante, § 36 [a].

[a] (U. S. 1895) A court of equity has no jurisdiction, on a petition of a receiver appointed by it, for an order requiring the delivery of possession of real estate, to try a claim of title to such real estate, set up by the occupant thereof, but the claimant is entitled to a trial by jury.—Coles v. Northrup, 66 Fed. 831, 14 C. C. A. 138, 30 U. S. App. 270.

[b] (Cal. 1891) Under Const. art. 1, § 7, providing that the right to trial by jury shall be secured to all and remain inviolate, defendant, in an action to quiet title, under Code Civ. Proc. § 738, is entitled to jury trial on the issues of prior possession and ouster when his verified answer shows that shortly before the commencement of the action he was rightfully in possession, and was ousted by plaintiff and wrongfully kept out of possession by him.—Donahue v. Meister, 88 Cal. 121, 25 Pac. 1096, 22 Am. St. Rep. 283.

[c] (N. Y. 1884) Where, in an action to foreclose a mortgage given by A., a denial is interposed by B., who is joined with A., as defendant, that his title or interest is subordinate to that of plaintiff's, as alleged, and he claims possession by a title paramount and adverse to his, the complaint should be dismissed as to B., as the right of possession between A. and B. cannot be settled in a foreclosure action, but must be tried by a jury.—Meigs v. Willis, 66 How. Prac. 466.

[d] (S. C. 1853) On a bill for the specific delivery of slaves, the court is not bound to refer the question of title, where it is disputed, to a court of law. It can determine the question of title itself.—Paslay v. Martin, 5 Rich. Eq. 351.

[e] (S. C. 1885) An action for the recovery of land, or, alternatively, for an order limiting its use, involves the title to land, and is triable only by a jury, unless a jury is waived.—St. Philip's Church v. Zion Presbyterian Church, 23 S. C. 297.

[f] (S. C. 1886) In an action for foreclosure of a mortgage given by devisees on their testator's land, a person was made defendant who claimed title paramount under a judgment against the executor and a sale thereunder. *Held*, that the issue as to such person's paramount title should be tried by a jury, and, after disposing of that issue, the case should be proceeded with as an equity case.—Sale v. Meggett, 25 S. C. 72.

[g] (S. C. 1893) Mortgagees of land made one P., who was in possession, and the mortgagors, defendants in a foreclosure suit, to which no defense was made. P. and one of the mortgagors held the legal title. The mortgagees obtained title from the master, and agreed with the mortgagors to reconvey on certain conditions. Afterwards the former brought an action for specific performance, and, in default thereof, for cancellation of the agreement, sale of the premises, and possession. P. was made a defendant, and set up a claim under a parol partition made with his mother prior to the mortgage, and by adverse possession. *Held* that, on the trial of such action, P. was entitled to a jury, since as to him it was merely an action for possession.—Marshall v. Pitts, 39 S. C. 390, 17 S. E. 831.

§ 43. —— Assessment of damages.

In actions in general, see post, § 85.

In mandamus, see post, § 106 [j].

Statutory provisions, see ante, § 38 [d].

Suit for damages by or against receivers, see post, § 74 [a, h].

Proceedings for assessment by jury, see "Damages," vol. 15, cc. 2343–2351, §§ 520, 520½; cc. 2447, 2448, § 575.

[a] (Fla. 1895) Laws 1889, c. 3884, § 2, providing that courts of chancery shall entertain suits to enjoin trespasses on timbered lands, and the cutting and removal of trees therefrom, and cause an account to be taken of the damage to the complainant from such trespass, and decree payment of the amount found due, to the extent of conferring jurisdiction on the court of chancery of an account for damages for a mere trespass cognizable at law, in respect to which the court had no jurisdiction independent of the statute, impairs the right of trial by jury.—Wiggins v. Williams, 36 Fla. 637, 18 South. 859, 30 L. R. A. 754.

[b] (Ind. 1892) Where the facts stated in a complaint present no ground for a specific decree, and it is sought to recover compensation by way of damages only, it is proper to submit the cause to a jury; the rule being that if the remedy sought be equitable the court cannot be required to call a jury, but if it be legal the trial is by jury, unless the jury is waived.—Robertson v. McPherson, 4 Ind. App. 595, 31 N. E. 478.

[c] (Ky. 1822) In a chancery case the court can decree the value of the hire of the slaves in question according to his own computation, without the intervention of a jury.—Baltzell v. Hall's Heirs, 11 Ky. (1 Litt.) 97.

[d] (Ky. 1895) In a suit in equity to recover the value of lumber cut from land, and to enjoin further trespasses, the court may determine the value of the lumber removed, and the damages for the injury arising therefrom.—Semon v. Freitag, 29 S. W. 320.

[e] (N. J. 1895) Where the amount of damages for breach of covenant against incumbrances is admitted by the party liable, such damages may be assessed by a court of equity without the intervention of a jury.—Schmid v. Lisiewski, 53 N. J. Eq. (8 Dick.) 670, 31 Atl. 603.

[f] (N. Y. 1861) The holder of a note, holding collateral securities as a pledge for its payment, assigned the securities to a third person. *Held*, in an action by the pledgor against the assignee for an accounting, that the court had no power to render judgment for damages against the assignee, as if the action had been of a legal, and not an equitable, nature, as this would deprive defendant of a right of trial by jury.—Lewis v. Varnum, 12 Abb. Prac. 305.

[g] (N. Y. 1861) In an action by a purchaser of land, in which the only relief specifically de-

manded was that the vendor be compelled to perform the agreement by conveying, it appeared that the defendant, had never been able to perform his agreement. *Held*, that the court could not order a reference to ascertain the damages for the breach of the agreement, and that the defendant had a right to have such questions tried by a jury.—Stevenson v. Buxton, 15 Abb. Prac. 352, reversing (1859) 8 Abb. Prac. 414, 37 Barb. 13.

[h] (N. Y. 1863) In an action to compel a specific performance and for an injunction till performance is made, it is competent for the court to render judgment simply for damages for the failure to perform, without allowing the defendant a jury trial.—Dunnell v. Ketcltas, 16 Abb. Prac. 205.

[i] (N. Y. 1885) In an action brought by a vendee to compel the specific performance of a contract of sale, or, if specific performance could not be made, for the recovery of the purchase price and damages, the court cannot, on determining that specific performance can be made, proceed to adjudicate on the amount of the claim for purchase money or for damages, without the intervention of a jury, since such claims are strictly legal in their nature.—Willis v. Bellamy, 52 N. Y. Super. Ct. (20 Jones & S.) 373.

[j] (N. Y. 1891) In an action to restrain the future maintenance of an elevated railroad and to recover damages for its maintenance in the past, the defendant is not entitled to a jury trial of the claim for damages, under the provision of the New York constitution that "trial by jury in all cases in which it has heretofore been used shall remain inviolate," since the cause of action is an equitable one, and a court of equity may award money damages which are incidental to the relief by injunction.—Lynch v. Metropolitan El. Ry. Co., 129 N. Y. 274, 29 N. E. 315, 26 Am. St. Rep. 523, 15 L. R. A. 287; Herold v. Same, 129 N. Y. 636, 29 N. E. 319, affirming (1891) Lynch v. Same, 59 N. Y. Super. Ct. 582, 13 N. Y. Supp. 956.

[k] (N. Y. 1891) In an action to restrain the maintenance of an elevated railroad in front of plaintiff's premises, plaintiff cannot recover for past damages caused by such elevated railroad while the premises were owned by plaintiff's grantor, and assigned to plaintiff by his grantor, as defendant would be deprived of its right to jury trial as to such past damages.—Siefke v. Manhattan Ry. Co., 59 N. Y. Super. Ct. (27 Jones & S.) 444, 14 N. Y. Supp. 763.

[l] (N. Y. 1891) Const. art. 6, § 8, as amended Jan. 1, 1870, provides that "the legislature shall have the same powers to alter and regulate the jurisdiction and proceedings in law and equity as they have heretofore possessed." Code Civ. Proc. § 970, provides that, "where a party is entitled by the constitution or by express provision of law to a trial by jury of one or more issues of fact," the court must, on motion, cause "those issues to be distinctly and plainly stated for trial accordingly." Laws 1891, c. 208, amending this section, extends this right so as to embrace all actions "where one or more questions arise on the pleadings as to the value of property or as to the damages which a party may be entitled to recover." *Held*, that such amendment is not unconstitutional, as granting a right of trial by jury in cases formerly within the cognizance of courts of equity.—Eggers v. Manhattan Ry. Co. (Super. N. Y.) 18 N. Y. Supp. 181, 27 Abb. N. C. 463, 21 Civ. Proc. R. 403; Underhill v. Same (Sup.) 18 N. Y. Supp. 43, 27 Abb. N. C. 478, 21 Civ. Proc. R. 441.

[m] (N. Y. 1891) Under Code Civ. Proc. § 970, providing that, where a party is entitled by the constitution or by express provision of law to a trial by jury of one or more issues of fact, the court must, on motion, cause those issues to be distinctly and plainly stated for trial accordingly, as amended by Laws 1891, c. 208, extending that right so as to embrace all actions where one or more questions arise on the pleadings as to the value of the property or as to the damages which the party may be entitled to recover, does not apply to the question of fee damage which it is necessary for the court to determine, in order to grant the relief demanded, in an action praying for an injunction against the construction of an elevated railway and asking for a judgment for past damages.—Eggers v. Manhattan Ry. Co. (Super. N. Y.) 18 N. Y. Supp. 181, 27 Abb. N. C. 463, 21 Civ. Proc. R. 403; Underhill v. Same (Sup.) 18 N. Y. Supp. 43, 27 Abb. N. C. 478, 21 Civ. Proc. R. 441.

[n] (N. Y. 1891) Under Laws 1891, c. 208, amending Code Civ. Proc. § 970, providing that, where one or more questions arise on the pleadings as to the value of property or as to the damages which a party may be entitled to recover, those issues shall, on motion, be distinctly and plainly stated for trial by jury, in an action against an elevated railroad company for injunction and damages, presenting an issue as to past damages, such issue comes within the amendment, and, on a motion to that effect, must be tried by a jury.—Eggers v. Manhattan Ry. Co. (Super. N. Y.) 18 N. Y. Supp. 181, 27 Abb. N. C. 463, 21 Civ. Proc. R. 403.

[o] (N. Y. 1892) Code Civ. Proc. § 970, as amended by Laws 1891, c. 208, providing that where a party is entitled by the constitution or by express provision of law to a trial by jury of one or more issues of fact, in an action not specified in section 968, or where one or more questions arise on the pleadings as to the value of property or as to damages which a party may be entitled to recover, either party may have an order directing such issues to be stated for trial by jury, does not entitle defendant, in an action to restrain the running of his elevated road, and for damages, to such order as a matter of right, but the granting of such an order rests in the sole discretion of the court.—Shepard v. Manhattan Ry. Co., 131 N. Y. 215, 30 N. E. 187; Levingston v. New York El. R. Co., 131 N. Y. 600, 30 N. E. 189.

[p] (N. Y. 1893) Where, in an action for equitable relief only against several defendants, the court found that no grounds therefor existed against any of defendants, but that plaintiff was entitled to damages at law against one of defendants for breach of contract, the court properly refused to submit the case to the jury.—Hawes v. Dobbs (Com. Pl.) 18 N. Y. Supp. 123.

[q] (N. Y. 1893) Where a plaintiff, suing for specific performance, fails to make out a case entitling him to equitable relief, he has no right to have the case tried as an action at law for damages, especially where, before the trial, the defendant's motion for a jury trial has been refused.—Lochmann v. Meehan, 66 Hun, 633, 21 N. Y. Supp. 389.

[r] (N. Y. 1894) In an action by an abutting property owner to restrain the future maintenance of an elevated railroad, and to recover damages for its maintenance in the past, defendant is not entitled to a jury trial as to damages which accrued when plaintiff had only a part interest in the property, the right of action for which she acquired by assignment from the other co-tenants.—Hunter v. Manhattan Ry. Co., 141 N. Y. 281, 36 N. E. 400.

[s] (N. Y. 1894) In an action against an elevated railroad company for an injunction and damages, plaintiff is not entitled to a jury trial

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on the question of past damages, though he obtained the right to such damages by assignment.—Klipstein v. New York El. R. Co., 8 Misc. Rep. 457, 28 N. Y. Supp. 683.

[t] (Wash. 1894) In a suit for equitable relief and damages, the court is not obliged, on request of a party, to call a jury to assess damages.—Wintermute v. Carner, 8 Wash. 585, 36 Pac. 490.

[u] (Wash. 1895) Where one purchases a business, and takes possession thereof, under a contract that the purchase price shall be deposited in a bank till it is determined whether the seller or another person claiming to own the business is entitled thereto, and that, in the event of its being determined that the seller is the owner, the money shall be paid to him, but, if found that the claimant is the owner, the money shall be returned to the purchaser, and the purchaser is afterwards made a party defendant to a suit by the claimant to be declared the owner, and for damages for the conversion of the good will of the business, he is not entitled as of right to a jury trial on the question of damages.—Murray v. Okanogan Live Stock & Dressed Beef Co., 12 Wash. 259, 40 Pac. 942.

§ 44. —— Partition.

[a] (Mo. 1894) In partition, where there is an issue between two defendants as to which is entitled to one undivided half of the land, and the decision of that issue depends on a finding as to the alleged title by adverse possession of one of the parties, a trial by jury as to that issue should be granted, when asked.—Benoist v. Thomas, 121 Mo. 660, 27 S. W. 609.

[b] (Mo. 1895) On issues in an action for partition by heirs as to whether gifts to the parties by deceased were advancements, or absolute gifts, there is no absolute right to trial by jury.—Gunn v. Thruston, 130 Mo. 339, 32 S. W. 654.

[c] (N. Y. 1875) Although an action for partition is an equitable action, yet, under Code, § 448, a jury trial is a matter of right where issues of fact are presented by the pleadings.—Hewlett v. Wood, 62 N. Y. 75.

[d] (N. Y. 1881) Where, in an action for partition, there were a large number of defendants and many separate appearances, and where the case presented four distinct issues of fact, two of which affected distinct parts of the property, and the other two affected undivided shares in the whole of the remainder, *held*, that though the cause could be better tried by reference than in any other way, yet, if any of the parties objected to a reference, the case should go to a jury; but, except as to the issues raised by claim of ownership of two pieces of the property, a compulsory reference might be ordered, and the action might be severed, so as to try separately before a referee the issues as to the remainder of the property, the title to which was not in dispute.—Cassedy v. Wallace, 61 How. Prac. 240.

[e] (N. Y. 1881) Under Laws 1853, c. 238, an heir at law may maintain an action for partition of a testator's lands, and declare void a devise under which the widow is in occupation thereof. In such action, the issues may, by timely demand, be tried by jury. Accordingly, the law does not contravene the constitutional inhibition of trial of title in an action of partition.—Ward v. Ward, 23 Hun, 431; Wager v. Wager, Id. 439.

[f] (N. Y. 1889) Code Civ. Proc. § 1544, which provides that an issue of fact in a partition case shall be triable by a jury, applies only to issues of fact denying plaintiff's right to maintain the action, and not to issues involving long accounts between the co-tenants, arising from a contract among them to improve the land and share the expense in the ratio of their respective interests, and such issues may be tried by a referee.—Brown v. Brown, 52 Hun, 532, 5 N. Y. Supp. 803.

[g] (N. C. 1875) Issues in a statutory proceeding for a partition are triable by a jury.—Covington v. Covington, 73 N. C. 168.

[h] (Pa. 1873) Where, in a suit for partition, the possession of the plaintiff, who was one of the tenants in common, is disputed by the others, an issue should be framed, and the facts found by the jury.—Harding v. Devitt, 10 Phila. 95, 30 Leg. Int. 416.

[i] (S. C. 1892) In an action of partition, defendant is entitled to a jury trial of the issues as to the title as made by the pleadings; and, unless the same is waived, it is error to frame an issue out of chancery and submit it to a jury.—Capell v. Moses, 36 S. C. 559, 15 S. E. 711.

[j] (S. C. 1894) In an action by the widow of intestate against the administrator, who claims as sole heir, for partition of land, defendant is entitled to a jury trial, under Code, § 274, of the question whether plaintiff is the widow of deceased.—Osborne v. Osborne, 41 S. C. 195, 19 S. E. 494.

§ 45. —— Quieting title and determination of adverse claims.

[a] (Minn. 1891) On the trial of an action, which was brought to determine adverse claims to real property, and to cancel and set aside, with the record thereof, certain deeds and mortgages relating to the same, the plaintiffs were not entitled, as a matter of strict right, to the verdict of a jury upon any question of fact.—Roussain v. Patten, 46 Minn. 308, 48 N. W. 1122.

[b] (N. J. 1873) Quiet occupation under claim of title entitles the occupant to an issue at law to try the validity of an adverse claim under P. L. 1870, p. 20, "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same," though the adverse claimant is a tenant in common.—Powell v. Mayo, 24 N. J. Eq. (9 C. E. Green) 178.

§ 46. —— Foreclosure of liens and mortgages.

Issue of fraud, see ante, § 41.
Question of title, see ante, § 42 [c, f, g].
Set-off and counterclaim, see ante, § 40.

[a] (Iowa, 1891) In an action to foreclose a mechanic's lien, where the owner claims to have conveyed the land before the lien was filed, he has no right to have the cause transferred to the law calendar to have a trial by jury on the account only.—Frost v. Clark, 82 Iowa, 298, 48 N. W. 82.

[aa] (Kan. 1868) In an action on a note for foreclosure of a mortgage securing it and determination of the priority of liens, the defendant is entitled, on demand, under section 274, Civ. Code, to have the issues tried by a jury, where there has been no reference made under section 292.—Clemenson v. Chandler, 4 Kan. 558.

[b] (Ky. 1888) Under Civ. Code, § 12, providing that "in an equitable action * * * either party may by motion have the case transferred to the ordinary docket for the trial of any issue concerning which he is entitled to jury trial, but either party may re-

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quire every equitable issue to be disposed of before such transfer," the issue as to the value of an attorney's services is transferable to the ordinary docket, to be tried by jury, in an action to enforce his lien, and recover for professional services; the equitable issue as to lien depending upon the result of the legal issue as to the value of the services.—Hill v. Phillips' Adm'r, 87 Ky. 169, 7 S. W. 917.

[c] (N. Y. 1840) Where the defendant, in a suit to foreclose a mortgage, alleged that the mortgage was usurious, on the ground that the mortgagor had been compelled, as a condition of the loan, to purchase property of the mortgagee at a price far exceeding its value, it was *held* to be a proper case for awarding an issue.—New Orleans Gaslight & Banking Co. v. Dudley, 8 Paige, 452.

[d] (N. Y. 1891) Laws 1885, c. 342 (Mechanic's Lien Act), provides that the manner and form of instituting and prosecuting actions to foreclose mechanics' liens shall be the same as in actions to foreclose mortgages (there being no right to a trial by jury in such actions). Code Civ. Proc. § 970, as amended by Laws 1891, c. 208, provides that where one or more questions arise on the pleadings "as to the value of property, or as to the damages which a party may be entitled to recover," either party may apply for an order directing "all such" issues to be stated for trial. *Held* that, in an action to foreclose a mechanic's lien, a party is only entitled to a trial by jury on the questions of the value of the property and damages, and not as to extra work done under the contract, or as to whether an alleged agreement was made subsequent to the contract, or as to payments.—Riggs v. Shannon (Com. Pl.) 16 N. Y. Supp. 939, 27 Abb. N. C. 456, 21 Civ. Proc. R. 434.

[e] (Ohio, 1884) One who has purchased a part of mortgaged property, accepting a deed requiring him to pay as a part of the purchase price a specified proportion of the mortgage debt, is not entitled, in the foreclosure suit, to a trial by jury of the issue formed by his answer admitting the acceptance of the deed, but denying the assumption of any part of the mortgage debt.—C. S. & L. Ass'n v. Kreitz, 41 Ohio St. 143.

§ 47. —— Cancellation and reformation of instruments.

Issue of fraud, see ante, § 41 [c].

[a] (Ky. 1888) In an action to set aside a deed for mental incompetency of the grantor and fraud of the grantee, brought by one as next friend, an affidavit by the grantor was filed, asking for the dismissal of the action as brought against his will, denying his incompetency, and alleging that the deed was given for a valuable consideration. The motion to dismiss being overruled, he asked leave to file an answer setting up substantially the same facts, which was also refused. *Held*, that the grantor, having thus put in issue the fact of his incompetency, was entitled to jury trial of that issue, and a writ of inquiry should have been issued.—Howard v. Howard, 87 Ky. 616, 9 S. W. 411, 1 L. R. A. 610.

[b] (Mass. 1876) Whether the plaintiff in a bill in equity to reform an insurance policy by inserting a stipulation alleged to have been agreed to by the parties thereto can have issues framed for a jury is not a matter of right, but wholly at the discretion of the court.—Ross v. New England Mut. Ins. Co., 120 Mass. 113.

§ 48. —— Creditors' bill and fraudulent conveyances.

[a] (Mass. 1884) Defendant in a suit in equity, under St. 1875, c. 235, for the collection of a debt out of property alleged to have been fraudulently conveyed to him, is entitled to a jury, on the issue of the fraud in the conveyance.—Powers v. Raymond, 137 Mass. 483.

[b] (Mass. 1887) In a suit in equity to set aside a compromise made by defendant with his creditors, on the ground that their assent was obtained by fraud, *held* that, irrespective of the question whether defendant had a constitutional right to a trial by jury, the court, in the exercise of its discretion, should, on defendant's motion, frame issues for a jury, the case being in effect substantially a common-law case, wherein, but for the fact that, under Pub. St. c. 151, § 3, it was brought in equity, a trial by jury might have been had.—Merchants' Nat. Bank v. Moulton, 143 Mass. 543, 10 N. E. 251.

[c] (Minn. 1860) Unless a conveyance carries upon its face the evidence of fraudulent intent, every question of that kind arising under Pub. St. c. 51, relating to fraudulent conveyances, must be submitted to a jury.—Filley v. Register, 4 Minn. 391 (Gil. 296), 77 Am. Dec. 522.

[d] (Mo. 1886) The attaching creditor, in answer to an interplea claiming the attached goods by virtue of a chattel mortgage, set up that the mortgage was executed by the debtor to defraud and hinder his other creditors. *Held*, that the issue was properly triable by a jury, and did not require a transfer of the case to equity.—Caruth-Byrnes Hardware Co. v. Wolter, 91 Mo. 484, 3 S. W. 865.

[e] (S. C. 1887) A complaint in equity was filed, praying that a sale of choses in action, and an assignment for the benefit of creditors, made by an insolvent, be set aside. An order was made referring the case to the master to take testimony and report upon all the issues. Defendant claimed the right to have certain issues referred to a jury. *Held*, that the reference to the master was properly ordered.—Pelzer v. Hughes, 27 S. C. 408, 3 S. E. 781.

§ 49. —— Injunction and abatement of nuisances.

Issue of damages, see ante, § 43.

[a] (Ga. 1878) Where the only issue made by the answer to a mandamus nisi is the fact that a bill in equity has been filed asking that a judgment plaintiff who applied for the mandamus be enjoined, so that the sole question, made under Code, § 3201, is as to the equity of the bill, the court may determine such question without a jury; and, where the decision that the bill has no equity is correct, the judgment making the mandamus absolute will not be reversed.—City of Brunswick v. Dure, 60 Ga. 457.

[b] (Mich. 1887) An action was brought to enjoin, as a nuisance dangerous to public health, a dam which had been in existence for over 40 years on the property of the defendant, who also held deeds for the land overflowed by the mill pond. The only evidence returned to the appellate court in proof of the nuisance was an indictment and conviction of defendant's grantors for the maintenance of said dam, nearly 30 years before. *Held*, that defendant was entitled to a jury trial.—Ronayne v. Loranger, 66 Mich. 373, 33 N. W. 840.

[c] (N. H. 1889) Under Laws 1887, c. 77, §§ 1, 2, giving the supreme court jurisdiction in equity, on information or petition, to enjoin or abate as a common nuisance the use of any building for the sale of liquors, defendant is entitled to a trial by jury to ascertain the fact of the nuisance before it can be abated in equity.—State v. Currier, 66 N. H. 622, 19 Atl. 1000.

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[d] (N. Y. 1872) The defendant in an application for an injunction has no absolute right to have the facts on which plaintiff's claim for relief depends tried by jury, since it is discretionary with the court to determine for itself the questions of fact on which the right to equitable relief demanded may depend.—Colman v. Dixon, 50 N. Y. 572.

[e] (N. Y. 1884) An action brought by the people against a telegraph company charged with maintaining unlawfully its poles in a public street is an action to abate a nuisance, and, an issue of fact being joined, is triable before a jury.—People v. Metropolitan Telephone & Telegraph Co., 31 Hun, 596.

[f] (N. Y. 1886) Code Civ. Proc. § 968, provides that in certain actions, including actions for a nuisance, an issue of fact must be tried by a jury unless the jury trial is waived or a reference directed. Section 970 provides that where a party is entitled by express provision of law to a trial by jury of one or more issues of fact, in an action not specified in section 968, he may apply, upon notice to the court, for an order directing all the questions arising upon those issues to be distinctly and plainly stated for trial. *Held*, in an action for the abatement of a nuisance, the recovery of damages, and a perpetual injunction, that plaintiff was entitled as a matter of right to a jury trial on the question of nuisance or no nuisance.—Cogswell v. New York, N. H. & H. R. Co., 54 N. Y. Super. Ct. (22 Jones & S.) 92.

[g] (N. Y. 1887) Construing Code Civ. Proc. § 968, providing that, in an action for a nuisance, the issues of fact must be tried by a jury, unless a jury is waived, in connection with section 1660, providing that an action for a nuisance may be maintained at common law, an equitable action to restrain the continuance of a nuisance, or an action for a nuisance in which equitable relief is asked, is not an action for nuisance within section 968.—Cogswell v. New York, N. H. & H. R. Co., 105 N. Y. 319, 11 N. E. 518, reversing (1886) 54 N. Y. Super. Ct. (22 Jones & S.) 92.

[h] (N. Y. 1889) An action to enjoin as a nuisance the keeping of bees on premises adjacent to plaintiff's dwelling house, and for damages on account of such nuisance, is not within Code Civ. Proc. § 968, providing that in certain actions, including an action "for a nuisance," the issues of fact must be tried by a jury, and in such an action defendants are not entitled to a jury trial as matter of right.—Olmsted v. Rich, 53 Hun, 638, 6 N. Y. Supp. 826; following (1887) Cogswell v. Railroad Co., 11 N. E. 518.

[i, j] (N. Y. 1891) In an action for damages to real property caused by an elevated railroad in the street in front thereof, and to restrain the further maintenance of the structure and the passage of trains upon it, the complaint alleged that the trains made "so much noise as greatly to interfere with the enjoyment" of the property, and that the locomotives emitted "foul gases, smoke, and cinders, which are a nuisance," and that thereby the value of the property had greatly deteriorated. *Held* that, so far, at least, as damages were claimed, the action was for a nuisance, and to that extent must be first tried by a jury, under Code Civ. Proc. § 968, subd. 2, providing for the trial by jury of an issue of fact in an action for a nuisance; the other issues then to be tried before the court.—Cornell v. New York El. R. Co., 59 Hun, 625, 13 N. Y. Supp. 511.

[k, l] (N. Y. 1896) A complaint alleged that defendants' works, used in supplying steam to various customers, were located near a house owned by plaintiff, that defendants' operations were so negligently conducted as to constitute a nuisance by tainting the air, and the manner in which the injury was occasioned to plaintiff's premises was specified. The complaint also alleged that plaintiff did not have an adequate remedy at law. The relief prayed for was that defendant be enjoined from operating its works in any manner so as to produce the effects complained of, and that plaintiff recover damages already sustained. *Held*, that the action was not for a nuisance within Code Civ. Proc. § 968, which provides that in an action for a nuisance an issue of fact must be tried by a jury, as section 1660, providing that an action for a nuisance may be maintained in any case where such action might have been maintained under the laws in force immediately before the Code took effect, refers only to the common-law action of nuisance, which was either for damages or to abate the nuisance.—Goldschmidt v. New York Steam Co. (Sup.) 40 N. Y. Supp. 109.

[m] (Ohio, 1876) Under Code, § 263, a jury trial may be had upon "issues of fact arising in actions for the recovery of money," even though equitable relief is asked, as here, to enjoin the defendant from further violating an agreement not to practice medicine in a certain town.—Brundridge v. Goodlove, 30 Ohio St. 374.

[n] (Ohio, 1894) Where the existence of a nuisance is clearly shown, in an action to enjoin it, relief will not be denied because its existence has not been determined by a jury called to aid the court, or in an action for damages.—McClung v. North Bend Coal & Coke Co. (Com. Pl.) 31 Wkly. Law Bul. 9.

§ 50. —— Insolvency and receiverships.

[a] (Ga. 1881) Where a receiver files exceptions of fact to the auditor's report on his account, he is entitled to a jury to pass upon them.—Akers v. Veal, 66 Ga. 302.

[b] (Tex. 1896) In proceedings for accounting by a receiver, instituted by motion in the action in which he was appointed, he is entitled to have tried by jury issues of fact arising on exceptions to the master's report.—Hamm v. J. Stone & Sons Live Stock Co., 13 Tex. Civ. App. 414, 35 S. W. 427.

§ 51. —— Specific performance.

Issue of damages, see ante, § 43 [g, h, i, q].

[a] (Mo. 1860) A case for the specific performance of a parol contract for the conveyance of land is required by law to be tried by the court, and it is therefore discretionary with it whether any issues shall be submitted to a jury.—McCullough v. McCullough, 31 Mo. 226.

[b] (N. Y. 1824) In a suit to compel a conveyance, where the title appears doubtful, and the doubt arises from questions of fact, it is a proper case for an issue at law, and an issue thereon should accordingly be directed to a jury.—Seymour v. De Lancey, Hopk. Ch. 436, 14 Am. Dec. 552.

§ 52. Joinder of legal and equitable issues.

As waiver of jury, see post, § 187.
Effect of prayer for personal judgment in foreclosure suit, see post, § 69 [q, t, u].
In action involving title to land, see ante, § 42.
In answer in legal action, see post, § 59 [i].
Injection of equitable issues into legal action, see post, § 53.

[a] (Cal. 1893) Plaintiff is not entitled to a jury in an action to recover money, it being asked that the assignment thereof be set aside for fraud and undue influence; the case being

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one of equitable cognizance.—Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317.

[b] (Ind. 1886) In a suit for partition and to quiet title, a jury may be demanded as matter of right.—Kitts v. Wilson, 106 Ind. 147, 5 N. E. 400.

[c] (Ind. 1888) Under the rule that, if any essential part of a cause is exclusively of equitable cognizance, the whole is drawn into equity, a suit on a promissory note, and to set aside a conveyance as fraudulent, need not be submitted to a jury generally as an action at law.—Towns v. Smith, 115 Ind. 480, 16 N. E. 811.

[d] (Ind. 1892) Under Rev. St. 1881, § 409, providing that in case of the joinder of actions, which were formerly of exclusive equitable jurisdiction, with causes of action which were formerly designated as actions at law, and were triable by a jury, the former shall be triable by the court and the latter by a jury, the parties to an action to set aside a deed and for partition of certain lands are entitled to have the issue as to the partition tried by a jury.—Abernathy v. Allen, 132 Ind. 84, 31 N. E. 534, following Kitts v. Willson (1886) 106 Ind. 147, 5 N. E. 400.

[e] (Ky. 1855) Where both legal and equitable defenses are relied upon, the former should be tried by the jury.—Petty v. Malier, 54 Ky. (15 B. Mon.) 591.

[f] (Mo. 1888) Where issues both of legal and equitable cognizance are so blended as to make the entire action properly an equitable one, it is not error to refuse a trial by jury.—Kortjohn v. Seimers, 29 Mo. App. 271.

[g] (N. Y.) In an action on a policy, the plaintiffs claimed under it for a loss, alleged facts showing an error in making it out, and demanded judgment for the loss and such further judgment as might be proper and necessary for the recovery. *Held*, that both legal and equitable relief was prayed for, and that the cause should have gone to the circuit, to a jury, where the relief could have been granted by the court, and the cause then submitted to a jury.—(1859) New York Ice Co. v. Northwestern Ins. Co., 31 Barb. 72; (1860) Id., 20 How. Prac. 424, 10 Abb. Prac. 34.

[h] (N. Y.) An action on a policy of insurance, also praying for a reformation of the policy as ancillary to the action at law, should go to the circuit court for trial by jury, to be submitted after the court had determined the right to the equitable relief prayed for.—(1859) New York Ice Co. v. Northwestern Ins. Co., 31 Barb. 72; (1860) Id., 20 How. Prac. 424, 10 Abb. Prac. 34.

[i] (N. Y. 1863) Where, in case of a breach of trust, the fund remains land, and the plaintiff frames his action to seek specific, equitable relief, joining, as defendants with the trustees, third persons who claim an interest in the land, and pending the action the plaintiff files a supplemental complaint, in which he alleges that the land has meanwhile been converted into money, and claims a judgment for damages, as well as all the relief asked in the original complaint, not inconsistent therewith, the action is still triable by the court without a jury.—Currie v. Cowles, 22 N. Y. Super. Ct. (9 Bosw.) 642.

[j] (N. Y. 1863) By uniting in one action claims for an accounting in respect to both real and personal property, plaintiff deprives himself of the right, if there is one, in respect to the personal property, to have the action tried by jury.—Moffat v. Moffat, 23 N. Y. Super. Ct. (10 Bosw.) 468; Same v. Mount, 17 Abb. Prac. 4.

[k] (N. Y. 1871) Where legal and equitable causes of action are at issue in one cause, all the issues, unless referred or a jury trial waived, must be tried by a jury.—People v. Albany & S. R. Co., 5 Lans. 25.

[l] (N. Y. 1878) Where the allegations in the complaint make out a case for equitable relief, and certain of them make out a case as to some defendants for legal relief, the issues joined as to the first are to be tried at special term by the court without a jury, and, if it fails, and leaves the issues joined as to some defendants as to the second, those should be tried by a jury; and this though the complaint is, as to the legal cause, in form an action in equity, and prays for equitable relief.—Hennequin v. Butterfield, 43 N. Y. Super. Ct. (11 Jones & S.) 411.

[m] (N. Y. 1891) In an action by assignors of a contract to do certain work for a city to recover money due thereon in excess of the indebtedness as security for which the contract was assigned, the city was made a party, as well as the assignee, and an injunction was asked to restrain it from paying over to the assignee money which the city held, owing on the contract. *Held*, that the case was one of equitable jurisdiction, proper for trial by the court instead of by a jury.—Titman v. Twelfth Ward Bank, 58 Hun, 610, 12 N. Y. Supp. 634.

[n] (N. Y. 1891) Plaintiff, a vendee of real estate, took from the vendors an assignment of all their right to any damages arising from operation of defendants' elevated railroad in front of the premises conveyed. In an action against defendants, she asks for an injunction in case of nonpayment of the damages to the fee, and those incidental thereto, for the past damages accruing after the reception of her title, and also for the assigned damages sustained by her grantors. *Held*, that the cause of action was strictly legal as to the assigned damages, which had been severed from the realty, and in no way connected with her equitable right to an injunction in case of nonpayment of future damages, and that defendants were entitled to a trial by jury in respect of the legal cause of action, without regard to the joinder of the two causes of action in one suit.—Sommer v. New York El. Ry. Co., 60 Hun, 148, 14 N. Y. Supp. 619.

[o] (N. Y. 1891) An action for both legal and equitable relief in respect of the same cause of action is not, as of right, triable by jury.—Bergman v. Manhattan Ry. Co., 59 N. Y. Super. Ct. (27 Jones & S.) 566, 14 N. Y. Supp. 384.

[p] (N. Y. 1891) A complaint for malicious prosecution averred that plaintiff had executed a release extorted by duress, and asked to have it canceled. *Held*, that the action was equitable.—Stono v. Weiller, 128 N. Y. 655, 28 N. E. 653, affirming Stone v. Same (1890) 57 Hun, 588, 10 N. Y. Supp. 828.

[pp] (Ohio, 1861) On a petition containing two counts,—the first at law under Code, § 122, on an account for lumber sold, and the second to enforce a mechanic's lien on defendant's house,—a jury trial may be had on the first count, under Code, § 263, providing that a jury trial may be had of "issues of fact arising in actions for the recovery of money."—Clippenger v. Ross, 2 Ohio Dec. 562, 3 West. Law Month. 645.

[q] (Ohio, 1877) In an action for an injunction and for an account depending on the right to an injunction, neither party has the right to a jury.—Converse v. Hawkins, 31 Ohio St. 209.

[r] (S. C. 1888) In an action for the recovery and partition of real estate, the former cause of action must, as required by Code Civ. Proc. § 274, be tried by a jury, and is not a case for "issues from chancery." If it is determined in favor of plaintiffs, the court on its equity side

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may then decree partition.—Reams v. Spann, 28 S. C. 530, 6 S. E. 325.

[s] (S. C. 1895) The fact that, in an action by an attorney for fees, it is also sought to impose a lien on a certain fund, does not entitle plaintiff to have the question as to the value of the services tried to the court.—Wilson v. York Tp., 43 S. C. 299, 21 S. E. 82; Same v. Catawba Tp., Id.; Same v. Cherokee Tp., Id.; Same v. Ebenezer Tp., Id.

[t] (S. C. 1895) Where the issues raised by pleadings are partly legal and partly equitable, it is not error to deny a motion to have all the issues tried by jury, though the right exists to have purely legal questions so tried.—City Council of Greenville v. Ormond, 44 S. C. 119, 21 S. E. 642.

[u] (Wash. 1892) In an action for divorce, where plaintiff joins as defendants persons to whom she claims her husband has fraudulently conveyed his property, and asks that the conveyance be set aside, that she may have alimony out of the property, under Code Proc. § 776, dispensing with jury trials in divorce cases, defendants have no right to have the issue of conspiracy to defraud plaintiff tried by a jury.—Prouty v. Prouty, 4 Wash. 174, 29 Pac. 1049.

§ 53. Injection of equitable issues into legal action.

[a] (N. Y. 1864) Code, § 275, provides that "the relief granted to a plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but, in any other case, the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue." *Held*, that while such section is intended to relieve a plaintiff from any technical objection that he has not prayed for the precise relief which, as it appears upon the trial, he is entitled to, it cannot be construed to enable plaintiff, by merely alleging in his complaint grounds of equitable relief, and failing to establish them, to secure a trial of an action for fraud without a jury, in violation of the constitution and of section 253 of the Code.—Bradley v. Aldrich, 40 N. Y. 504, 100 Am. Dec. 528.

[b] (N. Y. 1877) A plaintiff, by stating in his complaint an action of a distinctly equitable character, cannot deprive defendant of a jury trial, where the case is otherwise proper for a jury.—Davison v. Jersey Co. Associates, 71 N. Y. 333.

[c] (N. Y. 1880) A party cannot be deprived of his right to trial by jury, by the other party uniting with a cause of action at law allegations which, if proved, would entitle him to ancillary equitable relief.—Brady v. Cochran, 23 Hun, 274.

§ 54. Legal defense to equitable action.

Issue of fact, see ante, §§ 39–51.
—— *of fraud, see* ante, § 41.

[a] (Iowa, 1878) On a defense of alteration, defendant is not entitled to a jury trial in a foreclosure suit, which is an equitable proceeding, under Code 1873, § 2509.—Clough v. Seay, 49 Iowa, 111.

[b] (Kan. 1882) The fact that defendant in an action to quiet title sets up as a defense a cause of action in the nature of ejectment does not entitle him to a jury trial.—Larkin v. Wilson, 28 Kan. 513.

[c] (N. Y. 1873) While courts of equity, under the old English practice, assumed a remedial jurisdiction over claims of dower, yet, where the right to dower was contested, such courts have uniformly held that the question of right must be tried at law, and therefore, in an action for admeasurement of dower, the defense to which was that plaintiff had, by an antenuptial agreement, released her claim to dower, the defendant was entitled to a trial by jury.—Kinne v. Kinne, 2 Thomp. & C. 398.

[d] (Ohio, 1887) Where plaintiff sets out an equitable cause of action, and no issue of fact is taken on his averments, but defendant sets up new matter constituting a legal cause of action, which, if established, will extinguish the case made in the petition, such legal cause of action is triable by jury.—Sallady v. Webb, 2 Ohio Cir. Ct. R. 553.

[e] (S. C. 1895) A defense to an equitable action, to give the defendant the right to a jury trial, must exist separately from plaintiff's cause of action.—McLaurin v. Hodges, 43 S. C. 187, 20 S. E. 991.

§ 55. —— Set-off or counterclaim.

As issue of fact, see ante, § 40.

[a] (Ind. 1895) In an action to foreclose a mechanic's lien, when defendant sets up a counterclaim growing out of the same transaction, the whole controversy is drawn into equity, and defendant is not entitled to a trial by jury.—Reichert v. Krass, 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835.

[b] (Neb. 1893) A defendant to an equity suit is not entitled, as a matter of right, to a jury for the trial of a counterclaim for damages, which he has voluntarily pleaded.—Morrissey v. Broomal, 37 Neb. 766, 56 N. W. 383.

[c] (N. Y. 1880) In an action by C. against J. for a dissolution and accounting, J.'s answer averred that C. had, by appropriating the good will to himself, violated a provision in the articles that the good will should be sold to such partner as should bid the highest price; that the same was worth $200,000, and J. asked to counterclaim this against any sum found due to C. J. set up, as a further counterclaim, a fraudulent appropriation by C. of partnership funds. *Held*, that these matters presented no proper counterclaim, under Code, § 974. They showed no distinct cause of action entitling J. to a trial by jury, and were proper items to be proved on an accounting.—Cook v. Jenkins, 79 N. Y. 575.

[d] (S. C. 1896) In a suit to foreclose a mortgage given to secure the purchase price of machinery, defendant is not entitled to a trial by jury on a counterclaim for damages arising from a breach of warranty.—Sullivan Hardware Co. v. Washington, 47 S. C. 187, 25 S. E. 45.

§ 56. —— Payment and limitation.

As issue of fact, see ante, § 39 [q].

[a] (Cal. 1885) A plea of limitation does not convert an equitable action to determine conflicting claims to land into a legal action, so as to give defendant a right to a trial by jury.—Hancock v. Plummer, 66 Cal. 337, 5 Pac. 514.

[b] (Iowa, 1869) In an action on an account there were fourteen items under eight different dates, and two credits. The account was all on one side, and no discovery sought. The defenses were denial, payment, and the statute of limitations. *Held*, that the defendant was entitled to a trial by jury, of which he could not be deprived by a reference of the account without his consent.—McMartin v. Bingham, 27 Iowa, 234, 1 Am. Rep. 265.

[c] (Iowa, 1896) An answer in an action in equity to foreclose a mortgage, pleading payment and the statute of limitations as defenses, does not entitle defendant to a jury trial.—Leach v. Kundson, 97 Iowa, 643, 66 N. W. 913.

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[d] (N. C. 1872) A plaintiff, in an action to recover possession of land alleged that the defendant held a bond for title under a former owner now dead, and had made payments in part for the land, and that said former owner had devised the land to a daughter, who conveyed to the plaintiff. The defendant answered that by payments in money, and in property and services which were to be taken as money, he had paid in full for the land. Plaintiff replied that the alleged payments were not payments, but items in an account which were barred by the statute of limitations. A reference was ordered, and the referee reported that the defendant had made partial payments exceeding his indebtedness for the land. Exceptions were filed and sustained, on the ground that the items allowed were barred by the statute. *Held*, that these proceedings involved a misconception of the issue. The proper issue was whether the defendant paid his vendor in full or partially, and, if partially, how much, and should have been trial by a jury.—Eubanks v. Mitchell, 67 N. C. 34.

§ 57. —— Usury.

As issue of fact, see ante, § 46 [c].

[a] (Iowa, 1878) Under Code 1873, § 2509, providing that an action on a note, together with a mortgage or deed of trust, for the foreclosure of the same, shall be by equitable proceedings, an issue as to usury may be tried in certain proceedings without the intervention of a jury.—Clough v. Seay, 49 Iowa, 111.

[b] (N. Y. 1847) Though the maker of a mortgage which is usurious and a cloud upon his title has a right, under the act of 1837, to come into the court of chancery for the purpose of having the mortgage canceled, he is not entitled to an injunction to prevent the mortgagee from trying the question of usury before a jury, in a suit at law upon the bond, unless a discovery is necessary, or some other obstacle exists to the making of the defense at law.—Hartson v. Davenport, 2 Barb. Ch. 77.

[c] (N. Y. 1876) An action to foreclose certain mortgages to which usury was pleaded as a defense is a purely equitable action, and the framing of issues to a jury is in the discretion of the court, and not a matter of right.—Knickerbocker Life Ins. Co. v. Nelson, 8 Hun, 21.

§ 58. —— Denial of execution of writing.

[a] (Cal. 1890) In an action to foreclose a mortgage, defendant is not entitled to a jury trial as a matter of course, though judgment is asked for any deficiency, and the execution of the note is denied.—Downing v. Le Du, 82 Cal. 471, 23 Pac. 202.

[b] (Kan. 1890) In an action on a promissory note secured by a chattel mortgage, where a personal judgment against defendant is prayed for, and the execution of the note is denied under oath, defendant is entitled to a jury.—State Journal Co. v. Commonwealth Co., 43 Kan. 93, 22 Pac. 982.

§ 59. Equitable defense to legal action.

See ante, § 35 [d].

[a] (Cal. 1886) Where, in an action of ejectment, the cross complaint of defendant sets up the defense, and makes a case involving the application of equitable doctrines, and seeks relief that only a court of equity can give, the defendant is not entitled to a jury trial.—Fish v. Benson, 71 Cal. 428, 12 Pac. 454.

[b] (Cal. 1895) In ejectment, wherein defendant alleged that the instrument under which plaintiff claims was in fact intended as a mortgage, the fact that the answer closed with a prayer that it be "adjudged that plaintiff is not the owner of the property described," does not render the defense an equitable one, so as to deprive defendant of his right to trial by jury.—Locke v. Moulton, 108 Cal. 49, 41 Pac. 28.

[c] (Ind. 1891) Where, in an action to rescind a sale of land, the defendant, by cross complaint, seeks to recover possession of the land and quiet his title thereto, a demand that the issues be tried by the court should not be granted, since the issue in the cross action is properly triable by jury.—Ross v. Hobson, 131 Ind. 166, 26 N. E. 775.

[d] (Ind. 1893) In an action to quiet title to an undivided half of a certain lot, defendants filed a cross complaint setting up title to the entire lot under sheriff's deed executed pursuant to a sale to satisfy a mechanic's lien, and also claiming to own a judgment lien against the property; and the relief prayed was that their title be quieted, or, in default of such relief, that they have a lien on the lot for the money paid by them, and that the undivided half be sold to satisfy the same. *Held*, that such cross complaint was an action to quiet title simply, which is triable by jury.—Jennings v. Moon, 135 Ind. 168, 34 N. E. 996.

[e] (Ind. 1893) Where an action to quiet title, which is triable by jury, was joined in a cross complaint with one to declare a lien, which is triable by the court, it was not error to refuse defendants' demand to have all the issues raised thereby tried by the court.—Jennings v. Moon, 135 Ind. 168, 34 N. E. 996.

[f] (Iowa, 1885) Where an action of trespass is brought by a party claiming title to land used as a right of way against a railroad company so using it, and the company files a cross petition, setting up that the records of the condemnation proceedings have been lost, and demanding equitable relief, the action is to be considered an equitable proceeding, and the case is not properly triable by a jury.—Marling v. Burlington, C. R. & N. R. Co., 67 Iowa, 331, 25 N. W. 268.

[g] (Ky. 1853) Where, in an action commenced by ordinary proceedings, the defendant's answer makes an issue cognizable in equity, this should be tried in the manner prescribed in cases of equitable proceedings; but if the answer makes an issue not cognizable in equity, and the equitable defense has been adjudged insufficient, such issue must be referred to the jury, unless trial by jury has been waived.—Smith v. Moberly, 54 Ky. (15 B. Mon.) 70.

[h] (Mo. 1877) Under Wag. St. p. 109, §§ 13, 15, a proceeding by sci. fa. against a surety on an administrator's bond differs from no other suit, as to the right to try issues of fact by a jury, although an equitable defense is set up.—Wolff v. Schaeffer, 4 Mo. App. 367, affirmed (1881) 74 Mo. 154.

[i] (Mo. 1883) Where an answer in ejectment combines a legal with an equitable defense, plaintiffs may demand a jury.—Grayson v. Weddle, 80 Mo. 39.

[j] (Mo. 1884) The right to a trial by jury is not lost by filing an equitable answer.—Moline Plow Co. v. Hartman, 84 Mo. 610.

[k] (Mo. 1894) An action for recovery of money is an action at law, to be tried by a jury, though fraud is pleaded as a defense.—Routt v. Milner, 57 Mo. App. 50.

[l] (Mo. 1895) Where, in ejectment, the answer is a virtual admission of plaintiff's legal right to possession, but undertakes to avoid it by showing that it was held by plaintiff in trust for defendant, and asks affirmative relief, the case is converted into an equity one, in which

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neither party is entitled to a jury.—O'Day v. Conn, 131 Mo. 321, 32 S. W. 1109.

[m] (N. Y. 1889) Where the complaint states two legal causes of action, the only defense to one of which is a general denial, the plaintiff is, as to that issue at least, entitled to a jury trial, though an equitable defense to the other cause of action is interposed.—Beary v. Hoster, 53 Hun, 632, 6 N. Y. Supp. 330.

[n] (Ohio, 1895) Where the issues made upon the petition are triable by a jury, the filing of cross petitions, which, though equitable in their nature, do not supersede or extinguish the case made in the petition, will not require a trial by the court.—Cincinnati, H. & D. R. Co. v. Morris, 10 Ohio Cir. Ct. R. 502, 3 Ohio Dec. 479.

[o] (Ohio, 1896) Where an equitable cross demand was set up in the answer in an action for the recovery of specific real property and damages for its wrongful detention, and affirmative relief is demanded, the issue arising on the cross petition and reply was not a right triable by jury, under Rev. St. § 5130.—Gill v. Pelkey, 54 Ohio, 348, 43 N. E. 991.

[p] (S. C. 1882) A defendant is not deprived of the right to have a purely legal claim set up by plaintiff tried by a jury by the fact that his answer sets up an equitable defense.—Smith v. Bryce, 17 S. C. 538.

[q] (S. C. 1884) In an action for the recovery of real property, defendant set up as a defense that plaintiff had agreed to convey to her the land, and also another tract, upon payment of a stated amount, and had subsequently taken such other tract in full payment of the amount so stipulated. *Held*, that this defense raised an equitable issue, which should have been decided by the judge himself.—Brownlee v. Martin, 21 S. C. 392.

[r] (S. C. 1889) In an action to recover personal property which plaintiffs claim under a mortgage, the condition of which is alleged to have been broken, where the defenses are (1) a general denial, (2) plea of purchase for valuable consideration and without notice of the mortgage, and (3) payment of the mortgage debt, only legal issues are raised, under Gen. St. § 1776, which provides that mortgages not recorded are null as against subsequent purchasers; and it is error to set aside a verdict for plaintiffs, and order a new trial, on the ground that the answer sets up an equitable defense, which is triable only by the court.—Gregory v. Ducker, 31 S. C. 141, 9 S. E. 780.

[s] (S. C. 1895) In a suit on a bond, where the allegations in the answer involve fraud and mistake in an account, it is not error to deny a motion to have the cause submitted to a jury, the issues being purely equitable.—City Council of Greenville v. Ormand, 44 S. C. 116, 21 S. E. 641.

§ 60. —— Examination of long account.

[a] (N. Y. 1874) Where a plaintiff's right to claim interest does not depend upon an examination of accounts mentioned in the answer, but rests upon a question of fact determinable from evidence extrinsic of the accounts, the case is not one involving an examination of a long account, so as to deprive plaintiff of the right to a jury trial on the issue of his right to interest.—Ronalds v. Mechanics' Nat. Bank, 37 N. Y. Super. Ct. (5 Jones & S.) 208.

[b] (N. Y. 1887) Code, § 974, provides that, when a defendant interposes a counterclaim, the mode of trial of an issue of fact arising thereon is the same as if it arose in an action brought by the defendant against the plaintiff for the cause of action stated in the counterclaim and demanding the same judgment. Section 968 provides that an issue of fact shall be tried by a jury, unless a jury trial is waived or a reference is directed. To a complaint to recover on a contract of indemnity defendant set up two counterclaims,—the first alleging that the agreement relied on in the complaint was obtained by fraud and asking judgment that it be canceled; the second realleging the ground of the first counterclaim and demanding a money judgment for damages. *Held* that, notwithstanding section 974, it is apparent from the pleadings that the examination of a long account will be involved in the trial, and the action, being of an equitable nature, will be tried by the court.—Robinson v. New York, L. E. & W. R. Co., 55 N. Y. Super. Ct. (23 Jones & S.) 152.

[c] (N. Y. 1887) If the action disclosed by the complaint is triable by jury, the fact that the answer or counterclaim involves the examination of a long account cannot make the entire cause referable.—Untermeyer v. Bernhauer, 105 N. Y. 521, 11 N. E. 847.

[d] (N. Y. 1889) A complaint which alleges that defendants had plaintiff's brokers buy stocks for plaintiff, and received payment from them; that it was agreed that the stock was to be held subject to plaintiff's order until a certain date without further payment; and that before such date defendants converted the stock to their own use.—is in form for a conversion, and a compulsory reference cannot be had, even though the answer sets up a defense which may involve the examination of a long account.—Fiero v. Paulding, 53 Hun, 633, 6 N. Y. Supp. 122.

[e] (N. Y. 1893) Defendant does not waive his right to a jury trial on the issues presented by the complaint and answer, and entitle plaintiff to a compulsory reference, by setting up a counterclaim, in addition to his defense, involving the examination of a long account.—Chu Pawn v. Irwin, 73 Hun, 182, 25 N. Y. Supp. 871.

§ 61. Interpleader or intervention.

[a] (Cal. 1885) Since the effect of an intervention is to add new parties for the purpose of determining all conflicting claims to the matter in controversy, and does not affect the nature of the action, or interfere with the trial, where plaintiff, in ejectment, desires a jury trial, the filing of an intervention praying equitable relief will not affect his right to a jury.—Reay v. Butler, 7 Pac. 669.

[b] (Ill. 1888) Where an intervening petition is filed to enforce an equitable lien on a fund in the chancery court, the defendant, by answering to the merits, submits the issue to the court, and is bound by its action. It is wholly within the discretion of the chancellor whether or not the issue should be submitted to a jury.—South Park Com'rs v. Phillips, 27 Ill. App. 380.

[c] (Mo. 1887) In an action in which an interpleader will not lie, where a bill in the nature of a bill of interpleader is filed, neither party is entitled to a jury as a matter of right.—Grand Lodge Order of Hermann-Soehne v. Elsmer, 26 Mo. App. 108.

[d] (N. Y. 1895) An action at law becomes one in equity by interpleader proceedings, and neither party is entitled to a jury as a matter of right.—Dinlay v. McCullagh, 92 Hun, 454, 36 N. Y. Supp. 1007.

§ 62. Particular proceedings in equitable actions.

[a] (Ga. 1857) An order dissolving an injunction and directing a credit on a fi. fa. which was admitted by the plaintiff is not a decree requiring the intervention of a jury.—Cardin v. Jones, 23 Ga. 175.

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[b] (Ga. 1879) A chancellor does not violate the constitutional right of trial by jury in pronouncing judgment without the intervention of a jury, upon receiving an auditor's report that is not excepted to and presents no issue for a jury to try.—Cook v. Houston County Com'rs, 62 Ga. 223.

[c] (Ga. 1894) In the absence of statute, one excepting to an auditor's report, on the ground that the report of the evidence is incomplete, is not entitled, as of right, to have the question tried by jury.—Faircloth v. Stubbs, 94 Ga. 126, 21 S. E. 282.

[d] (Md. 1896) Code, art. 16, § 194, authorizing the court of equity, on failure of a purchaser at a trustee's sale to comply with his bid, to direct the property to be resold, and to order the payment by the purchaser of any deficit on the resale from the amount of his bid, does not violate Const. art. 15, § 6, providing that the trial by jury in courts of law shall remain inviolate.—Capron v. Devries, 83 Md. 220, 34 Atl. 251.

[e] (N. C. 1867) Code, c. 41, § 129, providing that, where a purchaser at a judicial sale ordered by the court fails to pay the purchase money, a judgment may be entered against him by the court, after giving such purchaser 10 days' notice of application therefor, is not in conflict with the declaration of rights, which provides that in all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the people, and ought to remain sacred and inviolate, since such proceeding is merely a substitute of the original power of a court of equity to proceed in such cases by attachment.—Ex parte Cotten, 62 N. C. 79.

§ 63. —— Contempt proceedings.

See post, § 139.

[a] (Iowa, 1886) The fact that the act constituting the contempt of an injunction to abate a liquor nuisance is also a crime under the statute does not entitle defendant to a jury trial. —Manderscheid v. Plymouth County Dist. Ct., 69 Iowa, 240, 28 N. W. 551.

[b] (Kan. 1891) A party charged with contempt for the violation of an injunction is not of right entitled to a jury trial.—State v. Durein, 46 Kan. 695, 27 Pac. 148.

[c] (N. D. 1895) One charged with contempt of court under Laws 1890, c. 110, § 13, relating to liquor nuisances, and to contempts of court for violating injunctional orders in actions to abate the same, is not entitled to have the charge tried by a jury.—State v. Markuson, 5 N. D. 147, 64 N. W. 934.

[d] (S. C. 1894) Where land is sold on foreclosure, and the purchaser, having obtained possession of part only, obtains from the court a rule requiring the mortgagor to show cause why he should not be punished for contempt, and why the sheriff should not eject him, the question whether the land so retained by the mortgagor passed under the sale is for the court.—Ex parte Boyce, 41 S. C. 201, 19 S. E. 495; Dacus v. Smith, Id.

[e] (S. D. 1892) The constitutional provision that "the right of trial by jury shall remain inviolate" does not entitle to a jury trial one prosecuted for contempt because of his violation of an order enjoining the sale of intoxicating liquors.—State v. Mitchell, 3 S. D. 223, 52 N. W. 1052.

§ 64. —— Rights of occupying claimants.

In actions in general, see post, § 87.

[a] (U. S.) Const. U. S. Amend. 7, provides that "in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved." The occupying claimant law of Ohio provides that an occupying claimant of land shall not be evicted or turned out of possession until he shall be fully paid the value of all lasting and valuable improvements made by him previous to receiving actual notice, by the commencement of suit, of a superior claim of title; the value of such improvements to be determined by commissioners appointed by the court. *Held*, that the recovery of the value of improvements by an occupying claimant was within the contemplation of such constitutional provision, and therefore such occupying claimant law, in so far as it provided for the ascertainment of the value of improvements by commissioners, would not be enforced in the federal courts, according to the procedure in the state court; but as the recovery for such improvements would be cognizable in equity, the federal courts will treat the proceeding as one in equity and appoint commissioners to value the improvements.—(1829) Bank of Hamilton v. Dudley, 27 U. S. (2 Pet.) 492, 7 L. Ed. 496; (1830) Parsons v. Bedford, 28 U. S. (3 Pet.) 433, 7 L. Ed. 732.

[b] (U. S. 1880) The fact that the value of the improvements, and of the use and occupation, in ejectment under Rev. St. Conn. p. 362, § 17, are to be determined by the court upon equitable principles, does not deprive the plaintiff of a right to trial by jury, in contravention of the inhibition in the state constitution. —Griswold v. Bragg (C. C.) 48 Fed. 519.

§ 65. Effect of removal from state to federal court.

[a] (U. S. 1867) In an action in a state court in Ohio, where the distinction between actions at law and suits in equity is abolished, and the action must always be brought in the name of the real party in interest, the defendant removed the cause into the federal court, whereupon the plaintiffs, by leave of the court, filed a bill in equity setting up the same cause of action, supposing (as it would seem) this to be necessary in that court, inasmuch as they were the equitable owners only of the drafts sued on. *Held* that, as the action was maintainable in the names of the plaintiffs as a legal action in the state court, it was equally maintainable in their names as a legal action when removed into the federal court, and that the plaintiffs had no right to deprive the defendant of a trial by jury by transferring what was really an action at law into a suit in equity.—Thompson v. Railroad Companies, 73 U. S. (6 Wall.) 134, 18 L. Ed. 765.

(b) PARTICULAR ACTIONS OR PROCEEDINGS.

IN GENERAL, § 66.
ACTIONS FOR THE RECOVERY OF MONEY ONLY OR OF SPECIFIC REAL OR PERSONAL PROPERTY, § 67.
ACCOUNTING AND SETTLEMENT, § 68.
ESTABLISHMENT AND FORECLOSURE OF LIENS OR MORTGAGES, § 69.
ENFORCEMENT AND ADMINISTRATION OF TRUSTS, § 70.
CANCELLATION AND REFORMATION OF INSTRUMENTS, § 71.
ESTABLISHMENT OF LOST OR DESTROYED INSTRUMENTS, § 72.
CREDITORS' SUIT AND SUITS TO SET ASIDE FRAUDULENT CONVEYANCES, § 73.
INSOLVENCY AND RECEIVERSHIPS, § 74.
QUIETING TITLE AND DETERMINATION OF ADVERSE CLAIMS, § 75.
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— CORPORATE ACTS AND PROCEEDINGS, § 79.
SPECIFIC PERFORMANCE, § 80.
OPENING OR SETTING ASIDE JUDGMENTS OR DECREES, § 81.
ENFORCEMENT OF JUDGMENTS OR AWARDS, § 82.
PROPERTY RIGHTS OF MARRIED WOMEN, § 83.
Particular proceedings in equitable actions, see ante, §§ 62–64.

§ 66. In general.

[a] (Idaho, 1889) An action under Act Jan. 30, 1885, whose object is not only to try the title to an office of which there are several claimants, but to oust a usurper and subject him to punishment by fine, is of legal and not of equitable cognizance, and the parties are entitled to trial by jury of the issues raised therein.—People v. Havird, 2 Idaho, 498, 25 Pac. 294, 10 L. R. A. 831.

[b] (Ill. 1889) Act July 1, 1883 (Starr & C. Ann. St. 1348), providing that whenever any association organized on the assessment plan, for the benefit of the representatives of deceased members, makes false reports required by statute, or conducts its business fraudulently, the attorney general shall institute proceedings to remove the officers, or dissolve the association, is not unconstitutional, as depriving corporations of the right of trial by jury, in that it transfers the jurisdiction of suits to dissolve corporations from courts of law to courts of equity.—Chicago Mut. Life Indemnity Ass'n v. Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549.

[c] (Ind. 1884) A suit on a guardian's bond is not an equitable, but a common law, suit, wherein a trial by jury is a matter of right.—Galway v. State, 93 Ind. 161.

[d] (Ind.) An action to contest a will is a statutory action, and is triable, as of right, by a jury.—(1886) Lamb v. Lamb, 105 Ind. 456, 5 N. E. 171; (1887) Deig v. Morehead, 110 Ind. 451, 11 N. E. 458.

[e] (Ind. 1890) In an action by one of several sureties on a note, who had been compelled to pay it, against a co-surety for contribution, the complaint alleged that the principal and the other sureties were, at the time of payment and since, insolvent, and had not, then or since, any property subject to execution. *Held*, that these allegations did not render the cause one of "exclusive equitable jurisdiction," within the provision of Rev. St. 1881, § 409, that such causes should be tried by the court; and it was properly tried by a jury.—Michael v. Albright, 126 Ind. 172, 25 N. E. 902.

[f] (Ind. 1891) Since Code, § 251, requires all suits to be brought in the name of the real party in interest, whether his title be legal or equitable, the right of the assignee of a chose in action to sue thereon does not depend on principles of equity jurisprudence, but on the express terms of the statute; and hence, in an action for rent accruing, which has been assigned to plaintiff, it is not error to grant a trial by jury.—McCoy v. Oldham, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208.

[g] (Iowa, 1877) An action for rent against a party claiming no title to the premises is an action at law, entitling defendant to trial by jury.—Bardwell v. Clare, 47 Iowa, 297.

[h] (Me. 1868) The libelee in a libel to annul a marriage is not entitled to a trial by jury under Const. art. 1, § 20.—Coffin v. Coffin, 55 Me. 361.

[i] (Minn. 1873) An action was brought to recover the value of certain wheat alleged to have been delivered by the bailee in excess of the quantity deposited with it by defendant, and converted by defendant. *Held*, that such action was a case at law, within Const. art. 1, § 4, entitling defendant to a jury trial.—St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132 (Gil. 99), 18 Am. Rep. 334.

[j] (N. M. 1889) An action on a contract by which plaintiff delivered to defendant's intestate a number of sheep, to receive in return, at the end of a fixed period, a quantity of wool, is not of an equitable nature, requiring relief in chancery, so as to deprive a party of a trial by jury.—Lewis v. Baca, 5 N. M. 289, 21 Pac. 343.

[k] (N. Y. 1859) An action to recover penalties for the violation of fire laws, and for the removal of buildings improperly constructed, is not an action in its nature equitable, but seeks relief at law. It is therefore within the constitutional guaranty of a jury trial.—Fire Department v. Harrison, 2 Hilt. 455, 17 How. Prac. 273, 18 How. Prac. 181, 9 Abb. Prac. 1.

[l] (N. Y. 1878) An action by a stockholder to compel the company to transfer his stock upon its books is purely one of equitable cognizance, and the defendant cannot demand a trial by jury.—Cushman v. Thayer Mfg. Jewelry Co., 7 Daly, 330, affirmed (1879) 76 N. Y. 365, 32 Am. Rep. 315.

[m] (Ohio, 1861) In a civil action on an account for lumber sold by plaintiffs to defendant, the issue must be tried by a jury, as it is a law action.—Clippenger v. Ross, 2 Ohio Dec. 562.

§ 67. Actions for the recovery of money only or of specific real or personal property.

Effect of equitable defense to legal action, see ante, § 59 [k, o, q].
—— *of joinder of legal and equitable issues, see* ante, § 52.
Issue of fact in injunction suit, see ante, § 49 [m].
—— *of fraud, see* ante, § 41 [aa].
—— *of title in partition, see* ante, § 44 [f].
Question of title in general, see ante, § 42.

[a] (Cal. 1891) In an action for the possession of land defendant is entitled to a trial by jury, under Code Civ. Proc. § 592, giving the right to a jury trial "in actions for the recovery of specific real or personal property," and plaintiff cannot deprive him of this right by framing his complaint so as to make the action an equity case, under Id. § 738, providing that an action may be brought by any person against another who claims an interest or estate in real property adverse to him, for the purpose of determining such adverse claim.—Newman v. Duane, 89 Cal. 597, 27 Pac. 66.

[b] (Cal. 1894) An action to enjoin diversion of water and abate defendants' dam and for damages is not an action to recover specific property, or for money due on contract, or for damages for breach of contract, or for injuries, such as, under Code Civ. Proc. § 592, gives the right to a trial by jury.—Churchill v. Baumann, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43.

[c] (Dak. 1889) In a suit to enforce a mechanic's lien, a jury trial is not demandable as a matter of right, under Code Civ. Proc. § 236, providing that an issue of fact for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless waived, but that all other issues are triable by the court, or may be referred: nor under the constitution of the United States, providing that in suits at common law the right of jury trial shall be preserved.—Gull River Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743.

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[d] (Minn. 1880) An action to foreclose a mechanic's lien is not an action for the recovery of money only, and plaintiff therein is not as a matter of right entitled to a jury trial, but it is triable by the court, as provided by Gen. St. 1878, c. 66, § 217.—Sumner v. Jones, 27 Minn. 312, 7 N. W. 265.

[e] (Minn. 1891) An action by the assignee of an insolvent debtor under the insolvent law of 1881, to recover money paid by the debtor to a creditor in payment of an antecedent debt, for the purpose of giving an unlawful preference over other creditors, is an action for the recovery of money only, and either party is entitled to a trial by jury.—Tripp v. Northwestern Nat. Bank, 45 Minn. 383, 48 N. W. 4.

[f] (Minn. 1896) Where the assignee in insolvency brings an action to set aside an execution sale, and to cancel the record of the sheriff's certificate thereof, on the grounds that the judgment and sale thereunder constituted a preference permitted by the insolvent in favor of one of its creditors, the defendant is not entitled to a jury trial, since the action is not one for the recovery of money only, or specific real or personal property, within the meaning of the statute.—Yanish v. Pioneer Fuel Co., 64 Minn. 175, 66 N. W. 198.

[g] (Mo. 1887) Plaintiff alleged that defendant had a contract with the city for street paving, and that defendant contracted with plaintiff to take charge of the work for one-fourth the profits; that plaintiff had performed his agreement, and defendant had failed to pay him one-fourth the profits; and that there is due plaintiff from defendant, on a just accounting, a certain sum, for which he asked judgment. *Held*, that the action was one for money, and not for an accounting or for equitable relief, and was triable by jury.—Donovan v. Barnett, 27 Mo. App. 460.

[h] (Neb. 1884) A proceeding to foreclose a mechanic's lien is equitable in its nature; and a party thereto is not entitled to a trial by jury, under Code Civ. Proc. § 280, which provides that issues of fact arising in actions for the recovery of money or of specific real or personal property shall be tried by a jury.—Dohle v. Omaha Foundry & Machine Co., 15 Neb. 436, 19 N. W. 644.

[i] (N. Y. 1857) An action to recover from an insurer the amount of a loss, founded upon an agreement to insure and deliver a policy, and a loss before delivery of the policy, being for the recovery of money only, is one which the Code requires to be tried by a jury.—Rockwell v. Hartford Fire Ins. Co., 4 Abb. Prac. 179.

[j] (N. Y. 1860) An action between partners for a dissolution and a settlement of the partnership affairs is not an action for the recovery of money only, which must be tried by a jury; but it is a suit which would formerly have been a suit in chancery, in which the court had power to order a feigned issue, and in which, under the Code, an order may be made for the trial of any questions of fact which are in issue.—O'Brien v. Bowes, 17 N. Y. Super. Ct. (4 Bosw.) 657.

[k] (N. Y. 1885) Code, § 968, provides that, where judgment for a sum of money is demanded, there must be a jury trial, and also in ejectment and certain other enumerated actions, and that other issues of fact must be tried by the court. *Held*, that the nature of the demand affords the test, and that, if a money demand is secondary to a demand for equitable relief, the case is for the court.—Clark v. Blumenthal, 52 N. Y. Super. Ct. (20 Jones & S.) 355.

[l] (N. Y. 1887) Where an action is not in form one of ejectment, but is such in substance, defendants are entitled to a jury trial.—New York Life Ins. & Trust Co. v. City of New York, 6 N. Y. St. Rep. 656.

[m] (N. Y. 1887) An action by an administratrix against the executors of an estate for part of a year's salary due plaintiff's intestate, who was one of the executors, is a pure money demand, and within the provisions of Code Civ. Proc. § 968, providing that an action in which the complaint demands judgment for money only must be tried by a jury, unless same is waived or a reference is directed.—Wood v. Simonson, 12 N. Y. St. Rep. 512.

[n] (N. Y. 1888) A complaint alleging that plaintiff recovered a judgment against a general partnership, on which execution was issued and returned unsatisfied, and that defendant, a special partner, fraudulently withdrew the assets contributed by him, together with alleged profits, although demanding a judgment against defendant as a general partner to the amount of money wrongfully withdrawn by him, states an equitable cause of action in the nature of a creditor's bill, and not an action to recover a money judgment only, which, under Code Civ. Proc. § 968, would entitle the parties to a jury trial.—Bell v. Merrifield, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436.

[o] (N. Y. 1888) A complaint asking that the surplus received by a mortgagee from mortgaged securities be paid over to the legatee of the mortgagor demands a judgment for money only, within Code Civ. Proc. § 968, and so calls for a trial by jury.—King v. Van Vleck, 109 N. Y. 363, 16 N. E. 547.

[p] (N. Y. 1888) Under Code Civ. Proc. § 968, providing that in actions in which the complaint demands judgment for a sum of money the issues of fact must be tried by a jury, an action to recover assessments ordered by a court of another state having jurisdiction, on account of unpaid stock subscriptions, must be brought to trial at a jury term.—Glenn v. Lancaster, 109 N. Y. 641, 16 N. E. 484, affirmed (1888) 21 Abb. N. C. 272.

[q] (N. Y. 1890) A complaint demands equitable relief, and not a judgment for a sum of money only, within Code Civ. Proc. § 968, providing what issues are triable by jury, which states that a chattel mortgage purporting to secure a debt due the defendant was made in trust for her by the plaintiff's husband, induced by undue influence, and that it has been foreclosed, and the proceeds appropriated by the defendant; the prayer being that he be required to account for the amounts received, with interest, and that the chattel mortgage be adjudged null and void.—Krenzle v. Miller, 57 Hun, 592, 10 N. Y. Supp. 635.

[r] (N. Y. 1891) Under Code Civ. Proc. § 968, providing that, in actions in which the complaint demands judgment for a sum of money only, the issues of fact must be tried by a jury, an action against executors of a deceased partner, to recover from his estate the amount of promissory notes made by the firm, on the ground that the surviving partners are insolvent, is properly placed on the circuit calendar for trial by a jury.—Bowery Bank v. Martin, 61 Hun, 625, 16 N. Y. Supp. 73.

[s] (N. Y. 1896) On a complaint alleging that defendant, while acting as plaintiff's attorney, received certain chattels and money, and fraudulently retained the same for his own use, demanding judgment that defendant account for money and property, that plaintiff recover damages for breach of contract, and for such other relief as might be equitable, the cause of action is equitable, and triable by the court without a jury.—Laufer v. Sayles, 5 App. Div. 582, 39 N. Y. Supp. 377.

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[t] (Ohio, 1862) Under Code, § 263, providing that in an issue of fact arising in an action for the recovery of money either party has the right to demand a trial by jury, the right to a trial exists in an action for money between two firms in part composed of the same members, though the action involves the exercise of chancery jurisdiction.—Riddle v. McBeth, 2 Ohio Dec. 606.

[u] (Ohio, 1866) Code, § 557, provides that an action may be brought by any person in possession by himself or tenant of real property against any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse estate or interest. *Held*, that an action by a party claiming the legal title and possession of real estate to determine the interest of a party claiming an estate therein adverse to him, and to enjoin such party from doing irreparable injury to the property by cutting timber thereon, was not an action "for the recovery of money, or of specific real or personal property," in which the parties are entitled to demand a trial by jury.—Ellithorpe v. Buck, 17 Ohio St. 72.

[v] (Ohio, 1872) In an action for the recovery of money, wherein the only relief prayed for is a money judgment, either party is entitled to a trial by jury, notwithstanding numerous items of account or of claim and counterclaim are involved in the issue.—Averill Coal & Oil Co. v. Verner, 22 Ohio St. 372.

[w] (Ohio, 1877) In an action for partition and an equitable account incident thereto, and not for the recovery of money or specific real property, neither party has the right to demand a jury trial, and an appeal, therefore, lies from the judgment.—Linton v. Laycock, 33 Ohio St. 128.

[x] (Ohio, 1885) An action to compel the return of an insurance policy claimed to have been signed under duress and without consideration is not triable by jury, since it is not an action for the recovery of money or specific personal property, within Rev. St. § 5130, providing for a trial by jury in such actions.—Windhorst v. Wilhelms, 1 O. C. D. 17.

[y] (Ohio, 1888) Where plaintiff administrator alleges that the husband of his intestate received money belonging to her which he promised to invest for her use, on account of which he seeks to recover a judgment for money, either party is, under the Code (Rev. St. § 5130), which provides that issues of fact for the recovery of money only shall be tried by a jury, unless waived, entitled to a trial by jury, and it matters not that before the adoption of the Code the relief would have been by a suit in equity, as the right to trial by jury may be extended but not abridged.—Gunsaullus v. Pettit, 46 Ohio St. 27, 17 N. E. 231.

[z] (Ohio, 1893) Rev. St. § 5130, provides that a jury may be demanded to try any "issues of fact arising in actions for the recovery of money only." *Held*, that an action is not one for the recovery of money only, within the purview of the statute, where to administer full and complete relief therein it is necessary to invoke the equity powers of the court to adjust the accounts between the parties.—Black v. Boyd, 50 Ohio St. 46, 33 N. E. 207.

[zz] (S. C. 1873) An action by a cestui que trust to set aside a sheriff's deed on execution against the trustee personally, on the ground that the land was not subject to such execution, is not an action for the recovery of "specific real property," but is a "matter of equity," and is therefore triable by the court, though a jury may be impaneled in the discretion of the judge.—Price v. Brown, 4 S. C. (4 Rich.) 144.

§ 68. Accounting and settlement.

Action on account, see ante, § 66 [m].

As action for recovery of money only, see ante, § 67 [g, j, q, s, v, z].

Assessment of damages, see ante, § 43 [f].

Equitable defense to legal action, see ante, § 60.

Issues of fact, see ante, § 39 [u].

Joinder of legal and equitable issues, see ante, § 52 [j].

Plea of payment and limitation, see ante, § 56 [b].

Set-off or counterclaim, see ante, § 55 [c].

[a] (Cal. 1861) An ordinary suit at law cannot be sent to a referee against the objection of a party who wishes a trial by jury; and this, even though the trial involves the examination of a long account.—Grim v. Norris, 19 Cal. 140, 79 Am. Dec. 206.

[b] (Ind. 1884) Before the adoption of the Code of 1881, parties were entitled to trial by jury in equitable actions. *Held*, that a party to a suit to settle a partnership was entitled to a jury.—Redinbo v. Fretz, 99 Ind. 458.

[c] (Iowa, 1885) Code 1873, § 2816, authorizing a reference in cases of mutual accounts, is not unconstitutional as depriving the parties of the right to a jury trial, the issue being one of equitable cognizance.—Burt v. Harrah, 65 Iowa, 643, 22 N. W. 910.

[d] (Ky. 1894) An action for damages on a contract involving the value of tools and plant in use, and not paid for; the value of materials on hand or delivered, or ready for delivery subsequent to a given date; the reasonable value of unestimated work done after that date; the amount of 15 per cent. earnings retained; interest from date of breach; and whatever profits plaintiff would have earned had he been permitted to complete the work under the contract,—may be transferred to equity, and referred to a special commissioner, without violation of Const. art. 13, § 8, guarantying the right to trial by jury.—O'Connor v. Henderson Bridge Co., 95 Ky. 633, 27 S. W. 251; Henderson Bridge Co. v. O'Connor, Id.

[e] (Minn. 1869) There are some issues which should under any circumstances be tried by the court or referee. The taking and settling the accounts of a copartnership forms one of those issues, and no court should ever submit it to a jury.—Berkey v. Judd, 14 Minn. 394 (Gil. 300).

[f] (Minn. 1873) Gen. St. 1866, c. 66, § 228, so far as it authorizes a compulsory reference in actions at law where the trial of an issue requires the examination of a long account on either side, is void, as infringing the constitutional guaranty of the right of trial by jury.—St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132 (Gil. 99).

[g] (Minn. 1879) An action involving an adjustment and settlement of mutual accounts, growing out of a common transaction, is one of equitable cognizance, and not triable by a jury.—Garner v. Reis, 25 Minn. 475.

[h] (Minn. 1883) An action for an accounting for property taken and held in trust by defendant for plaintiff, and for a partition of a part thereof, and the appointment of a receiver, is triable by the court, without a jury, as an equitable action.—Judd v. Dike, 30 Minn. 380, 15 N. W. 672.

[i] (Mo. 1874) The present constitutional provision as to the right of trial by jury refers to the right as theretofore existing, and does not inhibit the reference of a long account to an auditor on motion of one and against the ob-

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jection of the other party.—Edwardson v. Garnhart, 56 Mo. 81.

[j] (Mo. 1880) Plaintiffs and defendant, being common carriers and owning connecting lines, agreed in relation to transportation of two cargoes of goods over their lines, estimated on the amount of freights to be collected by each and the profits to be realized on the whole transaction, and struck a balance. Plaintiffs paid defendant in advance what it was estimated would come into their hands by way of collection in excess of their share of the profits. One cargo was subsequently destroyed, whereby part of the estimated profits were not realized. Plaintiffs, claiming that the enterprise was a partnership transaction, sued to recover the amount of their advances and their share of the profits realized, and for an accounting. The answer did not dispute the correctness of the items which entered into the settlement, or the accuracy of the balance ascertained, but denied the partnership, and alleged that defendant's share in the undertaking consisted in the rendering of services to plaintiffs, and that the money paid defendant was for such services. *Held*, that the issues joined were properly triable by a jury, and were not for reference or triable by the court.—Silver v. St. Louis, I. M. & S. Ry. Co., 72 Mo. 194, affirming (1878) 5 Mo. App. 381.

[k] (Neb. 1876) An action upon an account, of legal cognizance, is not referable, if either party claims trial by jury.—Lamaster v. Scofield, 5 Neb. 148.

[l] (Neb. 1895) The fact that a defaulting county treasurer failed to keep his accounts so that it could be ascertained under which of his separate official bonds the defalcation occurred does not entitle the county to an accounting in equity against the sureties on the several bonds, as such sureties are entitled to a trial by jury.—Kuhl v. Pierce County, 44 Neb. 584, 62 N. W. 1066.

[m] (N. H. 1882) Const. art. 20 (Bill of Rights), provides "that in all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, the parties have a right to trial by jury." Gen. Laws, c. 231, § 8, provides that "on the report of an auditor either party may elect to try the cause by the jury." In assumpsit on an account containing 273 items, and the set-off nearly as many more, the case was heard, and report made by an auditor. *Held*, that defendant is not entitled to jury trial on the auditor's report.—Davis v. Dyer, 62 N. H. 231.

[n] (N. Y. 1867) The Code by expressly permitting, even where a long account is involved (section 271), the referee to be confined to passing upon a specific question of fact involved in the issue, and by allowing an account to be taken as a separate matter "for the information of the court," not only authorized, but required, that neither party should be deprived of the benefit of a trial before a court or a jury as to matters not involved in the account.—Wheeler v. Falconer, 30 N. Y. Super. Ct. (7 Rob.) 45.

[o] (N. Y. 1870) Where the complaint states a cause of action which, if true, would entitle plaintiff to recover moneys paid to defendant, who interposes a counterclaim involving the examination of a long account, a reference does not violate Const. art. 1, § 2, guarantying trial by jury.—Townsend v. Hendricks, 32 N. Y. Super. Ct. (2 Sweeny) 503.

[p] (N. Y. 1871) In an action by an attorney for various services, including the management of suits in various courts, the drawing of deeds and other instruments, the examination of the titles to lands, charges for disbursements, etc., including many items, where a general denial is interposed, *held*, that the trial of the issues involves the examination of a long account, and a compulsory reference may be ordered. In such a case, a reference might have been ordered before the adoption of Const. 1846, and a trial by jury is not a matter of right.—Schermerhorn v. Wood, 4 Daly, 158.

[q] (N. Y. 1873) Under the Code of Procedure the court cannot refer the trial of an action, where any issue raised upon the complaint is such that the objecting party has the right to its trial by jury. All the causes of action stated in the complaint must be referable, and the power to refer even actions arising on contract is restricted to cases where the court can see, from the proofs before it, that the examination of a long account will be required.—Evans v. Kalbfleisch, 16 Abb. Prac. (N. S.) 13.

[r] (N. Y. 1878) In an action by some of the owners of a vessel to receive their share of the proceeds of a sale of the vessel made by defendant as their broker, for which, as alleged, he declined to account, the relief sought was an accounting and payment of the plaintiffs' proportionate share. *Held*, that the matter was of equitable cognizance, all the parties being before the court, and that a jury trial was properly refused by the court to the defendant.—Whiton v. Spring, 74 N. Y. 169.

[s] (N. Y. 1887) An action for unliquidated damages for breach of a building contract, which specifies several items of damage, consisting of loss of occupancy, damage to the building, and increased cost of completion, does not involve an account, and either party, on objection to a reference, is entitled to a trial by jury.—Untermeyer v. Bernhauer, 105 N. Y. 521, 11 N. E. 847.

[t] (N. Y. 1887) The complaint of a stockholder of an insolvent bank, suing in his own behalf and for the benefit of the other stockholders, against the directors, alleging that the property of the bank has been stolen and lost through the misconduct, inattention, and negligence of such directors, and asking that the damages resulting therefrom be made good by such directors, is in the nature of a complaint in an equitable action against the directors, as trustees, to call them to account, and such action is properly triable by the court, with the assistance of a jury, upon such questions of fact as the court may refer to them.—Brinckerhoff v. Bostwick, 105 N. Y. 567, 12 N. E. 58, reversed (1887) 43 Hun, 458.

[u] (N. Y. 1888) An action to recover money lost at stock gambling under the guise of purchases and sales of shares of stock and oil certificates, though covering many transactions and numerous items, is not an action involving the examination of a long account, within the meaning of Code Civ. Proc. § 1013, providing for compulsory references.—Willard v. Doran & Wright Co., 48 Hun, 402, 1 N. Y. Supp. 345.

[v] (N. Y. 1888) The right of trial by jury, guarantied by Const. 1846, art. 1, § 2, extends only so far as that right was recognized at the time of the adoption of the constitution; and as it was then the authorized practice to direct a reference in cases involving the examination of a long account, and not requiring the decision of any difficult question of law, a reference of such a case cannot be objected to as unconstitutional.—Shepard v. Eddy, 50 Hun, 601, 2 N. Y. Supp. 534, 15 Civ. Proc. R. 403.

[w] (N. Y. 1889) S., a short time before her death, transferred shares of stock to defendant, with whom she had resided, and who had had charge of her bank account, and made necessary purchases during her sickness. Defendant sold the stock and deposited the proceeds in bank to her own credit. The executor of S. sued to set aside such transfer on the ground of undue

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influence, etc., for an accounting, and to recover the money, or so much as might on the accounting be found due. A temporary injunction issued to restrain defendant from drawing out, and the bank from paying over, the deposit. *Held*, that the case was in equity, and a jury trial was properly refused.—Brigham v. Gott, 51 Hun, 636, 3 N. Y. Supp. 518.

[ww] (N. Y. 1889) An action against the clerk of a county to recover money paid him upon false and fraudulent claims for services and money expended for the county, founded on Code Civ. Proc. c. 16, tit. 1, art. 4, allowing an action in the name of the people for the misappropriation of public property, is an action sounding in tort, in which the defendant is entitled to a trial by jury; and hence the court is not authorized to compel a reference.—People v. Wood, 54 Hun, 438, 7 N. Y. Supp. 712.

[x] (N. Y. 1893) In an action for an accounting by defendant of his agency as manager of plaintiff's business for a term of years, plaintiff alleged that during the agency defendant had rendered accounts, purporting to be true statements of the receipts and disbursements of the business, some of which plaintiff has since learned were untrue; that the items, amounts, and dates of the transactions are known to defendant, but are unknown to plaintiff; that during the agency defendant established a business of his own in opposition to that of plaintiff's, thus allowing plaintiff's business to deteriorate; that defendant converted to his own use certain structures and apparatus belonging to plaintiff, and refused to deliver possession thereof on demand; that because of such acts and omissions by defendant, plaintiff suffered great loss in its business, and incurred large expense, which it seeks to recover when ascertained by a proper accounting. *Held* that, though some of the allegations might afford a remedy by action in tort, the acts complained of being a part of the dealing of an agent with the property of his principal, a case of equitable cognizance is presented; hence a reference was properly ordered.—Empire State Telephone & Telegraph Co. v. Bickford, 72 Hun, 580, 25 N. Y. Supp. 283.

[xx] (Ohio, 1887) On the trial of an action against several defendants, where the plaintiffs in their petition charge upon the defendants a conspiracy to cheat and defraud the plaintiffs, and with thereby procuring and appropriating to their own use a single sum of money which rightfully belongs to the plaintiffs, and which they are entitled to recover, and for which they seek a joint judgment against the defendants, and the answer admits the receipt of a stated sum of money, and is otherwise, in effect, a general denial, either party is entitled to demand a jury, notwithstanding the plaintiffs pray a full discovery, and for an account of the full amount due to them, and to have an equitable lien declared and enforced.—Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736.

[y] (S. C. 1882) Except in cases cognizable in equity under the constitution, a party to a suit has a right to a trial by jury, and cannot, without his consent, be deprived thereof; and the fact that a case involves the consideration of a long account affords no ground for depriving him of this right.—Smith v. Bryce, 17 S. C. 538.

[yy] (Vt. 1881) Where an account of executors and trustees has been allowed by the probate court, and an appeal taken, and the question is merely one of accounting, there is nothing for a jury, and a commissioner is properly appointed to take the account.—In re Weatherhead, 53 Vt. 653.

[z] (Vt. 1893) Under Const. c. 1, art. 12, and chapter 2, § 31, declaring the right to trial by jury when any issue in fact proper for the cognizance of a jury is joined in a court of law, there is no right to trial by jury in an action of book account, it having been the immemorial practice to try such action without a jury.—Hall v. Armstrong, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 866.

[zz] (Wis.) Though Const. art. 1, § 5, provides that the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy, it is competent for the legislature to provide for compulsory reference in actions involving the examination of long accounts, as such reference was provided for in actions of that kind by the territorial laws in force at the time of the adoption of the constitution.—(1842) Norton v. Rooker, 1 Pin. 195; (1863) Mead v. Walker, 17 Wis. 189; (1866) Board of Sup'rs of Dane County v. Dunning, 20 Wis. 210.

§ 69. Establishment and foreclosure of liens or mortgages.

As action for recovery of money only, see ante, § 67 [c, d, h].
As defense in legal action, see ante, § 59 [d, e].
Contempt proceedings, see ante, § 63 [d].
Defense of usury, see ante, § 57.
Denial of execution, see ante, § 58.
Infringement of right, see post, § 207.
Intervention in action, see ante, § 61.
Issue of fact, see ante, § 46.
—— *of fraud, see* ante, § 41 [d].
Joinder with legal issues, see ante, § 52 [pp, s].
Plea of payment and limitation, see ante, § 56 [c].
Question of title, see ante, § 42 [c, f, g].
Set-off or counterclaim, see ante, § 55.
Statutory provision, see ante, § 38 [c, e, f].

[a] (Cal. 1885) A party is not entitled, as a matter of right, to a trial by jury of an action to foreclose a mechanic's lien; it being a proceeding in equity, and the granting or refusing of a jury trial in such cases being entirely within the discretion of the court.—Curnow v. Happy Valley Blue Gravel & Hydraulic Min. Co., 68 Cal. 262, 9 Pac. 149.

[b] (Cal. 1894) In an action in equity to foreclose the lien of an assessment for street improvements, defendant is not entitled to a jury trial, as the action is not on a contract made by him, or which imposes a personal liability on him.—Santa Cruz Rock Pav. Co. v. Bowie, 104 Cal. 286, 37 Pac. 934.

[c] (Conn. 1879) Act 1875, providing that, in a bill for a foreclosure, the petitioner may pray for possession of the land mortgaged, and that the court may, if it grants the foreclosure and finds the petitioner entitled to possession, issue an execution of ejectment for the delivery of the possession to the petitioner, is not unconstitutional, as infringing the right of trial by jury.—Middletown Sav. Bank v. Bacharach, 46 Conn. 513.

[d] (Ind. 1883) In a suit to foreclose a mortgage, there is no constitutional right to a trial by jury.—Carmichael v. Adams, 91 Ind. 526.

[e] (Ind. 1886) Under Rev. St. 1881, § 409, providing that in causes which, before the 18th day of June, were of exclusive equitable jurisdiction, the case should be triable by the court, a suit to foreclose a chattel mortgage is of equitable cognizance, triable by the court, and there is, in such case, no constitutional right to a jury.—Brown v. Russell, 105 Ind. 46, 4 N. E. 428.

[f] (Ind. 1890) An action to foreclose a mechanic's lien is one of equity cognizance, and trial by jury is properly denied.—Albrecht v.

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C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157.

[g] (Ind. 1891) Where a lien on real estate is to be foreclosed, and a specific decree rendered, the entire issue is for trial by the court.—Brighton v. White, 128 Ind. 320, 27 N. E. 620.

[h] (Ind. 1892) A suit to enforce a lien is triable by the court.—Coleman v. Floyd, 131 Ind. 330, 31 N. E. 75.

[i] (Kan. 1886) A jury trial cannot be demanded as a matter of right in an action to recover on a note, and to foreclose a mortgage, where the pleadings admit the right to recover the amount claimed to be due upon the note, and nothing is left in controversy but the right to foreclose the mortgage.—Morgan v. Field, 35 Kan. 162, 10 Pac. 448.

[j] (Mich.) Laws 1882, p. 7 (How. Ann. St. p. 1265), is not unconstitutional because a suit in equity thereunder to enforce a tax lien need not be tried before a jury; the constitutional provision that "the right of trial by jury shall remain" not requiring the extension of the right to new cases.—(1884) State v. Iron Cliffs Co., 54 Mich. 350, 20 N. W. 493; (1885) In re Wayne County Taxes, 54 Mich. 417, 23 N. W. 189.

[k] (Mo. 1885) A suit to subject land to the enforcement of a vendor's lien, being an equitable one, is properly triable by the court, and a jury cannot be demanded therein as a matter of right.—Bronson v. Wanzer, 86 Mo. 408.

[l] (Mo. 1891) In a proceeding to enforce a mechanic's lien, a jury trial is allowable.—Murdock v. Hillyer, 45 Mo. App. 287.

[m] (Mont. 1884) Where suits to foreclose a chattel mortgage and to recover possession of the property are united, under Laws 12th Sess. p. 5, § 9, if the answer admits the mortgagee's right of possession, there is no issue for a jury. —Clark v. Baker, 6 Mont. 153, 9 Pac. 911.

[n] (N. Y. 1877) The complaint herein alleged that defendant was a married woman and possessed of a separate estate, that plaintiff sold to her building materials, and that the same were used for the benefit of her separate estate in the erection of buildings thereon, and judgment was demanded for the amount due, and that her separate estate be applied to the payment of the same, and that for that purpose a receiver thereof be appointed. *Held*, that the action was an action at law, and defendant was entitled to a trial by jury.—Litchfield v. Dezendorf, 11 Hun, 358.

[o] (N. Y. 1894) A proceeding to determine an attorney's lien is one of equitable jurisdiction, and the client is not entitled to a jury trial.—Canary v. Russell, 10 Misc. Rep. 597, 31 N. Y. Supp. 291, 24 Civ. Proc. R. 109.

[p] (Ohio, 1861) In a petition to enforce a mechanic's lien, there can be no jury trial, except on an order directing an issue out of chancery.—Clippenger v. Ross, 2 Ohio Dec. 562.

[q] (Ohio, 1873) In a suit for the foreclosure of a mortgage and for recovery of a personal judgment against defendant for the money due, defendant, under Act Feb. 19, 1864, is entitled to demand a jury trial as a right.—Keller v. Wenzell, 23 Ohio St. 579.

[r] (Va. 1881) A party has no absolute right to a trial by jury of an issue joined on a motion for a mechanic's lien; it being in the nature of an equitable remedy, and Code 1873, c. 163, § 8, not applying to motions which partake of the nature of an equitable proceeding to enforce a charge on real estate.—Pairo v. Bethell, 75 Va. 825.

[s] (Wis. 1861) The practice of uniting the legal cause of action for the mortgage debt with the equitable remedy in foreclosure, rendering the whole an equitable proceeding, existed in this state before the adoption of the constitution, and the parties in such a proceeding cannot now claim a jury trial of the issue upon the debt.—Stilwell v. Kellogg, 14 Wis. 461.

[t] (Wis. 1864) In a foreclosure action, the rendition of a personal judgment for any deficiency by the court without the intervention of a jury, is not an infringement of the right of trial by jury, secured by the constitution.—Connecticut Mut. Life Ins. Co. v. Cross, 18 Wis. 109.

[u] (Wis. 1889) An action to foreclose a lien upon a pledge is of an equitable nature, and not triable by jury, though a personal judgment be entered against the pledgor.—Wilson v. Johnson, 74 Wis. 337, 43 N. W. 148.

§ 70. Enforcement and administration of trusts.

As action for recovery of money only, see ante, § 67 [y].

Involving accounting, see ante, § 67 [g, q].

Joinder with legal issues, see ante, § 52 [i].

[a] (Ind. 1890) An action by a widow against the administrator of her husband's estate to recover her distributive share is of an equitable nature, and cannot be submitted to a jury as an action at law, under Elliott's Supp. § 302, which provides that where claims have been filed against an estate, disallowed, and transferred to the docket for trial, "the trial of such claims shall be conducted as in ordinary civil cases."—Sherwood v. Thomasson, 124 Ind. 541, 24 N. E. 334.

[b] (N. Y. 1863) Questions concerning trust funds belong to a court of equity, and do not require a jury trial, under the clause of the constitution that "trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever."—Sands v. Kimbark, 27 N. Y. 147, affirmed (1863) 39 Barb. 108.

[c] (N. Y. 1893) An action to enforce a provision of a will that defendant, the executrix, should pay plaintiff a sufficient sum to keep him from want, in which the complaint asks, not for a gross sum, but for $20 a week, "or such reasonable sum as may be proper," is an equitable action, and defendant is not entitled to a jury trial.—Burke v. Burke, 5 Misc. Rep. 312, 26 N. Y. Supp. 55, 31 Abb. N. C. 63.

[d] (Ohio, 1859) In an action in the nature of a bill in equity to enforce an express trust and for an account, it is within the discretion of the court to submit any questions to a jury. —Carlisle v. Foster, 10 Ohio St. 198.

[e] (S. C. 1876) An action by the heirs of a decedent to recover from the surety of a late commissioner in equity proceeds of land sold by him for partition is an equitable action, and properly triable by the court without a jury.—Featherston v. Norris, 7 S. C. (7 Rich.) 472.

[f] (S. C. 1895) The liability of a bank for cashing checks drawn by its president, as executor, on a fund deposited in trust for beneficiaries under the will, with knowledge of the nature of the fund, and that he intended to convert it to his own use, can be enforced only in a court of chancery, and a jury trial cannot be demanded as a matter of right.—Knobeloch v. Germania Sav. Bank, 43 S. C. 233, 21 S. E. 13.

§ 71. Cancellation and reformation of instruments.

As action for recovery of money only, or of specific real or personal property, see ante, § 67 [x, zz].

Fraudulent Conveyances, see post, § 73.

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Issues of fact, see ante, § 47.

Joinder with legal issues, see ante, § 52 [a, g, h, p].

[a] (Cal. 1891) Where defendant, in an action under Code Civ. Proc. § 1050, to have determined a claim asserted by defendant against plaintiff on a note, files a pleading which in form and substance is a complaint on the note, asking judgment for the amount claimed thereon, and plaintiff, answering, sets up want of consideration and other defenses, it is error for the court to refuse a demand by plaintiff for a jury trial.—Taylor v. Ford, 92 Cal. 419, 28 Pac. 441, reversing Id., 24 Pac. 942.

[b] (Cal. 1896) In an action to reform a written contract, and to restrain defendant meanwhile from disposing of the subject-matter of the contract, plaintiff is not entitled to a jury trial.—Loftus v. Fischer, 113 Cal. 286, 45 Pac. 328.

[c] (Ind. 1886) An action to set aside a will is, of right, triable by a jury, as it was not one of exclusive equitable jurisdiction prior to June 18, 1852, and not within section 409, Rev. St.—Lamb v. Lamb, 105 Ind. 456, 5 N. E. 171.

[d] (Ind. 1888) Where, in an action on a note and mortgage, defendant's wife filed a counterclaim, alleging that she executed the note and mortgage as surety for her husband, and had acquired the lands by gift from her father, and praying a cancellation of the mortgage, the issue joined is equitable, and a jury should be denied.—Johnson v. Johnson, 115 Ind. 112, 17 N. E. 111.

[e] (Ind. 1892) A complaint by the heirs of M. alleged that while he was of unsound mind defendants, with full knowledge thereof, fraudulently and without consideration induced him to convey lands to them; that he was subsequently adjudged insane, and his guardian disaffirmed the conveyances, and demanded a reconveyance, which was refused. The prayer for relief was for a judgment disaffirming and canceling the deeds, and that the title to the lands might be revested in plaintiffs, freed and discharged from all claims of defendants. Some of the land was in another state, and without the court's jurisdiction. *Held*, that the action was not to quiet title, but was a suit in equity to cancel the deeds, and plaintiffs, having elected to so proceed, were not entitled to a jury trial.—Monnett v. Turpie, 132 Ind. 482, 32 N. E. 328.

[f] (Mo. 1859) Where a plaintiff seeks the annulment of deeds, on the ground that they were obtained by duress and violence, the cause must be tried by the court, and not by the jury.—Bray v. Thatcher, 28 Mo. 129.

[g] (Mo. 1859) Where the object of a suit is to set aside conveyances of land and procure reconveyances, on the grounds of violence and fraud in obtaining them, the cause is properly tried by the court, and not by the jury.—Bray v. Thatcher, 28 Mo. 129.

[h] (N. Y. 1857) An action to set aside an assignment as fraudulent and void is properly triable by the court without a jury, where the facts are undisputed; the only question being whether, on the facts, the assignment was void.—Wilson v. Forsyth, 16 How. Prac. 448.

[i] (N. Y. 1890) An action wherein the complaint seeks to have set aside, on the ground of fraud, a release to defendant of all liability for causing plaintiff's arrest, and to recover damages for malicious prosecution, is for equitable relief, and is not triable by jury.—Stone v. Weiller, 57 Hun, 588, 10 N. Y. Supp. 828.

[j] (N. Y. 1894) In an action to adjudge a note and chattel mortgages void on the ground of usury, where defendant denies the usury and prays judgment against plaintiff, it is not error to deny plaintiff's motion to frame issues for the jury on the counterclaim, as, when defendant has answered plaintiff's proof, he has also established his case.—Hayes v. Bainbridge, 79 Hun, 611, 30 N. Y. Supp. 148.

[k] (Ohio, 1875) Plaintiff, having paid the whole of a sum called for by a written contract in ignorance of an alleged mistake therein, brought suit for the reformation of the contract, at the same time asking for a money judgment for the amount of his overpayment. The only issue of fact raised by the pleadings was as to his right to have the contract reformed. *Held*, that neither party was entitled to demand that such issue should be tried by a jury.—Ellsworth v. Holcomb, 28 Ohio St. 66.

[l] (Ohio, 1895) In an action by the grantor to cancel a deed on the ground that it was executed under duress, neither party is entitled to a jury trial of the issues joined by a denial of the petition.—Commercial Nat. Bank v. Wheelock, 52 Ohio St. 534, 40 N. E. 636, 49 Am. St. Rep. 738.

§ 72. Establishment of lost or destroyed instruments.

[a] (Ill. 1883) Rev. St. 1874, c. 116, known as the "Burnt Records Act," which provides for the establishment by a court of equity of titles to land, the record of which has been destroyed by fire, is not unconstitutional, as depriving parties of the right to trial by jury.—Heacock v. Lubuke, 107 Ill. 396.

[b] (Ill. 1884) Const. 1818 provides that "the right of trial by jury shall remain inviolate." Const. 1848 provides that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy." Const. 1870 provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate." *Held*, that Rev. St. 1874, c. 841, known as the "Burnt Records Act," which provides for the establishment of titles, the record of which has been destroyed by fire, by a suit in equity, is not unconstitutional, as depriving the parties of a right to trial by jury, since such a suit is of equitable cognizance, and is not embraced within the scope of the constitutional provisions.—Heacock v. Hosmer, 109 Ill. 245.

[c] (Ill. 1886) In Illinois, in a proceeding under the burnt records act (2 Starr & C. Ann. St. c. 116), a jury trial is not contemplated by the statute, and is not indispensable.—Culver v. Colehour, 115 Ill. 558, 5 N. E. 89.

[d] (Ill. 1892) The burnt records act (Rev. St. 1891, c. 116, §§ 6–29), which empowers courts of equity without a jury trial to establish title to land where the records have been destroyed, is not unconstitutional, as interfering with the right of trial by jury, even though the effect of a decree confirming title under said act is the same as that of a judgment in ejectment.—Harding v. Fuller, 141 Ill. 308, 30 N. E. 1053; Same v. Skinner, Id.; Same v. Donlan, Id., following (1884) Heacock v. Hosmer, 109 Ill. 245.

[e] (Ind. 1894) Rev. St. 1843, pp. 499, 500, § 78, provides that whenever any will shall have been lost or destroyed, and the fact is established by a court of chancery, the decree of such court shall be recorded by the clerk of the proper probate court. Rev. St. 1894, § 412 (Rev. St. 1881, § 409), provides that issues of law and fact in causes that prior to 1852 were of exclusive equitable jurisdiction shall be tried by the court. *Held*, that a jury trial could not be demanded as a matter of right in an action to establish a lost will.—Wright v. Fults, 138 Ind. 594, 38 N. E. 175.

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[f] (Kan. 1866) Act Feb. 9, 1864, to restore the records of Douglas county, which had been destroyed by fire, is not unconstitutional, because a trial by jury is not authorized to determine what records had existed before the fire.—Kimball v. Connor, 3 Kan. 414.

[g] (Mo. 1871) The rule that in equitable suits a jury will not be called as a matter of right applied in a suit alleging the cancellation and delivery of a note by mistake, and asking for relief, brought under the Missouri Code of Procedure.—Well v. Kume, 49 Mo. 158.

§ 73. Creditors' suit and suits to set aside fraudulent conveyances.

As action for recovery of money only, see ante, § 67 [e, f, n].
Issue of fact, see ante, § 48.
—— *of fraud, see* ante, § 41 [aa].
Joinder with legal issues, see ante, § 52 [c, u].
Procedure as denial of right, see post, § 207.
Discretion of court in submitting issues to jury, see "Fraudulent Conveyances," vol. 24, cc. 1385–1387, § 921.

[a] (U. S. 1893) The jurisdiction of a court of equity to set aside an assignment for the benefit of creditors cannot be defeated on the ground that, complainant's claim being for a money payment exceeding $20, the defendants are entitled to trial by jury under Const. Amend. 7, when such claim is recognized and provided for in the deed of assignment, and is not denied by the pleadings.—Talley v. Curtain, 54 Fed. 43, 4 C. C. A. 177, 8 U. S. App. 347.

[b] (Ala. 1845) A creditor who alleges fraud in the conveyance of a debtor by a mortgage or deed of trust cannot be prevented from trying this question in a court of law before a jury.—Marriott v. Givens, 8 Ala. 694.

[c] (Ind. 1882) Plaintiffs averred that they were creditors of one S., who had transferred his goods to other creditors, who were made defendants, under an agreement that, after payment of the latters' claims, the goods should be returned to him; and they averred, further, that, without any new consideration and to defraud plaintiffs, there was a modification of the original contract, whereby the absolute title vested in such defendants without providing for any return of the goods to S. *Held*, that the complaint was in the nature of a bill in equity seeking to charge defendants as trustees, and hence was not a case for a jury.—Hendricks v. Frank, 86 Ind. 278.

[d] (Ind. 1885) It is error to submit to a jury for trial as an action at law an equitable cause of action to subject lands fraudulently conveyed to the payment of the judgment, set up in a complaint at law to recover a sum of money.—Lake v. Lake, 99 Ind. 339.

[e] (Ind. 1887) A suit to set aside a mortgage on the ground of fraud, brought by creditors, is of equitable cognizance, and is triable by the court, not by a jury.—Stix v. Sadler, 109 Ind. 254, 9 N. E. 905.

[f] (Iowa, 1885) An action to subject real estate to the lien of a judgment against one of several defendants on the ground that he is the real owner of the property, and that the conveyance to his codefendant was a fraud on his creditors, is an equitable proceeding, and a refusal of a jury trial is not error.—Buckham v. Grape, 65 Iowa, 535, 17 N. W. 755.

[g] (Kan. 1877) Trial by jury is not a matter of right in an action to have a certain deed set aside and to have the land mentioned in such deed made subject to the payment of a certain judgment previously rendered in favor of the plaintiff and against one of the defendants.—McCardell v. McNay, 17 Kan. 433.

[h] (Ky. 1844) Under the statutes of 1838 and 1840 (3 St. Law, 376, 378), providing that, if an execution on a judgment rendered by a justice of the peace be returned unsatisfied, the justice may issue a summons against any third person indebted to the defendant, and make any orders necessary for the application of the debt, if any be found to exist, to the payment of the judgment, the proceedings are of an equitable nature, and the justice of the peace, or the circuit judge on appeal, may try the same without the intervention of a jury.—Kennedy v. Aldridge, 44 Ky. (5 B. Mon.) 141.

[i] (Neb. 1880) In a suit in equity to set aside a fraudulent conveyance, constituting a cloud on plaintiff's title to real estate owned by him, though not in his actual possession, defendants are not entitled to a trial by jury, though the court may submit special facts to a jury.—Harral v. Gray, 10 Neb. 186, 4 N. W. 1040.

[j] (Neb. 1895) In an action by a judgment creditor against the debtor and his vendee to set aside a transfer as in fraud of creditors, defendants were not entitled to a trial by jury.—Monroe v. Reid, 46 Neb. 316, 64 N. W. 983.

[k] (N. Y. 1888) An action to set aside a composition deed, and to vacate an order discharging an assignee on the ground of fraud, and to obtain an order for the payment in full of plaintiff's claim, and for the appointment of a receiver, is an equitable action, and the sending of issues to a jury is, under Code Civ. Proc. §§ 969–971, discretionary.—Blunt v. Hibbard (Com. Pl.) 3 N. Y. Supp. 121.

[l] (N. Y. 1889) An action by a receiver in supplementary proceedings to set aside a mortgage and foreclosure sale of the debtor's goods, made before the recovery of the judgment on which the proceedings were based, and to require the mortgagee to account for the value of the property, alleging that said mortgage was fraudulent as to creditors, is an equitable action, and triable by the court, and it is error to send it to the circuit, to be there tried as an action at law.—Mandeville v. Avery, 51 Hun, 636, 3 N. Y. Supp. 745.

[m] (N. Y. 1891) An action by a creditor against his debtor's assignee to compel the latter to account for the funds received, and to pay the balance found to be due, is equitable, and defendant's motion for a trial by jury is properly denied, notwithstanding the complaint avers an account stated between the assignee and plaintiff, and that a certain sum was found to be due from the assignee on such account.—Pendergast v. Greenfield, 127 N. Y. 23, 27 N. E. 388, reversing (1889) 55 Hun, 606, 7 N. Y. Supp. 829.

[n] (N. Y. 1891) After a creditor of an insolvent firm of wholesale clothiers had attached their entire stock, other persons claiming to be creditors for goods sold, whose claims had not matured, assumed to rescind the sales as having been induced by fraud, and replevied the goods, which they took from the possession of the sheriff. The attaching creditor then brought suit to restrain further proceedings in replevin, to have a receiver appointed, and compel the litigation of all the adverse claims to the property in one suit. *Held*, that it cannot be objected to this suit that plaintiffs in replevin are thereby deprived of a trial by jury; for, if they are as matter of right entitled to such trial, issues may be framed by which they may have the benefit of it.—National Park Bank v. Goddard, 62 Hun, 31, 16 N. Y. Supp. 343.

§ 74. Insolvency and receiverships.

See post, § 114.
Involving accounting, see ante, § 68 [t].
Issues of fact, see ante, § 50.

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[a] (U. S. 1880) An action against the receiver of a railroad for the death of a person is not a "suit at law," within the provision of the constitution guarantying the right of trial by jury, and therefore the granting of a jury trial in such an action is within the discretion of the court.—Kennedy v. Indianapolis, C. & L. R. Co. (C. C.) 3 Fed. 97.

[b] (U. S. 1896) The enforcement of the liability of a subscriber to corporate stock by suit in equity by the receiver of the corporation does not infringe the constitutional right of such subscriber to a trial by jury.—Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co. (C. C.) 72 Fed. 957.

[c] (N. Y. 1857) The provisions of the constitution relative to trial by jury do not apply to proceedings to close the business of a corporation on the ground of insolvency.—In re Mechanics' Fire Ins. Co., 5 Abb. Prac. 444.

[d] (N. Y. 1858) The act of 1849, providing for the settling of the affairs of insolvent corporations and compelling contribution by their members, is not unconstitutional on the ground that it deprives stockholders of the right of trial by jury, since such proceedings existed before the adoption of the constitution and were within the jurisdiction of courts of equity.—United States Trust Co. v. United States Fire Ins. Co., 18 N. Y. 199.

[e] (N. Y.) Act April 21, 1862 (Sess. Laws 1862, p. 743), to facilitate the closing up of insolvent and dissolved mutual insurance companies, and which compels parties controverting any demand made against them by receivers of such companies to submit such controversies to the decision of a referee, to the exclusion of a jury, is not unconstitutional, under Const. art. 1, § 2, declaring that trial by jury in all cases in which it has been heretofore used shall remain inviolate forever, since broader references were sanctioned long before the adoption of the constitution.—(1863) Sands v. Kimbark, 39 Barb. 108, affirmed (1863) 27 N. Y. 147; Sands v. Tillinghast, 24 How. Prac. 435.

[f] (N. Y. 1865) Laws 1862, p. 743, c. 412, authorizing justices of the supreme court to refer controversies arising between receivers and members of mutual insurance companies, is not unconstitutional as impairing the right to a trial by jury.—Sands v. Harvey, 4 Abb. Dec. 147, 19 Abb. Prac. 248.

[g] (N. Y. 1878) An action by the receiver of an insolvent corporation against the maker of notes given to the corporation, but averred by the defendant to have been signed by him through fraudulent representations made by the president, *held* to be properly discontinued for the purpose of a reference under 2 Rev. St. p. 469, § 73. The defendant's charge of fraud did not entitle him to a trial by jury.—Crosby v. Day, 16 Hun, 291.

[h] (N. Y. 1880) An action by a receiver against the trustees of a savings bank for negligence is properly tried by jury.—Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546, affirming (1880) 59 How. Prac. 426.

[i] (Ohio) Under Rev. St. § 6852, providing that creditors shall present their claims within a certain time after the publication of notice of assignment by an insolvent corporation, that the assignee shall indorse his allowance or rejection thereon, and that claimants whose claims are rejected shall bring suit against the assignee to enforce such claims within a certain time after they have been rejected, a suit to enforce the allowance of a claim by the assignee of an insolvent debtor is a civil action, in which the right to demand a jury does not exist.—(1892) Root v. Meader, 11 Ohio Dec. 747, 29 Wkly. Law Bul. 51; (1893) Id., 2 Ohio Dec. 547, affirmed Meader v. Root (1895) 5 O. C. D. 61.

§ 75. Quieting title and determination of adverse claims.

As action for recovery of money only or of specific real or personal property, see ante, § 67 [u].

As defense in legal action, see ante, § 59 [c].

Claim of title by defendant, see ante, § 42 [b].

Issues of fact, see ante, § 45.

Joinder with injunction, see post, § 77 [g, h].

Legal defense, see ante, § 54 [b].

[a] (U. S. 1893) A civil suit, instituted, under Act Feb. 25, 1885 (23 St. p. 321), in the name of the United States, against persons inclosing public lands, for the destruction of such inclosure, is a summary proceeding in the nature of a suit in equity for abatement, and defendant is not entitled to a jury trial.—Cameron v. United States, 148 U. S. 301, 13 Sup. Ct. 595, 37 L. Ed. 459.

[aa] (U. S. 1896) Act March 3, 1881, providing that if, in any action brought pursuant to Rev. St. § 2326, to settle claims to mining locations, title shall not be established by either party, the jury shall so find, and judgment shall be entered accordingly, does not absolutely require a jury trial.—Perego v. Dodge, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113.

[b] (U. S. 1888) Laws Mich. 1887, No. 260, p. 337, extending the jurisdiction of equity to quiet titles to cases where the lands are unoccupied, does not illegally deprive defendant of trial by jury, secured by Const. art. 6, § 27, this provision extending only to cases where by the common law trial by jury was customary, and at common law ejectment not lying where defendant was not in possession.—Grand Rapids & I. R. Co. v. Sparrow (C. C.) 36 Fed. 210, 1 L. R. A. 480.

[c] (Colo. 1892) Code Civ. Proc. § 1, abolishing the distinction between suits at law and in equity, and the forms of actions theretofore existing, does not abolish equity, or the nature and manner of determining a suit, but controls only its form; and a court, therefore, in proceeding under the "Town Site Act" (Gen. St. 1883, c. 108, § 14) to the determination of an adverse claim to a lot, commits no error in refusing a jury, and proceeding as in equity to a decree.—Rice v. Goodwin, 2 Colo. App. 267, 30 Pac. 330.

[d] (Conn. 1888) Gen. St. § 2356, providing that when any oyster bed is designated, contrary to that chapter, the superior court, as a court of equity, on petition, shall appoint a committee, who shall hear and report the facts to the court, which may order the removal of the stakes, is not unconstitutional, as denying the claimant a jury trial, since the case is an equitable one, and the committee is not a statutory tribunal, and the act requires the court to do what in other suits is left to its discretion.—Town of Clinton v. Bacon, 56 Conn. 508, 16 Atl. 548.

[e] (Idaho, 1887) A proceeding under Rev. St. U. S. §§ 2325, 2326, to determine the rights of adverse claimants to a mineral location, is an action at law, in which a jury may be demanded without regard to which party is in possession.—Burke v. McDonald, 2 Idaho, 310, 13 Pac. 351.

[f] (Ill. 1883) Laws 1871, § 50, providing that courts of chancery "may hear and determine bills to quiet title and to remove clouds from the title to real estate," do not interfere with the constitutional right of trial by jury, as the court has power to submit issues of fact to a jury.—Gage v. Ewing, 107 Ill. 11.

[g] (Ind. 1884) In a proceeding under the statute to quiet title, a jury may be demanded

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as of right; the action being statutory.—Trittipo v. Morgan, 99 Ind. 269.

[h] (Ind. 1886) A jury may be demanded, as matter of right, on the trial of an action to quiet title.—Johnson v. Taylor, 106 Ind. 89, 5 N. E. 732.

[i] (Ind. 1892) Rev. St. 1881, § 409, provides that issues of law and of fact in causes that, prior to June 18, 1852, were of exclusively equitable jurisdiction, shall be tried by the court, and all other issues of fact shall be triable as the same are now triable. *Held*, that since all civil actions were as of right triable by jury prior to this statute, and the action to quiet title was not on June 18, 1852, one of exclusive equitable jurisdiction, the case was properly submitted to a jury.—Puterbaugh v. Puterbaugh, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341.

[j] (Neb. 1883) An action to remove a cloud from the title to land is equitable in its nature, and the parties are not therein entitled to a trial by jury, as of right.—Raggencamp v. Converse, 15 Neb. 105, 17 N. W. 361.

[k] (Ohio, 1866) In an action brought under a statute to determine the title to land of which the plaintiff has possession, the plaintiff has no constitutional right to a trial by jury.—Ellithorpe v. Buck, 17 Ohio St. 72.

[l] (Pa. 1862) The act of April 22, 1856, giving a tenant in common in coal or iron mines, whose right is denied or resisted, the power to apply by petition in equity to the court of common pleas of the county where the lands may lie, who should adjudicate and determine the rights of the several parties according to the course of a court of chancery, conflicts with the constitutional right of the citizen to have controverted questions of fact in common-law causes decided by a jury; and it is applicable only to cases in which the rights of the complainants are equitable.—North Pennsylvania Coal Co. v. Snowden, 42 Pa. (6 Wright) 488, 82 Am. Dec. 530.

§ 76. Partition.

As action for recovery of money only, or of specific real or personal property, see ante, § 67 [w].

Effect of provision for other remedy, see post, § 236 [i].

Involving accounting, see ante, § 68 [h].

Issues of fact, see ante, § 44.

Joinder with other issues, see ante, § 52 [b, d, r].

On appeal from report of commissioners, see post, § 95 [c].

[a] (N. Y. 1874) An action brought pursuant to Laws 1853, c. 238, providing that heirs claiming under an ancestor who died in possession, whether they be in possession or not, notwithstanding any apparent devise, may prosecute an action for partition, notwithstanding any possession under the devise, provided they allege and establish that the apparent devise is void, is properly triable before a jury.—Hewlett v. Wood, 1 Hun, 478.

[b] (N. Y. 1893) The issue in an action for partition of real property is triable by jury, if either party so desires.—Larder v. Granger, 67 Hun, 649, 21 N. Y. Supp. 1107.

[c] (Ohio, 1886) In an action to recover land, either party is entitled to a jury trial, but when the pleadings set forth an action for partition, neither party is entitled to jury trial, except in the discretion of the court, on special issues, though the title, right of property, and possession be incidentally brought into the issues.—Barr v. Chapman (Com. Pl.) 30 Wkly. Law Bul. 264.

[d] (Va. 1895) Code, § 2562, providing that the circuit court, in its equity jurisdiction, may take cognizance of all questions of law affecting the legal title that may arise in suits for partition, does not conflict with Const. art. 1, § 13, guarantying trial by jury, because trial by jury in such case did not exist at the time of the adoption of the constitution.—Pillow v. Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 52 Am. St. Rep. 804.

§ 77. Injunction.

Action on injunction bond, see post, § 99 [g].

As action for recovery of money only, or of specific property, see ante, § 67 [b].

Effect of provision for other remedy, see post, § 236 [d].

Issue of damages, see ante, § 43.

—— *of fact, see* ante, § 49.

Joinder with other issues, see ante, § 52 [n, q].

[a] (U. S. 1847) An injunction, properly issued in support of the prima facie right or title of the party seeking it, does not affect or impair the right to a trial by jury.—Woodworth v. Rogers, Fed. Cas. No. 18,018 [3 Woodb. & M. 135, 2 Robb, Pat. Cas. 625].

[b] (U. S. 1894) Act July 2, 1890 (26 Stat. 209), relating to illegal combinations in restraint of trade, and conferring power on circuit courts "to prevent and restrain violations" of the act, is not an invasion of the right of trial by jury, as the jurisdiction so given to equity will be deemed to be limited to such cases only as are of equitable cognizance.—United States v. Debs (C. C.) 64 Fed. 724; Union Trust Co. v. Atchison, T. & S. F. R. Co., Id.

[c] (Conn. 1892) An action for a temporary restraining order and damages for obstructing a right of way is triable by a jury.—Spencer v. New York & N. E. R. Co., 62 Conn. 242, 25 Atl. 350.

[d] (Ind. 1874) On trial of an action for a perpetual injunction, where issues of fact are joined, the parties, or either of them, are entitled to trial by jury.—Hopkins v. Greenburg, K. & C. Turnpike Co., 46 Ind. 187.

[e] (Ind. 1880) In an action to enjoin a sheriff from selling land upon which there is a judgment lien, until other land belonging to the plaintiff's grantor is exhausted, the parties are, under Code, § 340, entitled to a trial by jury.—Edwards v. Applegate, 70 Ind. 325.

[f] (Ind. 1883) Since only a court of equity can give relief by injunction, and such courts are the judges of the facts as well as of the law, no right to trial by jury exists in injunction proceedings.—Helm v. First Nat. Bank of Huntington, 91 Ind. 44.

[g] (Ind. 1890) A complaint in an action against a city alleged that plaintiff was the owner of certain land; that defendant had unlawfully taken possession of the same, and, without having condemned it, was threatening to do irreparable damage to the same by cutting down the trees, and grading it as a street; and judgment was prayed that plaintiff's title be quieted as against defendant, and that defendant be enjoined from further trespassing thereon. *Held* a complaint to obtain an injunction, and not to quiet title, and therefore a trial by jury was properly refused.—Miller v. City of Indianapolis, 123 Ind. 196, 24 N. E. 228.

[h] (Ind. 1895) Where the complaint, in an action to restrain a railroad company from

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making an embankment in its roadbed so as to thereby cut off plaintiff's easement of way under the track, fails to allege an adverse claim by defendant, the action is one for an injunction, and not to quiet title, and therefore a trial by jury is properly denied.—Davis v. Cleveland, C., C. & St. L. Ry. Co., 140 Ind. 468, 39 N. E. 495.

[i] (Kan. 1881) In an action for an injunction, a trial by jury cannot be demanded as matter of right.—City of Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265.

[j] (La.) Injunctions are to be tried summarily and without a jury.—(1829) King v. Gayoso, 8 Mart. (N. S.) 370; (1842) Dabbs v. Hemken, 3 Rob. 123.

[k] (La. 1850) In all injunction suits, where security is required to be given, the parties are entitled to trial by jury if they comply with the legal requisites.—Cumming v. Police Jury of Rapides, 5 La. Ann. 634.

[l] (La. 1861) A jury trial will be refused in a suit for an injunction against an executory process, the case being a summary one within the provisions of Code Prac. arts. 739, 740.—Amacker v. Smith, 16 La. Ann. 361.

[m] (La. 1874) The parties to an injunction suit originating in a suit on a promissory note are not entitled to a trial by jury, since the action does not come under the exceptions contained in Code Prac. art. 494.—McCracken v. Wells, 26 La. Ann. 31.

[n] (N. Y. 1891) Where the principal object of an action was to restrain defendants from maintaining a railroad, although damages were also claimed for injuries to property caused by the railroad, a motion for a trial by jury, addressed to the whole case, was properly denied.—Jefferson v. New York E. R. Co., 58 Hun, 603, 11 N. Y. Supp. 488.

[o] (Ohio, 1877) An action to perpetually enjoin defendant from obstructing, and continuing existing obstructions on, an alleged road in which plaintiff claims a special use, and for damages occasioned by such obstructions, is in the nature of a bill in equity for injunction, and incidentally for an account, in which neither party is entitled to demand a jury trial.—Converse v. Hawkins, 31 Ohio St. 209.

[p] (Pa. 1892) Under Const. art. 1, § 6, providing that "trial by jury shall be as heretofore, and the right thereof remain inviolate," a court of equity has no jurisdiction to entertain a bill for an injunction where the title to land and the right of possession thereof is the sole question at issue.—Pennsylvania Canal Co. v. Middletown & H. Turnpike Co. (Com. Pl.) 11 Pa. Co. Ct. R. 582, 1 Pa. Dist. R. 663.

§ 78. —— To abate nuisance.

Contempt proceedings, see ante, § 63 [a, d].
Enforcement of health regulations, see post, § 108.
Issues of fact, see ante, § 49.
Municipal regulations, see post, § 107 [b].

[a] (U. S. 1886) Code Iowa 1873, § 1543, provides that any building, etc., where intoxicating liquors are manufactured, sold, or given away, contrary to law, shall be a nuisance, and may, along with the vessels and contents, fixtures, etc., be abated by "an action in equity." The person proceeded against is also made liable to fine and imprisonment. *Held*, in a proceeding under this statute, where the defendant removed the case to the federal court on the grounds that, inasmuch as the supreme court of the state had declared the law to be valid, he was virtually deprived of his right to a trial by jury, and that he had at a large expense established the place sought to be declared a nuisance prior to the passage of the act, and that it was only fit for a saloon and brewery, that no federal question was involved, and that the case should be remanded to the state court.—Schmidt v. Cobb, 119 U. S. 286, 7 Sup. Ct. 1373, 30 L. Ed. 321.

[b] (Iowa) Acts 1885 (Laws 20th Gen. Assem.) c. 143, which provides for the abatement of places where liquors are illegally kept for sale by a proceeding in equity, is not a violation of Const. art. 1, §§ 9–12, which provide that "the right of trial by jury shall remain inviolate," and that in all criminal prosecutions involving life or liberty the accused shall have a right to trial by jury, upon an indictment by a grand jury.—(1885) Littleton v. Fritz, 65 Iowa, 488, 22 N. W. 641, 54 Am. Rep. 19; (1885) Pontius v. Winebrenner, 65 Iowa, 591, 22 N. W. 646; (1885) Same v. Bowman, 66 Iowa, 88, 23 N. W. 277; (1885) Shermerhorn v. Weber, 67 Iowa, 278, 25 N. W. 160; (1886) Martin v. Blattner, 68 Iowa, 286, 25 N. W. 131; (1886) McLane v. Leicht, 69 Iowa, 401, 29 N. W. 327.

[c] (Iowa) Laws 20th Gen. Assem. c. 143, authorizing any citizen of the county to maintain a suit in equity to enjoin the maintenance of a liquor nuisance, is not unconstitutional, as depriving the person enjoined of his right to a trial by jury, since the provision that the right to a jury trial shall remain inviolate preserves that right only in cases where it existed prior to the constitution, and the jurisdiction of equity to enjoin the continuance of nuisances was recognized at that time.—(1885) Littleton v. Fritz, 65 Iowa, 488, 22 N. W. 641, 54 Am. Rep. 19; (1885) Pontius v. Winebrenner, 65 Iowa, 591, 22 N. W. 646; (1885) Same v. Bowman, 66 Iowa, 88, 23 N. W. 277; (1886) Martin v. Blattner, 68 Iowa, 286, 25 N. W. 131.

[d] (Iowa, 1887) The right to a trial by jury, in chancery cases, not being guarantied by any constitutional provision, and the courts of chancery in Iowa having had, prior to the enactment of the statute regulating the sale of intoxicating liquors, a well-settled jurisdiction of suits to abate nuisances, that statute is not unconstitutional because it denounces the illegal sale of intoxicating liquors as a nuisance, and provides for its abatement by proceedings in chancery.—State v. Jordan, 72 Iowa, 377, 34 N. W. 285.

[e] (Mass. 1828) St. 1827, c. 88, which provides that a court of equity shall give relief in cases of waste and nuisance, is not in contravention of article 15 of the declaration of rights, securing a right of trial by jury in all controversies concerning property, and therefore a jury trial could not be had as of right in an action to restrain the building of a bridge over a navigable stream in which the plaintiffs had obtained a prescriptive right of travel.—Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 23 Mass. (6 Pick.) 376.

[f] (Minn.) An action to abate a milldam as a nuisance, and to recover damages for its overflow, not being within the exceptions of Gen. St. 1866, c. 66, § 198, is triable by the court, unless the parties otherwise consent.—(1871) Finch v. Green, 16 Minn. 355 (Gil. 315); (1875) Brown v. Lawler, 21 Minn. 327.

[g] (N. H. 1889) Laws 1887, c. 77, declaring the use of a building for prostitution, gambling, and illegal sale of liquor to be a common nuisance, abatable in equity, does not change the ordinary course of procedure on questions triable by jury, and is valid.—State v. Saunders, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646.

[h] (N. Y. 1871) The constitutional right to a trial by jury applies to an action to abate

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a nuisance and recover the damages occasioned thereby, though the complaint is in form as for equitable relief and the prayer for damages may be regarded as incidental thereto.—Hudson v. Caryl, 44 N. Y. 553.

[i] (N. Y. 1879) An action to restrain a nuisance and recover the damages occasioned by it cannot be tried without a jury, unless the parties consent to trial by the court.—Dorr v. Dansville Gaslight Co., 18 Hun, 274.

[j] (N. Y. 1887) The complaint prayed judgment for damages and the abatement of a nuisance, and also for an injunction restraining the defendant from continuing the nuisance. Plaintiff sought a trial by jury on the ground that at common law there was the remedy by writ of nuisance for the recovery of damages and an abatement of the nuisance, and Const. art. 1, § 2, secures to a party the right to a jury trial in all cases where before its adoption this mode of trial was used. *Held* that, the plaintiff having elected to ask for equitable relief in his action, his case was not one of right triable by a jury under the constitution, and it was in the discretion of the court to have the issues tried by the court, or by the court with the aid of a jury.—Cogswell v. New York, N. H. & H. R. Co., 105 N. Y. 319, 11 N. E. 518, reversing (1886) 54 N. Y. Super. Ct. (22 Jones & S.) 92.

[jj] (N. Y. 1891) Where a complaint seeks an injunction to restrain defendants from operating their elevated railroad in front of plaintiff's premises until payment of all damages sustained by the plaintiff by reason thereof, the cause of action is equitable only, and defendants will not be entitled to a trial by jury upon the ground that the complaint states a nuisance, when its allegations are as consistent with the action of trespass as with that of nuisance.—Sommer v. New York El. Ry. Co., 60 Hun, 148, 14 N. Y. Supp. 619; Bach v. Same, 60 Hun, 128, 14 N. Y. Supp. 620.

[k] (N. Y.) Where the complaint alleges that defendants have taken possession of the street in front of plaintiff's property for the maintenance and operation of an elevated railway, thereby appropriating his easement in the street and committing a trespass on his property, and prays an injunction and damages, the action is an equitable one, and is not an "action for a nuisance," within Code Civ. Proc. § 968, requiring the latter actions to be tried by a jury.—(1891) Johnson v. Manhattan Ry. Co., 61 Hun, 627, 16 N. Y. Supp. 434; (1892) Johnston v. Same, 60 N. Y. Super. Ct. (28 Jones & S.) 494, 17 N. Y. Supp. 953.

[kk] (Ohio) Act Feb. 28, 1888 (85 Laws, p. 34) §§ 32, 61, requiring all buildings, save private residences, of three or more stories, to be provided with fire escapes, and empowering a court of equity to enjoin the use of any building in violation thereof, are not invalid, as depriving the owner of the use of property without the intervention of a jury. The constitutional provision that the right to a jury trial shall be inviolate was violated by Act Feb. 28, 1888, § 61 (Smith & B. St. § 8223-130), authorizing any court having equity jurisdiction to summarily enforce the provisions of the act, and restrain the use or occupation of any building for noncompliance therewith.—(1895) City of Cincinnati v. Steinkamp, 9 Ohio Cir. Ct. R. 178, 6 O. C. D. 85; (1896) Id., 54 Ohio, 284, 43 N. E. 490.

[l] (Pa. 1887) Act May 13, 1887, § 18, declaring any place for the illegal sale of intoxicating liquors a nuisance and directing that it be abated by proceedings at law or equity, is not unconstitutional, in that it deprives the defendant of a right of trial by jury.—Wishart v. Newell, 4 Pa. Co. Ct. R. 141.

[m] (Pa. 1888) The intervention of equity to abate a milldam situated in a city, which causes inundations and ice gorges several times each year, thus injuring private property and impairing public travel, is not in contravention of Const. art. 1, providing that "trial by jury shall be as heretofore, and the right thereof remain inviolate."—City of New Castle v. Haney, 6 Pa. Co. Ct. R. 87.

[n] (S. C. 1896) Dispensary Act, § 22, declaring the sale of intoxicating liquors without a license to be a nuisance, and providing process for the arrest of the offender, search of his premises, and seizure of intoxicants found thereon; an order restraining further sale by such offender; and summary proceedings to punish, as for contempt, one disobeying such order,—does not violate the constitutional provisions as to the right of trial by jury.—Ex parte Keeler, 45 S. C. 537, 23 S. E. 865, 55 Am. St. Rep. 785, 31 L. R. A. 678.

§ 79. —— Corporate acts and proceedings.

[a] (Ill. 1881) The act of 1874, providing for the issuance of an injunction to restrain an insolvent insurance company from doing business, and for the dissolution of the company if it appear proper, is not invalid, as not providing for a trial by jury.—Ward v. Farwell, 97 Ill. 593.

[b] (N. Y. 1889) Code Civ. Proc. § 968, provides that issues of fact must be tried by a jury, unless a reference is made or a jury waived, in an action for money only; in an action of ejectment; for dower, waste, nuisance, or to recover a chattel. Section 969 provides that an issue of law in any action, and an issue of fact in an action not specified in section 968, or wherein trial by jury is not expressly provided, must be tried by the court, unless a reference or a jury trial is directed. *Held*, that an action by a stockholder of a corporation to restrain its trustees from paying salaries they had voted to themselves, and requiring them to refund the amount already paid, was one triable by the court, and that neither party was entitled to a jury.—McNaughton v. Osgood, 114 N. Y. 574, 21 N. E. 1044.

[c] (Wis. 1874) The jurisdiction of equity to restrain corporations from abuse of franchise or violation of law was already established at the adoption of the state constitution, and hence Const. art. 1, § 5, declaring that the right of trial by jury shall remain inviolate and shall extend to all cases at law, has no application to it.—Attorney General v. Chicago & N. W. Ry. Co., 35 Wis. 425.

[d] (Wis. 1874) The exercise by the supreme court of its general jurisdiction under the constitution of injunctions to restrain railroad companies from exacting tolls in excess of the maximum rates established by Laws 1874, c. 273, is not an invasion of the right of trial by jury, which the constitution reserves and extends to all cases at law; for that provision does not comprehend cases of legal right determinable in a suit in equity.—Attorney General v. Chicago & N. W. Ry. Co., 35 Wis. 425.

§ 80. Specific performance.

Issue of damages, see ante, § 43 [g, h, i, ql. —— *of fact, see* ante, § 51.

[a] (Cal. 1893) In an action under Code Civ. Proc. § 738, authorizing an action against one claiming an interest in real property adversely to plaintiff, for the purpose of determining such adverse claim, defendant is not entitled to a trial by jury, where the only issue is whether defendant is entitled to a specific performance of a contract for the purchase of the

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land, made by plaintiff's grantor.—Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271.

[b] (Ohio, 1877) In a suit for the specific performance of a contract, neither party is entitled to a trial by jury as a matter of right, as the action is in equity.—Moore v. Moulton, 5 Ohio Dec. 534.

[c] (Ohio, 1896) An action to enforce the specific performance of a contract for the conveyance of land, and the payment of money, is not an action for the recovery of specific property, nor for money only, within the purview of Rev. St. § 5130, and neither party is entitled to demand a trial thereof by jury.—Hull v. Bell, 54 Ohio, 228, 43 N. E. 584.

§ 81. Opening or setting aside judgments or decrees.

On appeal in motion to set aside judgment, see post, § 95 [e].

[a] (N. Y. 1878) An action to vacate a judgment obtained against a corporation by collusion with its officers may be tried without a jury.—Whittlesey v. Delaney, 73 N. Y. 571.

[b] (N. Y. 1896) An action by an heir of a testator to set aside a judgment establishing the validity of the probate of the will as procured by collusion between plaintiff's attorney and the attorney for the executors, in order to cut off plaintiff's rights as an heir at law, is not triable by jury.—Ellensohn v. Keyes, 6 App. Div. 601, 39 N. Y. Supp. 774.

§ 82. Enforcement of judgments or awards.

Creditors' suits in general, see ante, § 73.

[a] (Ind. 1873) A jury trial may be claimed in an action upon a common-law award, but not in proceedings to enforce an award in a statutory arbitration.—Milner v. Noel, 43 Ind. 324.

[b] (Iowa, 1886) An action on an award upon matters in dispute between a township and its treasurer, and for money had and received by him for the township, and appropriated to his own use, is an action at law, authorizing a trial by jury, and it is error to refer it, against objection.—District Tp. of Grant v. Bulles, 69 Iowa, 525, 29 N. W. 439.

[c] (Ky. 1896) Where a creditor agrees by written contract to accept certain property from his debtor, at a valuation to be fixed by appraisers, an action by the debtor to recover the value of the goods as fixed above the debt is triable as an action at law, and not in equity.—Bank of Williamstown v. Webb, 33 S. W. 1109.

§ 83. Property rights of married women.

[a] (Mo. 1879) Rev. St. § 3296 (Acts 1875, p. 61), provides that any personal property belonging to any woman before her marriage, or which may have come to her during coverture by gift, shall be and remain her separate property, and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband. *Held*, that an action at law by a wife for the conversion of her personal property is a purely legal action, though she joins her husband with her as plaintiff, since her personal property belongs to her absolutely, and there is no relation of trust between herself and her husband respecting the same which would make the action of an equitable nature, and therefore such action was one for a jury.—Alt v. Meyer, 8 Mo. App. 198.

[b] (N. Y. 1855) A claim against the separate estate of a married woman is equitable in its nature, and, under the provisions of the Code, may be tried by the court without a jury.—Cheseborough v. House, 12 N. Y. Super. Ct. (5 Duer) 125.

3. PARTICULAR PROCEEDINGS IN CIVIL ACTIONS.

IN GENERAL, § 84.
ENTRY OF JUDGMENT OR ASSESSMENT OF DAMAGES, § 85.
ENFORCEMENT OF BONDS AND RECOGNIZANCES, § 86.
ASSESSMENT OF DAMAGES FOR IMPROVEMENTS ON OUSTER OF OCCUPYING CLAIMANT, § 87.
PLEA IN ABATEMENT OR MOTION TO DISMISS, § 88.
SUPPLEMENTARY PROCEEDINGS IN AID OF EXECUTION, § 89.
PROCEEDINGS TO ENFORCE OR DISCHARGE ATTACHMENT OR GARNISHMENT, § 90.
PROCEEDINGS AGAINST SHERIFFS AND CONSTABLES, § 91.
PROCEEDINGS AGAINST ATTORNEYS, § 92.
COMPENSATION AND LIEN OF ATTORNEYS, §§ 93, 94.

Appeal or proceedings for review, see post, §§ 95–98.
Arrest of debtor as criminal prosecution, see post, § 136 [d].
Contempt proceedings, see post, § 139.
Enforcement of bonds, see post, § 86 [e].
In criminal prosecutions, see post, § 142.
In equitable suits, see ante, §§ 62–64.
Particular defenses, see ante, § 31.
Rules of practice as denial or infringement of right, see post, § 206.

§ 84. In general.

[a] (Ga. 1888) On exception to an auditor's report in a law case, as being contrary to law and evidence, the court's action in overruling the exception, approving the report, and directing a verdict in accordance with it, is erroneous, as it deprives the exceptants of a jury trial.—Poullian v. Brown, 80 Ga. 27, 5 S. E. 107.

[b] (Mo.) In a proceeding under Wag. St. p. 291, § 13, which provides that, if an execution against a corporation has been returned unsatisfied, such execution may be used against any of the stockholders to the extent of the amount of stock held by such stockholder, provided that no execution shall issue against any stockholder, except on an order of the court in which the action shall have been brought made upon motion in open court, after sufficient notice in writing to the persons sought to be charged, the stockholder is not entitled to a trial by jury.—(1877) Schaeffer v. Phœnix Brewery Co., 4 Mo. App. 115; (1882) Erskine v. Lowenstein, 11 Mo. App. 595.

[c] (N. Y. 1857) On a nonenumerated motion, the court may set aside releases and overturn deeds and judgments, without the aid of a jury, if such questions arise. In cases, however, of importance and difficulty, the court may require the matters in controversy to be determined by action.—McLean v. Tompkins, 18 Abb. Prac. 24.

[d] (Okl. 1894) In proceedings for the arrest of a debtor under St. c. 66, art. 9, the debtor has no right to a jury trial on a motion to discharge the order of arrest, on the ground that it was granted on false allegations.—Light v. Canadian County Bank, 2 Okl. 543, 37 Pac. 1075.

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§ 85. Entry of judgment or assessment of damages.

See post, § 116 [f].

Against prosecuting witness, see post, § 142 [d].

—— *sureties on bonds, see* post, § 86.

As infringement of right, see post, § 210.

Assessment of punishment, see post, § 143.

In condemnation proceedings, see post, §§ 116–119.

In equitable suits, see ante, § 43.

In mandamus, see post, § 106 [j].

Invading province of jury as infringement of right, see post, § 233.

On unconditional contracts in writing, see ante, § 30.

Power of court to assess damages on default without a jury, see "Judgment," vol. 30, cc. 210–345, §§ 151–245.

Proceedings for assessment by jury, see "Damages," vol. 24, cc. 2343–2351, §§ 520, 520½; cc. 2447, 2448, § 575.

[a] (U. S. 1877) In an action of tort in the federal court, where defendant suffers a default, plaintiff has no constitutional right to have the damages assessed by a jury, but such assessment may be made by the court.—Raymond v. Danbury & N. R. Co., Fed. Cas. No. 11,593 [43 Conn. 596, 14 Blatchf. 133].

[b] (Ala. 1862) In an action on an open account for goods sold and delivered, and to recover money paid by the plaintiff for the defendant, the court cannot render judgment final without the intervention of a jury.—Porter v. Burleson, 38 Ala. 343.

[c] (Conn. 1885) The provision of the constitution that the right of trial by jury shall remain inviolate does not apply to the assessment of damages on a default, as the provision secured the right of jury trial only where it already existed, and on default the practice had always been for damages to be assessed by the court.—Seeley v. City of Bridgeport, 53 Conn. 1, 22 Atl. 1017.

[d] (Ill. 1851) The assessment of damages by a court under the sixth section of the replevin act is not a violation of the right of trial by jury.—Campbell v. Head, 13 Ill. (3 Peck) 122.

[e] (Ill. 1864) The right of trial by jury is not impaired by a law giving to the court the right to assess damages without a jury, in case of default.—Hopkins v. Ladd, 35 Ill. 178.

[f] (Iowa, 1854) Code, par. 1831, provides that the defendant may appear at the time of the assessment of damages in an action against him and cross-examine the plaintiff's witnesses, but for no other purpose. Paragraph 1824 provides that, where the defendant fails to answer or withdraws his pleading, he shall be deemed to be in default. Quære, whether paragraph 1831 is not unconstitutional, as depriving the defendant of the right of trial by jury, as applied to a case where he had answered and was not in default.—Hutchinson v. Sangster, 4 G. Greene, 340.

[g] (Iowa, 1862) Where an action of replevin has been dismissed by the plaintiff and reinstated by the defendants for the assessment of his damages, the plaintiff, under the statutes, is considered as a party in default, and is not entitled to demand a jury trial on the question of damages.—Wilkins v. Treynor, 14 Iowa, 391.

[h] (Iowa, 1882) A party who is in default is not entitled to a jury to assess damages. In such case the court is empowered to assess the damages, unless a jury be demanded by the party not in default.—Preston v. Wright, 60 Iowa, 351, 14 N. W. 352.

[i] (Ky. 1801) Act 1799, authorizing the court to award 15 per cent. damages for the nonperformance of a contract, is repugnant to the constitution, providing "that trial by jury should be as heretofore, and the right thereto remain inviolate."—Stidger v. Rogers, 2 Ky. (Ky. Dec.) 52.

[j] (Ky. 1801) Upon an attachment founded on an open account, it is error to take judgment without the intervention of a jury.—Demaree v. Jackson, 2 Ky. (Ky. Dec.) 68.

[k] (Ky. 1805) A law authorizing judgment to be entered on motion for a breach of a contract without the intervention of a jury, where the defendant is in default, is not unconstitutional.—Ewing v. Directors of Penitentiary, 3 Ky. (Hardin) 5.

[l] (Ky. 1848) In debt upon a constable's bond for a failure in his official duty, it is error for the court to assess the damages, since a jury should assess them.—Wells v. Commonwealth, 47 Ky. (8 B. Mon.) 459.

[m] (Ky. 1851) Where a sum is fixed by statute as a tax, interest thereon cannot be given without the intervention of a jury, though the court may enter judgment for the tax.—Portland Dry Dock & Ins. Co. v. Trustees of Portland, 51 Ky. (12 B. Mon.) 77.

[n] (La. 1851) In confirming a default, where the damages claimed are uncertain and to be valued by opinion, a jury must estimate them; otherwise, where they can be ascertained by precise evidence. It is often difficult to distinguish between these two classes of cases. The matter rests in the judge's discretion.—Brander v. Goodin, 6 La. Ann. 521.

[o] (Me. 1882) Where judgment is rendered for the plaintiff on demurrer, the defendant has no right to have damages assessed by a jury.—Hanley v. Sutherland, 74 Me. 212.

[p] (Md. 1870) A statutory provision that, when a judgment is taken by default, the court may assess the damages on proof thereof, without impaneling a jury, must be construed in subordination to a constitutional provision, that the right of trial by jury of all issues of fact in civil proceedings shall be inviolably preserved. Under such a statute, therefore, the court is empowered to assess the damages only when the defendant has not appeared in court and is in default; or when, having appeared, he waives or fails to assert his right to have the question referred to a jury.—Knickerbocker Life Ins. Co. v. Hoeske, 32 Md. 317.

[q] (N. M. 1882) A right given by statute to the court to assess the value of the property and damages in replevin, when plaintiff discontinues, is not an infringement of the constitutional right of trial by jury.—Lamy v. Remuson, 2 N. M. 245.

[r] (N. Y. 1852) On application for judgment in an action to recover against carriers for the loss of goods, it is irregular to order a reference to ascertain the damages, where it is not pretended that the case involves the examination of a long account. The damages should be assessed by a jury.—Hewitt v. Howell, 8 How. Prac. 346.

[s] (Ohio, 1881) In an action under Act April 20, 1874, (71 Ohio Laws, 146), giving a penalty of not less than $150 to the party aggrieved by a railroad corporation for overcharging for the transportation of passengers or property, where the case stands for judgment on the petition, it is not error to refuse to impanel a jury to assess damages.—Cincinnati, S. & C. R. Co. v. Cook, 37 Ohio St. 265.

[t] (Or. 1892) Hill's Code, § 249, subd. 2, as amended by Act 1891 (Sess. Laws, p. 173), which provides that in certain actions, including all

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actions sounding in damages or tort, if no answer be filed within the time specified, default may be entered against defendant, and plaintiff may apply at a subsequent term for the relief demanded in the complaint, and in all such cases "the court, without the intervention of the jury, shall assess the damages which he shall recover," etc., is not repugnant to the constitution (Hill's Code, art. 1, § 17), which declares that "in all civil cases the right of trial by jury shall remain inviolate," since the assessment of damages on a confession by defendant of the cause of action is not a "trial" of the action.—Dean v. Willamette Bridge Ry. Co., 22 Or. 101, 29 Pac. 440, 15 L. R. A. 614.

§ 86. Enforcement of bonds and recognizances.

Procedure as denial of right, see post, § 210 [a].
Proceedings other than actions, see post, § 124½.

[a] (Ga. 1872) A statute which authorizes execution to be issued against a surety in an appeal bond upon rendition of judgment against the principal, without a jury trial as between the respondent and the surety, is not unconstitutional.—Young v. Wise, 45 Ga. 81.

[b] (Ky.) The statute which requires that, on dissolution of an injunction and when judgment is affirmed on an appeal or writ of error, the court shall render judgment against the security in the injunction bond or for the prosecution of the appeal, is unconstitutional, as it deprives the party of a trial by jury.—(1801) Gullion v. Bowlware's Adm'rs, 2 Ky. (Ky. Dec.) 76; (1826) Hughes v. Hughes, 20 Ky. (4 T. B. Mon.) 43.

[c] (Mo. 1881) Rev. St. § 3904, provides that in all cases where judgment is given in any court upon any bond, bill, or note for the payment of money or delivery of property, against the principal debtor and any surety therein, and such surety shall pay the judgment, or any part thereof, he shall be entitled, on motion, to a judgment in the same court against the principal debtor for the amount he has paid, etc. *Held*, that said section clothes the court in which such a motion is pending with jurisdiction to hear and determine all questions growing out of the motion, and will authorize the submission of an issue of fact to a jury if either party should demand it.—Schlicker v. Gordon, 74 Mo. 534.

[d] (Tex. 1847) The summary judgments on bonds taken for injunctions under the statute of 1841, after the conditions of the bond are forfeited, are not in derogation of the right of trial by jury or of any other constitutional rights.—Janes v. Reynolds, 2 Tex. 250.

[e] (Wis. 1860) Code, § 328, provides that when a judgment is rendered against a party in an action of replevin the judgment may be entered up against the party as well as against the surety who shall have signed the undertaking for the return of the property. *Held*, that such statute is not in violation of the clause of the constitution providing that trial by jury shall remain inviolate, in that it permits a judgment to be entered against a surety who is not a party to the action and has no notice of its pendency, since a surety whose name is signed to the undertaking is a quasi party to the suit.—Pratt v. Donovan, 10 Wis. 378.

§ 87. Assessment of damages for improvements on ouster of occupying claimant.

In equity, see ante, § 64.

[a] (U. S. 1829) The occupant claimant law of Ohio, which declares that an occupying claimant shall not be evicted or turned out of possession until he shall be paid for improvements, and directs the court, in a suit at law, to appoint commissioners to value the same, is repugnant to the seventh amendment to the federal constitution. The compensation for improvements is a suit at common law, and must be submitted to a jury, if the case be pending in a court of the United States.—Bank of Hamilton v. Dudley, 27 U. S. (2 Pet.) 492, 7 L. Ed. 496.

[b] (Ill. 1852) Rev. St. 1845, c. 36, §§ 47–57, known as the "occupying claimants' law," giving to every person who is evicted from land for which he can show a plain and connected title in law or equity deduced from the record of some public office, without actual notice of an adverse title in like manner derived from record, compensation for improvements made before receiving such actual notice, is not in conflict with the declaration of the constitution that the right of trial by jury shall remain inviolate, in that it provides that the value of the improvements therein mentioned shall be assessed by commissioners without the intervention of a jury.—Ross v. Irving, 14 Ill. (4 Peck) 171.

[c] (Ind. 1825) The statute for the relief of occupying claimants of land, which provides that the value of the improvements and of the land without the improvements shall be assessed by three persons to be appointed by the court, is unconstitutional, as depriving the parties of a right to trial by jury.—Armstrong v. Jackson, 1 Blackf. 374.

[d] (Mich. 1859) Where the defendant files a claim for improvements under the statute (Comp. Laws, § 4603) in an action of ejectment, the case may be tried without a jury by the court, unless a jury is demanded by one of the parties.—Rawson v. Parsons, 6 Mich. 401.

[e] (Ohio, 1831) The occupying claimants' law (St. 1833, c. 365, § 2), providing for the appointment of three disinterested freeholders to assess the value of improvements, does not contravene Const. art. 8, § 8, providing that the right of trial by jury shall be inviolable.—Hunt's Lessee v. McMahan, 5 Ohio (5 Ham.) 132.

§ 88. Plea in abatement or motion to dismiss.

On appeal, see post, § 95 [j].
Plea of nul tiel record, see ante, § 32.

[a] (La. 1848) Plaintiff cannot require that an exception to the jurisdiction of the court on the ground of the defendant's domicile being in another parish than that in which the action is pending should be submitted to the jury.—McGehee v. Brown, 3 La. Ann. 272.

[b] (Me. 1850) An issue joined on a plea of misnomer in abatement must be tried by the jury.—State v. Marston, 31 Me. 292.

[c] (Md. 1882) Defendant pleaded in abatement that he resided in another county and that there had been no non est returned on a summons issued in said county against him. Plaintiff traversed the facts and prayed they might be inquired of by the country. Defendant joined issue and moved that the issue should be submitted to the court without jury. *Held*, that under article 75, § 87, of the Code, where a plea was interposed and traversed, it was for the jury, unless by agreement it should be decided by the court.—Tyler v. Murray, 57 Md. 418.

[d] (Ohio, 1877) If, in an action to recover damages for causing death by wrongful act, neglect, or default, nonresident defendants file a motion to dismiss for want of jurisdiction over them, and support it by a verified answer, as provided by section 89, Civ. Code, traversing the allegations of the petition, by showing that

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such nonresidents are not rightfully joined as defendants, the issue of fact thus presented is one which either party has a right to have tried by a jury.—Drea v. Carrington, 32 Ohio St. 595.

[e] (Tenn. 1809) The constitution, securing a trial of facts by a jury, precludes the court, on a plea in abatement, from considering credits indorsed on a bond sued on; the question as to whether they should be allowed as payments being one of fact for the jury.—Bacon v. Parker, 2 Tenn. (2 Overt.) 55.

[f] (Tex. 1892) A plea in abatement being purely an issue of fact, plaintiffs are entitled to a jury to try such issue.—Howeth v. Clark (App.) 19 S. W. 433.

§ 89. Supplementary proceedings in aid of execution.

As criminal proceeding, see post, § 139 [f].

Nature of action to subject property fraudulently conveyed, see post, § 99 [e].

[a] (Ind. 1880) In proceedings supplementary to execution under Code, § 322, where issues of fact are formed, such as in ordinary cases are triable by jury, the party demanding it may have a trial by jury.—McMahan v. Works, 72 Ind. 19.

[b] (Ind. 1890) In proceedings supplementary to execution, issues of fact are properly tried by a jury as in ordinary civil cases.—American White Bronze Co. v. Clark, 123 Ind. 230, 23 N. E. 855.

[c] (Iowa, 1861) Revision, c. 126, relating to supplementary proceedings in aid of execution, and providing that if, on examination, it be found that a judgment debtor has property in his hands which he unjustly refuses to apply toward the payment of the execution, the court may order him to so apply it, and, if he disobey any order of the court duly served on him, he may be punished as for contempt, is in contravention of Const. art. 1, § 9, providing that "the right of trial by jury shall remain inviolate, but the general assembly may authorize a trial by jury of a less number than 12 men in inferior courts; but no person shall be deprived of life, liberty, or property without due process of law," and section 10, providing that "in all criminal prosecutions in cases involving the life or liberty of an individual the accused shall have a right to a speedy and public trial by an impartial jury."—Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529.

[d] (Iowa, 1861) Revision, c. 126, authorizing supplementary proceedings in aid of execution, and providing that, if it be found that a debtor has property which he unjustly refuses to apply toward the satisfaction of the execution, the court may order him to apply the same in payment of the judgment, and that, if he fail to do so, he shall be guilty of a contempt, and may be arrested and imprisoned until he complies with the requirements of the law in this respect, is not in contravention of Const. art. 1, § 19, providing that "no person shall be imprisoned for debt in any civil action on mesne or final process, unless in case of fraud," since the act of the debtor in refusing to apply property liable to execution to the payment of the judgment is fraudulent in its nature.—Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529.

[e] (Iowa, 1861) Revision, c. 126, relating to supplementary proceedings in aid of execution, and providing that a judgment debtor may be imprisoned for disobeying an order of the court relating to the application of property found in the hands of the judgment debtor liable to execution, is unconstitutional, in that it deprives the judgment debtor of the right to trial by jury. That right is not lost by the fact that the judgment debtor untruthfully states that the property ordered to be applied was exempt from execution.—Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529.

[f] (Iowa, 1885) Code 1873, § 3145, authorizing the judge to commit a party who refuses to obey an order in proceedings auxiliary to execution directing him to turn over property in his possession to the court, is not a violation of Const. art. 1, § 9, providing that the right of trial by jury shall remain inviolate; for at the time the constitution was adopted no right to a trial by jury in such proceedings existed.—Farmer v. Hoffman, 67 Iowa, 678, 25 N. W. 848; Eikenberry v. Edwards, 67 Iowa, 619, 25 N. W. 832, 56 Am. Rep. 360.

[g] (Iowa, 1889) Code 1873, §§ 31, 37, 3146, 3148, which authorize a referee, appointed in proceedings supplementary to execution, to issue an order for the examination of the debtor, and also for his arrest when it appears that he is about to leave the state, is not unconstitutional because the debtor is deprived of the right of trial by jury.—Marriage v. Woodruff, 77 Iowa, 291, 42 N. W. 198.

[h] (Kan. 1885) Civ. Code, § 482, authorizing a judge, on proceedings in aid of execution, to commit the execution defendant to jail on finding that he has money which he neglects to apply, in accordance with the judge's order, to the satisfaction of the execution, is not unconstitutional, as violating right of trial by jury.—In re Burrows, 33 Kan. 675, 7 Pac. 148.

[i] (La. 1841) In proceedings under Act 1839, § 13, providing for the subjection of property in the hands of third persons belonging to a judgment debtor against whom an execution has been returned unsatisfied, persons who hold possession of property which the judgment creditor claims belongs to the judgment debtor and has been devested by fraud and simulation are entitled to trial by jury, as the purpose of the judgment creditor in such a case can be accomplished only by a revocatory action.—Samory v. Hebrard, 17 La. 555.

[j] (La. 1858) The act of 1855 (Sess Acts, p. 318, § 1) provides that any judgment creditor whose execution has been returned "No property found" may present his petition to compel his debtor to make a surrender of his property, etc.; that the judge thereupon order that the debtor show cause, etc., why he should not pay the debt of the complainant creditor or make a surrender of his property to his creditors; and that, should no good cause be shown and the debt remain unpaid, the judge shall order the debtor to make a surrender of his property to his creditors, etc. *Held*, that said section makes it the duty of the judge to decide upon the sufficiency of the cause for compelling the surrender, and the proceeding is therefore a summary one, to be tried without the intervention of a jury.—Savage v. Jeter, 13 La. Ann. 239.

[k] (Minn. 1877) Gen. St. c. 66, tit. 24, providing that, in proceedings supplementary to execution, the judgment debtor may be punished as for a contempt on disobedience of any order touching the disposition of his property, is not repugnant to Const. art. 1, § 4, which provides that the right to trial by jury shall remain inviolate and shall extend to all cases at law.—State v. Becht, 23 Minn. 411.

[l] (Ohio, 1859) In proceedings supplementary to execution, the judge sits, not as a court, but as a statutory tribunal of limited jurisdiction, exercising judicial functions, with no equity powers, and with no power to try an issue or call a jury.—Welch v. Pittsburg, Ft. W. & C. R. Co., 2 Ohio Dec. 5, 1 West. Law Month. 87.

[m] (S. C. 1883) Upon proceedings supplementary to execution the debtor is not entitled.

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under the declaration of rights, to a trial by jury.—Kennesaw Mills Co. v. Walker, 19 S. C. 104.

[n] (Wash. 1882) A denial of a jury trial in supplementary proceedings is not a violation of a constitutional right of a party thereto, under the fifth and seventh amendments to the constitution of the United States.—Murne v. Schwabacher, 2 Wash. T. 131, 3 Pac. 899.

§ 90. Proceedings to enforce or discharge attachment or garnishment.

As equitable proceeding, see ante, § 73 [h].

Effect of existence of other remedy, see post, § 236 [c].

Right to appeal to jury in proceedings before justices of the peace, see "Justices of the Peace," vol. 31, cc. 1344, 1345, § 372.

[a] (U. S. 1881) Upon a motion to dismiss an attachment, upon ex parte testimony, the court will not decide whether the evidence preponderates for or against the truth of the charges upon which the attachment is founded, where those charges constitute the very matter upon which the action is based,—the sole issue between the parties,—and which the plaintiffs are entitled ultimately to have submitted to a jury. But the court will consider such testimony, to ascertain whether the proceeding has been taken in good faith, and whether there is respectable evidence, which, if believed, would warrant a jury in finding a verdict for the plaintiffs. In this case there is such evidence, and the plaintiffs are entitled to have the sole issue between the parties decided by a jury.—Perry v. Sharpe (C. C.) 8 Fed. 15.

[b] (Cal. 1855) The doctrine of garnishment, although partially regulated by statute in this state, is not the less a common-law proceeding, and the parties are entitled to a trial by jury.—Cahoon v. Levy, 5 Cal. 294.

[c] (Kan. 1880) On the trial of an issue upon an interplea filed by a party who claims title to real estate attached, neither party is entitled to a jury as a matter of right.—Bennett v. Wolverton, 24 Kan. 284.

[d] (Ky. 1853) Where an attachment is based on an affidavit charging fraud, and the fraud is denied in the answer, this makes an issue to be tried on a motion to discharge the attachment, which issue is to be tried by the court.—Talbot v. Pierce, 53 Ky. (14 B. Mon.) 195.

[e] (La. 1842) Property, seized in execution and claimed by an intervener, having been sold under a consent decree, and the sale set aside for irregularity, plaintiffs ruled the intervener to show cause why an alias writ should not issue. His answer, denying the right to proceed by rule and alleging the illegality of the judgment, prayed for a jury. *Held*, no jury can be allowed.—Hobson v. Bein, 2 Rob. 109.

[f] (La. 1874) Plaintiff, notwithstanding the negative answer of the garnishee, took a rule on the garnishee to show cause why he should not pay a certain judgment against defendant because he had in his possession property, rights, and money of defendant to pay said judgment. The garnishee, on the day named for the trial of the rule, excepted to it on the ground that, being a new suit against him, it could not be tried in vacation. The exception was overruled, and the garnishee filed an answer praying for a jury. *Held*, that the exception should have been maintained, as the issues were such as should have been submitted to a jury if desired.—Denouvion v. McNight, 26 La. Ann. 74.

[g] (Md. 1860) The court may entertain a motion to quash an attachment for matter dehors the proceedings, and hear the evidence relating thereto, and decide thereon, without a jury.—Gover v. Barnes, 15 Md. 576.

[h] (Minn. 1895) Neither party is entitled as a matter of right to a jury trial on issues formed by a supplemental complaint and answer in a garnishment proceeding.—Weibeler v. Ford, 61 Minn. 398, 63 N. W. 1075.

[i] (Mo. 1839) Rev. Code 1835, p. 867, giving to a constable, when he levies an execution on property claimed by a third person, power to summon a jury to try the right of property, applies only to executions; and therefore a constable has no authority to summon a jury to try the right of property attached.—Little v. Seymour, 6 Mo. 166.

[j] (Neb. 1880) A proceeding under the statute for a trial of the right of property taken under execution is not in a legal sense a civil action, and is therefore not properly triable by a jury.—State v. Powell, 10 Neb. 48, 4 N. W. 817.

[k] (Neb. 1883) Where there is nothing in the record of the proceedings on an attachment issued by a county judge to show the character of the action in which it was issued, it will be presumed to have been issued by the judge (ex officio justice of the peace) in the exercise of his general or enlarged jurisdiction, concurrent with that of the district court to a certain amount; and a person, other than defendant, claiming the property levied on, will be entitled to a jury for the trial of the issues raised, as provided by Code Civ. Proc. §§ 486, 487, in cases where the right of property in property seized under process issued from a court of record is involved.—Schell v. Husenstine, 15 Neb. 9, 16 N. W. 758.

[l] (N. H. 1844) In suits begun since Act Sept. 30, 1841, plaintiff may bring before a jury the question of the trustee's liability; and his right to do so is not affected by the passage of the Revised Statutes pendente lite.—Wiggin v. Lewis, 16 N. H. 52.

[m] (N. C. 1884) The several provisions of the Code in respect to vacating attachments do not contemplate that the matters of fact arising therein shall be tried by a jury.—Pasour v. Lineberger, 90 N. C. 159.

[n] (Pa. 1872) An attachment was issued on a judgment in which there was no waiver of defendant's exemptions, and the assignee of defendant for creditors was summoned as garnishee. The garnishee answered, and defendant claimed his exemptions. *Held*, that plaintiff was entitled to an issue for trial by a jury.—Numbers v. Shelly, 3 Lanc. Bar, No. 50, p. 1.

[o] (S. C. 1821) A motion to set aside a foreign attachment was based on affidavits that defendant returned on the day, and before, the attachment issued; and the court, in its discretion, considering the question one of doubt, denied the motion. *Held*, that under such circumstances the issue should be tried by jury.—Shrewsbury v. Pearson, 1 McCord, 331.

[p] (Vt. 1832) A trustee has no right to a trial by jury on the question whether he has effects or not.—Huntington v. Bishop, 5 Vt. 186.

[q] (Va. 1879) Where persons claiming the property attached are admitted as parties in the cause, their claim must be tried, under Code 1873, c. 148, § 25, by a jury impaneled for the purpose.—Anderson v. Johnson, 32 Grat. 558.

[r] (Wash. 1891) Under Laws 1885–86, p. 45, §§ 31, 32, providing for dismissal of an attachment on motion to the court in which the action is brought, on the ground that it was improperly or irregularly issued, and that, if the

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motion is made on affidavits on defendant's part, plaintiff may oppose the same by affidavits or other evidence, the questions of fact raised by the motion are to be tried by the court, and, the attachment being merely ancillary to the action, a jury cannot be demanded.—Windt v. Banniza, 2 Wash. St. 147, 26 Pac. 189.

[s] (W. Va. 1877) Any party interested may be received to move to quash an affidavit and attachment, and in aid thereof may have an issue framed for jury trial to ascertain matters of fact.—Capehart's Ex'r v. Dowery, 10 W. Va. 130.

[t] (Wis. 1889) Garnishment proceedings to reach the nonleviable assets of a debtor, things in action, and evidence of debt, need not be tried by jury.—La Crosse Nat. Bank v. Wilson, 74 Wis. 391, 43 N. W. 153.

[u] (Wis. 1895) On the issue in garnishment as to whether the garnishee was indebted to the principal defendant at the time the former was served, the parties are not entitled to a jury trial as a matter of right.—Delaney v. Hartwig, 91 Wis. 412, 64 N. W. 1035.

[v] (Wyo. 1889) Neither the constitutional provision (Const. U. S. art. 7) for jury trial "in suits at common law," nor Rev. St. § 2517, providing that issues of fact in actions for the recovery of money only or specific real or personal property shall be tried by jury, entitles a defendant to a trial by jury of a motion to discharge an attachment.—Wearne v. France, 3 Wyo. 273, 21 Pac. 703.

§ 91. Proceedings against sheriffs and constables.

Necessity of presenting issue of fact, see ante, § 29 [b].

Removal, see post, § 121 [c].

[a] A statute authorizing the court to punish a sheriff for neglect of duty without the intervention of a jury is not in contravention of the constitution requiring "the ancient mode of trial by jury to be held sacred, and the right thereto to remain inviolate."
—(Ind. 1822) Dawson v. Shaver, 1 Blackf. 204;
(Ky. 1819) Wells v. Caldwell, 8 Ky. (1 A. K. Marsh.) 441.

[b] (Ala. 1833) It is not necessary that a jury be impaneled to try questions arising in proceedings against an officer for failure to return an execution, but such questions may be submitted to them.—Condry v. Henley, 4 Stew. & P. 9.

[c] (Ala. 1848) A sheriff or his sureties, proceeded against under the act of 1826, may insist on the fact of the receipt of the money being found by a jury.—Evans v. State Bank, 15 Ala. 81.

[d] (Ala. 1880) A motion for a summary judgment against a sheriff for failing to return an execution is not, within Code, § 3022, "an action founded on an instrument," etc.; and the issue must be determined by a jury.—Warwick v. Brooks, 67 Ala. 252.

[e] (Ind. 1822) St. 1823, p. 195, providing for proceedings against a sheriff and sureties on his official bond, by notice and motion, if, by implication, though not expressly, it authorizes judgment without a trial by jury, it is, in so far as it does away with a jury trial, unconstitutional.—Dawson v. Shaver, 1 Blackf. 204.

[f] (La. 1858) In a proceeding to render the sheriff liable for failing to return a writ of fieri facias before the return day, to which the sureties were made parties, the court properly allowed a trial by jury.—Holmes v. Dunn, 13 La. Ann. 153.

[g] (Miss. 1841) The statute providing that if any sheriff who has made return of a writ of fieri facias shall fail to immediately pay the money procured thereon to the party entitled thereto, or shall make a false return, a judgment may be rendered against such sheriff and his sureties, on motion made to the court by the party injured by such default, is not repugnant to the bill of rights declaring that the right of trial by jury shall remain inviolate, since such constitutional provision does not apply to summary proceedings of the nature mentioned in the statute.—Lewis v. Garrett's Adm'rs, 6 Miss. (5 How.) 434.

[h] (Miss. 1842) A law authorizing summary proceedings by motion against a sheriff for failing to return an execution, without the intervention of a jury, is constitutional.—Lewis v. Fellows, 7 Miss. (6 How.) 261.

[i] (Mo. 1837) A proceeding against a constable for failing to return an execution is in the nature of a proceeding for a contempt, and the trial must be had by the court without a jury.—Hart v. Robinett, 5 Mo. 11.

§ 92. Proceedings against attorneys.

[a] (Ga. 1877) Where a rule is granted against an attorney at law for not paying over money collected, his answer to the rule is traversable, and the issue thus formed is for trial by jury.—Smith v. Bush, 58 Ga. 121.

[b] (La. 1835) An attorney refusing to pay over money collected by him for his client, on being proceeded against summarily, under the statutes of 1809 and 1826, is not entitled to a jury trial.—West v. Carleton, 8 La. 253.

§§ 93, 94. Compensation and lien of attorneys.

[a] (Iowa, 1878) Code 1873, § 2961, authorizing the court to fix the amount of attorney's fees for defending against an attachment wrongfully sued out, is not unconstitutional, as depriving the parties of a right to trial by jury.—Weller v. Hawes, 49 Iowa, 45.

[b] (N. Y.) On application to the court to protect the lien of the attorney, the existence and extent of such lien may be determined in a summary way, as by a reference. The client cannot claim a right to have a trial by jury.—(1862) Ackerman v. Ackerman, 14 Abb. Prac. 229. Contra, see (1863) Fox v. Fox, 24 How. Prac. 409.

[c] (N. Y. 1875) On summary motion to compel an attorney to pay over money collected for his client, the attorney is not entitled to a jury trial, though he claims a lien on the fund for his services, but the court may direct a reference to determine how much is due him for such services, and order him to pay over the balance.—In re Fincke, 6 Daly, 111.

4. TRIAL ON APPEAL OR OTHER PROCEEDINGS FOR REVIEW.

IN GENERAL, § 95.
APPEALS FROM JUSTICES OF THE PEACE, § 96.
PROBATE MATTERS, § 97.
CONDEMNATION PROCEEDINGS, § 98.

Appeal to court in which jury of less than 12 is authorized, see post, § 222 [r].

As affected by amount in controversy, see ante, § 25 [d, e].

Effect of provision for jury trial on appeal, see post, § 237.

—— *of refusal to pay jury fee, see* post, § 174 [o].

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—— of waiver in trial court, see post, § 195.
In criminal prosecutions, see post, § 144.
On counterclaim, see ante, § 34 [c].
Re-examination of questions of fact tried by jury, see post, § 220.
Restrictions on right of appeal in civil cases, see post, § 212.
—— in criminal prosecutions, see post, § 217.
Waiver of right, see post, § 190.
Appeal to jury from judgments of justices of the peace, see "Justices of the Peace," vol. 31, cc. 1344, 1345, § 872.

§ 95. In general.

[a] (Ill. 1887) Defendant, whose land was assessed for a drainage tax, under the Illinois drainage act approved June 27, 1885, duly appealed to the county court and claimed a jury trial under the provision: "Appeals taken to the county court, under the provisions of this act, may be heard at any term thereof, * * * and trial shall be conducted as in other cases of appeals." *Held*, that he was entitled to a jury trial.—Mascall v. Drainage Com'rs, 122 Ill. 620, 14 N. E. 47.

[b] (Ind.) On appeal to the circuit court in a contested election, the appellant is not entitled to a jury trial.—(1857) French v. Lighty, 9 Ind. 477, note; (1878) Corey v. Lugar, 62 Ind. 60.

[c] (Ind. 1877) In an action to review the report of commissioners partitioning land, neither party is entitled to a trial by jury as a matter of right.—Allen v. Anderson, 57 Ind. 388.

[d] (Ind. 1877) Under 2 Rev. St. 1876, p. 183, § 356, which requires that on a complaint for a new trial the questions "shall be summarily decided by the court on the evidence produced by the parties," neither is entitled to a jury trial.—Houston v. Bruner, 59 Ind. 25.

[e] (Ind. 1894) A person is not entitled to a jury trial to determine the existence of facts relied on for setting aside a default judgment.—Quick v. Lawrence Nat. Bank, 10 Ind. App. 523, 38 N. E. 73.

[f] (Iowa, 1879) On petition for a new trial filed under Code 1873, § 3155, the court may, without jury, "first try and decide upon the grounds to vacate or modify the judgment," as provided in section 3160.—Carpenter v. Brown, 50 Iowa, 451.

[g] (Iowa, 1881) Upon an appeal to the circuit court from the board of equalization a party is not entitled to a jury trial.—Davis v. City of Clinton, 55 Iowa, 549, 8 N. W. 423; Dunleith & Dubuque Bridge Co. v. Dubuque County, 55 Iowa, 558, 8 N. W. 443.

[h] (La. 1813) No jury can be had on appeal in the supreme court.—Brooks' Syndics v. Weyman, 3 Mart. (O. S.) 9.

[i] (La. 1843) It is questionable whether a jury can be allowed on appeal from the parish to the district court.—Bouquevalte v. Young, 5 Rob. 162.

[j] (Mass. 1880) If, in a municipal court, in which no trial by jury can be had, an issue of fact is joined upon a plea in abatement, and judgment rendered for the plaintiff, and the defendant appeals to the superior court, he is entitled to a trial by jury in that court on the same issue, but on that only, unless that court orders or permits him to plead anew.—O'Loughlin v. Bird, 128 Mass. 600.

[k] (Mich. 1858) If necessary a venire may be issued for a jury to try the issue of fact on a trial of a writ of error in the supreme court, or it may be sent to the proper circuit for trial.—Teller v. Wetherell, 6 Mich. 46.

[l] (Minn. 1880) Under Gen. St. 1878, c. 1, § 52, providing that an appeal in an election contest from the decision of the board of county canvassers to the district court "shall be heard and tried by the district court of the proper county in the manner that civil actions are tried by that court," the district court may try such contests without a jury.—Newton v. Newell, 26 Minn. 529, 6 N. W. 346.

[m] (Wis. 1875) Although so much of the milldam act (Rev. St. c. 56, § 12) as provides that in a proceeding under that chapter on appeal to the supreme court from the circuit court's judgment "the cause shall be there heard and determined as it ought to have been in the circuit court" would, independently of the constitution, have probably required the supreme court to call a jury and try the case de novo, yet, under Const. art. 7, § 3, such court has no power to call a jury in any case removed to it, and hence causes arising under the milldam act, and brought up to the supreme court, are to be determined on exceptions, like other legal actions brought up by appeal or writ of error.—Kearns v. Thomas, 37 Wis. 118.

§ 96. Appeals from justices of the peace.

[a] (Ga. 1886) Under Code, § 4157a, an appeal from the judgment of a justice to a jury may be taken in all civil cases, whether the judgment was rendered upon questions of law or fact, or upon a combination of both.—Bates v. Messer, 76 Ga. 696.

[b] (N. H. 1852) A trustee was adjudged chargeable by a justice of the peace without a disclosure, and the case was appealed to the court of common pleas. *Held*, that the question of the trustee's liability should be tried in the latter court by a jury, though no disclosure had been taken.—Young v. Bride, 25 N. H. (5 Fost.) 482.

[c] (Vt. 1893) Rev. Laws, giving a jury trial in action of book account in justice's court, does not entitle one on appeal to the county court to jury trial.—Hall v. Armstrong, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366.

§ 97. Probate matters.

[a] (Conn. 1868) St. July 27, 1868, regulating civil actions, does not give the right to a trial by jury on an appeal from the decree of a probate court appointing a conservator.—Appeal of Weed, 35 Conn. 452.

[b] (Del. 1878) On appeal from the register's decision on a petition of review affirming the probate of a will and grant of letters testamentary, because of the register's refusal to order an issue of devisavit vel non to be tried before a jury on the petitioner's application, after hearing the proof on both sides, the superior court will order such issue to be tried before a jury at the bar of the court on the trial of the appeal.—Hall v. Dougherty, 5 Houst. 435.

[c] (La. 1843) Recused cases, transferred under Act Feb. 27, 1841, No. 32, from the probate to the district court, are to be tried in the same manner as if not removed. There being no provision for a jury in the probate, none can be allowed by the special judge in the district court.—Penny v. Weston, 4 Rob. 165.

[d] (Me. 1858) In appeals from the probate court, when questions of fact arise, the proceedings are analogous to the proceedings in courts of equity, when issues of fact are prepared for the jury, under the direction of the court.—Withee v. Rowe, 45 Me. 571.

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[e] (Me. 1874) Where an appeal is made from the decision of a probate court, neither party can, as a matter of right, claim a trial by jury.—Bradstreet v. Bradstreet, 64 Me. 204.

[f] (Minn. 1891) Under Gen. St. 1878, c. 66, §§ 216, 217, providing that a party is entitled to a jury trial as a matter of absolute right only of an issue of fact in an action at law for the recovery of money only, or of specific real property, or for divorce on the ground of adultery, a party is not entitled as of right to a jury trial of an issue of the validity of a will, on appeal to the district court from an order of the probate court admitting, or refusing to admit, the will to probate.—Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598.

[g] (Neb. 1893) Under Comp. St. c. 20, § 47, providing that, in appeals in probate matters from the county court to the district court, the latter shall hear and determine the issues in the same manner as on appeals in civil cases, it is error, on appeal by the executor or heir at law from an order of the county court making an allowance out of the funds of the estate of a deceased person for the support of his widow, to refuse a jury trial upon the demand of either party to the controversy.—Sheedy v. Sheedy, 36 Neb. 373, 54 N. W. 560.

[h] (N. H. 1864) Upon an appeal from the decree of the judge of probate allowing a guardian's account, it is a matter of discretion, and not of right, whether any question of fact that may arise shall be submitted to a jury.—Patrick v. Cowles, 45 N. H. 553.

[i] (N. H. 1864) When an auditor is appointed by this court, on appeal from a decree of a court of probate allowing a guardian's account, to hear the evidence and report facts, he does not derive his powers from the statute providing for the appointment of auditors to state accounts between parties, and the parties have no right to try by a jury any facts thus found by the auditor.—Patrick v. Cowles, 45 N. H. 553.

[j] (N. M. 1889) An action on a contract, by which plaintiff delivered to defendant's intestate a number of sheep, to receive in return, at the end of a fixed period, a quantity of wool, and an equal number of sheep, is not of an equitable nature, requiring relief in chancery. After such an action has been removed from the probate to the district court on appeal, it is triable de novo before a jury, and the fact that it is an appeal from the probate court does not deprive a party of his right to a jury trial.—Lewis v. Baca, 5 N. M. 289, 21 Pac. 343.

[k] (N. Y. 1863) The supreme court has no power, under the statutes of that state, to award an issue of fact to be tried by a jury, upon an appeal from a decree of the surrogate on an application for letters of administration.—Devin v. Patchin, 26 N. Y. 441.

[l] (S. C. 1851) Where one of the parties to a proceeding before the ordinary for partition of land sets up an adverse title in himself, and the ordinary decides against the party setting up the title, and such party appeals, he is entitled to trial by jury.—Faust v. Bailey, 5 Rich. Law, 107.

[m] (S. C. 1878) The supreme court has jurisdiction, on the hearing of an appeal in a case transferred from the probate to the circuit court, to order an issue to be made up to determine a question of fact by the verdict of a jury.—Shaw v. Cunningham, 9 S. C. (9 Rich.) 271.

[n] (S. C. 1882) Upon an appeal from the decision of the probate court, except in those cases where a jury can be demanded, under Code, § 276, as a matter of right, it is within the discretion of the court to order or to refuse a jury, and the court's decision thereon is not reviewable on appeal.—Rollin v. Whipper, 17 S. C. 32.

[o] (S. C. 1892) Code Civ. Proc. § 274, provides that "an issue of fact, in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury"; and section 60 provides that on appeal from the probate court the circuit court shall try the question according to the rules of law, and, if there shall be any question of fact or title to land to be decided, issue may be joined, and a trial had by jury. *Held* that, as section 60 recognizes a right to jury trial of only those issues required to be so tried by section 274, it was error for a circuit court, on motion of one of the parties to an appeal from the probate court, to grant an order framing and referring to a jury an issue as to whether or not there was a will, without notice to the opposite party, as required by Cir. Ct. Rule 28.—Ex parte Apeler, 35 S. C. 417, 14 S. E. 931; Apeler v. Hedderley, Id.

[p] (S. C. 1892) Code Civ. Proc. § 57, provides that any person interested in any final order or decree of the court of probate may appeal therefrom to the circuit court. Section 60 provides that when such appeal is perfected the circuit court shall proceed to the trial of the question, and, if there shall be any question of fact to be decided, issue may be joined thereon, and a trial had by a jury. *Held* that, on an appeal to the circuit court from an order of the probate court disallowing a claim against an estate, appellant is not entitled as of right to a trial by jury.—Hughes v. Kirkpatrick, 37 S. C. 161, 15 S. E. 912.

[q] (Tex. 1853) It is not error for the district court to try a case upon the record of the court of probate without a jury, especially if none be asked for.—Miller v. Miller, 10 Tex. 319.

[r] (Vt. 1826) On appeal from a decree in probate, if the objections to the decree are traversed, the issue is to be joined to the court, unless the issue is on the capacity of the testator or fraud in the procurement of a will.—Baker v. Goodrich, 1 Aikens, 395.

[s] (Wis. 1870) Where an appeal from a decision in probate was taken by one who claimed the right as widow of the testator, and a motion to dismiss the appeal, on the ground that she was not such widow, was based upon an exemplified copy of the record in a divorce suit in another state, the court did not err in deciding the question of fact without a jury.—Amory v. Amory, 26 Wis. 152.

§ 98. Condemnation proceedings.

[a] (Ind. 1857) On appeals to the circuit court from the assessment of damages to real estate taken for public works, the trial has uniformly been by jury; and such cases may be ranked as civil, within the above provision.—Lake Erie, W. & St. L. R. Co. v. Heath, 9 Ind. 558.

[b] (Ind. 1868) On appeal from a proceeding before a justice of the peace, to assess damages for land taken under the act incorporating the Evansville & Illinois Railroad Company (Loc. Laws, p. 1849), though the circuit court, sitting as a court of chancery, may take the opinion of the jury in such a case, the trial by jury is not a constitutional right.—Evansville & C. R. Co. v. M[illegible] 30 Ind. 209.

[c] (Ind. 1892) On an appeal from the commissioners' court to the circuit court, in a proceeding to establish a drain, either party is entitled to a trial by jury.—Bachelor v. Cole, 132 Ind. 143, 31 N. E. 569.

[d] (Iowa, 1866) A proceeding in the county court to appropriate land to the use of the pub-

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lic as a street, after an assessment of damages by a jury, was transferred by the defendant to the district court for review, under Revision, § 1067. *Held*, that the statute giving discretionary power in such a case to the district court to grant or refuse a new assessment by a jury of 12 men, depending on the inquiry by the court whether justice has or has not been done, is constitutional.—City of Des Moines v. Layman, 21 Iowa, 153.

[e] (Me. 1853) The appraisement by county commissioners of the damage done to the owner of land by the location of a railroad across it may be revised by a jury on the petition of the railroad corporation.—Kimball v. Kennebec. & P. R. Co., 35 Me. 255.

[f] (Me. 1853) In a proceeding against a party for overflow of land by a milldam, a report of commissioners being made, the case is to be tried by a jury, if either party request it.—Bryant v. Glidden, 36 Me. 36.

[g] (Mass. 1838) In the case of land taken for a railroad, if the county commissioners refuse to assess damages on the ground that the party applying for them does not own the land, he is entitled to have their judgment revised by a jury.—Carpenter v. Bristol County Com'rs, 38 Mass. (21 Pick.) 258.

[h] (Mo. 1890) Although the constitution, to insure a speedy assessment of damages for the taking of private property for public purposes, provides that such damages may be assessed in the first instance by a board of commissioners, yet it also provides that the right of trial by jury shall be held inviolate in such cases, and either party has the right to question the report of the commissioners by exception, or by demanding a jury, or by both.—Chicago, M. & St. P. Ry. Co. v. Randolph Town Site Co., 103 Mo. 451, 15 S. W. 437.

[i] (Mo. 1890) Plaintiff railroad company was organized under Laws 1857 and 1866, which provide that, in proceedings to condemn land for railroad purposes, the amount of compensation to the landowner shall be ascertained by viewers appointed for that purpose. Const. 1875, art. 12, § 4, provides that "the exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking by the general assembly of the property and franchises of incorporated companies already organized, or that may be hereafter organized, and subjecting them to the public use, the same as that of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right." Section 1 of the schedule of said constitution declares that "the provisions of all laws which are inconsistent with this constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this constitution as require legislation to enforce them, shall remain in force until the first day of July, 1877, unless sooner amended or repealed." *Held*, in proceedings begun by plaintiff in 1885 to condemn a right of way through defendants' land, that defendants were entitled to have the amount of their compensation ascertained by a jury.—St. Joseph & I. R. Co. v. Cudmore, 103 Mo. 634, 15 S. W. 535.

[j] (Mo. 1891) Where commissioners were appointed, and assessed the damages resulting from the condemnation of property for a railroad right of way, either party to the proceedings is entitled, as a matter of constitutional right, to have the damages reassessed by a jury.—Chicago, S. F. & C. Ry. Co. v. Elliott, 108 Mo. 321, 18 S. W. 901.

[k] (Mo. 1891) Const. art. 2, § 21, provides that the compensation to be paid for private property taken for public use "shall be determined by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law." Article 12, § 4, after declaring that the right of eminent domain shall never be so construed as to prevent the taking of property of incorporated companies, provides that "the right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right." *Held*, that the report of the commissioners might be questioned by either party by demanding a jury.—Chicago, S. F. & C. Ry. Co. v. Bates, 109 Mo. 53, 18 S. W. 1133; Same v. Eubanks, 109 Mo. 54, 18 S. W. 1134.

[l] (Mo. 1893) Const. art. 12, § 4, provides that "the right of trial by jury shall be held inviolate in all claims for compensation, when, in the exercise of eminent domain, any incorporated company shall be interested either for or against the exercise of said right." Rev. St. 1889, § 2738, provides that either party may have the assessment made by commissioners reviewed, "and the reviewal of such appraisement * * * shall, at the request of either party, be made by a jury." *Held*, that a corporation exercising the right of eminent domain is entitled to a reassessment by a jury.—Chicago, S. F. & C. Ry. Co. v. McGrew, 113 Mo. 390, 21 S. W. 201.

[m] (Mo. 1893) Const. art. 12, § 4, provides that the right of trial by jury shall be inviolate in all trials of claims for compensation, when any corporation shall be interested for or against the exercise of the right of eminent domain. Rev. St. 1889, § 2738, provides that, on the filing of the report of commissioners in condemnation proceedings, the court may order a new appraisement on good cause shown, which new appraisement shall, at the request of either party, be made by a jury. *Held*, that in a proceeding by a railroad company to condemn a right of way, across another company's track, defendant is entitled to a jury trial on the question of compensation only, and cannot have the commissioners' report set aside as a whole, and the question as to the manner of the crossing also determined by the jury.—Kansas City Suburban Belt R. Co. v. Kansas City, St. L. & C. R. Co., 118 Mo. 599, 24 S. W. 478.

[n] (N. Y. 1871) Const. art. 1, § 7, requiring compensation for the taking of private property for public use to be ascertained by a jury, does not preclude an appeal to the supreme court from an assessment made by a jury.—Rochester Waterworks Co. v. Wood, 60 Barb. 137.

[o] (Pa. 1859) Where an act grants an "appeal and a hearing from the report of viewers in condemnation proceedings," it is to be construed as meaning "an appeal to the court," and "a hearing before the court." The case is not of that class contemplated by the constitution in which the right of trial by jury is secured.—In re Pennsylvania Ave., 2 Pittsb. R. 1.

[p] (Pa. 1861) In a proceeding to obtain the use of a landing or wharf for a lateral railroad, under the act of April 24, 1843, an appeal lies from the action of the viewers to the court to which their report is to be made, there to be tried by a jury.—In re Horner & Roberts Lateral R. R., 37 Pa. (1 Wright) 333.

[q] (Pa. 1874) The act of 1873, authorizing a railroad company to take property near Delaware avenue, construed to allow but one jury of damages.—Fitzpatrick v. Pennsylvania R. Co., 10 Phila. 107.

[r] (Pa. 1877) Under the charter of the Pennsylvania R. Co. (Act April 13, 1846, and its supplements), the power and manner of assessing damages for property taken for the railroad are

conferred upon five viewers, whose report is made on their own view, and is subject, where returned, to the confirmation of the court of common pleas, and neither the corporation nor the owner have the right of trial by jury, or of appeal into the common pleas on the facts.—Long v. Pennsylvania R. Co. (Com. Pl.) 9 Lanc. Bar, 98.

[s] (Pa. 1879) Const. art. 16, § 8, secures an appeal and trial by jury for damages wherever private property is taken by a municipal corporation for public use, and the act of June 13, 1874, furnishes the remedy thus secured to owners where no sufficient provision for trial by jury already existed.—Appeal of Bachler, 90 Pa. 207.

[t] (Pa. 1882) A taking by the Chester Rolling Mills of lands for the construction of the lateral railroad is a taking, by a corporation invested with power from the state, for public use, and the eighth section of article 16 of the constitution, providing that the legislature shall not deprive any person of an appeal from a preliminary assessment of damages against such corporation, and that, on appeal, either party may demand a jury, applies.—Chester Rolling Mills v. Granahan, 1 Del. Co. R. 379.

[u] (Pa. 1895) Act June 13, 1874 (P. L. 283), providing that, in all cases of damages assessed against any municipality for property taken, "whether such assessment shall have been made by viewers or otherwise than on a trial by jury," and an appeal is not provided for or regulated by existing laws, an appeal may be taken by either party to the court of common pleas, authorizes a trial by jury.—Bechtel v. Bechtelsville Borough (Com. Pl.) 3 Pa. Dist. R. 713.

[v] (Vt. 1847) The provision in the charter of the Vermont Central Railroad Company, which authorizes a person whose land has been taken for the use of the company, and who feels aggrieved by the appraisal of the damages by the commissioners appointed in pursuance of the charter, to appeal to the county court, and which provides that the decision of the county court shall be final in the matter, does not entitle the person thus appealing to have his damages assessed in the county court by a jury.—Gold v. Vermont Cent. R. Co., 19 Vt. 478.

5. PARTICULAR FORMS OR KINDS OF CIVIL ACTIONS.

IN GENERAL, § 99.
ADMIRALTY, § 100.
ACTIONS SOUNDING IN TORT, § 101.
ACTIONS FOR PENALTIES, § 102.
DIVORCE, § 103.

Actions by or against United States, see ante, § 26.
Effect of provision for jury trial on appeal in action to recover duties, see post, § 238 [d].
—— *for other remedy, see* post, § 236.
Issues of fact or law, see ante, §§ 29, 30.
Mandamus, see post, § 106.
Quo warranto, see post, § 105.

§ 99. In general.

[a] (U. S. 1850) The act of the territorial legislature of Iowa of January 25, 1839, directing suits brought by the commissioners of the half-breed lands against the owners of those lands for their services to be tried before a court without the aid of a jury, is unconstitutional.—Webster v. Reid, 52 U. S. (11 How.) 437, 13 L. Ed. 761.

[b] (Ariz. 1894) The action of claim and delivery, being but a modification of the common-law action of replevin, is a case cognizable at common law, within the meaning of Rev. St. U. S. § 1868, providing for the right of trial by jury in such cases.—Carroll v. Byers, 36 Pac. 499.

[c] (Ga. 1860) A claim case must be submitted to a jury, unless the claimant waives that right, though the verdict must, as matter of law, be against him.—Hodges v. Holiday, 29 Ga. 696.

[d] (Ind. 1869) The right of trial by jury exists in an action on a common-law award.—Goodwine v. Miller, 32 Ind. 419.

[e] (Ind. 1874) An action by a judgment creditor to subject property fraudulently sold to the payment of his judgment, which but for such fraud would have been subject to levy on execution, is not a proceeding supplementary to execution, and the plaintiff is entitled to a jury trial.—Scott v. Indianapolis Wagon Works, 48 Ind. 75.

[f] (Iowa, 1849) Act Wis. T. Jan. 16, 1838, as supplemented by Act June 22, 1838, appoints commissioners to investigate and report upon titles to the "half-breed lands," with a view to partition and sale of the same. Act Iowa Jan. 25, 1839, repeals said act, but provides that the commissioners appointed thereunder may commence actions for their several accounts for services rendered, under said act, against the owners of the "half-breed lands," and declares that the trial of said suits shall be before the court, and not by jury. *Held*, that the repealing act is in violation of the constitution and the ordinance of 1787, as destroying the right of trial by the jury.—Reed v. Wright, 2 G. Greene, 15.

[g] (Iowa, 1868) Revision, § 3794, authorizing the court, on dissolution of an injunction enjoining proceedings on a judgment, to hear the evidence and assess the damages in a summary way, or, at the request of either party, have them assessed by a jury, does not authorize the court, in an action at law on the injunction bond, to discharge the jury and try the cause himself.—Parker v. Slaughter, 24 Iowa, 252.

[h] (Ky. 1807) A jury is necessary in case of attachment whenever it would be if there were an original writ.—McDaniel v. Sappington, 3 Ky. (Hardin) 94.

[i] (S. C. 1817) The act of 1786, provides for the submission of a disputed right to dower to a jury.—Righton v. Righton's Heirs, 1 Mill. Const. 130.

§ 100. Admiralty.

Issues of fact, see ante, § 31 [b].
Seizures, see post, § 124.
Suit to recover penalty for smuggling, see post, § 102 [a].

[a] (U. S. 1811) An information in rem against the thing itself, in a case of admiralty and maritime jurisdiction, is not a suit at common law, but an admiralty proceeding, and does not require a trial by a jury.—Clark v. United States, Fed. Cas. No. 2,837 [2 Wash. C. C. 519].

[b] (U. S. 1832) As the seventh amendment to the constitution of the United States preserving the right of trial by jury excludes admiralty jurisdiction over contracts regulated by the common law, no set-off (not otherwise within admiralty jurisdiction) is allowable on a libel for seamen's wages, unless it is a payment on account thereof.—Bains v. The James & Catherine, Fed. Cas. No. 756 [Baldw. 544].

[c] (U. S. 1875) There is no right in admiralty to a trial by jury unless given by statute.—

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Gillet v. Pierce, Fed. Cas. No. 5,437 [Brown, Adm. 553].

[d] (U. S. 1875) Congress did not intend, by Act 1845, granting admiralty jurisdiction, and saving the right of trial by jury, to grant a new right, but to save one already supposed to exist. —Gillet v. Pierce, Fed. Cas. No. 5,437 [Brown, Adm. 553].

[e] (U. S. 1875) By Rev. St. § 566, however, the law is changed, and the right to a trial by jury is expressly given in the class of cases specified in Act 1845.—Gillet v. Pierce, Fed. Cas. No. 5,437 [Brown, Adm. 553].

[f] (U. S. 1875) The act of 1845, extending the jurisdiction of the federal courts to certain cases arising on the Lakes and navigable waters connecting the same, having been passed on the erroneous assumption that admiralty jurisdiction was limited by the act of 1789 to tide waters, is wholly inoperative, and therefore the clause in the act of 1845 saving a right to trial by jury is also inoperative.—Gillet v. Pierce, Fed. Cas. No. 5,437 [Brown, Adm. 553].

[g] (U. S. 1883) In admiralty causes of contract or tort arising upon the Lakes, if either vessel concerned in such action be of 20 tons burden and upwards, enrolled and licensed for the coasting trade, and employed in navigation between different states, either party to such action may demand a trial by jury, under Rev. St. § 566; but if both vessels be foreign, or engaged in trade between places in the same state, or the action be other than one of contract or tort, it seems that neither party is entitled to a jury trial.—The Erie Belle (D. C.) 20 Fed. 63.

[h] (U. S. 1884) Section 566 of the Revised Statutes does not give a trial by jury in a cause of admiralty and maritime jurisdiction which concerns a vessel employed in commerce and navigation upon the rivers Monongahela and Ohio.—Bigley v. The Venture (D. C.) 21 Fed. 880.

[i] (U. S. 1896) In the act of 1845, purporting to extend the admiralty jurisdiction of the federal courts over the interior lakes and rivers, the provision, now embodied in Rev. St. § 566, saving to the parties a right to demand a jury trial of issues of fact in certain cases, is inoperative to do more than make the verdict advisory, and does not change the powers of the admiralty judge, who is still responsible for the decree rendered.—Sanderson v. The City of Toledo (D. C.) 73 Fed. 220.

[j] (U. S. 1896) The statute, by its terms, does not apply to controversies arising in respect to a vessel plying between ports in the same judicial district, and not engaged in commerce and navigation between places in different states.—Sanderson v. The City of Toledo (D. C.) 73 Fed. 220.

§ 101. Actions sounding in tort.

Assessment of damages in equity, see ante, § 43.

By or against receivers, see ante, § 74 [a, h].

Distinguished from equitable action, see ante, § 68 [ww].

[a] (Ind. 1889) There is no error in trying a suit for breach of warranty by a jury.—Harrisburgh Car Mfg. Co. v. Sloan, 120 Ind. 156, 21 N. E. 1088.

[b] (N. H. 1875) In an action against a town to recover damages for an injury caused by a defect in a highway, the right of trial by jury is secured by the constitution of 1792.—Copp v. Henniker, 55 N. H. 179, 20 Am. Rep. 194.

[c] (N. Y. 1861) An action to recover damages for a tortious conversion of property can be tried in no other way than by a jury, unless the parties waive that mode of trial in the manner prescribed by law.—Lewis v. Varnum, 12 Abb. Prac. 305.

[d] (N. Y. 1889) An action against the clerk of a county to recover money paid him upon false and fraudulent claims for services and money expended for the county, founded on Code Civ. Proc. c. 16, tit. 1, art. 4, allowing an action in the name of the people for the misappropriation of public property, is an action sounding in tort; and hence the court is not authorized to compel a reference.—People v. Wood, 54 Hun, 438, 7 N. Y. Supp. 712.

[e] (Vt. 1860) Declaration of Rights, section 12, provides that "when an issue of fact proper for the cognizance of a jury is joined in a court of law the parties have a right to trial by jury, which ought to be held sacred." Const. § 31, provides that "trials of issues proper for the cognizance of a jury in the supreme or county courts shall be by jury, except where the parties otherwise agree." *Held*, that such constitutional provisions apply to controversies fit to be tried by jury according to the rules of the common law, notwithstanding the particular right for the violation of which the action is brought did not exist by common law, but was created by a statute passed subsequent to the adoption of the constitution; and an action against a town to recover damages occasioned by the insufficiency of a highway is of that character. —Plimpton v. Town of Somerset, 33 Vt. 283.

§ 102. Actions for penalties.

As criminal proceeding, see post, § 152.

As equitable action, see ante, § 66 [a, k].

Proceedings other than actions, see post, § 124.

[a] (U. S. 1870) In a suit to recover the penalty for smuggling against a master of a vessel, he is entitled to a trial by jury.—United States v. The Queen, Fed. Cas. No. 16,107 [4 Ben. 237].

[b] (Ga. 1848) Const. art. 4, § 5, declaring that "trial by jury, as heretofore used in this state, shall remain inviolate," does not apply to pecuniary penalties imposed by municipal corporations of towns and cities, for a breach of their local by-laws and police regulations, for the security, welfare, and good government of such towns or cities.—Williams v. City Council of Augusta, 4 Ga. 509.

[c] (N. J. 1880) The charter of Passaic provides for the recovery of penalties incurred for a violation of municipal ordinances, by an action of debt in the name of the city of Passaic, for the use of the city, before any justice of the peace of said county. *Held*, that this meant an action of debt before a justice sitting as a court for the trial of small causes, and that the defendant was entitled to the trial by jury provided by the justice's court act.—Greely v. City of Passaic, 42 N. J. Law (13 Vroom) 429.

[d] (N. Y. 1876) Laws 1873, c. 370, § 40, providing that the police justice of the village of Port Jervis should hear and determine all cases arising under the charter, by-laws, and ordinances of said village, does not authorize such justice to refuse defendant's demand for a jury trial in an action by the village for a penalty for violation of a municipal ordinance. —People v. Cox, 9 Hun, 146, affirmed (1879) 76 N. Y. 47.

§ 103. Divorce.

Equitable issues in action for divorce, see ante, § 52 [u].

[a] (Cal. 1883) Const. art. 1, § 7, provides that "the right of trial by jury shall be secured to all, and remain inviolate." *Held* not applica-

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ble to a suit for divorce, as the right of trial by jury did not exist in such cases at common law.—Cassidy v. Sullivan, 64 Cal. 266, 28 Pac. 234.

[b] (Ind. 1873) A party to a suit for a divorce is not entitled, as a matter of right, to a trial by jury.—Musselman v. Musselman, 44 Ind. 106.

[c] (Iowa, 1875) In an action for divorce, commenced before Code 1873 took effect, and tried afterwards, either party had the right to demand a jury trial.—Wadsworth v. Wadsworth, 40 Iowa, 448.

[d] (Mo. 1876) Revision 1855, requiring divorce cases to be tried by the court, is not repugnant to the constitution, as impairing the right of trial by jury.—Mead v. Mead, 1 Mo. App. 247.

[e] (N. Y. 1849) Code, § 225, providing that "all or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties," does not repeal 2 Rev. St. p. 145, § 40, requiring the court to submit to a jury a question in a divorce action as to whether defendant is guilty of adultery, notwithstanding the consent of the parties that the case may be referred.—Whale v. Whale, 1 Code Rep. 115.

[f] (N. Y. 1850) A jury trial in suits for divorce for adultery is no longer, since the Code of Procedure, a matter of course.—Anonymous, 5 How. Prac. 306.

[g] (N. Y. 1856) 2 Rev. St. § 39, required a feigned issue to be made upon a charge of adultery in a divorce action. Code, §§ 253, 254, provided that every issue is triable to the court, except issues of fact in actions for the recovery of money only or of specific real or personal property, but permitted the submission of issues to a jury. Section 72 declared that feigned issues are abolished, and that, instead thereof, where the power now exists to order a feigned issue, an order for a trial to a jury may be made. *Held*, that an issue on adultery in an action for divorce must be submitted to a jury on an order made.—Forest v. Forest, 13 N. Y. Super. Ct. (6 Duer) 102, 3 Abb. Prac. 144.

[h] (N. Y. 1874) An issue of fact in a suit for divorce for adultery must be tried by a jury, unless the trial is waived, and a reference therein can only be ordered by the consent of both parties.—Dietz v. Dietz, 48 How. Prac. 114, 4 Thomp. & C. 565.

[i] (N. Y. 1877) Under 2 Edm. St. p. 150, § 40, in force before 1846, making it the duty of the court, if the adultery charged be denied, to direct a feigned issue to be made up for the trial of the facts contested by the pleadings by a jury, and Const. 1846, art. 1, § 2, providing that the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever, either party to an action for a divorce, on the ground of adultery, has a right to a jury trial of the issues of fact.—Batzel v. Batzel, 42 N. Y. Super. Ct. (10 Jones & S.) 561.

[j] (N. Y. 1887) The right of a party to a divorce suit to have a trial by jury on the issue of adultery is a constitutional right.—Conderman v. Conderman, 44 Hun, 181.

[k] (N. C. 1854) In a petition for a divorce and alimony, the material facts charged in the petition must be submitted to a jury, on whose verdict, and not otherwise, the court shall make their decree.—Miles v. Miles, 55 N. C. 21.

[l] (Pa. 1849) A respondent, denying the material allegations of a libel for divorce, and claiming in writing a trial by jury, has a right to such trial.—Butler v. Butler, 4 Clark, 284, 1 Am. Law J. (N. S.) 389.

6. CIVIL PROCEEDINGS OTHER THAN ACTIONS.

IN GENERAL, § 104.
QUO WARRANTO, § 105.
MANDAMUS, § 106.
MUNICIPAL REGULATIONS IN GENERAL, § 107.
ENFORCEMENT OF HEALTH REGULATIONS, § 108.
PROCEEDINGS FOR ADJUSTMENT OF RIGHTS BETWEEN CONTRACTORS AND MUNICIPAL CORPORATIONS, § 109.
ADMINISTRATION OF ESTATES OF DECEDENTS, § 110.
PROBATE AND CONTEST OF WILLS, § 111.
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Commitment to reformatories, see post, § 138.
Contempt proceedings, see post, § 139.
Effect of right of resubmission to jury of proceedings to collect wages, see post, § 242 [a].

§ 104. In general.

[a] (U. S. 1819) Act Assem. Md. 1793, § 14, incorporating the bank of Columbia, and giving it summary process by execution, in the nature of an attachment against debtors who have, by express consent in writing, made the notes and bills by them drawn or indorsed negotiable to the bank, is not unconstitutional, as taking away the right to trial by jury.—Bank of Columbia v. Okely, 17 U. S. (4 Wheat.) 235, 4 L. Ed. 559.

[b] (U. S. 1868) In the trial of informations founded on seizures of land or upon land, under the act of August 6, 1861, issues of fact are decided by a jury according to the course of the common law, and not by the judge, as in admiralty.—United States v. Athens Armory, Fed. Cas. No. 14,473 [2 Abb. (U. S.) 129, 35 Ga. 344].

[c] (U. S. 1884) Where the "justice, judge, or commissioner" finds that the petitioner is a Chinese laborer, prohibited by law from landing or from being or remaining in the United States, and, if the ship were in port, and about to return to China, would remand him to the ship to

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be carried to the country from whence he came, such a finding amounts to a finding in effect that he is unlawfully in the United States, and the court should order him to be remanded by the marshal to the custody from which he was taken, and, when the marshal returns that the ship has sailed, a supplemental order may be passed committing him to the custody of the marshal, to be held for a reasonable time to await the direction of the president, and a Chinaman thus brought before the court has no right to a trial by jury, in the investigation before the "justice, judge, or commissioner," to ascertain whether he is unlawfully within the United States.—In re Chow Goo Pooi (C. C.) 25 Fed. 77.

[d] (U. S. 1892) Section 12 of the interstate commerce act, in authorizing circuit courts to make orders enforcing subpœnas issued by the interstate commerce commission, is not unconstitutional, as failing to accord a trial by jury.—In re Interstate Commerce Commission (C. C.) 53 Fed. 476, reversed Interstate Commerce Commission v. Brimson (1894) 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047.

[e] (Ala. 1858) Sess. Acts 1853, tit. 5, pp. 51, 53, authorizing the tollgates of any plank road company to be thrown open on the report of commissioners appointed to ascertain such fact that the road is out of repair, deprives such a plank road company of its constitutional right to a trial by jury.—Powell v. Sammons, 31 Ala. 552.

[f] (Fla. 1848) The statute passed Jan. 7, 1847, giving a summary process to those who have claims upon steamboats for services done and supplies furnished, so far as it interferes with the right of trial by jury, is void.—Flint River Steamboat Co. v. Roberts, 2 Fla. 102, 48 Am. Dec. 178.

[g] (Ind. 1875) On the hearing of a motion for the writ, provided for in 3 St. 1863, p. 415, § 5, to require an agent, conductor, etc., of a railroad company, against which a judgment for the value of an animal killed has been rendered under such statute, to appear and answer as to the amount of money in his hands, etc., the defendant is not entitled to a jury trial.—Logansport, C. & S. W. Ry. Co. v. Patton, 51 Ind. 487.

[h] (Mass. 1814) The statute which directs that questions as to the settlement of paupers shall be decided by the court of common pleas without the intervention of a jury is not in contravention of the fifteenth article of the declaration of rights, providing that, "in a controversy concerning property and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred."—Inhabitants of Shirley v. Inhabitants of Lunenburgh, 11 Mass. 379.

[i] (Mass. 1876) Under the exception, in Const. art. 15, of cases in which the right of trial by jury "has heretofore been otherways used and practised," St. 1874, c. 205, so far as it provides that when a wife is living apart from her husband, for justifiable cause, and he fails to support her, this court may make such order as it deems expedient for the support of the wife and the maintenance of the minor children, is constitutional, although it makes no provision for a trial by jury.—Bigelow v. Bigelow, 120 Mass. 320.

[j] (Mo. 1822) Under the charter of the Bank of Missouri (section 27), permitting the collection of bank notes by summary proceedings on motion, the parties are entitled, in such proceedings, to a trial by jury.—Bank of Missouri v. Anderson, 1 Mo. 244.

[k] (N. Y. 1864) The constitutional provisions relative to the right of trial by jury do not apply to proceedings taken by corporations for the removal of a member for offenses against the corporation.—People v. New York Commercial Ass'n, 18 Abb. Prac. 271.

[l] (N. Y. 1891) Const. 1846, art. 1, § 2, which provides that the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever, does not apply to a summary proceeding to test the validity of a corporate election, provided for by Rev. St. pt. 1, c. 18, tit. 4, § 5.—In re Newcomb (Sup.) 18 N. Y. Supp. 16.

[m] (Ohio, 1873) An action for the recovery of money only, on the substitution, under Civ. Code, § 42, of a new party for the original defendant, does not thereby become a "special proceeding," in which a jury trial cannot be demanded.—Maginnis v. Schwab, 24 Ohio St. 336.

[n] (Pa. 1847) St. 1836, authorizing the appointment of a jury of six to ascertain and determine, out of court, the amount of damages occasioned to property by mobs, is not in violation of Const. art. 9, § 6, which declares that the "trial by jury shall be as heretofore, and the rights thereof remain inviolate," since the remedy given is statutory, and no right of trial by jury ever existed therefor.—In re Pennsylvania Hall, 5 Pa. (5 Barr) 204.

[o] (Pa. 1863) The act of May 1, 1861 (P. L. 553; P. & L. Dig. 4789), provided for the protection of the wages of laborers in Berks county, giving the right to any persons to whom wages to the amount of $25 might be due to proceed to collect the same by distraining therefor in the manner of a distress for rent. *Held* unconstitutional, as a denial of the right of trial by jury.—Linderman v. Reber, 1 Woodw. Dec. 82.

[p] (Pa. 1872) A judgment entered by a mutual insurance company against members of the corporation for the unpaid balance of their premium note, under the provisions of the act of July 26, 1842, on filing a memorandum, as required by the act, in the prothonotary's office, is not in conflict with the constitutional right of trial by jury.—Lycoming Fire Ins. Co. v. Buck, 1 Lux. Leg. Reg. 351.

[q] (Pa. 1879) Acts 1851, p. 354, which confers upon the board of port wardens a jurisdiction over controversies in regard to wharfage between adjoining wharf owners, is not in derogation of the right of trial by jury.—Simpson v. Neill, 89 Pa. 183.

[r] (Tex. 1867) In an action, under Act Feb. 4, 1858, authorizing proceedings to ascertain what land certificates have been illegally issued by the county courts of counties in Peters' colony, etc., the parties are not entitled to a jury trial.—Pelham v. State, 30 Tex. 422.

[s] (Wash. 1889) Act Wash. T. 1883, §§ 2–7, providing that when stock is killed on a railroad the value shall be ascertained by appraisers in a prescribed manner, and the amount shall thereupon become due and payable, are unconstitutional as denying the right of jury trial.—Dacres v. Oregon Ry. & Nav. Co., 1 Wash. St. 525, 20 Pac. 601.

§ 105. Quo warranto.

See post, § 130.
As equitable action, see ante, § 66 [a].
Necessity of tendering issue of fact, see ante, § 31 [c].
Proceedings in general, see post, § 121.

[a] (Ala. 1893) Since, at common law, a party to proceedings to try title to a public office had no right to have such issue tried by jury,

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he is not within the protection of Const. art. 1, § 12, providing that the right to trial by jury shall remain inviolate; and Code, § 428, providing that a contest of an election for the office of judge of probate must be heard and decided by the "judge" of the circuit court of the county where the election is held, is therefore not violative of the constitutional provision.—Taliaferro v. Lee, 97 Ala. 92, 13 South. 125; Hilliard v. Brown, Id.

[b] (Ark. 1870) As the right of trial by jury did not, at common law, extend to a civil proceeding, such as quo warranto, against a public officer, a refusal by the court to submit to a jury questions of fact arising in such a proceeding is not a violation of a constitutional provision that the right of trial by jury shall be preserved inviolate.—State v. Johnson, 26 Ark. 281.

[c] (Ark. 1877) The legislature has power, under Const. art. 7, § 52, to establish a special tribunal, and prescribe a particular form of procedure for determination of contested elections, and may do this without providing a trial by jury.—Govan v. Jackson, 32 Ark. 553.

[d] (Ark. 1880) A summary proceeding, under Act Jan. 23, 1875, §§ 67, 68, 72–75, for the determination of an election contest, being a proceeding in the nature of quo warranto, and, as such, not triable by jury at common law, is not triable by jury.—Wise v. Martin, 36 Ark. 305.

[e] (Ark. 1887) In proceedings under Code Civ. Proc. c. 12 (Mansf. Dig. c. 151), providing a remedy at law against usurpers in office, the right of trial by jury does not exist.—Wheat v. Smith, 50 Ark. 266, 7 S. W. 161.

[f] (Colo. 1890) In quo warranto to try title to office the court may, against respondent's objection, call a jury, and submit special issues to them to aid him in his finding of facts, under Civ. Code, § 173, which provides that in actions other than for the recovery of property, or money due on contract, or for damages for breach of contract, or for injuries, the issues of fact must be tried by the court, subject to its power to order any issue to be tried by a jury.—Londoner v. People, 15 Colo. 557, 26 Pac. 135.

[g] (Conn. 1888) Sess. Laws 1878, c. 102, providing for the final determination of the question of the election of a city officer in a proceeding before the judge of the superior court by petition and notice, whose determination should be conclusive, and that the certificate of the judge should entitle the prevailing party to the office, is not unconstitutional, in not giving the right of trial by jury.—State v. Lewis, 51 Conn. 113.

[h] (Fla. 1894) The right of trial by jury on issues purely of fact, arising in proceedings by quo warranto, is guarantied by the third section of the bill of rights of the constitution.—Buckman v. State, 34 Fla. 48, 15 South. 697, 24 L. R. A. 806.

[i] (Fla. 1894) A jury trial of questions purely of fact arising in quo warranto is a constitutional right.—Van Dorn v. State, 34 Fla. 62, 15 South. 701.

[j] (Idaho, 1889) Code Civ. Proc. § 536 (Act Jan. 30, 1885), provides that an action to try title to an office, and to oust a usurper and impose a fine on him, "shall be heard and determined by the judge of the district court in chambers and without the intervention of a jury." *Held*, that this is unconstitutional and in violation of Rev. St. U. S. § 1868, which provides that the territorial legislatures shall not deprive a party of trial by jury "in cases cognizable by the common law."—People v. Havird, 2 Idaho, 498, 25 Pac. 294.

[k] (Ind. 1878) In proceedings on information in the nature of quo warranto to determine the right of relator to an office, the denial to either party of a trial by jury is reversible error, under Bill of Rights (Const. 1851) § 20, though it appears that substantial justice was done.—Reynolds v. State, 61 Ind. 392.

[l] (Ind. 1878) A proceeding on information in the nature of quo warranto to contest the right of the relator to an office is a civil action, within the meaning of Bill of Rights (Const. 1851) § 20, providing that in all civil cases the right to trial by jury shall remain inviolate.—Reynolds v. State, 61 Ind. 392.

[m] (Mass. 1895) Pub. St. c. 150, § 3, giving the supreme judicial court the right to issue quo warranto and other writs, does not give the right of trial by jury to one whose right to a public office the attorney general seeks to test by such a writ.—Attorney General v. Sullivan, 163 Mass. 446, 40 N. E. 843.

[n] (Mass. 1895) An information in the nature of a quo warranto filed by the attorney general in the supreme judicial court to test one's right to a public office is not a controversy concerning property, or a suit between two or more persons, within the meaning of Declaration of Rights, art. 15, securing the right of trial by jury in all "controversies concerning property," and in all suits "between two or more persons."—Attorney General v. Sullivan, 163 Mass. 446, 40 N. E. 843.

[o] (Mich. 1867) When an issue in quo warranto is sent down to the circuit court to be tried, the parties cannot be denied a jury.—People v. Doesburg, 16 Mich. 133.

[p] (Minn. 1889) Proceedings on information in the nature of quo warranto belong to the class designated "remedial cases" in Const. § 2, art. 6, and are not included in the class denominated "cases at law" in section 4, art. 1, of the same instrument, in which trial by jury is demandable as of right.—State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020.

[q] (Mo.) The defendant in a proceeding by information in the nature of quo warranto has no constitutional right of trial by jury.—(1873) State v. Vail, 53 Mo. 97; (1877) State ex rel. Norton v. Lupton, 64 Mo. 415, 27 Am. Rep. 253.

[r] (N. Y. 1869) The issues of fact, in proceedings by information in the nature of quo warranto, under the Code, are, in the first instance, triable by the court, which may, however, order the whole issue, or any specific question of fact involved therein, to be tried by jury.—People v. Albany & S. R. Co., 55 Barb. 344, 38 How. Prac. 228, 1 Lans. 308, 7 Abb. Prac. (N. S.) 205.

[s] (Okl. 1893) A proceeding by information in the nature of quo warranto is a suit at common law, within the meaning of Const. U. S. Amend. 7, providing for the right of trial by jury in such suits.—Bradford v. Territory, 1 Okl. 366, 34 Pac. 66.

[t] (Wis. 1861) In a proceeding in the nature of a quo warranto, instituted in the supreme court for the purpose of removing defendant from the office of circuit judge, where the questions of fact were few and simple, in order to expedite a determination a jury should be called.—State v. Messmore, 14 Wis. 115.

§ 106. Mandamus.

Issues involved with injunction, see ante, § 49 [a].

Jurisdiction of supreme court dependent on power to impanel jury, see "Mandamus," III.

[a] (Ark. 1870) Authority conferred upon a court by a state constitution to issue writs of

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mandamus and to hear and determine the same carries with it the power to pass upon the facts without the intervention of a jury.—State v. Johnson, 26 Ark. 281.

[aa] (Cal. 1858) On an application for a mandamus in a capital case, to the supreme court, to compel a district judge to sign a bill of exceptions, to which he answers that he has signed a true bill, and that the one presented is not such, it was *held* that the relator was not entitled to a jury, under section 472 of the practice act.—People v. Judge of Tenth Judicial Dist., 9 Cal. 19.

[b] (Cal. 1889) Under Code Civ. Proc. § 1090, providing that if, in an application for a writ of mandate, a question of fact essential to the determination of the motion be raised, and affecting the substantial rights of the parties, the court may order the question to be tried before a jury, the question whether a board of education had a semblance of cause for rejecting plaintiff's claim under a contract with the board is properly left to the determination of a jury, though St. 1871–72, p. 846, § 1, subd. 12, gives the board power to reject any demand against it "for good cause, of which said board shall be sole judge."—Raisch v. Board of Education, 81 Cal. 542, 22 Pac. 890.

[c] (Conn. 1879) The trial of the issue of fact as to the truth of a return to an alternative writ of mandamus is not required by the constitution to be by jury.—Castle v. Lawlor, 47 Conn. 340.

[cc] (Fla. 1884) In mandamus proceedings, issues of fact are triable by the court, and not by a jury.—State v. Suwannee, 21 Fla. 1.

[d] (Ill. 1865) On a petition for a mandamus, where the issue involves facts outside of the record, it must be sent to some circuit court, or other court of appropriate jurisdiction, where the issue can be tried by a jury, and the verdict certified back to the supreme court.—People v. Young, 40 Ill. 87; Same v. Logan County, Id.

[dd] (Ind. 1884) Mandamus being a proceeding at law, and not in equity, any issue of fact must be tried by the jury if either party demands it.—State v. Burnsville Turnpike Co., 97 Ind. 416.

[e] (Ind. 1896) Since mandamus is a proceeding at law, either party may demand a trial by jury of an issue of fact arising therein.—Mott v. State, 145 Ind. 353, 44 N. E. 548.

[f] (Minn.) Const. art. 1, § 4, which provides that the right of trial by jury shall "extend to all cases at law," does not extend to and include proceedings by mandamus.—(1870) State v. Sherwood, 15 Minn. 221 (Gil. 172), 2 Am. Rep. 116; (1879) Same v. City of Lake City, 25 Minn. 404.

[g] (Mont. 1875) The act of congress of April 7, 1874 (18 U. S. Stat. 27), concerning the practice in territorial courts in recognizing the right of trial by jury in cases cognizable at common law, does not include proceedings in mandamus.—Chumasero v. Potts, 2 Mont. 242.

[h] (Ohio, 1884) On mandamus in the common pleas to compel a municipal council to order an election on the question of a surrender of the town's municipal powers, the main issue being whether the requisite number of qualified persons had petitioned. *held*, that this issue was not of right triable by a jury.—Dutten v. Village of Hanover, 42 Ohio St. 215.

[i] (Okl. 1894) Where an issue of fact is joined in mandamus, the parties are entitled, as a matter of right, to a trial by jury.—Territory v. Chicago, R. I. & P. Ry. Co., 2 Okl. 108, 39 Pac. 389.

[j] (Utah, 1875) Article 7 of the amendments to the constitution of the United States, which provides that "in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved," embraces proceedings by mandamus, where there is an issue as to damages.—Chamberlain v. Warburton, 1 Utah, 267.

§ 107. Municipal regulations in general.

Restraining violation of building regulations, see ante, § 78 [kk].

[a] (Ill. 1867) An ordinance of a town, declaring that if the owner of stock which have been impounded shall fail to remove them within a certain time and pay all costs of impounding and the damages which the stock may have done, to be appraised by three disinterested men, the pound master should sell them and satisfy such costs and damages, is in violation of Const. art. 13, § 6, declaring that the right of trial by jury shall remain inviolate without regard to the amount in controversy.—Bullock v. Geomble, 45 Ill. 218.

[b] (Me. 1867) Chapter 177, Pub. Laws 1860, and chapter 187, Pub. Laws 1863, relating to buildings adjudged to be nuisances, are not unconstitutional, in that they take away the right of jury trial.—Swett v. Sprague, 55 Me. 190.

[c] (Miss. 1855) An ordinance of the mayor and council of the city of Vicksburg directed the city marshal to seize and sell all hogs found running at large in the city, and to pay over half the proceeds to the use of the city hospital, and to retain the other half for his services. *Held*, that the ordinance was void as a violation of the constitutional provision that "the right of trial by jury shall remain inviolate."—Donovan v. City of Vicksburg, 29 Miss. (7 Cushm.) 247.

§ 108. Enforcement of health regulations.

[a] (Mass. 1878) The legislature can constitutionally make the action of its delegate, in revoking a license, final, and not subject to be reviewed by a jury, although St. 1871, c. 167, does not expressly give to a person aggrieved, by an order of the state board of health, under section 2, adjudging his business to be a nuisance, a right of appeal therefrom to a jury, yet he has such right.—Sawyer v. State Board of Health, 125 Mass. 182.

[b] (N. Y. 1867) Laws 1866, c. 74, authorizing the metropolitan board of health to abate nuisances, is not in violation of Const. art. 1, § 2, providing that "trial by jury in all cases" shall remain inviolate.—Reynolds v. Schultz, 27 N. Y. Super. Ct. (4 Rob.) 282.

[c] (N. Y. 1868) Act 1866, c. 74, creating the metropolitan sanitary district of the state of New York, is not in violation of the article of the constitution on providing for the right of trial by jury in all cases "in which it has heretofore been used," as a jury has not been the original tribunal to determine upon questions affecting the public health.—Metropolitan Board of Health v. Heister, 37 N. Y. 661.

[d] (N. Y. 1895) The exercise of the summary power given to health officers to quarantine persons likely to spread contagion is not a deprivation of the right of trial by jury.—In re Smith, 84 Hun, 465, 32 N. Y. Supp. 317.

§ 109. Proceedings for adjustment of rights between contractors and municipal corporations.

Mandamus, see ante, § 106 [b].

[a] (N. J. 1876) The legislature may designate any impartial tribunal to ascertain what com-

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pensation should be made to contractors for services rendered and materials furnished, in good faith, to a city, though the charter formalities have not been complied with, and the city cannot complain that the right of trial by jury has been violated.—Cleveland v. Board of Finance & Taxation of Jersey City, 38 N. J. Law (9 Vroom) 259.

[b] (N. Y. 1862) Acts April, 1860, § 4, providing that the damages which the contractors, to whom the gate houses, etc., were awarded by the Croton aqueduct board, etc., may be equitably entitled to recover from the city of New York, shall be ascertained by three arbitrators, one to be chosen by the mayor, one by the parties claiming the damages, and the third by these two, is void and unconstitutional, as depriving the corporation of the right to trial by jury to assess such damages.—People v. Haws, 15 Abb. Prac. 115.

[c] (N. Y. 1865) The legislature has no power, where a claim is made by individuals on a municipal corporation for damages on account of the failure of the corporation to award a contract to them, to direct that the damages the claimants have sustained shall be ascertained by arbitrators, to be appointed as prescribed in the act, without requiring the assent of the corporation, instead of by a trial by jury.—Baldwin v. City of New York, 45 Barb. 359.

§ 110. Administration of estates of decedents.

Effect of provision for jury trial on appeal, see post, § 240.

Necessity of presenting issue of fact, see ante, § 29 [s].

Right to jury trial on appeal, see ante, § 97.

[a] (Ark. 1882) A probate court has no right to have exceptions to an account tried by a jury.—Crow v. Reed, 38 Ark. 482.

[b] (Cal. 1887) Code Civ. Proc. §§ 1716, 1717, providing for trial by jury in probate proceedings, is not to be considered as granting an absolute right to a jury trial in cases of the settlement of accounts of executors and administrators, in view of the fact that the language of the Code in many places implies that the settlement is to be by the court.—In re Moore, 72 Cal. 359, 13 Pac. 885.

[c] (Cal. 1887) Code Civ. Proc. §§ 1713–1716, provides that, except when otherwise enacted, the provisions of part 2 of the Code, relating to ordinary actions, shall constitute the rule of proceeding in probate matters, and that issues of fact joined in such proceedings must be tried as provided for the trial of contested wills by section 1312. Sections 1635–1638 provide that any person interested in an estate may file exceptions to the account in writing, and a method of settling the account. *Held*, that exceptions to an account are aids to the court in his duty of scrutinizing it, but are not issues of fact to be submitted to a jury on demand of a party in interest.—In re Sanderson, 74 Cal. 199, 15 Pac. 753.

[d] (D. C. 1893) Exceptions to an administrator's account on the ground that certain claims made by him were unjust, and that he acted in bad faith, involved a controversy of fact, which, under St. 1798, c. 101, subc. 15, §§ 16, 17, the parties have the absolute right to have submitted to a jury, on an issue duly framed therefor.—In re Atwood's Estate, 2 App. D. C. 74.

[e] (Ga. 1875) Code, §§ 1839–1844, 2598, 2599, authorizing executors, etc., to be cited before the ordinary for settlement, and authorizing the ordinary to enforce his judgment by attachment or execution, are not in violation of that provision of the United States constitution permitting the right of trial by jury in suits at common law when the amount involved is over $20.—Davis v. Harper, 54 Ga. 180.

[f] (Ga. 1875) Code, §§ 1839–1844, 2598, 2599, authorizing executors, etc., to be cited before the ordinary to enforce his judgment by attachment or execution, are not in violation of that clause of the constitution which declares that the right of trial by jury shall be inviolate.—Davis v. Harper, 54 Ga. 180.

[g] (Ill. 1889) Const. 1870, art. 2, § 5, which declares that the "right of trial by jury as heretofore enjoyed shall remain inviolate," does not entitle one to trial by jury in a proceeding in the county court sitting in probate for the discovery of, and to obtain information concerning the possession of, certain notes belonging to the estate of a decedent; such proceeding being unknown to the common law.—Seavey v. Seavey, 30 Ill. App. 625.

[h] (Ill. 1895) The constitutional right of trial by jury does not apply to proceedings by way of citation to compel an administrator to make a proper report and settlement of the estate, in which proceedings the court exercises equitable or discretionary power.—Boyd v. Swallows, 59 Ill. App. 635.

[i] (Ind. 1861) Where an executor's claim against the estate is set down in the form of a suit on the issue docket, the defendants have a right to claim a trial by jury.—Hubbard v. Hubbard, 16 Ind. 25.

[j] (Ind. 1883) Under section 188 of the act then in force concerning the settlement of decedents' estates, any issue of fact concerning such a settlement was triable by jury prior to September 19, 1881, at the request of either party.—Clouser v. Ruckman, 89 Ind. 65.

[k] (Ind. 1884) A proceeding arising on exceptions to the report of an executor or administrator is not a civil case, within the meaning of Const. art. 1, § 20, giving the right of trial by jury in civil cases.—Taylor v. Wright, 93 Ind. 121.

[l] (Ind. 1886) A claim against a decedent's estate for money alleged to be due from the decedent for contribution as co-surety is triable by jury.—Sanders v. Weelburg, 107 Ind. 266, 7 N. E. 573.

[m] (Iowa, 1882) In a proceeding in the circuit court, sitting as a court of probate, to establish a claim against an estate, either party is entitled to a trial by jury, under Code 1873, § 2411, providing that "the court may hear and allow the same, or may submit it to a jury; and on such hearing, unless otherwise provided, all provisions of law applicable to an ordinary proceeding shall apply."—Ingham v. Dudley, 60 Iowa, 16, 14 N. W. 82.

[n] (La. 1850) On a claim by an heir against the succession, made by opposing the executor's final account, the parties cannot claim a jury trial.—Succession of Bozant, 5 La. Ann. 709.

[o] (La. 1866) Under Code Prac. art. 1036, providing that "all causes tried before a court of probate shall be decided without the intervention of a jury, even if the parties wish one," a suit against a succession, being a probate proceeding, cannot be submitted to a jury.—Devall v. Succession of Watterston, 18 La. Ann. 136.

[p] (Mo. 1891) Where a claim is made for a widow's allowance in the course of the administration of an estate, the issue made by the denial of the administrator that the claimant is the widow of the decedent is not triable by jury.—Bradley v. Woerner, 46 Mo. App. 371.

[q] (Ohio, 1869) In a summary proceeding before the probate court, under Act Feb. 26, 1843,

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on complaint of an administrator against a party suspected of embezzling or selling the property of an estate, the court has no jurisdiction to render judgment against accused, except for such property as he admits he took, as the accused cannot be deprived of his right to a trial by jury, as to property which he denies taking. —Howell v. Fry, 19 Ohio St. 556.

[r] (Pa.) There is no law that requires the orphans' court to order an issue to try facts arising in the settlement of an administrator's account.—(1858) In re Beehler's Estate, 3 Phila. 254; (1859) Appeal of Sharp, 3 Grant, Cas. 260.

§ 111. Probate and contest of wills.

As equitable action, see ante, § 71 [c].
Establishment of lost will, see ante, § 72 [e].
On appeal, see ante, § 97.
Second trial of same issue, see ante, § 14 [d].
Suit in equity to contest will, see ante, § 66 [d].

[a] (Fla. 1889) Act 1853 (McClel. Dig. p. 986, § 5), conferred upon the circuit courts jurisdiction over will contests, and provided for a jury trial. Const. 1868 gave the circuit courts jurisdiction in all cases in equity and at law, and gave the county courts "full surrogate or probate powers," subject to appeal. *Held*, that these provisions negatived the idea that the act of 1853 was continued in force, nor was the right to jury trial in will contests in the county courts preserved by the bill of rights of 1868, which declared that "the right of trial by jury shall be secured to all, and remain inviolate forever," as the right to jury trial did not exist in the probate court, independent of statute.—Lavey v. Doig, 25 Fla. 611, 6 South. 259.

[b] (Iowa, 1875) Upon the probate of a will, a jury trial cannot be demanded as a matter of right; and, where one has been granted, it is not error to set aside the finding of the jury. —Gilruth v. Gilruth, 40 Iowa, 346.

[c] (Md. 1864) Act 1798, c. 101, securing the right to a trial by jury to certain issues in the orphans' court, is not varied by Code, art. 93, § 249 et seq., so as to deprive the parties to such trial, on demand therefor in a proceeding to contest a will.—Humes v. Shillington, 22 Md. 346.

[d] (Minn. 1891) Const. art. 1, § 4, declaring that the right of trial by jury should remain inviolate, and should extend to all cases at law without regard to the amount in controversy, merely continued unimpaired and inviolate the right to a jury trial as it existed prior to the adoption of the constitution, and as, under the statutes then in force, a party had no absolute right to a jury trial of an issue as to the validity of a will, it does not render invalid Gen. St. 1878, c. 66, §§ 216, 217, so far as they allow such an issue to be tried by the court without a jury.—Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598.

[e] (Mo. 1895) A proceeding to contest a will is an action at law in which the parties are entitled to a trial by jury.—Garland v. Smith, 127 Mo. 567, 28 S. W. 191, 29 S. W. 836.

[f] (Tex. 1886) A party to a contest of the probate of a will, begun in the county court and removed to the district court because of the disqualification of the county court judge, is entitled to a trial by jury.—Cockrill v. Cox, 65 Tex. 669.

§ 112. Guardianship of infants and incompetents.

On appeal, see ante, § 97.

[a] (Ind. 1880) A jury trial is not a matter of right in the case of exceptions to a guardian's report, or in the trial of any matter connected with the administration of the trust, except in certain cases provided for by statute. —Glidewell v. Snyder, 72 Ind. 528.

[b] (N. J. 1793) Act Dec., 1784 (Patterson's Laws, p. 459) section 7, vesting the orphans' court with power to determine all disputes respecting the existence of wills, the fairness of inventories, the right of administration, the allowance of the accounts of executors, administrators, and trustees, and to award process, and to cause to come before it all persons who, as executors, administrators, guardians, trustees, and otherwise, shall be intrusted with, or in any way accountable for, any lands belonging to "any orphan, or person under age," is not unconstitutional, as taking away the right of trial by jury, as the constitution does not extend the right of trial by jury to cases which did not fall within its province before the adoption thereof.—Wood v. Tallman's Ex'rs, 1 N. J. Law (Coxe) 153.

[c] (Ohio, 1847) A guardian can be legally appointed by the probate court for a deaf and dumb person of full age, who is found by the court to be incapable of managing his affairs, without submitting the question of his incapacity to a jury.—Shroyer v. Richmond, 16 Ohio St. 455.

[d] (Ohio, 1876) St. 1871, authorizing the appointment of guardians for inebriates without trial by jury, does not violate Const. art. 1, § 5, providing that the right to trial by jury shall be inviolate.—Hageny v. Cohnen, 7 Ohio Dec. 88, 1 Wkly. Law Bul. 104, affirmed Hagany v. Cohnen (1876) 29 Ohio St. 82.

[e] (Pa. 1888) Act May 4, 1855, giving the custody and earnings of children to the mother, where the father, from drunkenness or other cause, neglects to provide for them, without a trial by jury, is not in violation of Const. art. 1, § 6, providing that the right to trial by jury as heretofore shall remain inviolate.—Van Billiard v. Van Billiard, 6 Pa. Co. Ct. R. 333.

[f] (Wis. 1857) A proceeding for the appointment of a guardian for an insane person is not a "case at law," within Const. art. 1, § 5, providing for the right of trial by jury.—Gaston v. Babcock, 6 Wis. 503.

§ 113. Inquisition in lunacy.

Concurrence of less than whole number of jurors in verdict, see post, § 224 [f].
Defects in number of jurors as infringement of right, see post, §§ 221 [a], 222 [b].
In criminal prosecution, see post, § 142 [a].
Procedure in criminal cases as infringement of right, see post, § 216 [j, k].

[a] (Iowa, 1882) Const. art. 1, § 10, providing that, in criminal prosecutions and cases involving life or liberty, the accused shall be entitled to a speedy and public trial by an impartial jury, etc., does not apply to a statutory inquest of lunacy before commissioners.—Black Hawk County v. Springer, 58 Iowa, 417, 10 N. W. 791.

[b] (Iowa, 1891) Const. art. 1, §§ 9, 10, providing that the right of trial by jury shall remain inviolate, and in all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have the right to a trial by an impartial jury, applies only to criminal prosecutions for offenses against the criminal law, where it is sought to punish defendant by fine or imprisonment, and does not apply to an inquest of lunacy.—In re Bresee, 82 Iowa, 573, 48 N. W. 991.

[c] (Iowa, 1891) A proceeding to adjudge a person insane, and commit her to the asylum, is a special proceeding, and not a civil action,

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within the meaning of Code 1873, § 2505, defining a civil action as a proceeding in which one party, known as "plaintiff," demands against another party, known as "defendant," the protection of a private right or the redress of a private wrong, and a jury cannot be demanded therein to try the question of insanity, under section 2740, providing that an issue of fact in an action by ordinary proceeding must be tried by a jury, unless the same is waived, and that all other issues shall be tried by the court.—In re Bresee, 82 Iowa, 573, 48 N. W. 991.

[d] (Mo. 1893) An inquiry of lunacy, held by the court, and not by a jury, as required by statute, is coram non judice, and void.—Kiehne v. Wessell, 53 Mo. App. 667.

§ 114. Insolvency proceedings.

As equitable proceedings, see ante, § 74.

[a] (Ill. 1895) An insolvent has no right to have the question whether property, claimed as a homestead, passed by the assignment for the benefit of his creditors, determined by a jury; since Rev. St. 1893, c. 10a, § 8, under which the question is to be decided, does not so provide, and the constitutional guaranty of trial by jury applies only to actions at common law.—Holnbeck v. Wilson, 159 Ill. 148, 42 N. E. 169.

[b] (La. 1820) A party has a right to a jury on a motion, in a concurso, to obtain an order for the payment of a claim, as privileged.—Meeker's Assignee v. Williamson's Syndics, 7 Mart. (O. S.) 315.

[c] (La. 1822) When the amount due a creditor who has voted for syndics is disputed, the party opposing has a right to demand a jury.—Planters' Bank v. Lanusse, 10 Mart. (O. S.) 690.

[d] (La. 1867) A jury trial is not allowed on an opposition to the proces verbal of the deliberations of the creditors of an insolvent succession. Such proceedings must be tried summarily.—Guion v. Guion's Creditors, 19 La. Ann. 81.

[e] (Mass. 1829) Where the assignee of the defendant's property, for the benefit of creditors, is summoned as trustee, the plaintiff is not, under St. 1817, c. 148, entitled to a trial by jury, to try the validity of the assignment.—Hawes v. Langton, 25 Mass. (8 Pick.) 67.

[f] (Mass. 1855) The provision of the insolvent laws, which authorizes the issuing of a warrant to take possession of all the estate of the debtor, on the petition of a creditor, without a trial by jury on the facts alleged in the petition, is constitutional.—O'Neil v. Glover, 71 Mass. (5 Gray) 144.

[g] (Mich. 1884) Laws 1883, No. 193, provides that, if any insolvent shall confess judgment, or do any act whereby any one of his creditors shall be given a preference over any other of them, any two or more creditors, owning debts aggregating $200, may make a petition to the circuit court or a judge thereof, setting forth such facts, that, after notice given, "in pursuance of the order of the court" to the debtor and preferred creditors, the court in term time, or the judge in vacation, "shall proceed summarily upon such petition," and that "if it shall appear to the court or judge" that the debtor is insolvent, or has given such preference, the court or judge shall appoint a receiver, who shall "take possession of all the debtor's property," and "convert the same into money," and "marshal and distribute the same among the several creditors," etc. *Held*, that the act is unconstitutional, in that provision is not made for trial by jury.—Risser v. Hoyt, 53 Mich. 185, 18 N. W. 611.

[h] (Minn. 1883) That the insolvency act of 1881 (Laws 1881, c. 148) does not give the creditor a right of trial by jury on the question whether the debtor's property may be distributed among his creditors without their filing releases, where the debtor has fraudulently concealed or disposed of any of it, is not a violation of Const. art. 1, § 4, which declares that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law," although the right to such a trial was given under the insolvency law in force when the constitution was adopted; as the issue to be determined under the act of 1881 is different, and for a different purpose, from that under the old act, and the proceedings of the tribunal created by the act of 1881 are not "at law," but special, corresponding more nearly to the proceedings in a court of equity.—Wendell v. Lebon, 30 Minn. 234, 15 N. W. 109.

[i] (Minn. 1888) In proceedings under section 2 of the insolvent act (Laws 1881, c. 148), on petition of creditors for the appointment of a receiver of the estate of a nonresident insolvent, doing business and owning property in this state, on the ground that he had made a preferential conveyance of his personal property situated in this state, whether the conveyance constituted an act of insolvency must be determined by the laws of this state where the proceedings are instituted and the property situated, and not by the laws of the domicile of the debtor, where the conveyance was executed; and the insolvent is not entitled, under Const. art. 1, § 4, to a trial by jury, such right not having existed at the time of the adoption of the constitution, and the proceedings not being a "case at law," within the meaning of the action referred to.—In re Howes, 38 Minn. 403, 38 N. W. 104.

[j] (Ohio, 1889) Under Rev. St. § 5130, providing that trial by jury may be demanded in actions for the recovery of money or specific property, a suit to enforce the allowance of a claim, by the assignee of an insolvent, is not an action in which the right to demand a jury exists, since the court could not determine the amount due plaintiff, but could merely find that he was entitled to participate in the distribution of the trust estate.—Merchants' Nat. Bank v. Little, 2 O. C. D. 496.

§ 115. Proceedings and assessments for public improvements.

On appeal, see ante, § 95 [a].

[a] (Ill. 1890) Rev. St. 1889, c. 42, § 37, which provides that drainage commissioners may assess benefits in lieu of a jury when the court so orders, is constitutional.—Hosmer v. Hunt Drainage Dist., 135 Ill. 51, 26 N. E. 587.

[b] (Ill. 1892) Rev. St. 1891, c. 42, § 37, which provides that, "in case a court so orders, the commissioners may make any assessment of benefits, or damages and benefits," caused by a proposed ditch, is not obnoxious to the constitutional guaranty of trial by jury.—Briggs v. Union Drainage Dist., 140 Ill. 53, 29 N. E. 721.

[c] (Ill. 1895) Where a valid ordinance provides that a local improvement shall be paid for by special taxation, the property owners have no right to have the question of benefit to their property submitted to a jury.—Davis v. City of Litchfield, 155 Ill. 384, 40 N. E. 354.

[d] (Kan. 1876) Under Bill of Rights, § 5, providing that the right of trial by jury shall be inviolate, proceedings to correct assessments are not rendered void because there is no provision for a trial by jury.—Ross v. Crawford County Com'rs, 16 Kan. 411.

[e] (Mass. 1878) St. 1869, c. 390, empowering the city counsel of Worcester to construct side-

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walks, and assess the cost on the abutters, is not unconstitutional for omitting to provide for a trial by jury.—Chapin v. City of Worcester, 124 Mass. 464.

[f] (R. I. 1887) Assessments for sewers are regarded as a species of taxation, and are not in conflict with the constitution which declares that the right of trial by jury shall remain inviolate.—Bishop v. Tripp, 15 R. I. 466, 8 Atl. 692.

[g] (S. C. 1821) An act conferring on a city council power to lay assessments for the purposes of drains, without the intervention of a jury, is constitutional.—Cruckhanks v. City Council, 1 McCord, 360.

§ 116. Eminent domain.

Concurrence of less than whole number of jurors in verdict, see post, § 224 [c, g].

Constitution of jury as infringing right, see post, § 226 [a, j].

Defects in number of jurors as infringement of right, see post, § 222 [b, i, m].

Effect of provision for jury trial on appeal, see post, § 239.

—— *of reservation of right of resubmission to jury, see* post, § 242 [b, e].

On appeal, see ante, § 98.

[a] The constitutional right to a jury trial does not extend to proceedings in exercise of the right of eminent domain.
—(Ark. 1877) Cairo & F. R. Co. v. Trout, 32 Ark. 17;
(Ill. 1852) Ross v. Irving, 14 Ill. (4 Peck) 171; (1859) Johnson v. Joliet & C. R. Co., 23 Ill. (13 Peck) 202;
(Minn. 1875) Ames v. Lake Superior & M. R. Co., 21 Minn. 241;
(N. J. 1832) Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. (Saxt.) 694, 23 Am. Dec. 756; (1872) In re Lower Chatham, 35 N. J. Law (6 Vroom) 497; (1892) State v. Heppenheimer, 54 N. J. Law (25 Vroom) 268, 23 Atl. 664;
(N. Y. 1831) Livingston v. City of New York, 8 Wend. 85, 22 Am. Dec. 622; Beekman v. Saratoga & S. R. Co., 3 Paige, 45, 22 Am. Dec. 679;
(N. C. 1837) Raleigh & G. R. Co. v. Davis, 19 N. C. 451;
(Tex. 1863) Buffalo Bayou, B. & C. R. Co. v. Ferris, 26 Tex. 588.

[b] (U. S. 1885) The act of congress approved July 15, 1882, to increase the water supply of the city of Washington, is not unconstitutional for the reason that it does not provide that ascertainment of the compensation for property taken shall be by the verdict of a jury.—Great Falls Mfg. Co. v. Garland (C. C.) 25 Fed. 521.

[c] (U. S. 1891) In a proceeding taken by the government, under Act Cong. Aug. 18, 1890, to condemn lands to the use of the United States, the owner of the land is not entitled as a matter of right to a trial by jury. —United States v. Engerman (D. C.) 46 Fed. 176.

[d] (Ark. 1877) The provision of Const. 1868, requiring that damages for the appropriation of a right of way should be assessed by a jury of 12 men, as shall be prescribed by law, did not execute itself, but required legislation; and, where no law was passed applicable to railroads chartered before 1868, a landowner had a right, on his lands being appropriated for such a road, to have an assessment according to the mode prescribed by the statute in force before the constitution, although it prescribed a jury of five men. —Cairo & F. R. Co. v. Trout, 32 Ark. 17.

[e] (Cal. 1860) Act March 29, 1860, providing for the condemnation of land for a state capitol site, and the appointment of commissioners to assess the damages for the property taken, is not unconstitutional, as depriving the owner of the property of the right to trial by jury.—Koppikus v. State Capitol Com'rs, 16 Cal. 248.

[f] (Del. 1846) An act providing that the owners of land lying on a certain stream should have the right to issue out a writ in the nature of a writ of ad quod damnum, to inquire by a jury of 12 men what damages have been sustained by such owners by reason of unauthorized obstructions placed in such stream, is a constitutional mode of proceeding, and does not violate the right of trial by jury.—Bailey v. Philadelphia, W. & B. R. Co., 4 Har. 389, 44 Am. Dec. 593.

[g] (Ill. 1872) Const. 1870, art. 2, § 13, providing that "private property shall not be taken or damaged for public use without just compensation," which, "when not made by the state, shall be ascertained by a jury, as shall be prescribed by law," and thereby repealing the statute then in force as to taking property for a public road, so far as it authorized an assessment of damages by the commissioners or supervisors, renders void such assessment made in a proceeding commenced after the adoption of the new constitution, although there was then no mode "prescribed by law" for the ascertainment of the compensation by a jury, as required therein.—Kine v. Defenbaugh, 64 Ill. 291.

[h] (Ind.) Rev. St. 1881, § 4276, providing that questions of fact in drainage proceedings shall be tried without a jury, is not repugnant to Const. art. 1, § 20, which provides that "in all civil cases the right of trial by jury shall remain inviolate."—(1883) Anderson v. Caldwell, 91 Ind. 451, 46 Am. Rep. 613; (1884) Indianapolis & C. Gravel Road Co. v. Christian, 93 Ind. 360; (1885) Lipes v. Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; (1887) Laverty v. State, 109 Ind. 217, 9 N. E. 774.

[i] (Ind. 1890) Under Act 1833, § 2 (Elliott's Supp. par. 1176), providing that a petition for the establishment of a ditch shall be docketed as an action pending, it is not an action at law, but a special proceeding, and the parties are not entitled to a trial by jury therein.—Baltimore & O. & C. R. Co. v. Ketring, 122 Ind. 5, 23 N. E. 527.

[j] (Mich. 1866) Where the state constitution requires a jury of 12 freeholders to determine the "necessity for using private property and the just compensation therefor," and also requires a jury in all cases where property is taken for public improvements in cities and villages, and an amendment is made exempting from the operation of the first provision "the action of commissioners of highways," the amendment does not include the municipal authorities of cities under the designation of "commissioners of highways."—Campau v. City of Detroit, 14 Mich. 276.

[k] (Minn. 1875) Condemnation proceedings, under the power of eminent domain, are not actions at law, within the constitutional provisions relating to trial by jury.—Ames v. Lake Superior & M. R. Co., 21 Minn. 241.

[l] (Mo. 1891) Const. 1875, art. 12, § 4, provides that "the right of trial by jury shall be held inviolate in all trials of claims for compensation," where an incorporated company shall seek to exercise the right of eminent domain. The schedule (section 1) declares that "the provisions of all laws which are incon

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sistent with this constitution shall upon its adoption cease." *Held*, that all laws, general and special, which provided for the ascertainment of compensation for land taken by virtue of the right of eminent domain otherwise than by a jury, existing at the time the constitution was adopted, were thereby repealed.—St. Joseph & I. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. 581.

[m] (Mo. 1895) Under Const. art. 12, § 4, providing that "the right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of the right of eminent domain, any incorporated company shall be interested either for or against such right," the fact that, in a condemnation proceeding by a city, certain of the defendants are incorporated companies, does not give other defendants the right to demand a trial by jury.—City of Kansas City v. Vineyard, 128 Mo. 75, 30 S. W. 326.

[n] (Mo. 1895) A municipal corporation is not an "incorporated company," within Const. art. 12, § 4, providing that "the right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of the right of eminent domain, any incorporated company shall be interested either for or against such right."—City of Kansas City v. Vineyard, 128 Mo. 75, 30 S. W. 326.

[o] (Mo. 1895) The fact that the city is plaintiff, and that there are corporate defendants in proceedings to condemn property for street purposes, does not entitle the other parties thereto, whose lands are sought to be condemned, to demand a trial by a jury of 12 men, where such right is waived or not asserted by the corporate plaintiffs or defendants, under Const. art. 12, giving the right of jury trial in all trials of claims for compensation in eminent domain proceedings, in the result of which an incorporated company should be interested; Const. art. 2, § 21, providing in all other cases for a jury of three.—In re Independence Avenue Boulevard, 128 Mo. 272, 30 S. W. 773; Appeal of Smart, Id.

[p] (N. C. 1837) The assessment of damages to be paid to private individuals for property directed by the legislature to be taken for public use need not be made by a jury of 12 freeholders; it not being a controversy respecting property, within the Bill of Rights, § 14, securing in such event a trial by jury.—Raleigh & G. R. Co. v. Davis, 19 N. C. 451.

[q] (Ohio, 1836) The charter of the Pennsylvania & Ohio Canal Co., § 9, provided that in case the company and the owner of land taken could not agree as to its value, and cannot agree on persons to appraise the same, then the legislature shall appoint commissioners to assess the value, is not an invasion of the constitutional guaranty that the right to trial by jury shall be preserved inviolate.—Willyard v. Hamilton, 7 Ohio (7 Ham.) 111, pt. 2d, 30 Am. Dec. 195.

[r] (Ohio, 1854) An act authorizing assessment of damages in condemnation cases, by summary method and without a jury, is in violation of the constitutional guaranty of trial by jury.—City of Cincinnati v. Board of Com'rs of Hamilton County, 1 Disn. 4.

[s] (Ohio, 1893) The commissioners, in making a finding that a proposed ditch will be conducive to the public health, etc., and in determining which is the best route therefor, and in making an order for the location of such ditch and for its construction, are exercising a political power delegated to them by statute, and in which no private right is affected as to which a trial by jury is guarantied by the constitution, while their findings and orders as to the value of the land taken, and the damages which will result from the construction of the proposed ditch, are steps in a proceeding to appropriate property to a public use, in which a trial by jury is so secured.—Vornholt v. Gordon, 30 Wkly. Law Bul. 33.

[t] (Pa. 1867) A citizen has no right to trial by jury in proceedings by a state under her powers of eminent domain.—Pennsylvania R. Co. v. First German Lutheran Congregation, 53 Pa. (3 P. F. Smith) 445.

§ 117. —— Determination of necessity for appropriation.

See ante, § 116 [s].

On appeal, see ante, § 98.

[a] (Mich. 1889) Act 1883, No. 124, relative to the taking of private property by municipal corporations for public purposes, provides (section 7) that the jury shall be sworn to "determine whether there is necessity for taking, for the use and benefit of the public, the private property which the petition describes and prays may be taken." Section 8 provides that "the jury shall determine in their verdict the necessity for taking such private property for the use and benefit of the public, for the proposed improvement, and, in case they find that such necessity exists, they shall award" compensation to the owner. *Held*, that the act is not objectionable for failure to require the necessity of the proposed improvement to be determined by the jury, as prescribed by Const. art. 18, § 2.—City of Detroit v. Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813.

[b] (Mich. 1892) Loc. Act 388 of 1889, relating to the condemnation of lands for a boulevard, and providing, in section 16, that "a jury may be impaneled to determine the necessity for taking such lands," and in section 21 that such jurors shall determine the necessity for taking the lands, and to award to each person entitled thereto the proper compensation, leaves for the determination of the jury the question of the public necessity for the contemplated improvement, and therefore does not contravene Const art. 18, § 2, providing that, when private property is taken for the use and benefit of the public, the necessity for using such property shall be ascertained by a jury.—Commissioners of Parks and Boulevards v. Moesta, 91 Mich. 149, 51 N. W. 903.

[c] (N. Y. 1860) The constitutional provisions in regard to taking of private property for public uses, and to trial by jury, do not relate to the question whether or not it is needed for the public use.—People v. Smith, 21 N. Y. 595.

[d] (R. I.) An act in relation to the laying out, enlarging, straightening, or otherwise altering the streets of a city, is not unconstitutional, because it does not permit an appeal to the jury as to the propriety of opening streets.—(1856) In re Dorrance St., 4 R. I. 230; (1857) Deblois v. Barker, Id. 445.

[e] (Wis. 1854) The towns in this state organized for the purpose of township government are not such municipal corporations as are forbidden by article 11, § 2, of the constitution to take land for public use without the consent of the owner, before the necessity thereof shall be established by the verdict of a jury.—Norton v. Peck, 3 Wis. 714.

§ 118. —— Roads and private ways.

On appeal, see ante, § 98.

Opening tollgates of plank road to enforce repair, see ante, § 104 [e].

[a] The right to a jury trial to determine the owner's damages in a proceeding to take land for the purposes of a highway, under the power

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of eminent domain, is not secured by the constitution.
—(Ind. 1859) Dronberger v. Reed, 11 Ind. 420; (Minn. 1878) Bruggerman v. True, 25 Minn. 123.

[b] (Cal. 1881) Act March 18, 1874, providing that where property is taken for a public road the damages shall be ascertained by the examination of the report of the road viewers, has been abrogated by Const. art. 1, § 14, which provides that private property shall not be taken or damaged for public use without just compensation, which shall be ascertained by a jury, unless a jury be waived as in other civil cases in a court of record.—Weber v. Santa Clara County Sup'rs, 59 Cal. 265.

[c] (Mich. 1878) Sess. Laws 1861, p. 256, providing for the condemnation of private ways, is unconstitutional, since it does not provide for a jury, which is rendered indispensable by Const. art. 18, § 18.—People v. Richards, 38 Mich. 214.

[d] (Minn. 1886) As no right of action existed at common law for damages to property resulting from a change of grade of a street by a city, the only remedy for such a change ordered by the council of the city of St. Paul is the appeal from the order of the council, provided for by the city charter (Sp. Laws 1874, c. 1, subc. 7, § 16), and that provision of the charter is not unconstitutional because it does not give a right of trial by jury.—Genois v. City of St. Paul, 35 Minn. 330, 29 N. W. 129.

[e] (N. H.) On a petition by a party aggrieved by an assessment by the selectmen of damages for the laying out of a road, neither party is entitled to a trial by jury, under the twentieth article of the bill of rights; it being within the exceptions contained in such article.—(1840) Backus v. Lebanon, 11 N. H. 19, 35 Am. Dec. 466; (1849) Dalton v. Town of North Hampton, 19 N. H. 362.

[f] (N. H. 1857) Act July 1, 1853, authorizing a corporation to build a road for the use of the public on payment of a uniform and fixed toll, and to take land for the purpose of building a road, and providing that, in case the amount of damages to be paid for the land could not be agreed upon, the question should be referred to the road commissioners of the county to assess such damage, is within the exceptions provided for in Const. Bill of Rights, art. 20, declaring that in all controversies concerning property the parties shall have the right of trial by jury, "except in cases in which it has been heretofore otherwise used and practiced."—In re Mt. Washington Road Co., 35 N. H. 134.

[g] (Ohio, 1855) The statute providing for the appropriation of land for laying out township ways is fatally defective in making no provision for a jury, in the proper sense of the term, to assess the damages of the property holder.—Shaver v. Starrett, 4 Ohio St. 494.

[h] (Ohio, 1857) A landowner *held* entitled to have the damages sustained through the location of a county road assessed by a jury.—In re Wells County Road, 7 Ohio St. 16.

[i] (Ohio, 1886) As there is no provision for the assessment of damages by a jury in Rev. St. § 4715, allowing a supervisor to take private material for use in repairing a road, the section is repugnant to section 19 of the bill of rights, and therefore invalid.—Hendershot v. State, 44 Ohio St. 208, 6 N. E. 245.

[j] (Ohio, 1893) Rev. St. §§ 4914, 4916, 4918, so far as they authorize the probate court to declare a turnpike road vacated as a toll road, thereby becoming a free road, without the intervention of a jury, or the right of appeal, on which a jury could be had to determine whether the road, or a part thereof, has been out of repair for the preceding six months, within the statutory meaning, are in conflict with Const. art. 1, § 5, declaring the right of trial by jury inviolate.—Salt Creek Val. Turnpike Co. v. Parks, 50 Ohio St. 568, 35 N. E. 304, 28 L. R. A. 769; West Alexandria & E. Turnpike Road Co. v. Gay, 50 Ohio St. 583, 35 N. E. 308.

[k] (Or. 1879) Misc. Laws, c. 50, § 29, which provides for the assessment of damages for taking stone or other materials to repair the public roads, is not unconstitutional because it authorizes the county court to assess the damages without a trial by jury.—Kendall v. Post, 8 Or. 141.

[l] (Wash. 1895) Act March 15, 1893 (Laws 1893, p. 301), providing for the location and construction of new roads and the improvement and maintenance of old ones, and that the assessment of damages and benefits shall be made in ex parte proceedings, so far as it relates to new roads, violates Const. art. 1, § 16, prohibiting the taking of private property without compensation ascertained by a jury, unless waived.—Senor v. Board of Com'rs of Whatcom County, 13 Wash. 48, 42 Pac. 552.

§ 119. —— Railroads.

On appeal, see ante, § 98.

[a] (U. S. 1830) An act of the legislature of New Jersey incorporating a railroad company, which provides for the assessment of damages to the owners of the land through which the road passes, is not repugnant to the state or United States constitution, although the proceeding prescribed for the mode of ascertaining compensation does not provide for a trial by jury. The right of trial by jury applies only to civil and criminal cases where a right is to be tried at law, and not to a mere collateral question of damages, where no suit is pending and the right of both parties admitted.—Bonaparte v. Camden & A. R. Co., Fed. Cas. No. 1,617 [Baldw. 205].

[b] (Cal. 1891) Since Civ. Code, § 499, provides that two lines of street railway under different managements may use the same street for the distance of five blocks, each paying an equal portion for the construction of the road used by them jointly, a street railway company, on receiving a franchise, has an absolute right to use so much of the tracks of another company, and does not thereby take the property of the other company, so that the laws relating to ascertaining the compensation to be paid on taking property under the right of eminent domain do not apply; and where the property of the first company is in the hands of the court through its receiver, the court may, on application of the second company, without the intervention of a jury, determine the amount of one-half the cost of constructing so much of the road as is sought to be used jointly, and allow such use on payment of the same.—Pacific Ry. Co. v. Wade, 91 Cal. 449, 27 Pac. 768, 25 Am. St. Rep. 201, 13 L. R. A. 754.

[c] (Md. 1891) Inasmuch as the special jury provided for in Code, art. 23, § 167, to determine the amount of damages to be awarded for land taken by a railroad company, was recognized by statute long prior to the adoption of the constitution of Maryland, the constitutional provision that no law shall authorize the taking of private property without compensation agreed on, or awarded by a jury, does not relate exclusively to the common-law jury, but leaves it to the legislature to determine, therefore said section is not unconstitutional.—Baltimore Belt R. Co. v. Baltzell, 75 Md. 94, 23 Atl. 74.

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[d] (Tex. 1871) The provisions in a railway charter granted by the legislature, which provides for the appointment by the district court of appraisers to determine the compensation due to owners of land taken by the company, is not in conflict with the constitutional guaranty of trial by jury.—Houston Tap & B. Ry. Co. v. Milburn, 34 Tex. 224.

§ 120. Proceedings against officers for misconduct in office.

Against sheriffs and constables for breach of duty as to process, see ante, § 91.

Effect of provision for other remedy, see post, § 236 [a].

Prosecution and impeachment, see post, § 141.

[a] (U. S. 1845) It seems that the act of congress of 1820, authorizing the agent of the treasury to issue a distress warrant against a defaulting officer without notice and without investigation, deprived such officer of his constitutional right of trial by jury.—United States v. Taylor, Fed. Cas. No. 16,440 [3 McLean, 539].

[b] (Ala. 1832) The statute of 1819 enacts "that all charges against clerks for misbehavior in office shall be exhibited to the court in writing, and the court shall direct the facts to be tried by a jury; and on conviction thereof, such clerk shall be fined or removed from office, as the court of which he is clerk shall think proper." Since this statute, a clerk cannot be removed unless charges are so exhibited, and the facts found by a jury, even for contumacy in the face of the court.—Callahan v. State, 2 Stew. & P. 379.

[c] (Ala. 1850) It is competent for the legislature to create an office not specially provided for in the constitution, and subject the incumbent to a trial for his defaults without the intervention of a jury. In such case the right of trial by jury never existed; and hence no constitutional provision is thereby violated.—Boring v. Williams, 17 Ala. 510.

[d] (Ga. 1848) An act of the legislature which authorizes the issuing of execution to collect money belonging to the public in the hands of a collector, receiver, or depositary, or any other legally appointed public monetary agent, without the intervention of a jury, is not in violation of the constitutional right of trial by jury; but the act of 1796, authorizing such issue of execution, for money belonging to the county for county purposes, is unconstitutional, except as to such collectors, receivers, or other legally appointed public monetary agents.—Tift v. Griffin, 5 Ga. 185.

[e] (Ga. 1870) Since a proceeding against a commissioner of roads for neglect of duty, under Rev. Code, § 701, is not technically a criminal proceeding, but one against a public agent for neglect of his official duty, the commissioner is not entitled, on the trial of a presentment of the grand jury for such neglect of duty, to a trial by jury.—Blankenship v. State, 40 Ga. 680.

[f] (Ga. 1872) Code, §§ 991, 996, providing that the comptroller general, on ascertaining that there has been a default by any agent or person intrusted with funds of the Western & Atlantic Railroad, owned by the state, shall issue executions against such defaulter and his sureties, does not impair the right of trial by jury required by the constitution to "remain inviolate," because the process, being virtually one for the collection of public revenues of the state, is not such as entitled the defendant to a jury trial at the time of the adoption of the constitution.—Scofield v. Perkerson, 46 Ga. 325, 350.

[g] (Tenn. 1841) The collector of county taxes, against whom a motion is made for an unpaid balance, under Act 1835, c. 15, § 14, is entitled to a trial of the facts of his case by a jury, under the provisions of said section.—Miller v. Moore, 21 Tenn. (2 Humph.) 421.

[h] (Vt. 1881) Gen. St. c. 84, §§ 50, 51, authorizing proceedings against a collector of taxes in default, is not unconstitutional as depriving the collector of all rights of a jury trial, as issues of fact in matters connected with offenses against the revenue at the time of the revolution were not tried by a jury, and were not understood by the framers of the constitution as being "proper for the cognizance of a jury."—In re Hackett, 53 Vt. 354.

§ 121. Suspension and removal of officers.

Conviction of misdemeanor as prerequisite, see post, § 145 [f].

Prosecution and impeachment, see post, § 141.

Quo warranto, see ante, § 105.

[a] (Cal. 1890) The right to a trial by jury, in a proceeding under Pen. Code, § 772, to remove defendant from office, is excluded by the provision for a summary hearing, which is valid; Const. art. 4, § 18, providing for the impeachment of certain officers, and that "all other civil officers shall be tried for misdemeanors in office in such manner as the legislature may provide."—Woods v. Varnum, 85 Cal. 639, 24 Pac. 843.

[b] (Idaho, 1894) Rev. St. 1877, § 7459, providing for a summary hearing and removal of an officer for misdemeanors or corruption in office, and a judgment including costs in favor of the informer, does not violate Const. U. S. Amend. 7, giving the right of trial by jury in all suits where the amount in controversy exceeds $20.—Rankin v. Jauman, 36 Pac. 502.

[c] (Tex. 1872) A sheriff is not entitled to a trial by jury upon a proceeding by the district judge for his removal from office, under Const. art. 5, § 18.—Davis v. State, 35 Tex. 118.

§ 122. Issuance or cancellation of licenses and permits.

[a] (Conn. 1882) The act of 1881, constituting the county commissioners in each county a court for the trial of complaints for the revocation of liquor licenses, and giving them all the powers of justices of the peace, does not constitute a court, within the meaning of the state constitution, and therefore is not unconstitutional in not providing for a trial by jury.—La Croix v. Fairfield County Com'rs, 49 Conn. 591.

[b] (Ga. 1830) Summary proceedings, under Act 1799, § 7, for the revocation of a pilot's license, on the ground of incompetency or negligence do not violate Const. U. S. Amend. 7.—Low v. Pilotage Com'rs, 1 R. M. Charlt. 302.

[c] (Iowa, 1885) The hearing by the court, without a jury, of an information brought, under Code 1873, § 1535, to revoke a permit to sell liquor, on the ground that it is sold for unlawful purposes, is not a violation of article 1, § 9, of the constitution, declaring that the right of trial by jury shall remain inviolate.—State v. Schmidtz, 65 Iowa, 556, 22 N. W. 673.

[d] (Iowa, 1885) A hearing by the court without a jury, under Code 1873, § 1535, of an information brought to revoke a permit to sell liquor, on the ground that its sale was for unlawful purposes, is not a violation of Const. art. 1, § 9, declaring that the right of trial by jury shall remain inviolate.—State v. Schmidtz, 65 Iowa, 556, 22 N. W. 673.

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[e] (N. Y. 1874) The provision of the excise law (Laws 1873, c. 549, § 8), providing for the cancellation by boards of excise of licenses granted for the sale of intoxicating liquors, is not in contravention of the constitutional provisions preserving the right of trial by jury. The power to license and to cancel licenses is vested in the legislature, and the mode and manner in which it shall be done rests in its discretion.—People v. Brooklyn Police & Excise Com'rs, 59 N. Y. 92.

§ 123. Establishment of boundaries.

[a] (Ill. 1874) On the hearing of objections to the report of surveyors appointed pursuant to Act March 25, 1869, to fix disputed boundaries of land, it was error for the court to refuse a jury trial.—Huston v. Atkins, 74 Ill. 474.

[b] (Iowa) While the statute (Miller's Code, p. 81) authorizing proceedings for the establishment of boundaries does not contemplate a jury trial, it is not unconstitutional on that account.—(1882) Gates v. Brooks, 59 Iowa, 510, 6 N. W. 595, 13 N. W. 640; (1885) Coombs v. Quinn, 66 Iowa, 469, 23 N. W. 928; (1886) Caldwell v. Nash, 68 Iowa, 658, 27 N. W. 812.

[c] (Mass. 1873) The legislature, when changing boundaries of cities and towns, in dividing among the cities the property, or in intrusting such division to the courts, need not provide for a trial by jury.—Stone v. City of Charlestown, 114 Mass. 214.

[d] (Mo. 1845) When the calls of a survey are all ascertained, and no resort to extrinsic evidence is necessary, it is for the court to fix the boundary; but, where parol evidence has to be resorted to to identify the calls, the facts must be ascertained by a jury.—Ott v. Soulard, 9 Mo. 581.

[e] (N. C. 1877) In a case of lappage, if the claimant under the senior grant is driven to show actual possession, an issue of fact is thereby raised, which must be submitted to a jury.—McAllister v. Devane, 76 N. C. 57.

§ 124. Seizures, penalties, and forfeitures.

Actions, see ante, § 102.
As criminal prosecution, see post, § 146 [a].
Assessment of damages, see ante, § 85 [s].
Fixing amount of penalty as invading province of jury, see post, § 234 [j].
Imposition of fines, see post, § 136.

[a] (U. S. 1796) A proceeding for a forfeiture for exportation of arms, etc., against the statute of May 22, 1794, is a civil cause, the process being of the nature of a libel in rem, and does not in any degree touch the person of the offender, who is not, therefore, entitled to trial by jury.—United States v. La Vengeance, 3 U. S. (3 Dall.) 297, 1 L. Ed. 610.

[b] (U. S. 1796) A proceeding for the forfeiture of a foreign vessel illegally fitted out as a privateer in the United States is a civil cause in the nature of a libel in rem, and does not, therefore, entitle the claimant to a trial by jury.—United States v. La Vengeance, 3 U. S. (3 Dall.) 297, 1 L. Ed. 610.

[c] (U. S. 1800) Act Ga. May 4, 1782, inflicting penalties on, and confiscating the estate of, such persons as are guilty of treason, is not repugnant to the constitution of that state (article 61) which provides that a trial by jury shall remain inviolate.—Cooper v. Telfair, 4 U. S. (4 Dall.) 14, 1 L. Ed. 721.

[d] (U. S. 1808) A seizure of a vessel of more than 10 tons burden on navigable waters for violation of the act of February 28, 1806, entitled "An act to suspend the commercial intercourse between the United States and certain parts of the island of San Domingo," is to be tried without a jury.—United States v. The Betsey, 8 U. S. (4 Cranch) 443, 2 L. Ed. 673.

[e] (U. S. 1812) Cases of seizure upon waters navigable from the sea by vessels of more than 10 tons burden for breach of the laws of the United States are civil cases of admiralty and maritime jurisdiction, and are to be tried without a jury.—Whelan v. United States, 11 U. S. (7 Cranch) 112, 3 L. Ed. 286.

[f] (U. S. 1823) In cases of seizures made on land, under the revenue laws, the district court proceeds as a court of common law, according to the course of the exchequer on information in rem, and the trial of facts is by a jury; but in cases of seizures on waters navigable from the sea by vessels of 10 or more tons burden, it proceeds, as an instance court of admiralty, by libel, and the trial is by the court.—The Sarah, 21 U. S. (8 Wheat.) 394, 5 L. Ed. 644.

[g] (U. S. 1824) Act Dec. 31, 1792, c. 1, relative to the forfeiture of vessels for failure to register transfers, in the proviso to the seventh section enacts that if such vessel shall be owned in part only, and "it shall appear to the jury before whom the trial shall be had" that any other owner was ignorant of the transfer, his share shall not be forfeited. Section 29 declares that all penalties and forfeitures shall be sued for in the manner that penalties are recovered for violations of Act Aug. 4, 1790, c. 35. Act Aug. 4, 1790, c. 35, provides for the prosecution of penalties in the same general terms which are employed in Revenue Act March 2, 1799, c. 128. The judiciary act of 1799 confers jurisdiction of seizures for forfeitures made under laws of impost, navigation, and trade on waters navigable from the sea by vessels of 10 tons burden and upwards, and provides that such cases are to be tried by the court, but that all other seizures are to be tried by jury. *Held*, that a proceeding under the act of 1792 against a vessel of more than 10 tons engaged in navigable waters should be tried by the court, and proceedings against other seizures only should be tried by jury.—The Margaret, 22 U. S. (9 Wheat.) 421, 6 L. Ed. 125.

[h] (U. S. 1824) The right to a jury trial in proceedings for the forfeiture of vessels, under the act of December 31, 1792, for failure to register a transfer of a ship, should be insisted upon in time by the parties claiming the benefit of it.—The Margaret, 22 U. S. (9 Wheat.) 421, 6 L. Ed. 125.

[i] (U. S. 1872) Where a seizure of goods has been made on land for an infringement of the internal revenue laws, the claimant is entitled to a trial by jury, if he appears and files an answer denying the facts charged in the information; and the court cannot strike out his answer, thus depriving him of his right to trial by jury.—Garnharts v. United States, 83 U. S. (16 Wall.) 162, 21 L. Ed. 275.

[j] (U. S. 1811) Though the nonimportation law (volume 9, Laws, p. 243) provides that the recovery for forfeitures incurred thereunder shall be by action of debt by indictment or information, the information may be of the nature of a libel in rem, so that the respondent is not entitled to a trial by jury.—Clark v. United States, Fed. Cas. No. 2,837 [2 Wash. C. C. 519].

[k] (U. S. 1865) In a proceeding in a federal district court against property seized as forfeited under the internal revenue laws, to which a claim is interposed, the claimant has a constitutional right to a trial by jury. The provision of Act June 30, 1864, § 68 (13 Stat. 233), declaring that "the proceeding to enforce said

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forfeiture of said property shall be in the nature of a proceeding in rem," is not to be construed as authorizing a trial on strict admiralty rules, and without the intervention of a jury.—United States v. One Hundred and Thirty Barrels of Whisky, Fed. Cas. No. 15,938 [1 Bond, 587].

[l] (U. S. 1880) A trial by jury is not necessary on a libel for the penalty imposed by law for the failure of the master of a vessel from a foreign port to report his vessel to the consul, or enter the manifest required by law.—The Paolina S. (C. C.) 11 Fed. 171.

[m] (Ky. 1818) Act Jan. 1810 (4 Litt. Laws, p. 161), authorizing the county court to impose a fine without trial by jury, for giving in a false and fraudulent list of taxable property, is unconstitutional as depriving the taxpayer of the right to trial by jury.—Carson v. Commonwealth, 8 Ky. (1 A. K. Marsh.) 290.

[n] (Mo. 1879) Wag. St. p. 1165, § 34, which imposes the penalty of paying treble the amount of taxes he would otherwise be liable to pay on a person who shall, at a hearing before a county board of equalization of which due notice has been given, be found guilty of having delivered a false list of his property to the tax assessor, does not contravene the constitutional requirements as to right of trial by jury.—State ex rel. Ferguson v. Moss, 69 Mo. 495.

[o] (N. J. 1887) In summary proceedings to recover a penalty for a violation of the "act to prevent deception in the sale of oleomargarine, butterine, or any imitation of dairy products, and to preserve the public health," approved March 22, 1886 (P. L. p. 107), the right to trial by jury does not exist.—Carter v. Camden District Court, 49 N. J. Law (20 Vroom) 600, 10 Atl. 108; Newton v. Reed, 10 N. J. Law J. 175.

[p] (N. C. 1822) The revenue law authorizing the sheriff to collect by distress a penalty for peddling without a license, is not unconstitutional as depriving the party of a jury trial.—Cowles v. Brittain, 9 N. C. 204.

[q] (Ohio, 1891) Laws 1890, p 327, § 13, imposing a fine on persons (parents and school teachers, etc.) failing to perform their duties in respect to the enforcement of the compulsory school law, and making such fine recoverable before a mayor, justice of the peace, or probate judge, is not in conflict with Const. U. S. Amend. art. 5, and Const. art. 1, §§ 5, 10, preserving the right of trial by jury.—Quigley v. State, 5 Ohio Cir. Ct. R. 638.

[r] (Pa. 1854) The act of April 14, 1851, prohibiting the sale of spirituous liquors under a penalty, and providing for the recovery of the same by summary proceedings before an alderman or justice of the peace, is not unconstitutional for the reason that it does not provide for a trial by jury.—Van Swartow v. Commonwealth, 24 Pa. (12 Harris) 131.

[s] (Pa. 1864) The act of 1862, §§ 1, 2, to prevent the disturbance of religious worship, is unconstitutional in providing for the forfeiture of property without granting a trial by jury.—Fetter v. Wilt, 46 Pa. (10 Wright) 457.

[t] (S. C. 1822) The statute imposing a penalty of $10,000 on those who sell lottery tickets in lotteries not authorized by the laws of the state, or keep open an office for that purpose, is unconstitutional, so far as it authorizes the tax collector to issue execution for the penalty without a conviction by a jury.—State v. Allen, 2 McCord, 55.

[u] (Vt. 1883) Intoxicating liquor, seized and condemned according to law, is without rights; and a claimant of such liquor is not entitled to a trial by jury.—State v. Smith, 55 Vt. 82.

§ 124½. Enforcement of bonds and recognizances.

Proceedings in civil actions, see ante, § 86.

[a] The statute authorizing a judgment against the sureties of a sheriff without a jury is constitutional.
—(Ind. 1822) Dawson v. Shaver, 1 Blackf. 204; (Ky. 1819) Wells v. Caldwell, 8 Ky. (1 A. K. Marsh.) 441; (1831) Murry v. Askew, 29 Ky. (6 J. J. Marsh.) 27.

[b] (Ky.) The statute giving the right to sureties to recover by summary process money paid by them for their principal is constitutional. The court of equity had jurisdiction, and the trial was without a jury, before the constitution was formed.—(1817) Creighton v. Johnson, 16 Ky. (Litt. Sel. Cas.) 240; (1817) McCord v. Same, 7 Ky. (4 Bibb) 531; (1821) Watts v. Griffin, 16 Ky. (Litt. Sel. Cas.) 244.

[c] (La.) In proceedings by motion against bail, he has a right to demand a jury.—(1821) Labarre v. Fry's Bail, 9 Mart. (O. S.) 381; (1831) Gale v. Quick's Bail, 2 La. 348.

[d] (Miss. 1834) Rev. Code, p. 142, § 160, authorizing a surety who has been compelled to pay the debt to recover the amount paid by motion against the principal without a jury trial, is void as violating the constitutional provision that the right of a jury trial shall remain inviolate.—Smith's Adm'r v. Smith, 2 Miss. (1 How.) 102.

[e] (Mo. 1894) A proceeding to enforce a recognizance in a criminal case is not an original action, in which the defendant is entitled to a jury trial.—State v. Murmann, 124 Mo. 502, 28 S. W. 2.

[f] (N. C. 1856) Where, in a summary proceeding by motion for judgment on a jail bond, the defendant pleads matter in pais, he is entitled to a trial by jury.—Whitley v. Gaylord, 48 N. C. 286.

§ 125. Levy, collection, and abatement of taxes.

Fines and penalties, see ante, § 124 [k, m, n].

[a] (Ga. 1857) The constitution does not give a jury trial in cases in which jury trial had not previously been used, such as a levy for a tax.—Harper v. Town of Elberton Com'rs, 23 Ga. 566.

[b] (Ill. 1877) An application for judgment for delinquent taxes is governed by the revenue act, and the act relating to trial by jury has no application.—Mix v. People, 86 Ill. 312.

[c] (La. 1875) A suit for taxes is summary, and is not to be tried by a jury.—City of New Orleans v. Cassidy, 27 La. Ann. 704.

[d] (Minn. 1875) The provision of Const. art. 1, § 4, preserving the right to trial by jury in "all cases at law," does not give parties to proceedings to enforce payment of delinquent taxes, under Laws 1874, c. 1, the right to a jury trial of any issue except the questions whether the tax has been paid, or whether the property is exempt from taxation.—Mille Lacs County Com'rs v. Morrison, 22 Minn. 178.

[e] (N. H. 1871) Under the provisions of the constitution and statutes as to petitions, etc., on a petition to abate taxes assessed by the selectmen of a town, there is no right to a trial by jury; but the court in such case may, in its discretion, send an issue to the jury.—Cocheco Mfg. Co. v. Strafford, 51 N. H. 455.

[f] (Vt. 1886) An act requiring tax listers to list the property of one who refuses to return a sworn inventory thereof at double its estimated value, is not unconstitutional as impos-

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ing a penalty without jury trial.—Bartlett v. Wilson, 59 Vt. 23, 8 Atl. 321.

§ 126. Admission or disbarment of attorneys.

[a] Respondent in disbarment proceedings is not entitled to a jury trial.
—(Mich. 1896) In re Shepard, 109 Mich. 631, 67 N. W. 971;
(Tenn. 1829) Smith v. State, 9 Tenn. (1 Yerg.) 228; (1893) State v. Davis, 92 Tenn. 634, 23 S. W. 59.

[b] (U. S. 1883) A proceeding to disbar an attorney is one within the proper jurisdiction of the court of which he is an attorney, and does not violate the constitutional provisions which require an indictment and trial by jury in criminal cases, as it is not a criminal proceeding to punish the attorney, but intended to protect the court from the ministrations of persons unfit to practice as attorneys.—Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552, 27 Alb. Law. J. 406, 5 Ky. Law Rep. 2.

[c] (Ind. 1869) Where a motion is made to suspend from practice an attorney, and issue joined, the defendant is entitled, under the Code, to demand that such issue shall be tried by a jury.—Reilly v. Cavanaugh, 32 Ind. 214.

[d] (Okl. 1894) In proceedings to revoke an order of a court, admitting an attorney to practice law, obtained by fraud, defendant is not entitled to a trial by a jury as a matter of right.—Dean v. Stone, 2 Okl. 13, 35 Pac. 578.

§ 127. Bastardy proceedings.

Issues of fact, see ante, § 29 [o].

[a] (Ky. 1831) A jury is neither necessary nor proper in a case of bastardy.—Scantland v. Commonwealth, 29 Ky. (6 J. J. Marsh.) 585.

[b] (Tenn. 1825) Acts 1741, c. 14, and Acts 1822, c. 29, § 1, authorizing the court without the intervention of a jury to adjudge a man the father of a bastard child and order him to maintain it, are not violative of the constitutional provision that no man shall be deprived of property without a judgment of his peers.—Goddard v. State, 10 Tenn. (2 Yerg.) 96.

§ 128. Summary proceedings for recovery of possession of land.

Effect of provision for jury trial on appeal, see post, § 237 [b–d].
Restrictions on right of appeal, see post, § 212 [i].

[a] (U. S. 1858) Act N. Y. March 31, 1821, making it unlawful for any person other than Indians to settle and reside on lands belonging to or occupied by any tribe of Indians, and providing that if any persons should so settle on Indian lands, the judge of any county court where they were situated, on complaint made to him, with due proof of such residence, should issue his warrant directing the sheriff to remove such persons, was not in violation of the federal constitution, as excluding such persons from a right, according to the course of the common law, to the trial of their property interests in such lands by a jury, but was a valid exercise by the state of its power to preserve the peace; that being one of the powers reserved to the states.—New York v. Dibble, 62 U. S. (21 How.) 366, 16 L. Ed. 149.

[b] (La.) In summary proceedings to eject a tenant and recover possession of leased premises, the parties are not entitled to a jury trial.—(1853) Wallace v. Smith, 8 La. Ann. 376; (1870) Pesant v. Heartt, 22 La. Ann. 292.

[c] (Mo. 1891) The landlord and tenant statute for the recovery of possession for the nonpayment of rent provides a full procedure in such action, and that its hearing shall be before the justice; but contains no requirement for a jury, and none is permitted.—State v. Allen, 45 Mo. App. 551.

[d] (Nev. 1867) A party in possession claiming title cannot be ousted without a trial before a common-law court and jury.—Stonecifer v. Yellow Jacket Silver Min. Co., 3 Nev. 38.

[e] (N. J. 1898) In summary proceedings by a landlord to recover the possession of land from a tenant, whose term had expired, the tenant is entitled to a trial by jury, notwithstanding the act of April 23, 1888.—Fry v. Myers, 56 N. J. Law (27 Vroom) 115, 28 Atl. 425.

[f] (N. Y. 1851) In a case of "summary proceedings to recover possession of land" before a county judge, the issue must be tried by a jury.—Benjamin v. Benjamin, 5 N. Y. (1 Seld.) 383.

[g] (N. Y. 1854) Act March 31, 1821, making it unlawful for persons other than Indians to settle or reside on Indian lands, and avoiding leases, contracts, and agreements made with Indians with respect to such lands, and providing for the removal of such persons by summary process in a court of common pleas on a complaint filed, is not unconstitutional, as the provision of the constitution and bill of rights respecting a trial by jury are not applicable to cases of a disturbance of the friendly relations between the state and the Indian nations or tribes within the state.—People v. Dibble, 16 N. Y. 203, 18 Barb. 412.

[h] (N. Y. 1858) A judgment debtor who continues in possession of land after a sale on execution against him has a right to a jury trial in summary proceedings, under 2 Rev. St. p. 512, to remove tenants.—Spraker v. Cook, 16 N. Y. 567.

[i] (S. C.) Gen. St. § 1819, providing a summary mode of ejecting tenants who either hold over after the expiration of their leases, or fail to pay rent when due, and conferring jurisdiction on justices of the peace in such cases, is not unconstitutional as violating the right to a trial by jury guarantied by Const. art. 1, § 11, for the reason that previous to the adoption of the constitution no right to a jury trial existed in such proceeding.—(1887) Frazee v. Beattie, 26 S. C. 348, 2 S. E. 125; (1890) Swygert v. Goodwin, 32 S. C. 146, 10 S. E. 933.

§ 129. Distress for rent.

Effect of provision for other remedy, see post, § 236 [b].

[a] (Fla. 1887) St. 1879, c. 3131, providing that "all claims for rent shall be a lien on agricultural products raised on the land rented," and prescribing a summary remedy for its enforcement, is not unconstitutional, in that it withholds the right of trial by jury.—Jones v. Fox, 23 Fla. 454, 2 South. 700.

[b] (Ky. 1835) The acts which give landlords prior liens for rent and the remedy by distress are constitutional.—Burket v. Boude, 33 Ky. (3 Dana) 209.

[c] (N. C. 1800) A warrant of distress for rent is unconstitutional as depriving a tenant of trial by jury.—Dalgleish v. Grandy, 1 N. C. 249.

§ 130. Election contests.

Mandamus to compel election, see ante, § 106 [h].
On appeal, see ante, § 95 [b, l].
Quo warranto, see ante, § 105.

[a] (Ga. 1884) Act Sept. 21, 1883, providing that in cases of contested elections for certain

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offices testimony should be taken before some judicial officer, after notice had been given to the opposite party, and should be submitted to the judge of the circuit, was not rendered unconstitutional by failure to provide for a trial of issues of fact by a jury.—Freeman v. State, 72 Ga. 812.

[b] (Ind.) A party in a contested election case has no right to demand a jury trial.—(1878) Corey v. Lugar, 62 Ind. 60; (1887) Pedigo v. Grimes, 113 Ind. 148, 13 N. E. 700.

[c] (La. 1870) Under Acts 1868, No. 156, relating to contests for public offices and providing that all cases may be tried before a judge at chambers, and, if required by either party, the judge may order a special jury, either party has a right to a trial by jury.—State v. Head, 22 La. Ann. 54.

[d] (Minn.) An action to contest the election of a county officer, under Gen. St. 1866, c. 1, §§ 46–52, is a special proceeding, and not a civil action, wherein a party is entitled to a jury trial.—(1860) Whallon v. Bancroft, 4 Minn. 109 (Gil. 70); (1868) Ford v. Wright, 13 Minn. 518 (Gil. 480).

[e] (Pa. 1862) The act of 1839, instituting the form of proceeding for contesting elections, and depriving a party, claiming a right to a public office by a popular election, of a trial by jury of the disputed facts, is not unconstitutional.—Ewing v. Filley, 43 Pa. (7 Wright) 384; In re Contested Elections for Sheriff and Clerk of Orphans' Court, 1 Brewst. 67; Thompson v. Ewing, Id.

§ 131. Fugitive slave laws.

Issues of fact or law, see ante, § 29 [a].

[a] (U. S. 1851) The rendition of a fugitive slave, under the acts of 1793 and 1850, is an executive, and not a judicial, proceeding, and trial by jury is not necessary therein under the federal constitution.—United States v. Scott, Fed. Cas. No. 16,240b.

[b] (U. S. 1853) Article 7 of the amended constitution, which gives a right to a trial by a jury in suits at common law where the value in controversy shall exceed $20, does not apply to a preliminary examination under the fugitive slave law of Feb. 12, 1793 (1 Stat. 302), as amended by Act Sept. 18, 1850 (9 Stat. 462), such a proceeding not being according to the course of the common law, but constitutional and statutory.—Miller v. McQuerry, Fed. Cas. No. 9,583 [5 McLean, 469].

[c] (Ky. 1833) The statute of 1808, by which persons of color may be compelled to depart from the state, is unconstitutional so far as it dispenses with the trial by jury.—Doram v. Commonwealth, 31 Ky. (1 Dana) 331.

[d] (Mass. 1851) Act Cong. 1850, c. 60, concerning fugitives from service, being substantially like Act Cong. 1843, c. 7, the constitutionality of which has been settled by the supreme court of the United States, was constitutional, though it confers on commissioners of the circuit court authority to return fugitives to service without provision for trial by jury.—In re Sims, 61 Mass. (7 Cush.) 285.

[e] (S. C. 1844) Act 1836, § 6 (7 St. at Large, p. 472), providing that any person who has carried a slave out of the state for a time, and during that time visited any state north of the Potomac, shall, upon again introducing such slave into the state, be liable to forfeiture of the slave, after certain summary proceedings, which were not sanctioned by the law existing at the adoption of the constitution, is in violation of Const. art. 9, § 6, which declares that a trial by jury, as heretofore used in this state, shall be forever inviolably preserved.—State v. Simons, 2 Speers, 761.

[f] (Wis. 1854) Act Cong. Sept. 18, 1850, known as the fugitive slave act, and providing for reference to the United States commissioner, for decision, questions of fact which must be established before the alleged fugitive can be delivered up, is unconstitutional and void, in that it withholds from the person claimed the right of trial by jury.—In re Booth, 3 Wis. 1.

§ 132. Habeas corpus proceedings.

[a] (Ind. 1864) A petitioner for a writ of habeas corpus is not entitled to a jury to try issues of fact.—Baker v. Gordon, 23 Ind. 204.

§ 133. Scire facias.

Plea of nul tiel record, see ante, § 32.

[a] (Mo. 1884) Under Rev. St. § 3600, providing that an issue of fact for the recovery of money only, or of specific real and personal property, must be tried by a jury, unless waived, the defendant is entitled to a jury by scire facias to revive a judgment.—Simpson v. Watson, 15 Mo. App. 425.

[b] (Mo. 1894) As a proceeding by scire facias upon a forfeited recognizance is not a civil action, a surety is not entitled, under either Const. art. 2, § 28, providing that the right of trial by jury shall remain inviolate, or under Rev. St. § 2131, providing that an issue of fact in an action for the recovery of money only must be tried by a jury, to have the issues of fact raised by his answer tried by a jury.—State v. Hoeffner, 124 Mo. 488, 28 S. W. 1.

[c] (Pa. 1890) To a sci. fa. to enforce a municipal lien for a street assessment, the affidavit of defense alleged that the liens filed for the assessment were insufficient for uncertainty; that the street never had been legally opened; that the liens were not authorized by the statute under which they were issued; that Federal lane was laid out under an act of the general assembly, and recognized in patents to abutting owners, and was accepted and directed to be opened by the city; that the city was attempting to open and widen an extension of the lane, partly outside of its proper limits, and by conspiracy between the city engineer and certain abutting owners, the assessment was to pay them damages for taking part of the lane which they had wrongfully fenced in, which was unnecessary, and practically destroyed the lane as established by the commonwealth; and that such extension was unauthorized by the ordinance. *Held*, that defendant was entitled to a jury trial.—City of Allegheny v. McCaffrey, 131 Pa. 137, 18 Atl. 1001, 25 Wkly. Notes Cas. 213.

(C) CRIMINAL PROSECUTIONS AND PROCEEDINGS.

1. NATURE AND SCOPE OF RIGHT IN GENERAL, §§ 134-144.
2. MISDEMEANORS AND MINOR OFFENSES, §§ 145-151.
3. VIOLATION OF MUNICIPAL ORDINANCES OR CHARTER PROVISIONS, §§ 152, 153.

Constitution of jury as infringing right, see post, § 226 [e].

Effect of provision for ultimate trial by jury, see post, § 236 [e, g].

—— *on appeal, see* post, § 241.

Procedure as infringement of right, see post, § 216.

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1. NATURE AND SCOPE OF RIGHT IN GENERAL.

APPLICATION OF CONSTITUTIONAL PROVISIONS IN GENERAL, § 134.
STATUTORY PROVISIONS, § 135.
PROSECUTIONS IN GENERAL, § 136.
CRIMES COMMITTED WITHIN THE JURISDICTION OF THE UNITED STATES, § 137.
COMMITMENT TO INDUSTRIAL SCHOOLS AND REFORMATORIES, § 138.
CONTEMPT PROCEEDINGS, § 139.
HABITUAL CRIMINALS AND VAGRANTS, § 140.
PROSECUTION AND IMPEACHMENT OF OFFICERS, § 141.
PARTICULAR PROCEEDINGS IN CRIMINAL PROSECUTIONS, § 142.
ASSESSMENT OF PUNISHMENT, § 143.
TRIAL ON APPEAL, § 144.

Bastardy proceedings, see ante, § 127.
Inquisitions in lunacy, see ante, § 113.

§ 134. Application of constitutional provisions in general.

Courts in which required, see ante, §§ 19–24.
Misdemeanors and minor offenses, see post, § 145.
Of federal constitution, see ante, § 23.
Violation of municipal ordinances, see post, § 152.

[a] (Ala. 1855) The constitutional guaranty of a trial by jury "in all prosecutions by indictment or information" (article 1, § 10) does not apply to offenses created by statute since the adoption of the constitution, except in the specified cases; but it is within the power of the legislature to make such offenses triable before a justice of the peace, without indictment.—Tims v. State, 26 Ala. 165.

[b] (Cal.) The constitutional provision securing the right of trial by jury applies only to civil and criminal cases in which an issue of fact is joined.—(1860) Koppikus v. State Capitol Com'rs, 16 Cal. 248; (1862) People v. Blake, 19 Cal. 579.

[c] (Colo. 1892) A particular offense, which was unknown before the adoption of the constitution, is now triable by jury or not, according to its status, as naturally falling within a class of offenses that were or were not theretofore so tried.—McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516.

[d] (Colo. 1892) The provisions of the constitution guarantying trial by jury and the like in criminal cases were adopted with reference to the procedure theretofore generally existing; and if, in a given class of offenses, trials without a jury were the prevailing rule, this rule is not changed by the constitution.—McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516.

[e] (Ky.) The right of trial by jury in criminal and penal cases existed before the adoption of the constitution.—(1802) Caldwell v. Commonwealth, 2 Ky. (Ky. Dec.) 129; (1828) Harris v. Wood, 22 Ky. (6 T. B. Mon.) 641; (1833) Doram v. Commonwealth, 31 Ky. (1 Dana) 331.

[f] (N. Y. 1895) Const. art. 1, § 2, declaring that trial by jury in all cases in which it has been heretofore used shall remain inviolate, does not apply to an offense thereafter created, and tried in a court not then existing.—People v. Van Houten (Sess.) 13 Misc. Rep. 603, 35 N. Y. Supp. 186.

[g] (Vt. 1869) The clause in Bill of Rights, § 10, "all prosecutions for criminal offenses," means all prosecutions for crimes and misdemeanors, in the trial of which the "issue in fact" is proper for the cognizance of a jury.—State v. Peterson, 41 Vt. 504.

[h] (Wis. 1863) The provision in the constitution that secures to the accused, in prosecutions by indictment or information, a trial by a jury of the county or district wherein the offense was committed, which district shall have been previously ascertained by law, refers only to such crimes as are committed within the state, and does not imply a prohibition against punishing crimes committed by a citizen of the state against its laws when out of its limits.—State v. Main, 16 Wis. 398.

§ 135. Statutory provisions.

[a] (Ala. 1892) Act March 19, 1875 (Acts 1874–75, p. 235), conferred on the county courts of Butler and other counties power to try indictment for all misdemeanors except violations of the revenue law, and provided for the transfer of such indictment from the circuit court. Section 2 provided that on the transfer and delivery of such indictment to the county court "the jurisdiction of the circuit court shall cease, except in cases of appeals hereinafter provided for, and exclusive jurisdiction thereof shall vest in the county court." Section 3 provides for a trial by jury, and, on conviction, appeal to the circuit court. Section 4 provides for impaneling a jury. Acts 1875–76, p. 361, repeals sections 3 and 4 of the act of March 19, 1875, as to Butler county. *Held* that, as by the repeal of sections 3 and 4 there is no provision for a trial by jury in the county court of an indictment transferred from the circuit court, the act is void as to Butler county, under Const. art. 1, § 7, which guaranties a trial by jury to one charged with crime.—Reeves v. State, 96 Ala. 33, 11 South. 296.

[b] (Ga. 1893) Acts 1892, p. 65 (Code, § 4711), providing for trial by jury before imprisonment for contempt, is prospective in its scope, and does not apply where a party was, previously to its passage, adjudged guilty of contempt, and was undergoing punishment therefor when the act was passed.—Kingsbery v. Ryan, 92 Ga. 108, 17 S. E. 689.

[c] (Ky. 1818) The act of the Virginia legislature of 1786, giving to one charged with delivering a fraudulent list of taxable property the right to trial by jury, being in full force at the adoption of the Constitution, and adopted by that instrument, was not affected by the act of 1810, authorizing the court, in such actions, on the appearance of the defendant, to proceed and inquire into, and decide, the cause.—Carson v. Commonwealth, 8 Ky. (1 A. K. Marsh.) 290.

§ 136. Prosecutions in general.

[a] (Ill. 1895) The act of June 17, 1893, providing that no person shall be imprisoned for nonpayment of a fine or judgment in any civil, criminal, quasi criminal, or qui tam action, except upon conviction by jury, unless he waives such jury by executing a formal waiver in writing, does not apply to cases where the defendant has been sentenced to imprisonment, and no fine or money judgment entered up against him.—Sloncen v. People, 58 Ill. App. 315.

[b] (La. 1882) Act No. 9 of 1847, relating to the sale of lottery tickets, does not violate the constitutional provisions as to the right to a jury trial.—Augusti v. Louisiana Lottery Co., 34 La. Ann. 504.

[c] (Md. 1892) Acts 1812, c. 78, as amended by Acts 1890, c. 605, provides that, on a petition being filed before a justice complaining of the condition of a certain turnpike, the justice shall appoint disinterested persons to make inquisition as to the road's condition, and if the road be found out of order the justice shall send the inquisition to the criminal court, which may fine the person intrusted by the turnpike com-

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pany with the superintendence of the road. *Held* that, on such an inquisition, the criminal court had no power to grant the turnpike company a jury trial, as its only duty was to enter up a judgment in accordance with the finding of the inquisition. — Francis v. Weaver, 76 Md. 457, 25 Atl. 413.

[d] (Mich. 1871) Comp. Laws, c. 166, providing for the imprisonment of a debtor who has disposed of his property with intent to defraud his creditors, is not a criminal prosecution within the meaning of Const. art. 6, par. 28, guarantying the right of trial by jury in criminal cases. — Johnson v. Maxon, 23 Mich. 129.

[e] (N. C. 1854) The act of the general assembly giving to the intendant of police of a town the power to try assaults and batteries is in violation of Const. § 8, providing that no freeman shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used.—State v. Moss, 47 N. C. 66.

§ 137. Crimes committed within the jurisdiction of the United States.

In what courts allowable, see ante, § 21.

[a] (U. S. 1890) The fact that the offense is committed on an American vessel does not give the offender, when tried before a consular tribunal, the right to invoke the constitutional guaranty of trial by jury, on the ground that the deck of the vessel is territory of the United States.—Ross v. McIntyre, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581.

[b] (D. C. 1892) A person charged with receiving stolen goods is entitled to trial by jury. —United States v. Jackson, 20 D. C. 424.

[c] (D. C. 1892) Gaming, being punishable under 22 Stat. 412, by imprisonment and fine, is a crime, and a person accused thereof is entitled to a jury trial.—United States v. Herzog, 20 D. C. 430.

[d] (D. C. 1892) Petty larceny is a felony, and one charged therewith is entitled to trial by jury.—In re Fauldan, 20 D. C. 433.

[e] (D. C. 1892) Assault and battery is a crime triable by jury, within the meaning of the United States constitution, and cannot be tried by a police court without a jury.—In re Robinson, 20 D. C. 570.

§ 138. Commitment to industrial schools and reformatories.

Effect of provision for jury trial on appeal, see post, § 241 [g].

[a] (Cal. 1876) The action of a police magistrate, in committing a minor child to an industrial school for his training and reformation, does not amount to a criminal prosecution, nor to proceedings according to the course of common law; and the minor is not entitled to a trial by jury.—Ex parte Ah Peen, 51 Cal. 280.

[b] (Ill. 1882) Act May 29, 1879 (Laws 1879, p. 309), relating to industrial schools for girls, and providing for a jury of only six on a trial to determine whether a girl is a proper person to be sent to such school, does not conflict with the constitutional provision that the right of trial by jury, as heretofore established, shall remain inviolate.—In re Ferrier, 103 Ill. 367.

[c] (Minn. 1892) The mode of procedure under Gen. St. 1878, c. 35, § 44 et seq., for the commitment of incorrigible infants to the reform school, is not violative of the constitutional provision that the right of trial by jury shall remain inviolate.—State v. Brown, 50 Minn. 353, 52 N. W. 935, 36 Am. St. Rep. 651, 16 L. R. A. 691.

[d] (Ohio, 1869) A proceeding under the statute (1 Swan & C. St. p. 690) providing that the grand jury instead of filing an indictment against a person under 16 years of age may return to the court that in their judgment the accused is a suitable person to be committed to a house of refuge, and directing that the court shall thereupon order his commitment accordingly, is not a criminal proceeding within the meaning of Const. art. 1, §§ 5, 10, relating to the rights of trial by jury, and to the rights of the accused under criminal prosecutions.—Prescott v. State, 19 Ohio St. 184, 2 Am. Dec. 388.

[e] (Pa. 1839) The acts of March 23, 1826, and April 10, 1835, authorizing the committing of infants to the house of refuge without trial by jury, are constitutional.—Ex parte Crouse, 4 Whart. 9.

§ 139. Contempt proceedings.

In equity, see ante, § 63.

Statutory provisions, see ante, § 135 [b].

[a] A respondent in contempt proceedings is not entitled under the constitution to a trial by jury.

—(U. S. 1895) In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; (1801) United States v. Duane, Fed. Cas. No. 14,997 [Wall. Sr. 102]; (1877) King v. Ohio & M. Ry. Co., Fed. Cas. No. 7,800 [7 Biss. 529];

(Ark. 1849) Neel v. State, 9 Ark. (4 Eng.) 259, 50 Am. Dec. 209;

(Colo. 1892) Wyatt v. People, 17 Colo. 252, 28 Pac. 961;

(Ind. 1884) Garrigus v. State, 93 Ind. 239;

(Neb. 1882) Gandy v. State, 13 Neb. 445, 14 N. W. 143;

(N. H. 1859) State v. Matthews, 37 N. H. 450;

(N. C. 1890) In re Deaton, 105 N. C. 59, 11 S. E. 244;

(Okl. 1894) Burke v. Territory, 2 Okl. 499, 37 Pac. 829.

[b] (Conn. 1890) Sess. Laws 1889, c. 167, making it the duty of the magistrate before whom a person is found guilty of intoxication to commit him to jail for contempt of court if he refuses, on request of the prosecuting officer, to disclose when, where, and from whom he procured the liquor, is not unconstitutional on the ground that it deprives the prisoner of the right to a trial by jury in violation of Const. art. 1, § 21.—In re Clayton, 59 Conn. 510, 21 Atl. 1005, 21 Am. St. Rep. 128, 13 L. R. A. 66.

[c] (Ga. 1896) Act Dec. 22, 1892, amending Code, § 4711, so as to confer a right of trial by jury in certain cases of contempt, has no application to a proceeding pending before a judge of the superior court to enforce the payment of alimony by a husband to his wife; hence defendant in such a proceeding is not entitled to demand a jury to pass upon the question of his ability to comply with an order of the judge directing the payment by him of certain sums as alimony.—Lee v. Lee, 97 Ga. 736, 25 S. E. 174.

[d] (Ill. 1890) Rev. St. 1889, c. 51, § 36, which authorizes the circuit court to punish summarily, as in cases of contempt, a refusal to obey a subpœna issued by a notary public, is in conflict with Const. art. 2, § 9, which preserves trial by jury in all criminal cases, since such refusal is not a contempt of the circuit court.—Puterbaugh v. Smith, 131 Ill. 199, 23 N. E. 428, 19 Am. St. Rep. 30.

[e] (Iowa) Under Iowa practice, a person required to show cause why he should not be

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punished for contempt of court is not entitled to a jury trial.—(1886) Manderscheid v. District Court, 69 Iowa, 240, 28 N. W. 551; (1888) McDonnell v. Henderson, 74 Iowa, 619, 39 N. W. 512.

[f] (Minn. 1877) Gen. St. c. 66, tit. 24, providing that a judgment debtor may be examined touching his property on the return of an execution unsatisfied, and may be punished for contempt for disobedience of any order of the court made in respect thereto, is not repugnant to Const. art. 1, § 6, providing that in all criminal prosecutions the accused shall enjoy the right to a jury trial.—State v. Becht, 23 Minn. 411.

[g] (N. J. 1868) The infliction of summary punishment for a contempt of court, consisting of improper conduct towards a juror not in the presence of the court, is not an infringement of that clause of the constitution of this state which guaranties to the citizen a trial by jury. —State v. Doty, 32 N. J. Law (3 Vroom) 403, 90 Am. Dec. 671.

[h] (N. Y. 1875) The power to punish for contempt is an exception to the constitutional provision against depriving a man of his liberty without a jury, and without a regular trial, and therefore it should not be extended beyond the limits imposed by statutes, especially by courts which are not of general jurisdiction.—Rutherford v. Holmes, 5 Hun, 317, affirmed (1876) 66 N. Y. 368.

[i] (Ohio, 1888) In a proceeding for contempt in refusing to answer as a witness, the witness is not entitled to a trial by jury under the constitutional provision that the party accused of crime shall have a speedy public trial by an impartial jury; the contempt is not a crime.—Ammon v. Johnson, 3 Ohio Cir. Ct. R. 263, 2 O. C. D. 149.

§ 140. Habitual criminals and vagrants.

Restrictions on right of appeal, see post, § 217 [i].

[a, b] (Cal. 1895) The legislature not having provided for summary proceedings without a jury in prosecutions for vagrancy, a jury trial, when demanded, cannot be refused.—In re Fife, 110 Cal. 8, 42 Pac. 299.

[c] (La. 1868) Act 1855, §§ 120, 121, empowering recorders of the city of New Orleans to try and sentence vagrants without a jury, are authorized by Const. art. 124, and must therefore be considered an exception to the rule prescribed by article 103, requiring prosecution to be by jury.—State v. Noble, 20 La. Ann. 325.

[d] (N. Y. 1873) The habitual criminal act, providing that where a professional thief, burglar, pickpocket, or forger attends a public place he may be arrested, brought before a magistrate, and if it appear to the satisfaction of the magistrate that such person was frequenting the place in question for an unlawful purpose, and that he has prior thereto been convicted of any one of certain offenses, he shall be deemed a disorderly person, and committed to jail for a stated period, is not repugnant to Const. art. 1, providing that trial by jury shall remain inviolate.—People v. McCarthy, 45 How. Prac. 97.

[e] (Pa. 1862) The act of March 13, 1862, authorizing the arrest of professional thieves, burglars, etc., in the city of Philadelphia, and their commitment to prison by the mayor, or public magistrate of the central station, is not in conflict with the constitutional right of trial by jury, nor prohibited by section 9 of the bill of rights.—Byers v. Commonwealth, 42 Pa. (6 Wright) 89.

[f] (S. C. 1837) The act of 1836, relating to vagrants, does not violate the constitutional provision that "the trial by jury as heretofore used in this state shall be forever inviolably preserved."—State v. Maxcy, 1 McMul. 501.

§ 141. Prosecution and impeachment of officers.

[a] (Ala. 1855) The third section of the act of February 7, 1854 (Pamph. Acts 1853–54, p. 247), which makes defaulting overseers of roads triable before a justice of the peace, is not violative of the right to a trial by jury, as secured by the tenth and twenty-eighth sections of the first article of the constitution.—Tims v. State, 26 Ala. 165.

[aa] (Ala. 1875) Although under the constitution impeachment is a criminal prosecution, yet it is not of such a character as to confer upon the accused a constitutional right to a jury trial, and a statute providing for the impeachment of certain officers, under article 7, § 2, of the constitution, is not unconstitutional because no provision is made therein for a jury trial.—State v. Buckley, 54 Ala. 599.

[b] (Tex. 1873) On an information against an officer for malfeasance in office, the officer is entitled to a trial by jury.—Wilson v. State, 38 Tex. 548.

[c] (Tex. 1875) An information against a district clerk to remove him from office is not a "criminal prosecution" within Bill of Rights, § 8, declaring that in such cases the accused shall have a speedy public trial by jury.—Glavecke v. State, 44 Tex. 137.

§ 142. Particular proceedings in criminal prosecutions.

As infringement of right, see post, § 216.

[a] (La. 1896) Defendant having been convicted of murder, and sentenced to be hanged, the trial judge appointed, at his instance, a committee of medical experts to examine into his mental condition, a majority of which reported him to be of a mind sound, though of a low grade. *Held*, that defendant was not entitled thereafter, on application, to a trial by jury on the issue of insanity vel non.—State ex rel. Armstrong v. Judge of Eighth Judicial Dist., 48 La. Ann. 503, 19 South. 475.

[b] (Minn. 1893) Where a convict who has been conditionally pardoned is arrested for an alleged violation of the conditions of the pardon, the court may, in its discretion, if in doubt as to the facts, take the verdict of a jury, but the party is not entitled to a jury trial as a matter of right, except on the question whether he is the same person who was convicted, if he pleads that he is not.—State v. Wolfer, 53 Minn. 135, 54 N. W. 1065, 39 Am. St. Rep. 582, 19 L. R. A. 783.

[c] (N. H. 1850) A justice of the peace throughout the state may, upon a complaint for an assault made before him in the county of Rockingham, order the respondent to recognize for his appearance at the court of common pleas for the county of Strafford; as the proceedings do not constitute a trial, within the meaning of article 17 of the bill of rights.—State v. Thompson, 20 N. H. 250.

[d] (Wis. 1886) Rev. St. § 4791, authorizing the municipal judge on determining that a complaint in a criminal proceeding was malicious and without probable cause to enter judgment against the complainant for costs, is not unconstitutional as permitting judgment without a trial by jury.—State v. Smith, 65 Wis. 93, 26 N. W. 258.

§ 143. Assessment of punishment.

Province of court and jury, see "Criminal Law," vol. 15, c. 291, § 2495.

[a] (Ala. 1871) One indicted for an assault with intent to murder, who confesses himself

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guilty of an assault and battery with a pistol, must have the amount of the fine fixed by a jury; the court not having power to fix the fine in such case.—Nelson v. State, 46 Ala. 186.

[b] (Ala. 1877) Code 1876, §§ 4453, 4484, provide that, on plea of guilty in cases of misdemeanor, punishment is fixed by the court, and not by the jury.—Drake v. State, 60 Ala. 42.

[c] (Cal. 1862) The proceeding to determine the degree of the crime of murder, after a plea of guilty, is not a trial requiring a jury, but is a question for the court.—People v. Noll, 20 Cal. 164.

[d] (Ill. 1874) On a plea of guilty of manslaughter, the court has the same power to fix the punishment that the jury would have upon finding the defendant guilty upon trial.—Coates v. People, 72 Ill. 303.

[e] (Ind. 1886) Since murder in the first degree may be punished capitally, the court cannot assess defendant's punishment without the intervention of a jury.—Frazier v. State, 106 Ind. 562, 7 N. E. 378.

[f] (Iowa, 1858) A justice of the peace has no authority to render a judgment against a prisoner who has demanded, under Code, § 3333, a trial by jury, for fine and costs, until he is found guilty by a jury.—Dupont v. Downing, 6 Iowa (6 Clarke) 172.

[g] (Ky. 1849) A defendant may be tried and fined by the court, without a jury, where the fine to be imposed does not exceed £5.—Frost v. Commonwealth, 48 Ky. (9 B. Mon.) 362.

[h] (Mass. 1866) Gen. St. c. 160, §§ 1, 2, divide murder into two degrees, making one degree capital and the other not, and section 3 provides that there shall be a verdict of a jury before a sentence of death can be passed. *Held* not to prevent the court from passing sentence of death after a plea of guilty of murder in the first degree was voluntarily entered by defendant, under an indictment for murder in the common-law form, when such sections are construed with Gen. St. c. 158, § 5, providing that no person indicted for an offense shall be convicted thereof, unless by confession of his guilt, or by admitting the truth of the charge against him, "or by the verdict of a jury," and with chapter 171, § 29, providing that "if on arraignment a person refuses to plead or answer, or does not confess the indictment to be true, the court shall order a plea of not guilty to be entered, and thereupon the proceedings shall be the same as if he had pleaded not guilty," clearly implying that a plea of guilty, or a confession, supersedes the necessity of a trial.—Green v. Commonwealth, 94 Mass. (12 Allen) 155.

[i] (Mass. 1871) A statute providing for sentence of an appellant from a police court, on his default, is not unconstitutional, as depriving him of the right of trial by jury; his failure to prosecute is a waiver thereof.—Commonwealth v. Whitney, 108 Mass. 5.

[j] (N. H. 1892) Gen. Laws, c. 282, § 3, which provides that on a plea of guilty of murder the court having cognizance of the offense shall determine the degree, is valid.—State v. Almy, 67 N. H. 274, 28 Atl. 372, 22 L. R. A. 744.

[k] (Ohio, 1892) Rev. St. § 7316, which provides that "if the offense charged is murder, and the accused be convicted by confession in open court, the court shall examine the witnesses, and determine the degree of the crime, and pronounce sentence accordingly," is constitutional and valid.—Craig v. State, 49 Ohio St. 415, 30 N. E. 1120, 16 L. R. A. 358.

[l] (Tex. 1894) Where defendant, in a criminal trial, persists in pleading guilty, if the punishment of the offense is not absolutely fixed by law, and beyond the direction of the jury to graduate, a jury must be impaneled to assess the punishment, and evidence submitted to enable them to decide thereupon. Code Cr. Proc. art. 519.—Josef v. State, 33 Tex. Cr. R. 251, 26 S. W. 213.

[m] (W. Va. 1888) Code, c. 152, § 22, authorizing the court to fix punishment when a prisoner has been found guilty of a felony, is not in violation of the constitutional provision that no person shall be deprived of his liberty without the "judgment of his peers."—State v. Davis, 31 W. Va. 390, 7 S. E. 24.

§ 144. Trial on appeal.

[a] (Iowa, 1855) On appeal from justice's court, the party complaining has no right to a trial by jury de novo until the court is satisfied that the judgment below was against the evidence.—Baurose v. State, 1 Iowa (1 Clarke) 374.

[b] (Iowa, 1856) Code, § 3361, giving the district court on appeal power to grant or refuse a jury trial, applies to the liquor law of January 22, 1855, notwithstanding section 10 of that law.—Santo v. State, 2 Iowa (2 Clarke) 165, 63 Am. Dec. 487.

[c] (Va. 1873) When a person is tried by a justice of the peace for petit larceny, and convicted, he has an absolute right of appeal to the county court, and in that court the cause is to be heard de novo upon the evidence; and the accused is entitled to be tried by a jury as in like cases originating in that court.—Read v. Commonwealth, 24 Grat. 618.

[d] (Wis. 1895) When one charged with crime is brought before a justice for preliminary examination, and makes affidavit that the justice is prejudiced, the determination by the justice, in complying with Rev. St. § 4809, which requires him to "transmit all the papers in the case to the nearest justice * * * qualified by law to conduct the examination," as to who is such nearest justice is a question for him as the court, and not one of fact for a jury.—Jackson v. State, 91 Wis. 253, 64 N. W. 838.

2. MISDEMEANORS AND MINOR OFFENSES.

APPLICATION OF CONSTITUTIONAL PROVISIONS IN GENERAL, § 145.
OFFENSES IN GENERAL, § 146.
VIOLATION OF LICENSE LAWS, § 147.
SUNDAY LAWS, § 148.
DISORDERLY CONDUCT AND DRUNKENNESS, § 149.
DISTURBANCE OF PUBLIC ASSEMBLY, § 150.
SALE OF INTOXICATING LIQUORS, § 151.

Effect of provision for jury trial on appeal, see post, § 241.
Under municipal ordinances, see post, §§ 152, 153.

§ 145. Application of constitutional provisions in general.

Courts in which required, see ante, §§ 19–24.

[a] (Ala. 1889) An act conferring jurisdiction to try misdemeanors on indictment, without a constitutional provision for a trial by jury, is void.—Collins v. State, 88 Ala. 212, 7 South. 260.

[b] (Iowa, 1859) Ordinance 1787, art. 2, does not secure to defendant the right to require a jury trial for all offenses in the first instance, and before all courts; the lesser offenses may be punished without a jury.—State v. Beneke, 9 Iowa, 203.

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[c] (La. 1860) The act of March 17, 1859 (Sess. Acts, p. 168) providing for the punishment of a certain offense by a summary proceeding, pursuant to Const. 1852, art. 124, conferring on the recorder's court in New Orleans such criminal jurisdiction as may be necessary for the punishment of minor offenses, and as the police and good order of the city may require, does not contravene article 103, providing that prosecutions shall be by indictment or information, and guarantying accused the right of trial by jury, such provision having no application to the class of offenses which are to be tried summarily.—State v. Gutierrez, 15 La. Ann. 190.

[d] (Md. 1880) The constitutional provision, securing to the accused the right to a speedy trial by an impartial jury, must be understood to refer to prosecutions which, by regular course of law, had been the subject of jury trial, and does not prohibit the prosecution and trial of minor offenses without a jury.—In re Glenn, 54 Md. 572.

[e] (N. Y. 1855) Act April 9, 1855, § 5, requiring magistrates therein named to hold special sessions for the trial of offenses arising thereunder and to proceed to trial as soon as the complainant can be notified, is not violative of Const. art. 1, § 2, declaring that a trial by jury in all cases shall remain inviolate, since section 6, providing that no person shall be held to answer for any infamous crime unless on presentment or indictment of the grand jury, leaves the trial of all misdemeanor cases to be provided for by the legislature, by a jury, or without a jury.—People v. Fisher, 11 How. Prac. 554.

[f] (Tenn. 1824) Under Acts 1817, c. 132, § 6, making the failure of the clerk of the probate court to perform any of his official duties a misdemeanor for which he shall be removed from office by the court, a removal cannot be legally made except on his conviction of the misdemeanor, either by confession, or by the verdict of a jury, since by the term "misdemeanor" a criminal charge was intended to which he could not be compelled to answer, under Const. art. 11, § 14, except on presentment, indictment, or impeachment.—Sevier v. Justices of Washington County, 7 Tenn. (Peck) 334.

§ 146. Offenses in general.

[a] (U. S. 1881) Under the Maryland oyster law of 1880, an oyster schooner, found dredging in the Chesapeake Bay without a license, was seized, and with her master and crew carried into Annapolis by the state oyster police. The master and crew were tried before a justice of the peace and fined, and on nonpayment of the fine the vessel was forfeited and sold. *Held*, that the forfeiture and sale were valid; that the law was not repugnant to the state constitutional provision that in all criminal prosecutions every man shall be entitled to trial by jury.—The Ann (D. C.) 8 Fed. 923.

[b] (Ala. 1892) Acts 1876-77, p. 197, gives justices of the peace in Madison county concurrent final jurisdiction of all misdemeanors. 2 Code, § 4237, provides that, in all trials before a justice of the peace, he must determine both the law and the facts without a jury. Section 4239 provides that if accused does not demand a trial by jury the trial must proceed before the justice. *Held*, that where defendant, charged in Madison county with removing seed cotton between the hours of sunset and sunrise, which is made a misdemeanor by section 4141, did not demand a trial by jury, it was the duty of the justice to try the charge himself, instead of holding defendant to the circuit court, though sections 4255 et seq. provide generally for preliminary examinations before magistrates, and binding the accused over to the court having jurisdiction of the offense.—Ex parte Pruitt, 99 Ala. 225, 13 South. 317.

[c] (Ga. 1893) A highway act is not invalid because it denies to defaulters, who fail to work the roads, or pay the commutation tax, the right of jury trial.—Haney v. Roads & Revenues of Bartow County Com'rs, 91 Ga. 770, 18 S. E. 28.

[d] (Mass. 1866) Gen. St. c. 116, § 14, conferring on police courts jurisdiction of larcenies where the property stolen does not exceed the value of $50, and giving that court power to impose a punishment by fine or by imprisonment in a house of correction, is not in violation of Declaration of Rights, § 12, providing that no man shall be arrested, imprisoned, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land, as it does not empower the police court to impose an infamous punishment.—Lewis v. Robbins, 95 Mass. (13 Allen) 552.

[e] (Mo. 1832) Act 1831, providing that assaults shall not be punished by indictment, but must be punished in a summary way before justices of the peace, does not violate Const. art. 13, § 9, providing that the accused shall have the right to trial by an impartial jury.—State v. Ledford, 3 Mo. 102.

[f] (Mo. 1891) Act Gen. Assem. (Sess. Acts 1891, p. 159, § 1), providing that "every person who shall obtain board or lodging in any hotel * * * by means of any trick or deception, or false or fraudulent representation, * * * and shall fail or refuse to pay therefor, shall be held to have obtained the same with intent to cheat and defraud such hotel keeper, * * * and shall be deemed guilty of a misdemeanor," does not deprive accused of a right to jury trial, as guarantied by Const. art. 2, § 22.—State v. Kingsley, 108 Mo. 135, 18 S. W. 994.

[g] (N. Y. 1824) 2 Rev. Laws, pp. 507, 508, creating a special session of justices for the trial of petit larceny without a jury, is not repugnant to Const. art. 7, pars. 2-7, prescribing that trial by jury in capital or otherwise infamous crime shall remain inviolable.—Murphy v. People, 2 Cow. 815; Jackson v. Wood, Id. 819, note.

[h] (N. Y. 1857) The act providing that keepers of houses of ill fame may be punished summarily as disorderly persons is unconstitutional and void; the offense being indictable at common law, the accused having the right of trial by jury.—Warren v. People, 3 Parker, Cr. R. 544.

[i] (N. Y. 1880) Laws 1879, c. 390, provides that courts of special sessions shall, in addition to the powers now possessed by them, have exclusive jurisdiction in the first instance to hear and determine charges for petit larceny not charged as a second offense. Const. art. 6, § 26, as amended in 1869, provides that "courts of special sessions shall have such jurisdiction of offenses of the grade of misdemeanor as may be prescribed by law." *Held*, that the act of 1879 is not unconstitutional, as depriving one accused of petit larceny not constituting a second offense of the right of trial by jury, since such an offense is a misdemeanor.—Devine v. People, 20 Hun, 98; People v. Dutcher, Id. 241.

[j] (Ohio, 1883) Bill of Rights, art. 1, § 5, provides that the "right of trial by jury shall be inviolate." Section 10 provides that no person shall be allowed to answer to any criminal charge without indictment or presentment by the grand jury except in petit larceny and other inferior offenses, and that in any trial, in any court, the party accused will be allowed to appear and to defend in person and with

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counsel, and to have a speedy public trial by an impartial jury. *Held*, that a person charged with the offense of gaming, made a misdemeanor by Rev. St. § 6938, was entitled to a trial by jury.—Hoffner v. Village of Oberlin (D. C.) 9 Wkly. Law Bul. 239.

[k] (Va. 1814) In a prosecution for unlawful gaming the defendant is entitled to a trial by jury, although the penalty is only $20.—Commonwealth v. Horton, 1 Va. Cas. 335.

§ 147. Violation of license laws.

[a] (Cal. 1895) One charged with practicing medicine, without having procured a certificate, in violation of Act April 3, 1876, as amended, is entitled to a trial by jury.—Ex parte Wong You Ting, 106 Cal. 296, 39 Pac. 627.

[b] (N. J. 1880) A provision in the charter of Passaic directing prosecutions for the unlicensed sale of malt liquors to be held before any justice of the peace of Passaic county does not confer upon defendant the right of trial by jury.—State v. City of Passaic, 42 N. J. Law (13 Vroom) 87.

§ 148. Sunday laws.

Municipal ordinances, see post, § 153 [e].

[a] (Conn. 1838) A complaint for a breach of the Sabbath, exhibited by a tithingman to a justice of the peace, is not an information within Const. art. 1, § 9, and consequently the party accused is not, on the prosecution of such complaint before the justice, constitutionally entitled to a trial by jury.—Goddard v. State, 12 Conn. 448.

[b] (Pa. 1891) A defendant who is tried before a magistrate for keeping his barber shop open on Sunday is not entitled to a jury trial of the issue whether shaving is a work of necessity.—Commonwealth v. Waldman, 140 Pa. 89, 21 Atl. 248, 27 Wkly. Notes Cas. 333, 11 L. R. A. 563.

[c] (Va. 1889) The constitutional right of trial by jury does not extend to the petty offense of laboring on the Sabbath, punishable by a small fine, and cognizable by a justice.—Ex parte Marx, 86 Va. 40, 9 S. E. 475.

§ 149. Disorderly conduct and drunkenness.

Declaring certain persons to be common drunkards as infringement of right, see post, § 236 [g].

[a] (N. J. 1889) In a prosecution under Revision, p. 305, § 6, for the use of loud and indecent language on the streets of a town, the refusal of a trial by jury is proper, such right not being given by the act.—Bassette v. State, 51 N. J. Law (22 Vroom) 502, 18 Atl. 354.

[b] (N. Y. 1843) The statute authorizing a magistrate to convict one who abandons or neglects to provide for his wife as a disorderly person is constitutional, though no trial by jury is given.—Duffy v. People, 6 Hill, 75, affirming (1841) 1 Hill, 355.

[c] (N. Y. 1855) Act April 9, 1855, entitled "An act for the prevention of intemperance, pauperism, and crime," and making criminal acts which were before innocent, does not, by provision for trial by courts of special sessions, violate Const. art. 1, § 2, declaring that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever."—People v. Fisher, 20 Barb. 652, 11 How. Prac. 554, 2 Parker, Cr. R. 402, overruled Wynehamer v. People (1856) 13 N. Y. (3 Kern.) 378.

[d] (N. Y. 1856) A criminal proceeding in a court of special sessions authorized by the act to prevent intemperance (Laws 1855, p. 340) is unconstitutional, because it deprives the accused of his constitutional right to a jury trial.—Wynehamer v. People, 13 N. Y. (3 Kern.) 378, overruling People v. Fisher (1855) 20 Barb. 652, 2 Parker, Cr. R. 402.

§ 150. Disturbance of public assembly.

[a] (N. Y. 1881) Laws 1834, c. 78, allowing one arrested for disturbing a religious meeting to have a jury, as in courts of special sessions, is valid.—People v. Clark, 23 Hun, 374.

[b] (Ohio, 1884) Act Feb. 17, 1831, providing for the imposition of a fine on any one disturbing a religious society, without a trial by jury, and for the enforcement of such a fine by imprisonment, is not repugnant to Const. art. 10, § 5, providing that "the right of trial by jury shall be inviolate," as one accused of such offenses was not entitled to a jury trial prior to the adoption of the constitution.—Inwood v. State, 42 Ohio St. 186.

§ 151. Sale of intoxicating liquors.

Contempt proceedings, see ante, § 139 [b].

Effect of provision for jury trial on appeal, see post, § 241 [c, q].

Examination of intoxicated person as infringement of right, see post, § 216 [h].

Municipal ordinances, see post, § 153 [b, c, e, h].

On appeal, see ante, § 144 [b].

Prescribing weight of evidence as invading province of jury, see post, § 234 [f, i, o].

Procedure as infringing right, see post, § 216 [h].

Restrictions on right of appeal, see post, § 217.

[a] (La. 1860) Act March 17, 1859, for prevention and punishment of selling liquor to slaves, is not unconstitutional, as authorizing summary proceeding in recorder's court without a jury.—State v. Gutierres, 15 La. Ann. 190.

[b] (Miss. 1884) Under Const. art. 1, § 31, providing that "the legislature, in cases of * * * drunkenness, * * * and other misdemeanors of like character, may dispense with an inquest of a grand jury, and may authorize prosecutions before justices of the peace," an act authorizing prosecutions before a justice of the peace for the illegal sale of liquor was constitutional, though it provided for a trial "without the intervention of a jury."—Ex parte Wooten, 62 Miss. 174.

[c] (N. Y. 1877) A jury trial is a matter of right in prosecutions for unlawful sales of intoxicating liquor.—People v. Baird, 11 Hun, 289.

[d] (R. I. 1858) Rev. St. c. 73, prohibiting the sale, or keeping for sale, of liquors, is not in conflict with the clauses of the state constitution securing to accused persons the right of trial, because it makes an offense out of facts which do not at common law constitute an offense.—State v. Paul, 5 R. I. 185.

[e] (Vt. 1855) Bill of Rights, art. 10, respecting trial by jury, was not intended to apply to small offenses against the police regulations of the state, such as a prohibitory liquor law is.—State v. Conlin, 27 Vt. (1 Williams) 318; In re Dougherty, Id. 325.

3. VIOLATION OF MUNICIPAL ORDINANCES OR CHARTER PROVISIONS.

APPLICATION OF CONSTITUTIONAL AND STATUTORY PROVISIONS IN GENERAL, § 152.
OFFENSES IN GENERAL, § 153.

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Actions for penalties, see ante, § 102.
Courts in which jury trial may be had, see ante, §§ 19–24.
Effect of provision for jury trial on appeal, see post, § 241.
Proceedings for enforcement of municipal regulations, see ante, § 107.
Necessity of strict observance of procedure provided by law, see "Municipal Corporations," X. (B).

§ 152. Application of constitutional and statutory provisions in general.

[a] That no trial by jury, in the case of one prosecuted for violation of a city ordinance, is provided for, infringes no constitutional right.—(Fla. 1894) Theisen v. McDavid, 34 Fla. 440, 16 South. 321, 26 L. R. A. 234; (1894) Hunt v. City of Jacksonville, 34 Fla. 504, 16 South. 398, 43 Am. St. Rep. 214;

(Mo. 1887) City of Marshall v. Standard, 24 Mo. App. 192;

(S. C. 1886) Ex parte Schmidt, 24 S. C. 363.

[b] Offenses against ordinances passed in the exercise of the express or implied powers vested in municipal corporations, and relating to acts not included in the criminal statutes of the state, are not "crimes" to which the constitutional provision for trial by jury refers.—(Ga. 1853) Floyd v. Eatonton's Com'rs, 14 Ga. 354, 58 Am. Dec. 559;

(La. 1883) City of Monroe v. Meuer, 35 La. Ann. 1192.

[c] (Cal. 1891) Where defendant is prosecuted under a city ordinance for an offense which is declared a misdemeanor by the city charter and Penal Code, he is entitled to a jury trial, under Pen. Code, § 1042, providing that issues of fact in criminal cases must be tried by a jury unless the right be waived in cases not amounting to felony.—Taylor v. Reynolds, 92 Cal. 573, 28 Pac. 688.

[d] (Colo. 1892) Violations of municipal ordinances constituted a class of offenses that were, in general, proceeded against summarily before the constitution was adopted, and the right of trial by jury in connection therewith does not now exist, even where the act constituting the local offense is also a public misdemeanor, under a statute.—McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516.

[e] (Fla. 1894) A city ordinance is not void because it does not provide for a trial by jury of an alleged violation thereof, as municipal cases were not triable by jury before the adoption of the constitution (Declaration of Rights, § 3), providing that "the right of trial by jury shall be secure to all, and remain inviolate forever."—Hunt v. City of Jacksonville, 34 Fla. 504, 16 South. 398, 43 Am. St. Rep. 214.

[f] (Kan. 1886) Const. § 10 (Bill of Rights), providing that "in all prosecutions the accused shall be allowed * * * to have * * * a speedy public trial, by an impartial jury," applies only to criminal prosecutions for violations of the laws of the state, and does not apply to prosecutions for violations of ordinary city ordinances, which have relation only to the local affairs of the city.—State v. City of Topeka, 36 Kan. 76, 12 Pac. 310, 59 Am. Rep. 529.

[g] (La. 1893) Violations of municipal ordinances constitute a class of offenses that are proceeded against summarily, and hence a trial by jury cannot be demanded.—State v. Fourcade, 45 La. Ann. 717, 13 South. 187, 40 Am. St. Rep. 249.

[h] (Minn. 1886) The legislature may, in establishing municipal courts, provide for the trial and hearing of complaints and causes involving merely the violation of municipal ordinances in a summary manner, without a jury, and, with respect to such prosecutions, the act establishing the municipal court of the city of Mankato (Sp. Laws 1885, c. 119) is constitutional.—City of Mankato v. Arnold, 36 Minn. 62, 30 N. W. 305.

[i] (Neb. 1889) The provision of a city charter, requiring the police judge of such city to hear prosecutions for violations thereof without a jury, is not in violation of the constitutional provision that "the right of trial by jury shall remain inviolate," such prosecutions being of a quasi criminal nature, and for acts which are not made crimes by the criminal laws of the state, or are made offenses only for the better protection of the health and peace of the municipality in the exercise of its police power.—Leiberman v. State, 26 Neb. 464, 42 N. W. 419.

[j] (N. J. 1889) Certain acts which are indictable as offenses against the state may also be, by the legislature, constituted offenses against the police regulations of municipalities so as to subject the offender to the mode of trial incident to proceedings for the violation of ordinances. Where, in such cases, the legislature has not made special provision for a trial by jury, it cannot be demanded as matter of right.—State v. City of Trenton, 51 N. J. Law (22 Vroom) 498, 18 Atl. 116, 5 L. R. A. 352.

[k] (N. Y. 1879) In a prosecution before a police justice for violation of an ordinance prohibiting certain acts which are not offenses at common law, the accused is entitled to be tried by a jury, in the absence of any express provision in the charter as to the mode of trial.—People v. James, 16 Hun, 426.

[l] (N. Y. 1895) Code Cr. Proc. § 702, relative to proceedings before courts of special sessions and police courts, providing that, before the court hears any testimony, defendant may demand a jury, does not apply to cases for violation of village ordinances before police justices.—People v. Van Houten (Sess.) 13 Misc. Rep. 603, 35 N. Y. Supp. 186.

[m] (Or. 1886) The enforcement of a penalty for the violation of a city ordinance is not a criminal prosecution, within the meaning of the provision of the constitution on the subject of the right of trial by jury in criminal prosecutions, and it is not error in the police court to refuse a jury trial in such an action.—Wong v. City of Astoria, 13 Or. 538, 11 Pac. 295.

[n] (S. D. 1896) The charter of the city of Watertown (sections 25, 27), authorizing a police justice to try certain cases for violation of ordinance without a jury, and allowing an appeal in such cases only when imprisonment exceeding 10 days or a fine exceeding $20 is imposed, violates Const. art. 6, § 6, declaring and extending the right of trial by jury to all cases at law irrespective of the amount in controversy, and section 7, declaring the right to trial by an impartial jury in all criminal prosecutions.—Belatti v. Pierce, 8 S. D. 456, 66 N. W. 1088.

[o] (Tenn. 1869) Offenses under municipal ordinances, of a class which, before the adoption of the constitution, were usually considered triable in a summary manner, may be authorized to be so tried, notwithstanding constitutional provision that the right of trial by jury shall remain inviolate.—Trigally v. City of Memphis, 46 Tenn. (6 Cold.) 382.

[p] (Tex. 1856) Where power is given to a mayor, by an ordinance, to fine and imprison without a jury, the grant of such power is unconstitutional and void. The accused need not

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demand a jury to set aside a summary conviction; having merely excepted to the mayor's jurisdiction.—Smith v. City of San Antonio, 17 Tex. 643.

§ 153. Offenses in general.

[a] (U. S. 1890) The breach of ordinance No. 478 of the city of New Orleans, prohibiting the keeping of a private market within six blocks of a public market, is an offense against municipal police regulations, which may be punished by summary proceedings before a magistrate without trial by jury.—Natal v. State, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288, affirming State v. Natal (1887) 39 La. Ann. 439, 1 South. 923.

[b] (Iowa, 1879) Const. art. 1, § 9, provides that the right of trial by jury shall remain inviolate; and art. 1, §§ 10, 11, that in all criminal prosecutions, and in cases involving life or liberty, the accused shall have a right to a trial by jury, and that all offenses less than felony, and in which the punishment does not exceed a fine of $100 or imprisonment for 30 days, shall be tried summarily before a justice or other officer authorized by law. Code 1873, § 543, provides that police judges shall have the criminal jurisdiction of justices of the peace, and shall have jurisdiction of all violations of city ordinances; section 542, that city councils shall provide by ordinance for impaneling juries for the police courts; and section 4672, that in a criminal case before a justice defendant may demand a trial by jury. *Held*, that one who is arrested and brought before a police court for selling liquor in violation of a city ordinance is not entitled to a jury trial, and that the right to such a trial cannot be conferred by any ordinance.—Zelle v. McHenry, 51 Iowa, 572, 2 N. W. 264.

[c] (Kan. 1895) A prosecution in the police court under an ordinance prohibiting the unlawful sale of intoxicating liquors, and the keeping of any place for conducting the sales of the same, is criminal in character, so as to entitle the defendant therein to a trial by jury.—In re Jahn, 55 Kan. 694, 41 Pac. 956.

[d] (La. 1894) One charged with carrying a concealed weapon, in violation of a city ordinance, is not entitled to a trial by jury.—Town of Opelousas Board of Police v. Giron, 46 La. Ann. 1364, 16 South. 190.

[e] (Minn. 1892) It is competent for the legislature, in establishing municipal courts, to provide for the trial of complaints and causes involving merely the violation of municipal ordinances, as for selling liquor on Sunday, in a summary manner without a jury; and Sp. Laws 1889, c. 34, § 7, relating to such summary proceedings, in the municipal court of Minneapolis, is valid.—State v. Harris, 50 Minn. 128, 52 N. W. 387; Same v. O'Brien, Id.; Same v. Jevne, Id.; Same v. Loomis, Id.; Same v. Wood, Id.; Same v. Brown, Id.; Same v. Gallagher, Id.; Same v. Lyons, Id.

[f] (Ohio, 1883) Rev. St. § 6938, provides, that whoever plays at any game whatever, for any sum of money or property of any value, shall be fined not more than $100, or imprisoned not more than 6 months nor less than 10 days, or both. An ordinance of the Village of Oberlin (section 4) provides "that, if any person shall play at any game whatever, for any money or any valuable thing, such person shall, on conviction thereof, be fined in any sum not less than $10, nor more than $50." *Held*, that such ordinance defined an offense substantially the same as mentioned in the statute; and the accused being entitled to a trial by jury of the offense described in the statute, he was likewise entitled to a trial by jury of the offense mentioned in the ordinance.—Hoffner v. Village of Oberlin (D. C.) 8 Ohio Dec. 710, 9 Wkly. Law Bul. 239.

[g] (Pa. 1889) In proceedings for the violation of a borough ordinance relating to corner lounging, the defendant is entitled to introduce evidence in his behalf, and the justice is constituted a judge to hear the case without the intervention of a jury, and determine upon all the evidence whether the defendant is liable to pay the fine imposed by the ordinance.—Commonwealth v. Lynch, 6 Pa. Co. Ct. R. 536.

[h] (S. C. 1888) Under Const. art. 1, §§ 11, 13, 14, 19, which provide that the right of jury trial "shall remain inviolate"; that no law shall be enacted "subjecting any person to punishment without trial by jury"; that a person "accused of any crime or offense shall have a speedy and public trial by an impartial jury"; and that "all offenses less than felony, and in which the punishment does not exceed a fine of $100, or imprisonment for 30 days, shall be tried summarily before a justice of the peace or other officer authorized by law,"—an act authorizing the trial of a violation of a municipal ordinance against the sale of liquor, before the mayor without a jury, is valid.—City Council of Anderson v. O'Donnell, 29 S. C. 355, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632.

[i] (Tex. 1856) The charter of the town of La Grange provides that the mayor shall, in a summary way, try all offenses against the laws passed by the council, without a jury. The constitution provides that in all cases where judicial officers of inferior tribunals shall have jurisdiction in the trial of causes where the penalty is fine and imprisonment, the accused shall have the right of trial by jury. In this case the defendant was accused of assault and battery, and fined $30 by the mayor. *Held*, that said clause in the charter is unconstitutional and void.—Burns v. Town of La Grange, 17 Tex. 415.

(D) ENFORCEMENT OF RIGHT.

RIGHT TO DEMAND JURY IN GENERAL, § 154.
NECESSITY FOR DEMAND, § 155.
— CRIMINAL PROSECUTIONS, § 156.
EXCUSES FOR FAILURE TO MAKE DEMAND, § 157.
NOTICE OF DEMAND, § 158.
TIME FOR MAKING DEMAND, § 159.
— TERM AT WHICH DEMAND MUST BE MADE, § 160.
— FIRST DAY OF TERM, § 161.
— AFTER CONTINUANCE OR ADJOURNMENT, § 162.
— AFTER SETTING FOR TRIAL BY COURT, § 163.
— AFTER COMMENCEMENT OF TRIAL, § 163½.
— PARTICULAR ISSUES, § 164.
— IN ACTIONS BEFORE JUSTICES OF THE PEACE, § 165.
FORM AND SUFFICIENCY OF DEMAND, § 166.
— ALLEGATIONS IN OR INDORSEMENT ON PLEADINGS OR OTHER PAPERS, § 167.
— VERIFICATION OF PLEADING OR AFFIDAVIT OF DEFENSE, § 168.
EFFECT OF DEMAND MADE AT PREVIOUS TRIAL OR TERM OF COURT, § 169.
EFFECT OF PREVIOUS TRIAL BY COURT, § 170.
SPECIAL OR STRUCK JURY, § 171.
OBJECTION TO SUBMISSION TO JURY, § 172.
DETERMINATION OF RIGHT, § 173.
PAYMENT OR DEPOSIT OF JURY FEE, § 174.
— TIME FOR PAYMENT, § 175.

Rules of procedure as infringement of right, see post, § 208.

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Application and procedure for submission of questions in divorce cases, see "Divorce," vol. 17, cc. 688–690, § 485.

Notice of trial and preliminary proceedings, see "Trial," I., II.

Review as dependent on objection to trial by court, see "Appeal and Error," vol. 2, c. 1655, § 1155 [c].

—— *of objection first raised on appeal, see* "Appeal and Error," vol. 2, c. 1663, § 1165.

—— *of order denying jury trial as dependent on objections made in trial court, see* "Appeal and Error," vol. 2, c. 1575, § 1037 [f, i].

Submission by justice of the peace on his own motion, see "Justices of the Peace," vol. 31, c. 1339, § 367 [a].

—— *on court's own motion, see* "Trial," X. (A).

§ 154. Right to demand jury in general.

[a] (Ind. 1837) In criminal cases, except petit misdemeanors, etc., the state, as well as the defendant, may insist on a trial by jury.—State v. Mead, 4 Blackf. 309, 30 Am. Dec. 661.

[b] (Mo. 1859) Where a case is properly triable by the court, it is not for the parties, as a matter of course, to require a jury.—Morris v. Morris, 28 Mo. 114.

[c] (Mo. 1863) A defendant in a St. Louis law commissioners' court can demand a jury of 12 persons.—Aka v. Anderson, 34 Mo. 74.

[d] (Mo. 1865) A party to an action in the circuit court is entitled to trial by a jury of 12 men, if he demands it.—Henning v. Hannibal & St. J. R. Co., 35 Mo. 408.

[dd] (Mo. 1890) On exceptions by a landowner to the report of commissioners in proceedings to condemn a right of way for a railroad company, such owner is entitled to a trial by jury, under Const. art. 12, § 4, providing that the right of trial by jury shall be held inviolate in all trials of claims for compensation for land taken, when any incorporated company shall be interested for or against the exercise of the right to take such land, though the report of the commissioners has not been set aside for good cause shown, as provided by Rev. St. 1879, § 2738.—Kansas City, Ft. S. & S. E. Ry. Co. v. Cox, 41 Mo App. 499.

[e] (N. Y. 1820) Under Act April 10, 1818, extending the jurisdiction of justices of the peace, where the demand exceeds $25, either party has a right to demand that the jury should consist of 12; but he must make his demand for that purpose before the venire issues.—Strong v. Beardslee, 18 Johns. 130.

[f] (W. Va. 1891) When an order is made by the chancellor directing an issue of quantum damnificatus in a suit between the owner of property and an internal improvement company, the order should state that the issue is to be tried by a jury of 12 freeholders, if either party desires it, as the constitution guaranties such right.—Ward v. Ohio River R. Co., 35 W. Va. 481, 14 S. E. 142.

§ 155. Necessity for demand.

See post, § 166 [n].

As infringement in criminal prosecutions, see post, § 216 [e, f].

Failure to demand in trial court as waiver in trial de novo on appeal, see post, § 190.

—— *to repeat demand as waiver, see* post, § 176 [c].

Special or struck jury, see post, § 171 [m].

Where prayed for in pleading, see post, § 167 [j].

[a] To secure a trial by jury in a civil case a jury must be demanded.

—(U. S. 1896) Perego v. Dodge, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113; (1827) Deadrick v. Harrington, Fed. Cas. No. 3,694b [Hemp. 50];

(Ala. 1848) Evans v. State Bank, 15 Ala. 81;

(Cal. 1859) Smith v. Brannan, 13 Cal. 107; (1885) Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 8 Pac. 22;

(Ga. 1848) Flint River Steamboat Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248;

(Ill. 1884) Heacock v. Hosmer, 109 Ill. 245; (1890) Chicago Driving Park v. West, 35 Ill. App. 496;

(Ind. 1856) Madison & I. R. Co. v. Whiteneck, 8 Ind. 217; (1859) Burgess v. Matlock, 12 Ind. 357; (1886) Sprague v. Pritchard, 108 Ind. 491, 9 N. E. 416; (1890) Sheets v. Bray, 125 Ind. 33, 24 N. E. 357;

(Ky. 1895) Tabler v. Anglo-American Ass'n, 32 S. W. 602;

(La. 1826) Le Blanc v. Johns, 4 Mart. (N. S.) 635; (1853) Wallace v. Smith, 8 La. Ann. 376;

(Mo. 1877) Brown v. Home Sav. Bank, 5 Mo. App. 1;

(Nev. 1891) Haley v. Eureka County Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815;

(N. Y. 1810) Blanchard v. Richly, 7 Johns. 198; (1861) Barlow v. Scott, 24 N. Y. 40; (1863) Pennsylvania Coal Co. v. Delaware & H. Canal Co., *40 N. Y. (1 Keyes) 72; (1871) West Point Iron Co. v. Reymert, 45 N. Y. 708; (1878) Whittlesey v. Delaney, 73 N. Y. 571; (1891) Stono v. Weiller, 128 N. Y. 655, 28 N. E. 653;

(Ohio, 1893) Bonewitz v. Bonewitz, 50 Ohio St. 373, 34 N. E. 332, 40 Am. St. Rep. 671;

(S. C. 1894) Marshall v. Marshall, 42 S. C. 436, 20 S. E. 298;

(Tex. 1859) Dyches v. State, 24 Tex. 266;

(Wash. 1892) Washington Iron Works v. Jensen, 3 Wash. 584, 28 Pac. 1019; (1892) Stetson & Post Mill Co. v. McDonald, 5 Wash. 496, 32 Pac. 108;

(Wis. 1866) Leonard v. Rogan, 20 Wis. 540.

[b] (Ala. 1862) Where a party is liable on motion, if the defendant does not tender an issue and demand a jury trial, the court, on proof of the requisite facts, may render judgment for the plaintiff.—Andrews v. Keep, 38 Ala. 315.

[c] (Ala. 1874) When a claim filed against an insolvent estate is contested, if neither party demands a trial by jury (Rev. Code, § 2203), the court may try the contest without a jury.—Blankenship's Adm'r v. Nimmo's Adm'r, 50 Ala. 506.

[d] (Ala. 1894) The act amending the act creating the city court of Anniston (section 6), providing that questions of fact in civil actions shall be tried without a jury, unless one be demanded by the plaintiff at the commencement of the suit, or by defendant on his appearance, "by endorsing such demand in writing on the plea or demurrer or other pleadings," and providing the failure to demand a jury "as above directed" shall be deemed a waiver of the right to jury trial, is mandatory.—Ex parte Ansley, 107 Ala. 613, 18 South. 242.

[e] (Cal. 1890) The court proceeded with the trial of the case at the same time with another case against the same defendant, allowing the testimony, so far as applicable, to be used in both cases, though the witnesses were separately sworn, in each case. Defendant claimed that counsel who went to the court to demand a

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jury in this case, were thus prevented from doing so. *Held*, that the course pursued by the court was within its discretion, and, that as no demand for a jury and a continuance was made, it could not be said that defendant was injured thereby.—McGuire v. Drew, 83 Cal. 225, 23 Pac. 312; Towle v. Clunie, 23 Pac. 314.

[f] (Ind. 1837) If neither party require a jury, the cause may be tried without one, although the amount in controversy exceed $20.—Minton v. Moore, 4 Blackf. 315.

[g] (Iowa, 1861) Since Revision, c. 126, relating to summary proceedings in aid of execution, and providing for the imprisonment of a judgment debtor who disobeys any order of the court or judge relating to the application of his property to the payment of the debt, is unconstitutional, as depriving the judgment debtor of the right to trial by jury; that right is not waived by a failure to demand a jury, since the county judge before whom the examination is had has no power to impanel a jury.—Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529.

[h] (Mass. 1878) After a railroad company has filed a discontinuance of its petition under Gen. St. c. 43, § 41, for a jury, and accepted the award of the commissioners assessing damages for taking land, etc., the respondent, not having applied for a jury, nor entered into a recognizance, under section 24, to pay costs, is not entitled to insist on a trial by jury.—Fall River R. Co. v. Chase, 125 Mass. 483.

[i] (Mich. 1879) Although Const. art. 6, § 27, provides that the right to a jury trial is to be deemed waived if not demanded in the manner prescribed by law, there is no waiver where no method is prescribed, or the conditions are such as to render execution of the provision impossible.—Odell v. Reynolds, 40 Mich. 21.

[j] (Minn. 1875) In an action before a justice, under Gen. St. c. 84, in regard to forcible entry and detainer, if defendant fails to call for a jury trial he will be deemed to have waived his right thereto.—Gibbens v. Thompson, 21 Minn. 398.

[k] (Mo. 1845) The statute authorizing courts to try issues of fact where neither party requires a jury applies only where both parties are present and are in a situation to make an election.—Sutton v. Clark, 9 Mo. 559.

[l] (Mo. 1886) Where, in an action for cancellation of deeds, and to vest title in plaintiff, the court, without a jury, has determined the issues of law, and fixed the damages and rents and profits, and no objection has been taken thereto at the trial, nor exception then saved, the defendants must be held to have waived a jury trial as to the law issues.—Pike v. Martindale, 91 Mo. 268, 1 S. W. 858.

[m] (Mo. 1890) The right to a trial by jury in condemnation proceedings, given by the constitution, is waived by a failure to demand it.—Chicago, M. & St. P. R. Co. v. Randolph Town Site Co., 103 Mo. 451, 15 S. W. 437.

[n] (N. J. 1881) If a party goes to trial before a justice, without demanding a jury, under statutes which provide that, on appeal from the decision of the justice, the cause shall be heard and determined by the appellate court without a jury, he thereby waives any right to jury trial on appeal.—Wanser v. Atkinson, 43 N. J. Law (14 Vroom) 571.

[o] (N. Y. 1825) Under Act 1818, c. 94, § 41, on appeal from a justice of the peace, the court of common pleas need not try the case with a jury, where none is demanded.—Flower v. Allen, 5 Cow. 654.

[p] (N. Y. 1862) Where the evidence is nowise doubtful or contradictory, the judge, if not requested to submit any question to the jury, has a right himself to decide the case upon the evidence.—Wilklow v. Lane, 37 Barb. 244.

[q] (N. Y. 1888) A defendant in foreclosure who counterclaims money due and damages for breach of a contract, asking an affirmative judgment thereon, cannot demand a jury trial of the issues thus raised as of course, under Code Civ. Proc. § 974, providing that where defendant interposes a counterclaim, and thereon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact arising thereon is the same as if it arose in an action brought by the defendant against the plaintiff for the cause of action stated in the counterclaim, and demanding the same judgment, since such case is within Code, § 970, which provides that where a party is entitled to a jury trial in an action not specified in section 968, he may apply on notice to the court for an order directing issues.—Mackellar v. Rogers, 109 N. Y. 468, 17 N. E. 350, affirming MacKellar v. Same (1885) 52 N. Y. Super. Ct. (20 Jones & S.) 468.

[r] (N. Y. 1895) Defendant's right to a jury trial on an issue of damages for trespass to an easement in a street is waived where no steps were taken to obtain it, and defendant allowed evidence to be taken by the court without objection.—Pegram v. New York El. R. Co., 147 N. Y. 135, 41 N. E. 424.

[s] (Ohio, 1866) Where the defendant in an action under Code, § 557, to determine an adverse estate or interest in land takes issue with the plaintiff, and claims in his answer that he is the legal owner and in possession of the land in dispute, and asks that his title thereto may be quieted, and suffers the cause to be tried by the court without objection, he thereby waives his right to demand a jury trial.—Ellithorpe v. Buck, 17 Ohio St. 72.

[t] (S. C. 1883) The legal right to a jury trial of an issue of title to land is not waived by a failure to demand a jury.—De Walt v. Kinard, 19 S. C. 286.

[u] (Tex. 1853) It is not error for the district court to try a case upon the record of the court of probate without a jury, if none is asked for.—Miller v. Miller, 10 Tex. 319.

[v] (Tex. 1878) Where neither party demands a jury, it is competent for the court to try and determine a question of damages.—Burnett v. Gunter, 1 White & W. Civ. Cas. Ct. App. § 664.

[w] (Tex. 1888) Where neither party demands a jury trial, it is the duty of the court to hear the evidence, and determine the facts as well as the law.—Brooks v. Pegg (Sup.) 8 S. W. 595.

§ 156. —— Criminal prosecutions.

[a] (Ala. 1823) A party who would avail himself of the privilege of a trial by jury must appear and claim it.—Armstrong v. State, Minor, 160.

[b] (N. J. 1877) The right to a jury trial is waived by defendants who were present at a trial before a police justice and permitted the case to be tried without intimating any desire for a jury.—State v. Mills, 39 N. J. Law (10 Vroom) 587.

[c] (N. Y. 1887) Code Cr. Proc. § 202, relating to proceedings in courts of special sessions, provides that before the evidence is heard defendant may demand a trial by jury, and section 701 that if defendant do not demand such trial the court must proceed to try the issue. Defendant pleaded not guilty, and on being asked by the court if he was ready for trial he replied that he was, and the court proceeded to try him forthwith, without objection on his part. *Held*, that this was a consent to be tried by the court.—People v. Cook, 45 Hun, 34.

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[d] (Tex. 1856) The accused need not have demanded a jury to entitle him to have set aside a summary conviction before a mayor; he having merely excepted to the mayor's jurisdiction.—Smith v. City of San Antonio, 17 Tex. 643.

§ 157. Excuses for failure to make demand.

[a] (Mass. 1805) The docket showed that defendant duly filed a notice claiming a trial by jury, but the cause was placed on the "jury waived" list. Defendant's attorney searched for the notice, but, being unable to find it, concluded that his clerk had not filed it, and, without making a motion to transfer the case, proceeded to trial without a jury. After the trial, but before the findings of the court had been entered, the justice found the notice in the files, and called counsel's attention to it, and he then asked that the case be transferred to the jury list. *Held*, that the court properly refused to make the transfer.—Walcott v. O'Connor, 163 Mass. 21, 39 N. E. 345.

[b] (Tenn. 1879) Where a citizen of another state sues in Tennessee, appears by counsel, and fails to demand a trial by jury within the time required by Acts 1875, c. 4, a subsequent application for a trial by jury should not be granted on the ground that he was ignorant of the above provision.—Coulter v. Weed Sewing Mach. Co., 71 Tenn. (3 Lea) 115.

[c] (Tex. 1886) It is a sufficient excuse for not demanding a jury on the first day of the court that there was at that time no judge competent to receive the demand and enter the order.—Hays v. Hays, 66 Tex. 606, 1 S. W. 895.

[d] (Tex. 1893) It was error for the court to refuse defendants a jury trial on the ground that they had waived their right by failing to call for one when the appearance docket was called for orders, and that the demand came too late after a motion for a continuance had been overruled, it appearing that no jury was in attendance when the docket was called, and that such jury had been discharged because of failure to demand a jury trial.—Cook v. Cook, 5 Tex. Civ. App. 30, 23 S. W. 927.

§ 158. Notice of demand.

As infringement of right, see post, § 208.
Struck jury, see post, § 171 [g–i].

[a] (Cal. 1865) A jury trial is waived by a party, if he fails to file a notice six days before the commencement of the term that a jury will be required; but the court has a right, notwithstanding such waiver, to direct an issue of fact to be tried by a jury.—Doll v. Anderson, 27 Cal. 248.

[b] (Mass. 1882) By consent of counsel an answer was filed in which the right to file an amended one was reserved, but defendant afterwards gave plaintiff notice that he should not file one. *Held*, that the parties were then "at issue," within a statute requiring a party desiring a jury trial to file a notice to that effect within 10 days after the parties are "at issue," and that plaintiff, by not filing a notice within the time, had waived a trial by jury.—Bailey v. Joy, 132 Mass. 356.

[c] (Mass. 1892) Pub. St. c. 167, § 69, provides that, where a trial by jury is desired, notice thereof shall be filed "before the parties are at issue, or within such time thereafter as the court may direct." Super. Ct. Rule 22 provides that "the notice that a party desires a trial by jury, required by the statute, shall be filed not later than ten days after the filing of the answer or plea, unless the court shall restrict or extend the time." While a cause was on trial without a jury, defendant asked to amend his answer, and plaintiff claimed the right to a trial by jury on the allowance of the amendment. *Held*, that it was within the discretion of the court to allow the amendment without allowing plaintiff's demand for a jury.—Cleverly v. O'Connell, 156 Mass. 88, 30 N. E. 88.

[d] (Mass. 1894) After the death of plaintiff's intestate, answer was filed in an action brought by him, and his death suggested. A year later plaintiff was appointed his administratrix, and was admitted to prosecute the action. On the same day she was allowed to file a claim for jury trial. *Held*, that the claim was seasonably filed, since Pub. St. c. 167, § 69, provides for notice before the parties are at issue, and the parties were not at issue until the substitution of plaintiff.—McGivern v. Wilson, 160 Mass. 370, 35 N. E. 864.

[e] (N. Y. 1807) Where a prisoner on his arraignment suggests that he is an alien, and claims the privilege of a trial by jury de medietate linguæ, the court of oyer and terminer may order such jury to be summoned instanter, as 1 Laws, p. 377, relative to the venire and the eight days to be allowed for summoning them, applies only to jurors drawn out of the box by the county clerk as qualified jurors, and not to such a case.—People v. McLean, 2 Johns. 381.

[f] (N. Y. 1891) Laws 1891, c. 208, which permits motions under it to be made at any time, supersedes general rule of practice No. 31, providing that, in cases where the trial of issues of fact is not provided for by the Code, the party desiring a trial by jury "shall, within 10 days after issue joined, give notice of a special motion that the whole issue * * * be tried by a jury."—Eggers v. Manhattan Ry. Co. (Super. N. Y.) 18 N. Y. Supp. 181, 27 Abb. N. C. 468, 21 Civ. Proc. R. 403.

[g] (N. Y. 1894) Gen. Rule Prac. 31, providing that, in cases where the trial of issues of fact is not provided for by the Code, a party desiring jury trial shall, within 10 days after issue joined, give notice of a motion therefor, does not apply to issues on a counterclaim, since the motion in such case is provided for by Code Civ. Proc. §§ 970, 974.—Bradley & Currier Co. v. Herter (Super. N. Y.) 30 N. Y. Supp. 270, 23 Civ. Proc. R. 408.

[h] (Vt. 1825) Appellant may alter the issue from the court to the jury, without notice to the appellee.—Stanton v. Loyd, 1 Aikens, 35.

§ 159. Time for making demand.

See post, § 166 [n].
Prescribing time as infringement of right, see post, § 208 [b].
Special or struck jury, see post, § 171.

[a] (Ala. 1858) A failure to apply for a jury when a will is contested (Code, § 1634) is not a waiver of the right which will authorize the court to refuse it when demanded at the trial.—Stedham's Heirs v. Stedham's Ex'r, 32 Ala. 525.

[b] (Ind. 1872) Under 1 Gav. & H. St. p. 475, § 7, in a proceeding before a justice to condemn lands for a highway as well as on appeal, three viewers are to be appointed who are to be sworn as jurors to assess damages, and when such have been appointed without any objection from the owner of the land, and on appeal to the circuit court three other viewers were appointed, the owner only making a general objection to the appointment of viewers, and not claiming a jury of 12, it was *held* that, after a report by viewers appointed by the court on appeal, it was too late to demand a jury.—Beynon v. Brandywine, B. & S. C. Turnpike, 39 Ind. 129.

[c] (Iowa, 1880) Failure to object to the trial of a cause as an equitable action within the

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time prescribed by law is a waiver of the right to a trial by jury.—Gibbs v. Coonrod, 54 Iowa, 736, 7 N. W. 146.

[d] (La. 1838) Either party has a right to pray for a jury at any time before the cause is set for trial; and this right cannot be denied, though delay be evidently the object. Code Prac. arts. 494, 495.—Reynolds' Curator v. Mahle, 12 La. 424.

[e] (La. 1843) A prayer for a jury on a motion for a new trial of an appeal from the parish comes too late.—Bouquevalte v. Young, 5 Rob. 162.

[f] (La. 1866) A party is entitled to a trial by jury, who prays for it before the cause is set for trial.—Simpson v. Richardson, 18 La. Ann. 121.

[g] (La. 1874) The plaintiff, a judgment debtor of the defendant, issued execution and instituted garnishment process against the city, the latter being a judgment debtor of the defendant, by virtue of a judgment and decree of the United States circuit court. The plaintiff then moved that the city show cause why it should not be condemned and ordered to pay to the sheriff the amount of plaintiff's judgment, on the ground that it was shown by the answer that the city had sufficient funds to pay it. *Held*, that the city could not object that it was entitled to a trial by jury, in the absence of any application made before trial.—Foulhouze v. Gaines, 26 La. Ann. 84.

[h] (Md. 1866) An objection to the court's taking cognizance without a jury, and upon a motion to quash an attachment, of a claim of a third party, comes too late on appeal, when no such objection was raised below, and there was an agreement for its trial by the court.—Howard v. Oppenheimer, 25 Md. 350; Dean v. Same, Id. 368.

[i] (Mo. 1888) A demand by a landowner for a jury, after the report of commissioners in proceedings to condemn land for a railway has been filed, is in time if the owner has excepted to the report.—Kansas City, C. & S. R. Co. v. Story, 96 Mo. 611, 10 S. W. 203.

[j] (N. J. 1840) It is time enough to elect to have a trial by jury when the cause is ordered on for trial, on an appeal to the common pleas, if there is no rule to the contrary.—Field v. Ten Eyck, 18 N. J. Law (3 Har.) 195.

[k] (N. Y. 1857) In an action seeking to avoid a settlement of accounts alleged to have been obtained in fraud, and seeking an accounting in reference to transactions covering a period of eight years, the plaintiff moved, at special term, to settle the issues for trial by jury. *Held*, that the application should be denied; that it must be left to the court, on the trial of the cause, to determine the mode of trial.—Church v. Freeman, 16 How. Prac. 294.

[l] (N. Y. 1879) The claim under Laws 1869, p. 932, c. 410, for a jury of 12 may be made at any time before trial.—Power v. New York Cent. & H. R. R. Co., 7 Abb. N. C. 371.

[m] (N. Y. 1881) The right to a jury trial is lost by a failure to urge it before or at the trial.—Derham v. Lee, 60 How. Prac. 334.

[n] (N. Y. 1893) Where an adjudged lunatic has refused to avail himself of two opportunities given him to have the question of his sanity tried by a jury, his third application for a supersedeas of the commission on substantially the same affidavits as on his prior applications, again asking for a hearing before a jury, is properly denied.—In re Blewitt, 138 N. Y. 148, 33 N. E. 820.

[o] (N. Y. 1896) A right to try by jury the title to land devised by a will is not waived by failure of the devisee to demand a jury trial before the surrogate on an application for probate of the will.—Corley v. McElmeel, 149 N. Y. 228, 43 N. E. 628, affirming (1895) 87 Hun, 23, 33 N. Y. Supp. 862.

[p] (R. I. 1895) Judiciary Act, c. 26, § 1, provides that in all answered causes there shall be a decision of the court and a judgment. Chapter 19, § 17, provides that entries on the docket or papers are deemed to be a decision. *Held*, when the only entry on the papers is defendant's submission to judgment for a certain sum, and there is no entry of judgment, his application within two days for a jury trial should be granted.—Lavelle v. Kimball, 18 R. I. 786, 31 Atl. 166.

[q] (R. I. 1895) Right to claim jury trial in an action of account does not exist after the court has noted its decision on the report of the auditor.—White v. Eddy, 19 R. I. 108, 31 Atl. 823.

[r] (Tenn. 1841) The collector of county taxes against whom a motion is made for unpaid balances, under Act 1835, § 14, is entitled to a trial by jury, and the fact that the court had discharged the jury at the time the application was made is not good ground for refusal, as a continuance could be ordered.—Miller v. Moore, 21 Tenn. (2 Humph.) 421.

[s] (Tex. 1878) Under the present jury law, in cases filed before its passage, a jury must be demanded before the jury for the term is dismissed, even if not before the time fixed for calling the docket of jury cases.—Cushman v. Flanagan, 50 Tex. 389.

§ 160. —— Term at which demand must be made.

Effect of demand made at previous term, see post, § 169.

[a] (Iowa, 1879) A rule (1878) of the circuit court provides that no cause shall be tried before a jury unless entered upon the clerk's docket of causes to be tried by a jury, and if a cause is not upon such docket at any term when it is called for trial, a jury trial shall be deemed waived, unless the court continue the cause; but continuances must be transferred to the docket during vacation or on the first day of any term. *Held*, that a jury trial may be had by any party in a continued cause, when demand therefor is made on the first day of any term, though other terms may have intervened in which no jury trial was demanded.—Rogers v. Martin, 51 Iowa, 709, 2 N. W. 262.

[b] (N. H. 1885) Whether the questions are so complicated that a jury trial is impracticable must be determined at the trial term.—Dole v. Pike, 64 N. H. 22, 3 Atl. 743.

[c] (Tenn. 1890) Under Acts 1889, c. 220, § 1, which entitles any litigant to a jury trial, "provided he call for same on the first day of any term at which the suit stands for trial," a jury may be demanded in a suit appealed from a justice at the second term after the appeal is perfected, when the suit stands for trial at such term, though no jury was demanded at the first term.—Swink v. McKnight's Ex'rs, 88 Tenn. (4 Pickle) 765, 14 S. W. 311.

[d] (Tex. 1890) Though both parties fail to demand a jury on appearance day, it is not error to grant a jury trial at a subsequent term.—Noel v. Denman, 76 Tex. 306, 13 S. W. 318.

[e] (Tex. 1892) It is not error for a trial court to refuse to place a cause on the jury docket, and allow it to be tried by a jury, where the jury docket for the term has been disposed of before the demand for a jury is made, and two terms of the court had passed without such a demand.—Petri v. First Nat. Bank, 83 Tex. 424, 18 S. W. 752, 29 Am. St. Rep. 657.

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§ 161. —— First day of term.

[a] (Tex. 1881) A party who does not, as required by Rev. St. Arts. 3060-3066, demand a jury trial on the first day of the term, is not afterwards entitled thereto, at least without showing a sufficient excuse for not making the demand in time.—McFaddin v. Preston, 54 Tex. 403.

[b] (Tex. 1892) There was no error in the trial court refusing to grant defendant's demand for a jury after the jury docket had been disposed of for the term, and the regular panel discharged; Sayles' Civ. St. §§ 3064, 3066, providing that a demand for a jury shall be made on the first day of the term.—Denton Lumber Co. v. First Nat. Bank (Sup.) 18 S. W. 962.

[c] (Tex. 1892) Sayles' Civ. St. art. 3061, provides that any party, desiring to have the suit tried by a jury, shall make application therefor on the first day of the term at which it is to be tried. *Held*, that where the court, at the first day of the term, orders that no cases on the jury docket shall be called at that term, an application for a jury trial, not made till the day on which a case is set for trial, is properly refused.—Petri v. Lincoln Nat. Bank, 84 Tex. 153, 19 S. W. 379.

[d] (Tex. 1894) Under Rev. St. art. 3061, providing that any party desiring a trial by jury shall make application therefor on the first day of the term, unless it be an appearance case, in which event the application shall be made on "default day," read in connection with articles 1280, as amended by Act April 13, 1891, and 1281, 1282, "default day" is "appearance day," which is the second day of the term.—Cruger v. McCracken (Civ. App.) 26 S. W. 282.

[e] (Tex. 1894) An application for trial by jury after the jury service for the term has ended, and the jury discharged, was properly denied, under Rev. St. art. 3061, providing that one desiring a jury trial "shall make application therefor in open court on the first day of the term of the court at which the suit is to to be tried."—Barton v. American Nat. Bank, 8 Tex. Civ. App. 223, 29 S. W. 210.

[f] (Wis. 1886) Rev. St. § 2477, which provides that, if a jury shall not be demanded when the action shall be "called for trial," a jury trial shall be waived, does not require a jury to be demanded at the usual call of the docket on the first day of the term.—State v. Clark, 67 Wis. 229, 30 N. W. 122.

§ 162. —— After continuance or adjournment.

[a] (N. Y. 1823) An assistant justice is bound to issue a venire, if demanded, on the same day on which an adjournment is made, after issue, and before proceeding to inquire into the merits of the cause. An adjournment is not a proceeding to inquire into the merits.—Bayless v. Crany, 1 Cow. 86.

[b] (N. Y. 1855) Issue having been joined upon a return of the summons, a demand for a jury in the marine court, made after the appearance of the parties on an adjourned day for trial, is too late.—Dempsey v. Paige, 4 E. D. Smith, 218.

[c] (N. Y. 1856) Under Sess. Laws 1840, p. 123, providing that, in the absence of a justice of the district court on the return day, the clerk may adjourn a cause, where the clerk so adjourns it, the demand for a jury must be made on the adjourned day upon joining issue before the justice.—Meech v. Brown, 1 Hilt. 257, 4 Abb. Prac. 19.

[d] (N. Y. 1857) After issue has been joined in the district court, and the trial adjourned, it is too late on the day of trial to demand a jury. —Mason v. Campbell, 1 Hilt. 291.

[e] (N. Y. 1857) An adjournment before issue joined does not deprive the party of his right to demand a jury on the adjourned hearing when issue was joined.—Mead v. Darragh, 1 Hilt. 395.

§ 163. —— After setting for trial by court.

[a] (La.) An application for a jury comes too late after the cause is fixed or called for trial. Code Prac. arts. 494, 495.—(1837) Morgan v. Police Jury of Pointe Coupee, 11 La. 157; (1842) Menefee v. Johnson, 2 Rob. 274.

[b] (La. 1847) A prayer for a trial by jury is not too late, though made after the case has been set for trial and continued, if it be not actually fixed for trial at the time of the prayer. —Louisiana State Bank v. Duplessis, 2 La. Ann. 651.

[c] (La. 1849) After a case has been set down for trial, it is too late for one of the parties to file an application for trial by jury.—Wood v. Lyle, 4 La. Ann. 145.

[d] (La. 1876) In district courts it is the settled practice to refuse application for a jury after the case has been once fixed, and continued by preference: the case having been set down for trial, the application for a jury is too late. —Wheeless v. Fisk, 28 La. Ann. 731.

[e] (La. 1882) Although a case has already been fixed for trial, an application for a jury is in time, if, at the moment it is made, the case does not stand fixed for trial.—Gallagher v. Hebrew Congregation of Baton Rouge, 34 La. Ann. 526.

§ 163½. —— After commencement of trial.

[a] (La. 1846) A court may, at the instance of a party, order a case to be tried before a jury, even after the trial had been commenced before the court alone.—Hoffman v. Western Marine & Fire Ins. Co., 1 La. Ann. 216.

[b] (Md. 1887) The garnishee and claimant in an attachment suit, who has elected to try his case upon motion to quash before the court, may, even after the evidence has been partly taken, dismiss his motion, and, by filing a plea, have the same question tried before a jury.—Ferrall v. Farnen, 67 Md. 76, 8 Atl. 819.

[c] (N. J. 1818) By statute, the court for the trial of small causes cannot, after the cause is in part tried, award a venire, and proceed to try it by jury.—Tilton v. Brand, 4 N. J. Law (1 Southard) 289.

[d] (N. Y. 1806) The mere inspecting of the note on which the action is founded by the court is not such a commencement of the trial as to preclude a party from demanding a jury, as provided by statute in cases before justices of the peace.—Olney v. Bacon, 1 Johns. 142.

[e] (N. Y. 1823) Where, after both parties have avowed themselves ready, the justice tells the plaintiff to go on, and the defendant admits a part of the plaintiff's account, and a witness for the plaintiff is partly sworn, it is too late for the defendant to demand a venire.—Gale v. Barnes, 1 Cow. 235.

[f] (N. Y. 1867) To wait until the trial is entered upon before making an application for a jury trial is a waiver.—McKeon v. See, 27 N. Y. Super. Ct. (4 Rob.) 449.

[g] (N. Y. 1894) Where defendant goes to trial before the special term without objecting to the power of the court, and proceeds with the trial to its close, submitting requests to find, a claim, made for the first time in such requests, that he was entitled to a trial by jury, is too late.—Rogers v. Straub, 75 Hun, 264, 26 N. Y. Supp. 1066.

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[h] (S. C. 1886) A demand for a jury in a trial justice's court should properly be made before the trial has commenced; and it is not error to refuse such a demand made after the state has closed its case.—State v. Mays, 24 S. C. 190.

[i] (S. D. 1896) A request by defendant for a trial by jury, made after plaintiff has closed his evidence,—the parties having noted the case for trial by the court,—comes too late.—Webster v. White, 8 S. D. 479, 66 N. W. 1145.

[j] (Tenn. 1896) Under Acts 1889, c. 220 (enacting that a party desiring a jury trial shall be entitled thereto if he calls for the same on the first day of the term), if the case is called for trial on the first day of the term, neither party, after announcement of ready for trial, without demand for jury, can demand a jury trial.—McGuire v. North Carolina & St. L. Ry., 95 Tenn. (11 Pickle) 707, 33 S. W. 724.

§ 164. —— Particular issues.

[a] (Md. 1883) An application by the complainant, in a bill in equity, for issues to be framed and sent to a court of law for trial by jury, comes too late, after an answer to the bill has been filed and the testimony is all in.—Chase v. Winans, 59 Md. 475.

[b] (Mass. 1876) Generally, a motion for a trial by jury on issues of fact is made too late after the coming in of the master's report.—Atlanta Mills v. Mason, 120 Mass. 244.

[c] (Mass. 1883) In an action for the breach of the condition of a bond, if a trial by jury is not claimed, as provided by Pub. St. c. 167, § 69, it is too late, after a finding by the court that the condition is broken, to move to have the damages assessed by a jury.—Vitrified Wheel & Emery Co. v. Edwards, 135 Mass. 591.

[d] (N. H. 1864) If either party desires a jury trial, the motion for issues should be made before the appointment of an auditor.—Patrick v. Cowles, 45 N. H. 553.

[e] (N. Y. 1874) In an action brought by the attorney general to determine which one, if either, of two boards of railroad directors is entitled to office, and to have a new election ordered if neither was elected, an application for a jury to try issues of fact, made after the attorney general had rested, is not made too late.—People v. Albany & S. R. Co., 57 N. Y. 161.

[f] (N. Y. 1891) A motion, under Code Civ. Proc. § 970, for the submission of issues to a jury for the determination of the amount of damages, in an action to enjoin the construction of an elevated railroad, will not be denied on the ground that it is premature, because the question as to the amount of damages may not, for some reason, be reached.—Eggers v. Manhattan Ry. Co. (Super. N. Y.) 18 N. Y. Supp. 181, 27 Abb. N. C. 463, 21 Civ. Proc. R. 403.

[g] (Pa. 1851) After the court in an election contest have heard several hundred witnesses, including all the testimony on one side and nearly all that on another, a motion will not be entertained to frame an issue for a jury.—In re Contested Election of District Attorney, 1 Phila. 159, 8 Leg. Int. 39; In re Kneass, 2 Pars. Eq. Cas. 553.

[h] (Pa. 1857) An application directly to the court for an issue, under Act April 20, 1846, § 2, is proper, where the proceeds of real estate sold at orphans' court sale are before an auditor for distribution.—In re Bacon's Estate, 2 Phila. 376.

[i] (Pa. 1891) An auditor's refusal to award an issue in a case tried before him is not error where the demand for the issue was not made until the case had been before him for two years, and a large amount of testimony taken, and some days after the parties had been notified by the auditor that his report was ready for filing.—Second Nat. Bank v. Lackawanna & S. Coal & Iron Co., 140 Pa. 628, 21 Atl. 412; Appeal of Jenkins, Id.

[j] (S. C. 1818) Where a bond is given for performance of covenants, after judgment by default, execution issued, and levy and sale, it is too late for the defendant to avail himself of the privilege given in the act of 1792 to compel the plaintiff to submit the condition of the bond and the special matter to a jury.—Durkey v. Hammond, 2 Mill, Const. 151.

§ 165. —— In actions before justices of the peace.

[a] (Iowa, 1884) Code 1873, § 3537, provides that in actions before a justice, "unless one of the parties demand a trial by jury at or before the time for joining issue, the trial shall be by the justice." In an action before a justice the notice was made returnable at 9 o'clock a. m. Within 15 minutes thereafter defendant filed answer. The trial was postponed until after 10 o'clock to wait for one of plaintiff's attorneys, and at 10 minutes after 10, and before trial had commenced, plaintiff demanded a jury trial. By the provisions of section 3525 plaintiff is not required to appear or give any attention to the answer until 10 o'clock. *Held*, that the demand was in time, plaintiff being entitled to a reasonable time after 10 o'clock within which to make it.—Hall v. Chicago, B. & Q. R. Co., 65 Iowa, 258, 21 N. W. 596.

[b] (Ohio, 1880) Rev. St. § 6607, provides that "if the suit be not continued, place of trial changed, or either party demands a jury upon the return day of the summons, the justice shall try the cause." Section 6547 provides that "in all civil actions," after defendant's appearance, and before proceeding to inquire into the merits, either party may demand a jury. *Held*, that forcible entry and detainer is a civil action within the meaning of section 6547; section 6607 must be read as if the comma after the word "summons" was placed after the word "jury," and it was error for a justice of the peace to refuse a demand for a jury on the trial day, though it was some days after the return day.—Hill v. Hollister (Com. Pl.) 8 Ohio Dec. 116, 5 Wkly. Law Bul. 757.

[c] (Ohio, 1883) In an action of forcible detainer defendant may demand a jury on the appearance day, though it was subsequent to the return day of the summons.—Bonham v. Mills, 39 Ohio St. 534.

§ 166. Form and sufficiency of demand.

Special jury, see post, § 171 [d].

[a] (Ill. 1889) Where the petitioner in condemnation proceedings voluntarily appears before a judge, and offers testimony on the question of title, without objecting to the mode of procedure, an exception to the decree only raises the question of the sufficiency of the evidence, and does not avoid the waiver of jury trial caused by the voluntary introduction of testimony.—Chicago, S. F. & C. Ry. Co. v. Ward, 128 Ill. 349, 18 N. E. 828.

[b] (Ind. 1881) A bastardy case, being governed by the rules regulating the trial of ordinary civil actions, must be tried by a jury if one be properly demanded by either party; and defendant, though not personally present, may appear by attorney, and demand a trial by jury.—Alley v. State, 76 Ind. 94.

[c] (Ind. 1893) A demand for a jury trial on all the issues joined in an action was properly refused as to all the issues where some of them

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were only triable by the court, since a motion must include only such relief as the party making it is entitled to.—Peden v. Cavins, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276.

[d] (Iowa, 1890) In an action to recover an amount claimed to be due under a contract dissolving a partnership, and for certain items alleged to have been omitted from the settlement of the partnership through fraud, accident, or mistake, a motion was made by defendant to transfer the cause from the equity to the law docket, but was not ruled upon until the final decision of the case, when it was overruled. It did not appear that the motion was ever called to the court's attention until after the trial, nor that defendant made any objection to proceeding to try the case in the manner in which it was tried. Each party asked an accounting as to many items omitted through fraud or mistake. *Held*, the motion was properly overruled.—Donahue v. McCosh, 81 Iowa, 206, 46 N. W. 1008.

[e] (La. 1851) Where, after the death of a curator ad hoc who had prayed for a jury, another is appointed, but the minutes do not show his acceptance or who was present at the trial by the court, the case will be remanded; defendant could not, without his consent, be deprived of his right to a jury.—Fellows v. Reid, 6 La. Ann. 724.

[f] (Minn.) Where part of the issues are triable by a jury and part by the court, a demand for a jury trial of the whole action is properly denied.—(1883) Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254; (1885) Chadbourne v. Zilsdorf, 34 Minn. 43, 24 N. W. 308; (1888) Lace v. Fixen, 39 Minn. 46, 38 N. W. 762.

[g] (N. J. 1873) A demand for trial by jury should be made to the court, and not by mere entry in the minutes.—Halsey v. Paulison, 36 N. J. Law (7 Vroom) 406.

[h] (N. Y. 1852) This court will not reverse a judgment of a district court, for the refusal of the justice to order a jury, where the defendant makes such a demand in the absence of the plaintiff, and subsequently goes to trial without objection and without the plaintiff being apprised of what had taken place, and where the defendant, after a trial upon the merits, raises this objection for the first time in the plaintiff's hearing, on the appeal.—Shannon v. Kennedy, 1 E. D. Smith, 346.

[i] (N. Y. 1857) A justice has the right to allow a defendant to appear and answer in the plaintiff's absence, before proof taken, and that appearance carries with it all the usual incidents of an appearance as the right to demand a jury.—Mead v. Darragh, 1 Hilt. 395.

[j] (N. Y. 1894) A recital in the record of an action that "defendant renewed the motion to send this case to the circuit" does not show that he asked for a trial by jury, in the absence of any other showing as to a request for a jury, or that the case be sent to circuit.—Hartman v. Manhattan Ry. Co., 82 Hun, 531, 31 N. Y. Supp. 498.

[k] (N. C. 1895) Where, against defendant's objection, the issues were sent to a referee for trial, and the referee filed 14 findings of fact, some of which related to questions of fact not in issue under the pleadings, and defendant filed exceptions to the findings, a demand at the end of his exceptions for a jury trial on all the issues raised thereby was too general to entitle him to such a trial.—Keystone Driller Co. v. Worth, 117 N. C. 515, 23 S. E. 427.

[l] (N. C. 1896) Where an exception to a referee's report reserving a jury trial fails to specifically demand it on an issue of fact raised by the pleadings and passed on by the referee in the finding excepted to, and to specify the precise issue on which testimony will be offered, the right to jury trial will be forfeited.—Taylor v. Smith, 118 N. C. 127, 24 S. E. 792.

[m] (Pa. 1858) To secure a trial by jury on an issue in the orphans' court, it must be shown by evidence that there exists in regard to the claim involved some disputed fact, for the determination of which the intervention of a jury is necessary.—In re Beehler's Estate, 3 Phila. 254.

[n] (Tex. 1886) Rev. St. arts. 3064–3066, providing that a party desiring a trial by jury must make application therefor, accompanying such application with a jury fee, on the first day of the term of the court, or on the appearance day, if the case be an appearance, must be strictly complied with, or a jury trial will be denied.—Fields v. Crescent Ins. Co., 3 Willson, Civ. Cas. Ct. App. § 125.

§ 167. —— Allegations in or indorsement on pleadings or other papers.

[a] (Ala. 1890) Acts 1888–89, pp. 316–323, establishing the city court of Decatur, which provide that a plaintiff in a civil action, who wishes a jury trial, must demand the same "at the commencement of the action" by indorsing such demand in writing on the summons or complaint, are sufficiently complied with on appeal from a justice's court to the city court, by a plaintiff who indorses a demand for a jury on the complaint filed by him in the city court before any trial could possibly have taken place under the rules and practice of that court.—Nixon v. Killain, 90 Ala. 484, 7 South. 761.

[b] (La. 1811) Defendant sued on a promissory note, though he have not indorsed the word "defense" on his answer, is entitled to a jury if he pray for it.—Kelly v. Barbin, 2 Mart. (O. S.) 47.

[c] (La.) A jury may be prayed for in a supplemental answer, but its allowance rests in the court's discretion, and will be refused where it would delay the trial a whole term; the jurors summoned for the term having been discharged.—(1827) Davis' Heirs v. Prevost, 6 Mart. (N. S.) 265; (1828) Green v. Boudurant, 7 Mart. (N. S.) 229; (1841) Hooper v. Hyams, 1 Rob. 90.

[d] (La. 1842) One of two debtors in solido cannot avail himself of the other's prayer for a jury.—Smith v. Scott, 3 Rob. 258; Mulhollan v. Henderson, Id. 297.

[e] (La. 1871) The intrusion act (Act No. 156 of 1868) accords to defendant, in a contest thereunder for the right to an office, the right of trial by jury, if a jury is asked for in the answer to the suit. *Held*, that defendant, who was allowed to file an answer in which he asked for a jury, was entitled thereto, though he had previously filed an exception in which he did not claim such right, which was subsequently decided to be substantially an answer.—State v. Gilmore, 23 La. Ann. 606.

[f] (Pa. 1895) Under the court rule providing that if respondent in a divorce case desires a trial by jury he must make his demand in his answer, where the answer is filed without request for a jury, and plaintiff is present with counsel and witnesses before a commissioner at the time fixed for hearing, defendant is not entitled to a jury trial.—Johnson v. Johnson (Com. Pl.) 16 Pa. Co. Ct. R. 427, 4 Pa. Dist. R. 460.

[g] (Tenn. 1883) Under Acts 1875, c. 4, when a suit is originally instituted in a court of record, the party demanding a jury must do so in

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his first pleading, or will be deemed to have waived a jury.—Franklin v. McCorkle, 79 Tenn. (11 Lea) 190.

[h] (Tenn. 1886) Under the act of February 19, 1875, which provides that, when a suit is originally instituted in a court of record, the party demanding a jury shall do so in his first pleading, and in case of all other suits within the first three days of the trial term, or he shall be deemed to have agreed to try the case without a jury; no demand of the clerk, nor mere notice to him that a jury is demanded, nor entry by him upon a rule docket or other docket, at the instance of one of the parties to a suit, is sufficient, but the demand should be made of the court.—East Tennessee, V. & G. R. Co. v. Martin, 85 Tenn. (1 Pickle) 134, 2 S. W. 381.

[i] (Tenn. 1887) The act of 1875 (Mill. & V. Code, § 3602), providing that "either party desiring a jury must make the demand in his first pleading tendering an issue triable by jury," etc., applies to pleadings alike at common law and under the Code, and requires a party, in terms, to make the demand, if he desires the issue tendered to be tried by a jury. A conclusion to the plea, "and of this he puts himself upon the country," is not equivalent to such demand.—Gleaves v. Davidson, 85 Tenn. (1 Pickle) 380, 3 S. W. 348.

[j] (Tenn. 1890) A jury trial having been asked for under Laws 1875, c. 4, providing that it shall be demanded in the first pleading tendering an issue triable by jury, a demand need not be made under the act of April, 1889, providing that either party shall be entitled to a jury if he calls for it on the first day of the trial term, and that unless such demand is made the case shall be tried without a jury.—Arlington Ins. Co. v. Caldwell, 88 Tenn. (4 Pickle) 758, 14 S. W. 221.

§ 168. —— Verification of pleading or affidavit of defense.

As infringement of right, see post, § 209.

[a] (La.) Defendant's affidavit for a jury, under Act March 20, 1839, No. 53, § 24, must show that his defense is certain and unequivocal and will affect plaintiff's right to recover.—(1840) Amado v. Breda, 16 La. 257; (1842) Smith v. Scott, 3 Rob. 258.

[b] (La.) The maker of a promissory note, to obtain a jury, must make affidavit as required by Act 1839, No. 53, § 24.—(1844) Kennard v. Gustine, 9 Rob. 170; (1846) Hennen v. Bourgeat, 12 Rob. 522.

[c] (La. 1855) Defendant who, sued on a note, does not set up want or failure of consideration, supported by affidavit as required by the act of 1839, is not entitled to a jury.—Foster v. Levinson, 10 La. Ann. 584.

[d] (La. 1860) It is sufficient for a party who is sued on a promissory note to obtain a trial by jury to swear that all the allegations in his answer are true, where want or failure of consideration are substantially set forth in the answer.—Frellson v. McDonald, 15 La. Ann. 536.

[e] (La. 1866) To entitle a defendant who is sued upon a promissory note to the right of trial by jury, he must swear to the truth of the allegations in his pleas of want of consideration.—Letten v. Durbridge, 18 La. Ann. 129.

[f] (La. 1866) In a suit brought on a contract of lease (an unconditional obligation to pay a specific sum of money), the defendant, in order to obtain a trial by jury, must make oath to the truth of the allegations of the answer.—Gallot v. McCluskey, 18 La. Ann. 259.

[g] (La. 1866) An affidavit by the defendant in an action on a promissory note stated that the facts set forth in the answer were true, to the best of the affiant's knowledge and belief, and that he believed it essential to his rights that the case should be tried by a jury. *Held*, that the affidavit was insufficient to entitle the defendant to a trial by jury, as he did not swear that he expected to prove that the note had been obtained through error.—Williams v. Boozeman, 18 La. Ann. 532.

[h] (La. 1885) Under Code Prac. art. 494, providing that suits brought on unconditional obligations to pay money shall be tried without a jury unless the defendant pleads want of consideration, or sets up a reconventional demand and makes oath to the truth of the allegations of his defense, in the absence of such oath to the averments of a defense, the case is properly stricken from the jury docket, and passed upon by the court itself.—Meyer v. Weil, 37 La. Ann. 160.

[i] (Pa. 1887) As, to entitle a party to demand a jury trial in a divorce proceeding, there must, under the act of assembly, be "a matter of fact affirmed by the one, and denied by the other," of the parties, a denial which is not under oath, and without evidence to support it, is not a denial, within the meaning of the act.—Uhrich v. Uhrich, 3 Del. Co. R. 281.

[j] (Pa. 1888) Under Act March 13, 1815, § 2 (Purd. Dig. p. 614), requiring an issue to be formed and tried to a jury, where either of the parties shall desire any matter of fact affirmed by one and denied by the other party tried by a jury, a prayer for an issue in divorce will not be granted to respondent, unless the answer contains a specific and absolute denial of the cause of the complaint set forth in the libel.—Cain v. Cain, 6 Pa. Co. Ct. R. 366.

§ 169. Effect of demand made at previous trial or term of court.

Term at which demand must be made, see ante, § 160.

[a] (Iowa, 1877) A demand for a jury trial at a former term of court, when the case was continued, will be deemed waived by the party's failure to again demand a jury at the time of trial.—Davidson v. Wright, 46 Iowa, 383.

[b] (La. 1812) A party, who has prayed for a jury below, is entitled to one without praying for it in the appellate court, before which the case is tried de novo. Where a party is without laches, his application for the trial of a matter of fact by jury should always be favored.—Bayon v. Rivet, 2 Mart. (O. S.) 148.

[c] (N. J. 1887) The justice's court act, § 33, provides that either party in any action, after the defendant has pleaded, and before the justice has begun to inquire into the merits of the action, may demand a jury. Section 41 provides that, if the jury disagree, other writs of venire may issue in the cause until a verdict is obtained. In an action where the jury disagreed, neither party asked for a new jury. The justice proceeded to try the case. *Held*, that the failure to call for a new jury was a waiver of the right to it, and the justice had power to proceed in due course to trial and judgment.—White v. Hathaway, 50 N. J. Law (21 Vroom) 119, 11 Atl. 343.

[d] (N. Y. 1896) An action for specific performance of a contract to mortgage certain land, and to enjoin defendants from doing certain acts prejudicial to plaintiff's rights under the contract, was, on failure of the trial court to retain the action for the purpose of awarding damages for breach of the contract (a decree for specific performance being unavailing, for want of title in defendants), sent back to the trial court. The complaint alleged that de-

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fendants had, by fraud, included in the mortgage other property than that agreed to be mortgaged. The answer denied the fraud, but did not set up an inability to perform, alleging, on the contrary, a full compliance with the contract. *Held*, that it was proper, on the second trial, to refuse a trial by jury, demanded by defendants before their inability to perform was disclosed.—O'Beirne v. Bullis (Sup.) 38 N. Y. Supp. 4.

[e] (N. C. 1879) Where, after the issues are framed, but before any evidence is adduced, the jury is discharged without verdict, the parties stand as before the jury were sworn, and the judge cannot pass upon the issues, except on a waiver of jury trial, under Code, § 240.—Chasteen v. Martin, 81 N. C. 51.

[f] (Tex. 1894) The court may try a case without a jury, unless one is demanded and the jury fee paid; and the mere fact that a former trial, before another judge and in another venue, was by jury, will not entitle a party to a jury on the second trial.—Ellis v. Bonner, 7 Tex. Civ. App. 539, 27 S. W. 687.

§ 170. Effect of previous trial by court.

[a] (Miss. 1849) Where the decree of a probate court is upon an issue which that court had the right to try only by consent of parties, and which peculiarly requires the finding of a jury, it seems that on a rehearing either party may insist upon a trial by jury.—Ratcliff v. Ratcliff, 20 Miss. (12 Smedes & M.) 134.

[b] (N. Y. 1860) Where an action is tried by the judge without a jury, and the case is finally submitted for determination, an order thereafter made directing certain questions in relation to which testimony was conflicting to be tried by jury is erroneous.—O'Brien v. Bowes, 17 N. Y. Super. Ct. (4 Bosw.) 657.

[c] (N. Y. 1896) Under Consolidation Act, § 1372, as amended by Laws 1891, c. 378, providing that the justice may, at any stage, direct a trial by jury, where a judgment of a justice has been reversed he may order a jury for the second trial.—New York Small Stock Co. v. Third Ave. R. Co., 16 Misc. Rep. 64, 37 N. Y. Supp. 637.

§ 171. Special or struck jury.

Waiver of right see post, § 191.
—— *to object to trial by struck jury, see* post, § 172 [o].

[a] (Ala. 1858) Code, § 2264, does not require the court to be active in assigning a struck jury. It is only when one of the parties makes the necessary demand that the court is required to order it, and that must be made before the organization of the jury is entered on.—McArthur v. Carrie's Adm'r, 32 Ala. 75, 70 Am. Dec. 529.

[b] (Ala. 1895) After the parties have announced themselves ready for trial, and a jury has been impaneled and accepted by plaintiff, defendant is not entitled, as a matter of right, to demand a struck jury.—Goodson v. Brothers, 111 Ala. 589, 20 South. 443.

[c] (Ind. 1894) A party who has demanded a struck jury, and who, in pursuance of a notice from the clerk, appears before him, for the purpose of striking the jury, cannot, after examining the list of jurors, withdraw his demand, and insist on a trial by the regular panel.—Dorsey Mach. Co. v. McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290.

[d] (La. 1876) A supplemental petition calling for a special jury, will not be entertained, if filed after issue joined and after the case has been set down for trial on the summary docket.—State ex rel. Attorney General v. Carey, 28 La. Ann. 49.

[e] (Minn. 1876) Under Gen. St. c. 71, § 16, which provides, with respect to struck juries, that "in no case shall it be necessary to strike such jury more than six days previous to the term of the court at which the action * * * is to be tried," proceedings to obtain a struck jury must be instituted before the commencement of the term at which it is tried.—O'Brien v. City of Minneapolis, 22 Minn. 378.

[f] (Minn. 1884) The provision of Laws 1881, c. 45, § 1, that in Hennepin county petit jurors shall be summoned to appear on the second Tuesday of each general term of the district court, does not change or amend the previous statute requiring struck juries to be selected six days before the commencement of the term of court, though it may have removed one of the reasons for such requirement as to that county.—Mark v. St. Paul, M. & M. Ry. Co., 32 Minn. 208, 20 N. W. 131.

[g] (N. J. 1843) Where the plaintiff applies for a struck jury, no notice of the application need be given to the defendant, unless the latter have a rule by proviso, in which case two days' notice of the intended application must be given.—Fuller v. Saxton, 20 N. J. Law (Spencer) 61.

[h] (N. J. 1843) The defendant, unless he have a rule by proviso, cannot enter a rule for a struck jury without giving two days' notice to the plaintiff.—Fuller v. Saxton, 20 N. J. Law (Spencer) 61.

[i] (N. Y. 1796) After notice of a motion for a struck jury, it is irregular for a party to proceed to trial.—Franklin v. Nore, Colem. Cas. 46.

[j] (Ohio, 1859) Where the record showed that the grand jury were impaneled only on the twelfth day of the trial term, and that the right to a struck jury, given by Swan's Rev. St. § 492, as matter of right, was formally demanded on the day of trial, and it did not appear how long before that day the indictment was found, it was a fatal error to refuse the demand on the ground of waiver of the right by unreasonable delay in demanding it.—Whitehead v. State, 10 Ohio St. 449.

[k] (Ohio, 1859) The right to demand a struck jury, given to either a prisoner or the state by Swan's Rev. St. 492, in all criminal cases, except when either party is entitled to more than two peremptory challenges, is waived by failure to claim it before the day of trial, unless excused by special circumstances.—Whitehead v. State, 10 Ohio St. 449.

[l] (Pa. 1808) The time for applying for a special jury is not limited. To entitle a party to a special jury, no certificate of counsel is necessary that the motion is not intended for delay.—Neff's Lessee v. Neff, 1 Bin. 350.

[m] (Pa. 1845) A party is entitled to a struck jury without applying to the court therefor.—Brown v. O'Brien, 4 Pa. Law J. 501.

[n] (Pa. 1887) Defendant had struck a jury under a rule of court. On the day of trial, the rule of court was repealed. The requisite number of struck jurors not being obtained, a jury was called without reference to the struck list. *Held* not error.—Powell v. Whitaker, 7 Atl. 597.

[o] (Tenn. 1890) Under M. & V. Code, § 4805, providing that on motion of either party, in any civil action, a special jury may be ordered and summoned, if in the opinion of the court it is proper, it is not within the power of the circuit court to summon such special jury on its own motion.—McDaniel v. Nashville, C. & St. L. Ry. Co., 88 Tenn. 542, 13 S. W. 76.

[p] (Va. 1895) The granting of a special jury is correctly refused where the application is made only after the denial of a motion for a

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continuance, and the case is tried by a competent jury.—Goodell's Ex'rs v. Gibbons, 91 Va. 608, 22 S. E. 504.

§ 172. Objection to submission to jury.

[a] (Ala. 1830) Where issue is joined to the country in an action where the amount in controversy is less than $20, the judgment will not be reversed on appeal because the issue was tried to the jury instead of by the court.—McGrew v. Adams, 2 Stew. 502.

[b] (Ga. 1892) Acts 1882–83, p. 538, creating a city court, declares that the trial of all issues of fact shall be by the court without a jury, except where either party in a civil case or the defendant in a criminal case shall, in writing, demand a trial by jury, and that the failure to file such demand at or before the beginning of the trial shall be a waiver of the right. *Held*, where no written demand had been made, that by submitting, without objection, to be tried by a jury, the prisoner waived the right to be tried by the judge.—Taffe v. State, 90 Ga. 459, 16 S. E. 204.

[c] (Idaho, 1887) In proceedings, under Rev. St. U. S. §§ 2325, 2326, to determine the right of adverse claimants to mineral locations, where the complaint is open to the objection that it states two causes of action, one legal and one equitable, it is too late, after trial by jury has been had, for the plaintiffs to move to have the case declared a proceeding in equity, and to have it decided as such without the intervention of a jury.—Burke v. McDonald, 2 Idaho, 310, 13 Pac. 351.

[d] (Ind. 1892) Where there were two defenses, one legal and one equitable, and plaintiffs objected to trial by jury without confining their objection to the equitable issue, it was not error to allow a jury, even if evidence was offered, and the trial proceeded on the equitable issue only.—Lindley v. Sullivan, 133 Ind. 588, 32 N. E. 738, 33 N. E. 361.

[e] (Minn.) An action to abate a milldam as a nuisance, and to recover damages for its overflow, being not within the exceptions of Gen. St. 1866, c. 66, § 198, is properly triable by the court, unless parties otherwise consent; and acquiescence in the calling and swearing of the jury is a substantial consent to the trial of the issues of fact in the case by jury, and their verdict for plaintiff, ascertaining his damages, will sustain a money judgment in his favor in such case.—(1871) Finch v. Green, 16 Minn. 355 (Gil. 315); (1875) Brown v. Lawler, 21 Minn. 327.

[f] (Minn. 1875) In a case triable by the court, subject to the right of the parties to consent, or of the court to order, that the case be tried by a jury, if either party allow a jury to be impaneled without objection, it will be *held* a consent that the jury should try the case instead of the court.—Brown v. Lawler, 21 Minn. 327; Same v. Nagel, Id. 415.

[g] (Neb. 1880) A proceeding under the statute for a trial of the right of property taken under execution is not in a legal sense a "civil action," and is therefore not properly triable by a jury; but where a jury was impaneled by agreement, or at the instance of one of the parties, he cannot complain on that ground.—State v. Powell, 10 Neb. 48, 4 N. W. 317.

[h] (N. Y. 1851) It is too late, after verdict, to make the objection that the cause was tried by a jury, or that there was irregularity in summoning or impaneling it.—Dayharsh v. Enos, 5 N. Y. (1 Seld.) 531.

[i] (N. Y. 1873) On a cause being moved for trial before a court without a jury, defendant objected that the question was one of fact, and that he was entitled to a jury trial. The objection was overruled. *Held*, that this was not error, and that though the case may have been one entitling defendant to a jury trial, yet having based his objection on untenable ground, he must be confined to it.—McKeon v. See, 51 N. Y. 300, 10 Am. Rep. 659.

[j] (N. Y. 1879) The "assent" of the opposite party to a jury trial by 12 men, under Laws 1869, p. 932, c. 410, is sufficiently manifested by any conduct that satisfies the justice. The statute is to be liberally construed in favor of trial by jury.—Poyer v. New York Cent. & H. R. R. Co., 7 Abb. N. C. 371.

[k] (N. Y. 1886) Where the claim for damages is merely incidental to the equitable relief sought by the action, it is error to refuse, on defendant's motion, to have the case tried as an equity case, instead of by a jury; and defendant does not waive his right so to insist by having waited in uncertainty as to whether plaintiff might not waive his claim to equitable relief.—Watson v. Manhattan Ry. Co., 53 N. Y. Super. Ct. (21 Jones & S.) 137, 17 Abb. N. C. 289.

[l] (N. Y. 1888) In an action to reform a contract and to recover damages for its breach, a motion to dismiss on the grounds that plaintiffs have shown no equities; that, under the contract as made, defendants have paid plaintiffs all they were entitled to; that plaintiffs have not shown that the real contract was otherwise than as it was drawn; or that there was mutual mistake or fraud requiring its reformation, upon which their cause of action depended,—is too broad to raise the objection that the action should be tried to a jury, and not to the court, though a reformation of the contract was not necessary to enable plaintiffs to recover; and their proper remedy should have been an action at law for damages.—Little v. Webster, 48 Hun, 620, 1 N. Y. Supp. 315, judgment affirmed (1890) 122 N. Y. 670, 26 N. E. 755.

[m] (N. Y. 1894) Where an order for a trial by jury, in an action to enjoin the operation of an elevated railroad in front of plaintiff's premises, and for damages, was made under Code Civ. Proc. § 970, and the party proceeded to trial without objection, the verdict is conclusive until set aside, though the order was erroneous because not applicable to such action; and it is error for the court to render judgment in disregard thereof.—Danziger v. Metropolitan El. Ry. Co., 81 Hun, 5, 30 N. Y. Supp. 580.

[n] (N. C. 1883) Whether, under the constitution as amended, a party to a suit formerly cognizable only in equity has a right to insist upon a trial by the court or not, after he has voluntarily accepted a trial by jury, he cannot afterwards insist upon having the same facts passed upon by the court.—Leggett v. Leggett, 88 N. C. 108.

[o] (Ohio, 1839) A party moving for a struck jury cannot object that it is ordered without sufficient notice to the opposite party, who may waive it.—Sutton v. State, 9 Ohio (9 Ham.) 133.

[p] (Wash. 1895) The objection that plaintiff had a jury trial, to which he was not entitled, cannot be raised for the first time on appeal.—Weigle v. Cascade Fire & Marine Ins. Co., 12 Wash. 449, 41 Pac. 53.

§ 173. Determination of right.

[a] (Iowa, 1858) A justice of the peace has no authority to try a prisoner himself after the prisoner, as authorized by Code, § 3333, has demanded a trial by jury.—Dupont v. Downing, 6 Iowa (6 Clarke) 172.

[b] (Minn. 1883) A motion, made before the commencement of the trial of an action, for a jury trial of the issues, must be decided on

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the pleadings, and the decision cannot be affected by the character of the case subsequently made by the evidence.—Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254.

[c] (N. Y. 1811) Where a venire has been issued by a justice of the peace, he cannot proceed to try the cause without a jury.—Sebring v. Wheedon, 8 Johns. 460.

[d] (N. Y. 1886) Code Civ. Proc. § 2083, requiring an issue in a mandamus proceeding to be tried by a jury, as if it were joined in an action specified by section 968, abrogates the necessity for an order directing the issue to be tried by a jury, such an application being required, by section 970, in all actions where a party is entitled to a jury trial not specified in section 968.—People v. Order American Star, 53 N. Y. Super. Ct. (21 Jones & S.) 66.

[e] (N. Y. 1889) After an action was at issue at the special term of the New York supreme court, on defendants' motion to send it to the circuit court for trial by jury as a law action, the court ordered that the case be "stricken from the calendar, and sent to the next circuit court for trial of the issues therein." *Held*, that this was not an adjudication that defendants were entitled to have all the issues of fact tried by a jury.—Olmsted v. Rich, 53 Hun, 638, 6 N. Y. Supp. 826.

[f] (N. Y. 1891) Where the issues in an equitable action, triable by jury as a matter of right, are so tried, the special term has no inherent power, as a court of equity, to disregard the verdict rendered on such trial.—Mellen v. Mellen (Sup.) 16 N. Y. Supp. 191, 27 Abb. N. C. 99, 21 Civ. Proc. R. 301.

[g] (N. Y. 1891) In actions by abutting owners to enjoin the operation of an elevated railroad, and for damages, the procedure will be as follows: The cases will be tried as they are reached at special term, and, if it be found that plaintiff is entitled to relief, the issue as to past damages will be framed, and placed on the circuit calendar as a preferred case, unless plaintiff elects to proceed without asking a decree for past damages. The judge presiding at special term shall at the same time exercise his discretion as to whether an issue as to fee damage shall be coupled with the issue as to past damages, and be also placed on the circuit calendar for trial, or whether he will himself proceed with the supplemental inquiry as to fee damage, or refer such inquiry; and if plaintiff, after the order is made, framing the issue as to past damages, shall elect not to ask a decree for such damages, such order may be vacated by the judge at special term.—Underhill v. Manhattan Ry. Co. (Sup.) 18 N. Y. Supp. 43, 27 Abb. N. C. 478, 21 Civ. Proc. R. 441; Oswald v. Metropolitan El. Ry. Co. (Sup.) 18 N. Y. Supp. 44, 21 Civ. Proc. R. 445.

[h] (N. Y. 1891) Where the plaintiff in an action against an elevated railway company does not waive his claim to past damages, there must be formulated: (1) An issue as to such past damages, as follows: "What amount of damages, if any, did plaintiff in this action sustain in the use or rental value of the premises described in the complaint from the day of ——, in the year ——, to the day of the trial of this issue, by reason of the construction, maintenance, and operation of the elevated railway in front of said premises?" (2) A question as to the value of the property taken by defendant, as follows: "What is the value of the property taken by the elevated railway company or companies from plaintiff by reason of the construction, maintenance, and operation of the elevated railway in front of plaintiff's premises described in the complaint?"—Eggers v. Manhattan Ry. Co. (Super. N. Y.) 18 N. Y. Supp. 181, 27 Abb. N. C. 463, 21 Civ. Proc. R. 403.

[i] (N. C. 1887) Under Const. art. 4, § 18, which provides that parties may waive a jury trial, and that all issues of fact shall be found by the judge, when a jury trial has not been waived, and issues have been presented to the jury, but without response, it is error for a judge to find the issues of fact.—McCanless v. Flinchum, 98 N. C. 358, 4 S. E. 359.

[j] (Ohio, 1860) Under Act March 1, 1859 (56 Ohio Laws, p. 93), amending the second trial act of April 12, 1858, providing that whenever notice is entered on the record of a party's demand for a second trial the same shall not be allowed, unless the court is of the opinion that the case is one in which a trial by jury may be demanded by either party, it is unnecessary that the order awarding a second trial should show that the court was of the opinion that the case was one in which a trial by jury might be demanded by either party.—Powers v. Seaton, 2 Ohio Dec. 365.

[k] (Tenn. 1896) On appeal to the circuit court, where plaintiff has duly demanded a jury, and the cause has been placed on the jury docket, as provided by Mill. & V. Code, §§ 3603, 3604, defendant's right to a jury is also thereby determined, and the cause cannot be subsequently changed to a nonjury cause without the consent of both parties, as required by section 3605.—Warren v. Scudder-Gale Grocery Co., 96 Tenn. 574, 36 S. W. 383.

§ 174. Payment or deposit of jury fee.

See ante, § 166 [n].

Compensation of jurors in general, see post, §§ 392–399.

Requirement as infringement of right in civil cases, see post, § 213.

—— *in criminal cases, see* post, § 219.

Right of officer serving venire to demand his fees in advance, see "Sheriffs and Constables," II.

—— *to attack constitutionality of statute providing for deposit of jury fees, see* "Constitutional Law," vol. 10, c. 1288, § 39 [z].

[a] (Colo. 1891) Act Feb. 10, 1883, § 3, provides that superior courts shall exercise such jurisdiction in civil actions, and be governed by such practice and pleadings, as are applicable to district courts. Section 15 provides that, in any action in which a party is entitled to a jury, such party may have a jury summoned in the manner provided for summoning juries in the county court. *Held*, that the right of trial to a jury in the superior court must be determined by Gen. St. § 1097, which provides that district courts shall have jurisdiction in all causes for divorce and alimony, and such cause must be tried by jury when charges in the bill are denied in the answer; but when such right exists the jury will be drawn and summoned pursuant to the practice in the county court, and it is not necessary that the party demanding a jury shall prepay the fees as required by the county court act.—Pleyte v. Pleyte, 1 Colo. App. 70, 28 Pac. 23.

[b] (Colo. 1892) The failure of the court to compel plaintiffs to prepay the jury fee, under Act 1891 (Sess. Laws 1891, p. 248, § 9), as a prerequisite to his right to demand a jury, is not ground for reversing the judgment in favor of plaintiffs.—Pitkin County Com'rs v. Brown, 2 Colo. App. 473, 31 Pac. 525.

[c] (Colo. 1893) As Acts 1891, p. 248, provide that, in actions in a county court in a county of the first class, either party shall be entitled to a jury without advancing the fees therefor, it is not in the power of the court to refuse a jury for failure to advance the fees.—Woods v. Tanquary, 3 Colo. App. 515, 34 Pac. 737.

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[d] (Colo. 1895) Gen. St. § 504, providing that one may have a jury trial in the county court by advancing the jury fees, applies only to causes to be heard when no regular panel is in attendance, and does not affect the right to have a cause tried by a jury impaneled under Sess. Laws 1891, p. 248, § 2, providing that when a jury is required in a county court the clerk shall so notify the clerk of the district court, who, with the sheriff, shall draw the names of the jurors from the persons certified to him by the board of county commissioners to act as jurors, and shall certify such names to the clerk of the county court, who shall issue a venire for such jurors.—Pitkin County Com'rs v. First Nat. Bank, 6 Colo. App. 423, 40 Pac. 894.

[e] (Mich. 1854) Debt for a forfeiture incurred by a violation of the law prohibiting the sale of intoxicating drinks is not such a criminal action as entitles the defendant to a jury without paying fees.—People v. Hoffman, 3 Mich. 248.

[f] (Mich. 1874) Where a jury trial was demanded in justice court, and the jury fees were paid, the person demanding such trial cannot, after the first jury has disagreed, insist upon a trial by another jury without paying an additional jury fee.—McGraw v. Sturgeon, 29 Mich. 426.

[g] (N. J. 1893) Where no jury was demanded on the trial below, the question whether relator was entitled to a jury trial without prepayment of the jury fees cannot be considered in the appellate court.—Joy & Seliger Co. v. Blum, 55 N. J. Law (26 Vroom) 518, 26 Atl. 861.

[h] (N. J. 1893) In an action in the district court, where the matter in dispute is above $200, a demand for a jury, made by defendant at the proper time, entitles him to a trial by jury without prepayment of costs.—Clayton v. Clark, 55 N. J. Law (26 Vroom) 539, 26 Atl. 795.

[i] (N. Y. 1856) Where a party demands a jury trial in justice court, and neglects to pay the jury fees in proceedings for the issuing of the venire, such failure is a waiver of the right to a jury trial.—Kilpatrick v. Carr, 3 Abb. Prac. 117.

[j] (N. Y. 1882) The justice may, if the venire is left with him to be delivered to a constable agreed on, require the fees to be deposited with him for the constable and jurors, to be handed to the officer with the venire. If an excessive amount is demanded and refused, proceeding to try the case without a jury is ground for a reversal.—Powens v. Jones, 10 Abb. N. C. 458.

[k] (N. Y. 1895) Code Civ. Proc. § 3328, providing that a "justice of the peace, or a constable, juror, or a witness before a justice of the peace, is not obliged to render any services * * * without previous payment or tender of his fee therefor," only authorizes the officers mentioned to require prepayment of the fees to which they may be entitled, respectively, and does not authorize the justice to refuse to issue a venire unless the party asking for it first pays or secures the fees of the jurors.—Bellappi v. Hovey, 90 Hun, 135, 35 N. Y. Supp. 624.

[l] (N. Y. 1895) The failure of a party to tender fees within the time specified by Laws 1882, c. 410, § 1377, so as to entitle him to a jury trial, does not render it improper for the justice to allow a jury trial, over the objection of the adverse party, since section 1372, as amended by Laws 1891, c. 378, provides that the justice, in the absence of a demand, may, in his discretion, direct a trial by jury.—Equitable Gaslight Co. v. French, 10 Misc. Rep. 749, 31 N. Y. Supp. 812.

[m] (N. Y. 1895) Where defendant, in a district court of New York City, within the time specified by Laws 1882, c. 410, § 1377, in order to entitle him to a jury trial, tenders the jury fee to the assistant clerk, who, through some mistake, refuses to receive it, and he afterwards, before trial, tenders the fee to the clerk, plaintiff is not prejudiced by the action of the justice in allowing a jury trial.—Equitable Gaslight Co. v. French, 10 Misc. Rep. 749, 31 N. Y. Supp. 812.

[n] (Tex. 1889) Rev. St. art. 3066, which provides for the payment of $5 in the district and $3 in the county court when a jury is demanded, does not require a defendant who pays the jury fee of $3 in the county court to pay an additional fee when the case is removed to the district court, because the county judge is related to one of the parties.—Warner v. Crosby, 75 Tex. 295, 12 S. W. 745.

[o] (Tex. 1895) Where appellant, on appeal from a justice's to a county court, refuses to pay the jury fee required by Rev. St. art. 3066, the court properly refused to allow the case to be put on the jury docket, though a trial by jury was had before the justice.—Wood v. Gamble (Civ. App.) 32 S. W. 368.

[p] (Utah, 1896) Comp. Laws 1876, § 1091, was not repealed by the Code of Civil Procedure of 1884; and hence a justice of the peace should require a party demanding a jury to deposit the fees to which they may be entitled.—People v. Van Tassel, 13 Utah, 9, 43 Pac. 625.

§ 175. —— Time for payment.

[a] (Cal. 1887) Where in a civil action the defendant demands a trial by jury, but fails to deposit the jury fees required by the rules of the court to be paid in advance, the case may be tried without a jury.—Conneau v. Geis, 73 Cal. 176, 14 Pac. 580, 2 Am. St. Rep. 785.

[b] (Iowa, 1856) A defendant is entitled to a jury trial without paying the fees in advance.—Hine v. Sweney, 3 G. Greene, 511.

[c] (Iowa, 1856) The refusal of a defendant, demanding a jury, to pay jury fees in advance, confers no jurisdiction upon the court to try a question of fact.—Hine v. Sweney, 3 G. Greene, 511.

[d] (La. 1844) Where a party having prayed for a jury, but, failing to advance the jury fee (Act Feb. 10, 1841, No. 16, § 17), the case is transferred to the court docket and taken up as a court case, it will be too late, at the moment of trial, to tender the fee and move for a retransfer.—Daniels v. Andrews, 7 Rob. 160.

[e] (La. 1848) The jury fee may be paid at any time before the trial is fixed, but until paid the prayer for a jury will be disregarded. Act 1841, No. 16, § 17.—Wilson v. State Bank, 3 La. Ann. 196.

[f] (Mich. 1879) Payment of the jury fee at the time the demand for a jury trial is made is not necessary to make the demand valid.—Odell v. Reynolds, 40 Mich. 21.

[g] (Mich. 1888) When a jury is demanded on joining issue, and the jury fee tendered before the trial is begun, the right to a jury is not waived by the failure to pay the fee on joining issue.—Pontiac & Lapeer Plank Road Co. v. Hopkinson, 69 Mich. 10, 36 N. W. 797.

[h] (Minn. 1893) Under Gen. St. 1878, c. 70, § 30, as amended by Laws 1891, c. 83, a party calling for a jury in a justice's court must pay the jurors' fees into court in advance, and, if he refuses to do so, the justice may proceed to try the case without a jury.—Rollins v. Nolting, 53 Minn. 232, 54 N. W. 1118.

[i] (Tex. 1885) The depositing of the jury fee on the second instead of the first day of the term, as provided for in Rev. St. art. 3066, no parties being injured, is no ground for refusing

the jury claim, as said statute is not mandatory.—Gallagher v. Goldfrank, 63 Tex. 473.

[j] (Tex. 1885) Where, upon defendant's demanding a jury and having the cause placed on the jury docket, no jury fee is deposited by or on the first day of the term, it is improper to grant a motion by plaintiffs to strike the cause from the jury docket, notwithstanding the jury fee has been deposited before the filing of the motion; and in such case an objection by plaintiffs, upon the cause being called in its regular order to its trial, on the ground that all the jury cases have not been disposed of, is properly overruled.—Allyn v. Willis, 65 Tex. 65.

[k] (Tex. 1886) Rev. St. arts. 3064, 3066, directing that a demand for a jury shall be made and the jury fee paid upon the first day of the term, are not strictly mandatory; and, where a plaintiff demands a jury on the first day of the term, it is error to try the case without a jury, although the jury fee is not paid until the next day, the jury docket not having at that time been disposed of; and it is immaterial that granting a jury trial will cause the case to be postponed until the next term.—Allen v. Plummer, 71 Tex. 546, 9 S. W. 672.

[l] (Tex. 1891) Where a party does not pay the jury fee until 34 days after he has demanded a jury, and until the time allotted for jury cases has passed, he waives his right to a jury trial.—Cabell v. Hamilton Brown Shoe Co., 81 Tex. 104, 16 S. W. 811.

[m] (Tex. 1895) Though defendant, on the call of the docket, demands a jury, yet where the jury fee is not paid till after the jury docket is disposed of for the term, so that to allow trial by jury would require a continuance over the term, the right to a jury is lost.—Wood v. Kieschbaum (Civ. App.) 31 S. W. 326.

(E) LOSS AND WAIVER OF RIGHT.

1. IN CIVIL CASES, §§ 176-196.
2. IN CRIMINAL CASES, §§ 197-203.

Estoppel to deny right to jury trial, see ante, § 172.

Effect of waiver of jury trial on review of findings of court on conflicting evidence, see "Appeal and Error," vol. 3, cc. 1886, 1887, § 3987.

Review in criminal prosecutions on waiver of jury in lower court, see "Criminal Law," vol. 15, cc. 868-870, § 3082.

—— *of findings in equitable actions where jury trial is waived, see* "Appeal and Error," vol. 3, c. 1864, §§ 3975, 3976.

—— *of findings of fact on appeal where jury trial is waived, see* "Appeal and Error," vol. 3, cc. 1850, 1851, § 3957; cc. 1853, 1854, § 3964.

Stipulation for waiver as part of record on appeal, see "Appeal and Error," vol. 3, cc. 18, 19, § 2290.

Waiver as consideration for contract, see "Contracts," vol. 11, c. 272, § 307.

1. IN CIVIL CASES.

IN GENERAL, § 176.
STATUTORY PROVISIONS, § 177.
RIGHT TO WAIVE JURY, § 178.
NECESSITY OF FORMAL WAIVER, § 179.
FORM AND SUFFICIENCY OF WAIVER, § 180.
SUBMISSION TO COURT, § 181.
SUBMISSION TO ARBITRATION, § 182.
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FAILURE TO APPEAR OR PARTICIPATE IN TRIAL, § 184.
PARTICIPATING IN PROCEEDINGS AFTER GRANT OR REFUSAL OF JURY, § 185.
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OPERATION AND EFFECT OF WAIVER, § 194.
—— EFFECT ON RIGHT TO JURY AT SUBSEQUENT TRIAL, § 195.
—— EFFECT OF WAIVER AFTER DEMAND, § 196.

Necessity of demand for jury, see ante, §§ 155, 156.

Presumptions on appeal, see "Appeal and Error," vol. 3, cc. 1486, 1487, § 3722.

Submission on court's own motion after waiver by parties, see "Trial," X. (A).

§ 176. In general.

[a] (Ala. 1829) A party may waive his right of trial by jury by executing a power of attorney to confess judgment.—Johnston v. Atwood, 2 Stew. 225.

[b] (Ala. 1883) A jury trial is not waived by the admission of facts on a motion to dismiss the suit.—Moore v. Helms, 74 Ala. 368.

[c] (Cal. 1891) After the court had denied defendant's written application for a jury trial, failure to repeat the application did not waive defendant's right to such trial.—Swasey v. Adair, 88 Cal. 179, 25 Pac. 1119.

[d] (Iowa, 1893) Where a party states in open court that it is immaterial to him whether the case is tried as a proceeding at law, or in equity, merely directing a trial as in equity is not a denial of a trial by jury, as it was his duty to demand such trial, if he wished it.—Lothian v. Lothian, 88 Iowa, 396, 55 N. W. 465.

[e] (Kan. 1892) A defendant by not appearing at the time a case is assigned for trial waives his right to a trial by jury.—Weems v. McDavitt, 49 Kan. 360, 30 Pac. 481.

[f] (Kan. 1893) Where the issues joined by the pleadings would require the granting of a jury trial on demand, but the parties state to the court, at the time of demand, that the only matters in issue are the priorities of certain alleged liens, the refusal of a jury trial is not error.—Wiscomb v. Cubberly, 51 Kan. 580, 33 Pac. 320.

[g] (La. 1816) Leave to defendant, whose exceptions are overruled, to answer over without delaying the trial, does not deprive him of his right to a jury, though the trial be thereby delayed.—Tricou v. Bayou, 4 Mart. (O. S.) 169.

[h] (Me. 1862) The defendant waives a jury trial by an agreement that the action shall abide the result in another case.—Bradstreet v. Erskine, 50 Me. 407.

[i] (Mass. 1834) If, after the county commissioners have laid out a highway, and assessed the damages sustained by the owner of the land, such owner removes his fences, and rebuilds them on the line of the highway so laid out, he does not thereby deprive himself of his right to a jury to reassess the damages.—In re Endicott, 41 Mass. (24 Pick.) 339.

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[j] (N. H. 1855) Where an auditor's report is transferred to the superior court, under an agreement that judgment shall be rendered on the report according to the opinion of such court, a trial by jury is waived.—Beebe v. Dudley, 30 N. H. (10 Fost.) 34.

[k] (N. J. 1807) It is not the duty of the defendant to see that the venire is served, in an action before a justice.—Morelander v. Hays, 2 N. J. Law (1 Penning.) 161.

[l] (N. J. 1830) Defendant in an action before a justice, on his motion for adjournment being denied (two previous continuances having been had), asked a jury trial, which being granted, he agreed voluntarily to get a constable to serve the venire. Shortly before the time appointed for the jury to convene, defendant reported that he had seen two constables, but it was not his place to get them to serve the venire, and the justice at the time set for trial tried the case without a jury and rendered judgment for plaintiff. *Held*, that defendant was not entitled to a reversal for being deprived of a jury trial, since his failure to secure it was due to his own misconduct.—Daniels v. Scott, 12 N. J. Law (7 Halst.) 27.

[m] (N. Y. 1822) Where, in a cause in the justice's court, a venire is demanded by either party, the justice may deliver it himself to the constable to be executed; but if he delivers it to the party, and he does not appear at the time to which the cause was adjourned for trial, and the venire is not returned, the justice may consider the suppression of the venire by the party as a waiver of a trial by jury, and proceed to hear and decide the cause himself, as if no venire had been demanded or issued.—Coon v. Snyder, 19 Johns. 384.

[n] (N. Y. 1860) After a trial had begun before a justice's jury, one juror was taken sick. The defendant asked an adjournment to procure testimony, which was properly refused. He refused to go on with five jurors, or to have a talesman called, or to have a new venire issued and a jury brought in at once, and insisted on a full jury on a future day. *Held*, that his conduct amounted to a waiver of a jury for any trial properly had on that day, and a judgment by the justice without a jury was sustained.—Babcock v. Hill, 35 Barb. 52.

[o] (N. Y. 1889) Defendants desired a trial by jury, but finally consented in open court that if the case, which was then placed on the calendar of the circuit court, might go over, it should be tried at the ensuing special term; and, in pursuance of an order to that effect, it was afterwards tried at the special term without a jury. *Held*, that such agreement constituted a waiver in open court of a trial by jury.—Third Nat. Bank v. Shields, 55 Hun, 274, 8 N. Y. Supp. 298.

[p] (N. Y. 1894) A party in a condemnation proceeding who agrees on commissioners to be appointed, and appears before them, and examines witnesses, waives any right he may have to a trial by jury, and cannot afterwards object that the court had no authority to appoint the commissioners.—Akin v. Water Com'rs of Amsterdam, 82 Hun, 265, 31 N. Y. Supp. 254.

[q] (N. C. 1875) Issues in an action to abate a nuisance are triable by jury; and this is of right notwithstanding a former mistrial.—Hyatt v. Myers, 73 N. C. 232.

[r] (Ohio, 1885) Where a jury is properly demanded and selected, in a trial before a magistrate, the constable's refusal to serve the summons on the persons so selected as jurors does not authorize the magistrate to try the cause without a jury.—Moriarity v. Devine, 1 O. C. D. 49, 1 Ohio Cir. Ct. R. 82.

[s] (Pa. 1856) The error of the clerk of the common pleas and district courts in entering a report of viewers to assess damages for injuries caused by the construction of the works of defendant in the latter instead of the former court will not deprive a party, who has complied with the requirements of law, of his trial by jury.—Ihmsen v. Monongahela Nav. Co., 27 Pa. (3 Casey) 267.

[t] (Tex. 1895) Where defendant insisted that he was entitled to a jury trial, and that the jury offered was not lawful, the court cannot, by adopting his view of the legality of the jury, force him to trial without a jury.—Western Union Tel. Co. v. Everheart, 10 Tex. Civ. App. 468, 32 S. W. 90.

[u] (Va. 1868) Where, on a motion to abate an attachment, the plaintiff refuses to express any desire as to whether the issues of fact should be tried by a jury, and the defendant desires the issues tried by the court, it is the duty of the court to hear and decide the motion without a jury.—Claflin v. Steenbock, 18 Grat. 842.

§ 177. Statutory provisions.

[a] (Cal. 1855) The legislature alone has the power of determining in what cases a jury trial may be waived; and the words, "prescribed by law," look to actual legislation upon the subject, and in no just sense can be extended to a permission of the exercise of this power by the court.—Exline v. Smith, 5 Cal. 112.

§ 178. Right to waive jury.

Number of jurors, see post, § 189.

[a] (U. S. 1832) The right to trial by jury secured by the federal constitution is for the benefit of the parties litigating in courts of justice, and may be waived by them.—United States v. Rathbone, Fed. Cas. No. 16,121 [2 Paine, 578].

[b] (U. S. 1874) Act Cong. March 3, 1865, providing that a jury may be waived on issues of fact in civil cases "in circuit courts," does not extend to district courts.—Blair v. Allen, Fed. Cas. No. 1,483 [3 Dill. 101].

[c] (Ill. 1869) A statutory provision for a jury, on a trial of the right of property, of not less than six nor more than twelve persons, does not prevent the parties waiving a jury altogether.—Kreuchi v. Dehler, 50 Ill. 176.

[d] (Ill. 1886) In condemnation proceedings, under the eminent domain act, the parties may waive the jury, and consent to have the case tried by the court, and a trial and judgment by the court will be valid. The provision of the constitution of 1870, art. 2, § 13, that such compensation "shall be ascertained by a jury," secures a privilege merely, which may be waived under paragraph 42 of the practice act (2 Starr & C. St. c. 110, par. 42).—Chicago, M. & St. P. Ry. Co. v. Hock, 118 Ill. 587, 9 N. E. 205.

[e] (Ill. 1896) In a contest under Rev. St. c. 148, § 7, conferring on courts of chancery jurisdiction to hear bills to contest wills, and providing that in case of contest "an issue shall be made up whether the writing produced be the will * * * which shall be tried by a jury," etc., trial by jury may be waived.—Whipple v. Eddy, 161 Ill. 114, 43 N. E. 789.

[f] (Ind. 1857) The trial by jury may be waived by a party.—Lake Erie, W. & St. L. R. Co. v. Heath, 9 Ind. 558.

[g] (Mich. 1894) A property owner may waive his right to a trial by jury to determine the value of property taken by a city for a public use.—Borgman v. City of Detroit, 102 Mich. 261, 60 N. W. 696.

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[h] (Mo. 1884) A party may waive his constitutional right to demand a jury, or have it resworn, in a suit in which plaintiffs and defendant are the only interested parties.—Merrill v. City of St. Louis, 83 Mo. 244, 53 Am. Rep. 576, affirming (1882) 12 Mo. App. 466.

[i] (Mo. 1895) A party may waive his constitutional right to a jury trial.—O'Day v. Conn, 131 Mo. 321, 32 S. W. 1109.

[j] (Neb. 1877) A jury may be waived and damages assessed by the court in actions in replevin.—Baker v. Daily, 6 Neb. 464.

[k] (N. H. 1852) In a case tried before an auditor, a party by express agreement, or by his acts, may waive his right to a trial by jury.—King v. Hutchins, 26 N. H. (6 Fost.) 139.

[l] (N. J. 1811) The legal number of jurors cannot be dispensed with even by consent.—Mitten v. Smock, 3 N. J. Law (2 Penning.) 911.

[m] (N. Y. 1824) It is erroneous for a court of common pleas to proceed as a court of error, on appeal from a justice, and try the case without a jury, even though both parties elect this form of trial.—Cowen v. Bush, 3 Cow. 343.

[n] (N. Y. 1860) It is competent for a party in an action in a justice's court, who has demanded a trial by jury, to waive that mode of trial by consent in open court.—Hosford v. Carter, 10 Abb. Prac. 452.

[o] (N. Y. 1876) In a case where it is the right of either party to go to the jury upon a question of fact, the parties may waive the right, and make the court the judge of the fact as well as the law.—Hagaman v. Burr, 41 N. Y. Super. Ct. (9 Jones & S.) 423.

[p] (N. Y. 1892) In an action for divorce on the ground of adultery, the right of the party accused of adultery to a jury trial or a trial in open court may be waived.—Chase v. Chase, (Sup.) 19 N. Y. Supp. 268.

[q] (Pa. 1888) So far as Act July 22, 1874, providing for the submission of cases to the decision of the court, expressly excepts parties "acting in a fiduciary capacity," it is in violation of Const. art. 5, § 27, providing that "the parties, by agreement filed, may, in civil cases, dispense with trial by jury."—Campbell v. Fayette County, 6 Pa. Co. Ct. R. 132.

[r] (Wis. 1868) It is clearly competent for parties to any litigation or controversy, not a proceeding for crime, to waive their constitutional rights with regard thereto. They may waive their right to trial by the courts and juries; hence it is competent for the legislature to prescribe by statute how such right may be waived, or what should be the evidence of waiver, if they leave it optional with the parties to waive a trial before the court and a jury, or not to waive it, as they see fit.—Home Ins. Co. v. Security Ins. Co., 23 Wis. 171.

[s] (Wis. 1874) The defendant in a proceeding under the bastardy act may waive his right to a trial by jury, and consent to a trial by the court.—Jerdee v. State, 36 Wis. 170.

§ 179. Necessity of formal waiver.

[a] (U. S. 1869) A reasonably strict conformity to the regulations of Act Cong. March 3, 1865 (13 Stat. 501) § 4, providing that the issues of fact in civil cases in the United States courts may be tried and determined by the court, when the parties or attorneys of record file a stipulation in writing with the clerk of the court waiving a jury, and providing that the court's finding shall have the same effect as the verdict of the jury, and may be reviewed the same as a jury trial, is required to save to parties the rights and privileges which belong to them in common-law jury trials; and hence they must file a stipulation, as the act requires, to entitle them to its privileges.—Flanders v. Tweed, 76 U. S. (9 Wall.) 425, 19 L. Ed. 678.

[b] (U. S. 1884) The stipulation to submit a case to the court without a jury must distinctly waive a jury according to the terms of Rev. St. Tenn. § 649.—Kelly v. Town of Milan (C. C.) 21 Fed. 842.

[c] (Cal. 1852) The right to trial by a jury cannot be waived by implication.—Smith v. Pollock, 2 Cal. 92.

[d] (Cal. 1886) The right to a jury trial is a constitutional right, and no act on the part of a litigant shall be deemed a waiver of the right, except such as are so constituted by express law. In this connection, a new rule of court has not the force of such a law.—Biggs v. Lloyd, 70 Cal. 447, 11 Pac. 831.

[e] (Ind. 1858) The statute having provided a certain way of waiving a jury, no other act can be a waiver.—Shaw v. Kent, 11 Ind. 80.

[f] (Md. 1881) Without the consent of both parties, a cause cannot be tried before the court without a jury, under Const. art. 4, § 4.—Desche v. Gies, 56 Md. 135.

[g] (N. Y. 1878) The constitutional clause declaring that a jury trial may be waived in the manner to be prescribed by law does not preclude courts from holding parties to have waived their right thereto by their conduct or silence.—Baird v. City of New York, 74 N. Y. 382.

[h] (N. C. 1879) The provisions of the Code destroying the distinction between actions at law and suits in equity do not make it competent for the judge in the trial of a civil action, in which a jury has been sworn and impaneled and issues have been framed, but no evidence has been adduced on either side, the jury being discharged without a verdict, to pass on the issues, as was formerly his right, where defendant, by answer, admitted the equity of the bill and set up matter of avoidance, and, on replication taken, allowed the case to be brought in for hearing without proof of the matter of avoidance.—Chasteen v. Martin, 81 N. C. 51.

[i] (Ohio, 1890) Where both parties appear at the trial of a civil action for the recovery of money only, in which issues of fact have been joined, it is error for the court to try the cause and render judgment therein without a jury having first been waived, and such waiver entered on the journal.—Longstreth & Ayer Mfg. Co. v. Halsey, 4 Ohio Cir. Ct. R. 307.

[j] (Or. 1890) A circuit court has no authority to try an issue of fact without a jury, unless a jury trial is waived in the manner provided by the Civil Code, though the only evidence offered was the written stipulations of the parties; the proper method in such case being to direct a verdict.—American Mortg. Co. v. Hutchinson, 19 Or. 334, 24 Pac. 515.

[k] (S. C. 1886) By Code, § 288, a jury trial may be waived by failing to appear at the trial, by written consent in person or by attorney filed with the clerk, and by oral consent in open court entered on the minutes; but there is no provision for a waiver by conduct.—Sale v. Meggett, 25 S. C. 72.

§ 180. Form and sufficiency of waiver.

[a] (U. S. 1880) A stipulation in writing, signed by the parties and filed with the clerk, that the case shall be tried by the court, is equivalent to waiver of a jury.—Bamberger v. Terry, 103 U. S. 40, 26 L. Ed. 317; Wayne Coun-

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ty Sup'rs v. Kennicott, 103 U. S. 554, 26 L. Ed. 486.

[b] (Cal. 1894) A case was continued on account of the absence of defendant's attorney, and afterwards called, when defendant appeared with a new attorney, and demanded a jury. *Held* that, by his failure to demand a jury on the first call defendant did not waive his right to it, under Code Civ. Proc. § 631, providing for such waiver (1) by failing to appear at the trial; (2) by written consent; and (3) by oral consent in open court.—Farwell v. Murray, 104 Cal. 464, 38 Pac. 199.

[c] (Ind. 1894) Where a jury may be waived by oral consent in open court, entered on the record (Rev. St. 1881, § 550), an oral agreement to waive a jury, made by the attorneys of the parties the day before the case was called for trial, in open court, and entered on the record, is binding on the parties.—Whitestown Milling Co. v. Zahn, 9 Ind. App. 270, 36 N. E. 653.

[d] (Md. 1893) Under Const. art. 4, § 8, providing that the parties to a cause may submit it to the court for determination without the aid of a jury, a promise to relinquish the constitutional right to a jury trial is a sufficient consideration for an agreement to submit a civil case to the court.—Lanahan v. Heaver, 77 Md. 605, 26 Atl. 866, 20 L. R. A. 759.

[e] (Neb. 1882) It is not necessary that a waiver of trial by jury in open court shall be in writing.—Gregory v. City of Lincoln, 13 Neb. 352, 14 N. W. 423.

[f] (N. M. 1888) Under Comp. Laws, § 2000, providing that, on issue joined in mandamus, trial and further proceeding shall be had as in a civil action, if a jury trial is intended, it is waived by the conclusion of an answer asking "the court to inspect the evidence so offered with this answer," and to dismiss the alternative writ, and by respondent's failure to request a jury, or to object or except to its absence.—Territory v. Board of County Com'rs of Bernalillo County, 4 N. M. (Johns.) 204, 16 Pac. 855.

[g] (N. Y. 1891) Where plaintiff in an action against an elevated railway company for injunction and damages elects to waive his claim for past damages, the waiver must be filed in the form of a stipulation, and must be general, unconditional, and unqualified.—Eggers v. Manhattan Ry. Co. (Super. N. Y.) 18 N. Y. Supp. 181, 27 Abb. N. C. 463, 21 Civ. Proc. R. 403.

§ 181. Submission to court.

[a] (Ark. 1893) In an action to quiet title, where both plaintiff and defendant claim to be in possession of the land, if defendant has a right to a trial by jury of the issue of fact as to whether he or plaintiff is in possession, he waives such right by voluntarily submitting to a trial of all the issues by the court sitting in equity.—Love v. Bryson, 57 Ark. 589, 22 S. W. 341.

[aa] (Ill. 1891) Where a motion is made by defendant for judgment on stipulation, and the court enters judgment accordingly, after hearing affidavits for and against the motion, plaintiff cannot object on appeal that the court did not compel defendant to present the stipulation by plea so that the plaintiff might have had the question of its execution tried by jury, and might have cross-examined defendant's witnesses, where plaintiff did not, in the trial court, demand a jury trial, or object to the evidence presented by affidavit.—Washington v. Louisville & N. R. Co., 136 Ill. 49, 26 N. E. 653, affirming (1890) 34 Ill. App. 658.

[aaa] (Ind. 1886) In a case triable by jury, it is not error to refuse to submit one particular question of fact to a jury, and the request to do so may be considered a waiver of the right to try the whole case by jury.—Spencer v. Robbins, 106 Ind. 580, 5 N. E. 726.

[b] (Mass. 1858) The submission of a case in writing to the judgment of the superior court or court of common pleas upon evidence, "to be tried without the intervention of a jury," is a waiver of a trial by jury, pursuant to St. 1857, c. 267.—Bass v. Haverhill Mut. Fire Ins. Co., 76 Mass. (10 Gray) 400.

[bb] (Minn. 1891) Where the complaint contains both an equitable and legal cause of action, the defendant is entitled to a trial by jury of the latter; but, if the case proceeds to trial by the court without objection, he will be deemed to have waived a jury.—Peterson v. Ruhnke, 46 Minn. 115, 48 N. W. 768.

[c] (Minn. 1891) The equitable action for a rescission is entirely distinct from the legal action for damages for fraudulent representations or a breach of warranty; hence defendant does not, by submitting to a trial on the merits in the equitable action, waive his right to a jury trial on the question of damages.—Marshall v. Gilman, 47 Minn. 131, 49 N. W. 688.

[d] (N. H. 1873) A party waives his right to a jury trial, on the filing of an auditor's report, by submitting the questions raised by the report for the decision of the court, without reserving the right to a trial by jury.—Plummer v. Meserve, 54 N. H. 166.

[e] (N. Y. 1874) Where a complaint is based on theory that the cause of action therein set forth is one of equitable jurisdiction, and the demand is for equitable relief, but the complaint contains allegations of fact sufficient, if proved, to entitle the plaintiff to recover in an action at law, the defendant, by proceeding with the trial before the court without a jury, without objection, and claiming a right to a trial by jury, waives his right to insist, at the close of the evidence, that, no equitable cause of action having been established, the complaint must be dismissed, although it contains allegations of fact, which, having been established, entitles the plaintiff to recover in an action at law, on the ground that as to the legal cause of action he is entitled to a trial by jury.—Black v. White, 37 N. Y. Super. Ct. (5 Jones & S.) 320.

[f] (N. Y. 1880) One who was engaged to teach 20 weeks, but was discharged before the end of the term, sued the district trustee in the county court and was nonsuited. Afterwards he appealed from the trustee's refusal to pay him his wages to the superintendent of public instruction, who reversed the trustee's decision and directed him to pay the claim. *Held*, that the trustee, by submitting the case to the superintendent, without objection, waived any right to a trial by jury.—People v. Eckler, 19 Hun, 609.

[g] (N. Y. 1890) Where each party requests the court to direct a verdict in his favor, and on direction of the court a verdict is rendered which has evidence to support it, the defeated party cannot then insist upon going to the jury on a controverted question of fact, since, by moving for a verdict, he has submitted the question to the court.—Howell v. Wright, 122 N. Y. 667, 25 N. E. 912.

[h] (N. C. 1881) Where the judge determines the facts involved in a question of estoppel, with the tacit consent of the counsel for the defense, who argues the facts before the court, the defendant cannot complain on appeal that he was denied a trial by jury.—Crump v. Thomas, 85 N. C. 272.

[i] (N. C. 1884) On motion to vacate an attachment, it is competent for the court to find

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the facts from the affidavits and other proper evidence; and a party consenting to this mode of trial cannot afterwards demand a jury trial.—Pasour v. Lineberger, 90 N. C. 159.

[j] (Pa. 1811) Where plaintiff does not object to a peremptory nonsuit, but merely asks the court to give his opinion in writing, and objects to such opinion, he waives his right to have the case submitted to the jury.—Hayes v. Grier, 4 Bin. 80.

[k] (S. D. 1894) Where defendant tries the case on the theory that it presents questions of law only, it cannot, after they have been decided adversely, object that there were questions of fact for a jury.—Grigsby v. Western Union Tel. Co., 5 S. D. 561, 59 N. W. 734.

[l] (Tex. 1894) Where defendant demurs to plaintiff's evidence, and plaintiff joins in the demurrer, defendant is not entitled, in case the demurrer is overruled, to have the question of plaintiff's right to recover submitted to the jury.—Galveston, H. & S. A. Ry. Co. v. Templeton, 87 Tex. 42, 26 S. W. 1066.

§ 182. Submission to arbitration.

Consenting to reference, see post, § 188.

[a] (D. C. 1881) A party's right to a jury trial may be waived by a regular reference to arbitrators, and its equivalent obtained by a proper final award.—Strong v. Barbour, 1 Mackey, 209.

[b] (Ind. 1877) After the submission of a cause for arbitration and the return of the award, a party to such submission cannot demand a trial by jury.—Spencer v. Curtis, 57 Ind. 221.

[c] (Mass. 1890) By entering into a submission to arbitration in person or by attorney duly authorized, a party waives the right to a jury trial of the controversy submitted, and also of all questions of fact involved in the inquiry, whether the award should be accepted, rejected, or recommitted.—Boyden v. Lamb, 152 Mass. 416, 25 N. E. 609.

[d] (Pa. 1884) Where there is a prospective agreement to submit disputes to arbitrators, and either party is to fix the time and place of choosing arbitrators, the right of trial by jury is not taken away.—Rogers v. Davidson, 4 Penny. 472.

§ 183. Noticing case for trial on court or jury docket.

[a] (Iowa, 1872) Under Revision, § 2615, providing for the transfer of an equitable proceeding to the law docket, upon motion; and section 2619, making the want of such motion a waiver, etc.; and section 2619, relating to the trial of law issues,—the defendant, by failing to have a cause transferred to the law docket within the statutory time, will be held to have waived his right to a jury trial.—Richmond v. Dubuque & S. C. R. Co., 33 Iowa, 422.

[b] (Ky. 1854) That the record shows an action for the recovery of money or specific real or personal property to have been transferred in entirety to the equity docket amounts to a waiver of a jury trial.—Smith v. Moberly, 54 Ky. (15 B. Mon.) 70.

[c] (Ky. 1884) It being essential that an ordinary action should go to equity that it might be heard with a pending equitable action, a party, by consenting to the transfer, does not waive his right to a jury, but is entitled to have the legal issue submitted to a jury; the exercise of equity jurisdiction being dependent on the result of the legal issue.—Betz v. Newport Provision Mart. Ass'n, 6 Ky. Law Rep. 222.

[d] (Mich. 1888) Where a case was called for jury trial, defendant's counsel, being engaged in a trial in another court, asked to have the case set down for trial by the court at a later day, which was done, and trial had by the court, without any objection or exception by defendant, and there was no application by him to have the trial adjourned; and he cannot object that he did not voluntarily waive his right to jury trial.—Hudson v. Roos, 72 Mich. 363, 40 N. W. 467.

[e] (Minn. 1891) A case having been by consent set for trial by the court on a day certain, the right to a jury is waived, and cannot be asserted when the cause is called for trial.—St. Paul Distilling Co. v. Pratt, 45 Minn. 215, 47 N. W. 789.

[f] (Minn. 1893) In a proceeding in garnishment, where the court went on the theory that the suit was a "court case," but one in which it might order specific questions of fact to be tried by a jury, claimants, by failing to object, and by proceeding on the same theory, waive the right to a jury trial, if such existed.—Smith v. Barclay, 54 Minn. 47, 55 N. W. 827.

[g] (N. Y. 1878) A defendant in a case where an equitable cause of action is joined with others purely legal, does not waive his right to a trial by jury by consenting that the case be placed on the calendar for trial at the special term, and by noticing the case for trial at that term.—Wheelock v. Lee, 74 N. Y. 495.

[h] (N. Y. 1886) On the trial of a case, defendant stated that it was an equity case. Plaintiff did not reply, and the court announced that it would put a jury in the box, to which it might submit any specified question of fact. *Held*, that plaintiff did not thereby waive his right to a jury trial, since there was a jury impaneled capable of trying the whole issue.—Clark v. Mosher, 5 N. Y. St. Rep. 84.

[i] (N. Y. 1888) Where defendant fails to apply for a direction of issues to the jury, but notices the case for trial at special term, where no jury can be had, he waives his right to jury trial.—Mackellar v. Rogers, 109 N. Y. 468, 17 N. E. 350, affirming Mackellar v. Same (1885) 52 N. Y. Super. Ct. (20 Jones & S.) 468.

[j] (N. Y. 1889) Noticing an action for trial at special term is not a waiver by the moving party of the right of trial by jury; that not being one of the modes enumerated in Code Civ. Proc. § 1009.—Brown v. Brown, 52 Hun, 532, 5 N. Y. Supp. 893.

[k] (N. Y. 1891) Where an action which is triable by jury is noticed by both parties for the special term, and no issues are stated, the right to a jury trial is waived.—Collins v. Collins, 59 Hun, 620, 13 N. Y. Supp. 28, judgment affirmed (1892) 131 N. Y. 648, 30 N. E. 863.

[l] (N. Y. 1891) Code Civ. Proc. § 970, provides that "where a party is entitled, by the constitution, or by express provision of law, to a trial by jury of one or more issues of fact," the court must, on motion, cause "those issues to be distinctly and plainly stated for trial accordingly." Laws 1891, c. 208, amending this section, extends this right so as to embrace all actions "where one or more questions arise on the pleadings as to the value of property, or as to the damages which a party may be entitled to recover." *Held*, that the right to a jury trial under this amendment is not waived by the mere service of a notice of trial for the special term.—Underhill v. Manhattan Ry. Co., (Sup.) 18 N. Y. Supp. 43, 27 Abb. N. C. 478, 21 Civ. Proc. R. 441; Eggers v. Manhattan Ry. Co. (Super. N. Y.) 18 N. Y. Supp. 181, 27 Abb. N. C. 463, 21 Civ. Proc. R. 406.

[m] (N. Y. 1892) Where an action which is triable by jury is noticed by both parties for the special term, and no issues are stated, the right to a jury trial is waived.—Collins v. Collins,

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131 N. Y. 648, 30 N. E. 863, affirming (1891) 59 Hun, 620, 13 N. Y. Supp. 28.

[n] (N. Y. 1894) Where an action to foreclose a mechanic's lien, noticed for trial by plaintiff, appeared on the calendar on April 6th, and was set down for trial on April 17th, defendant did not waive his right to jury trial of questions of fact arising on a counterclaim by delaying to move therefor till April 9th, as he did not notice the case for trial himself, nor wait until the case was reached for trial before making the motion.—Bradley & Currier Co. v. Herter (Super. N. Y.) 30 N. Y. Supp. 270, 23 Civ. Proc. R. 408.

[o] (N. Y. 1895) The answer in an action for damages admitted plaintiff's cause of action, and set up a counterclaim for equitable relief. The cause was placed on the circuit court calendar, and was noticed for trial by both parties. Two months afterwards defendant moved to strike the cause from the circuit court calendar and place it on the special term calendar. *Held*, that the motion was properly denied, though there was no issue of fact requiring trial by jury, as defendant's conduct was equivalent to a consent to a trial at circuit.—Tubbs v. Embree, 89 Hun, 475, 35 N. Y. Supp. 820.

[p] (N. Y. 1895) Where defendant has waived his right to jury trial by noticing the cause for an equity term, it is discretionary with the court to deny an application for a jury trial.—Boyd v. Boyd (Com. Pl.) 12 Misc. Rep. 119, 33 N. Y. Supp. 74, 2 N. Y. Ann. Cas. 30.

[q] (N. Y. 1895) A cause was noticed for the October equity term, and when it was reached it was marked "Ready," and passed from day to day, and finally set out for trial on October 25th, when, on defendant's motion, it was marked off, because of the illness of his attorney. *Held*, that defendant thereby waived his right to a jury trial and that such waiver was not affected by a notice served, after the term, stating that he thereby withdrew his notice of trial.—Boyd v. Boyd (Com. Pl.) 12 Misc. Rep. 119, 33 N. Y. Supp. 74, 2 N. Y. Ann. Cas. 30.

[r] (Ohio, 1866) Where a case has been sent to the court of common pleas, and the defendant procures its reinstatement in the district court, where he cannot have a jury without leave of court, and the case is there tried without a jury, the defendant has waived his right to a jury trial.—Ellithorpe v. Buck, 17 Ohio St. 72.

[s] (Tex. 1886) Where parties consent to set a case for trial on a day of the term after the jurors are discharged under an order of court, no demand being then or previously made for a jury, though the case has been pending for several years, the absence of a jury is no ground for a continuance.—Cole v. Terrell, 71 Tex. 549, 9 S. W. 668.

[t] (Tex. 1895) Where a cause was put on the jury docket by the court after an agreement setting it in the week fixed for nonjury trials, and no objection was made to a jury trial either by the court or the opposite party, defendant should be allowed a jury, although an irregular jury had been discharged in consequence of the setting of the case after jury trials, when he demanded one on the first day of the term, paid the jury fee on the first day set for the trial of juries, and the failure to pay on the day required by Rev. St. art. 3060, did not prejudice the plaintiff, or disturb the business of the court.—Western Union Tel. Co. v. Everheart, 10 Tex. Civ. App. 468, 32 S. W. 90.

[u] (Vt. 1860) A party who has set a cause down, "Not for the jury," and has failed to show to the court good cause of continuance, is not entitled to have the damages assessed by the jury.—Briggs v. Gleason, 32 Vt. 472.

§ 184. Failure to appear or participate in trial.

[a] Jury trial may be waived, and, defendant failing to appear, plaintiff may have the cause heard by the court.
—(Colo. 1883) Leahy v. Dunlap, 6 Colo. 552;
(Ind. 1857) Willets v. Ridgway, 9 Ind. 367.

[b] (Cal. 1854) Under Prac. Act, § 179, providing that a trial by jury shall be waived "by failing to appear at the trial," the mere act of filing an answer does not operate as an appearance at the trial.—Zane v. Crowe, 4 Cal. 112.

[c] (Cal. 1858) Under Prac. Act, § 179, the failure of the defendant in replevin to appear when called is a waiver of a jury.—Waltham v. Carson, 10 Cal. 178.

[d] (Cal. 1890) In a case in which defendant was not represented at the trial, it was immaterial that a jury was not ordered on defendant's demand, as the court was authorized, by Code Civ. Proc. § 631, to dispense with a jury, on failure of defendant to appear in person or by counsel.—McGuire v. Drew, 83 Cal. 225, 23 Pac. 312; Towle v. Clunie, 23 Pac. 314.

[e] (Ind. 1856) By failing to appear at the trial of an action for the tortious taking of personalty, a jury is waived.—Langdon v. Bullock, 8 Ind. 341.

[f] (Ind. 1881) Under 2 Rev. St. 1876, p. 173, § 340, a defendant who has pleaded to the action, but fails to appear at the trial, waives his right to have the issues tried by a jury.—Love v. Hall, 76 Ind. 326.

[g] (Iowa, 1879) Where plaintiff is in default for failure to file a reply to a counterclaim, it is not error to refuse a jury for the trial of the counterclaim.—Chute v. Hozleton, 51 Iowa, 355, 1 N. W. 672.

[h] (Ky. 1854) Where a party, having appeared and pleaded an insufficient plea, failed to answer further, *held*, that this did not show such a failure to appear as amounted to a waiver of his right to a trial by jury.—Burgess v. Jacobs, 53 Ky. (14 B. Mon.) 517.

[i] (Mich. 1883) Where a defendant, though present, refuses to take part in the trial, he cannot complain that the trial should not have been by jury; he having made no objection thereto.—Lymburner v. Jenkinson, 50 Mich. 483, 15 N. W. 562.

[j] (Mich. 1883) Where defendant has demanded of a justice a jury trial, he is entitled to it, and, though he absents himself from the court room and from further proceedings in the case, this is not a waiver which will authorize the justice to proceed without a jury.—Boats v. Berg, 51 Mich. 8, 16 N. W. 184.

[k] (Mich. 1886) The jury, before which a trial was had, were discharged by the justice on failing to agree, and another trial set for the following day, of which the defendant's attorney had knowledge. The latter informed the justice that his client was gone, and said that he should not further appear in the action, but did not ask for a jury, nor pay the fees therefor, nor did he ask a continuance. Defendant had originally demanded the jury. *Held*, that defendant waived the right to a jury trial, and it was not error for the justice to retry the case on the next day, without a jury, defendant still failing to appear.—Tremayne v. Roberts, 61 Mich. 284, 28 N. W. 113.

[l] (Mo. 1873) Where defendant objected to going into the case, and took no further action

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in the case, except to watch its progress, and the clerk's entry was, "neither party requiring a jury the cause is submitted to the court." *Held*, that this was a sufficient waiver of a trial by jury. A party must either appear at a trial and abide the consequences or not appear. He cannot occupy an ambiguous position, partly appearing and partly not appearing.—Tower v. Moore, 52 Mo. 118.

[m] (N. H. 1876) A party, by failing to appear before a referee in a referred case, does not lose his right to a jury trial.—Kelley v. Simonds, 57 N. H. 308.

[n] (N. Y. 1856) Where a party demands a jury trial in a justice's court, and neglects to appear on the adjourned day, the justice may proceed to hear the cause without a jury.—Kilpatrick v. Carr, 8 Abb. Prac. 117.

[o] (N. Y. 1856) Where an action is at issue on issues of fact only, and is noticed for trial and placed upon the calendar, and the defendant fails to appear, the cause must be tried by the court and jury or by the court alone, if the plaintiff elects to treat the defendant's nonappearance as a waiver of his right to a trial by jury.—Giberton v. Fleischel, 12 N. Y. Super. Ct. (5 Duer) 652.

[p] (N. Y. 1865) The "waiver" of a trial by jury, provided for in the Code, subd. 1, § 266, by the failure of one of the parties to appear, implies the voluntary relinquishment, not the enforcement, of a right by the several parties, not by one, unless the other avails himself of it.—Hendricks v. Carpenter, 27 N. Y. Super. Ct. (4 Rob.) 665.

[q] (Tex. 1880) Where a party has demanded a jury, the mere absence of himself and his attorney, when the case is reached and called for trial, is not a waiver or forfeiture of his right to trial by jury.—Lacroix v. Evans, 1 White & W. Civ. Cas. Ct. App. § 749.

[r] (Tex. 1895) Under Rev. St. art. 3072, providing that, when one party has applied for a jury trial, he shall not be permitted to withdraw such application without the consent of the other parties, where plaintiff so applies, defendant is entitled to a jury trial as a matter of right, which is not waived by his failure and that of his attorney to be present at the trial.—Jones v. Hamby (Civ. App.) 29 S. W. 75.

[s] (Wis. 1856) An issue of fact, where an issue is formed and remains on record, must be tried by a jury, unless the parties agree to a trial by the court, whether the defendant defends at the trial or not.—Haskins v. Wilson, 5 Wis. 106.

§ 185. Participating in proceedings after grant or refusal of jury.

[a] (Cal. 1895) In proceedings to revoke the probate of a will, petitioner, by going to trial after his request for a trial by jury was erroneously refused, does not waive the error.—In re Robinson's Estate, 106 Cal. 493, 39 Pac. 862.

[b] (Minn. 1873) Where a party objected to a compulsory reference of an action at law, and on his objections being overruled a reference was ordered, his thereafter agreeing that a certain person might act as referee under such order, and going to trial before such referee, cannot be deemed a waiver of his right to a jury trial; the record showing that he intended to save his objection.—St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132 (Gil. 99).

[c] (N. Y. 1869) The fact that a defendant excepts to findings of facts and conclusions of law by the judge is not a waiver of his right to a jury trial.—Fasnacht v. Stehn, 53 Barb. 650, 5 Abb. Prac. (N. S.) 338.

[d] (N. Y. 1874) In an action upon a policy of insurance upon a single stock of goods, it appeared that such stock consisted of 51 items. *Held*, that the demand of the insured did not constitute an account such as to authorize a compulsory reference, and that by appearing and proceeding to trial under a compulsory order of reference, the party not consenting to the order did not waive his right to a jury trial.—Brink v. Republic Fire Ins. Co., 2 Thomp. & C. 550.

[e] (N. Y. 1880) The party, being entitled to a jury trial and having demanded it, the court reserving its decision on the subject, waives his right to such a trial by proceeding without objection with the trial before the court to completion, and failing to insist on a ruling on the question reserved.—Hand v. Kennedy, 83 N. Y. 149.

[f] (Wis. 1885) Where the court has erroneously held that a case is one at law, and submitted it to trial by a jury, a party objecting waives no right by going to trial before the jury.—Fraedrich v. Flieth, 64 Wis. 184, 25 N. W. 28.

§ 186. Choice of remedies.

[a] (Ind. 1879) Where an action was brought against a board of county commissioners in their own county, and they, refusing to move for a change of venue, challenged every juror for cause, and refused to submit the case to any jurors drawn from the county, the court could try the case without a jury.—Fountain County Com'rs v. Loeb, 68 Ind. 29.

[b] (Mass. 1894) Declaration of Rights, art. 15, preserving the right of trial by jury, does not apply to one who voluntarily avails himself of a statute which provides for a determination of his rights in another manner.—Citizens' Gaslight Co. of Reading, South Reading, & Stoneham v. Inhabitants of Wakefield, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457.

[c] (Mo. 1888) In proceedings to condemn land for railway purposes, the right of trial by jury as to the amount of compensation, guarantied by Const. art. 12, § 4, is not waived by the appearance of the owner before the judge in vacation pursuant to notice, and the appointment of commissioners at his request.—Kansas City, C. & S. R. Co. v. Story, 96 Mo. 611, 10 S. W. 203.

[d] (N. M. 1889) The fact that an action on a contract has been wrongfully commenced in the probate court, and removed to the district court on appeal, does not deprive the plaintiff of his right to a jury trial.—Lewis v. Baca, 21 Pac. 343.

[e] (N. Y. 1891) Under Code Civ. Proc. par. 970, as amended by Laws 1891, c. 208, providing that where one or more questions arise on the pleadings as to the value of property, or as to the damages which the party may be entitled to recover, such issues shall be submitted to a jury where the claim for past damages in an action to enjoin the construction of an elevated railroad has been unconditionally waived, a motion to submit the issues to a jury will be denied.—Eggers v. Manhattan Ry. Co. (Super. N. Y.) 18 N. Y. Supp. 181, 27 Abb. N. C. 463, 21 Civ. Proc. R. 403.

[f] (Ohio, 1890) One who, in a justice's court, moves to dismiss an attachment, and files affidavits in support thereof, waives any right he may have had to a trial of the attachment by a jury.—Strauss v. Cooch, 47 Ohio St. 115, 24 N. E. 1071.

§ 187. —— Legal and equitable issues.

[a] (U. S. 1892) Where, after the passage of the act of March 3, 1887 (24 St. p. 554), au-

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thorizing suits against receivers without leave of the courts appointing them, a person seeks damages for personal injuries by intervening in the suit wherein the receiver was appointed, he cannot afterwards complain that the matter was determined by a master instead of a jury. —Furrer v. Ferris, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649.

[b] (U. S. 1893) One who files a bill asking equitable relief, procures the appointment of an examiner, takes testimony before him, submits the same to the court, and argues the case on the theory that it is an equity suit, thereby waives any right he may have to a jury trial. —Book v. Justice Min. Co. (C. C.) 58 Fed. 827.

[c] (U. S. 1894) Where an insurance company brings suit to enjoin an action on a policy, it thereby waives the right to a jury trial.—North British & Mercantile Ins. Co. v. Lathrop (C. C.) 63 Fed. 508; Lathrop v. North British & Mercantile Ins. Co., Id.

[d] (Cal. 1852) A party, by filing an "undertaking" preliminary to obtaining an injunction, waives his right to a trial by jury.—Russell v. Elliott, 2 Cal. 245.

[e] (Ind. 1884) One does not waive his right to a trial by jury by agreeing that his action may be consolidated with another proceeding triable by the court.—Orr v. Miller, 98 Ind. 436.

[f] (Mass. 1855) A plaintiff electing to proceed at equity instead of at law, under Rev. St. c. 35, § 3, to recover threefold the amount of usurious interest paid to defendant, does not thereby waive his right to a trial by jury.—Ward v. Hill, 70 Mass. (4 Gray) 593.

[g] (Mo. 1886) Where a petition is framed with a view of obtaining equitable relief, a failure to submit the issue to a jury is not error.—Nelson v. Betts, 21 Mo. App. 219.

[h] (N. Y. 1858) When the allegations and the prayer of the complaint present a case in equity, proper to be tried by the court at special term without a jury, and on such trial it appears that plaintiff's cause of action, if any, is one for the recovery of money only, which could only be tried by jury, except by consent, quære, whether the special term has jurisdiction to order judgment for plaintiff.—Saltus v. Genin, 16 N. Y. Super. Ct. (3 Bosw.) 250.

[i] (N. Y. 1863) In an action for injunction and damages, if the complaint contains allegations appropriate to both legal and equitable relief, and the defendant answers and goes to trial without asking to compel the plaintiff to elect or amend, he cannot object that he was entitled to a trial by jury.—Pennsylvania Coal Co. v. Delaware & H. Canal Co., 3 Abb. Dec. 470.

[j] (N. Y. 1867) Where, on the motion of the plaintiff, the court erroneously proceeds to try, without a jury, a cause which should be tried by one, it will not operate as a waiver of the legal rights of the plaintiff, who, failing to show himself entitled to equitable relief, may yet have his claim tried by jury as an action at law.—Davis v. Morris, 36 N. Y. 569.

[k] (N. Y. 1877) A plaintiff, by stating in his complaint an action of a distinctly equitable character, waives the right of trial by jury.—Davison v. Jersey County Associates, 71 N. Y. 333.

[l] (N. Y. 1892) Where plaintiff includes in his complaint a cause of action of which he is not entitled to jury trial as well as one of which he is so entitled, he cannot, as a matter of right, demand a jury trial.—Shenfield v. Bernheimer, 63 Hun, 630, 17 N. Y. Supp. 881.

[m] (N. Y. 1892) The complaint, in an action against an elevated railroad to recover damages for injuries to property, having been so drawn that the action might be regarded as one at law for a nuisance, or in equity to restrain the continuance of a trespass, and defendant's motion that it be sent to the circuit for trial having been overruled, without a motion on its part to require plaintiff to elect whether to try the case as an action for nuisance or for a trespass, defendant could not object that it was denied a jury trial.—Barrett v. Manhattan Ry. Co., 63 Hun, 630, 18 N. Y. Supp. 71.

[n] (Pa. 1891) Under Act April 20, 1846, § 2 (P. L. 411), which provides that when the right of a lien creditor to share in the proceeds of a judicial sale of land purchased by himself is objected to by any person interested, the court shall either refer the matter to an auditor, who shall report as to the proper distribution of the fund, or direct an issue to determine the validity of the purchaser's lien, one who has elected between the two remedies by applying for the appointment of an auditor waives his right to have the matter tried before a jury.—Second Nat. Bank v. Lackawanna & S. Coal & Iron Co., 140 Pa. 628, 21 Atl. 412; Appeal of Jenkins, Id.

[o] (Wash. 1896) A defendant, by allowing, without objection, equitable issues to be made up by the cross complaints of his codefendants, waives any right to demand a jury trial.—Frye v. Hill, 14 Wash. 83, 43 Pac. 1097.

§ 188. Consenting to reference.

[a] Agreeing on a reference is a waiver of a right to a jury trial, and one party cannot afterwards demand it.

—(Ill. 1891) Garrity v. Hamburger Co., 136 Ill. 499, 27 N. E. 11, affirming (1890) 35 Ill. App. 309, and affirmed on rehearing (1891) 28 N. E. 743;

(Ind. 1865) Goodwin v. Hedrick, 24 Ind. 121;

(Iowa, 1872) Hewitt v. Egbert, 34 Iowa, 485;

(La. 1823) Hatch v. Watkins, 1 Mart. (N. S.) 154;

(N. J. 1878) Beattie v. David, 40 N. J. Law (11 Vroom) 102;

(N. Y. 1840) Lee v. Tillotson, 24 Wend. 337, 35 Am. Dec. 624; (1858) Woodruff v. Commercial Mut. Ins. Co., 2 Hilt. 130;

(N. C. 1874) Armfield v. Brown, 70 N. C. 27; Keener v. Finger, Id. 35; (1875) Armfield v. Brown, 73 N. C. 81; (1877) Perry v. Tupper, 77 N. C. 413; (1880) Grant v. Reese, 82 N. C. 72; (1885) Harris v. Shaffer, 92 N. C. 30;

(S. C. 1889) Rhodes v. Russell, 32 S. C. 585, 10 S. E. 828.

[b] (U. S. 1848) Where defendant acquiesces in a reference, and appears before the auditor, and contests the claim, he cannot object that the case should have been tried by jury.—Kelly v. Smith, Fed. Cas. No. 7,675 [1 Blatchf. 290].

[c] (Fla. 1894) Where defendant in an action for partition of land, without objection, allowed the cause to be tried by the referee, he waived any right he might have had to try the question of title to a jury.—Rivas v. Summers, 33 Fla. 539, 15 South. 319.

[d] (Ga. 1876) Where a person filing exceptions of fact to the report of an auditor, to whom the case has been referred, fails for any cause to convince the court, he is entitled to trial by jury, with the report as prima facie evidence against him.—White v. Reviere, 57 Ga. 386.

[e] (Ill. 1891) Where, after a trial in assumpsit has been commenced before a jury, defendant consents to the discharge of the jury, and to an accounting before an auditor, he cannot afterwards object to the order of ref-

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erence on the ground that it required disputed questions of fact and law to be decided by the auditor, and therefore invaded his right to a jury trial, since it will be presumed that he waived such right.—Garrity v. Hamburger Co. (Sup.) 28 N. E. 743, affirming on rehearing (1891) 136 Ill. 499, 27 N. E. 11, which affirms (1889) 35 Ill. App. 309.

[f] (Ill. 1891) Even if the right to a jury trial on all questions of fact which might arise in the hearing before the auditor were not waived by defendant, he should, if he desired a jury on any question of fact, have claimed his right before the introduction of evidence in regard thereto, and the finding of the auditor thereon.—Garrity v. Hamburger Co. (Sup.) 28 N. E. 743, affirming on rehearing (1891) 139 Ill. 499, 27 N. E. 11.

[g] (Ind. 1871) Where a party to a suit was present by his attorneys, when the court made an order referring the cause to a master in chancery, and submitted not only to the order of reference, but to an order requiring him to furnish the master with a bill of particulars, making no objection thereto, and appeared before the master, and offered evidence, and was present by his attorneys when the report of the master was filed, and finally when the court ordered the report of the master to be spread upon the order book, together with the evidence, all which he permitted to be done without objection, *held*, that it was too late for him to demand a jury trial, as the record of these facts disclosed such "oral consent in open court," as shown by the entries on the record, as amounted to a waiver by a jury trial.—Hauser v. Roth, 37 Ind. 89.

[h] (Iowa, 1888) When, on exceptions to a report containing findings of facts and conclusions of law, the report is modified in respect to the latter only, a trial by jury will not be granted at the instance of a party who agreed to the appointment of the referee, and moved to confirm the report.—In re Hooker's Estate, 75 Iowa, 377, 39 N. W. 652.

[i] (Kan. 1890) Where a party objects to the reference of a cause, and demands a jury trial, which objection and demand are overruled, but subsequently consents to the appointment of a referee, he abandons the objection and demand, and waives the jury trial, and the right to insist on the error in denying such trial.—Smith v. Burlingham, 44 Kan. 487, 24 Pac. 947.

[j] (Minn. 1886) Leave to amend his answer was granted to defendant upon condition that he stipulate to try the action before a referee. *Held*, that a subsequent stipulation by defendant for the appointment of the referee is a waiver of any right which he might have had to demand a jury trial, or to object to the imposing of the condition as an abuse of judicial discretion.—Deering v. McCarthy, 36 Minn. 302, 30 N. W. 813.

[k] (N. H. 1854) Where an auditor has had the question as to the comparative value of keeping chattels pledged, and of their use received by the trustee, submitted to him, and he has passed on it without objection being made, if the right to have that question submitted to a jury ever existed, plaintiff will be deemed to have waived it.—Hills v. Smith, 28 N. H. (8 Fost.) 369.

[l] (N. H. 1876) Defendants moved for a reference, and stipulated to waive jury trial. The action was referred, but the referee signified his inability to act. *Held*, that defendants could not then revoke their waiver, and claim jury trial.—Marsh v. Brown, 57 N. H. 173.

[m] (N. H. 1877) By consenting to a reference, under Act 1874, c. 97, § 13, a party does not waive his right to a jury trial, as provided for in such act.—Smith v. Fellows, 58 N. H. 169.

[n] (N. Y. 1878) A party who makes no objection to an order of reference and proceeds with the trial before the referee cannot afterwards object to the referee or claim a jury trial.—Baird v. City of New York, 74 N. Y. 382.

[o] (N. C. 1877) Where, after the issues are joined, a reference is ordered on plaintiff's motion, without opposition from defendant, there is a reference by consent which waives the right of trial by jury.—Atkinson v. Whitehead, 77 N. C. 418.

[p] (N. C. 1887) While a party has a constitutional right to have an issue of fact tried by a jury, yet he waives the right by failing to reserve it, or to make the proper demand at the time a reference of such issue is ordered.—Grant v. Hughes, 96 N. C. 177, 2 S. E. 339.

[q] (N. C. 1889) Under Const. art. 4, § 13, providing that in all issues of fact parties may waive the right to a jury, the court may refuse to submit issues to a jury after a voluntary reference.—Nissen v. Genesee Gold Min. Co., 104 N. C. 309, 10 S. E. 512.

[r] (N. C. 1894) Where reference by consent was vacated without objection, and at the next term the case was again referred, against the objection of both parties, such reference is compulsory, entitling plaintiff to a jury trial.—McDaniel v. Scurlock, 115 N. C. 295, 20 S. E. 451.

[s] (N. C. 1896) An order of reference, made at plaintiff's request, is a waiver of his right to a jury trial, and cannot be recalled, except by consent of both parties.—Collins v. Young, 118 N. C. 265, 23 S. E. 1005.

[t] (Ohio, 1869) Where issues of fact relating to accounts have been referred by consent to a master, who has filed his report, and a motion is pending to confirm it, neither party has a right to a trial of the same issues to a jury afterwards.—Butler v. Lee, 2 Cin. R. 5.

[u] (S. C. 1886) One who has, expressly or by implication, consented to a reference to the master, of the issues raised as to the ownership of mortgaged land, cannot afterwards object to the trial of such issue by the court without a jury.—Martin v. Martin, 24 S. C. 446.

[v] (S. C. 1888) Under Code Civ. Proc. § 292, providing that the issues in an action may be referred by consent, and section 274, providing that a jury may be waived, or a reference be ordered, in an action brought by an executor to have the rights of legatees adjusted, a consent to an order of reference is a waiver of a jury, and one who has consented to such reference cannot claim to have the issue tried by jury.—Trenholm v. Morgan, 28 S. C. 268, 5 S. E. 721.

[w] (Wash. 1893) Trial by jury having been once waived, and a reference agreed on, a party cannot demand a jury trial when the judgment on the report has been reversed for failure of the report to state the account, and the case referred for that purpose.—Park v. Mighell, 7 Wash. 304, 35 Pac. 63.

§ 189. Number of jurors.

Infringement of right, see post, §§ 221-225.

[a] In civil cases a trial by less than 12 men as a jury may be good, by agreement between the parties.

—(Ind. 1861) Brown v. State, 16 Ind. 496;

(Ky. 1825) Cravens v. Gant, 18 Ky. (2 T. B. Mon.) 117;

(Va. 1893) Roach v. Blakey, 89 Va. 767, 17 S. E. 228.

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[b] (Cal. 1861) In the absence of the plaintiff, defendant consented to a trial before four jurors only. *Held*, that the consent was invalid without consent of the adverse party, express and entered at the time on the minutes of the court, and that, in default of this, a jury must be either altogether waived or must consist of twelve men.—Gillespie v. Benson, 18 Cal. 409.

[c] (Colo. 1894) In the trial of a civil case before a justice of the peace, the jury may consist of any number of jurors the parties agree upon, or accept without objecting.—Corthell v. Mead, 19 Colo. 386, 35 Pac. 741.

[d] (Ill. 1869) A statutory provision for a jury, on a trial of the right of property, of not less than six nor more than twelve persons, does not prevent the parties from excusing a juror by consent, after the trial has commenced.—Kreuchi v. Dehler, 50 Ill. 176.

[e] (Ill. 1869) A statutory provision for a jury of not less than six nor more than twelve persons, on a trial of the right of property, does not prevent the parties agreeing on a less number than six.—Kreuchi v. Dehler, 50 Ill. 176.

[f] (Ind. 1853) Where a party goes to trial with less than the regular number of jurors without objecting thereto, until after a motion for a new trial, his consent, at least in a civil case, cures the error.—Durham v. Hudson, 4 Ind. 501.

[g] (Ind. 1864) That a cause was tried by a jury of 11 men without the consent of the parties is waived by a failure to object.—Mitchell v. Stephens, 23 Ind. 466.

[h] (Ind. 1872) Under 1 Gav. & H. St. p. 475, § 7, in a proceeding before a justice to condemn lands for the use of a road, as well as on appeal, three viewers are to be appointed, who are to be sworn as jurors to assess the damages, and when such had been appointed without any objection from the owner of the land sought to be condemned, and, on appeal to the circuit court, three other viewers were appointed, the owner only making a general objection to the appointment of viewers, and not claiming a jury of twelve, *held*, that the right of trial by a jury of twelve was waived, even if the owner otherwise had that right.—Beynon v. Brandywine, B. & S. C. Turnpike Co., 39 Ind. 129.

[i] (Iowa, 1858) It is a duty of the court to see to it that the jury is properly constituted, and the question to a party whether he has any objection to the jury means whether he has any challenge to make. His answer in the negative is not an express waiver of the defect that there were only 11 jurors, he not knowing that such was the fact.—Cowles v. Buckman, 6 Iowa (6 Clarke) 161.

[j] (Ky.) It is no objection to a verdict that the jury was composed of 13 instead of 12 jurors, where the defendant was present in the court below, and did not there object.—(1828) Ross v. Neal, 23 Ky. (7 T. B. Mon.) 407; (1844) Berry v. Kenney, 44 Ky. (5 B. Mon.) 120.

[k] (Ky. 1831) A judgment rendered upon the verdict of less than 12 jurors, unless the defendant waives objection, is erroneous.—Ayres v. Barr, 28 Ky. (5 J. J. Marsh.) 286; Oldham v. Hill, 28 Ky. (5 J. J. Marsh.) 300.

[l] (Minn. 1871) The record of a justice showed that certain persons were sworn as a jury to try a cause, by agreement of parties. *Held*, that defendant was estopped by his consent to object, on appeal, that the jury did not consist of the proper number, or was, for any cause, illegally constituted.—Clague v. Hodgson, 16 Minn. 329 (Gil. 291).

[m] (Mo. 1860) A party has the constitutional right to a jury of 12 men, in any jury trial before a court of record, but he may waive this right and consent to a trial with a smaller number, in which case the consent should be entered of record.—Vaughn v. Scade, 30 Mo. 600.

[n] (Mo. 1867) In all trials in courts of record it is the constitutional right of a party to demand a jury of 12 men; and, if no exceptions are taken to the action of the court in proceeding to trial with a less number, the party may still take advantage of the error, by a motion in arrest of judgment. The defect will not be considered as waived or consent presumed, unless entered of record.—Scott v. Russell, 39 Mo. 407.

[o] (Mo. 1894) The right of property owners to a jury of twelve men in the county court, on an issue as to damage caused by the establishment of a highway, is waived by an appeal by them, from the judgment of such court on a verdict of six men, to the circuit court, where they waive their right to a jury.—In re Essex Ave., 121 Mo. 98, 25 S. W. 891; Hughes v. Mermod. Id.

[p] (N. Y. 1845) An agreement by the parties in a justice's court, for the trial of a cause by a jury of less than six jurors, is good, though not made until after the return of the venire, and when the jury is drawn, if the parties proceed to trial pursuant to such agreement.—Carman v. Newell, 1 Denio, 25.

[q] (Tex. 1880) A party submitting to a trial before 11 jurors, without objecting thereto, waives the defect.—Williams v. Mudgett, 2 Posey, Unrep. Cas. 254.

[r] (Wis. 1853) Unless a party shows affirmatively that he objected to a jury of six instead of twelve, as prescribed in Rev. St. c. 86, § 17, he will be presumed to have waived his right to a jury of twelve, and will not be heard to dispute the constitutionality of the 16th section of this chapter, providing for a jury of six in the county court.—Millett v. Hayford, 1 Wis. 401.

[s] (Wis. 1874) By agreement of the parties to a bastardy proceeding in the circuit court, one of the jurors was discharged and the case allowed to proceed with the remaining eleven jurors. *Held*, that the verdict was not thereby rendered illegal.—Rindskopf v. State, 34 Wis. 217.

§ 190. At trial de novo on appeal.

Necessity of demanding in appellate court, see ante, § 155 [o]

[a] (Md. 1855) By section 46, art. 3, of the present constitution, it is declared that the legislature shall enact no law for the taking of private property for public use without just compensation agreed on or awarded by a jury being first paid or tendered to the owner. *Held*, that the failure to appeal, as allowed by Act 1838, c. 226, and the ordinance of Baltimore City of 1850, No. 17, and of 1853, No. 58, making provision for the previous payment or tender of compensation, and giving the right to secure a trial by jury by appeal, operates as a waiver of the right to a jury trial.—Steuart v. City of Baltimore, 7 Md. 500.

[b] (N. J. 1881) There is no constitutional right to trial by jury on appeal from the courts for trial of small causes, where no jury was demanded below.—Wanser v. Atkinson, 43 N. J. Law (14 Vroom) 571.

[c] (Pa. 1877) The fact that a landowner had permitted his case, on appeal to the court of quarter sessions from an assessment of benefits from the opening of a street, to go before a board of viewers without objection, *held* to be no waiver of his constitutional right to a

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trial by jury, on appeal to the court of common pleas, this being effectuated by Act 1874, p. 283, giving an appeal "whether such assessments shall have been made by viewers or otherwise than upon a trial in court; and an appeal is not provided for or regulated by existing laws."—Appeal of Pusey, 83 Pa. 67.

[d] (Pa. 1884) Under Const. 1874, art. 16, § 8, providing that, on appeal from an assessment of damages for the taking of private property for a public use the amount of damages shall be determined by a jury; and Act May 24, 1878, declaring that, if no exceptions are filed within a specified time to the report of viewers assessing damages caused by a change in the grade of a street, the court shall enter judgment of confirmation, from which either party may appeal, etc.,—the right to file exceptions to such report is limited to questions of jurisdiction, regularity of the proceedings, and misconduct of the viewers, and, as the appellate tribunal has no right to hear exceptions relating to the amount of damages, exceptions of that character are nugatory; and hence the filing thereof is not a waiver of the right of appeal and trial by jury.—Rodgers v. Borough of Freemansburg, 2 Pa. Co. Ct. R. 523.

[e] (Pa. 1886) A landowner who has been awarded damages for the appropriation of his land for a public road, and who has had his day in court, on exceptions to the award, has no standing to petition the court for a jury to assess his damages.—In re West Whiteland Road, 4 Pa. Co. Ct. R. 511.

§ 191. Special or struck jury.

[a] (Ohio, 1878) Where a party demands a struck jury, and the clerk serves the panel on the parties and notifies them of the time to strike, and they fail to strike during the term, such neglect waives that right, and it is too late to claim it at the trial of the cause at a subsequent term.—Hutchins v. Wick, 4 Ohio Dec. 170, 1 Cleve. Law Rep. 89.

§ 192. Evidence of waiver.

[a] A waiver of the right of trial by jury cannot be implied.

—(N. J. 1836) Hinchly v. Machine, 15 N. J. Law (3 J. S. Green) 476.

CONTRA, see

(Miss. 1841) Lewis v. Garrett's Adm'rs, 6 Miss. (5 How.) 434.

[b] (U. S. 1832) The right of trial by jury, secured by the constitution of the United States, is for the benefit of parties litigating in courts of justice, and is a privilege they may waive; but every reasonable presumption should be made against the waiver of a right deemed so valuable as to be secured by the constitution.—United States v. Rathbone, Fed. Cas. No. 16,121 [2 Paine, 578].

[c] (Ill. 1849) Where the record shows that a case was tried by the court in the presence of the parties without objection, it will be presumed that a trial by jury was waived.—Burgwin v. Babcock, 11 Ill. (1 Peck) 28.

[d] (Mich. 1888) When a justice of the peace is not able to certify positively that no jury was demanded at the time provided by statute, he should allow a jury trial.—Pontiac & Lapeer Plank Road Co. v. Hopkinson, 69 Mich. 10, 36 N. W. 797.

[e] (Minn. 1873) A constitutional right to a jury trial may be waived, but such waiver should plainly and explicitly appear; otherwise, every reasonable presumption should be made against it.—St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132 (Gil. 99).

[f] (N. Y. 1891) Where a jury is impaneled in an action for waste, and is afterwards discharged, and the cause tried by the court, without exception from plaintiff, it will be presumed that plaintiff waived her right to a trial by jury; Code Civ. Proc. § 968, providing that in such action "an issue of fact must be tried by a jury, unless a jury trial is waived."—Eysaman v. Small, 61 Hun, 618, 15 N. Y. Supp. 288.

§ 193. Record of waiver.

[a] (U. S. 1847) Where the laws permit a waiver of a trial by jury, it is too late to raise an objection that the waiver was not made a matter of record, after the case has proceeded to a hearing.—Phillips v. Preston, 46 U. S. (5 How.) 278, 12 L. Ed. 152.

[b] (Ark. 1884) The record entry, "Neither party requiring a jury," may be construed to import a waiver.—Chapline v. Robertson, 44 Ark. 202.

[c] (Cal. 1891) Where the record shows that two special questions were submitted to the jury which they answered, but gave no general verdict, and that these questions did not cover all the issues in the case; that the trial proceeded, and both parties introduced evidence; and that the case was submitted to the "court for decision and judgment," which was rendered against defendant.—the right to trial by jury was waived by defendant, under Code Civ. Proc. § 631, providing that jury trial may be waived by oral consent in open court entered in the minutes, or by failure to appear at the trial.—Montgomery v. Sayre, 25 Pac. 552.

[d] (Ill. 1864) A waiver of a jury trial must appear from the record, to support a trial and judgment by the circuit court without a jury.—Ware v. Nottinger, 35 Ill. 375.

[e] (Ind. 1845) Where a cause has been tried by the court instead of a jury, the record should show that the cause was submitted to the court by the parties.—Mahan v. Sherman, 7 Blackf. 378.

[f] (Ohio, 1893) The journal entry recited that, "the cause coming on for trial, came thereupon the parties and their attorneys, and neither party demanded or waived the interposition of a jury, but without objection submitted the cause to the court upon the pleadings, evidence, and argument of counsel." *Held*, that the journal shows that trial by jury was waived, within the meaning of Rev. St. § 5204, subd. 3, providing that such waiver may be, by "oral consent in open court, entered on the journal."—Bonewitz v. Bonewitz, 50 Ohio St. 373, 34 N. E. 332, 40 Am. St. Rep. 671.

[g] (W. Va. 1878) A recital in a record that "neither party required a jury, and the court is substituted in lieu of a jury to try the case," *held* to be "consent entered of record," waiving a jury, within Act 1872, c. 47, § 35.—King v. Burdett, 12 W. Va. 688.

§ 194. Operation and effect of waiver.

[a] (Cal. 1859) Where a jury has been waived, it is immaterial whether the action, under Prac. Act, § 254, be a legal or equitable proceeding.—Smith v. Brannan, 13 Cal. 107.

[b] (Cal. 1890) A defendant cannot demand a trial by a jury after having waived his right thereto in consideration of an agreement to transfer a cause to another department of the court.—Hawes v. Clark, 84 Cal. 272, 24 Pac. 116.

[c] (Ill. 1884) Where a jury trial was waived by both parties after the cause was at issue, and there is no subsequent change of the issues before the cause is called for trial, the court properly denied defendant's demand when the case was called for a jury trial.—Heacock v. Lubukee, 108 Ill. 641.

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[d] (Ill. 1893) Waiving a jury, and submitting a cause on the short-cause calendar to trial by the court without objection, is a waiver of the objection that the case was improperly placed on such calendar, even though the party on a previous day moved to strike the case from the short-cause calendar, and excepted to the denial of his motion.—Belford v. Beatty, 145 Ill. 414, 34 N. E. 254, affirming (1892) 46 Ill. App. 539, and following Jensen v. Fricke (1890) 133 Ill. 171, 24 N. E. 515.

[e] (Iowa, 1879) Where an appeal in the circuit court is by consent consolidated with another case between the same parties, brought from the district court, an entry on the judge's docket of a stipulation to try "by the court" does not bind the parties, when made before the consolidation.—Rogers v. Martin, 51 Iowa, 709, 2 N. W. 262.

[f] (Iowa, 1888) Where parties agree to a trial by the court, and the jury is afterwards discharged for the term, amendments to the petition not materially changing the issues do not entitle defendant to a trial by jury.—Foster v. Hinson, 75 Iowa, 291, 39 N. W. 682.

[g] (Md. 1893) An agreement, under Const. art. 4, § 8, to submit a civil cause to the court for determination without the aid of a jury, will not, in the absence of an expression to the contrary, be construed as an agreement to try the case only before the judge who happened to be on the bench when the agreement to submit was made and entered on the docket.—Lanahan v. Heaver, 77 Md. 605, 26 Atl. 866, 20 L. R. A. 759.

[h] (Mass. 1859) An agreement, under St. 1857, c. 267, waiving a trial by jury, submits the facts to the determination of the presiding judge.—Loring v. Whittemore, 79 Mass. (13 Gray) 228.

[i] (Mass. 1886) Where the defendant in a suit in equity set down the cause for hearing before a single justice, and by lapse of time lost his right to have issues framed for a jury, and afterwards agreed with the plaintiff for a postponement of the case, he is not entitled thereby to a trial by jury unless it was so stipulated by him, in his agreement with plaintiff, as a condition of postponement.—Dole v. Wooldredge, 142 Mass. 161, 7 N. E. 832.

[j] (Minn. 1893) The waiver of a jury when a cause is called for trial is a waiver only as to the issues then formed, and not an agreement to waive it as to all new and different issues that may thereafter be formed under amended pleadings.—McGeagh v. Nordberg, 53 Minn. 235, 55 N. W. 117.

[k] (N. Y. 1891) Plaintiff brought an action in equity for the reformation of a lease and for damages. Plaintiff showed himself entitled to common-law relief, and the court sent the cause to the circuit to have such right tried before a jury, where, a jury trial being waived, the issues were tried by the court without a jury, and damages awarded plaintiff. *Held*, that defendant, having waived a trial by jury, could not object that, only monetary damages having been awarded plaintiff and equitable relief denied him, the action should have been dismissed.—Phelps v. City of New York, 61 Hun, 521, 16 N. Y. Supp. 321.

[l] (N. Y. 1895) Code Cr. Proc. § 701, provides that on a plea in the court of special sessions, other than one of guilty, if defendant does not demand a jury, the court must proceed to try the issue. Section 702 provides that, before the court hears any testimony on the trial, defendant may demand a jury. *Held*, that an express waiver, at the time of the plea, of a jury, not being necessary, it, having been made, did not affect defendant's right thereafter, before hearing the testimony, to demand a jury.—People v. Molinet, 13 Misc. Rep. 301, 34 N. Y. Supp. 1114.

[m] (S. C. 1888) Where both parties waive jury, and consent to trial by the court on testimony taken by a referee, after the chief issue has been so tried and determined neither party has the right to demand a jury for a subordinate issue; and it is error to order trial by jury on such issue without consent of both parties.—State v. Pacific Guano Co., 28 S. C. 63, 5 S. E. 167.

[n] (S. C. 1892) While, under Code Civ. Proc. § 288, the judge cannot, in an action on contract, withdraw the trial of issues of fact from the jury without the consent of the several parties, the party requesting that the case be heard by the judge without the aid of the jury cannot complain that it was so tried.—Stepp v. National Life & Maturity Ass'n, 37 S. C. 417, 16 S. E. 134.

[o] (S. C. 1895) After a party has, in writing, waived a trial by jury in a civil action, he will not be afterwards heard to say that he was denied the right.—C. Aultman & Co. v. Salinas, 44 S. C. 299, 22 S. E. 465.

[p] (Tex. 1879) A party's right to trial by jury by paying the jury fee, etc., is not affected by his waiver of a jury at a preceding term.—Dean v. Sweeney, 51 Tex. 242; Brown v. Chenoworth, Id. 469.

[q] (Wis. 1881) On the evidence as it then stood, both parties, by agreement, permitted the jury to be discharged, and submitted the cause to the court; but plaintiffs were permitted, against defendants' objection, to introduce further evidence, and the cause was decided by the court with reference to such additional evidence, without any waiver by defendants of their right to a jury trial on that state of the evidence. *Held* error.—Hewitt v. Week, 51 Wis. 368, 8 N. W. 269.

§ 195. —— Effect on right to jury at subsequent trial.

[a] (Ill. 1881) A waiver of jury trial is not a waiver of a jury upon a second trial, after the cause is remanded from an appellate court.—Town of Carthage v. Buckner, 8 Ill. App. (8 Bradw.) 152.

[b] (Mich. 1879) A party who stipulated that the case might be tried by a referee has the right to a jury trial, after a new trial is ordered, on appeal taken after trial before the referee.—Hopkins v. Sanford, 41 Mich. 243, 2 N. W. 39.

[c] (N. H. 1893) A case put on the jury list was, by agreement, taken from it, marked "Issues to the court," and continued. Next term it was tried to the court, but not decided. *Held*, that plaintiff was not at the next term entitled to a jury trial, unless the agreement was ordered vacated at the trial term.—Trainor v. Heath, 67 N. H. 384, 29 Atl. 846.

[d] (N. C. 1875) Where a trial by jury has been waived by consent of the parties, and the finding of the court set aside on appeal, the new trial must be by jury, unless this also be waived by consent.—Benbow v. Robbins, 72 N. C. 422.

[e] (Tenn. 1882) No demand for a jury trial was made, but the case was tried by a jury without objection. After amendment a second trial was to be had. *Held*, that defendant could object to a jury trial the second time.—Nashville, C. & St. L. Ry. v. Foster, 78 Tenn. (10 Lea) 351.

[f] (Tex. 1888) Under Rev. St. art. 3061, providing that any party to a civil suit desiring

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to have the same tried by a jury shall make application therefor in open court on the first day of the term of court at which the suit is tried, upon the reversal of a judgment by the supreme court, either party is entitled on the second trial to apply for a jury, although the same was waived at the first trial.—Dunlap v. Brooks, 8 Willson, Civ. Cas. Ct. App. § 357.

§ 196. —— Effect of waiver after demand.

[a] (Cal. 1892) Where defendant, some days before trial, orally demanded a jury, plaintiff making no objection, and the day before trial defendant withdrew his demand, whereupon plaintiff served written demand, and at the opening of the trial asked for a jury, and defendant objected to a jury and to the submission of issues thereto, on the ground that no special issues had been settled, the overruling of defendant's objections, where the issues to be tried were made by the pleadings, and where the court itself found on all the issues submitted, was not prejudicial error; Code Civ. Proc. § 1717, providing that, "if no jury is demanded, the court must try the issues, and if, on written demand, a jury is called by either party, and the issues are not sufficiently made up" by the pleadings, the court, on due notice, must frame the issues and submit the same, with the evidence, to the jury for a verdict.—In re Westerfield's Estate, 96 Cal. 113, 30 Pac. 1104; Smith v. Westerfield, Id.

[b] (La. 1811) If plaintiff pray for a jury and defendant do not, the latter cannot be deprived of his right to one by the former's waiver of his prayer.—Sweeny v. Barbin, 2 Mart. (O. S.) 47.

[c] (La. 1855) The consent of both parties alone can waive a jury, awarded at the instance of either or by the court proprio motu.—Livaudais v. Spear, 10 La. Ann. 24.

[d] (La. 1887) A jury had been asked for by defendant, and, when the cause was called for trial, he offered to waive the jury, and have the cause determined by the judge, to which plaintiff objected. *Held*, that the jury could not be dispensed with, except by the consent of both parties.—Lewis v. Klotz, 39 La. Ann. 259, 1 South. 539.

2. IN CRIMINAL CASES.

IN GENERAL, § 197.
RIGHT TO WAIVE JURY IN GENERAL, § 198.
MISDEMEANORS AND MINOR OFFENSES, § 199.
ON PLEA OF GUILTY, § 200.
NUMBER OF JURORS, § 201.
FORM AND SUFFICIENCY OF WAIVER, § 202.
OPERATION AND EFFECT OF WAIVER, § 203.

Failure to appeal to court when jury trial may be had, see post, § 241 [g].
Necessity of demand for jury, see ante, § 156.

§ 197. In general.

[a] (Tenn. 1871) A record of trial without plea of not guilty will not support a plea of former conviction; and if, on motion of the prisoner, a new trial is granted, and he stands mute, on entry of a plea of not guilty, he is entitled, under Code, §§ 5212–5214, to the usual panel and challenges.—Link v. State, 50 Tenn. (3 Heisk.) 252.

[b] (Wis. 1883) The right of the accused in a criminal prosecution, under Const. art. 1, § 7, to trial by a jury "of the county or district wherein the offense shall have been committed," is waived by a motion for a change of venue, which is granted.—Bennett v. State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

§ 198. Right to waive jury in general.

Effect of plea of guilty, see post, § 200.
In minor offenses, see post, § 199.

[a] The defendant in a criminal case cannot waive a trial by jury.
—(Ark. 1855) Wilson v. State, 16 Ark. 601;
(Mich. 1870) Brimingstool v. People, 1 Mich. N. P. 260;
(N. C. 1883) State v. Stewart, 89 N. C. 563; (1884) State v. Holt, 90 N. C. 749, 47 Am. Rep. 544.

[b] Trial of a plea of not guilty to an information or indictment for felony or misdemeanor must be by jury, and cannot be waived.
—(Mo. 1847) Neales v. State, 10 Mo. 498;
(Wis. 1877) State v. Lockwood, 43 Wis. 403.

[c] A defendant, who has pleaded not guilty, cannot, even by consent, be tried for felony by the court without a jury.
—(Ill. 1891) Morgan v. People, 136 Ill. 161, 26 N. E. 651;
(Ohio, 1861) Williams v. State, 12 Ohio St. 622.

[d] A statute authorizing the accused to waive the right of trial by jury, and to elect to be tried by the judge, does not violate the constitutional provision which guaranties the right of trial by jury.
—(Conn. 1878) State v. Worden, 46 Conn. 349, 33 Am. Rep. 27;
(La. 1881) State v. White, 33 La. Ann. 1218; (1891) State v. Robinson, 43 La. Ann. 383, 8 South. 937;
(Wis. 1885) In re Staff, 63 Wis. 285, 23 N. W. 587, 53 Am. Rep. 285.

[e] A trial by the court, and conviction of a felony, where the accused waives a trial by jury, is illegal.
—(Iowa, 1884) State v. Carman, 63 Iowa, 130, 18 N. W. 691, 50 Am. Rep. 741; (1885) Same v. Larrigan, 66 Iowa, 426, 23 N. W. 907;
(Mo. 1867) State v. Mansfield, 41 Mo. 470.

[f] (U. S. 1882) The right to a speedy and public trial by an impartial jury is guarantied to every one accused of crime by amendment to article 6 of the constitution. It is a right which cannot be waived; and a trial by the court without a jury, even with the consent of the accused, is erroneous.—United States v. Taylor (C. C.) 11 Fed. 470.

[g] (Ala. 1877) The provision of the Declaration of Rights, § 9, that the legislature may by law dispense with a grand jury in misdemeanors, imports that a statute may provide for a waiver of trial by jury.—Connelly v. State, 60 Ala. 89, 31 Am. Rep. 34.

[h] (Ark. 1856) In an indictment for assault and battery, the issue of fact cannot, by consent of parties, be tried by the court.—Bond v. State, 17 Ark. 290.

[i] (Conn. 1858) The superior court has no power to try a criminal case without a jury, on the plea of not guilty, even by agreement of parties.—State v. Maine, 27 Conn. 281, 71 Am. Dec. 89.

[j] (Ill. 1889) Under Const. art. 2, § 5, which provides that the right of trial by jury, as heretofore enjoyed, shall remain inviolate, and Rev. St. c. 38, div. 13, § 11, which provides that juries in all criminal cases shall be the judges of the law and of the fact, a defendant who has pleaded not guilty cannot, even by consent, be tried for felony by the judge without a jury.—Harris v. People, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153.

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[k] (Ind. 1884) Rev. St. 1881, § 1821, providing that "defendant and prosecuting attorney, with the assent of the court," may waive a jury trial, except in capital cases, is constitutional.—Murphy v. State, 97 Ind. 579.

[l] (Ind. 1886) Murder in the first degree being a crime which may be capitally punished, under an indictment therefor, it is not competent for accused to waive trial by jury.—Frazier v. State, 106 Ind. 562, 7 N. E. 378.

[m] (Iowa, 1884) Code, 1873, § 2740, provides that in civil actions issues of fact "must be tried by a jury, unless the same is waived." Section 4350 provides that in criminal cases "an issue of fact must be tried by a jury." *Held*, that the defendant in a criminal case cannot waive his right to a jury trial; and the court has no jurisdiction in such a case unless aided by a jury, and any judgment rendered by the court alone is null and void.—State v. Carman, 63 Iowa, 130, 18 N. W. 691, 50 Am. Rep. 741.

[n] (Iowa, 1895) Under Code 1873, § 4347, relating to criminal trials in district courts, and providing that issues of fact shall be tried by a jury, and section 4350, providing that an issue of fact must be tried by a jury of the county in which the indictment is found, a jury cannot be waived in a criminal proceeding prosecuted by indictment.—State v. Douglass, 96 Iowa, 308, 65 N. W. 151.

[o] (La. 1881) One accused of a crime may waive his right to a trial by jury, and elect to be tried by the court. There is nothing in the constitution that conflicts with such right of waiver.—State v. White, 33 La. Ann. 1218; State v. Askins, 33 La. Ann. 1253.

[p] (Mich. 1861) The recorder has no right in his court to try a case on a criminal complaint or information without a jury, although the prisoner is willing to waive his right to a jury trial.—People v. Smith, 9 Mich. 193.

[q] (Mich. 1892) Under How. Ann. St. § 6485, providing that in all actions where, in the court's opinion, the subject-matter is peculiarly proper for the consideration of the jury, the court may order the cause to be so tried, the court may try a criminal case with a jury, though the accused desires to submit the questions of fact to the judge.—City of Grand Rapids v. Bateman, 93 Mich. 135, 53 N. W. 6.

[r] (Mich. 1892) How. Ann. St. § 7097, which provides that in criminal prosecutions in justice's court, if no jury is demanded by the accused, the court shall proceed to try the issue, and (section 7099) that, if the accused shall not have waived his right to trial by jury, a jury shall be summoned, gives the accused his choice of two modes of trial; and it is error for the court to order a jury against his protest, after he has demanded a trial by the court without a jury.—People v. Steele, 94 Mich. 437, 54 N. W. 171.

[s] (Neb.) One charged with a felony cannot waive a jury trial of the issues of fact raised by his plea in bar and the state's reply. Cr. Code, § 449.—(1894) Arnold v. State, 57 N. W. 378. CONTRA, see (1884) State v. Priebnow, 16 Neb. 131, 19 N. W. 628.

§ 199. Misdemeanors and minor offenses.

[a] A jury trial cannot be waived in a criminal prosecution for a misdemeanor.

—(Iowa, 1895) State v. Tucker, 96 Iowa, 276, 65 N. W. 152;

(Wis. 1877) State v. Lockwood, 43 Wis. 403.

CONTRA see

(Ill. 1869) Darst v. People, 51 Ill. 286, 2 Am. Rep. 301;

(Mo. 1867) State v. Mansfield, 41 Mo. 470.

[b] On a plea of not guilty in a misdemeanor defendant cannot waive a trial by jury.

—(Mo. 1847) Neales v. State, 10 Mo. 498;

(Wis. 1877) State v. Lockwood, 43 Wis. 403.

[c] (Ga. 1890) Under Code, § 10, providing that "a person may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest," the right to a trial by jury may be waived in a misdemeanor case.—Logan v. State, 86 Ga. 266, 12 S. E. 406.

[d] (Iowa, 1888) The Code provides that an issue of fact must be tried by a jury of the county in which the indictment is found. Section 4669 provides that on a plea, if defendant does not demand a trial by jury, the justice must proceed to try the issue. Section 4672 provides that, before the justice has heard any testimony, defendant may demand a trial by jury. Section 4702 provides that in misdemeanor cases, wherein the district court has only appellate jurisdiction, the cause appealed shall stand for trial anew in such court in the same manner that it should have been tried before the justice. *Held*, that defendant, who was tried before a justice, has a right, on appeal, to waive trial by jury in the district court.—State v. Ill, 74 Iowa, 441, 38 N. W. 143.

[e] (Mich. 1874) The trial of a defendant by a justice without a jury, upon a criminal complaint for a simple assault and battery, where the defendant, after having pleaded not guilty, on being asked by the justice if he wished a trial by a jury, declared that he did not, and submitted to a trial without calling for a jury, is not a violation of the defendant's constitutional rights.—Ward v. People, 30 Mich. 116.

[f] (Minn. 1893) A defendant in a criminal case in a municipal court which has jurisdiction only of offenses cognizable before a justice of the peace may waive a jury, and consent to trial by the court.—State v. Woodling, 53 Minn. 142, 54 N. W. 1068; Same v. Bannock, 53 Minn. 419, 55 N. W. 558.

[g] (Mo. 1896) In a prosecution for violation of a city ordinance, defendant may waive his right to a jury trial by submitting the case to the court on a statement of admitted facts.—City of St. Charles v. Hackman, 133 Mo. 634, 34 S. W. 878.

[h] (Ohio, 1877) One charged with a minor offense, such as the violation of the statute forbidding common labor on Sunday, may waive a jury, and submit to a trial by the court.—Billigheimer v. State, 32 Ohio St. 435.

[i] (Tenn. 1874) In a prosecution for the unlawful sale of liquor, where there is no controversy about the facts, the attorney general and defendant may make an agreed statement of facts, and leave it to the court to apply the law and make the finding.—Levi v. State, 63 Tenn. (4 Baxt.) 289.

[j] (Tex. 1886) Code Cr. Proc. art. 535, allowing a waiver of jury trial in misdemeanors, is not in conflict with Const. art. 1, § 10, providing that "in all criminal prosecutions the accused shall have a speedy public trial by an impartial jury," and a person accused of a misdemeanor has the right to be tried by the court without a jury.—Moore v. State, 22 Tex. App. 117, 2 S. W. 634.

[k] (Va. 1886) Under Const. art. 1, § 10, conferring the right of trial by jury in all capital or criminal prosecutions, and Code, c. 158, § 36, providing for the waiver of a jury in any case except that of "felony or misdemeanor," defendant, indicted in a corporation court for unlawfully selling liquor to a minor, cannot waive a trial by jury.—Mays v. Commonwealth, 82 Va. 550; Ford v. Same, Id. 553.

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[l] (W. Va. 1888) Code, c. 116, § 29, so far as it provides for the trial of misdemeanor cases by the court in lieu of a jury, by consent of the defendant, is *held* constitutional by an equally divided court.—State v. Cottrill, 31 W. Va. 162, 6 S. E. 428.

[m] (W. Va. 1888) Bill of Rights, § 14, declaring that "trial of crimes and misdemeanors, unless herein otherwise provided, shall be by a jury of 12 men," secures to persons accused of crimes and misdemeanors the right to have an issue of not guilty tried by a jury, but does not inhibit the trial of such issues by the court in lieu of a jury, and an issue in a misdemeanor case can be so tried by consent of defendant. Conviction is affirmed, the court being equally divided.—State v. Cottrill, 31 W. Va. 162, 6 S. E. 428.

[n] (W. Va. 1890) Code, c. 116, § 29, which provides for the trial of misdemeanors by the court instead of a jury when defendant consents thereto, is constitutional.—State v. Griggs, 34 W. Va. 78, 11 S. E. 740; Same v. Snider, 34 W. Va. 83, 11 S. E. 742.

§ 200. On plea of guilty.

[a] (Ind. 1885) Upon indictment for murder the defendant's case, after plea of guilty entered, is for the consideration of a jury and not of the court; and a judgment entered on such plea by the court will be reversed as nullity.—Wartner v. State, 102 Ind. 51, 1 N. E. 65.

[b] (N. H. 1892) A person indicted for murder may waive his constitutional right to a jury trial by pleading guilty.—State v. Almy, 67 N. H. 274, 28 Atl. 872, 22 L. R. A. 744.

§ 201. Number of jurors.

In bastardy proceeding, see ante, § 189 [a].
Infringement of right, see post, §§ 221–225.

[a] Defendant cannot waive his constitutional right to trial by jury, so as to authorize a trial by less than 12 jurors.
—(Cal. 1874) People v. O'Neil, 48 Cal. 257;
(Ind. 1876) Allen v. State, 54 Ind. 461;
(Mo. 1877) State v. Davis, 66 Mo. 684, 27 Am. Rep. 387;
(N. Y. 1858) Cancemi v. People, 18 N Y. 128;
(Pa. 1858) Commonwealth v. Shaw (Quart. Sess.) 7 Am. Law Reg. (O. S.) 289; (1888) Commonwealth v. Byers, 5 Lanc. Law Rev. 270, 5 Pa. Co. Ct. R. 295.

[b] The defendant's consent to a trial for a felony by less than 12 men is absolutely void.
—(Miss. 1884) Hunt v. State, 61 Miss. 577;
(Mo. 1867) State v. Mansfield, 41 Mo. 470;
(Mont. 1881) Territory v. Ah Wah, 4 Mont. 149, 1 Pac. 732, 47 Am. Rep. 341;
(N. M. 1895) Territory v. Ortiz, 42 Pac. 87.

[c] A defendant in a criminal action may, with the consent of the state and court, waive a statute enacted for his benefit, or a constitutional provision giving him the right to be tried by a full jury of 12.
—(Iowa, 1879) State v. Kaufman, 51 Iowa, 578, 2 N. W. 275, 33 Am. Rep. 148; (1890) Same v. Grossheim, 79 Iowa, 75, 44 N. W. 541;
(Minn. 1888) State v. Sackett, 39 Minn. 69, 38 N. W. 773.
CONTRA, see
(Ala. 1870) Bell v. State, 44 Ala. 393;
(N. Y. 1858) People v. Cancemi, 7 Abb. Prac. 271.

[d] In a trial for misdemeanor, the defendant may consent to be tried by less than 12 jurors.
—(Ky. 1858) Murphy v. Commonwealth, 58 Ky. (1 Metc.) 365; (1859) Tyra v. Commonwealth, 59 Ky. (2 Metc.) 1;
(Mo. 1867) State v. Mansfield, 41 Mo. 470;
(Nev. 1876) State v. Borowsky, 11 Nev. 119.

[e] (Ark. 1848) A defendant in a criminal case, accused of an assault, etc., is entitled, by the constitution, to a trial by a jury of twelve men, but he may waive the right, and submit to a trial by six men, or by the justice of the peace alone, if he so choose; and the statute authorizing a trial by six jurors is, so far as it tends to deprive the defendant of this right, unconstitutional.—State v. Cox, 8 Ark. (3 Eng.) 436.

[f] (Ark. 1886) A defendant, under indictment for illegal liquor traffic, declined to agree to have his case tried by a jury of less than 12. Thereupon the court, by mistake, impaneled a jury of 11. The error was not discovered until the evidence was all in, and the jury were being instructed as to the law of the case. The court ordered another juror in the box, and was about to hear the case all over, when the defendant objected; whereupon the court ordered the jury of 11 to retire, and consider their verdict. *Held* that, under these circumstances, the defendant could not be regarded as having agreed to be tried by a jury of less than 12.—Warwick v. State, 47 Ark. 568, 2 S. W. 335.

[g] (Ark. 1886) Section 2219, Mansf. Dig., providing that cases other than felony may, by agreement of the parties, be tried by a jury of less than 12 jurors, is not unconstitutional. —Warwick v. State, 47 Ark. 568, 2 S. W. 335.

[h] (Iowa, 1879) Where, in a prosecution for forgery, a juror was taken ill during the trial, and was discharged with the consent of the defendant, the continuance of the trial with the remaining 11 jurors was not an infringement of the defendant's right to trial by jury, as secured by the constitution, which provides that "the right of trial by jury shall remain inviolate."—State v. Kaufman, 51 Iowa, 578, 2 N. W. 275, 33 Am. Rep. 148.

[i] (Mass. 1853) On a trial for a misdemeanor, if the defendants' counsel consent that one juror may be withdrawn, and the case proceed with the remaining eleven, which consent is duly entered of record, a verdict of guilty will not be set aside because rendered by only eleven jurors.—Commonwealth v. Dailey, 66 Mass. (12 Cush.) 80.

[j] (Mich. 1867) Where there had been a conviction of murder by a jury, one of whom, being an alien, was totally disqualified as a juror, but the fact was not discovered by the defendant till after verdict, on a motion for a new trial, it was *held* that the defendant could not expressly or impliedly waive his constitutional right to trial by 12 men.—Hill v. People, 16 Mich. 351.

[k] (Pa. 1882) Act May 1, 1861, providing that certain offenses may be tried, at defendant's election, by a justice of the peace and six jurors, is not in conflict with Bill of Rights, art. 1, § 6, declaring that trial by jury shall be as heretofore, and the right thereof remain inviolate.—Lavery v. Commonwealth, 101 Pa 560.

[l] (Pa. 1888) A trial in the court of quarter sessions by 11 jurors, although the twelfth juror was excused on account of sickness, and the trial continued with the consent of the defendant, is illegal, since the defendant cannot waive his constitutional right to trial by

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jury, so as to authorize a trial by less than 12 jurors.—Commonwealth v. Byers, 5 Lanc. Law Rev. 270, 5 Pa. Co. Ct. R. 295.

[m] (Pa. 1894) One under indictment for obtaining money by false pretenses may waive his constitutional right to a trial before a jury of 12.—Commonwealth v. Sweet (Quart. Sess.) 16 Pa. Co. Ct. R. 198; Id., 4 Pa. Dist. R. 136.

[n] (S. D. 1894) Trial by a jury of less than the constitutional number, by consent, is a "trial by jury," within the meaning of Huron City Charter, § 24, giving the police justice exclusive jurisdiction over offenses against the ordinances of the city, and section 27, allowing an appeal in such cases as were tried without a jury, and in no others.—City of Huron v. Carter, 5 S. D. 4, 57 N. W. 947.

§ 202. Form and sufficiency of waiver.

[a] (Ga. 1890) On a trial for a misdemeanor, defendant's waiver of arraignment and a jury trial recited that he "waives arraignment and a trial by jury, pleads not guilty, and puts himself upon the country." Defendant then appeared, and went to trial without a jury. *Held*, that the words "puts himself upon the country," contained in the printed form on which the waiver was written, and which through inadvertence were not erased, were mere surplusage.—Logan v. State, 86 Ga. 266, 12 S. E. 406.

[b] (Ind. 1861) A waiver of trial by jury in criminal cases and an agreement for trial by the court (2 Rev. St. p. 371) is not binding on defendant, if it be made by his attorney without consulting him, though he was present in court.—Brown v. State, 16 Ind. 496.

[c] (Mich. 1894) A defendant, charged before a justice with being a disorderly person, was asked if he wanted a jury, and he replied, by his attorney, that the court could do as it chose about the jury, as he should put in no defense. *Held*, that defendant waived a jury.—People v. Weeks, 99 Mich. 86, 57 N. W. 1091.

[d] (N. Y. 1870) The right of trial by jury must be distinctly waived by the prisoner, and such waiver be distinctly and affirmatively shown on the return, to give the court of special sessions of the city of New York jurisdiction. It is not enough to show that the prisoner elected to be tried "by the court of special sessions," but the question "if he waives a trial by jury" must be distinctly put to him.—People v. Mallon, 39 How. Prac. 454.

[e] (Ohio, 1886) Under Rev. St. § 3718a, giving the justice of the peace jurisdiction of prosecutions for the adulteration of food, and providing that, if a trial by jury be not waived, the justice shall proceed to impanel a jury to hear such cause, the accused need not waive the trial by jury in writing to give the magistrate jurisdiction to proceed to final judgment in the case without a jury, since Rev. St. § 7147, providing that, where one accused of a misdemeanor in a writing subscribed by him during the examination waives a jury and submits to be tried by the magistrate, he may render a final judgment, does not apply to the prosecution under such special statute.—Martindale v. State, 1 O. C. D. 328, 2 Ohio Cir. Ct. R. 328.

§ 203. Operation and effect of waiver.

[a] (Ala. 1885) A waiver of trial by jury does not apply to a subsequent trial at another term of court.—Cross v. State, 78 Ala. 430.

[b] (Ga. 1892) A person who waives a trial by jury, and is convicted by the county court of a misdemeanor, but, on certiorari to the superior court, obtains a reversal, may, on return to the county court, withdraw his waiver of trial by jury, and demand a jury trial.—Brown v. State, 89 Ga. 340, 15 S. E. 462.

[c] (Ga. 1896) On the case being called for trial, accused declined to have counsel appointed to defend him, and also waived his right to a jury trial, but on a subsequent day the court appointed counsel, who promptly moved to withdraw the previous waiver of jury. *Held* that, it not appearing that the state's counsel made any point as to delay, or claimed that the granting of the motion would result in prejudice to the state, the motion was erroneously denied.—Butler v. State, 97 Ga. 404, 23 S. E. 822.

[d] (Iowa, 1855) A defendant appealed from a justice, alleging the judgment to be against the evidence. In the district court the prosecuting officer moved to affirm. Thereupon the defendant, being asked whether he wanted a jury, said he did not. Then the court affirmed the judgment. Then the defendant asked for a new trial, and demanded a jury to try the issue presented. *Held* that, if otherwise entitled, declining a jury on the motion, where he had no right to a jury, was not a waiver of a jury for a new trial.—Baurose v. State, 1 Iowa (1 Clarke) 374.

[e] (La. 1881) Accused, indicted for larceny, waived jury trial, was found guilty by the court, and obtained a new trial. *Held*, that he could demand a jury.—State v. Touchet, 33 La. Ann. 1154.

[f] (Minn. 1893) The right, having been waived, cannot be recalled at will.—State v. Bannock, 53 Minn. 419, 55 N. W. 558.

[g] (N. J. 1883) One who waives in writing his right to trial by jury, as provided by Laws 1867, p. 463, cannot afterwards retract the waiver after he has pleaded to the accusation.—Edwards v. State, 45 N. J. Law (16 Vroom) 419.

[h] (N. Y. 1863) Where a person, arrested and brought before a magistrate under a charge of petit larceny, presented to the magistrate a writing, signed by him, in which he waived a jury and demanded to be tried before a court of special sessions, he thereby waived his right, when subsequently brought before the court of special sessions, to demand a jury.—People v. Riley, 5 Parker, Cr. R. 401.

[i] (Ohio, 1871) When by consent of both parties a jury is waived and a cause submitted to the court, neither party can subsequently withdraw his waiver and demand a jury, unless for special reasons to be determined by the court.—Hauser v. Metzger, 1 Cin. R. 164.

[j] (Vt. 1894) Where the parties waive their right to go to the jury, they make the trial one by the court.—Miltimore v. Bottom, 66 Vt. 168, 28 Atl. 872.

(F) DENIAL OR INFRINGEMENT OF RIGHT.

1. IN GENERAL, §§ 204-220.
2. NUMBER OF JURORS, §§ 221-225.
3. CONSTITUTION AND SELECTION OF JURY, §§ 226-232.
4. RESTRICTION OR INVASION OF FUNCTIONS OF JURY, §§ 233-235.
5. EFFECT OF PROVISION FOR OTHER REMEDY, §§ 236-242.

Extending jurisdiction of inferior courts, see ante, § 24.

1. IN GENERAL.

IMPAIRMENT OF RIGHT IN GENERAL, § 204.
STATUTORY PROVISIONS, § 205.
RIGHTS OF ACTION AND PROCEDURE IN CIVIL CASES, § 206.

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— JURISDICTION IN EQUITY, § 207.
— PROCEEDINGS FOR PROCUREMENT OF JURY, § 208.
— VERIFICATION OF PLEADING AND AFFIDAVIT OF DEFENSE, § 209.
— ENTRY OF JUDGMENT, § 210.
— NEW TRIAL, § 211.
— RESTRICTIONS ON RIGHT OF APPEAL, § 212.
— COSTS, § 213.
— BONDS AND RECOGNIZANCES, § 214.
— COMPULSORY REFERENCE, § 215.
PRACTICE AND PROCEDURE IN CRIMINAL PROSECUTIONS, § 216.
— RESTRICTIONS ON RIGHT OF APPEAL, § 217.
— REQUIREMENT OR DENIAL OF BAIL, § 218.
— COSTS, § 219.
RE-EXAMINATION OR OTHER REVIEW OF QUESTIONS OF FACT TRIED BY JURY, § 220.

§ 204. Impairment of right in general.

[a] (Ind. 1858) A party who claims his constitutional right of trial by jury must have it, though full justice has been done by the court as to the merits.—Shaw v. Kent. 11 Ind. 80.

[b] (Mass. 1885) Prov. Laws 1692–93, c. 13, § 2, providing that every person building with brick or stone in Boston shall have liberty to set half his partition wall on his neighbor's ground, and that when such neighbor shall build he shall pay for one-half the partition wall, so far as it shall be built against, is unconstitutional, in that it denies the right of trial by jury.—Wilkins v. Jewett, 139 Mass. 29, 29 N. E. 214.

[c] (Nev. 1877) If it appears that the court below refused a demand for a jury to try issues of fact in an action at law, and tried the case without a jury, it is the duty of the appellate court, notwithstanding the fact that such issues may have been fairly tried and proper judgments rendered by the court, to grant a new trial.—Treadway v. Wilder, 12 Nev. 108.

[d] (Pa. 1888) Act May 4, 1855, giving the custody and earnings of children to the mother, when the father from drunkenness neglects to provide for them, without a jury trial, is not violative of Const. art. 6, § 1, preserving the right of a trial by jury.—Van Billiard v. Van Billiard, 6 Pa. Co. Ct. R. 333.

[e] (Tex. 1873) Although the governor may assume that a vacancy exists in the office of state treasurer, he has no power to adjudge the office forfeited. Such power belongs alone to the judiciary, and the right of trial by jury exists in every such case.—Honey v. Graham. 39 Tex. 1.

§ 205. Statutory provisions.

[a] (Miss. 1840) Where, on motion of a surety, who had paid the debt, against the principal, there was an issue found, and a trial by jury, it was *held* that the proceedings were valid, although the statute authorizing this summary remedy made no provision for the trial by jury, and without such trial would be unconstitutional.—Woodward v. May, 5 Miss. (4 How.) 389.

[b] (Wis. 1866) Rev. St. c. 140, § 19, which provides for ascertaining by the verdict of a jury, in an action on a penal bond, the fact of a breach and the amount due, is modified by Laws 1864, c. 88, which provides for a compulsory reference when the trial of an issue of fact will require the examination of a long account.—Dane County Sup'rs v. Dunning, 20 Wis. 210.

§ 206. Rights of action and procedure in civil cases.

In criminal prosecutions, see post, § 216.

[a] (U. S. 1870) Internal Revenue Act July 13, 1866, § 19 (14 Stat. 152), as amended March 2, 1867 (14 Stat. 475), providing that no suit to restrain the assessment or collection of any tax authorized under the act shall be maintained in any court, is not unconstitutional, in that it deprives the party of a trial by jury.—Pullan v. Kinsinger, Fed. Cas. No. 11,463 [2 Abb. (U. S.) 94].

[b] (U. S. 1875) Act June 22, 1874 (18 Stat. 186), requiring the production by defendants or claimants of all books, papers, etc., in proceedings under the revenue laws, and providing that in case of failure so to do the allegations of the libel may be taken as confessed, is not unconstitutional, as in violation of that provision of the federal constitution which gives the right of trial by jury in suits at common law when the value in controversy shall exceed $20. When the issues are made up, the claimants have a right to demand a jury trial; but they must first submit to and comply with all reasonable and proper rules and orders of the court entered against them in making up the issues and preparing the case for final trial.—United States v. Distillery No. 28, Fed. Cas. No. 14,966 [6 Biss. 483].

[c] (Conn. 1841) The statute exempting military officers from actions at law for imposing fines is not unconstitutional, as impairing the right of trial by jury.—Merriman v. Bryant, 14 Conn. 200.

[d] (Ga. 1808) "An act to alleviate the condition of debtors and afford them temporary relief," in providing, by section 4, that the superior and inferior courts shall not issue any civil process or try any civil case, except for trial of right of property, real and personal, until the act by its limitations expires, since it merely postpones, does not take away the right of trial by jury, in violation of the constitutional prohibition.—Grimball v. Ross, T. U. P. Charlt. 175.

[e] (Ga. 1848) An act of the legislature, clogging the right of trial by jury with onerous conditions, will not be pronounced unconstitutional, unless it totally prostrates the right or renders it wholly unavailing to a party for his protection; nor is an act authorizing a judgment to be rendered without the intervention of a jury on that account unconstitutional.—Flint River Steamboat Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248.

[f] (La. 1876) A state law allowing judge, on disagreement of jury, to decide cause, does not infringe the federal constitution.—Joseph v. Bidwell, 28 La. Ann. 382, 26 Am. Rep. 102.

[g] (N. J. 1836) A court cannot by a rule of practice alter the law, so as to deprive a party of his right to trial by jury.—Hinchly v. Machine, 15 N. J. Law (3 J. S. Green) 476.

[h] (N. Y. 1882) Code Civ. Proc. § 1778, which requires that, in an action against a corporation on an evidence of debt, an order must be obtained and served with the answer, is in derogation of the common law and must be strictly construed, in view of the fact that it deprives a corporation of the constitutional right of trial by jury guarantied to natural persons, and therefore must be held to apply only to actions founded exclusively on evidence of debt issued by corporations.—Bradley v. Albemarle Fertilizing Co., 2 Civ. Proc. R. 50.

[i] (N. Y. 1893) Code Civ. Proc. § 2244, relating to pleadings in summary proceedings, provides that at the time when a precept is returnable the person in or claiming possession may file "a written answer, verified in like manner as verified answers in actions in the supreme court, denying generally the allegations, or specifically any material allegations of the petition." No other answer or pleading by defendant in such proceeding is authorized by statute. Section 2247 provides that defendant may, on

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tendering or paying the proper amount of costs, demand a jury trial. *Held*, that where, in summary proceedings to remove a tenant for nonpayment of rent, defendant filed a verified answer denying all the allegations in the petition, and alleging generally payment of all rent due, and tendered the proper fees for a jury, and demanded a jury trial, it was error for the justice, on defendant's refusal to comply with an order requiring him to furnish a bill of particulars of the alleged payments, to refuse defendant a jury trial, and render judgment against him.—Bloom v. Huyck, 71 Hun, 252, 25 N. Y. Supp. 7.

[j] (N. C. 1787) The act of assembly of 1785, requiring the court to dismiss, on motion, suits brought by persons whose property had been confiscated against the purchasers, on affidavit of the defendants that they were purchasers from the commissioners of confiscated property, is unconstitutional, as an infringement of the right of trial by jury.—Bayard v. Singleton, 1 N. C. 5.

[k] (Ohio, 1892) Rev. St. § 5204, which provides that, in an action arising on contract, trial by jury may be waived, by the consent of the party appearing, when the opposite party fails to appear by himself or attorney, does not impair the right of trial by jury, and is therefore valid.—Springfield, J. & P. Ry. Co. v. Western Ry. Const. Co., 49 Ohio St. 681, 32 N. E. 961.

[l] (S. C. 1835) The seventy-ninth rule of the supreme court, which requires a copy of the indictment in cases of felony to be obtained by order of the judge who tried it before an action for malicious prosecution shall be commenced, is no abridgment of the right of trial by jury as used in the state before the adoption of the constitution of the state.—Burton v. Walkins, 2 Hill, 674.

[m] (Va. 1883) The jurisdiction of a justice of the peace is limited to suits for less than $50. A. owed B. $126. B. induced A. to give B. bonds of $42 each. After all became due B. brought three separate suits upon such bonds, respectively, before a justice of the peace. *Held*, that a writ of prohibition to restrain the justice from proceeding was properly issued, since the splitting of the total indebtedness into several distinct debts was an infringement of the right to trial by jury.—James v. Stokes, 77 Va. 225.

[n] (Wis. 1874) The charter of Waupun (P. & L. Laws 1871, c. 381, §§ 38–40), providing for condemning land for a street, but not for notifying the owner of the time and place for the assembling of the jury, *held* to contravene Const. art. 11, § 2, that "no municipal corporation shall take private property for public use against the consent of the owner, without the necessity thereof being established by the verdict of a jury."—Seifert v. Brooks, 34 Wis. 443, following Hood v. Finch (1859) 8 Wis. 381.

§ 207. —— Jurisdiction in equity.

[a] (U. S. 1890) Code Miss. 1880, § 1845, providing that, in an action to set aside a fraudulent conveyance and subject the property to a simple contract debt, the creditor shall have a lien on the property from the filing of his bill, does not deprive the defendant of his right of trial by jury to determine the amount of the demand against him.—Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358.

[b] (Ala. 1888) Code 1886, § 3545, authorizing a creditor who has no lien or judgment to file a bill in chancery for the discovery of assets of the debtor liable to the payment of his debts, making no provision for the trial of any questions arising on such a bill, does not violate Const. art. 1, § 12, preserving the right of trial by jury.—Montgomery & F. Ry. Co. v. McKenzie, 85 Ala. 546, 5 South. 322.

[c] (Ala.) Code 1886, § 3545, providing that a creditor without a lien or judgment may maintain a bill in chancery for the discovery of the assets of the debtor, is not a violation of Const. art. 1, § 12, providing that "the right of trial by jury shall remain inviolate."—(1888) Southern Ry. Construction & Land Co. v. McKenzie, 85 Ala. 546, 5 South. 322; (1892) Id., 96 Ala. 465, 11 South. 367; (1892) Montgomery & F. Ry. Co. v. Same, Id.; (1892) Norman v. Goetter, 96 Ala. 468, 11 South. 368.

[d] (Ala. 1802) Code 1886, § 3546, relating to bills of discovery, as amended by Sess. Acts 1888–89, p. 96, providing that any number of judgment or other creditors may join as complainants in such bill, is not in conflict with Const. art. 1, § 12, "preserving the right of trial by jury," because it does not provide for a jury trial to determine the amounts due the several complainants.—Cook v. New York Condensed Milk Co., 100 Ala. 580, 13 South. 685.

[e] (Ala. 1892) Code 1886, § 3545, providing that a creditor without a lien or judgment may maintain a bill for the discovery of the assets of the debtor, does not violate Const. art. 1, § 12, providing that the right of trial by jury shall remain inviolate.—Cook v. Schmidt, 100 Ala. 582, 13 South. 686.

[f] (Md. 1889) Code 1888, art. 16, § 26, which authorizes any person entitled to an interest of any kind in property to institute a suit against any one denying or interested to deny his title, and provides that the court may in its discretion declare him entitled thereto, without other relief being asked or given, so far as its language seems to warrant the filing of a bill to quiet title to land claimed by virtue of adverse possession against the holder of the paper title violates the constitutional provision guarantying to suitors the right of trial by jury.—McCoy v. Johnson, 70 Md. 490, 17 Atl. 387.

[g] (Miss. 1891) Code, § 1843, relating to chancery courts, provides that "the said courts shall have jurisdiction of bills exhibited by creditors, who have not obtained judgments at law, or, having judgments, have not had executions returned unsatisfied, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering, delaying, or defrauding creditors, and may subject the property to the satisfaction of the demand of such creditors, as if complainant had a judgment and execution thereon returned, 'No property found.'" *Held*, that a decree setting aside an assignment on the complaint of creditors who had not obtained judgments at law would not be disturbed on the ground that it violated Const. art. 1, § 12, which declares that "the right of trial by jury shall remain inviolate," since Const. 1890, § 147, expressly provides that "no judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction."—Scott v. Francis Vandegrift Shoe Co., 10 South. 455.

[h] (N. Y. 1870) Act April 24, 1862, providing for the collection of demands against vessels, by giving a lien enforceable in rem, is not in conflict with Const. art. 1, § 2, preserving the right of trial by jury in cases in which it had been theretofore used, since liens were given in such cases before the adoption of the constitution, which were enforceable in equity without a jury.—Sheppard v. Steele, 43 N. Y. 52, 3 Am. Rep. 660.

[i] (N. Y. 1891) Laws 1844, c. 220, relating to mechanics' liens in New York City, merely provided that liens may be filed where work has been done or materials furnished on buildings in that city; that foreclosure proceeding should

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be commenced by the service of a notice on the owner: and that issue should be joined on the appearance of the parties and tried as in action of assumpsit. Laws 1885, c. 342, relating to mechanics' liens, applies to the entire state, and provides that, in an action to foreclose, all persons having a lien on the property must be made defendants, and that the court may settle and determine the equities of all the parties thereto; and section 12 provides that the issues joined must be tried the same as other issues are tried. *Held*, that the act of 1885 does not violate Const. 1846, art. 1, § 2, which provides that "trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever," since the issues of fact in an action to foreclose a mechanic's lien are still triable by jury.—Schillinger Fireproof Cement & Asphalt Co. v. Arnott (Sup.) 14 N. Y. Supp. 326.

[j] (Pa. 1870) Under the constitution the legislature cannot convert a legal right into an equitable one, so as to infringe upon the right of trial by jury.—Appeal of Norris, 64 Pa. (14 P. F. Smith) 275.

[k] (Pa. 1884) Act March 17, 1869, authorizing the court to allow the attachment of property alleged to have been fraudulently conveyed, is not unconstitutional, as denying to defendant the right to trial by jury.—White v. Thielens, 106 Pa. 173.

[l] (Pa. 1895) The supplement of April 22, 1856 (P. L. 502), to Act 1850, relative to litigation between tenants in common, will not be construed to require a suit in equity, where one has a legal right, as this would be depriving parties of the right to jury trial, contrary to the constitution.—Winton Coal Co. v. Pancoast Coal Co., 170 Pa. 437, 33 Atl. 110.

[m] (Tenn. 1831) Acts 1829, c. 95, creating a special court for the determination of suits commenced by the Bank of Tennessee against its officers and other defaulters to the institution, and providing that such suits shall be tried according to the principles of equity, and that there shall be no appeal, is repugnant to the constitutional provision that the right of trial by jury shall remain inviolate.—State Bank v. Cooper, 10 Tenn. (2 Yerg.) 599, 24 Am. Dec. 517.

[n] (W. Va. 1889) Code 1887, c. 106, § 1, which provides that an attachment may be sued out in equity for the recovery of damages for a wrong, is not unconstitutional, as depriving defendant of the right to trial by jury.—McKinsey v. Squires, 32 W. Va. 41, 9 S. E. 55.

§ 208. —— Proceedings for procurement of jury.

[a] (Mass. 1882) A statute providing that, in civil actions, a party shall not be entitled to a trial by jury unless he files, within the time prescribed, a notice that he desires such trial, is constitutional.—Foster v. Morse, 132 Mass. 354, 42 Am. Rep. 438.

[b] (N. J. 1838) Where the statute provides for a trial by jury, unless expressly waived, the court cannot make a rule that a jury shall be considered as waived unless demanded at a certain time.—Ten Eyck v. Farlee, 16 N. J. Law (1 Har.) 348.

[c] (N. Y. 1887) Const. art. 1, § 2, preserving the right to have an issue of adultery tried by a jury, could not be modified or limited by a rule of practice, such as general rule No. 31, so as to reduce it to a matter in the discretion of the court, if application therefor was not made within 10 days after issue.—Conderman v. Conderman, 44 Hun, 181.

§ 209. —— Verification of pleading and affidavit of defense.

[a] (D. C. 1879) The seventy-third rule of the supreme court, requiring defendant's pleas to a petition under oath to be verified by affidavit, is not unconstitutional, as denying a defendant the right to trial by jury in all cases where the value in controversy exceeds $20.—National Metropolitan Bank v. Hitz, 4 MacArthur & M. 198.

[b] (D. C. 1893) A rule of court providing that plaintiff in an action ex contractu, whose affidavit sets out his cause of action, and the amount he claims to be due, shall be entitled to judgment, unless defendant files a counter affidavit, is not unconstitutional, as depriving defendant of the right of jury trial.—Cropley v. Vogeler, 2 App. D. C. 28.

[c] (Ga. 1878) Act 1870, authorizing the city court of Augusta to render judgment without a jury in all civil cases founded on contract, where an issuable defense has not been filed on oath, is not unconstitutional, as it does not deprive the defendant of the right of trial by jury.—Dortic v. Lockwood, 61 Ga. 293.

[d] (Miss. 1856) Act 1854, providing that, if a railroad company sue for installments of stock, it shall not be necessary for the company to prove such subscription to have been made, unless the defendant shall deny the subscription by plea or answer, verified by affidavit, is constitutional.—Thigpen v. Mississippi Cent. R. Co., 32 Miss. 347.

[e] (Pa. 1854) An act of assembly requiring specific affidavits of defense in certain cases, where copies of the instrument sued on are filed, is not unconstitutional, as infringing the right of trial by jury.—Bishop v. Denormande, 1 Pittsb. R. 145.

[f] (Pa. 1878) The law as to affidavits of defense does not contravene the constitutional guaranty of the right of trial by jury.—Lawrance v. Borm, 86 Pa. 225; Randall v. Weld, Id. 357.

[g] (Vt. 1849) The county court have the right to require the defendant, in a suit apparently brought for the collection of a debt, to furnish his affidavit, at least of his own belief, that the claim is disputable; and, if he refuse to comply with such rule, it is not error for them to deny him a trial by jury.—Jones v. Spear, 21 Vt. 426.

§ 210. —— Entry of judgment.

[a] (N. Y. 1850) The statute of 1844, providing that all recognizances given in the city and county of New York to answer a criminal charge, on being forfeited, shall be filed by the district attorney, together with a certified order of the court forfeiting the same, in the office of the county clerk, and docketed as if the same were the transcript of a judgment record for the penalty, and that such judgment shall be a lien on real estate, and may be collected by execution, is not in contravention of the section of the constitution of the year 1821, which declared that the trial by jury, in all cases in which it had been theretofore used, should remain inviolate forever.—Gildersleeve v. People, 10 Barb. 35.

[b] (Pa. 1872) Where defendant, answering with plaintiff, agreed to abide by the act of July 26, 1842, a judgment entered under that act for an unpaid balance of a premium note, by filing a memorandum in the prothonotary's office, is not an infringement of the defendant's right to have his liability settled by a jury, as he has by such an agreement agreed to waive a jury trial.—Lycoming Fire Ins. Co. v. Buck, 1 Luz. Leg. Reg. 351.

[c] (Pa. 1877) A rule of court provided that, in appeals from the judgment of a magistrate, if the appellant did not appear when the case was called, judgment would be given against him. *Held*, that the rule was not a violation

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of the right of trial by jury.—Lloyd v. Toudy, 4 W. N. C. 225.

[d] (Wash. 1895) Logger's Lien Act (Laws 1893, p. 428) § 20, in so far as it provides that in an action against a purchaser of logs, lumber, etc., within the 30 days given laborers to file liens, to recover damages for eloigning the property, the court may enter a personal judgment against the eloigner, and thus deprive him of the right to trial by jury, is invalid and void.—McCoy v. Cook, 13 Wash. 158, 42 Pac. 546.

§ 211. —— New trial.

[a] (U. S. 1888) The exaction, as a condition of refusing a new trial, that the prevailing party shall remit a portion of the amount of the verdict, does not impair the constitutional right of trial by jury.—Arkansas Val. Land & Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854.

[b] (R. I. 1879) The repeal of Gen. St. c. 210, § 1, which gave suitors in the supreme court a second trial as of course, does not contravene Const. art. 1, § 15, providing that "the right of trial by jury shall remain inviolate."—Mathews v. Tripp, 12 R. I. 256.

[c] (Tenn. 1890) Code, § 3122, providing that not more than two new trials shall be granted in an action, does not infringe the constitutional right of trial by jury, or operate to deprive any one of his property otherwise than by the judgment of his peers or the law of the land.—East Tennessee, V. & G. Ry. Co. v. Mahoney, 89 Tenn. 311, 15 S. W. 652.

§ 212. —— Restrictions on right of appeal.

Appeal to court in which jury of less than 12 *is authorized, see* post, § 222 [r].

Effect of provision for jury trial on appeal, see post, § 237.

In criminal prosecutions, see post, § 217.

[a] (Colo. 1892) Even if, where trial by jury is a constitutional right, a statute permitting this right to be exercised only upon an appeal, there being no unreasonable restrictions connected with the appeal, is legal, it is not legal where the right of appeal, and jury trial in connection therewith, are made to depend on the giving of bond and other restrictions.—McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516.

[b] (Conn. 1867) A statute that does not allow an appeal to a jury from a judgment of a justice of the peace not exceeding $5 in amount is not unconstitutional in this state.—Curtis v. Gill, 34 Conn. 49.

[c] (Conn. 1871) The adoption of a state constitution, providing that "the right of trial by jury shall be preserved inviolate," does not prohibit the legislature from increasing the amount requisite to entitle a defeated party in an action before a justice to appeal and obtain a jury trial, although such new enactment enlarges the number of causes in which a jury trial is practically denied.—Guile v. Brown, 38 Conn. 237.

[d] (Mass. 1805) The provision of the constitution that "in all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practiced, the parties have a right to a trial by jury," is not violated by a law which disallows an appeal from a justice of the peace on a complaint filed to collect a fine under the militia law.—Mountfort v. Hall, 1 Mass. 443.

[e] (Mass. 1857) A statute extending the jurisdiction of justices of the peace to civil actions for the recovery of not more than $100, and requiring any party appealing to give security for the prosecution of his appeal, and for costs, is not unconstitutional, as infringing on trial by jury.—Hapgood v. Doherty, 74 Mass. (8 Gray) 373.

[f] (Mass. 1874) St. 1863, c. 191, authorizing the mayor and aldermen of Cambridge to construct sidewalks and to assess the expense of edge stones and covering materials "upon the abutters in just proportions," is not unconstitutional, for giving one aggrieved no right of appeal to a jury.—Howe v. City of Cambridge, 114 Mass. 388.

[g] (Mont. 1885) Act March 2, 1883, § 2, providing that the findings of appraisers appointed to assess the value of stock killed by a railroad shall be held to be conclusive evidence of the value of such stock, is unconstitutional in that, by denying the right of appeal from such findings, it deprives the railroad of the right of trial by jury.—Graves v. Northern Pac. R. Co., 5 Mont. 556, 6 Pac. 16, 51 Am. Rep. 81.

[h] (Neb. 1894) Code Civ. Proc. § 985, providing that, "if either the plaintiff or defendant in his bill of particulars claims more than $20, the case may be appealed to the district court, but if neither party demand a greater sum than $20, and the case is tried by a jury, there shall be no appeal," is not in contravention of Bill of Rights, § 6, providing that "the right of trial by jury shall remain inviolate, but the legislature may authorize trial by a jury of a less number than 12 men in courts inferior to the district court," or of section 24, providing that "the right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied," as applied to an action before a justice of the peace involving less than $20, and in which a jury trial with a jury composed of less than 12 men was had, since section 24, while preserving the right of review in the courts of last resort, does not necessarily imply that such review shall be obtained by appeal.—Moise v. Powell, 40 Neb. 671, 59 N. W. 79.

[i] (N. H. 1878) The provincial act of 1714, in force prior to 1791, provided for a trial by a jury of 18 men in proceedings by a landlord for the eviction of a tenant. Act 1791 provided for a trial of forcible entry and detainer suits before two justices, with a jury, who ordered restitution of the land without inquiring into the merits of the title; and their judgment was no bar in a subsequent action. Gen. St. 1866, c. 231, empowers a justice of the peace to summon the tenant in all real and possessory actions, and try all questions as to the right of immediate possession, except the question of title, in which the defendant can have the benefit of a jury trial either on a plea of title or appeal only, by submitting to the burden of giving security, not only to prosecute his appeal, but to pay rent and damages for the detention of the land. *Held*, that the act of 1866 was in contravention of the constitution of 1792, providing that trial by jury as theretofore "used and practiced" shall remain inviolate.—Perkins v. Towle, 58 N. H. 425.

[j] (N. J. 1881) Const. 1884, ordaining that the right of trial by jury shall remain inviolate, Act March 12, 1880, denying the right to demand a jury trial on appeal from the justice's court, unless the judgment, exclusive of the costs, exceeds $30, is unconstitutional.—McGinty v. Carter, 48 N. J. Law (19 Vroom) 113, 3 Atl. 78.

[k] (Ohio, 1872) Swan & C. St. pp. 1280, 1301, providing for a preliminary assessment of damages for taking land for a county road

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by a board of three viewers, and requiring the claimant, on appealing from the order of the county commissioners made on the viewers' report, to give bond, etc., does not contravene Const. art. 1, § 5, declaring the right of trial by jury inviolate.—Reckner v. Warner, 22 Ohio St. 275, approving Norton v. McLeary (1858) 8 Ohio St. 205.

[l] (Pa. 1820) Act March 20, 1810, § 11, which requires the payment of costs before an appeal can be entered under the arbitration law, is not unconstitutional, as depriving a poor person of the right of trial by jury.—McDonald v. Schell, 6 Serg. & R. 240.

§ 213. —— Costs.

As restriction on right of appeal, see ante, § 212 [l].

In criminal prosecutions, see post, § 219.

[a] (Cal. 1895) There is no error in requiring a party, in accordance with a rule of court, to deposit jury fees as a condition to having a jury.—Bank of Lassen County v. Sherer, 108 Cal. 513, 41 Pac. 415.

[b] (Colo. 1877) Laws 1874, pp. 214, 215, providing that a party demanding a trial by jury in the probate court shall be required to advance and pay into court a jury fee of $20, does not contravene Const. U. S. Amend. 7, securing the right of trial by jury.—Venine v. Archibald, 3 Colo. 163.

[c] (Colo. 1877) The amount of a jury fee, which a party demanding a trial by jury may be required to pay, is a matter resting in the discretion of the legislature; and the courts will not interfere, unless the fixed fee amounts to a practical prohibition of the right.—Venine v. Archibald, 3 Colo. 163.

[d] (Conn. 1895) Gen. St. § 1356, providing for a jury of six for trial of an action of summary process, and requiring the party asking for it to give bonds, is constitutional.—Miller v. Lampson, 66 Conn. 432, 34 Atl. 79.

[e] (Iowa, 1875) Laws 15th Gen. Assem. c. 32, providing that a per diem of the jury shall be taxed as part of the costs, does not violate Bill of Rights, § 9, which declares that the right of trial by jury shall remain inviolate.—Adae v. Zangs, 41 Iowa, 536.

[f] (Iowa, 1876) The statute authorizing the jury's fees to be taxed to the unsuccessful party is constitutional.—Little v. McGuire, 43 Iowa, 447.

[g] (Iowa, 1888) Under Bill of Rights, § 9, declaring that "the right of trial by jury shall remain inviolate," Acts 1876, c. 143, § 16, as amended by Acts 19th Gen. Assem. c. 24, § 6, which provides for trial by 6 jurors in city superior courts, is not unconstitutional in requiring the party demanding 12 jurors to pay the additional expense of the same.—Conners v. Burlington, C. R. & N. Ry. Co., 74 Iowa, 383, 37 N. W. 966.

[h] (Me. 1872) Pub. Laws 1868, c. 151, § 6, providing that the party demanding a jury in the superior court shall pay the jury fee and tax the same in his costs, if he prevail, is not in violation of Const. art. 1, § 20, providing that in all civil cases and in all controversies concerning property "the parties shall have a right to trial by jury, except in cases where it has heretofore been otherwise practiced."—Randall v. Kehlor, 60 Me. 37, 11 Am. Rep. 169.

[i] (Minn. 1862) There is no valid objection to charging a party who demands a jury trial a reasonable jury fee.—Adams v. Corriston, 7 Minn. 456 (Gil. 365).

[j] (Mo. 1884) Rev. St. § 2802, giving special juries to either party, on motion, by paying the costs of the same, does not violate the constitutional right of trial by jury.—Vierling v. Stifel Brewing Co., 15 Mo. App. 125.

[k] (Mo. 1892) The provision of Rev. St. 1889, § 2613, for an attorney's fee as costs in favor of plaintiff in a suit for injury to stock resulting from the failure of a railroad company to fence its track, is not repugnant to Const. art. 2, § 28, which declares that the "right of trial by jury as hereinbefore enjoined shall remain inviolate," because the section does not expressly provide for a jury trial; but, being in the nature of a penalty or exemplary damages, the amount must be determined by a jury, unless the right be waived.—Briggs v. St. Louis & S. F. Ry. Co., 111 Mo. 168, 20 S. W. 32.

[l] (Tenn. 1892) In Acts 1891, c. 101, making railroads liable for all injuries to stock upon or near their unfenced tracks, the provision that the amount of attorney's fees to be allowed plaintiff, in an action to recover for such injuries, shall be fixed by the "court trying the case," does not refer to the judge alone but to the tribunal, including both judge and jury; and under it the question of fees should be submitted to the jury, so that the act does not as to such fees deprive the company of the right to a jury trial.—Illinois Cent. R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618; Newport News & M. V. R. Co. v. Barbour, Id.; Same v. Turner, Id.; Same v. Claybrook, Id.

[m] (Wyo. 1889) Rev. St. § 3401, providing that if, within 10 days after the order for change of venue, a plaintiff who has applied for the change fails to give bond for the costs thereof, the cause shall be deemed discontinued, and the costs taxed against said plaintiff, does not deny him the administration of justice or his constitutional right to a jury trial.—Barkwell v. Chatterton, 4 Wyo. 307, 33 Pac. 940.

§ 214. —— Bonds and recognizances.

As restriction on right of appeal in civil cases, see ante, § 212.

Entry of judgment on bond, see ante, § 210 [a].

[a] (Ark. 1849) Dig. c. 67, § 46, providing that, in case the property specified in the delivery bond shall not be delivered as provided, then the said bond shall have the force and effect of a judgment, on which execution may issue against all the obligors, is not repugnant to the constitutional guaranty of a trial by jury, because, in executing such a bond, the obligors must have accepted the condition proposed by the statute, and thus waived a jury trial.—Ex parte Reardon, 9 Ark. (4 Eng.) 450.

[b] (N. J. 1873) Nix. Dig. p. 576, requiring a person, however poor and unknown, to give a bond before he can discharge his vessel from a builder's lien and obtain a trial, does not violate the right of trial by jury.—Edwards v. Elliott, 36 N. J. Law (7 Vroom) 449, 13 Am. Rep. 463.

§ 215. —— Compulsory reference.

Involving examination of accounts, see ante, § 68.

Legal or equitable nature of actions as affecting right to make reference, see ante, §§ 35–83.

Making referee's report prima facie evidence, see post, § 234.

Reservation of right of resubmission to jury, see post, § 242 [c].

[a] (U. S. 1832) The courts of the United States cannot deprive either party of the right of trial by a jury of any issue of fact by referring such issue to referees without his ex-

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plicit consent.—United States v. Rathbone, Fed. Cas. No. 16,121 [2 Paine, 578].

[b] (Ga. 1886) Act Oct. 16, 1885, provides that masters in chancery shall report their findings of fact and conclusions of law; that on exceptions filed the judge shall examine the report, and if there be no error verdict shall be taken on the report, and if there be error he shall submit the issue to a jury, and only so much of the evidence as is pertinent to this issue shall be read; that newly-discovered evidence, such as would authorize a new trial, shall be submitted; that incompetent testimony admitted by the master shall be omitted, and competent testimony rejected by him shall be given to the jury. *Held*, that the act is not obnoxious to the constitutional provision (Code, § 5174) declaring that the right of trial by jury shall remain inviolate.—Mahan v. Cavender, 77 Ga. 118.

[c] (Mo. 1851) Article 16 of act regulating practice in courts of justice, authorizing a reference of issues to referees, does not infringe the constitutional right of trial by jury.—Shepard v. Bank of Missouri, 15 Mo. 143.

[d] (Neb. 1888) A purely legal action cannot by referred except by consent of the parties, the constitution guarantying to either party, in such case, the right of trial by a jury.—Kinkaid v. Hiatt, 24 Neb. 562, 39 N. W. 600.

[e] (Neb. 1895) A reference in an action at law cannot be had except by consent, as the parties are entitled to a trial by jury.—Kuhl v. Pierce County, 44 Neb. 584, 62 N. W. 1066.

[f] (N. H. 1875) That part of Acts 1874, c. 97, § 13, which provides for committing certain causes to referees for trial, is not in conflict with article 20 of the bill of rights, or any other part of the constitution of the state, although the legislature have no power to pass an act which shall take away or impair the substance of the right of trial by jury as used and practiced when the constitution was adopted.—Copp v. Henniker, 55 N. H. 179, 20 Am. Rep. 194.

[g] (N. C. 1878) A compulsory reference of issues of fact to the determination of a single person is a violation of the constitutional right of trial by jury.—Bernheim v. Waring, 79 N. C. 56.

[h] (Pa. 1892) Act March 25, 1873, which compels parties to submit certain controversies to arbitration, without right of appeal, is unconstitutional, as depriving the parties of their right to trial by jury.—Cutler v. Richley, 151 Pa. 195, 25 Atl. 96, 30 Wkly. Notes Cas. 561.

[i] (Tex. 1873) Parties have a right to trial by jury, and when a jury is demanded it is error in the court to dismiss the case upon a fact ascertained by the court from report of an auditor.—Pfeiffer v. Maltby, 38 Tex. 523.

§ 216. Practice and procedure in criminal prosecutions.

[a] (Ala. 1858) Code, § 3615, requiring that accused, after a change of venue, shall be tried on a certified copy of the indictment found, does not impair his right to a trial by jury and is not repugnant to any principle of the bill of rights.—Bramlett v. State, 31 Ala. 376.

[b] (Cal. 1865) Section 296 of the criminal practice act, providing that, "if the demurrer be disallowed, the court shall permit the defendant at his election to plead, which he must do forthwith, or at such time as the court may allow; if he do not plead, judgment shall be pronounced against him,"—does not interfere with the right of trial by jury guarantied in criminal cases by the constitution.—People v. King, 28 Cal. 265.

[c] (Me. 1853) No law can be enacted which shall take away the right to a trial by jury or interpose such impediments as unreasonably to impair it in criminal cases.—Saco v. Wentworth, 37 Me. 165, 58 Am. Dec. 786.

[d] (N. C. 1884) Code, § 908, which confers on the court power to amend defective justices' warrants, is not in conflict with Bill of Rights, art. 1, § 13, providing that "no person shall be convicted, * * * but by * * * a jury."—State v. Crook, 91 N. C. 536.

[e] (Ohio, 1854) A provision, in an act conferring certain criminal jurisdiction on probate courts, that, if the defendant does not demand a trial by jury, he shall be tried by the court, is not unconstitutional.—Dailey v. State, 4 Ohio St. 57.

[f] (Ohio, 1856) Where the accused has the option of submitting the issue to the jury, or to the court, and he submits the issue to the court, the right of trial by jury is not, by such submission, infringed.—Dillingham v. State, 5 Ohio St. 280.

[g] (Tex. 1884) Code Cr. Proc. art. 560, subd. 6, giving trial judges discretionary power to refuse continuances, is not repugnant to Bill of Rights, § 15, guarantying accused the right of trial by jury.—Lillard v. State, 17 Tex. App. 114.

[h] (Vt. 1853) St. 1852, § 22, entitled "An act to prevent traffic in intoxicating liquors," authorizing the arrest, without warrant, of a person found intoxicated, his detention in custody and examination, when sober, as to the place where and the person of whom he obtained liquor, is not in violation of Const. § 10, which gives persons accused of crime the right to trial by jury.—In re Powers, 25 Vt. 261.

[i] (Vt. 1887) The legislature may prescribe the mode and manner of jury trials in criminal causes, provided it does ont impair the right itself.—In re Marron, 60 Vt. 199, 12 Atl. 523.

[j] (Wis. 1883) St. §§ 4697–4699, provide that a defendant in a criminal action, who claims that he was insane at the time of the commission of the alleged offense, may plead that matter separately, and as a special plea with the plea of not guilty, and that the issue on the plea of insanity shall be first tried by the jury impaneled in the action, and that the verdict of the jury on that plea shall be taken before the case is tried on the plea of not guilty, and that the verdict on such plea of insanity, if it be that the defendant was not insane at the time of the commission of the offense, shall be conclusive upon the question of insanity on the trial of the plea of not guilty. *Held*, that such statute is not repugnant to Const. art. 1, § 7, which provides that the accused shall enjoy a speedy public trial by an impartial jury.—Bennett v. State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

[k] (Wis. 1883) Rev. St. § 4697 et seq., requiring defendant in a criminal prosecution to plead insanity separately, and that the issue as to his insanity be tried by the jury, before that as to his guilt, is not repugnant to Const. art. 1, § 5, providing that the right of trial by jury shall remain inviolate, and shall extend to all cases at law, "without regard to the amount in controversy," which applies to civil actions only.—Bennett v. State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

§ 217. —— Restrictions on right of appeal.

Effect of provision for jury trial on appeal, see post, § 241.

In civil cases, see ante, § 212.

[a] (Iowa, 1888) Acts 1876, c. 143, § 7, which allows an appeal to the district court in crim-

inal cases tried in vacation in the municipal superior courts, being repealed by Acts 1882, c. 24, § 4, directing an appeal to the supreme court, Acts 1880, c. 77, § 1, providing that in cases of violation of ordinances in incorporated towns and cities of the second class defendant shall have no jury except on appeal, cannot apply to those cities which have superior courts, without taking away the right of trial by jury; since these courts have exclusive original jurisdiction of violations of ordinances; and in such case, if the panel is discharged, the cause should be continued.—City of Creston v. Nye, 74 Iowa, 369, 37 N. W. 777.

[b] (Kan. 1895) Gen. St. 1889, § 1010, which authorizes a trial without a jury in the municipal court for a violation of an ordinance prohibiting the sale of intoxicating liquors, in so far as it requires the recognizance on appeal to be conditioned for the payment of the fine and costs imposed by the district court, imposes an unreasonable restriction on the right of appeal, and is consequently repugnant to the constitutional guaranty of the right of trial by jury.—In re Jahn, 55 Kan. 694, 41 Pac. 956.

[c] (Me. 1853) Act 1851, regulating the sale of intoxicating liquors, and providing for an appeal, and that in the event of a final conviction before a jury defendant shall pay double the fine awarded against him by the justice or judge from whose judgment the appeal is taken, is unconstitutional, as impairing the right to trial by jury, as the accused can obtain a jury trial only by appeal, and the legislature cannot impose penalties upon the exercise of the right.—State v. Gurney, 37 Me. 156, 58 Am. Dec. 782.

[d] (Me. 1853) If a statute require a party, as a condition of being allowed his trial by jury, to give bond that he will not, pending his appeal, violate the provisions of the act on which he is accused, such a statute is unconstitutional, as impairing the party's right to a trial by jury.—Saco v. Wentworth, 37 Me. 165, 58 Am. Dec. 786.

[e] (Me. 1853) St. 1851, c. 211, § 6, requiring that a bond in the sum of $200 shall be given by a party sentenced by a justice of the peace, or by a judge of the municipal or police court, to pay a fine and costs, as one of the conditions before an appeal can be allowed, is in violation of Const. art. 1, § 6, which guaranties to the accused in all criminal prosecutions a speedy, public, and impartial trial by jury.—Saco v. Wentworth, 37 Me. 165, 58 Am. Dec. 786.

[f] (Me. 1855) So much of Laws 1853, c. 48, as provides that any person, on conviction for an illegal sale of liquors, who shall take an appeal, shall furnish a bond for his appearance and the prosecution of his appeal, and shall stand committed until the order is complied with, is unconstitutional, as impairing the right to trial by jury.—Saco v. Woodsum, 39 Me. 258.

[g] (Mass. 1805) No appeal lies to the common pleas, in a prosecution under the militia law, where the statute takes away that right. The statute does not contravene the article in the constitution securing the right of trial by jury.—Mountfort v. Hall, 1 Mass. 443.

[h] (N. H. 1890) Gen. Laws, c. 258, § 4, requiring an appellant from a sentence of a justice of the peace to pay certain fees, is not an infringement of the constitutional right to a trial by jury, as the amount of such fees is less than the amount of those required by the provincial act of 1718, which was in force at the time of the adoption of that provision of the constitution.—State v. Griffin, 66 N. H. 326, 29 Atl. 414.

[i] (N. Y. 1853) Act April 12, 1853, giving a general form of a record in cases of summary conviction for vagrancy, departing from the common-law mode of procedure, and not providing for an appeal, is not in violation of Const. art. 1, § 2, declaring that the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever, because that relates to the conviction, and the statute only to the review of it.—In re Morris, 2 Edm. Sel. Cas. 381.

[j] (R. I. 1851) An act relating to intoxicating liquors, providing that a person convicted by a justice of an illegal sale can appeal on payment of all costs, but not providing for their repayment on acquittal on appeal, is not unconstitutional, as an infringement of the right of trial by jury.—Littlefield v. Peckham, 1 R. I. 500.

[k] (R. I. 1887) Pub. Laws 1886, c. 596, as amended by Pub. Laws 1887, c. 634, providing for the seizure and condemnation of liquors kept for illegal sale, and providing (section 26) that on entry of judgment of forfeiture, unless an appeal be then taken and recognizance given, a warrant shall forthwith issue for the destruction of such liquors, and requiring the recognizance to be given in the sum of $300, with conditions that the appellant will file his reasons of appeal, and that he will appear and prosecute it with effect, and will not, during the pendency of it, violate any of the provisions of the act, is, in so far as it requires the recognizance to be conditioned that appellant should not further violate the act, unconstitutional, as imposing an unreasonable condition on the taking of an appeal, by which means only could a jury trial be had.—In re Liquors of McSoley, 15 R. I. 608, 10 Atl. 659.

[l] (R. I. 1887) Pub. Laws 1886, c. 596, as amended by Pub. Laws 1887, c. 634, providing for the seizure, trial, and condemnation of liquors kept for illegal sale, and providing that, unless an appeal be taken and recognizance given, with good and sufficient sureties, a warrant shall issue for the destruction forthwith of said liquors, is not unconstitutional, because it makes the taking of an appeal, by which only a jury trial could be had, conditional on the giving of a recognizance, with sureties, and defines no time within which they must be secured.—In re Liquors of McSoley, 15 R. I. 608, 10 Atl. 659.

[m] (Vt. 1869) The provisions of the charter of the city of Burlington which confer upon the recorder's court final jurisdiction of criminal offenses within the jurisdiction of a justice of the peace to try and determine are unconstitutional; the citizen's right of a trial by jury being thereby infringed.—State v. Peterson, 41 Vt. 504.

[n] (Vt. 1887) R. L. § 4506, requiring a defendant appealing from a conviction in a justice's court to pay for the copies of the proceedings in the justice court, does not abridge his constitutional right of trial by jury, though only by appealing can he obtain a jury trial.—In re Marron, 60 Vt. 199, 12 Atl. 523.

[o] (W. Va. 1886) The constitutional right to a trial by jury is not unduly abridged by providing for a trial before a justice for minor offenses, and requiring security for the prosecution of an appeal to a jury.—Beasley v. Town of Beckley, 28 W. Va. 81.

§ 218. —— Requirement or denial of bail.

[a] (Ind. 1826) The statute providing that it shall be the duty of the justice of the peace to inquire into, and in a summary way to punish, by fine not exceeding $3, all trivial breaches of the peace, and if, on examination, it shall appear that $3 would not be an adequate punishment, to bind the offender and witnesses to the next circuit court, is not in violation of Const. art. 1, § 5, providing that in all criminal

cases, except petit misdemeanors, which shall be punished by fine not exceeding $3, right of trial by jury shall remain inviolate.—State v. McCory, 2 Blackf. 5.

[b] (Ind. 1896) Indianapolis City Charter, § 118, giving the police court power to hold one charged with petit larceny to bail to appear before a higher court if he is of the opinion that the punishment which he is authorized to assess is inadequate, does not deprive the accused of the right of trial by jury.—Stevens v. Anderson, 145 Ind. 304, 44 N. E. 460.

[c] (N. Y. 1855) A law regulating town police, which takes from a defendant the right to give bail for his appearance at the next criminal court having jurisdiction in the case, is unconstitutional, as interfering with the trial by jury.—People v. Carroll, 3 Parker, Cr. R. 22.

§ 219. —— Costs.

As restriction on right of appeal, see ante, § 217.

In civil cases, see ante, § 213.

[a] (U. S. 1852) The legislature cannot make the right to a trial by jury in a criminal case dependent on giving a bond, with surety, for the payment of the penalty and costs.—Greene v. Briggs, Fed. Cas. No. 5,764 [1 Curt. 311].

[b] (Tenn. 1874) The act of 1875, "to tax the losing party with the jury fees in all cases in civil suits, and to repeal" Code, §§ 4036, 4037, *held* to impair the full enjoyment of the right of trial by jury.—Neely v. State, 63 Tenn. (4 Baxt.) 174.

§ 220. Re-examination or other review of questions of fact tried by jury.

Right to jury trial on appeal, see ante, §§ 95–98.

[a] (U. S. 1830) Under the laws of Louisiana, on a jury trial, the oral testimony, if either party desire it, is to be taken down in writing by the clerk, to be sent to the supreme court, to serve as a statement of facts in case of appeal; and the written evidence is to be filed with the proceedings, to enable the appellate court to revise the judgment below, and exercise the power of granting a new trial. *Held*, that a refusal of the judge of the district court of the United States to permit the evidence to be put in writing could not be assigned for error in the supreme court of the United States, a verdict being given, because, if the same had been put in writing, that court could not redress any error by granting a new trial; the constitution of the United States and the amendment thereto declaring that "No fact, once tried by a jury, shall be otherwise re-examinable in any court of the United States than according to the rules of the common law."—Parsons v. Bedford, 28 U. S. (3 Pet.) 433, 7 L. Ed. 732.

[b] (U. S. 1869) So much of Act Cong. March 3, 1863, § 5, as provides for the removal of judgments in a state court in a cause which was tried by a jury to the circuit court of the United States for a retrial on the facts involved, is unconstitutional, being in conflict with Const. Amend. 7, which declares that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.—The Justices v. Murray, 76 U. S. (9 Wall.) 274, 19 L. Ed. 658.

[c] (U. S. 1812) Where a cause has once been tried by a jury in the district court, there cannot, even in appeal cases, be a new trial by a jury in the circuit court.—United States v. Wonson, Fed. Cas. No. 16,750 [1 Gall. 5].

[d] (Ga. 1848) On an issue of fraud, suggested by a creditor under the statute of 1823 for the relief of honest debtors, and after a verdict for the debtor, the creditor will not be allowed an appeal to another jury under the act of 1799.—Armis v. Barker, 4 Ga. 170.

[e] (Mass. 1891) On appeal by a petitioner from the probate court, the judge after trial set aside the verdict and discharged the issue which he had framed for the jury. *Held* that, as petitioner was not entitled to a jury trial as a matter of right, the decision would stand, in the absence of anything to show an abuse of discretion.—Fay v. Vanderford, 154 Mass. 498, 28 N. E. 681.

[f] (Minn. 1896) Laws 1895, c. 320, which provides that where a party was entitled on the trial to have a verdict directed in his favor, and duly moved for the same, the court may, on a motion for a new trial, or on an appeal in such motion, order judgment in his favor notwithstanding the verdict, is not unconstitutional as denying the right of trial by jury.—Kernan v. St. Paul City Ry. Co., 64 Minn. 312, 67 N. W. 71.

[g] (N. Y. 1864) Act Cong. March 3, 1863, § 5, authorizing the removal of causes commenced in state courts against civil or military officers for any arrest or imprisonment, made during the Rebellion, by virtue or under color of authority from the president of the United States or congress, to the circuit court of the United States, after verdict and judgment in the state court, to be therein tried as if originally commenced in the federal courts, is in violation of the seventh amendment of the federal constitution, declaring that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.—Patrie v. Murray, 43 Barb. 323, 29 How. Prac. 312.

[h] (N. Y. 1871) Laws 1852, c. 356, §§ 8–11, authorizing the supreme court to increase or reduce the amount of damages reported by commissioners for taking of land for the use of a waterworks company, is repugnant to Const. art. 1, § 7, requiring compensation for the taking of private property for public use to be ascertained by a jury, or, at least, three commissioners appointed by a court.—Rochester Waterworks Co. v. Wood, 60 Barb. 137.

2. NUMBER OF JURORS.

IN GENERAL, § 221.
JURY OF LESS THAN 12 MEN, § 222.
DECREASE IN NUMBER PENDING TRIAL, § 223.
CONCURRENCE OF LESS THAN WHOLE NUMBER, § 224.
JURY OF MORE THAN 12 MEN, § 225.

Constitution of jury in general, see ante, §§ 3–7.

Effect of provision for trial on appeal by jury of 12, see post, § 241 [d, f, i, n].

Retroactive effect of statutes, fixing number, see ante, § 5.

Right of municipal corporation to object to jury of less than 12, see ante, § 116 [a].

—— *to demand jury of 12, see* ante, § 154 [c–f].

Waiver in civil cases, see ante, § 189.

—— *in criminal cases, see* ante, § 201.

§ 221. In general.

[a] (N. J. 1893) Act March 23, 1887, directing that a commission de lunatico inquirendo shall be executed before a jury of 12 men, instead of 24, is constitutional.—De Hart v. Condit, 51 N. J. Eq. (6 Dick.) 611, 28 Atl. 603, 40 Am. St. Rep. 545.

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[b] (Pa. 1865) The constitutional provision granting an accused a trial "by an impartial jury" is not violated by permitting a juror to be examined as a witness against defendant.—Howser v. Commonwealth, 51 Pa. (1 P. F. Smith) 332.

[c] (Utah, 1895) It is not reversible error in a prosecution to permit a juror, with defendant's consent, to act as an interpreter.—People v. Thiede, 11 Utah, 241, 39 Pac. 837.

§ 222. Jury of less than 12 men.

[a] A trial by a less number than 12 men, acting as a jury, in criminal cases, is void.
—(Ind. 1861) Brown v. State, 16 Ind. 496; (1876) Allen v. Same, 54 Ind. 461;
(Tenn. 1858) Bowles v. State, 37 Tenn. (5 Sneed) 360.

[b] (Ark. 1873) Act July 23, 1868, providing for a general system of railroad incorporation, and by section 23 allowing compensation for damages for land taken, to be assessed by five commissioners appointed by the court, is in violation of Const. art. 5, § 48, providing that no right of way shall be appropriated without compensation first made, which compensation shall be ascertained by a jury of 12 men.—Whitehead v. Arkansas Cent. R. Co., 28 Ark. 460.

[c] (Ind. 1847) In an indictment for larceny, the plea was not guilty, and the verdict and judgment were for the state. It appeared by the transcript that the cause had been tried by only 11 jurors. The court *held* the trial to be a nullity, set aside the judgment and verdict, and remanded the cause for another trial.—Brown v. State, 8 Blackf. 561.

[d] (Ind. 1880) The trial of a case by a jury of six persons is an absolute nullity.—Moore v. State, 72 Ind. 358.

[e] (Iowa, 1882) Acts 1880, c. 163, limiting the right of appeal from justices' courts to cases in which the amount in controversy is more than $25, is not, by reason of the fact that the jury in a justice's court consists of six men only, in conflict with Bill of Rights, art. 1, § 9, providing that "the right of trial by jury shall remain inviolate, but the general assembly may authorize trial by jury of a less number than 12 men in inferior courts;" nor is it invalid under the ordinance of 1787, art. 2, for the provisions of the ordinance were abrogated by the admission of the state into the Union, so far as they were in conflict with the state constitution.—Higgins v. Farmers' Ins. Co., 60 Iowa, 50, 14 N. W. 118.

[f] (Minn. 1869) The jury contemplated by Const. art. 1, § 6, securing the right to jury trial in criminal cases, is a body of 12 men, and it is error to try a party charged with crime in a justice court, against his objection, with a jury of 6.—State v. Everett, 14 Minn. 439 (Gil. 330).

[g] (Miss. 1892) Where the record shows that judgment was entered against a prisoner on a verdict returned by a jury of 11 men, there is a fatal defect affecting the jurisdiction of the court, incurable by any supplementary oral proof, and therefore the verdict and the judgment founded on it are void, and the prisoner is in the same condition as if he had not been tried.—Ex parte Scott, 70 Miss. 247, 11 South. 657.

[h] (Miss. 1895) Code 1892, § 2835, providing for a jury of six in inquests of lunacy, does not conflict with any provision of the state constitution, nor with the fourteenth amendment to the federal constitution, which provides that "no person shall be deprived of life, liberty, or property, except by due process of law."—Fant v. Buchanan, 17 South. 371.

[i] (Mo. 1857) The appointment of 5, instead of 12, men, to assess the damages caused by laying out a plank road on the land of an individual, is not inconsistent with the constitution.—Louisiana & F. Plank Road Co. v. Pickett, 25 Mo. 535.

[j] (Mo. 1860) The law prescribing that jury trials in the St. Louis law commissioners' court shall be before a jury of 6 persons or a less number, if the parties shall consent, is invalid, as the constitutional number required to constitute a jury in a court of record is 12.—Vaughn v. Scade, 30 Mo. 600.

[k] (N. J. 1806) A cause cannot be tried by 11 jurors.—Briant v. Russell, 2 N. J. Law (1 Penning.) 146.

[l] (N. M. 1895) The jury provided for by Const. U. S. Amend. 6, declaring that in all criminal prosecutions the accused shall have the right of speedy trial by an impartial jury, is the common-law jury of 12 men, and a conviction by a jury of 11 is void.—Territory v. Ortiz, 8 N. M. 154, 42 Pac. 87.

[m] (N. Y. 1854) The city charter of Utica, which provides that, when the land of individuals is taken for streets, the common council may appoint five disinterested freeholders to ascertain the land required, the names of holders, and the recompense to be made, is so far in conflict with Const. art. 1, § 7, declaring that in such cases compensation shall be ascertained by a jury, or by commissioners appointed by a court of record. Where a word, by common usage, has acquired a popular signification, it shall be understood in that sense unless its meaning is controlled by the context, or the circumstances; and, where the constitution speaks of a jury, it is to be understood as meaning a jury with its ordinary and well-known attributes and functions.—Clark v. City of Utica, 18 Barb. 451.

[n] (N. Y. 1868) As a defendant in an action to recover possession of chattels has a constitutional right to trial by a jury of 12 men, and a justice of the peace has only the power to impanel a jury of 6 men, it follows that when, on the return of a justice's summons in such an action, the defendant demands a jury of 12, the justice must dismiss the suit.—Baxter v. Putney, 37 How. Prac. 140.

[o] (N. Y. 1872) Act 1861, increasing the jurisdiction of justices of the peace to $200, is not void, as violating Const. art. 1, § 2, providing that trial by jury in all cases in which it has been heretofore used shall remain inviolate, because it transfers a class of cases from courts of record, where juries are composed of 12 men, to justices' courts, in which they consist of 6, since such provision has no reference to the power of the legislature to alter and increase the jurisdiction of justices' courts, and was not intended as a limitation of such power in that regard.—Knight v. Campbell, 62 Barb. 16.

[p] (N. Y. 1881) The fact that the jury provided for by Laws 1834, c. 78, on trials for disturbing religious meetings, may consist of six persons, does not amount to a violation of Const. art. 1, § 2, providing that trial by jury in all cases in which it has heretofore been used "shall remain inviolate forever."—People v. Clark, 23 Hun, 374.

[q] (Ohio, 1853) As juries did not belong at common law to courts held before justices of the peace, a law requiring a less number than 12 to constitute a jury in such courts does not violate the provision of the constitution that the right of trial by jury shall be inviolate.—Work v. State, 2 Ohio St. 296, 59 Am. Dec. 671.

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[r] (Ohio, 1854) A law giving only an appeal to the probate court and a jury of six men from the decision of viewers upon a question of damages for land taken for a public road is unconstitutional.—Lamb v. Lane, 4 Ohio St. 167.

[s] (Okl. 1894) A statute providing that criminal cases which the justice's court has power to hear and determine may be tried before a jury of six men is constitutional.—Collier v. Territory, 2 Okl. 444, 37 Pac. 819.

[t] (Pa.) Act May 1, 1861 (Purd. Dig. p. 396), providing for a trial before a jury of six summoned by a justice of the peace, violates Const. art. 1, § 6, saying that "the trial by jury shall be as heretofore [i. e., by a jury of 12 citizens], and the right thereof shall remain inviolate."—(1873) Commonwealth v. Saal, 10 Phila. 496, 30 Leg. Int. 194; (1880) Same v. Seamans (Quart. Sess.) 3 Law T. (N. S.) 133.

[u] (Pa. 1886) A justice has no power to hear a charge of aggravated assault and battery before a jury of six. In such case he must hear the case on the complaint of the prosecutor, and either bind the prisoner over to court or discharge him.—Commonwealth v. Mead, 5 Law T. (N. S.) 123.

[v] (Tex. 1888) Under Const. art. 5, § 13, providing that "petit juries in the district court shall be composed of 12 men," a conviction for crime on a trial in the district court before a jury of 6 must be set aside.—Jester v. State, 26 Tex. App. 369, 9 S. W. 616.

[w] (Wash. 1888) Code 1881, c. 143, § 2033, providing that a creditor may file written specifications of fraud on the part of an insolvent debtor, in opposition to his discharge under the insolvency act, and after the answer of the debtor to the charge of fraud has been received, a jury of not less than 6 shall be summoned to try the issue, is, so far as it provides for a less number than the constitutional jury of 12, unconstitutional and void.—Thomas v. Hilton, 3 Wash. T. 365, 17 Pac. 882.

[x] (Wis. 1854) The refusal to give a trial of fact by a jury of 12 men, instead of 6, is the denial of a constitutional right, and ground for a new trial.—May v. Milwaukee & M. R. Co., 3 Wis. 219.

§ 223. Decrease in number pending trial.

[a] (Iowa, 1885) Code 1873, § 2793, authorizing less than 12 jurors to render a verdict in case of the sickness of one or more of them, is unconstitutional; the jury contemplated by the constitution being the common-law jury of 12 men.—Eshelman v. Chicago, B. & Q. R. Co., 67 Iowa, 296, 25 N. W. 251; Kelsh v. Town of Dyersville, 68 Iowa, 137, 26 N. W. 38.

[b] (Mich. 1892) Const. art. 6, § 27, provides that "the right of trial by jury shall remain." Article 4, § 46, provides that "the legislature may authorize a trial by a jury of a less number than 12 men." *Held* that, though the legislature may fix a certain number less than 12 which shall constitute a jury, it cannot provide for contingencies in which a jury may consist of less than 12, in the discretion of the trial court; and hence 2 How. Ann. St. § 7622, providing that, after the impaneling of a jury, if any juror is unable to attend, the court may enter that fact and the cause of inability on its journal, and the proceeding shall then continue as if the whole panel were present, is unconstitutional.—McRae v. Grand Rapids, L. & D. R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750.

[c] (N. J. 1812) If 1 of the jurors be sick, so that he cannot deliberate, and a verdict be taken, it is the verdict of the other 11, and will be set aside.—Denman v. Baldwin, 3 N. J. Law (2 Penning.) 945.

[d] (Pa. 1888) A trial in the court of quarter sessions by 11 jurors, though the twelfth was excused on account of sickness, and the trial continued with the consent of defendant, is illegal.—Commonwealth v. Byers, 5 Pa. Co. Ct. R. 295.

[e] (Tex. 1873) Gen. Laws 15th Leg. p. 22, § 19, provides that the practice in county courts shall be regulated by the rules and laws governing the district court. The act regulating juries in civil and criminal cases in district courts provides (section 19) that when, during a trial, a juror is discharged from serving, the remainder of the jury may render a verdict. On the trial of accused in a county court, a juror was excused because of the severe illness of his wife. *Held*, that a verdict by the remainder of the jury was valid.—Gindrat v. State, 3 Tex. App. 573.

§ 224. Concurrence of less than whole number.

[a] (Ariz. 1894) Laws 1891, p. 71, providing that in civil cases three-fourths of a jury of 12 may render a verdict, is void, under Rev. St. U. S. § 1868, providing that in territories no party shall be deprived of the right of trial by jury in cases cognizable at common law.—Carroll v. Byers, 36 Pac. 499.

[b] (Ariz. 1894) Laws 1891, p. 71, providing that in civil cases three-fourths of a jury of 12 may render a verdict, is void, under Const. U. S. Amend. 7, providing that where the amount in controversy exceeds $20 the right to trial by jury shall be preserved.—Carroll v. Byers, 36 Pac. 499.

[c] (Fla. 1894) Const. 1887, art. 16, § 29, providing that compensation for property appropriated shall be ascertained by a jury of 12 men in a court of competent jurisdiction, "as shall be prescribed by law," is violated by that provision of Act June 8, 1887, that in such proceedings "a majority of the jury may determine all matters before them."—Jacksonville, T. & K. W. Ry. Co. v. Adams, 33 Fla. 608, 15 South. 257, 24 L. R. A. 272.

[d] (Mont.) So much of Act Jan. 15, 1869, as provides that three-fourths of a jury may find a verdict in common-law action, is in conflict with article 8 of the United States constitution, which secures the right of trial by jury in certain cases.—(1869) Kleinschmidt v. Dunphy, 1 Mont. 118; (1870) Aylesworth v. Reece, Id. 200.

[e] (N. H. 1860) The legislature has no power so to change the law in relation to juries as to provide that petit juries may be composed of a less number than 12, nor to provide that a number of the petit jury less than the whole number may render a verdict, in any case where the constitution gives to the party a right to a trial by jury.—Opinion of Justices, 41 N. H. 550.

[f] (N. J. 1890) An inquisition of lunacy by only 12 jurors, under Act March 23, 1887 (P. L. p. 48), whose verdict is unanimous, does not violate the right of trial by jury guarantied by Const. art. 1, § 7, since the practice at the time of the adoption of the constitution, though prescribing a trial by from 12 to 24 jurors, did not require the concurrence of more than 12 to constitute a sufficient verdict.—In re Lindsley, 46 N. J. Eq. (1 Dick.) 358, 19 Atl. 726.

[g] (N. Y. 1854) Under St. 1847, c. 31, § 4, providing for the appointment of a jury to appraise the damage to real estate by a railroad company's taking it, only a majority of the jury need concur in the appraisement. This does not make the law unconstitutional.—Cruger v. Hudson River R. Co., 12 N. Y. (2 Kern.) 190.

[h] (Okl. 1893) St. c. 70, art. 18, § 22, providing that nine jurors may return a verdict, is invalid, as in violation of Const. U. S. Amend.

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7, providing for the preservation of the right of trial by jury.—Bradford v. Territory, 1 Okl. 366, 34 Pac. 66.

[i] (Utah) Laws 1892, c. 44, providing that in all civil actions a verdict may be rendered by a concurrence therein of nine or more members of the jury, is not in conflict with Const. U. S. Amend. 7, providing that in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved.—(1893) Hess v. White, 9 Utah, 61, 33 Pac. 243, 24 L. R. A. 277; (1894) Fred W. Wolf Co. v. Salt Lake City Brewing Co., 10 Utah, 179, 37 Pac. 262; (1894) Riley v. Salt Lake Rapid Transit Co., 10 Utah, 428, 37 Pac. 681; (1895) Mackey v. Enzensperger, 11 Utah, 154, 39 Pac. 541; (1895) Leedom v. Earls Furniture & Carpet Co., 12 Utah, 172, 42 Pac. 208; (1896) Pratt v. Parsons, 13 Utah, 31, 43 Pac. 620; (1896) Smith v. Salt Lake City R. Co., 13 Utah, 33, 43 Pac. 919.

§ 225. Jury of more than 12 men.

[a] (Miss.) It is not error for a jury of 13 in number to pass upon an issue in assumpsit. If the number were less than 12, the verdict would be void.—(1845) Tillman v. Ailles, 13 Miss. (5 Smedes & M.) 373, 43 Am. Dec. 520. CONTRA, see (1834) Wolfe v. Martin, 2 Miss. (1 How.) 30.

[b] (N. C. 1800) Where a caveat was tried by 13 jurors, instead of 12, the judgment rendered will be reversed on error.—Whitehurst v. Davis, 3 N. C. 113.

[c] (Tex. 1873) A conviction of crime by a jury composed of more than 12 men is void, and will be set aside.—Bullard v. State, 38 Tex. 504, 19 Am. Rep. 30.

[d] (Tex. 1880) On trial of an indictment of assault with intent to murder, the jury as impaneled contained 13 men, including 1 who had been stricken off by the defense. At the close of the evidence the error was discovered, and the person who had been so stricken was instructed to leave the box. The jury had not left the box, nor had there been any opportunity for them to converse among themselves. *Held*, that a conviction by the other 12 jurors should be sustained.—Davis v. State, 9 Tex. App. 634.

[e] (W. Va. 1891) Under Bill of Rights, § 14, declaring that trials of crimes and misdemeanors shall be by a jury of 12 men, where the record shows that the prisoner was tried by a jury of 13 jurymen, instead of 12, the verdict should be set aside and a new trial awarded.—State v. Hudkins, 35 W. Va. 247, 13 S. E. 367.

3. CONSTITUTION AND SELECTION OF JURY.

IN GENERAL, § 226.
QUALIFICATIONS AS JURORS, § 227.
COMPETENCY FOR TRIAL OF CAUSE, § 228.
SELECTION FROM VICINAGE, § 229.
SUMMONING AND IMPANELING, § 230.
EXAMINATION, § 231.
CHALLENGES AND OBJECTIONS, § 232.

§ 226. In general.

[a] (Ala. 1887) Under Const. 1868, art. 13, § 5, providing that no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made to the owner, irrespective of any benefit from any improvement by such corporation, which compensation shall be ascertained by a jury of 12 men in a court of record as prescribed by law, a city charter providing that damages shall be assessed by a jury of viewers is void, as being in conflict with the constitutional provision that the assessments shall be made by a jury of 12 men in a court of record as shall be prescribed by law.—Faust v. City of Huntsville, 83 Ala. 279, 3 South. 771.

[b] (Ky. 1881) Where the jury commissioners have been instructed by the court to select the jury without regard to race or color, there is no ground for complaint by a colored man, indicted for murder, although no negro may be upon the jury, unless it appears that persons were excluded on account of race or color. —Hicks v. Commonwealth, 3 Ky. Law Rep. 87.

[c] (Ky. 1882) Where, in the selection of a jury for the trial of an indictment against several colored men jointly indicted, the regular panel is exhausted, the jury may be completed from bystanders, whether they are of the African race or not.—Mullins v. Commonwealth, 3 Ky. Law Rep. 686.

[d] (Ky. 1896) Where it does not appear that the jury commissioners violated the statute by the selection of persons not qualified, or in an illegal manner drew from the list selected the grand and petit jurors, a judgment will not be reversed on the ground that no person of African descent was included in the list of jurors from which the jury rendering the verdict was chosen.—Smith v. Commonwealth, 33 S. W. 825.

[e] (La. 1860) Inasmuch as Const. 1852, art. 103, providing that prosecutions shall be by indictment or information, and guarantying the right of trial by an impartial jury of the vicinage, does not apply to the punishment of minor offenses tried summarily without the intervention of a jury, an act requiring that recorders, in trying such offenses, should be assisted by a jury of three slaveholders does not violate the constitutional provision in respect to an impartial trial by a jury of the vicinage.—State v. Gutierrez, 15 La. Ann. 190.

[f] (Minn. 1896) Gen. Laws 1895, c. 328, providing for struck juries on application of either party, is not in conflict with the constitutional provision that the right to trial by jury shall be inviolate.—Lommen v. Minneapolis Gaslight Co., 65 Minn. 196, 68 N. W. 53, 60 Am. St. Rep. 450, 33 L. R. A. 437.

[g] (Miss. 1846) The trial by jury is by 12 free and lawful men, who are not of kin to either party, for the purpose of establishing by their verdict the truth of the matter which is in issue between the parties. Any legislation, therefore, which merely points out the mode of arriving at this object, but does not rob it of any of its essential ingredients, cannot be considered an infringement of the right.—Dowling v. State, 13 Miss. (5 Smedes & M.) 664.

[h] (Mo. 1896) Act April 1, 1891 (Laws 1891, p. 172), providing the manner of selecting and drawing petit jurors, and prescribing their qualifications, in counties having a certain population, is not in violation of Const. art. 2, § 28, providing that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate."—State ex rel. Kansas City & S. Ry. Co. v. Slover, 134 Mo. 607, 36 S. W. 50.

[i] (N. J. 1896) A struck jury is a legal one, within the constitutional requirement that the right of trial by jury shall remain inviolate; such a jury having been derived from the English law, confirmed by legislation in this commonwealth.—Fowler v. State, 58 N. J. Law (29 Vroom) 423, 34 Atl. 682.

[j] (N. Y. 1853) The constitution of the state declares that, "when private property shall be taken for any private use, the compensation to

be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, or shall be prescribed by law." In the charter of the city of Rochester it is provided that "the damages and recompense to be paid to owners of lands taken by the city for public improvements, shall be assessed by three assessors assigned by the common council," etc. *Held*, that said provision in the charter is plainly in conflict with the constitution, and an assessment based on it was unauthorized and void.—House v. City of Rochester, 15 Barb. 517.

[k] (N. C. 1887) A special venire of 50 men was returned by the sheriff on the trial of a colored person for murdering a white person, among whom there were no persons of color. There were in the county eligible colored freeholders qualified to serve as jurors. *Held*, that a challenge to the array, without assigning either prejudice on the part of the sheriff against, or favor for, either the slain or the accused, or any improper influence in summoning the jury, was properly overruled.—State v. Sloan, 97 N. C. 499, 2 S. E. 666.

[l] (Tex. 1875) The fact that a negro is placed upon trial before a jury composed exclusively of white men is not ground for a challenge to the array.—Williams v. State, 44 Tex. 34.

[m] (Tex. 1883) A special venire for the trial of a negro will not be quashed because composed wholly of white men, no fraud or corruption in the action of the jury commissioners being shown.—Cavitt v. State, 15 Tex. App. 190.

§ 227. Qualifications as jurors.

See ante, § 226 [g, h].

[a] (Mich. 1891) Act No. 150, Pub. Acts 1881 (section 978, How. Ann. St.), providing for the enrollment of the military companies, to be composed of not more than 150 members in each company, and exempting such members from jury duty, is not an infringement of the right of trial by jury.—Hall v. Burlingame, 88 Mich. 438, 50 N. W. 289.

[b] (Mich. 1894) Saginaw City Charter, § 8, tit. 15, which provides that jurors must be qualified electors, and people of fair character and sound mind, freeholders in the city, and understanding English, is not in conflict with the provisions of the constitution that in condemnation proceedings the issues shall be passed on by "a jury of freeholders" (Const. art. 18, §§ 2, 14, and article 15, § 15).—City of Saginaw v. Campau, 102 Mich. 594, 61 N. W. 65.

[c] (Mo. 1893) Rev. St. 1889, Append. art. 21, § 9, which disqualifies persons from serving as jurors in the city of St. Louis, in criminal cases, because of their inability to read and write the English language, is not in conflict with Const. art. 2, § 28, which guaranties the right of trial by jury, as this provision does not deprive the legislature of the power to prescribe the qualifications of jurors.—State v. Welsor, 117 Mo. 570, 21 S. W. 443.

[d] (N. M. 1881) Defendant was tried by a jury of Mexicans, who did not understand English, and the proceedings were all interpreted to them. *Held* no violation of the provision of the bill of rights entitling defendants to trial by jury.—Territory v. Romine, 2 N. M. 114.

[e] (Tenn. 1871) The acts of June 5, 1865, May 3, 1866, and February 25, 1867, relating to the right to register and vote, excluded from the right of suffrage every person who could not prove to the satisfaction of the register that he had been an unconditional Union man during the Rebellion. Act Nov. 26, 1866, c. 5, § 1, provided that it should be ground for challenge to a juror that he is not a registered voter. *Held* that, the exclusion from registration being based on partisan considerations, the restriction of the right to sit on the jury was a violation of the constitutional provision that the right of trial by jury should remain inviolate.—Gibbs v. State, 50 Tenn. (3 Heisk.) 72.

[f] (Tex. 1874) A trial by jurors unable to speak and understand the English language is in violation of the right of trial secured by the bill of rights.—Lyles v. State, 41 Tex. 172, 19 Am. Rep. 38.

[g] (Tex. 1880) Cr. Code, art. 636, § 14, providing that inability to read and write is a cause for challenge, except when it appears that the requisite number of jurors who are able to read and write cannot be found in the county, does not affect the constitutional right to be tried by a jury every one of whom can comprehend and speak the English language.—McCampbell v. State, 9 Tex. App. 124, 35 Am. Rep. 726; Nolen v. State, 9 Tex. App. 419.

[h] (Utah, 1861) The Utah statute which provides that only taxpayers shall be eligible to sit on a jury is in violation of Const. U. S. Amend. art. 7, which declares that "the right of trial by jury shall be preserved."—Reece v. Knott, 3 Utah, 451, 24 Pac. 757.

§ 228. Competency for trial of cause.

Competency in general, see post, §§ 400–630.

[a] (U. S. 1887) Rev. St. Ill. c. 78, § 14, providing that a juror shall not be disqualified because he has formed an opinion based upon rumor, or upon newspaper statements about the truth of which he has expressed no opinion, if on oath he states that he believes he can fairly and impartially render a verdict in accordance with the law and the evidence, does not violate either Const. U. S. Amend. 6, or Const. Ill. art. 2, § 9, which guaranty to the accused party in every criminal prosecution "a speedy public trial by an impartial jury."—Spies v. State of Illinois, 123 U. S. 131, 8 Sup. Ct. 21, 31 L. Ed. 80.

[b] (Colo. 1874) The act of 1872 (9 Sess. Laws, p. 1894), providing that pre-existing opinion shall not disqualify a juror, if the court shall be satisfied, from his examination or from other evidence, that he will render an impartial verdict in the case, does not conflict with the sixth amendment to the constitution of the United States, which secures to persons charged with crime the right to be tried by an impartial jury.—Jones v. People, 2 Colo. 351.

[c] (D. C. 1893) Const. U. S. art. 2, par. 9, guarantying to accused a trial by an impartial jury, does not render incompetent a juror who has formed an opinion from reading newspaper reports, when the juror testifies that he can render an impartial verdict.—United States v. Schneider, 21 D. C. 381.

[d] (Ga. 1846) A juror who states upon oath, in answer to the statutory interrogatories, that he has formed and expressed an opinion in regard to the guilt or innocence of the prisoner from hearsay, is not an impartial juror within the meaning of the constitutional provision which declares that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury."—Reynolds v. State, 1 Ga. (1 Kelly) 222.

[e] (Ga. 1856) Act 1856, which secures to a party accused of crime a trial by an impartial jury, who have not formed or expressed an opinion as to the guilt or innocence of the accused, either from having seen the crime committed or from having heard any part of the evidence delivered on oath, is not repugnant to

the constitution of 1798, which provides for trial by jury "as heretofore used in this state," since matters of the qualification of jurors were subjects of legislative regulation previous to the adoption of the constitution.—Rafe v. State, 20 Ga. 60.

[f] (Ill. 1887) Rev. St. c. 78, § 14, providing that a juror shall not be disqualified because he has formed an opinion based on rumor, or upon newspaper statements about the truth of which he has expressed no opinion, if on oath he states that he believes he can fairly and impartially render a verdict in accordance with the law and the evidence, does not violate Const. art. 2, § 9, which guaranties to the accused party in every criminal prosecution "a speedy public trial by an impartial jury."—Spies v. People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320.

[g] (Ill. 1893) Rev. St. c. 78, § 14, which provides that "in the trial of any criminal cause the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements, (about the truth of which he has expressed no opinion,) shall not disqualify him to serve as a juror in such case if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement," does not conflict with Const. art. 2, § 9, which guaranties every accused person "trial by an impartial jury."—Coughlin v. People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57, following Spies v. People (1887) 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

[h] (Ind. 1877) The provision of 2 Rev. St. 1876, p. 394, § 85, that a person shall not sit as juror in a capital case who has opinions which preclude him from returning a verdict inflicting the penalty of death, is constitutional; and such person may be challenged for cause.—Greenley v. State, 60 Ind. 141.

[i] (Ind. 1882) A county cannot be deprived of jury trial because the adverse party challenges all the jurors as interested, being householders of the county, and the county refuses to ask for change of venue.—Orange County Com'rs v. Hon, 87 Ind. 356.

[j] (Ind. 1883) Rev. St. 1881, § 1793, provides that it shall be good cause for challenge to a juror that he has formed or expressed an opinion as to defendant's guilt or innocence; but, if he states that he has formed or expressed such opinion, the court or the parties shall examine him on oath as to the ground of such opinion, and if it appears to have been formed on reading newspaper statements, communications, comments, reports, rumors, or hearsay, and not on conversation with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and he states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict on the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve. *Held*, that such statute is constitutional.—Stout v. State, 90 Ind. 1.

[k] (La. 1895) A conviction by a jury in part composed of persons who participated with a voluntary posse in running down defendant cannot be sustained as the result of a fair trial "by an impartial jury."—State v. Duncan, 47 La. Ann. 1025, 17 South. 482.

[l] (Mass. 1854) Rev. St. c. 95, § 28, which provides that, "in indictments and penal actions for the recovery of any sum of money or other thing forfeited, it shall not be a cause of challenge to any juror that he is liable to pay taxes in any county or town which may be benefited by such recovery," is no violation of article 29 of the declaration of rights, securing to every citizen "the right to be tried by judges as free, impartial, and independent as the lot of humanity will admit."—Commonwealth v. Reed, 67 Mass. (1 Gray) 472.

[m] (Mass. 1889) A legislature has constitutional authority to provide that mere inhabitancy in a town or county shall not disqualify one from sitting as a juror, to try a prisoner for unlawfully obtaining money from the treasurer of the town or county.—Commonwealth v. Brown, 150 Mass. 334, 23 N. E. 98.

[n] (Minn. 1881) Gen. St. 1878, c. 10, § 200, providing that in any action to which a city is a party, a resident and taxpayer of the city shall be competent as a juror, does not violate Const. art. 1, § 4, guarantying the right of trial by jury.—McClure v. City of Red Wing, 28 Minn. 186, 9 N. W. 767.

[o] (Miss. 1831) A juror who stated on his voir dire that he had formed and expressed an opinion as to the guilt or innocence of the accused was not an impartial juror within the meaning of Declaration of Rights, § 10, securing a speedy public trial by an impartial jury to all persons accused of crime, where he further stated that such opinion was based on rumor only, and that it would not influence his mind in the determination of the case, and that he felt he could decide the case according to the evidence produced at the trial.—State v. Johnons, 1 Miss. (Walk.) 392.

[p] (Mont. 1889) Cr. Prac. Act, § 287, par. 11, which provides that having formed or expressed an opinion shall disqualify a juror, unless he has formed his opinion from the newspapers and can state on oath that he feels able to decide the case impartially, is not in conflict with Const. U. S. Amend. 6, conferring the right of trial by an impartial jury.—Territory v. Bryson, 9 Mont. 32, 22 Pac. 147.

[q] (Nev. 1876) Act March 2, 1875, regulating proceedings in criminal cases, is unconstitutional, in that it does not allow a defendant, charged with felony, to challenge a juror for actual bias.—State v. McClear, 11 Nev. 39; State v. Johnson, Id. 148.

[r] (N. H. 1891) The provision of Bill of Rights, art. 35, that "it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit," though applying to jurors, does not require the exclusion of a juror who has formed an opinion as to defendant's guilt.—State v. Sawtelle, 66 N. H. 488, 32 Atl. 831.

[s] (N. Y. 1873) Laws 1872, c. 745, providing that a juror's opinion or impression in reference to the circumstances of the case or the guilt or innocence of the prisoner, etc., is not a sufficient ground of challenge for principal cause, if he can render an impartial verdict, and if the court are satisfied that he does not entertain such a present opinion as would influence his verdict, is not unconstitutional, since the legislature has power to regulate, by statute, the mode of procuring and impaneling a jury, provided care is taken to preserve the right of trial by an impartial jury.—Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492.

[t] (Ohio, 1865) The act of March 3, 1860, allowing the court to admit a juror as competent to sit in a case, although he has formed and expressed an opinion in regard to the guilt or innocence of the accused, if the court is satisfied that he will render an impartial verdict, is not repugnant to the clause in the constitution guarantying to every party accused a trial by an impartial jury.—Cooper v. State, 16 Ohio St. 328.

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[u] (Ohio) The statute providing that a juror shall not be disqualified who has formed an opinion from newspapers and rumors, but testifies that he believes he could render an impartial verdict, is not in violation of the constitutional provision for trial by an "impartial jury."—(1884) McHugh v. State, 42 Ohio St. 154; (1885) Palmer v. Same, Id. 596.

[v] (Tenn. 1873) Acts 1870, c. 51, that no juror shall be disqualified by any opinion which he may have, based upon any published account of the facts of the offense with which the prisoner is charged, contravenes the constitutional guaranty of "a public trial by an impartial jury."—Eason v. State, 65 Tenn. (6 Baxt.) 466.

[w] (Tex. 1874) Const. art. 5, § 8, authorizing the jury in a capital case, in their discretion, to substitute imprisonment for life for the death penalty, does not abrogate the statutory provision making conscientious scruples as to inflicting the punishment of death for crime a disqualification of a juror.—Caldwell v. State, 41 Tex. 86.

[x] (Utah. 1895) 2 Comp. Laws. 1888, § 5024, providing that a juror shall not be disqualified because he has formed an opinion based on newspaper report, if on oath he states that he can act impartially on the matters submitted to him, is not in violation of Const. U. S. Amend. 6, which guaranties to an accused a trial by an "impartial" jury.—People v. Thiede, 11 Utah, 241, 39 Pac. 837.

§ 229. Selection from vicinage.

See ante, § 226 [e].

Apportionment of jurors in general, see ante, § 8.

"Neighboring freeholders" as jurors, see post, § 260 [n].

[a] (U. S. 1891) A direction by the court in a venire that the jury shall be summoned from a certain part of the district, as allowed by Rev. St. § 802, is not in conflict with Const. Amend. 6, which provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy trial by an impartial jury of the state and district wherein the crime shall have been committed."—United States v. Ayres (D. C.) 46 Fed. 651.

[b] (Cal. 1891) Pen. Code, § 1033, as amended by Act March 9, 1887 (Sess. Laws 1887, p. 61), providing that the state may have a change of venue in a criminal action, "on the application of the district attorney, on the ground that from any cause no jury can be obtained for the trial of defendant in the county where the action is pending," is void, being in conflict with Bill of Rights, § 7, providing that "the right of trial by jury shall be secured to all and remain inviolate," the right secured being the right to trial by a jury of the vicinage as it existed at common law.—People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.

[c] (Conn. 1837) The provision in a city charter that the jury shall be taken from the freemen of the city, and not from the body of the county, is not repugnant to Const. art. 1, § 21, declaring that the right of trial by jury shall remain inviolate.—Colt v. Eves, 12 Conn. 243.

[d] (Idaho, 1880) A jury summoned, under the laws of the territory, from the county in which the district court is being held, for the transaction of business under the territorial laws, may be adopted by the court for the transaction of business and the disposition of cases arising under the laws of the United States, and such a jury is in every respect from the vicinage, since it is drawn from the district within which the crime was committed, though the crime was committed in another county of the district.—United States v. Mays, 1 Idaho, 763.

[e] (Ill. 1884) The constitutional right of trial by jury includes the right of having the jurors selected from the county in which the offense is alleged to have been committed.—Buckrice v. People, 110 Ill. 29.

[f] (Iowa, 1850) It was not contrary to the constitution to form two jury districts and two places for the sittings of the district court in Lee county.—Trimble v. State, 2 G. Greene, 404.

[g] (Iowa, 1888) Code 1873, § 4160, providing that "when a public offense is committed on the boundary line between two or more counties, or within 500 yards thereof, the jurisdiction is in either," is not in conflict with Const. art. 1, § 9, which provides that "the rights of trial by jury shall remain inviolate," when a statute similar to section 4160 was in force when the first constitution was adopted, and has remained so ever since.—State v. Pugsley, 75 Iowa, 742, 38 N. W. 498.

[h] (La. 1845) The statute of January 26, 1844, exempting the inhabitants of the parish of Rapides, residing in a certain portion thereof, from serving as jurors, does not infringe the right secured by Const. 1812, art. 6, § 18, to persons prosecuted in that parish of having a trial by an impartial jury of the vicinage.—State v. Jones, 8 Rob. 573.

[i] (La. 1877) A law which directs a change of venue on the naked application of the district attorney is constitutional; article 6 of the constitution, guarantying a trial by a jury of the parish, "unless the venue be changed," leaving the legislature free to declare when and how the venue may be changed, which is accomplished by the act.—State v. McCoy, 29 La. Ann. 593.

[j] (Mich. 1880) Comp. Laws, c. 256, denouncing as an offense the cutting and carrying away of timber from the public lands, and providing for the punishment thereof, is violative of the constitutional guaranty of right of trial by jury, in so far as it undertakes to authorize a trial in a county other than that where the offense was committed, and is therefore void.—Swart v. Kimball, 43 Mich. 443, 5 N. W. 635.

[k] (Mich. 1882) Jury Law 1877, pp. 113, 114, provides that the names of the jurors summoned from each precinct shall be kept in separate packages; that one name shall be drawn from each package before drawing the second name from any; and section 32 (amending 1 Comp. Laws, § 600), provides that when jurors have not been summoned, or a sufficient number do not appear, the court may cause a sufficient number to be summoned forthwith, and, in order to obtain jurors or talesmen near the county seat, may direct from which township or district such jurors shall be drawn. *Held*, that where the court, on suggestion of the prosecution in a homicide case, and three weeks before the trial, ordered the jury to be drawn from 11 specified townships out of the 25 in the county, but not including the county seat, or the locality of the crime, or the townships adjoining them, the jury was neither of the vicinage, nor of the county at large, nor one near the county seat, nor desired by the judge for the general purposes of the term, and hence was not sanctioned by law.—People v. Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477.

[l] (Mich. 1888) How. St. § 7556, providing that the jury list selected from each township or ward shall be computed according to the population at the last preceding census, is designed to secure a jury list from the body of the whole county, properly proportioned among its various divisions, and is mandatory; and a

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deviation from the statute in drawing from certain townships or wards a number of jurors disproportioned to the population is ground for challenge by a litigant.—Hewitt v. Saginaw Circuit Judge, 71 Mich. 287, 39 N. W. 56.

[m] (Minn. 1885) Under Sp. Laws 1878, p. 508, provding for the selection, from the qualified electors of the city of Rochester exclusively, of a list of persons to serve as jurors before the city justice, a jury was impaneled from such list to serve on the trial before such justice of a complaint for an offense committed within the county. *Held*, that such jury was a jury of the county or district in which the crime was committed, within the provision of Const. art. 1, § 6, that "in all criminal prosecutions the accused shall enjoy the right to a trial by a jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law."—State v. Kemp, 34 Minn. 61, 24 N. W. 349.

[n] (Miss. 1835) A conviction based on a command to a sheriff in a special venire to summon a jury "residing as near as may be to the place where the murder was committed" is invalid, as an abridgment of the prisoner's constitutional right to be tried by a jury of the county.—Shaffer v. State, 2 Miss. (1 How.) 238.

[o] (Neb. 1881) Under Const. art. 1, § 11, declaring that "in all criminal trials the accused shall have the right to * * * a speedy public trial, by an impartial jury of the county or district in which the offense is alleged to have been committed," the legislature may, in its discretion, by a general law, create trial districts which shall include more territory than a single county; but to be effective such law must be accompanied by one under which jurors can be called from the whole body, and not from a portion merely, of such district. The trial district and the jury district must be the same.—Olive v. State, 11 Neb. 1, 7 N. W. 444.

[p] (N. Y. 1866) Laws 1861, c. 210, providing for summoning additional juries from a town or city where the court is held, does not conflict with the constitution of the United States, which secures to persons accused of crime the right to a trial "by an impartial jury of the state and district wherein the crime shall have been committed"; nor is it repugnant to the constitution of this state, which declares that "trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever." The legislature could therefore provide for summoning jurors from any place in the county, as well as from bystanders or from the county at large, to supply a deficiency of jurors at any court or any trial.—Gardiner v. People, 6 Parker, Cr. R. 155.

[q] (N. C. 1892) Code, § 988, which provides that if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina or elsewhere, every such offender shall be guilty of a felony, and every such offense may be punished in the county where the offender shall be apprehended as if actually committed there, is repugnant to Const. U. S. art. 1, § 13, which is construed to guaranty a trial by a jury of the vicinage in all cases which were so triable at common law.—State v. Cutshall, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130.

[r] (Pa. 1888) Though the court directs the jury commissioners "to empty the jury wheel of all the names remaining therein and to make a new selection" it is error to order that the names of the persons then down in the wheel shall be excluded from the new selection, since the selection must be from the whole qualified electors of the county.—Commonwealth v. Baranowski, 6 Pa. Co. Ct. R. 157.

[s] (R. I. 1875) The provision of Const. art. 1, § 15, that the right of trial by jury shall remain inviolate, does not mean necessarily trial by a jury of the vicinage,—i. e., of the county where the cause of action originated or the parties reside,—and hence is not violated by an act authorizing a change of venue to secure an impartial trial or to avoid local prejudice.—Taylor v. Gardiner, 11 R. I. 182.

[t] (Tenn. 1892) Acts 1891, c. 26, § 5, establishing a special court, and providing that the jury of such court shall be taken from the districts of the county over which the court has jurisdiction, instead of from the entire county, is not in violation of Const. art. 1, § 9, providing that, in prosecutions by indictment or presentment, the accused is entitled to a "speedy public trial by an impartial jury of the county."—Ellis v. State, 92 Tenn. 85, 20 S. W. 500.

[u] (Tenn. 1896) Under Const. art. 1, § 9, guarantying to the accused "a speedy public trial by an impartial jury of the county," the action of the court in directing the sheriff to summon a special venire entirely from the country districts of the county is illegal, and entitles the accused to a new trial, if convicted, though no injury be shown.—Zanone v. State, 97 Tenn. 101, 36 S. W. 711, 35 L. R. A. 556.

[v] (Wis. 1884) Rev. St. 1878, § 4618, providing that offenses committed within 100 rods of the dividing line between two counties may be prosecuted and punished in either, is not in violation of Const. art. 1, § 7, securing to the accused the right to trial by a jury of the "county or district" wherein the offense was committed, "which county or district shall have previously been ascertained by law."—State v. Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388.

§ 230. Summoning and impaneling.

See ante, § 226 [h, k].

[a] (Ark. 1874) Cr. Code, § 219, which provides that the following oath shall be administered to the jury: "You and each of you do solemnly swear that you will well and truly try the case of the state of Arkansas against [the defendant], and a true verdict render, unless discharged by the court or withdrawn by the parties,"—is not in contravention of the constitution, which provides that the right of trial by jury shall remain inviolate.—Palmore v. State, 29 Ark. 248.

[b] (Colo. 1880) The fact that under Gen. Laws, §§ 812, 1479, the court may summon talesmen after exhausting the regular panel, does not cure the error of improperly sustaining a challenge by the state, since the prisoner is entitled to a list of the panel in order that he may inquire concerning them, and any irregular action of the court which compels resort to talesmen infringes this right.—Stratton v. People, 5 Colo. 276.

[c] (Ga. 1848) Const. art. 4, § 5, provides that trial by jury, "as heretofore used in this state, shall remain inviolate." 3 Bl. Comm. p. 579, which is the fundamental law of this state in all cases where not abrogated by statute, sets forth "that the truth of any accusation, whether preferred in the state, or by indictment, information, or bill, shall afterwards be confirmed by the unanimous suffrage of 12 of the defendant's equals and neighbors, indifferently chosen and superior to all suspicions." Act 1805 (Prince's Dig. p. 433) provides for the summoning and panel of grand jurors, and also the panel of petit jurors. *Held*, that a jury taken from the panel of petit jurors alone was not in-

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differently chosen, within the meaning of the constitution, since the defendant was entitled to have a jury drawn from both the grand and petit panels.—Rouse v. State, 4 Ga. 136.

[d] (Ga. 1856) Since, prior to the adoption of the constitution of 1798, which provides that the right of trial by jury shall remain inviolate "as heretofore used in this state," it was within the province of the legislature to regulate the manner of summoning and impaneling jurors, the acts passed, subsequent to the adoption of the constitution, regulating the mode of selecting, drawing, and summoning jurors, is not an infraction of the right secured by the constitution.—Rafe v. State, 20 Ga. 60.

[e] (Ga. 1888) An act creating a city court, and providing for a panel of 18, instead of 24, jurors, from which to select a jury for the trial of a civil case, is not in violation of Const. Ga. art. 6, § 18, declaring that the right to trial by jury shall remain inviolate, as the constitution does not prescribe the manner of selecting the jury.—Conyers v. Graham, 81 Ga. 615, 8 S. E. 521.

[f] (Ky. 1896) Under the statute requiring the circuit judge of each county to appoint three housekeepers, intelligent, discreet, over 21 years of age, residents of different parts of the county, and having no case for a jury, to serve as jury commissioners, a negro on trial cannot challenge the array because none of the jury commissioners was of his race.—Smith v. Commonwealth, 33 S. W. 825.

[g] (Mich. 1884) Neither the right of trial by jury nor the guaranty of local self-government is infringed by a statute authorizing jurors to be drawn by a board of jury commissioners appointed by the senate on the nomination of the governor.—People v. Harding, 53 Mich. 48, 481, 18 N. W. 555, 19 N. W. 155, 51 Am. Rep. 95; Same v. Anderson, 53 Mich. 60, 18 N. W. 561.

[h] (Mich. 1888) Parties to an action have a right to have the jury selected in substantial conformity with the law as established, and where a departure has occurred, and the positive provisions exacted to secure and guard the right to trial by jury have been violated or disregarded, there is no warrant in the courts for treating the deviations as harmless irregularities.—Hewitt v. Saginaw Circuit Judge, 71 Mich. 287, 39 N. W. 56.

[i] (Miss. 1881) Code 1880, § 1681, giving the board of supervisors power to select jurors, does not conflict with Const. art. 1, § 7, which provides that the accused shall be tried by an impartial jury of the county.—Cooper v. State, 59 Miss. 267.

[j] (S. C. 1857) Const. art. 9, § 6, providing that the right to trial by jury shall remain inviolate, does not prohibit the court or legislature from changing the method of drawing jurors from that which existed at the time of the adoption of the constitution.—State v. Boatwright, 10 Rich. Law, 407.

[k] (S. C.) Rule 97 of the circuit court, adopted at the November term, 1856, directs that in the formation of a jury for the trial of a felony, when the right of peremptory challenge is claimed and allowed, a child under 10 years of age shall, in the presence of the court, draw one from the names of all the jurors in attendance, which one, having answered, shall be presented to the accused, and so on until in regular course the panel may be exhausted or the jury be formed. Act 1791 (7 St. at Large, p. 262) § 4, provides that the circuit courts may from time to time make such just and reasonable rules and orders for the more regular and convenient conducting and effectual discharge of business therein as to them shall seem necessary and proper. Act 1731 (1 Brev. Dig. p. 447) § 15, provides that from the names of the persons who shall have been duly summoned and shall appear to serve as petit jurors the chief justice shall cause 12 persons to be drawn by a child under the age of 10 years, and the persons so drawn shall serve on all trials at such court; and in case any of the jurors so drawn shall be challenged, and the challenge allowed, or shall absent themselves or neglect to attend, that then the names of other persons shall be drawn out of the said box or glass to fill up or complete the jury. *Held*, that the act of 1731 was not unconstitutional, as imposing an undue restriction on the selection of a jury, and that rule 97 was within the terms of Act 1791.—(1857) State v. Boatwright, 10 Rich. Law, 407; (1857) Same v. Price, Id. 351; (1858) Same v. Clayton, 11 Rich. Law, 581.

[l] (Wis. 1857) The city charter of Milwaukee provides that a jury of six freeholders be appointed to decide upon the necessity of taking land for streets and upon the amount of compensation; but it does not provide that the so-called jury shall be sworn, and therefore violates article 11, § 2, of the constitution, which provides that in such cases "the necessity shall be first established by the verdict of a jury."—Lumsden v. City of Milwaukee, 8 Wis. 485.

[m] (Wis. 1859) An act of the legislature changing the method of selecting the jury panel, by authorizing the selection by the circuit judge, instead of a drawing by lot, is not an infringement of the constitutional provision that the right of jury trial shall be preserved.—Perry v. State, 9 Wis. 19.

§ 231. Examination.

[a] (Ga. 1846) The act of 1843, prescribing certain questions to be propounded to jurors touching their qualifications, is not unconstitutional, as an infringement on the right to trial by jury.—Boon v. State, 1 Ga. (1 Kelly) 618.

[b] (Ga. 1890) The right to a fair trial by an impartial jury is not impaired by Code, § 4682, prescribing the questions that may be asked a juror on his voir dire; the accused being allowed to offer evidence before the judge that any of the answers are untrue.—Woolfolk v. State, 85 Ga. 69, 11 S. E. 814.

§ 232. Challenges and objections.

[a] Statutory allowance of peremptory challenges of jurors by the state in criminal prosecutions is not in conflict with the constitutional right of trial by jury.

—(Mass. 1869) Commonwealth v. Dorsey, 103 Mass. 412;

(N. Y. 1865) Walter v. People, 32 N. Y. 147, affirming People v. Walters (1864) 18 Abb. Prac. 147, and Walter v. People, 6 Parker, Cr. R. 15;

(Vt. 1888) State v. Ward, 61 Vt. 153, 17 Atl. 483.

[b] (U. S. 1894) A rule that a juror shall be challenged or accepted and sworn as soon as his examination is completed is not objectionable, as embarrassing the exercise of the right of peremptory challenge.—St. Clair v. United States, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936.

[c] (U. S. 1895) The provision of Revision N. J. p. 532, that no exception to a juror in a criminal case on account of his citizenship or age or other disqualification shall be allowed after he has been sworn or affirmed, is not in violation of the provisions of the state constitution that the right of trial by jury shall remain inviolate.—Kohl v. Lehlback, 160 U. S. 293, 16 Sup. Ct. 304, 40 L. Ed. 432.

[d] (Cal. 1893) The law taking away the challenge for implied bias on the ground that the juror has formed or expressed an unqualified opinion as to the guilt of the accused is not

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unconstitutional as taking away one of the essential constituents of the right of jury trial secured by the constitution.—People v. Ah Lee Doon, 31 Pac. 963.

[e] (Ga. 1846) Pen. Code 1833, allowing the state 10 peremptory challenges, is not in violation of Const. art. 4, § 5, declaring that "trial by jury as heretofore used in this state shall remain inviolate."—Boon v. State, 1 Ga. (1 Kelly) 618.

[f] (La. 1856) The accidental insertion of the names of 3 jurors who had been excused in a list of 82 did not embarrass a prisoner in his challenges.—State v. Johnston, 11 La. Ann. 422; Same v. Kennedy, Id. 479.

[g] (Miss. 1846) How. & H. St. p. 674, § 46, which limits the number of peremptory challenges in capital cases on the part of the prisoner to 12, is not an infringement of the clause in the constitution which provides "that the right of trial by jury shall remain inviolate."—Dowling v. State, 13 Miss. (5 Smedes & M.) 664.

[h] (Miss. 1871) The setting aside by the court of a juror who has not been challenged by either party, or the discharge of a juror who, after having been sworn, is discovered to be incompetent, are acts which do not deprive the parties to the suit of any legal right, and which may properly be done by the court in order to secure an impartial jury.—Gilliam v. Brown, 43 Miss. 641.

[i] (Nev. 1876) St. 1861, p. 470, § 340, providing that from a list of 36 jurors, otherwise possessing the statutory qualifications, the state and defendant shall challenge peremptorily one juror alternately, until each has taken 12 peremptory challenges, and the remaining 12 jurors shall be sworn to try the case, is in conflict with article 1, § 3, of the constitution, which provides that the right of trial by jury shall be secured to all and remain inviolate forever, since it takes away the right of challenge for cause, whereby the 12 remaining to try the case may be prejudiced or otherwise unqualified to act as jurors.—State v. McClear, 11 Nev. 39.

[j] (N. H. 1869) A statute allowing the state, on the trial of criminal cases, the same number of peremptory challenges as the respondent, is constitutional.—State v. Wilson, 48 N. H. 398.

[k] (N. Y. 1875) Laws 1873, c. 427, providing that all challenges of jurors, both in civil and criminal cases, shall be tried and determined by the court alone, is constitutional.—Weston v. People, 6 Hun, 140.

[l] (Pa. 1861) The provision in the criminal procedure act of 1860, allowing four peremptory challenges to the commonwealth in all cases, is not in conflict with that portion of the constitution which provides "that trial by jury shall be as heretofore, and the right thereof shall remain inviolate."—Warren v. Commonwealth, 37 Pa. (1 Wright) 45.

[m] (Pa. 1861) The allowance of four peremptory challenges, under the criminal procedure act of 1860, does not conflict with the constitutional provision "that trials by jury shall be as heretofore, and the right thereof remain inviolate," although in consequence thereof it becomes necessary to call in the talesmen.—Hartzell v. Commonwealth, 40 Pa. (4 Wright) 462.

[n] (S. C. 1848) The act of 1841, which gives to each party, in all cases in which a jury shall be impaneled, before they shall be charged with the trial of any issue, the right to challenge, without cause shown, two of the jury so impaneled, is not a violation of section 6, art. 9, of the constitution; for the "trial by jury" in that section does not relate to the preliminary proceedings by which a jury is impaneled, and those proceedings are no part of "the trial."—Cregier v. Bunton, 2 Strob. 487.

[o] (S. C. 1890) An act of the legislature reducing the number of challenges in jury trials does not violate the constitutional provision that "the right of trial by jury shall remain inviolate."—State v. Wyse, 32 S. C. 45, 10 S. E. 612.

[p] (Wyo. 1888) Rev. St. § 3281, providing for trial of challenges to jurors in capital cases by three triers, and constituting them sole judges of the competency of such jurors, is not void as an infringement of the powers of the trial court as defined by the organic act of the territory.—Carter v. Territory, 3 Wyo. 193, 18 Pac. 750.

4. RESTRICTION OR INVASION OF FUNCTIONS OF JURY.

IN GENERAL, § 233.
WEIGHT AND SUFFICIENCY OF EVIDENCE, § 234.
NONSUIT OR DIRECTING VERDICT. § 235.

Concurrence of less than whole number of jurors, see ante, § 224.
Decision by judge on disagreement of jury, see ante, § 206 [f].
Effect of reservation of right of resubmission to jury, see post, § 242.
Permitting juror to act as interpreter, see ante, § 221 [c].

§ 233. In general.

[a] (N. Y. 1890) Laws 1857, c. 156, § 12, which provides that, on an appeal from the award of commissioners appointed to ascertain the amount of compensation for private property taken for public use, the court may increase or diminish the amount of compensation awarded, violates Const. art. 1, § 7, which requires that the compensation for private property taken for public use shall be ascertained by a jury or by commissioners, and is void.—In re Malone Waterworks Co. (Sup.) 15 N. Y. Supp. 649.

[b] (Pa. 1873) The act of 1868, authorizing the "court," upon petition, on "due proof" that a ground rent has "been extinguished by payment or presumption of law," to decree that such ground rent is extinguished, is unconstitutional, as violating the right of trial by jury.—Appeal of Haines, 73 Pa. (23 P. F. Smith) 169.

[c] (Pa. 1881) Act March 14, 1872, which enables the court to make the record conform to what was tried before the jury and found by the verdict, does not infringe the right of trial by jury.—Parks v. Boynton, 98 Pa. 370.

§ 234. Weight and sufficiency of evidence.

Permitting juror to testify, see ante, § 221 [b].
Taking evidence before referee for resubmission to jury, see post, § 242 [d].
Waiver of objections, see post, § 508 [s].

[a] (U. S. 1881) Act Ga. Oct. 14, 1879, providing for the regulation of freight and passenger tariffs, which declares that the schedule of rates established by the commissioners shall be held and taken in all courts as sufficient evidence that the rates therein fixed are just and reasonable, does not deprive railroad companies of their right to trial by jury, since it merely prescribes the effect of evidence.—Tilley v. Savannah, F. & W. R. Co. (C. C.) 5 Fed. 641.

[b] (Mass.) The fact that the judgment of a foreign court of admiralty condemning a ship

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for a breach of blockade is conclusive evidence of such breach, as against defendant, does not infringe defendant's right to trial by jury in an action on a policy of marine insurance on the vessel so condemned.—(1810) Baxter v. New England Marine Ins. Co., 6 Mass. 277, 4 Am. Dec. 125; (1811) Id., 7 Mass. 275.

[c] (Mass. 1811) Where the defense to an action on a marine insurance policy was that the loss occurred through a breach of blockade, a decision of the trial judge that the sentence of a foreign court of vice admiralty was conclusive evidence on the question whether the loss occurred in that way is not a denial of the right to a trial by jury.—Baxter v. New England Marine Ins. Co., 7 Mass. 275.

[d] (Mass. 1877) Gen. St. c. 121, § 46, making an auditor's report prima facie evidence upon the matters referred to him, is not unconstitutional, as an infringement upon a party's right to have the question of his liability determined by a jury; it being within the legislative power to regulate the forms of proceedings and the rules of evidence.—Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381.

[e] (Mo. 1894) Rev. St. 1889, § 3581, making it criminal for an officer of a bank to receive a deposit knowing that the bank is insolvent, and providing that the subsequent failure of the bank shall be prima facie evidence of such knowledge, does not violate Const. art. 2, § 28, which provides that "the right to trial by jury, as heretofore enjoyed, shall remain inviolate."—State v. Buck, 120 Mo. 479, 25 S. W. 573.

[f] (Neb. 1881) Comp. St. c. 50, § 18, which provides that, in actions against a saloon keeper for injury caused by the furnishing of intoxicating liquor, it shall only be necessary to sustain the action to prove that defendant sold or gave liquor to the person so intoxicated, whose acts or injuries are complained of, on that day or about that time when said acts were committed or injuries received, is not in violation of Const. art. 1, § 6, which guaranties the right of trial by jury, as it only provides the effect to be given to evidence in fixing responsibility.—Pleuler v. State, 11 Neb. 547, 10 N. W. 481.

[g] (N. H. 1868) Act July 3, 1863, entitled "An act in relation to damages occasioned by dogs," is unconstitutional, in so far as it undertakes to charge the owner with the amount of damage done by his dog, as fixed by the selectmen, because it is in violation of the right to trial by jury guarantied by Bill of Rights, art. 20.—East Kingston v. Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174.

[h] (N. H. 1876) The provisions of Gen. St. c. 212, providing for sending cases to auditors, and making the auditors' report evidence to the jury, are not in violation of the constitutional provision protecting trial by jury, except in cases in which it has been heretofore otherwise practiced; for references to auditors were in use before the constitution.—Perkins v. Scott, 57 N. H. 55. CONTRA, see King v. Hopkins, Id. 334.

[i] (N. Y.) Excise Law 1857, c. 628, authorizing the issuance of licenses for the sale of spirituous liquors or wines in quantities of less than five gallons, not be drunk upon the premises, provides that "whenever any person is seen to drink in such shop, or house, outhouse, yard, or garden belonging thereto, any spirituous liquor or wine forbidden to be drunk therein, it shall be prima facie evidence that such spirituous liquors or wines were sold by the occupant of such premises or his agent with the intention that the same should be drunk therein." *Held*, that such statute, in so far as it declares what should constitute prima facie evidence, was unconstitutional, as depriving accused of his right to trial by jury.—(1882) People v. Lyon, 27 Hun, 180. CONTRA, see (1886) Excise Com'rs of Auburn v. Merchant, 103 N. Y. 143, 8 N. E. 484.

[j] (Ohio, 1881) 71 Ohio Laws, p. 146, fixing a minimum penalty against a railroad for overcharging for transportation, is not unconstitutional as invading the province of a jury, since such penalty is in the nature of a punishment.—Cincinnati, S. & C. R. Co. v. Cook, 37 Ohio St. 265.

[k] (Pa. 1866) Act March 27, 1852, § 7, relating to Clarion river, a public highway, which makes the award of referees appointed under the act final, is unconstitutional, so far as it attempts to deprive of a trial by jury a plaintiff in an action for obstructing by a dam his navigation of that river.—Rhines v. Clark, 51 Pa. (1 P. F. Smith) 96.

[l] (R. I. 1859) The construction of Rev. St. c. 68, §§ 1, 2, holding that the decision of the school commissioner, and a justice of the supreme court upon appeal, that a tax has been illegally assessed, is conclusive, both in law and fact, upon the parties to the appeal, does not bring that statute into conflict with section 15, art. 1, of the constitution, which declares that the "right of trial by jury shall remain inviolate."—Crandall v. James, 6 R. I. 144.

[m] (R. I. 1875) A statute provided that "when a cause is at issue in the supreme court or court of common pleas, if the form of action be assumpsit, debt, covenant, or other form of action in any way involving accounts, the court may, in its discretion, appoint one or more auditors," etc., and further provided for a trial by jury, after confirmation of the auditor's report and judgment thereon, "in which trial the report shall be prima facie evidence of all matters expressly embraced in the order." *Held* that, so far as this statute made the auditor's report prima facie evidence for the jury, it was in conflict with Const. art. 1, § 15, which provides that "the right of trial by jury shall remain inviolate," and was therefore void.—Francis v. Baker, 11 R. I. 103, 23 Am. Rep. 424.

[n] (Tenn. 1895) A provision in Acts 1895, c. 67, relating to the protection of hotel, inn, and boarding house keepers, that proof of certain things shall be prima facie evidence of fraudulent intent to defraud such keepers, does not impair the right of trial by an impartial jury, as guarantied by Const. art. 1, §§ 6, 8, 9.—State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656.

[o] (Tex. 1895) Act May 6, 1893, providing that payment of the United States special license tax shall be prima facie evidence that the person paying such tax is engaged in selling liquor, is not in conflict with Const. art. 1, § 15, giving the right of trial by jury, since prima facie evidence is merely proof upon which the jury may find a verdict.—Floeck v. State, 34 Tex. Cr. R. 314, 30 S. W. 794.

[p] (Vt. 1860) The act of 1856, providing for a compulsory reference of suits at law, and which makes the referee's report prima facie evidence of the facts therein reported, in case either party claims a trial by jury, does, so far as it applies to actions suitable for trial by jury according to the course of the common law, impair the right to such a jury trial as is guarantied by the constitution, and it is therefore void.—Plimpton v. Somerset, 33 Vt. 283.

[q] (Wis. 1882) Rev. St. § 4073, providing that a person convicted of a felony may still be a competent witness, is not unconstitutional, as impairing the right of trial by jury.—Sutton v. Fox, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

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§ 235. Nonsuit or directing verdict.

Practice in general, see "Trial," VI. (B, C, D).

[a] (U. S. 1828) The courts of the United States have no authority to order a peremptory nonsuit against the will of the plaintiff. He has a right by law to a trial by a jury, and to have the case submitted to them. He may agree to a nonsuit, but cannot be compelled to submit to it.—Doe v. Grymes, 26 U. S. (1 Pet.) 469; De Wolf v. Rabaud, 26 U. S. (1 Pet.) 476, 7 L. Ed. 227.

[b] (U. S. 1885) Without a waiver of the right of trial by jury in a United States circuit court, by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment thereon.—Baylis v. Travelers' Ins. Co., 113 U. S. 316, 5 Sup. Ct. 494, 28 L. Ed. 989, following Randall v. Baltimore & O. R. Co. (1883) 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003.

[c] (Conn. 1856) The act of 1852, authorizing the granting of nonsuits in civil actions, where the plaintiff, who has produced his evidence and rested his cause, shall have failed to make out a prima facie case, is not repugnant to the constitution of this state, as impairing the right of trial by jury.—Naugatuck R. Co. v. Waterbury Button Co., 24 Conn. 468.

[d] (Ill. 1882) To order a nonsuit, where there are issues of fact and evidence adduced in support of the issues, is a deprivation of a party's right to a trial by jury.—Greenwich Ins. Co. v. Raab, 11 Ill. App. (11 Bradw.) 636.

[e] (Iowa, 1894) Where the evidence would have warranted the court in directing a verdict, it was not error to order the cause tried to the court.—Garretson v. Ferrall, 92 Iowa, 728, 61 N. W. 251.

[f] (Me. 1824) Where the evidence offered by the plaintiff is deemed insufficient to maintain the action, the ordering of a nonsuit is no infringement of Declaration of Rights, § 20, which secures the privilege of trial by jury.—Perley v. Little, 3 Me. (3 Greenl.) 97.

[g] (N. M. 1891) Under the constitutional provision which guaranties to persons accused of crime the right of trial by jury, the court, in a criminal case, has no power to direct the jury to convict, though the evidence of guilt is overwhelming.—Territory v. Kee, 5 N. M. 510, 25 Pac. 924.

[h] (Pa. 1861) Facts are for the jury; the law applicable to them, for the court. Therefore, when the court ordered a nonsuit, on the ground that, under the law as applicable to all the facts of the case that a jury could have found from the evidence, there was no liability on the part of the corporation defendants, such order was *held* not to violate the constitutional right of trial by jury.—Munn v. City of Pittsburg, 40 Pa. (4 Wright) 364.

[i] (Tenn. 1896) To compel plaintiff, in a suit for damages for death of his intestate, to join in a demurrer to the evidence, where the evidence is conceded to be true, and all legitimate and reasonable inferences that may be drawn from it are admitted, is not in violation of Const. art. 1, § 6, providing that the right of trial by jury shall remain inviolate.—Hopkins v. Nashville, C. & St. L. Ry., 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354.

5. EFFECT OF PROVISION FOR OTHER REMEDY.

IN GENERAL, § 236.
APPEAL TO COURT WHERE JURY TRIAL MAY BE HAD, § 237.
— ACTIONS BEFORE JUSTICES OF THE PEACE AND OTHER INFERIOR COURTS, § 238.
— CONDEMNATION PROCEEDINGS, § 239.
— PROBATE MATTERS, § 240.
— CRIMINAL PROSECUTIONS, § 241.
RESERVATION OF RIGHT OF RESUBMISSION TO JURY, § 242.

§ 236. In general.

[a] (Cal. 1855) Comp. Laws, p. 214, known as the "Act to prevent extortion in office," is not in conflict with the constitution, in that it deprives the defendant of the right to trial by jury, since the last section of that act provides a remedy whereby a jury trial may be had.—Ryan v. Johnson, 5 Cal. 86.

[b] (Fla. 1884) Act March 11, 1879, c. 3131, and Act Feb. 22, 1881, c. 3247, providing a summary proceeding by warrant of distress for securing rents, whereby the tenant's property is made liable to seizure without personal notice to the tenant, is not in conflict with the constitutional provisions which secure the right of trial by jury, as the tenant may have the matters in dispute tried by a jury on his replevying the property and tendering an issue.—Blanchard v. Raines' Ex'x, 20 Fla. 467.

[c] (N. J. 1891) Revision, p. 550, §§ 59, 60, allowing a trial before a justice by a jury of 6, of the title to property levied on, where it is claimed by a third person, is not unconstitutional as depriving the parties of the right to a constitutional jury of 12, since it does not compel the parties to resort to such a proceeding, but leaves optional with the claimant to bring replevin or trespass de bonis asportatis, and, with the plaintiff in execution, to give bond, and compel a sale by the officer.—Berry v. Chamberlain, 53 N. J. Law (24 Vroom) 463, 23 Atl. 115.

[d] (N. Y. 1872) In an action for an injunction and damages for the use by defendant of plaintiff's trade-mark, defendant has no absolute right to a preliminary order settling issues to be tried by a jury, and the refusal to grant such order does not necessarily deprive the defendant of his right to such trial, since, when the cause is brought to trial without a jury, the defendant may then object, and it will be the duty of the court to order the cause to be tried by a jury, unless the damages are waived.—Colman v. Dixon, 50 N. Y. 572.

[e] (N. Y. 1878) Laws 1877, c. 387, § 48, authorizing the recorder of Kingston to commit a prisoner to jail, not exceeding five days, for nonpayment of costs, in case such prisoner elects not to be tried before the recorder, and waives examination, does not affect his ultimate right of trial by jury, and is not, therefore, in violation of Const. art 1, § 2.—People v. Webb, 16 Hun, 42.

[f] (N. C. 1860) The fact that a county court, by a special statute, cannot hold jury trials, does not deprive a party of his common-law right to have issues of fact tried by a jury; and in such case the cause should be transferred to the superior court for trial.—Buchanan v. McKenzie, 53 N. C. 91.

[g] (R. I. 1887) Pub. St. c. 244, § 24, provides that every person who shall have been convicted three times within a period of six months of intoxication, etc., or who shall be proved to have been thus intoxicated three times within six weeks, shall be deemed a common drunkard. *Held* not to violate the provision of the constitution securing the right of trial by jury, there being nothing to prevent any person complained of under the act from having a trial by jury on any question of fact arising, and there being provision for jury trial on complaint for indecent intoxication.—State v. Flynn, 16 R. I. 10, 11 Atl. 170.

[h] (Wis. 1862) The provisions of the law of 1859 relating to actions to try the title to

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lands conveyed for taxes are not unconstitutional, as denying the right of trial by jury; section 42 saving that privilege.—Wakeley v. Mohr, 15 Wis. 609.

[i] (Wis. 1882) Rev. St. §§ 3149–3153, relating to "partition of water powers," and providing for the appointment of commissioners to take control of mills and to use them in such reasonable manner as will enable them to ascertain the respective rights of the parties, and to determine the manner of using, applying, and preserving the same, is not unconstitutional, as denying the right of trial by jury, since it is expressly provided in the statute that an issue of fact in any such action properly triable by jury may be tried by jury with like effect as in other cases.—Janesville Cotton Mfg. Co. v. Ford, 55 Wis. 197, 12 N. W. 377.

§ 237. Appeal to court where jury trial may be had.

Restrictions on right of appeal in civil cases, see ante, § 212.

—— *in criminal cases, see* ante, § 217.

[a] (Md. 1855) A law which secures the right of trial by jury on appeal, though providing for a primary trial without jury, is no violation of a constitutional provision for guarding such right.—Steuart v. City of Baltimore, 7 Md. 500.

[b] (Mo. 1891) Even if Const. 1875, art. 2, § 28, requires a jury in such cases as an action to recover possession under the landlord and tenant act, a statute is not repugnant thereto where it provides, without unreasonable restriction, for an appeal to a court where a jury trial may be had.—State ex rel. Kansas City Auditorium Co. v. Allen, 45 Mo. App. 551.

[c] (Pa. 1865) Act Dec. 14, 1863, giving a single justice power to determine questions arising in proceedings by landlords to regain possession of the demised premises, and on a finding against the tenant to forthwith issue a writ of possession, with a right of appeal and ultimate trial by jury, is not in contravention of section 6 of the declaration of rights, which provides that the trial by jury shall be as heretofore and remain inviolate.—Kinley v. McFillen, 6 Phila. 35.

[d] (Pa. 1866) The landlord and tenant act of 1863 substitutes the judgment of one justice for that of two and a jury of freeholders, but allows an appeal to the common pleas upon giving bail for costs and rent that have accrued or may accrue; such appeal, however, not to operate as a supersedeas to the warrant of possession. If the jury find for the tenant upon the appeal, they are to assess his damages sustained by removal from the premises, and he is entitled to a judgment for such damages, costs, and the possession. *Held*, that this act does not violate the constitutional provision securing a trial by jury.—Haines v. Levin, 51 Pa. (1 P. F. Smith) 412.

§ 238. —— Actions before justices of the peace and other inferior courts.

Criminal prosecutions, see post, § 241.

[a] Statutes which authorize a justice of the peace to decide questions without a jury, but give an appeal from his judgment to a court which tries by jury, are not unconstitutional, as impairing the right of trial by jury.
—(Conn. 1823) Beers v. Beers, 4 Conn. 535, 10 Am. Dec. 186;
(N. C. 1811) Keddie v. Moore, 6 N. C. 41, 5 Am. Dec. 518;
(Pa. 1808) Emerick v. Harris, 1 Bin. 416;
(Tenn. 1835) Morford v. Barnes, 16 Tenn. (8 (Yerg.) 444.

[b] (N. Y. 1869) The statute authorizing a trial by a jury of 6 in a justice's court, although the amount claimed exceeds the limit of the jurisdiction of the court, is not unconstitutional, if it also allows the defendant the right to remove the cause to a court of record, where he could have a trial by a jury of 12.—People v. Lane, 55 Barb. 168, 6 Abb. Prac. (N. S.) 105.

[c] (N. C. 1811) Acts 1802, c. 6, increasing the jurisdiction of a justice of the peace to £30, is not incompatible with section 14, Bill of Rights, securing the right of trial by jury, in the state constitution, since the parties are secured the right of appeal with trial by jury.—Keddie v. Moore, 6 N. C. 41, 5 Am. Dec. 518; Richmond v. Boman, 6 N. C. 46; Wilson v. Simonton, 8 N. C. 482.

[d] (Pa. 1825) The act of April 2, 1821 (7 Smith's Laws, p. 474), and the supplement thereto, passed March 24, 1824, laying a duty on retailers of foreign merchandise, and providing for an action to recover the same before a justice or alderman without a jury, and which provides for an appeal from the decision of such justice or alderman to a court where the defendant might have a jury, does not violate Const. art. 9, § 6, providing for trial by a jury.—Biddle v. Commonwealth, 13 Serg. & R. 405.

[e] (Tenn. 1835) Acts 1831, c. 59, § 2, vesting justices with jurisdiction of suits where the amount in controversy may exceed $20, there being no jury trial in justices' courts, is not unconstitutional, as depriving a person of the right of trial by jury, since the party is entitled to a jury trial on appeal.—Morford v. Barnes, 16 Tenn. (8 Yerg.) 444.

[f] (W. Va. 1885) A party's constitutional right to a jury trial is not invaded by a summary proceeding in the first instance in an inferior court, if he has an unqualified right to such a trial in the appellate court on appeal from such inferior court.—Jelly v. Dils, 27 W. Va. 267.

§ 239. —— Condemnation proceedings.

[a] (Ind. 1866) The provision in the plank road act for the assessment of damages in the first instance by viewers, to be appointed by the justice, is not in conflict with Const. art. 1, § 20, which provides that "in all civil cases the right of trial by jury shall remain inviolate," since on appeal to the circuit court, the issue may be tried by a jury.—Norristown Turnpike Co. v. Burket, 26 Ind. 53.

[b] (Iowa, 1885) As an appeal lies from the decision of the board of supervisors, in awarding damages for opening a highway, to the circuit court, where the party aggrieved may obtain a jury trial, a landowner is not deprived of his constitutional right to such trial; and, if he neglects to avail himself of the said right, he has no ground to complain.—Tharp v. Witham, 65 Iowa, 566, 22 N. W. 677.

[c] (Miss. 1882) The provision in a railroad company's charter that land damages shall be assessed by three commissioners appointed by the chancery court, and if dissatisfied therewith either party may appeal and demand a jury, is not unconstitutional.—New Orleans, B. R., V. & M. R. Co. v. Drake, 60 Miss. 621.

[d] (N. Y. 1894) Laws 1870, c. 291 (Village Incorporation Act), as amended by Laws 1893, c. 694, providing that compensation for land taken for streets shall be determined by a jury of 6, taken from a list of 12 prepared by the trustees, and that the landowner may appeal from their award to the county court, where the damages shall be assessed by three commissioners appointed by the court, does not

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violate the requirement of the constitution that compensation shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, since the right of appeal cures the defect in selecting a jury from such list.—People v. Board of Trustees of Haverstraw, 80 Hun, 385, 30 N. Y. Supp. 825.

[e] (S. D. 1895) Since Comp. Laws, § 1324, gives a landowner the right to appeal to a jury from the assessment by township supervisors of damages occasioned by the laying out, alteration, or discontinuance of a road, Id. § 1302, providing that the assessment of such damages shall be made by township supervisors, is not in conflict with Const. art. 6, § 13, which provides that private property shall not be taken for public use or damaged without just compensation, as determined by a jury.—Town of Dell Rapids v. Irving, 7 S. D. 310, 64 N. W. 149, 29 L. R. A. 861.

§ 240. —— Probate matters.

[a] (Ala.) Code, §§ 3619, 3640, allow an appeal to the circuit or supreme court from any final decree of the probate court within one year from the rendition thereof. Section 3210, as amended by Act Gen. Assem. Feb. 28, 1889, provides that compensation for lands taken by eminent domain may be ascertained by a jury of 6 men in proceedings in the probate court. Section 3215 provides that in such cases either party may appeal by bill of exceptions to the supreme court within three months. Const. art. 14, § 7, entitles either party appealing from a preliminary assessment of compensation for condemned lands to have the damages "determined by a jury according to law." *Held* that, since a "jury according to law" is a jury of 12 men, section 3215 is unconstitutional, since, if an appeal by bill of exceptions were taken by either party directly to the supreme court, the other would be deprived of right to trial by such a jury.—(1890) Postal Tel. Cable Co. v. Alabama G. S. R. Co., 92 Ala. 331, 9 South. 555; (1891) Alabama M. Ry. Co. v. Newton, 94 Ala. 443, 10 South. 89.

[b] (R. I. 1880) A statute giving probate courts jurisdiction to set off dower, but reserving a right of appeal, by claiming which any party interested may have a trial by jury in the appellate court, is not unconstitutional, in that it impairs the right of trial by jury.—Weaver v. Sturtevant, 12 R. I. 537.

§ 241. —— Criminal prosecutions.

[a] (U. S. 1888) One charged with the offense of criminal conspiracy is entitled to a jury trial in the first instance; and it is not sufficient that by the local statutes (Rev. St. Dist. Col. §§ 773, 1073–1077) he would be entitled to an appeal from a conviction by the police court to the supreme court, upon giving recognizance, and to a jury trial on such appeal.—Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223.

[b] (U. S. 1873) Act June 17, 1870 (16 Stat. 153), which establishes a police court in the District of Columbia, and gives such court jurisdiction over certain offenses committed in the District; and provides that trial in that court is to be without a jury, but any party aggrieved may appeal to the criminal court of the District, and that the appeal may be tried by a jury, is unconstitutional, under Const. art. 3, § 2, subdiv. 3, which provides that the trial of all crimes, except impeachment, shall be by jury.—In re Dana, Fed. Cas. No. 3,554 [7 Ben. 1].

[c] (Conn. 1856) The provision of the act of 1854, to suppress intemperance, that the justice, if he shall find the liquor was kept in violation of said act, shall render judgment that the liquor and the vessels which contained it be forfeited, is not, by giving to the justice jurisdiction over property to an unlimited amount, repugnant to the constitution of this state, as impairing the right of trial by jury, inasmuch as the right of appeal is allowed to the claimant in every case.—State v. Brennan's Liquors, 25 Conn. 278.

[d] (Iowa, 1859) Article 2 of the ordinance of 1787 is not violated by a trial in an inferior court before a jury of less than 12 men, appeal being left open to carry the case before a jury of 12.—State v. Beneke, 9 Iowa, 203.

[e] (Kan. 1874) Where a statute authorizes a trial before a municipal court without a jury, for a violation of a city ordinance, and at the same time secures to the defendant an appeal therefrom to an appellate court in which he has a right to a trial by a jury, proceeding under the statute is not in conflict with the constitutional provision that the "right of trial by jury shall be inviolate."—City of Emporia v. Volmer, 12 Kan. 622.

[f] (Ky. 1889) Act Feb. 11, 1880, providing that "juries in justices', police, and quarterly courts may consist of six men," does not include county courts; but to try defendant against his objection by a jury of six men in the county court is a judicial error, and, the judgment being for a fine of more than $20, entitles defendant, under Cr. Code, § 362, to an appeal to the circuit court, where the error may be cured by a trial de novo by a jury of twelve men.—Helvenstine v. Yantis, 88 Ky. 695, 11 S. W. 811.

[g] (Mass. 1823) St. 1822, c. 25, giving the police court of the city of Boston power to sentence to the house of correction persons adjudged guilty of certain offenses, is not unconstitutional, as subjecting them to an infamous punishment without trial by jury. If, on conviction in the police court, the party does not appeal to a higher tribunal, where he may be tried by a jury, it is a voluntary waiver of his privilege.—Commonwealth v. Bowden, Thacher, Cr. Cas. 9.

[h] (Mass. 1857) A statute which authorizes a single magistrate to try and pass sentence in a criminal case, but gives the defendant an unqualified and unfettered right of appeal and a trial by jury in the appellate court, subject only to the requirement of giving bail for his appearance there, or, in default of such bail, being committed to jail, is not unconstitutional, as impairing the right of trial by jury.—Jones v. Robbins, 74 Mass. (8 Gray) 329.

[i] (Minn. 1869) The jury contemplated by Const. art. 1, par. 6, securing the right to trial by jury in criminal cases, is a body of 12 men, and it is error to try a party charged with crime, in a justice court, against his objection, with a jury of 6, though he may appeal to the district court, on entering into recognizance with sureties, where a trial by the constitutional jury may be had.—State v. Everett, 14 Minn. 439 (Gil. 330).

[j] (Mo. 1887) There is no constitutional objection to a legislative provision for the trial of cases involving breaches of city ordinances without an indictment and without a jury, especially where a jury may be had on appeal.—City of Marshall v. Standard, 24 Mo. App. 192.

[k] (N. C. 1854) Act Gen. Assem. giving to the intendant of police of a town power to try assaults and batteries is in contravention of Const. § 9, providing "that no freeman shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used," though the defendant may be entitled to an appeal from a

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conviction by such magistrate.—State v. Moss, 47 N. C. 66.

[l] (N. C. 1884) The legislature may provide other means for trial of petty misdemeanors than by jury, provided the right of appeal is preserved.—State v. Crook, 91 N. C. 536.

[m] (N. C. 1894) Under Const. art. 1, § 13, the legislature may authorize the trial of petty misdemeanors in inferior courts without a jury, by making provision for appeal.—State v. Whitaker, 114 N. C. 818, 19 S. E. 376.

[n] (S. C. 1893) Const. 1868, art. 1, §§ 11, 13, 14, which provide that the right of trial by jury shall remain inviolate, do not entitle a person charged with carrying a concealed weapon to a trial by a jury of 12 men, in the absence of any provision in the constitution forbidding the general assembly from determining the number of persons who shall constitute a jury, as it had the power to do before the adoption of such constitution; especially since article 1, § 19, provides that cases of such character shall be tried "summarily" before a justice of the peace, without indictment or intervention of a jury, saving to defendant the right of appeal.—State v. Williams, 40 S. C. 373, 19 S. E. 5.

[o] (Va. 1892) Code, § 4106, which confers upon justices of the peace jurisdiction over the offense of keeping a bawdy house, concurrent with that of the county and corporation courts, is repugnant to Const. art. 1, § 10, guarantying to the accused in all criminal prosecutions the right to a speedy trial by an impartial jury; and the fact that sections 4107 and 4108 give in such a case the right of appeal and trial by jury in the appellate court does not relieve the statute of its repugnancy.—Miller v. Commonwealth, 88 Va. 618, 14 S. E. 161, 342, 979, 15 L. R. A. 441.

[p] (Va. 1895) Code 1887, § 4106, as amended by Acts Assem. 1893–94, p. 430, provided that justices of the peace shall have concurrent jurisdiction with the county and corporation courts in petit larceny and other misdemeanors whenever the accused elects to be tried by said justice, and is not in conflict with Const. art. 1, § 10, which provides "that in all capital or criminal prosecution a man hath a right to * * * a speedy trial by an impartial jury," as provision is made for a trial by jury on appeal to a higher court in case of conviction before the justice.—Brown v. Epps, 91 Va. 726, 21 S. E. 119, 27 L. R. A. 676, reversing Miller v. Commonwealth (1892) 88 Va. 618, 14 S. E. 161, 342, 979, 15 L. R. A. 441.

[q] (W. Va. 1885) Provisions of the charter authorizing a town or city to require licenses to legalize the sale of intoxicating liquor, and providing for the punishment of selling without a license by fine and imprisonment, to be imposed by summary proceedings, is constitutional; the right of appeal and trial by jury being given.—Moundsville v. Fountain, 27 W. Va. 182; Jelly v. Dils, Id. 267.

§ 242. Reservation of right of resubmission to jury.

[a] (Ga. 1848) Acts 1841, 1845, providing that all persons employed on watercraft on certain rivers of the state, on making an affidavit and an application to any judge of the superior court or justice of an inferior court, may obtain an order to the clerk to enter up judgment on such affidavit and to issue an execution instanter; and further providing that the owners of such said watercraft may, when desirous of contesting said claim, file a bond to secure said debt, whereupon there shall be a trial by jury, is not unconstitutional, as affecting the right of trial by jury.—Flint River Steamboat Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248.

[b] (Mo. 1892) 1 Rev. St. 1879, pars. 894–896, which authorized the appointment of commissioners to assess damages for land condemned, allowed the landowner to have such damages reassessed by a jury, and provided that the petitioner, upon paying into court the damages as assessed by the commissioners, might take possession of the land, does not conflict with Const. 1875, art. 12, par. 4, which declares that the right of trial by jury shall be held inviolate in all trials for compensation where, in the exercise of the right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right.—Rothan v. St. Louis, O. H. & C. Ry. Co., 113 Mo. 132, 20 S. W. 892.

[c] (N. H. 1875) Acts 1874, c. 97, § 13, which authorizes the court, without consent of parties, to commit certain cases to referees, but providing that if either party is dissatisfied he may afterwards have a hearing before a court and jury, is not in conflict with Bill of Rights, art. 20, guarantying the right to a trial by jury.—Copp v. Henniker, 55 N. H. 179, 20 Am. Rep. 194.

[d] (S. C. 1895) Where a party is entitled to a jury trial, the court cannot order the testimony to be taken by a referee, on which the case may be afterwards tried by a jury.—Wilson v. York Tp., 43 S. C. 299, 21 S. E. 82; Same v. Catawba Tp., Id.; Same v. Cherokee Tp., Id.; Same v. Ebenezer Tp., Id.

[e] (Wash. 1894) Act March, 1893 (Laws, p. 237), relating to laying out highways, provides that notice of the proceeding shall be given by posting, and, after the survey has been made and the plat and award has been filed by the viewers, the clerk shall publish a notice that the court will consider the report on a certain day, when, if any one objects to the award, the court will call a jury. *Held*, that the act is in violation of Const. art. 1, § 16, which provides that compensation for a taking of property for a public use shall be ascertained by a jury unless a jury is waived.—In re Smith, 9 Wash. 85, 37 Pac. 311.

III. QUALIFICATIONS OF JURORS AND EXEMPTIONS.

ELIGIBILITY IN GENERAL, § 243.
CONSTITUTIONAL AND STATUTORY PROVISIONS, § 244.
PHYSICAL CAPACITY, § 245.
AGE, § 246.
INTELLIGENCE AND EDUCATIONAL QUALIFICATIONS, § 247.
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Challenges for cause, see post, §§ 551–598.
Competency for trial of cause, see post, §§ 400–630.
Prescribing qualifications as infringement of right, see ante, § 227.
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—— *for service on special or struck jury, see* post, § 368.
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Summoning disqualified persons on the panel as ground of challenge to array, see post, § 362.
Waiver of objections, see post, §§ 503–523.
Arrest of judgment for disqualification of jurors, see "Judgment," vol. 30, cc. 676–678, §§ 481–483.
—— *in criminal cases, see* "Criminal Law," vol. 15, cc. 250, 251, §§ 2442, 2443.
Conclusiveness of finding of lower court as to competency of jury in criminal prosecutions, see "Criminal Law," vol. 15, cc. 822–828, § 3056.
Constitutionality of statute prescribing qualification of jurors, see "Constitutional Law," vol. 10, c. 1332, § 60 [e].
Disqualification of juror as ground for new trial in civil actions, see "New Trial," II. (D).
—— *in criminal prosecutions, see* "Criminal Law," vol. 15, cc. 63–125, §§ 2225–2282.
Effect of statute granting exemption from jury duty as to constitutional guaranty against special privileges, see "Constitutional Law," vol. 10, c. 2029, § 609.
Exclusion from jury by reason of race, see "Civil Rights," vol. 10, cc. 40–42, § 5.
Mandamus to enforce exemption from jury service, see "Mandamus."
Qualification of infants, see "Infants," vol. 27, c. 975, § 8 [i, j].
Qualifications of jurors, necessity of bill of exceptions to review objection, see "Appeal and Error," vol. 3, c. 209, § 2430.
—— *to assess compensation in condemnation proceedings, see* "Eminent Domain," vol. 18, cc. 1604–1606, § 553.

§ 243. Eligibility in general.

Age of juror as exemption, see post, § 264.
Conflict between federal and territorial constitutions and statutes as to female jurors, see post, § 244 [p].
Public office as exemption, see post, §§ 261–264.
Validity of territorial act permitting women to serve on jury, see post, § 244.
Waiver of objections as to age of jurors, see post, § 507.

[a] (Fla. 1889) A man is not disqualified from jury service because he is the assessor of taxes for a city or town.—Ellis v. State, 25 Fla. 702, 6 South. 768.

[b] (Ky. 1892) The judgment of a lower court will not be reversed on appeal because some of the members of the jury were colored persons.—Osborn v. Commonwealth, 20 S. W. 223.

[c] (Mass. 1876) Under Gen. St. c. 132, § 1, and Id. c. 6, § 1, an infant is not qualified to serve on a jury.—Wassum v. Feeney, 121 Mass. 93, 23 Am. Rep. 258.

[d] (Pa. 1867) A juror is not disqualified by inability to state his age.—Commonwealth v. Winnemore, 2 Brewst. 378.

[e] (R. I. 1880) In Gen. St. c. 189, § 1, providing that certain persons are "liable" to serve as jurors, the word "liable" is tantamount to "qualified," and the section defines the qualification of jurors, as well as the liability to serve.—State v. Davis, 12 R. I. 492, 34 Am. Rep. 704.

[f] (Wash. 1884) A husband and wife are jointly householders and the head of the family, so that the wife may act as juror under a statute requiring jurors to be householders.—Rosencrantz v. Territory, 2 Wash. T. 267, 5 Pac. 305; Walker v. Same, 2 Wash. T. 286, 5 Pac. 313.

§ 244. Constitutional and statutory provisions.

Constitutionality of act exempting members of fire companies, see post, § 261 [zz].
—— *exempting members of state battery, see* post, § 261 [o].
—— *exempting postmasters, see* post, § 261 [u].
Power to bind subsequent legislature by exemption law, see post, § 262.
Repeal of act exempting member of fire company, see post, § 261 [g].

[a] (U. S. 1864) Although congress has heretofore adopted some of the state laws and modes of procedure, especially those which prescribe the qualification of jurors and the mode of summoning them, there is no necessity for so doing, or for using any part of the state machinery. The national legislature has constitutional power to prescribe the qualifications of jurors and the manner in which they shall be selected and summoned; it may make the judicial system of the United States complete for the independent exercise of all its functions.—In re Charge to Grand Jury, Fed. Cas. No. 18,274 [2 Spr. 292].

[b] (U. S. 1886) Act May 17, 1884 (23 Stat. 24, § 7), declares that the general laws of Oregon shall be the law in Alaska so far as applicable, and not in conflict with United States laws; and Rev. St. § 800, provides that jurors shall have the qualifications prescribed by the law of the state in which they sit. *Held*, that the latter statute cannot apply to Alaska, as there is no law there on the subject, and jurors should be chosen under Civ. Code Or. §§ 918–920.—Kie v. United States (C. C.) 27 Fed. 351.

[c] (Ala. 1875) Act Dec. 31, 1868, to amend Rev. Code, § 4063, which requires the officers therein designated to select grand and petit jurors from the list of registered voters on file in the probate judge's office, observing strictly "all qualifications and restrictions in regard to competency and qualification as now provided by law," does not repeal section 4180, which allows a challenge for cause, in a criminal trial, to one summoned as "a juror, and not a resident freeholder or householder for the preceding year."—Iverson v. State, 52 Ala. 170.

[d] (D. C. 1886) Rev. St. U. S. § 812, declaring that no person shall be summoned as a juror in any circuit or district court more than once in two years, has no application to the courts of the District of Columbia. The subject is regulated by Rev. St. § 861.—United States v. Nardello, 4 Mackey, 503.

[e] (Ga. 1856) Act Feb. 28, 1856, declaring who are qualified to serve as jurors in criminal cases, is applicable to cases pending at the time of its enactment.—Reid v. State, 20 Ga. 681; Bailey v. Same, Id. 742.

[f] (Ga. 1878) The act of 1858, allowing the names of "all" the citizens of Chatham county on the books of the receiver of tax returns between the ages of 21 and 60 to be placed in the jury box, contravenes the constitutional requirement of "the selection of upright and

intelligent persons to serve as jurors."—Moses v. State, 60 Ga. 138.

[g] (Ill. 1879) In the act of May 28, 1879, providing for the organization of the state militia, the provision exempting from jury service an active member of a company of the state militia is constitutional and valid.—Dunne v. People, 94 Ill. 120, 34 Am. Rep. 213.

[h] (Ky. 1891) Act Feb. 21, 1890, entitled "An act to secure a more uniform and equal distribution of jury service among the citizens of the county of Jefferson and the city of Louisville," and prescribing the manner in which the jurors shall be selected, and that they shall be "21 years of age, housekeepers, sober, temperate, discreet, and of good demeanor," is not unconstitutional as giving to Jefferson county a class of jurymen inferior to that provided by the general law (Gen. St. c. 62, art. 3, § 2, and article 4, § 4), which prescribes that, in addition to the qualifications mentioned, jurors shall be "of fair character and approved integrity, of sound judgment, and well informed," since the special act does not prescribe who shall be competent jurors, but simply regulates the manner of selecting them, leaving their qualifications as under the general law.—Beatty v. Commonwealth, 91 Ky. 313, 15 S. W. 856.

[i] (Mich. 1891) Pub. Acts 1881, No. 150 (How. Ann. St. § 978), providing for the enrollment of not over a certain number of members in each company and battery of state troops, each member to pay $10 annually, and declaring that on such payment he shall receive from the commanding officer a certificate and shall be exempt from jury duty and poll tax, is not void as conferring on military officers the power to arbitrarily set aside the authority of the courts to compel the attendance of qualified jurors, or as transferring from the courts to military officers the right to determine exemptions from jury duty, since on such payment the member is exempted by the law, and not by the act of the commanding officer.—Hall v. Judge of Superior Court of Grand Rapids, 88 Mich. 438, 50 N. W. 289.

[j] (Mich. 1891) Nor is such act void as against public policy, on the ground that no public reason therefor exists; the legislature being the exclusive judge of whether such a reason exists or not.—Hall v. Judge of Superior Court of Grand Rapids, 88 Mich. 438, 50 N. W. 289.

[k] (Ohio, 1880) Rev. St. § 5176, making it a ground of principal challenge that a person called as a talesman has already served as a talesman in the trial of any cause in any court of record within the preceding 12 months, was not affected by the act of March 29, 1880.—Taylor v. State, 36 Ohio St. 212.

[l] (Tex.) The statute of 1856, requiring jurors to be selected from a jury list made up out of the freeholders of each county, is repugnant to Const. art. 12, § 45, making all qualified voters competent to sit as jurors.—(1871) Maloy v. State, 33 Tex. 599; (1872) Wilson v. Same, 35 Tex. 365.

[m] (Tex. 1877) Acts 15th Leg. p. 78 (approved August 1, 1876), § 1, providing that no person shall be qualified to serve as a juror on the trial of any cause, civil or criminal, unless he be a legal voter and citizen of this state, and freeholder or householder in the county in which he may be called to serve, of sound mind, and good moral character, and that an inability to read or write shall be a sufficient cause for challenge, is mandatory, and none of its provisions can be dispensed with by the courts.—Lester v. State, 2 Tex. App. 432.

[n] (Tex. 1891) The provisions of the Civil Statutes in regard to the qualification of jurors in civil cases do not apply in criminal cases.—Hunter v. State, 30 Tex. App. 314, 17 S. W. 414.

[o] (Utah, 1875) The act of congress of June 23, 1873 (18 Stat. 254, c. 469), relating to the territory of Utah, and known as the "Poland Law," does not profess to prescribe all the qualifications of jurors in that territory, and it supersedes and controls the territorial laws only so far as it prescribes a new qualification of the same kind as embraced in the territorial law.—Conway v. Clinton, 1 Utah, 215.

[p] (Wash. 1884) There is nothing in the constitution and laws of the United States to prevent married women serving on juries under the statutes of Washington territory.—Hayes v. Territory, 2 Wash. T. 286, 5 Pac. 927.

§ 245. Physical capacity.

Discharge by court pending trial, see post, § 538.
—— *on court's own motion, see* post, § 530.
Excusing juror for physical causes, see post, §§ 384, 530, 538.

[a] (Ind. 1891) A juror whose eyesight was so defective that he could not see the face of the defendant, or the expression of the faces of the witnesses, was incompetent, especially where various articles were placed before the jury to illustrate the testimony, none of which were seen by him.—Rhodes v. State, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429.

[b] (Mich. 1871) The court may, in its discretion, reject a juror on a ground which would not sustain a challenge for cause, as, for instance, deafness.—Atlas Min. Co. v. Johnston, 23 Mich. 36.

[c] (Tex. 1895) It was proper to excuse a venire man who, by reason of defective hearing, was unable to understand the proceedings in court.—Mitchell v. State (Cr. App.) 33 S. W. 367.

§ 246. Age.

[a] (Ala. 1880) One summoned as a juror who is under 21, or over 70, years of age, is not qualified to serve.—Williams v. State, 67 Ala. 183.

[b] (Miss. 1859) Under Rev. Code, p. 497, art. 126, providing that all citizens of the United States, being freeholders or householders in their respective counties, and not under 21, or over 60 years of age, shall be qualified to serve as jurors in the county of their residence, a juror over 60 is incompetent.—Williams v. State, 37 Miss. 407.

[c] (Mo. 1887) Rev. St. 1879, § 2778, provides that no challenge to a juror on account of age shall be allowed after the jury is sworn. Section 2779 provides that no person over 65 years of age shall be compelled to serve on any jury. *Held*, that a challenge to a juror because over 65 was properly sustained.—State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330.

[d] (Mo. 1887) Rev. St. 1879, § 2777, provides that every juror shall be over 21 years of age. Section 2778 forbids any exception to a juror on account of citizenship, nonresidence, state, age, or other disability, after the jury is sworn. *Held*, that a challenge by the state, in a murder trial, because a juror was under 21, was proper.—State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330.

§ 247. Intelligence and educational qualifications.

As infringement of right to trial by jury, see ante, § 227 [b].

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Constitutionality of law making inability to read and write ground of challenge except when sufficient jurors so qualified are not to be found in county, see ante, § 227 [b, c, g].

Discretion of court as to competency of jurors for trial of cause, see post, § 405.

Sufficiency of evidence, see post, § 585 [h].

Understanding English language, see post, § 248.

[a] (Fla. 1884) The court may in the exercise of its discretion determine whether one drawn as a juror is sufficiently intelligent to sit in the case.—Jefferson County v. Lewis, 20 Fla. 980.

[b] (La. 1876) Ignorance is not such disqualification in a juror as to authorize a challenge for cause.—State v. Lewis, 28 La. Ann. 84.

[c] (La. 1880) A lack of sufficient understanding or intelligence is a legal cause for the discharge of a juror.—State v. Rountree, 32 La. Ann. 1144.

[d] (La. 1885) Under Const. art. 116, and Act No. 54 of 1868, requiring jurors to be intelligent persons, it is not an improper or illegal discretion on the part of the jury commissioners, under certain conditions, to determine the questions of intelligence of a juror by his ability to read and write, not as a conclusive test, but as one of the means of determining his competency.—State v. Chase, 37 La. Ann. 165.

[e] (La. 1892) The intelligence and ability of a juror are matters within the sound discretion of the court.—State v. Casey, 44 La. Ann. 969, 11 South. 583.

[f] (Miss. 1878) No educational qualifications are required of jurors.—American Life Ins. Co. v. Mahone, 56 Miss. 180.

[g] (Miss. 1893) Const. § 244, provides that every elector shall be able to read the constitution. Section 264 provides that a juror must be a qualified elector, and able to read and write. *Held*, that a juror who cannot read and write is disqualified, though a registered elector.—Mabry v. State, 71 Miss. 716, 14 South. 267.

[h] (N. Y. 1896) Whether one meets the requirements of Code Civ. Proc., providing that, in order to be qualified to serve as a trial juror in the city of New York, a person must be "intelligent," rests in the good judgment and sound discretion of the trial judge.—People v. McLaughlin, 2 App. Div. 419, 37 N. Y. Supp. 1005.

[i] (Pa. 1867) Under Act April 20, 1858 (Bright. Dig p. 587, § 83), a juror was not disqualified on the ground that he did not read newspapers, and could not tell his age.—Commonwealth v. Winnemore, 1 Brewst. 356.

[j] (Pa. 1867) Inability to read is not a disqualification for jury service unless made so by statute.—Commonwealth v. Winnemore, 2 Brewst. 378.

[k] (Tex. 1874) Pasch. Dig. art. 3040, makes it a ground of challenge that a juror "has such bodily or mental defect or disease as renders him unfit for jury services." *Held*, that such "mental defect" must be understood to embrace either such imbecility, or gross ignorance, as practically disqualifies a person from performing his duties as a juror.—Caldwell v. State, 41 Tex. 86.

[l] (Tex. 1880) It seems that Code Cr. Proc. art. 636, providing that a juror may be challenged for cause where it appears that he cannot "read and write," implies that he is disqualified where he cannot read and write the English language.—Nolen v. State, 9 Tex. App. 419.

[m] (Tex. 1882) Under a statute prescribing, among the qualifications of jurors, that they shall be able to read and write, they must be able to read and write the English language.—Wright v. State, 12 Tex. App. 163.

[n] (Tex. 1882) Under a statute making it ground for challenging a juror that he can neither read nor write, unless it shall appear to the court that the requisite number of jurors who can read and write are not to be found in the county, a judge has no authority to dispense with the reading and writing test because the county is sparsely populated.—Garcia v. State, 12 Tex. App. 335.

[o] (Tex. 1886) A juror in a criminal case stated on his voir dire that he could read and write a little, but not much; that he could write his name, but could not read writing unless it was very plainly written. *Held*, that the juror was incompetent, under Code Cr. Proc. art. 636, subd. 14, which provides that a challenge of a juror in a criminal case for cause may be made for the reason "that he cannot read and write."—Johnson v. State, 21 Tex. App. 368, 17 S. W. 252.

[p] (Tex. 1892) In a capital case, one of the persons summoned as a juror stated on his voir dire that he could neither read nor write English. *Held*, that a challenge by the state was properly sustained.—Campbell v. State, 30 Tex. App. 645, 18 S. W. 409.

§ 248. Knowledge of language.

Ability to read and write English, see ante, § 247.

As infringement of right to trial by jury, see ante, § 227 [b, c].

Exclusion on court's own motion though not excluded by statute, see post, § 526.

Right of state to challenge for cause, see post, § 554 [g].

[a] (Cal. 1894) Where a juror understands English "pretty well," but will not say that he could always understand what any one might say in English, it is for the court to decide whether he is competent to comprehend all that might be said in his hearing.—People v. Davis, 36 Pac. 96.

[b] (Colo. 1879) Inability, upon the part of persons called to serve as jurors, to speak the English language and to understand it when spoken, does not necessarily disqualify them from so serving, under the statutes.—Town of Trinidad v. Simpson, 5 Colo. 65.

[c] (Colo. 1889) The fact that an elector is a Mexican and unable to understand the English language does not render him incompetent to serve either on grand or petit juries.—In re Allison, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790.

[d] (La. 1840) A juror is competent, though ignorant of the English language.—Gay v. Ardry, 14 La. 288.

[e] (La. 1871) A juror who does not understand the language in which the proceedings are conducted is as much an unfit person to sit on the trial as though he were infirm, or incapable of rendering such services.—State v. Push, 23 La. Ann. 14.

[f] (La. 1889) On an indictment for murder, where a juror of foreign birth testifies that he knows enough English to enable him to understand what the lawyers and witnesses may say, he is not disqualified by the fact that he does not know the meaning of the terms "bias," "prejudice," and "verdict."—State v. Dent, 41 La. Ann. 1082, 7 South. 694.

[g] (La.) It is not necessary to the competency of a juror that he should be a scholar,

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and understand the definition of any word used in the course of a trial by witnesses, counsel, and the court; but it is sufficient if he is conversant with the English language so as to understand in substance the argument of counsel, and the testimony of witnesses.—(1890) State v. Ford, 42 La. Ann. 255, 7 South. 696; (1892) Same v. Casey, 44 La. Ann. 969, 11 South. 583.

[h] (Mich. 1871) The court may, in its discretion, reject a juror on a ground insufficient to sustain a challenge for cause, as, for instance, imperfect knowledge of the English language.—Atlas Min. Co. v. Johnston, 23 Mich. 36.

[i] (Pa. 1870) A person who cannot understand the English language is not qualified to serve as a juror.—Fisher v. City of Philadelphia, 4 Brewst. 395.

§ 249. Prosecution or conviction for crime.

Conviction of assault of juror summoned as ground for discharge, see post, § 384 [c].
Effect of pardon, see post, § 251.
Privilege of jurors as to examination on voir dire, see post, § 573.

[a] (Ala. 1862) Code, § 3583, makes it ground for challenge against a juror that he has been indicted within 12 months for an offense of the same character as that charged against the prisoner. *Held*, that a juror who had been indicted for assault with intent to commit murder was properly rejected on trial of an indictment for murder.—Crockett v. State, 38 Ala. 387.

[b] (Fla. 1889) Where a venire man was asked upon his voir dire if he was under prosecution for any crime, and he answered that he believed he was, he was properly excused.—Ellis v. State, 25 Fla. 702, 6 South. 768.

§ 250. Polygamist.

Effect of pardon, see post, § 251.
Sufficiency of juror's answer to question propounded, see post, § 582 [m].

[a] (Idaho, 1890) Under Rev. St. §§ 3941, 3942, providing that jurors must be citizens of the United States, and electors of the county, and sections 500, 501, requiring that electors must not be members of any organization that teaches its adherents to commit the crimes of bigamy or polygamy, a member of the so-called "Mormon Church" cannot be a juror.—Territory v. Evans, 2 Idaho, 627, 23 Pac. 232, 7 L. R. A. 646.

[b] (Utah, 1884) Under Act Cong. March 22, 1882, § 8, providing that no polygamist shall vote or "hold any office or place of public trust, honor, or emolument," etc., a polygamist is not disqualified from serving on a jury.—People v. Hopt, 3 Utah, 396, 4 Pac. 250.

§ 251. —— Effect of pardon.

[a] (Tex. 1895) An absolute pardon removes the disqualification to act as juror imposed by Code Cr. Proc. arts. 636, 639, providing that a person convicted of theft cannot act as juror even by consent of parties.—Easterwood v. State, 34 Tex. Cr. R. 400, 31 S. W. 294.

[b] (Utah, 1886) Section 5 of an act of congress approved March 22, 1882, provides "that, in a prosecution for bigamy, polygamy, or unlawful cohabitation, * * * it shall be sufficient cause of challenge to any person drawn or summoned as a juryman or talesman that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable by the foregoing sections." *Held*, in a prosecution for polygamy, that a juror who, on his voir dire, said that he had lived in the practice of polygamy, but had ceased to do so, and who produced a pardon from the president of the United States, extending to him amnesty under section 6 of the act, was competent.—United States v. Bassett, 5 Utah, 131, 13 Pac. 237.

[c] (Va. 1887) A conviction for felony, for which the offender had been pardoned by the governor in 1868, does not disqualify the offender from serving on a jury, such pardon, under the constitution then in force, obliterating the offense.—Puryear v. Commonwealth, 83 Va. 51, 1 S. E. 512.

§ 252. Citizenship.

Discharge by court pending trial, see post, § 535.
—— *on court's own motion, see* post, § 526 [d].
Examination of juror as to citizenship, see post, § 563 [a].
Inability of alien to own real estate as disqualification, see post, § 256 [a].
Presumptions and burdens of proof, see post, § 584 [g].
Right of alien to question his liability to serve, see post, § 264 [d].
Sufficiency of evidence, see post, § 585 [f, l, m].
—— *of juror's answers to questions propounded, see* post, § 582 [c].
Unnaturalized elector as juror, see post, § 258.
Waiver by failure to challenge or object, see post, § 505.

[a] Alienage is a disqualification of a juror.—(Ill. 1840) Stone v. People, 3 Ill. (2 Scam.) 326;
(Ky. 1815) Siller v. Cooper, 7 Ky. (4 Bibb) 90;
(N. M. 1887) Territory v. Baker, 4 N. M. (Gild.) 236, 13 Pac. 30;
(S. C. 1798) State v. Quarrel, 2 Bay, 150, 1 Am. Dec. 637;
(Vt. 1888) Richards v. Moore, 60 Vt. 449, 15 Atl. 119;
(Wis. 1856) Schumaker v. State, 5 Wis. 324.

[b] (Ala. 1820) A subject of the king of Spain, living in Louisiana when taken possession of by the United States, is not competent to serve as a juror in Alabama, unless it appear that he has been naturalized, or was an inhabitant of Louisiana at the time of its incorporation into the Union.—Judson v. Eslava, Minor, 2.

[c] (Fla. 1876) A person who has taken no step toward naturalization is prohibited by the constitution from being a juror.—Keech v. State, 15 Fla. 591.

[d] (Ill. 1838) Under Rev. Laws, p. 378, providing that all free white male taxable inhabitants in any county in the state, being natural born citizens of the United States or naturalized according to law, shall be competent to serve as jurors, an alien cannot serve on a jury.—Guykowski v. People, 2 Ill. (1 Scam.) 476.

[e] (Ind. 1883) Rev. St. 1881, § 1793, provides that it is good cause for challenge of any person called as a juror in a criminal case that he is an alien. *Held*, that the word "alien" means one not a citizen of the state, and that a citizen of the state is a qualified juror, though he is not a citizen of the United States.—McDonel v. State, 90 Ind. 320.

[f] (Iowa, 1882) A judgment rendered on the verdict of a jury, two of whose members were aliens, is reversible on appeal.—Foreman v. Hunter, 59 Iowa, 550, 13 N. W. 659.

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[g] (Minn. 1889) When a proposed juror states, on his voir dire, that he is of foreign birth and parentage, but, without objection, is also permitted to testify that he has declared his intention to become a citizen of the United States, the apparent disability is removed.—State v. Barrett, 40 Minn. 65, 41 N. W. 459.

[h] (Mo. 1887) Rev. St. 1879, § 2777, provides that every juror shall be a citizen of the state. Section 2778 provides that no exception to a juror on the ground of his citizenship shall be allowed after the jury is sworn. *Held*, that the state's challenge of a juror because not a citizen of the state was properly allowed in a murder trial.—State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330.

[i] (Mo. 1894) Under Rev. St. § 6060, providing that every juror shall be a male citizen of the state, resident of the county, one who recently moved into the state to live, but has not been a resident long enough to vote, is a qualified juror, since one may be a citizen though not entitled to vote.—State v. Fairlamb, 121 Mo. 137, 25 S. W. 895.

[j] (Mont. 1888) During the progress of a trial, defendant objected that there was an alien on the jury, and it was found that one of the jurors came to America when two years old, and had taken out no naturalization papers; whereupon opportunity was given by the court, and he was naturalized in proper form, and the trial proceeded. *Held* that the objection of alienage would not apply.—Territory v. Hart, 7 Mont. 489, 17 Pac. 718.

[k] (N. Y. 1810) Aliens, though freeholders and inhabitants of a town, are not qualified to serve as jurors in suits before justices of the peace, as they are not "good and lawful men" within 1 Laws 24th Sess. c. 165, § 12.—Borst v. Beecker, 6 Johns. 332.

§ 253. Disloyalty.

As infringement of right to trial by jury, see ante, § 227 [e].

Who may insist on jurors taking test oath, see post, § 264 [c].

[a] (U. S. 1871) By the constitution of Missouri, adopted in 1865, a test oath of loyalty was prescribed to be taken by public officers, jurors, etc., which the United States supreme court [Cummings v. Missouri (1866) 71 U. S. (4 Wall.) 277, 18 L. Ed. 356] decided to be unconstitutional. A juror on a trial for murder in a state court refused to take the oath; but on being examined as to the reason of his refusal, he alleged not only that he had sympathized with the late rebellion, and therefore could not take it truthfully, but also that those were still his feelings, and were stronger than ever; whereupon the court discharged him. *Held*, that his avowed present disloyalty to the government was a sufficient cause in itself for his discharge, irrespective of his refusal to take the oath.—Klinger v. Missouri, 80 U. S. (13 Wall.) 257, 20 L. Ed. 635.

[b] (U. S. 1875) The disqualification to serve as jurors, provided by Rev. St. § 820, of those who joined the rebellion against the United States, is absolute, and it is not discretionary with the court or with the United States attorney whether the rule of disqualification shall be applied or not.—United States v. Hammond, Fed. Cas. No. 15,294 [2 Woods, 197].

[c] (U. S. 1877) Under Rev. St. § 820, it is a good cause of challenge to a juror that he voluntarily joined the Confederate army.—United States v. Butler, Fed. Cas. No. 14,700 [1 Hughes, 457].

[d] (Md. 1792) One who has not taken the oath required by the act entitled "An act for the better security of the government" is not qualified to serve as a juror.—Shane v. Clarke, 3 Har. & McH. 101.

§ 254. Residence.

Necessity of drawing new panel where regular jurors are residents of new county set off since panel was drawn, see post, § 314 [j].

—— *that return to venire in condemnation proceedings show that jurors were nonresident freeholders, see* post, § 303 [g].

Residence necessary for voter as jury qualification, see post, § 258.

Right of court to summon jurors from another jurisdiction, see ante, § 12.

Sufficiency of evidence, see post, § 585 [k].

—— *of jurors' answers to questions propounded, see* post, § 582 [b].

Waiver by failure to challenge or object, see post, § 505.

[a] (Ala. 1892) A proposed juror who states that he does not know whether or not he lives in the county in which the trial is had, but that he claims such county as his residence, and has been living there and voting therein for 10 years, is competent as a resident of that county.—Amos v. State, 96 Ala. 120, 11 South. 424.

[b] (Ark. 1844) A resident in the county, and a citizen of the state, is competent to serve as juror, although his residence has not been of sufficient length to confer upon him political privileges.—Anderson v. State, 5 Ark. (5 Pike) 444.

[c] (Cal. 1856) A citizen of this state who has resided in the county 14 days, and then been absent for some months from the state with the intention of returning to reside in the county, and did return and reside therein some 14 days, is a competent juror; his residence dating from his first residence, and not from his return.—People v. Stonecifer, 6 Cal. 405.

[d] (Cal. 1860) A juror is not disqualified by reason of having been a resident of the state for only three months.—Thompson v. Paige, 16 Cal. 77.

[e] (Conn. 1821) Under a statute requiring the jury in forcible entry and detainer to be indifferent freeholders dwelling near unto the lands entered upon, it is not necessary that the jurors should reside in the same town where the land is.—Dutton v. Tracy, 4 Conn. 79.

[f] (D. C. 1886) An unmarried man whose parents live in Virginia, but who, himself, lives in Washington, and intends to so long as he is employed there, although he spends his vacations in Virginia, and votes there, is a "resident" of Washington, under Rev. St. § 872, prescribing the qualifications of jurors.—United States v. Nardello, 4 Mackey, 503.

[g] (Ga. 1855) A juror is disqualified by law from serving on a trial of felony who has not resided in the county for six months.—Epps v. State, 19 Ga. 102.

[h] (Ga. 1859) Under the act of 1856, a juror need not have been a citizen of the county where the offense is tried for any specified time.—Thomas v. State, 27 Ga. 287.

[i] (Iowa, 1860) A person who has removed with his family to another state, and has there purchased a homestead claim upon which he resides, and has voted in that state, he is incompetent as a juror in an action in this state.—State v. Groome, 10 Iowa, 308.

[j] (Iowa, 1879) A conviction will not be reversed on the affidavit of a juror which shows that a short time before the trial he entered upon certain land outside the county to pre-empt it, but fails to show that he had not abandoned

it, and was not, at the time of the trial, a resident of the county in which it took place.—State v. Wart, 51 Iowa, 587, 2 N. W. 405.

[k] (La. 1845) The 12 months' residence necessary to render a juror competent, commences only from his determination to reside in the state, though he have been within it many months previously.—State v. Kennedy, 8 Rob. 590.

[l] (La. 1886) Where the line between two parishes has not been definitely settled, a man living near it is a lawful juror in that parish in which he is a registered voter and claims his residence.—State v. Gonsoulin, 38 La. Ann. 459.

[m] (Mich. 1890) A juror regularly drawn on the panel, who swears that his wife and children are residing only temporarily at another place for the purpose of educating the children, and that he had never had any intention of changing his residence, is not disqualified, though it appears that a year before the trial he voted at the place of his family's temporary residence.—People v. Johnson, 81 Mich. 573, 45 N. W. 1119.

[n] (Miss. 1834) No length of citizenship of a state is required as a qualification of jurors.—Byrd v. State, 2 Miss. (1 How.) 163.

[o] (Mo. 1882) Under Rev. St. § 2777, requiring every juror to be "a male citizen of the state and a resident of the county," *held* that a person who had lived in the county two months, having come there from another state, with the intention of making it his home, was qualified.—State v. France, 76 Mo. 681.

[p] (Mo. 1896) When a juror is shown to have left the state for two years with the intent of changing his domicile, and it is not shown that his return was animo manendi, refusal to accept him as a juror is not error.—State v. Taylor, 134 Mo. 109, 35 S. W. 92.

[q] (N. C. 1869) The state, on a criminal trial, may challenge a juror upon the ground of his being a nonresident of the county where the trial is had.—State v. Bullock, 63 N. C. 570.

[r] (S. C. 1890) Gen. St. § 842, provides, in reference to trial justices in criminal cases, that a jury may be organized "from the vicinity." The charter of McCormick confers on the town council "the same powers which a trial justice has, to try, fine, and punish any person or persons violating any town ordinance." *Held* that, in such cases, the council could summon persons living in the vicinity as jurors.—Town Council of McCormick v. Calhoun, 32 S. C. 291, 10 S. E. 1009.

[s] (Tex. 1887) The unorganized county of H., in this state, is attached to the organized county of W. for judicial purposes. *Held* that, for all judicial purposes, the two counties of H. and W. are one and the same, and a resident of H. county is a competent juror for jury service in the county of W.—Groom v. State, 23 Tex. App. 82, 3 S. W. 668.

[t] (Wis. 1839) Under the laws of the territory of Wisconsin, a person who has resided six months therein with the bona fide intention of becoming a citizen, although he may have a family residing and keeping house elsewhere, is a legal juror and an elector, under the statute requiring six months' residence in the territory with the bona fide intention of becoming a citizen.—Lask v. United States, 1 Pin. 77.

§ 255. Property qualification in general.

Sufficiency of juror's answer to question propounded, see post, § 582 [n].

Waiver by failure to challenge or object, see post, § 506.

[a] (N. Y. 1851) A want of "property qualification" is a good cause of challenge to a juror in justices' courts, and not merely a personal privilege exempting the juror, if he sought such exemption.—Fenwick v. Parker, 3 Code Rep. 254.

[b] (N. Y. 1863) A juror, not a freeholder, nor assessed in respect to any personal estate, was set aside, although it appeared that he was worth $250 in personal property, above all debts.—Valton v. National Loan Fund Life Assur. Soc., 17 Abb. Prac. 268.

[c] (N. Y. 1874) The property qualification of a juror, when questioned by a challenge, must be that required to authorize the original selection of the individual as a juror. 2 Rev. St. p. 411, § 13. So far as depends upon the ownership of personalty, it must appear and be evidenced by the assessment roll; the provision of the statute (section 33), requiring the court to discharge a juror when he is not the owner of real or personal property as prescribed, is not designed to affect challenges, but to give a right to the juror to be discharged on his own motion. *Held*, that where upon challenge of a juror it appeared that, when placed on the jury list, he was the owner of a farm, for which he was assessed, but was not assessed for personal property, and before the trial he sold his farm, taking back a mortgage, he was not eligible, and the challenge was properly sustained.—Kelley v. People, 55 N. Y. 565, 14 Am. Rep. 342.

[d] (Utah, 1875) The provisions of the territorial statute, that a person shall not serve as a petit juror unless he is the owner of taxable property, is express, and cannot be disregarded. The qualification must exist at the time he is offered as a juror, and it does not satisfy the statute that he possessed the qualification when the jury list was prepared.—Conway v. Clinton, 1 Utah, 215.

[e] (Va. 1861) Code, c. 162, § 1, requiring jurors in cases of felony to own real or personal property of the value of $100, at least, was repealed by Act April 9, 1853 (Sess. Acts p. 47).—Wash v. Commonwealth, 16 Grat. 530.

§ 256. Ownership or occupancy of real estate.

As infringement of right to trial by jury, see ante, § 227 [b].

Freehold in the town as qualification for juror in justice's court, see post, § 260 [i].

Necessity that return of venire show that jurors in condemnation proceedings were freeholders, see post, § 303 [g].

"Neighboring freeholders" as jurors, see post, § 260 [n].

Ownership of real estate as qualification for juror in condemnation proceedings, see post, § 260 [f, h].

—— *in local courts, see* post, § 260 [e, k, l].

Qualifications as voter as affecting right to serve as juror, see post, § 258.

[a] (U. S. 1805) An alien cannot be a petit juror in the District of Columbia because he cannot be a freeholder.—United States v. Johnston, Fed. Cas. No. 15,490 [1 Cranch, C. C. 237].

[b] (Ala. 1861) The tenant and occupant by yearly letting of a room used as a sleeping apartment is not a freeholder or householder within the meaning of Code, § 3583, which prescribes the qualifications of jurors.—Aaron v. State, 37 Ala. 106.

[c] (Ala. 1875) A person who has merely "rented land for the last 12 months" is not a "freeholder" or "householder," within the mean-

ing of Rev. Code, § 4180, which allows a challenge for cause, in a criminal trial, of one summoned as a juror, "and not a resident freeholder and householder for the preceding year."—Iverson v. State, 52 Ala. 170.

[d] (Ala. 1882) A man who resides with his wife and family, whom he supports, is a "householder" so as to qualify him as a juror, though the title to the property is in his wife's name.—Sylvester v. State, 72 Ala. 201.

[e] (Ala. 1894) A juror, though he has resided in a county for several years, if he has never been a householder or freeholder therein, is subject to challenge for cause, under Cr. Code 1886, § 4331, which makes it a ground of challenge that a juror has not been a resident householder or freeholder the preceding year.—Williams v. State, 109 Ala. 64, 19 South. 530.

[f] (Conn. 1840) Act 1837, relating to the qualifications of jurors, dispenses with the necessity of a freehold.—Ladd v. Prentice, 14 Conn. 109.

[g] (Ill. 1880) A person is not disqualified from serving on a jury because he is not a freeholder.—Kerwin v. People, 96 Ill. 206.

[h] (Ind.) A freeholder merely is not competent to sit upon a petit jury, he must be a householder.—(1858) Carpenter v. Dame, 10 Ind. 125; (1860) Bradford v. State, 15 Ind. 347.

[i] (Ind. 1859) That a juror is not a householder is a good cause for challenge.—Lafayette Plank Road Co. v. New Albany & S. R. Co., 13 Ind. 90, 74 Am. Dec. 246.

[j] (Ind. 1880) Under 2 Rev. St. 1876, p. 31, § 6, a juror must be either a householder or freeholder of the county in which the case is tried.—Lamphier v. State, 70 Ind. 317.

[k] (La. 1812) A single man who rents a store and eats at another's table is not a housekeeper, nor qualified as a juror, under Acts 1805, No. 26, § 5.—In re Parmele, 2 Mart. (O. S.) 313.

[l] (La. 1840) A qualification as housekeeper, prescribed by Code Prac. art. 506, but omitted in Acts 1831, No. 53, is unnecessary to entitle one to serve as juror.—Rondeau v. New Orleans Improvement & Banking Co., 15 La. 160.

[m] (La. 1840) One who resides in the parish, and pays a tax and house rent, is a housekeeper, within the intendment of Code Prac. art. 506, so as to qualify him for jury service.—Rondeau v. New Orleans Improvement & Banking Co., 15 La. 160.

[n] (Miss. 1834) A juror must be either a freeholder or householder.—Byrd v. State, 2 Miss. (1 How.) 163.

[o] (Miss. 1858) One in possession of land, under a title bond conditioned that the obligor will convey on payment of the price, is qualified to act as a juror, in cases where the statute requires the jury to be composed of freeholders.—New Orleans, J. & G. N. R. Co. v. Hemphill, 35 Miss. 17.

[p] (Miss. 1879) The term "householder" as used in Code 1871, § 724, defining who shall be competent jurors, means a person who has a family whom he keeps together and provides for, and of whom he is the head.—Nelson v. State, 57 Miss. 286, 34 Am. Rep. 444.

[q] (Miss. 1879) Code 1871, § 724, providing that male citizens who are "householders" shall be competent jurors, is not in conflict with Const. art. 1, § 13, which directs that no property qualification shall ever be required of any person to become a juror.—Nelson v. State, 57 Miss. 286, 34 Am. Rep. 444.

[r] (Miss. 1879) That a person has rented a store and slept in it does not make him a householder, so that he can serve on a jury.—Brown v. State, 57 Miss. 424.

[s] (N. M. 1881) Under the law requiring a juror to be the "owner" of real estate, it is enough that he is in possession of or has a qualified interest in real estate.—Territory v. Young, 2 N. M. 93.

[ss] (N. M. 1884) Within the statute requiring a juror to be the "head of a family" one who is boarding employés during the limited time of their service, is not qualified, nor is one of two equal partners living and messing together for convenience and economy.—Territory v. Lopez, 2 Pac. 364.

[t] (N. C. 1822) Freeholders of another state, owning no freehold in this state, are not qualified to serve as jurors.—Sheepshanks v. Jones, 9 N. C. 211.

[tt] (N. C. 1877) The statutory requirement that a tales juror shall be a freeholder does not apply to the original panel.—State v. Wincroft, 76 N. C. 38.

[u] (N. C. 1884) A tenant by the curtesy initiate is a freeholder in the sense of that term as applicable to the qualifications of jurors.—State v. Mills, 91 N. C. 581.

[uu] (Pa. 1863) Under the act of 1772, requiring the inquest in proceedings to oust a tenant to be by a jury of freeholders, the estate required to be owned by a juror must be at least a tenancy for life.—Rhoads v. Wesner, 1 Woodw. Dec. 79.

[v] (Tenn. 1837) A citizen of one county who owns freehold lands in another county, or who is the owner of an occupant right to lands situated in another county, is a good and lawful juror of the county in which he resides.—State v. Bryant, 18 Tenn. (10 Yerg.) 527.

[vv] (Tenn. 1873) A person living in a part of a house used by him as a store, his sister and her two children living with him, he paying the rent and furnishing the supplies, is a "householder," and therefore a competent juror.—Hall v. State, 65 Tenn. (6 Baxt.) 522.

[w] (Tex. 1877) A juror stated that he was a single man, and not a freeholder, but that he rented a house and land, and, with a younger brother, occupied the same as a home for all purposes, except that he took his meals with the owner of the premises. *Held*, that the juror was a householder within the meaning of the jury act.—Lester v. State, 2 Tex. App. 432.

[ww] (Tex. 1879) The word "householder" as used in the law defining qualifications of jurors applies to one who "rents a room and boards."—Robles v. State, 5 Tex. App. 346.

[x] (Tex. 1887) A juror must be a freeholder in the state and a householder in the county in order to be qualified.—Boren v. State, 23 Tex. App. 28, 4 S. W. 463.

[xx] (Tex. 1890) One who boards and lodges in the private house of another is not a "householder" within the meaning of the statutes, and hence is not a qualified juror in a murder case.—Lane v. State, 29 Tex. App. 310, 15 S. W. 827.

[y] (Tex. 1895) One who occupies a room in his father's house by his father's permission is not a householder so as to be competent as a juror.—Maines v. State, 35 Tex. Cr. R. 109, 31 S. W. 667.

[yy] (Tex. 1895) A clerk, whose employer furnishes him a room at his house, where he eats and sleeps, is not a householder, so as to

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be competent as a juror.—Maines v. State, 35 Tex. Cr. R. 109, 31 S. W. 667.

[z] (Va. 1846) Under Act Feb. 24, 1846, a juror in a criminal case must be a freeholder in the county to the officer of which the venire facias is directed.—In re Day, 3 Grat. 629.

[zz] (Va. 1852) In a case of felony, one who is not a freeholder is not a competent juror under the statute.—Dowdy v. Commonwealth, 9 Grat. 727, 60 Am. Dec. 314.

§ 257. Payment of taxes.

As infringement of right to trial by jury, see ante, § 227 [b].

Necessity for taking names from books of receiver of tax returns, see post, § 260 [b].

Presence of name on assessment roll for personalty or ownership of real estate, see ante, § 255 [b, c].

Qualifications as voter as affecting right to serve as juror, see post, § 258.

Waiver by failure to challenge or object, see post, § 506.

[a] (U. S. 1887) In applying Code Civ. Proc. Cal. § 198, establishing, as one of the qualifications of a juror, that he shall have been "assessed on the last assessment roll of the county, or city and county, on property belonging to him," to the United States courts, under the act of congress adopting as the qualification of jurors in the United States courts those prescribed by law in the courts of the state, it is sufficient that the juror pays taxes upon property assessed upon the assessment roll, although assessed in the name of another.—United States v. Hackett (C. C.) 29 Fed. 848.

[b] (Conn. 1796) It is not necessary to the qualifications of a juryman that his estate be actually rated, or put into the list.—State v. Doan, 2 Root, 451.

[c] (Fla. 1892) Section 1, c. 4015, Laws Fla., providing that grand and petit jurors shall be taken from the registered voters "who have paid their last assessed capitation tax in their respective counties," does not require payment of the tax which has been assessed, but which has not become due and payable, before the jury is organized.—Smith v. State, 29 Fla. 408, 10 South. 894.

[d] (Fla. 1893) The disqualification of persons for jury service by reason of the nonpayment of their "last assessed capitation tax," as provided in Laws 1891, c. 4015, § 1, does not arise until after the time has elapsed in which one is allowed to pay such tax without coercion.—Collins v. State, 31 Fla. 574, 12 South. 906.

[e] (Kan. 1894) The mere showing that persons called as jurors did not pay taxes on personal property the preceding year does not prove that they were disqualified as jurors, where it does not appear but that they may have been on the assessment rolls of real property.—State v. Reed, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

[f] (Kan. 1896) A township assessor, by failing to enter on the assessment rolls the name of a person who is duly assessed, and is otherwise qualified to sit as a juror on the trial of causes in the district court, cannot thereby disqualify him from serving as such juror.—State v. Lowe, 56 Kan. 594, 44 Pac. 20.

[g] (Mich. 1891) Under How. Ann. St. §§ 7554, 7555, providing that jurors for the regular list must be selected from persons assessed on the assessment roll of the township or ward, it is a good cause of challenge to jurors called from the regular panel that they were not on the assessment roll of the township from which they were chosen, and a failure to excuse such jurors on challenge for cause is reversible error.—Schlacker v. Ashland Iron Min. Co., 89 Mich. 253, 50 N. W. 839.

[h] (Mich. 1896) How. Ann. St. §§ 7554, 7555, providing that the panel of jurors shall be drawn from persons whose names appear on the assessment rolls for that year, contemplate that only such persons shall be competent as jurors; and any juror called in a case whose name does not so appear may be challenged for cause.—People v. Thacker, 108 Mich. 652, 66 N. W. 562.

[i] (Miss. 1892) Const. 1890, § 264, provides that no one shall be a juror unless a qualified elector. Section 241 provides that no one shall be a qualified elector unless registered under the provisions of the constitution, nor unless he has paid his taxes for the two preceding years. *Held*, that though the provision requiring registration as a voter, as a prerequisite to serving as juror, was necessarily suspended till the completion of the first registration, under the constitution, yet no such suspension was necessary where the juror had not paid his taxes, since he could not have been on the register, if the registration had been complete, and hence the challenge was erroneously overruled.—Nail v. State, 70 Miss. 32, 11 South. 793.

[j] (N. C. 1877) Where the sheriff has been enjoined from collecting taxes, a juror is not disqualified for failure to pay them.—State v. Heaton, 77 N. C. 505.

[k] (N. C. 1884) Jurors of the original panel must not only be freeholders, but must have paid their taxes for the preceding year; that is, for the year preceding the one in which the tax returns are laid before the county commissioners, not necessarily for the year preceding the trial.—State v. Carland, 90 N. C. 668.

[l] (N. C. 1885) It is no ground for challenge to a juror summoned in a criminal case that he has not paid his taxes for the preceding year, the only qualification required by Code, § 1738, being that he shall be a freeholder of the county in which the trial is had.—State v. Kilgore, 93 N. C. 533.

[m] (N. C. 1886) The nonpayment of taxes for the year preceding the first Monday in September constitutes a disqualification to act as a juror.—State v. Haywood, 94 N. C. 847.

[n, o] (N. C. 1887) When it appears that a juror, sitting in the trial of a cause, has paid his taxes for the fiscal year preceding the time he was placed on the jury list, as provided by Code, §§ 1722, 1723, he cannot be challenged for cause, though he may not have paid his taxes for the year preceding the time of the trial.—Sellers v. Sellers, 98 N. C. 13, 3 S. E. 917.

[p] (N. C. 1889) A person being eligible to sit as a juror if he has paid tax for the fiscal year next preceding the time when his name was placed on the jury list, when he has so paid tax it is error to allow a challenge on the ground that he has not paid tax for the fiscal year during which the trial is had.—State v. Gardner, 104 N. C. 739, 10 S. E. 146.

[q] (N. C. 1891) Acts 1889, c. 559, providing for a quadrennial instead of an annual revision of the jury list, does not affect the rule that a person is not disqualified as juror for not having paid taxes for the fiscal year during which the trial is had.—State v. Davis, 109 N. C. 780, 14 S. E. 55.

[r] (N. C. 1894) Under Act 1889, c. 559, requiring the county commissioners to select as jurors, on the first Monday of September, 1892,

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and every four years thereafter, such persons as have paid their taxes for the preceding year, a person so selected, who had paid his land tax for the year preceding the first Monday of September, 1892, is competent in a trial in April, 1894, though he has not paid his taxes for 1893.—State v. Sherman, 115 N. C. 773, 20 S. E. 711.

[s] (Utah, 1875) A juror summoned was the owner of taxable property, and was ready to pay his taxes, but was not assessed, nor did he pay taxes. *Held*, if he was not so assessed and allowed to pay taxes, it was not his fault, and such juror is competent to serve.—United States v. Reynolds, 1 Utah, 226.

§ 258. Qualifications as voter.

Declaration of intention to become citizen as qualification for jury service, see ante, § 252.

Improperly sustaining challenge because juror's name was not on assessment roll as ground for reversal, see post, § 598 [o].

Necessity of taking names from books of receiver of tax returns, see post, § 260 [b].

Payment of taxes in general, see ante, § 257.

Residence in general as qualification, see ante, § 254.

Selection of jury list from registered voters instead of qualified voters, see post, § 275 [g].

Sufficiency of jurors' answers to questions propounded, see post, § 582 [h].

Waiver by failure to challenge or object, see post, § 506.

Qualifications as elector in general, see "Elections," vol. 18, cc. 135–175, §§ 55–91.

[a] (Cal. 1853) Under the act concerning jurors (St. 1852, p. 7, § 1), a juror who is not an elector of the county for which he is summoned is incompetent to serve.—Sampson v. Schaffer, 3 Cal. 107.

[b] (Cal. 1854) Under a statute requiring jurors to be electors of the county for which they are summoned, one whose residence in the county has been only for five weeks, and who states that he considers himself a resident of another county, is not qualified to serve as a juror, since mere residence, without intention of acquiring a domicile, will not constitute him an elector.—People v. Peralta, 4 Cal. 175.

[c] (Mich. 1885) If his intention to become a citizen is declared in due form by a man of foreign birth, and the conditions of age and residence exist, he is entitled to vote under Const. art. 7, § 1, and is qualified to act as a juror under How. Ann. St. § 7555, requiring jurors to have the qualifications of electors.—People v. Scott, 56 Mich. 154, 22 N. W. 274; Same v. Rosevear, 56 Mich. 158, 22 N. W. 276.

[d] (Mich. 1891) How. Ann. St. § 7555, provides that jurors shall have the qualifications of electors. *Held*, that a resident of the state for many years, and a resident of the county for three and one-half months, though he had moved from one township to another in the county a few days prior to being summoned, was a qualified juror.—People v. Wright, 89 Mich. 70, 50 N. W. 792.

[e] (Mich. 1895) Under Laws 1893, No. 204, § 5, providing that jurors shall have the qualifications of electors in the place where they reside, one who is an elector is competent to serve as a juror, though he be not yet a full citizen.—People v. Considine, 105 Mich. 149, 63 N. W. 196.

[f] (Miss. 1892) Const. 1890, § 264, provides that no person shall be a grand or petit juror unless a qualified elector. Section 241 provides that no one shall be a qualified elector unless registered in accordance with the provisions of the constitution. Section 274 provides that the constitution should become operative November 1, 1890, except that it should be controlled until April 1, 1892, by all repugnant laws except those repugnant to the ordinances of the constitution, the provisions of section 183, and the provisions of sections 223–226, inclusive. Code 1880, § 1661, provides that male citizens between the ages of 21 and 60 years, not convicts, may serve as jurors within the county of their residence. *Held*, that section 1661 was repugnant to section 264, and controlled it by virtue of section 274, until April 1, 1892, and that, the first registration under the constitution not being complete on June 22, 1892, at which date certain jurors were impaneled, a challenge to such jurors, on the ground that they were not qualified voters by reason of their failure to register under the provisions of the constitution, would not lie, because from necessity the constitutional provision fixing the qualification of jurors was suspended until a new registration should be completed.—Nail v. State, 70 Miss. 32, 11 South. 793.

[g] (Mo. 1887) Const. art. 8, § 2, provides that every foreign born male over 21 years old, who shall have declared his intention to become a citizen not less than 1, not more than 5, years before offering to vote, shall be entitled so to do, if he has resided in the state for 1 year, and in the county, city, or town for 60 days, immediately prior to the election. Rev. St. 1879, § 2777, provides that jurors shall be male citizens of the state and residents of the county. Section 3126 provides that all words and phrases of the statutes shall be construed in their plain, ordinary, and usual sense, unless such construction is plainly inadmissible. *Held*, the word "citizen" would be construed as equivalent to "voter," and one who was foreign born, but who had declared his intention of becoming a citizen, so as to entitle him to vote, and who had lived 18 years in the state and 3 years in the city, and was of full age, was a competent juror in a criminal case.—State v. Pagels, 92 Mo. 300, 4 S. W. 931.

[h] (Mo. 1894) The fact that one is not a voter does not render him incompetent to serve as a juror.—State v. Fairlamb, 121 Mo. 137, 25 S. W. 895.

[i] (Neb. 1883) A person who has resided in a county for 24 days only is not competent to serve as a juror under Code Civ. Proc. § 657, which provides that a juror must be an elector of the county wherein he is called to serve, and Comp. St. c. 26, § 3, which provides that to be an elector a person must have resided for 40 days in the county where he proposes to vote.—Hart v. State, 14 Neb. 572, 16 N. W. 905.

[j] (Nev. 1865) The fact that a qualified voter, under the constitution, had not paid his poll tax, or registered his name at the time of the trial of a cause, did not make him an incompetent juror in such cause, under the registry law, where the time within which a voter was required to register his name had not expired.—State v. Salge, 1 Nev. 455; State v. Waterman, Id. 543.

[k] (S. C. 1834) Under Act 1799, fixing the qualifications for jurymen by reference to the qualifications for voting, as established by Const. art. 1, § 4, a juryman was not required to be a freeholder, but might serve if he had paid a tax the preceding year of three shillings.—State v. Massey, 2 Hill, Law, 379; Same v. Baldwin, Id.; Same v. Williams, Id. 381.

[l] (Tex. 1890) Rev. St. art. 3010, provides that jurors must be citizens of the state and

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county in which they are to serve, and legally qualified to vote therein. Code Cr. Proc. art. 631, provides that in order to be qualified jurors they must answer affirmatively the question, "Are you a qualified voter in this county and state?" Const. art. 6, § 1, provides that male persons of foreign birth, who have declared their intention of becoming citizens, and subject to no other disqualifications, are qualified voters. *Held*, that persons who have legally declared their intention of becoming citizens are not, by reason of their foreign birth, disqualified to act as jurors.—Abrigo v. State, 29 Tex. App. 143, 15 S. W. 408.

[m] (Va. 1873) A person having the constitutional qualifications of a voter, although he has neither registered nor voted, is a qualified juror.—Craft v. Commonwealth, 24 Grat. 602.

§ 259. Prior service as juror.

See ante, § 244 [d].

Effect of replacing in jury box names of jurors who had already served, see post, § 282 [o].

In particular cause, see post, §§ 423–430.

Prior service as juror as exemption, see post, § 261 [l, q, z].

—— *as ground of challenge to member of struck jury panel, see* post, § 368 [b].

Rejection of disqualified juror drawn on panel, see post, § 283 [c, f, k].

—— *on court's own motion, see* post, § 525 [f].

Repeal of act making prior service as talesman ground of challenge, see ante, § 244 [k].

Retaining jurors beyond time for which they were drawn as basis for challenge on ground of prior service, see post, § 391 [a].

[a] (U. S. 1892) Under Rev. St. § 812, as amended by Act Cong. June 30, 1879, § 2, providing that it shall be ground of challenge to any juror that he has been summoned and attended as a juror at any term of the circuit or district court within a year, a juror is not subject to challenge merely because he has served as a talesman in another cause in the same court and term.—Walker v. Collins, 50 Fed. 737, 1 C. C. A. 642, 4 U. S. App. 406.

[b] (U. S. 1878) Rev. St. § 812, which provides that no person shall be summoned as juror more than once in 2 years, etc., does not intend that 24 months must elapse between the close of the term at which a juror is summoned, and serves, and the beginning of the next term at which he is competent to serve.—United States v. Reeves, Fed. Cas. No. 16,139 [3 Woods, 199].

[c] (Colo. 1894) Under Acts 1891, p. 251, § 4, providing that prior service as juror within a year shall be ground of challenge to any person summoned as a talesman from the bystanders, or on open venire, jurors not summoned from the bystanders, or on open venire, cannot be challenged for such prior service, since Act 1891 to that extent modifies the provision of Act 1889 (Mill's Ann. St. § 2595) that "any person" who shall have so served shall be subject to such challenge.—Dill v. People, 19 Colo. 469, 36 Pac. 229, 41 Am. St. Rep. 254.

[d] (Ga. 1856) A person belonging to the grand jury list of a county, who has not been sworn on the grand jury of the term of the court at which a trial takes place, is not disqualified from serving on the jury to try offenders.—Rafe v. State, 20 Ga. 60.

[e] (Ill. 1860) Laws 1859, p. 154, providing that it shall be ground of challenge to any juror, called to be sworn in any cause, that he has been sworn as a juror at any term within a year, was aimed at "professional jurors," and it is good cause of challenge to a juror that he has served on the grand jury within a year.—Bissell v. Ryan, 23 Ill. (13 Peck) 566.

[f] (Ill. 1864) A juror may be challenged, in an action of ejectment, who has been sworn and has served as a grand juror within a year previous to the time of challenge.—Brooks v. Bruyn, 35 Ill. 392.

[g] (Ill. 1879) Under Rev. St. 1874, c. 78, § 14, providing that it shall be ground of challenge to a juror, who is not of the regular panel, that he has served as a juror within a year, jurors summoned by the sheriff, under order of the court, to fill vacancies in the regular panel, are not members of the regular panel, and hence are liable to challenge for having served within the year.—Mueller v. Rebhan, 94 Ill. 142.

[h] (Ill. 1891) Rev. St. c. 47, § 6, provides that when condemnation suits are tried in vacation the clerk shall make a list of 64 freeholders, from whom the jury shall be selected; and section 7, Id., gives the same right of challenge as in other civil cases. Chapter 78, § 14, Id., makes it a cause for challenge that a juror, not one of the regular panel, has served as a juror within a year. *Held*, that said cause of challenge could be applied to any of the jurors in such a condemnation suit, since said list does not constitute a regular panel.—Chicago, P. & St. L. Ry. Co. v. Eaton, 136 Ill. 9, 26 N. E. 575.

[i] (Ind. 1873) Under St. 1873, March 8, § 2, a juror who has served as a talesman upon a jury in the same court at a previous term within a year may be challenged for this cause.—Christie v. State, 44 Ind. 408.

[j] (Ind. 1876) The fact that a juror has served as talesman upon any jury impaneled in the circuit, superior, or criminal court of a county, within one year previous to the time when he is again summoned, is good ground of challenge for cause.—Barker v. Hine, 54 Ind. 542.

[k] (Iowa, 1888) An objection that one summoned as a juror had served as a grand juror within the year prior to the summons will not be considered, where it does not appear from the record that he was not one of the regular panel, as Code 1873, § 239, declares that it shall be a cause of challenge that a trial juror has served on a jury in a court of record within one year, "unless he be a member of the regular panel."—State v. Standley, 76 Iowa, 215, 40 N. W. 815.

[l] (Kan. 1896) A challenge of a juror on the ground that he has served as a juror in a court of record during the year next preceding the trial, under Gen. St. 1889, c. 54, § 3, is not good unless it is shown that the juror actually sat in the trial of a case.—State v. Lowe, 56 Kan. 594, 44 Pac. 20.

[m] (Mass. 1833) Where, by statute, service as a juror renders one ineligible to serve again within three years, service as a juror in some court is intended; and a service on a sheriff's jury does not render the juror thus ineligible.—Brewer v. Inhabitants of Tyringham, 31 Mass. (14 Pick.) 196.

[n] (Mich. 1872) It is not good ground of challenge for cause, under Sess. Laws 1869, p. 106, § 3, authorizing a challenge to any person who has served as a juror on the regular panel, or as a talesman, in such court, within a year, that a juror has already sat on the trial of one cause at the same term.—Burden v. People, 26 Mich. 162.

[o] (Mich. 1884) Under Act 1869, providing that a juror may be challenged if he has serv-

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ed as a juror or as talesman within one year, it is sufficient that he has served as a talesman in a proceeding to open a street.—Williams v. City of Grand Rapids, 53 Mich. 271, 18 N. W. 811.

[p] (Mich. 1896) Under How. Ann. St. § 7584, providing that it shall be ground of challenge to a juror in a court of record that he has served as a juror on the regular panel, or as talesman, in such court, at any time within one year, a challenge to a juror who has served on the regular panel, in the same court, within a year, should be sustained.—People v. Thacker, 108 Mich. 652, 66 N. W. 562.

[q] (Miss. 1887) That part of section 1661, Code 1880, which provides that "it shall be a good cause to challenge any tales juror that he has served as such in the trial of as many as three cases at that or the last preceding term of the court," does not apply to a member of the regular panel for the week.—Louisville, N. O. & T. Ry. Co. v. Mask, 64 Miss. 738, 2 South. 360.

[r] (N. C. 1888) Code, § 1733, provides that "it shall be a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit, or tales juror within two years next preceding such term of the court." The juror objected to was at the regular panel, and the court had told the jurors, the night before, that the talesmen were discharged, and such of the regular panel as wished to do so might go home, and need not return, but that those who remained would be in attendance next day. The juror challenged did not go home, was in court next morning, and was called into the jury box by the sheriff. *Held*, that this juror was still a regular juror, and the disqualification did not apply to him.—Newby v. Harrell, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503.

[s] (Ohio, 1864) Under 4 Curw. St. p. 3180, which provides that any person who shall have already served on a jury as a talesman in the trial of any cause in the same court during the term may be challenged for such cause, a talesman who was sworn as a juror and sat for a whole day hearing all the testimony in the case may be challenged, although the jury was discharged without a verdict, and a judgment was rendered for one of the parties by agreement.—Famulener v. Anderson, 15 Ohio St. 473.

[t] (Okl. 1895) Under St. 1890 it is no ground for a challenge for cause to a juror that he had already served as a talesman in a cause during the same term of court.—Irwin v. Irwin, 3 Okl. 184, 41 Pac. 383.

[u] (Tex. 1878) Under Acts 1876, p. 83, § 26, providing that where a person serves as a juror for one week in the district court within six months preceding, or in the county court within three months preceding, it shall be good cause for challenge, previous jury service in the county court for less than a week, within the time limited, is no cause for a challenge.—Welsh v. State, 3 Tex. App. 413.

[v] (Tex. 1879) In Jury Law 1876, p. 83, § 26, making cause for challenge one week's service in the district court within six months "preceding," this word refers to a prior term; a previous week's jury service during the pending term is not cause therefor.—Garcia v. State, 5 Tex. App. 337.

[w] (Tex. 1889) Under Rev. St. art. 3010, disqualifying a juror who has served for six days within a certain time, one who has served five days is not disqualified.—Monk v. State, 27 Tex. App. 450, 11 S. W. 460.

§ 260. Qualifications for service in particular courts or proceedings.

Adoption by federal courts of state practice as to jurors, see "Courts," vol. 13, cc. 2703–2705, § 929.

[a] (U. S. 1805) The qualifications of jurors in the circuit court of the District of Columbia, for Alexandria county, must be the same as in the county courts of Virginia.—Young v. Marine Ins. Co., Fed. Cas. No. 18,162 [1 Cranch, C. C. 238].

[b] (U. S. 1873) The United States courts sitting in Georgia are not bound by the law of that state, requiring the names of jurors to be taken from the book of the receiver of tax returns, but are only bound to see that the jurors have the same personal qualifications as are required for jurors in the state courts.—United States v. Collins, Fed. Cas. No. 14,837 [1 Woods, 499].

[c] (U. S. 1883) In matters relating to the qualifications and exemptions of jurors, the federal courts are governed by the laws of the states in which the court is held.—United States v. Kilpatrick (D. C.) 16 Fed. 765.

[d] (U. S. 1887) Notwithstanding the federal courts require for their jurors similar qualifications with those of jurors in the state courts, and enforce like objections and challenges to them, they have the power, and it is their duty to exercise it, to enforce any other objection to jurors which from their nature, if well founded, would unfit them to act.—United States v. Benson (C. C.) 31 Fed. 896.

[e] (Ala. 1893) Act Feb. 21, 1887, § 3 (Acts 1886–87, p. 190), providing that in Montgomery county the jury list shall be selected from the male residents between 21 and 60 years old, and section 18, repealing Code 1876, § 4732 (Code 1886, § 4299), which requires the jury list to be selected from householders and freeholders, and all other laws inconsistent with the act, does not repeal, for such county, Cr. Code 1886, § 4331, declaring it ground for challenge in a criminal case that the person has not been a resident householder or freeholder for a year.—Ezell v. State, 102 Ala. 101, 15 South. 810; Parker v. Same, 102 Ala. 128, 15 South. 819.

[f] (Colo. 1891) As Civ. Code, § 243, requires the jurors in condemnation proceedings to be freeholders, it is error to overrule a challenge to one who testified that he owned personal property, but no mining property, nor any house or land.—Colorado Cent. R. Co. v. Humphreys, 16 Colo. 34, 26 Pac. 165.

[g] (Ill. 1872) The provision of the constitution continuing the recorder's court under the name of the "criminal court of Cook county," and investing it with the same criminal jurisdiction as a circuit court in all cases arising in that county, had the effect of repealing the mode of selecting jurors in such court under the earlier laws, which required that jurors should be selected from the taxpayers of the city, and of requiring them to be in future selected from the body of the county the same as in the circuit court.—Peri v. People, 65 Ill. 17.

[h] (Mich. 1890) The provision in the Owosso city charter, § 109, that the jury to ascertain the necessity for taking private property for public uses shall be composed of inhabitants of the town, qualified to serve as jurors in courts of record, is void as in violation of Const. art. 18, § 2, which requires such jurors to be freeholders. Under How. Ann. St. §§ 2495, 7554, 7555, one need not be a freeholder to be qualified to serve as a juror in courts of

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record.—City of Owosso v. Richfield, 80 Mich. 328, 45 N. W. 129.

[i] (N. Y. 1814) Jurors in a justices' court must be freeholders of the town where the cause is to be tried.—Streeter v. Hearsey, 11 Johns. 168

[j] (N. Y. 1856) It is not requisite for the sheriff of the city and county of New York, on executing writs of inquiry, to summon only such persons as jurors as the commissioners of jurors may have selected to serve or may designate.—Jennings v. Asten, 12 N. Y. Super. Ct. (5 Duer) 695, 3 Abb. Prac. 373.

[k] (N. Y. 1866) Under 2 Laws 1847, p. 134, c. 496, providing that it shall not be necessary for any juror in the city of New York that he shall be actually assessed therein, but that all persons qualified to serve as jurors, resident in the city, and not exempt by any law of the state shall be selected, ownership of real estate is not a necessary qualification for jurors in the city of New York.—Friery v. People, 2 Abb. Dec. 215, affirming (1865) 54 Barb. 319.

[l] (N. C. 1888) Jurors in a criminal court need not be freeholders under Act Ga. 1885, c. 63, § 19, requiring them to possess the qualifications of jurors in the superior courts, who, under Code Ga. § 1722, need not be freeholders.—State v. Freeman, 100 N. C. 429, 5 S. E. 921.

[m] (Pa. 1863) Under the act of 1872, requiring that the inquest by which rights of parties shall be decided where a landlord seeks to oust a tenant shall be composed of freeholders, the term "freeholder" implies the owner of land in fee simple, fee tail, or for life.—Rhoads v. Wesner, 1 Woodw. Dec. 79.

[n] (S. C. 1835) Act 1833, providing for a jury of 24 "neighboring freeholders" on the trial of an insolvent debtor, should be construed as meaning freeholders of the district.—Rice v. Sims, 3 Hill, Law, 5.

§ 261. Exemptions.

As infringement of right to trial by jury, see ante, § 227 [a].

Evidence of exemption, see post, § 263.

Power of court to excuse member of panel, see post, §§ 384–390.

Prior service as juror as disqualification, see ante, § 259.

Summoning exempt persons as ground of challenge to array, see post, § 363.

Constitutionality of statute, exempting from jury duty, see "Constitutional Law," vol. 10, cc. 1510, 1511, § 178.

[a] (Cal. 1882) One who has faithfully served in the organized state militia for seven consecutive years, and has received the adjutant general's certificate to that effect, is exempt from jury duty under the express provisions of Code, § 1936.—Ex parte Will, 61 Cal. 121.

[b] (D. C. 1893) A person employed by the United States to sell stamps at a small yearly salary is not a "salaried officer of the government of the United States" (Rev. St. § 875), so as to render him exempt from jury duty.—United States v. Barber, 21 D. C. 456.

[c] (Fla. 1889) A man is not exempt from jury duty by reason of being assessor of taxes for a city or town.—Ellis v. State, 25 Fla. 702, 6 South. 768.

[d] (Ga. 1857) An honorary member of the Columbus Guards is not exempt from jury duty under the act of 1845.—Stewart v. State, 23 Ga. 181.

[e] (Ga. 1871) Members of fire companies in cities of Georgia are not now exempt of right from jury duty.—Ex parte Rust, 43 Ga. 209.

[f] (Ga. 1878) The president of a company of lessees of penitentiary convicts is not an officer of the penitentiary within the meaning of Code, § 4805, and so is not exempt from jury duty.—Lockett v. State, 61 Ga. 44.

[g] (Ill. 1874) Act Feb. 11, 1874, declaring that active members of the fire departments should be exempt from jury duty, repeals, by implication, a provision in the charter of Chicago exempting firemen "who shall have faithfully served as such * * * for the term of seven years."—Appeal of Scranton, 74 Ill. 161.

[h] (La. 1876) The assistant clerk of a court is an "officer" of the court, within an act exempting the judges and officers of the courts from jury duty.—State v. Newton, 28 La. Ann. 65.

[i] (La. 1879) Jury Law 1873, p. 166, allowing the members of a parish police jury to be drawn as talesmen in criminal trials, abolishes the previous exemption in that regard.—State v. Daniel, 31 La. Ann. 91.

[j] (Md. 1870) An honorary member of a volunteer militia company is exempt from jury duty for one year from the date of his certificate of membership.—Albert v. White, 33 Md. 297.

[k] (Mass. 1772) The standing grand jurors of a county for a year are exempt from serving on petit juries.—In re Reed, Quincy, 331.

[l] (Mass. 1819) Under St. 1807, c. 139, § 5, providing that no person shall be liable to be drawn and serve as juror in any court oftener than once in three years, a person who has served as a juror in the circuit court of the United States within three years is not liable to be returned as a juror in the state courts.—In re Swan, 16 Mass. 220.

[m] (Mass. 1834) A minister of the Methodist Episcopal Church, who belongs to the "local connection," and whose duty it is to preach when called upon to churches within a convenient distance from his residence, is a settled minister within the meaning of the statute of 1812, exempting settled ministers from serving as jurors.—Commonwealth v. Buzzell, 33 Mass. (16 Pick.) 153.

[n] (Mass. 1838) Attorneys at law, though retired from practice, are exempted from serving as jurors.—In re Swett, 37 Mass. (20 Pick.) 1.

[o] (Mich. 1891) Pub. Acts 1881, No. 150, (How. Ann. St. § 978), providing for the enrollment of not more than a certain number of members in each company and battery of state troops, each member to pay into the treasury annually not less than $10, and declaring that on such payment he shall receive from the commanding officer a certificate, and shall be exempt from jury duty and poll tax, is not void as conferring on military officers the power of arbitrarily setting aside the authority of the courts to compel the attendance of qualified jurors, or because it transfers from the courts to military officers the power to determine exemptions from jury duty, since the member, when he has complied with the act, is made exempt by law, and not by an act of the military officers.—Hall v. Burlingame, 88 Mich. 438, 50 N. W. 289.

[p] (Mo. 1893) A dentist who has obtained a certificate to practice dentistry under Rev. St. 1889, c. 110, art. 3, § 6889, is not "a person exercising the functions of * * * a practitioner of medicine," and exempt from jury duty, under Rev. St. 1889, § 6062.—State v. Fisher, 21 S. W. 446; Id., 119 Mo. 344, 24 S. W. 167, 22 L. R. A. 799.

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[q] (Neb. 1886) Under Code Civ. Proc. § 665, providing that all persons are exempt from service as jurors in the district court who have served in such court within two years, such fact being shown on a criminal trial it is sufficient cause to excuse a juror.—Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825.

[r] (N. Y. 1806) Such of the inhabitants of the city of New York as are not members of the corporation, or made free of the city in the manner prescribed in the charter, are not exempted from serving on juries out of the city. The exemption extends only to the mayor, aldermen, commonalty, and persons made free of the city.—Cortelyou v. Van Brundt, 1 Johns. 313.

[s] (N. Y. 1871) 2 Rev. St. p. 415, § 33, exempting from jury duty persons in the actual employment of any "iron manufacturing company," does not apply to companies engaged in making articles from iron manufactured. It includes only companies engaged in manufacturing iron.—People v. Holdridge, 4 Lans. 511.

[t] (N. C. 1818) A commissioner of navigation is not exempt from serving as a tales juror.—State v. Hogg, 4 N. C. 684; Id., 6 N. C. 319.

[u] (N. C. 1835) The exemption of postmasters from serving on juries, under Act Cong. 1825, c. 275, § 35, is constitutional.—State v. Williams, 18 N. C. 372.

[v] (N. C. 1851) A person who was exempted by law from serving on juries, as a member of a fire company, was exempt from serving on a special venire.—State v. Whitford, 34 N. C. 99.

[w] (N. C. 1878) The exemption of firemen from jury duty ceases with the reason thereof; and their presence in court demonstrates their liability to serve as talesmen.—State v. Willard, 79 N. C. 660.

[x] (S. C. 1840) A commissioned officer in the United States navy is not exempt from jury service in South Carolina.—State v. Ingraham, 1 Cheves, 78.

[xx] (S. C. 1840) All previously existing exemptions are virtually repealed by the jury law of 1799.—State v. Ingraham, 1 Cheves, 78.

[y] (Tenn. 1873) A legislative exemption of the members of a fire company from serving as jurors, both during the membership and after active service as such members for five years, continues, though the company be disbanded.—Beamish v. State, 65 Tenn. (6 Baxt.) 530.

[yy] (Tenn. 1883) One who, though holding a license to practice law, follows only the business of a real estate agent, occasionally appearing in suits before magistrates arising out of matters connected with his real estate business, is not within Code, § 4005, exempting "practicing" attorneys from liability to serve on juries.—Wheatley v. State, 79 Tenn. (11 Lea) 262.

[z] (Tenn. 1884) The statute explicitly provides that a juror shall not be appointed to serve more than once in each 12 months. *Held*, therefore, that a juror who has served regularly during a term of the circuit court of the county cannot be required to serve within 12 months in a city and county criminal court.—State v. Godwin, 81 Tenn. (13 Lea) 268.

[zz] (Tex. 1872) A provision in the charter of a fire company granted by the legislature, exempting its members from jury service, is not repugnant to Const. 1869, art. 12, § 45, providing that all qualified voters of a county shall also be qualified jurors of such county.—Ex parte House, 36 Tex. 83.

§ 262. —— Power of legislature to repeal exemption laws.

Exemption from jury duty as special privilege, see "Constitutional Law," vol. 10, c. 2029, § 609 [a, b, d, e].

—— *as vested right not to be impaired, see* "Constitutional Law," vol. 10, c. 1510, § 178 [b, d].

Impairment of obligation of contract by state of exemptions from jury duty, see "Constitutional Law," vol. 10, c. 1653, § 302 [a, b].

[a] (Ill. 1876) The legislature has not the power to exempt a person perpetually from serving on juries, in consideration of services rendered as a member of a fire company; but such exemptions are subject to repeal by any succeeding legislature.—Bragg v. People, 78 Ill. 328.

§ 263. —— Evidence of exemption.

[a] (Ala. 1881) Though firemen are exempt from jury duty under Code, § 4734, the court has no authority to discharge a person, regularly summoned, simply on his statement that he is a fireman.—Phillips v. State, 68 Ala. 469.

[b] (Ala. 1891) Code, § 174, exempts from jury duty every member of the state troops, and provides that the "commanding officer of each company shall furnish each member with a certificate of membership, signed by such commanding officer, which shall prove such exemption in any court." *Held*, that this certificate is not the only competent evidence of such exemption, but it may be proved by the statement of the person claiming it.—King v. State, 90 Ala. 612, 8 South. 856.

[c] (Ala. 1895) Testimony of a juror on voir dire examination that he is a member of the Mobile Cadets, without additional proof that such cadets were a part of the state troops, does not authorize the court to excuse the juror.—Simon v. State, 108 Ala. 27, 18 South. 731.

[d] (Mo. 1872) Under section 4 of the act (Loc. Laws 1845, p. 15) which exempts members of the corporation of fire wardens from jury service, and declares that the certificate of the secretary "certifying to their membership shall be competent evidence of the fact," and that the certificate "shall be granted only to active members," the exhibition of such certificate is proof only of the mere fact of membership, and not that the bearer is an active and faithful member of the corporation; and such a certificate will not exempt him from jury duty.—State ex rel. Parsons v. Primm, 50 Mo. 87.

§ 264. —— Who may raise question of exemption or disqualification.

Disqualification by age, see ante, § 246.

Right to exempt juror drawn for jury, see post, § 355 [d].

[a] Exemption from jury duty is not a disqualification to act as juryman. It is a personal privilege which may be claimed or waived.
—(D. C. 1886) United States v. Lee, 4 Mackey, 489, 54 Am. Rep. 293;
(La. 1871) State v. Morningstar, 23 La. Ann. 8; (1890) Same v. Jackson, 42 La. Ann. 1170, 8 South. 297;
(Me. 1865) State v. Wright, 53 Me. 328;
(N. H. 1861) State v. Forshner, 43 N. H. 89, 80 Am. Dec. 132;
(N. J. 1886) Patterson v. State, 48 N. J. Law (19 Vroom) 381, 4 Atl. 449;
(R. I. 1883) State v. O'Brien, 14 R. I. 266;
(S. C. 1892) State v. Toland, 36 S. C. 515, 15 S. E. 599; Same v. Dearing, Id.

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[b] A law exempting persons over a certain age from serving on a jury is a favor to a class, and does not render a person over that age incompetent, if he chooses to waive his privilege.—(Ill. 1857) Davis v. People, 19 Ill. (9 Peck) 74; (1865) Murphy v. Same, 37 Ill. 447;
(Ind. 1826) State v. Miller, 2 Blackf. 35;
(Kan. 1872) Moore v. Cass, 10 Kan. 288;
(Me. 1887) State v. Day, 79 Me. 120, 8 Atl. 544;
(Mich. 1892) People v. Rawn, 90 Mich. 377, 51 N. W. 522;
(N. M. 1894) United States v. Folsom, 38 Pac. 70.

[c] (U. S. 1878) The right, under Rev. St. § 821, to require the panel of jurors called to serve for a term to take the oath therein prescribed as to participation in the rebellion against the United States, or to be discharged from the panel, is limited to the district attorney, and is not a right of individual suitors in a case about to be tried.—Atwood v. Weems, 99 U. S. 183, 25 L. Ed. 471.

[d] (U. S. 1806) A juror cannot object to serve because he is an alien.—Lingan v. Marbury, Fed. Cas. No. 8,371 [1 Cranch, C. C. 365].

[e] (U. S. 1887) That one summoned as a juror in the United States courts was an officer of the navy anterior to the late war; that he resigned, and thereafter served in the Confederate army; and that his disabilities have not been removed,—will not support a personal claim for exemption from jury duty.—In re Carnes (C. C.) 31 Fed. 397.

[f] (Ala. 1880) One's exemption as a juror, under Code 1876, § 4884, because he has reached 60 years of age, is a personal privilege which he may waive or assert.—Williams v. State, 67 Ala. 183.

[g] (Ala. 1883) The right of a coroner to be exempt from jury service is a privilege which he may waive, and he is not subject to challenge upon such waiver.—Jackson v. State, 74 Ala. 26.

[h] (Fla. 1879) Laws Fla. c. 3010, § 2, approved February 17, 1877, providing that county commissioners among other officers, shall not be qualified to serve on a jury, is an absolute disqualification of a county commissioner, and does not give him a privilege which he may waive.—Ladd v. State, 17 Fla. 215.

[i] (Fla. 1892) Laws Fla. c. 3010, § 3 (McClel. Dig. p. 622, § 8), which provides that "no person shall be drawn to serve on a grand or petit jury more than once during the same year," does not disqualify a person for jury service during more than one term the same year, but only furnishes him an exemption from such service.—Blount v. State, 30 Fla. 287, 11 South. 547.

[j] (Fla. 1894) The provision of Rev. St. § 1152, that no person shall be drawn on a jury more than once in the same year, is a personal privilege, and not a disqualification.—Lambright v. State, 34 Fla. 564, 16 South. 582.

[k] (Me. 1863) Officers of the United States are not disqualified to act as jurors, although by our statutes they have a right to be excused from serving as such.—State v. Quimby, 51 Me. 395.

[l] (Me. 1865) Though coroners are exempt from jury service, under Rev. St. c. 10, § 3, the fact that a coroner served on the jury is not ground for arresting judgment, where it appears that he waived his exemption.—State v. Wright, 53 Me. 328.

[m] (Md. 1882) Code, art. 50, § 3, exempting persons over 70 years of age from jury service, does not disqualify such persons, and a conviction is not avoided because one of the petit jury convicting was over that age.—Green v. State, 59 Md. 123, 43 Am. Rep. 542.

[n] (Mass. 1886) A constable, although exempt under Pub. St. c. 170, § 2, from serving as a juror, if duly drawn, may serve as a juror, and this does not entitle a party to a new trial as of right.—Moebs v. Wolffsohn, 143 Mass. 130, 8 N. E. 892.

[o] (Mich. 1892) The exemption of a justice of the peace from acting as a juror is a personal privilege, and not the subject of challenge for cause.—People v. Lange, 90 Mich. 454, 51 N. W. 534.

[p] (Ohio, 1873) 70 Ohio Laws, p. 173, § 21, exempts all public officers from service on juries during their term of office, but such exemption is a privilege, which they may waive, and not a disqualification.—Glassinger v. State, 24 Ohio St. 206.

[q] (R. I. 1889) Pub. St. c. 200, § 1, provides that all persons of a certain class "shall be liable to serve as jurors, except as hereinafter provided," and section 2 exempts from such service, inter alia, "constables." Section 20 provides for fining any member of a town council who willfully draws an exempted person for jury service. *Held*, that a constable is simply exempted, and not disqualified, from acting as a juror.—State v. Cosgrove, 16 R. I. 411, 16 Atl. 900.

[r] (Tex. 1854) Persons to be affected by the finding of jurors may object to their fitness, but have nothing to do with the question whether a juror is privileged from acting as such; whether a person is exempt on account of his age comes under the latter class of questions.—Breeding v. State, 11 Tex. 257.

[s] (Tex. 1882) A deputy sheriff is not disqualified from serving as a juror, if he does not see fit to claim the exemption conferred by statute.—Burns v. State, 12 Tex. App. 269.

[t] (Wis. 1857) The fact that a juror served at the last term of court is such juror's privilege of exemption, and not ground of challenge to him.—Conkey v. Northern Bank, 6 Wis. 447.

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

(A) IN GENERAL, §§ 265-267.
(B) JURY LIST, §§ 268-282.
(C) THE JURY PANEL, §§ 283-348.
(D) THE TRIAL JURY, §§ 349-367.
(E) SPECIAL OR STRUCK JURY, §§ 368-380.
(F) CONTROL OF COURT OVER JURORS, §§ 381-390.
(G) TERM OF SERVICE AND COMPENSATION, §§ 391-399.

Apportionment of jurors, see ante, § 8.
Challenges for cause, see post, §§ 551–598.
Challenge to panel or array, and motion to quash venire, see post, §§ 541–550.
Demand as prerequisite to summoning jury, see ante, §§ 154–175.
Mode of selecting and summoning as infringing right, see ante, §§ 226–232.
—— *of selection as infringing right to jury of the vicinage, see* ante, § 229.
Waiver of objections, see post, §§ 503–523.
—— *by failure to challenge, see* post, § 512.

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Application for jury to assess damages for public improvements, see "Municipal Corporations," IX. (D).

Disqualification of judge as affecting validity of orders relating to drawing or summoning jurors, see "Judges," vol. 29, c. 1821, § 243.

Operation and effect of disqualification of judge as to orders for drawing and summoning jurors, see "Judges," vol. 29, c. 1821, § 243.

Review of discretion of court, see "Appeal and Error," vol. 3, cc. 1664–1667, § 3843.

—— *of rulings as to selecting, impaneling, and swearing jurors, see* "Appeal and Error," vol. 3, cc. 2051–2056, §§ 4124–4127.

To assess compensation in condemnation proceedings, see "Eminent Domain," vol. 18, cc. 1606–1610, § 554.

(A) IN GENERAL.

NATURE AND FORM OF PROCEEDING IN GENERAL, § 265.
CONSTITUTIONAL AND STATUTORY PROVISIONS, § 266.
STATUS OF JUROR AS PUBLIC OFFICER, § 267.

§ 265. Nature and form of proceeding in general.

[a] (U. S. 1872) Act Cong. July 20, 1840 (5 Stat. 394), providing that jurors in federal courts shall have like qualifications as jurors in the highest court of the state in which they are sitting, does not require literal conformity to the state laws for selecting and drawing jurors, but only substantial conformity, and that only so far as practicable.—United States v. Tallman, Fed. Cas. No. 16,429 [10 Blatchf. 21].

[b] (U. S. 1873) Under Act July 20, 1840 (5 Stat. 394), requiring jurors in the United States courts to have similar qualifications to those required for jurors in the highest courts of the state in which they are sitting, and requiring the practice in obtaining jurors to conform as far a practicable to the practice in such state courts, a minute adherence to the state practice is not necessary, nor is it necessary for the United States courts to make any use of the state agencies for obtaining jurors, but they should depend on their own officers.—United States v. Collins, Fed. Cas. No. 14,837 [1 Woods, 469].

[c] (U. S. 1873) The provision of Act Cong. July 20, 1840 (5 Stat. 394), that jurors in federal courts shall have the same qualifications and exemptions as jurors in the state courts, and shall be designated in the mode practiced in the state courts, does not require that jurors in federal courts shall be designated by state officers, but that they should be selected by federal officers as nearly as possible in the same manner as jurors in state courts are selected by state officers.—United States v. Gardner, Fed. Cas. No. 15,187.

[d] (U. S. 1883) In matters relating to the designating and summoning juries, federal courts have a large discretion. There is no statute requiring them to conform their practice, pleading, and procedure in criminal trials to the laws of the state in which they are held. The criminal jurisdiction of the federal courts is derived from the acts of congress, but in exercising their functions they are guided by the common law, in the absence of statute.—United States v. Kilpatrick (D. C.) 16 Fed. 765.

[e] (La. 1858) Act 1855, p. 492, § 7, provides that no jury shall be summoned for the probate term of the district court of Franklin parish. Section 26 authorizes the judge of the district court to hold adjourned or special terms whenever he may find it necessary, at which terms all business, civil or criminal, may be done, and for which a jury may be summoned. *Held*, that the judge could not summon a jury for a term commencing on the date fixed by statute for the commencement of the probate term.—State v. Doyall, 13 La. Ann. 418.

§ 266. Constitutional and statutory provisions.

Alteration of statute as to size of panel, see post, § 290 [e, l].

Application of general law as to power of court to order special venire to local courts, see post, § 310 [a].

—— *of statute increasing size of panel to criminal trials, see* post, § 290 [o].

Constitutionality of act authorizing appointment of jury commissioners by governor, see post, § 268 [c, j].

—— *authorizing mayor to appoint jury commissioner, see* post, § 269 [b].

Implied repeal of act permitting talesmen to be taken from others than bystanders, see post, § 341 [u].

—— *of municipal charter provision requiring city assessor to return jury list, see* post, § 273 [c].

Repeal of act authorizing open venire, see post, § 325 [g].

—— *authorizing sheriff to summon bystanders after discharge of regular panel, see* post, § 340 [c].

—— *defining qualifications for jurors, see* post, § 275 [i].

—— *of congress as to localities whence jurors may be drawn, see* post, § 275 [b].

Repeal of general law as to mistakes in jurors' names by special law, see post, § 309 [j].

—— *of law allowing special venire to be summoned by sheriff from bystanders or county at large, see* post, § 325 [c].

—— *of statute authorizing talesmen to be returned by sheriff, see* post, § 340 [b].

[a] (U. S.) Act Cong. June 30, 1879, c. 52, § 2 (21 Stat. 43), providing for the drawing of jurors, and repealing certain sections of the Revised Statutes respecting the selection, qualifications, and oath of jurors, does not affect the power of the court to call in talesmen to supply a deficiency in the panel, or repeal Rev. St. § 804, providing that "when, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the by-standers sufficient to complete the panel."—(1888) Lovejoy v. United States, 128 U. S. 171, 9 Sup. Ct. 57, 32 L. Ed. 389; (1894) St. Clair v. Same, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936; (1881) United States v. Rose (C. C.) 6 Fed. 136; (1883) Same v. Munford (C. C.) 16 Fed. 164.

[b] (Ala. 1881) Act Feb. 13, 1879 (Acts 1879, p. 204), regulating the drawing of grand and petit jurors in certain counties therein specified, was not intended to be retroactive, so as to affect the validity of any jury which had been drawn under the general law prior to the approval of the act, but which was organized subsequently thereto.—Marler v. State, 68 Ala. 580.

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[c] (Ala. 1883) Code 1876, § 4874, providing that the court in summoning a jury for a capital case must make an order commanding the sheriff to summon not less than 50 nor more than 100 persons, including those summoned on the regular juries for the week or term, when the term does not exceed one week, is mandatory, and failure to comply strictly with its provisions is reversible error.—Posey v. State, 73 Ala. 490.

[d] (Ala. 1889) The fact that the jury to try defendant was summoned under a statute passed after the commission of the offense is not ground of challenge to the array; the jury being a part of the remedy, which the legislature may alter.—Hawes v. State, 88 Ala. 37, 7 South. 302.

[e] (Ala. 1893) Act Feb. 18, 1893, providing that juries in the county of Wilcox shall be drawn and organized as provided by Code, pt. 5, tit. 3, c. 4, arts. 1, 2, is unconstitutional as attempting to revive a law without re-enacting and publishing it at length.—Stewart v. State, 100 Ala. 1, 13 South. 943.

[f] (Dak. 1880) In territories grand and petit juries may be selected and summoned as at common law. Act Cong. June 30, 1870, so far as it relates to the drawing of jurors, does not apply to the courts of territories.—Beebe v. United States, 2 Dak. 292, 11 N. W. 505.

[g] (Ga. 1856) Pen. Code div. 14, § 34, providing that the repeal of an act shall not affect cases pending under it, has no reference to the mode of selecting, drawing, and summoning jurors, but refers to the act charged as an offense.—Rafe v. State, 20 Ga. 60.

[h] (Ind. 1885) Act April 15, 1881, provided that jurors should thereafter be obtained through jury commissioners to be appointed in each county at the first term of the circuit court after the act went into effect. *Held*, that an action, triable at the first term after the act took effect, was properly tried before a jury selected under the former law; no opportunity having occurred for the new law to go into operation.—McCrory v. Anderson, 103 Ind. 12, 2 N. E. 211.

[i] (Iowa, 1855) The provisions of Code, c. 96, relative to jurors, are directory only.—Claussen v. La Franz, 1 Iowa (1 Clarke) 226.

[j] (Iowa, 1866) The provisions of Rev. St. 1860, c. 115, in regard to the mode of obtaining jurors, are directory; and a substantial compliance with its requirements is sufficient.—State v. Carney, 20 Iowa, 82.

[k] (La. 1832) Act March 2, 1830, No. 19, repealing Act Feb. 7, 1829, No. 59, relative to juries in the first judicial district, revives the laws on that subject in force prior to the act repealed.—Prall v. Peet's Curator, 3 La. 274.

[l] (La. 1858) The act approved March 19, 1857, entitled "An act to amend an act relative to jurors," does not repeal, but merely amends, and re-enacts, as amended, Act 1855, § 3, entitled "An act relative to juries."—State v. Soulé, 13 La. Ann. 478.

[m] (La. 1893) There is no connection between Acts 1877, No. 44, and Acts 1880, No. 85, the former being for the selection of jurors to try cases generally, and the latter providing for the selection of jurors at terms other than regular jury terms for the trial of cases where the punishment is not necessarily imprisonment at hard labor or death.—State v. Wright, 45 La. Ann. 57, 12 South. 129.

[n] (Mo. 1886) The statute with respect to selecting jurors is directory only.—State v. Gleason, 88 Mo. 582.

[o] (Neb. 1891) Act March 30, 1889, provides for the manner of selecting, drawing, and summoning grand and petit juries in counties having a population of 70,000 or more, and for the repeal of Code Civ. Proc. §§ 658–661, 665, which theretofore regulated such matters. Section 14, which declares the repeal, has a proviso that these sections shall remain in force in such counties until the county boards have complied with the provisions of the act as regards the preparation of lists, etc. *Held*, that there is no ground for quashing the panel made up under the provisions of the old law, after the passage of the act of 1889, where the county board has taken no steps to put such act in operation.—Neal v. State, 32 Neb. 120, 49 N. W. 174.

[p] (N. Y. 1890) The practice prescribed for the municipal court of Buffalo, by Sp. St. May 20, 1880, providing that it shall be the same as is "now provided by law for justices' courts," was not affected by the subsequent amendment of the sections of the Code regulating the drawing of a jury in justices' courts.—Bergman v. Wolff (Super. Buff.) 11 N. Y. Supp. 591.

[q] (N. C. 1887) Acts 1885, c. 63, § 19, prescribing how a special venire ordered by the judge of the criminal court in a capital case shall be drawn and summoned for the counties of New Hanover and Mecklenberg, is not unconstitutional. The mere fact that the number of jurors required to be drawn and summoned to attend these courts is not so great as in other counties, and that a special venire is to be drawn in New Hanover county to serve each succeeding day of the term of its criminal court, does not render the statute void.—State v. Jones, 97 N. C. 469, 1 S. E. 680.

[r] (Ohio, 1882) Rev. St. §§ 7267–7275, providing the method of impaneling the jury in capital cases, are not repealed by Act March 29, 1881, or changed otherwise than by substituting the wheel for the box in drawing jurors.—McHugh v. State, 38 Ohio St. 153.

[s] (Ohio, 1895) Rev. St. §§ 5189a, 5189b, relating to the selection of jurors and the appointment of jury commissioners in certain counties, were not repealed as to Montgomery county by Act April 24, 1893 (90 Ohio Laws, 254).—State v. Wood, 52 Ohio St. 601, 43 N. E. 1039.

[t] (Tex. 1877) The jury act of 1876 repealed all laws and parts of laws conflicting with its provisions; and, since it went into effect, legal jurors are obtainable only in conformity with its provisions.—Shackleford v. State, 2 Tex. App. 385.

[u] (Tex. 1878) Pasch. Dig. § 3016, providing that the district attorney may, at any time after indictment, obtain an order for summoning not less than 36, nor more than 60, veniremen in any capital case in the district court; and section 3030, providing that, where a list of persons summoned is exhausted by challenge or otherwise, talesmen may be summoned on verbal order of the court,—were not impliedly repealed by Jury Law 1876 (Gen. Laws 15th Leg. p. 78) § 23, merely because a special mode is therein provided for the selection of a special venire and supplying any deficiencies therein.—Harrison v. State, 3 Tex. App. 558.

[v] (Tex. 1890) Rev. St. art. 3053, provides that the jurors shall be selected from the names included in the list drawn by the jury commissioners for the week; and article 3055 provides that the court may adjourn the whole number of jurors for the week, or any part thereof, to any subsequent day of the term. At the court's direction the jury for the week ending November 2, 1889, reported November 4th, and defendant, after exhausting his challenges, was compelled, against his objection, to take one of these, who had already served six days. *Held*, that section 3055 must be construed as an exception to the general provision of section 3053; so as to give effect to both, and there was

no error in overruling defendant's objection.—Howard Oil Co. v. Davis, 76 Tex. 630, 13 S. W. 665.

[w] (Va.) In a capital case, the provisions of Act 1877, c. 17, §§ 4, 8, prescribing the mode of selection of a jury, are mandatory, not directory, and must be strictly followed.—(1885) Richards v. Commonwealth, 81 Va. 110; (1886) Honesty v. Commonwealth, Id. 283.

§ 267. Status of juror as public officer.

[a] (Conn. 1881) Jurors are not public officers, under the constitution or the law, and where they have been selected for a year, and a law is passed changing the mode of selection, they may be superseded by the new jurors appointed under the act.—State v. Bradley, 48 Conn. 535.

(B) JURY LIST.

JURY COMMISSIONERS OR OTHER OFFICERS OR BOARDS—APPOINTMENT AND QUALIFICATION, § 268.
— DE FACTO OFFICER, § 269.
— BIAS OF COMMISSIONER AS DISQUALIFICATION TO ACT, § 270.
— TERM OF OFFICE, § 271.
— COMPENSATION, § 272.
— WHO MAY OR MUST ACT, § 273.
— TIME AND PLACE OF MEETING OR SELECTION, § 274.
PROCUREMENT AND SELECTION OF NAMES, § 275.
MAKING AND REQUISITES OF LIST AND RECORD, § 276.
REPLACING NAMES AND REVISION AND CORRECTION OF LIST, § 277.
JURY WHEEL OR BOX, § 278.
— CUSTODY AND FASTENINGS, § 279.
— FORM AND REQUISITES OF BALLOTS, § 280.
PRESUMPTION OF REGULARITY, § 281.
EFFECT OF ERRORS AND IRREGULARITIES, § 282.

Infringement of right to trial by jury, see ante, § 230 [g, i].

Repeal of law as to selection of jurors and appointment of jury commissioners, see ante, § 266 [s].

§ 268. Jury commissioners or other officers or boards—Appointment and qualification.

Absence of negroes from board of jury commissioners, see ante, § 230 [f].

Appointment of commissioners to select jurors for current term, see post, § 325 [r].

Effect of appointment of new jury commissioners to select special venire instead of utilising old ones, see post, § 331 [e].

Judicial power to appoint jury commissioners, see "Constitutional Law," vol. 10, cc. 1445, 1446, § 137 [ww, y].

[a] (U. S. 1889) One who has always advocated the principles and voted the state and national tickets of the Democratic party, but who at one time organized a Democratic movement in his county in opposition to that part of his party then in power, nominated a legislative ticket, and was himself elected thereon by the aid of Republican votes, acting, while in the legislature, with the Democrats, and proclaiming himself a Democrat, is a "well-known member" of that political party, within the meaning of Act Cong. June 30, 1879, providing that a jury commissioner appointed by the judge shall be "a well-known member of the principal political party in the district" opposed to that to which the clerk may belong.—United States v. Paxton (C. C.) 40 Fed. 186.

[b] (U. S. 1889) 21 Stat. 43, requiring the court to appoint a jury commissioner, who shall be a citizen of good standing, and shall reside in the district in which the court is held, and who shall be a well-known member of the principal political party in the district opposing that to which the clerk belongs, is directory merely, and not mandatory.—United States v. Chaires (C. C.) 40 Fed. 820.

[c] (Ala. 1880) Act Dec. 19, 1876, authorizing the governor to appoint five commissioners in each of six counties, who were to discharge and perform all the duties relating to the selection and drawing of grand and petit jurors previously performed by the judges of probate, sheriffs, and clerks of the circuit and city courts of such counties, does not violate any statute or constitutional provision.—Davis v. State, 68 Ala. 58, 44 Am. Rep. 128.

[d] (La.) The clerk's omission to take the special oath required of him by law, as a member of the jury commission of the parish, will vitiate the drawing of the jury, and avoid the verdict and judgment. — (1878) State v. Williams, 30 La. Ann. 1028; (1879) Same v. Vance, 31 La. Ann. 398; (1880) Same v. Thompson, 32 La. Ann. 879.

[e] (La. 1879) The clerk of the court need not take the oath of jury commissioner at every drawing of the jury, but it is sufficient if he take it once during his term.—State v. Revells, 31 La. Ann. 387.

[f] (La. 1879) Judgment will not be arrested for want of qualification in the jury commissioners.—State v. Miles, 31 La. Ann. 825.

[g] (La. 1889) When the clerk of court, who is ex officio a jury commissioner, has taken the oath as such, it is not necessary for him to again take the oath when the judge removes the commissioners he is authorized to appoint, and appoints others.—State v. Nockum, 41 La. Ann. 689, 6 South. 729; Same v. Riley, 41 La. Ann. 693, 6 South. 730.

[h] (La. 1892) Since Act 1877, No. 44, § 8, requiring the order of the judge appointing jury commissioners to be recorded in the minutes of the court, is merely directory, failure to make such record will not invalidate the appointment, but such appointment may be shown by the order of the judge, the "oath book," and the procès verbal of the venire that the commissioners who were appointed acted. — State v. Taylor, 44 La. Ann. 783, 11 South. 132.

[i] (La. 1892) The acts of a jury commissioner who duly qualified after appointment are valid, where his appointment and oath of office were not entered on the minutes of the court at the time of the appointment, but are so entered before the final adjournment of the first term of the court thereafter.—State v. Hall, 44 La. Ann. 976, 11 South. 574.

[j] (Mich. 1884) How. Ann. St. §§ 7623–7630, providing for the appointment of jury commissioners by the governor, does not contravene the constitutional requirement that judicial officers shall be elected; jury commissioners not being judicial officers. — People v. Reilly, 53 Mich. 260, 18 N. W. 849.

[k] (Mont. 1891) Const. art. 8, § 17, provides that the district court in each county which is a judicial district by itself shall "always be open" for the transaction of business, and that in each district where two or more counties are united the judges of such district shall "fix the term of court." *Held*, that the constitution does not annul St. 16th Sess. 166, providing that it shall be the duty of the judge of the district court, "at each regular term," to appoint jury

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commissioners. The act applies to district courts which are in session continuously, as well as to those having regular appointed terms.—State v. McHatton, 10 Mont. 370, 25 Pac. 1046.

[l] (N. Y. 1856) A statute requires that the commissioner of jurors for the city of New York shall be appointed by the supervisors of the city, the judges of the superior court, and the judges of the court of common pleas for said city and county, but does not prescribe what shall constitute a quorum. *Held* that, on due notice to all, a majority was sufficient to constitute a quorum, and could appoint any one to the office of commissioner or remove him from it, and that it was not necessary that all the judges of the superior and common pleas court should be present, or even a majority of each.—People v. Walker, 23 Barb. 304, 2 Abb. Prac. 421.

[m] (Pa. 1894) Under Act April 10, 1867, regulating the drawing of jurors, the president judge need not take an additional oath, in writing, before entering on his duties under the act.—Klemmer v. Mt. Penn Gravity R. Co., 163 Pa. 521, 30 Atl. 274, 35 Wkly. Notes Cas. 142.

[n] (Pa. 1895) The judge who participates in the filling of the jury wheel and the drawing of the jurors need not take the oath prescribed by Act 1834, § 87; the oath taken by him when he assumed the duties of judge being sufficient—Commonwealth v. Smith (Com. Pl.) 16 Pa. Co. Ct. R. 577.

[o] (Tex. 1882) Gen. Laws 1876, p. 79, § 4, requires a district judge to appoint as jury commissioners citizens "who had no suit in the district court of the county which required the intervention of a jury." *Held*, that a jury commissioner was not disqualified because he was the son of one who had been a defendant in a suit still pending.—Veramendi v. Hutchins, 56 Tex. 414.

[p] (Tex. 1882) Rev. St. art. 3027, provides that the county court shall, at the January and July terms of each year, appoint three jury commissioners, and that the same proceedings for procuring jurors shall be held by such commissioners as are held by the commissioners of the district court. Article 3022, relating to district courts, provides that if, for any cause, jury commissioners should not be appointed at the time prescribed by law, or should fail to select jurors, or should the panel selected be lost or destroyed, the court shall supply sufficient jurors for the term, and may appoint commissioners for that purpose. *Held*, that the court properly overruled an objection by defendant to being compelled to draw a jury from an array selected by jury commissioners appointed at the May term instead of the January term of the court.—O'Bryan v. State, 12 Tex. App. 118.

[q] (Tex. 1887) Rev. St. art. 3022, provides that if for any reason the jury commissioners have not been appointed at the proper time or have failed to select jurors, or the panel selected has been set aside, or the list lost, the court shall proceed to supply jurors for the term, and may, if necessary, appoint jury commissioners to that end. *Held*, that where the jury commissioners had drawn jurors for a three weeks term only, and the term was thereafter lengthened to four weeks, by statute, the court at the lengthened term properly had jurors for the fourth week selected by the jury commissioners, appointed at that term to procure jurors for the next term.—Williams v. State, 24 Tex. App. 32, 5 S. W. 658.

[r] (Tex. 1895) Under Rev. St. art. 3022, providing that if, from any cause, jury commissioners should not be appointed at the proper time, the court may, when necessary, appoint commissioners to provide jurors, the court has power, when jury commissioners were not appointed at the previous term, to appoint jury commissioners during a term, and instruct them to select jurors for that term, although the provisions concerning the keeping of lists, and the issuance, service, and return of the venire, cannot be observed.—Western Union Tel. Co. v. Everheart, 10 Tex. Civ. App. 468, 32 S. W. 90.

[s] (Tex. 1896) Rev. Civ. St. art. 3145, enumerates the qualifications of jury commissioners for the district court. Article 3146 provides that the same person shall not act as such jury commissioner more than once in the same year. *Held*, that article 3155, providing that jury commissioners for county courts shall possess the same qualifications as jury commissioners for the district court, does not prevent one serving as jury commissioner for a county court more than once in a year.—McCamant v. State (Cr. App.) 34 S. W. 610.

§ 269. —— De facto officer.

De facto officers in general, see "Officers," I. (D), (E).

—— *sheriffs, see* "Sheriffs and Constables," I. (A), (C).

[a] (Ga. 1879) It is no cause for a challenge to the array, on a trial for murder, that no order of the appointment of the jury commissioners appears upon the minutes; they acting as such in fact, and being recognized as such by the court filling a vacancy in their board, and adopting their list.—Cox v. State, 64 Ga. 374, 37 Am. Rep. 76.

[b] (N. Y.) The constitutionality of the act authorizing the mayor of New York to appoint the commissioner of jurors cannot be tried on challenge to the array of a jury, since the validity of the acts of a de facto officer cannot be tried in a collateral proceeding.—(1875) Thompson v. People, 6 Hun, 135; (1876) Dolan v. Same, 6 Hun, 493, affirmed (1876) 64 N. Y. 485.

[c] (N. Y. 1876) A challenge to the array of a petit jury, on the ground that the panel was selected by a person not authorized to act as commissioner of jurors, cannot be sustained where it appears that the person who drew the panel was a de facto commissioner of jurors.—Carpenter v. People, 64 N. Y. 483.

[d] (S. C. 1872) A defect in the jury commissioner's title to his office *held* to be no ground of challenge of the array of jurors in a civil action.—Palmer v. Charlotte, C. & A. R. Co., 3 S. C. (3 Rich.) 580.

[e] (S. C. 1879) Where a chairman of a retiring board of county commissioners, whose successors had been chosen, but had not organized, assisted in preparing a jury list, he had no authority to discharge any duties pertaining to his office; and the list so prepared was illegal.—State v. Bryce, 11 S. C. 342.

[f] (S. C. 1892) A jury commissioner who continued to discharge the duties of the office in the interval between the expiration of his term and the qualification of his successor, who had been duly appointed before the expiration of the incumbent's term, was de facto jury commissioner in such interval, and his acts were binding.—State v. Lee, 35 S. C. 192, 14 S. E. 395, distinguishing Same v. Bryce (1879) 11 S. C. 342.

§ 270. —— Bias of commissioner as disqualification to act.

Bias of sheriff as disqualification to summon special venire, see post, § 327.

—— *talesmen, see* post, §§ 344, 345.

—— *venire, see* post, § 299.

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Effect of errors and irregularities, see post, § 282 [c, l].

Relationship to litigant as disqualification for appointment, see ante, § 268 [o].

[a] (La. 1895) A conviction by a jury drawn from a venire selected by only three of six jury commissioners, one of whom had taken a most active part in securing defendant's arrest, cannot be sustained.—State v. Duncan, 47 La. Ann. 1025, 17 South. 482.

[b] (Mass. 1888) On a charge of forging and uttering discharges for money payable from a town and county treasury, the officers of the town and county are not disqualified to act in drawing and summoning the jurors.—Commonwealth v. Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736, 1 L. R. A. 620.

[c] (Neb. 1888) Where the county commissioners select 60 names of persons proportionately from the several precincts of the county from which the petit jurors are to be drawn by the clerk of the court, and the sheriff, etc., a motion to quash the panel, on the ground that one of the commissioners had an action pending in court to be determined by a jury, should be overruled, in the absence of a showing of partiality or unfairness, or that any of the persons thus selected were favorable to such commissioner.—Northeastern Neb. Ry. Co. v. Frazier, 25 Neb. 42, 40 N. W. 604.

[d] (S. C. 1874) It is a good ground of challenge to the array, on the trial of a prisoner for murder, that the jury commissioner is a near blood relative of the deceased, and that he assisted at the drawing of the jury.—State v. McQuaige, 5 S. C. (5 Rich.) 429.

§ 271. —— Term of office.

Right of jury commissioner of county court to serve more than once in a year, see ante, § 268 [s].

Selection by commissioner after expiration of term, see ante, § 269 [e, f].

[a] (Ga. 1885) Under Code, § 132, providing that all officers of the state must discharge the duties of their office until their successors are commissioned and qualified, jury commissioners hold over after the expiration of their term until their successors are appointed.—Roby v. State, 74 Ga. 812.

[b] (La. 1883) The senate's confirmation of a judge appointed during its recess to fill a vacancy, and his taking a new oath, do not create such a new term as vacates the office of jury commissioners previously appointed by him.—State v. Claude, 35 La. Ann. 71.

[c] (La. 1890) Under Act 1877, No. 44, the jury commissioners appointed by the district judge for the districts outside of New Orleans hold office during the pleasure of the judge.—State v. Jean, 42 La. Ann. 946, 8 South. 480.

[d] (S. C. 1876) Since commissioner of jurors holds over until his successor is appointed and qualified, a challenge to the array does not lie merely because his term has expired.—State v. McJunkin, 7 S. C. (7 Rich.) 21.

[e] (W. Va. 1892) Under Code 1891, p. 773, c. 116, relative to petit juries, providing that jury commissioners shall be appointed by the circuit court, or the judge thereof in vacation, and that their term of office shall be four years, and shall commence on the 1st day of June next after their appointment, an appointment made on the 1st of June gave the appointee the office, with his term commencing on the same day, and including the entire day.—State v. Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243; Same v. Scott, 36 W. Va. 704, 15 S. E. 405.

[f] (W. Va. 1892) Code 1891, c. 116, p. 773, relative to petit juries, provides that jury commissioners shall be appointed for the term of four years, which shall commence on the 1st day of June next after their appointment, and that "vacancies caused by death, resignation, or otherwise shall be filled for the unexpired term in the same manner as the original appointments." *Held* that, where the act went into effect in May, an appointment on June 10th following, for the unexpired term, commencing June 1st, was authorized, since the word "vacancy" does not necessarily presuppose a former incumbent of the office.—State v. Scott, 36 W. Va. 704, 15 S. E. 405.

§ 272. —— Compensation.

[a] (Pa. 1886) Under Act April 10, 1867 (P. L. 62) § 5, providing that each jury commissioner shall receive $2.50 per day, "and 4 cents per mile circular from the residence of the commissioners to the court house," each commissioner is entitled to $2.50 for each day in which he is occupied in going about the county and investigating as to who are proper persons to be on the jury list, as well as for the actual filling the jury wheel and drawing the panels therefrom, but is only entitled to mileage for going to the court house to fill the wheel or drawing names from it.—Fees v. Lebanon County, 1 Pa. Co. Ct. R. 428.

§ 273. —— Who may or must act.

Effect of absence of judge at revision of list, see post, § 282 [m].

Mode of selecting panel for struck jury, see post, § 369.

Who may or must act or be present at drawing the panel, see post, § 284.

[a] (La. 1873) Rev. St. § 2144, provides that it shall be the duty of the sheriff of the parish of Orleans to furnish a list of all persons liable to jury duty residing within the limits of the parish of Orleans. *Held*, that said section applied as well to the sheriff for the criminal court as to the sheriff of the civil court, because the sheriff for the criminal court is a sheriff for the parish of Orleans as much as the sheriff of the civil courts.—State v. Burns, 25 La. Ann. 302.

[b] (La. 1877) In the selection of persons from whom the regular juries shall be drawn for the trial of cases in the superior criminal court for the parish of Orleans, the jury commissioners appointed under the law to make the selection cannot delegate that duty to any other person, but they must, themselves, make the selection. Their approval of a selection made by some one else can impart no validity to the selection.—State v. Newhouse, 29 La. Ann. 824.

[c] (Mich. 1888) The persons selected from the wards of East Saginaw to serve as jurors in the circuit court were drawn by the city assessor acting alone, and the list of persons so selected was signed by the assessor only, and not by the assessor and the aldermen of the respective wards. *Held*, that such jurors were regularly selected, as the city charter (Loc. Laws 1869, p. 432), creating the office of city assessor, and requiring him to return lists of jurors, is not repealed by How. Ann. St. § 7554, providing that the supervisor and township clerk of each township, and, in cities, the supervisor or assessors, as the case may be, and aldermen of each ward or assessment district, shall make a list of persons to serve as petit jurors, or, if repealed, was re-enacted by Loc. Laws 1885, p. 365, § 5, which re-enacts such old charter provision.—Hewitt v. Saginaw Circuit Judge, 71 Mich. 287, 39 N. W. 56.

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[d] (Mich. 1895) 2 How. Ann. St. § 7554, provides that the supervisor and township clerk of each township, and the supervisor or assessors, as the case may be, and alderman of each city ward or assessment district, shall make a list of jurors to serve for a year. Section 7555 directs such officers to select from their respective assessment rolls suitable persons, and specifies the qualifications required. Alpena city charter makes the controller its assessing officer, and authorizes each ward to elect two aldermen and a supervisor; the latter having the powers of town supervisors. *Held*, that it was not necessary that the controller should join in selecting a jury list, as the intent of the statute was not to require the action of an assessing officer, but merely of a local officer having knowledge of the persons listed, so that a list made by the city supervisors and aldermen was properly made.—People v. Fuhrmann, 103 Mich. 593, 61 N. W. 865.

[e] (Mont. 1894) Where the absence of one or two jury commissioners will not prevent a majority from selecting the juries (Laws 16th Sess. p. 168, § 12), the fact that the district clerk, who is one of the five commissioners, did not act with, and as one of, the commissioners who selected a jury in a certain case, does not render such jury illegal.—State v. Osnes, 14 Mont. 553, 37 Pac. 13.

[f] (N. J. 1891) In a criminal case a challenge to the array will not be sustained because, in making the jury list, the assistant clerk officiated in the absence of the chief, as by Act 1876 (Supp. Revision, p. 124, pl. 6), the deputy is clothed with the power of the chief in the latter's absence.—Stephens v. State, 53 N. J. Law (24 Vroom) 245, 21 Atl. 1038.

[g] (Pa. 1821) Under Act March 29, 1805, requiring the sheriff and at least two of the county commissioners to meet and select the persons to serve as jurors for the coming year, it is not ground of challenge to the array that the sheriff from time to time left the room where the selection was in progress, where nothing material was done during his absence.—Commonwealth v. Lippard, 6 Serg. & R. 395.

[h] (Pa. 1894) Though the president judge of the court of oyer and terminer is a member of the jury board, his presence is not essential when the names are put in the wheel, if a majority of the board are present without him.—Commonwealth v. Manfredi, 162 Pa. 144, 29 Atl. 404, 34 Wkly. Notes Cas. 437.

[i] (S. C. 1891) Under Gen. St. § 2234, providing for the appointment of a jury commissioner, and declaring that he, "with the county auditor and chairman of the board of county commissioners or a majority of the same, shall constitute a board of jury commissioners," etc., a drawing for jury lists, made in the absence of the auditor by the other two commissioners, is valid.—State v. Merriman, 34 S. C. 16, 12 S. E. 619.

§ 274. —— Time and place of meeting or selection.

Presumption of regularity as to time of making list, see post, § 281 [a].

[a] (Ala. 1891) 2 Code, p. 132, § 2, providing that the jury commissioners of a county shall meet at a certain time for the purpose of drawing jurors for the ensuing year, and that "if, for any reason, a meeting is not held at the time appointed," a meeting shall be held as soon thereafter as practicable, does not authorize a subsequent meeting merely for the purpose of correcting errors or mistakes that may have been made in drawing at the regular meeting.—Wells v. State, 94 Ala. 1, 10 South. 656.

[b] (Ala. 1893) In Acts 1890–91, p. 1288, § 22, in regard to the trial of misdemeanors in Geneva county, the provision that the sheriff shall prepare the list of petit jurors on the first Monday in January is merely directory.—Childs v. State, 97 Ala. 49, 12 South. 441.

[c] (Fla. 1892) Laws 1879, c. 3125, § 1, providing that the board of county commissioners, "at a meeting to be held the first week in January of each year, or as soon thereafter as practicable," shall select from the list of registered voters persons to serve as jurors, is directory, in so far as it fixes the time for such selection; and, if the commissioners fail to make the selection at the January meeting, they may do so at a subsequent meeting.—Reeves v. State, 29 Fla. 527, 10 South. 901.

[d] (La. 1895) Under Acts 1894, No. 89, relating to the jury commission, the clerk may designate any convenient point in the parish as a place of meeting for the jury commission.—State v. Johnson, 47 La. Ann. 1092, 17 South. 480; State v. Shaw, 47 La. Ann. 1094, 17 South. 596.

[e] (Mich. 1878) It is no ground of challenge to the array that the jury lists were not returned until after the time designated by law.—Thomas v. People, 39 Mich. 309.

[f] (Pa. 1894) The fact that the wheel was not filled by the first term of court is not ground for complaint by prisoners tried at subsequent terms after the wheel was filled.—Commonwealth v. Manfredi, 162 Pa. 144, 29 Atl. 404, 34 Wkly. Notes Cas. 437.

[g] (Wis. 1864) The statute requiring the board of supervisors of the town and the common council of the city of Ripon to select and return, before the last day of May, the names of persons qualified to serve as jurors in the municipal court of that city and town, is directory; and, if they are properly selected and returned afterwards, it is no ground of challenge.—Burlingame v. Burlingame, 18 Wis. 285.

§ 275. Procurement and selection of names.

Effect of failure to make jury list, see post, § 282.

—— *of selecting insufficient list, see* post, § 282 [g].

Liability of jurors to be superseded by jurors selected under new law, see ante, § 267 [a].

Necessity for United States courts to obtain names of jurors from books of receiver of taxes, see ante, § 260 [b].

Time and place, see ante, § 274.

Absence of juror's name from tax books as ground for new trial, see "New Trial," II. (D).

[a] (U. S. 1846) Under Act Cong. July 20, 1840 (5 Stat. 394), making the practice of United States courts in obtaining jurors conform as far as practicable to the practice of the courts of the state in which they are sitting; and Act Ill. March 3, 1845, making the selection of jurors the duty of jury commissioners,—the United States courts sitting in Illinois can no longer order a venire to be issued to the marshal to summon the regular panel, thus leaving the selection of names to the marshal's discretion, but must require the clerk and marshal, prior to each term, to select jurors from the entire state.—United States v. Woodruff, Fed. Cas. No. 16,758 [4 McLean, 105].

[b] (U. S. 1854) That part of Act Sept. 24, 1789, § 29 (1 Stat. 88), which provides that

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jurors shall be drawn from such parts of the district as the court shall direct, was not repealed by Act July 20, 1840 (5 Stat. 394). The latter act relates only to the mode of designating jurors and their qualifications.—United States v. Stowell, Fed. Cas. No. 16,409 [2 Curt. 153].

[c] (U. S. 1873) One of the officers appointed to select the names of 500 persons from whom jurors were to be drawn applied to a reputable citizen of a distant county for the names of proper persons residing in his vicinity to be placed upon the list. The names furnished, in compliance with this request, were submitted to the board of officers whose duty it was to make out the list of 500 names, and some of the names so furnished were put upon the list. *Held*, that this was a substantial compliance with the rule which required the selection of the names to be made by the board of officers. —United States v. Collins, Fed. Cas. No. 14,837 [1 Woods, 499].

[d] (U. S. 1873) A rule of the United States court for the Southern district of Georgia, which prescribed that the names of 500 persons having the qualifications of jurors under the state law should be selected from the body of the district by the marshal and clerk and three United States commissioners, to be designated by the court, from which the names of grand and petit jurors should be drawn by the marshal and clerk, by lot, is in substantial accord with the law of Georgia prescribing how jurors shall be selected, and is a compliance with the act of congress on the subject.—United States v. Collins, Fed. Cas. No. 14,837 [1 Woods, 499].

[e] (Cal. 1880) Code Civ. Proc. § 204, as amended April 1, 1880, provides that the superior court shall designate the number of grand and petit jurors needed by the court for the ensuing year, and that thereupon the board of supervisors shall select a list of persons to serve as such grand and petit jurors. Section 206 provides that the list shall contain the number of names designated by the court. Section 208 provides that certified lists of the persons selected shall be delivered to the county clerk. Section 209 provides that the county clerk shall write all the names on slips and deposit them "in a box to be called 'the jury box.'" Section 211 provides that the names of jurors, grand and petit, shall be drawn from "the jury box." *Held* that, where the court ordered that "the number of grand and petit jurors" needed for the year was 300, the court properly overruled a challenge to the panel, based on the ground that the court did not separately state the grand and petit jurors needed, and that the clerk used but one box for both kinds of jurors.—People v. Crowey, 56 Cal. 36.

[f] (La. 1877) In the selection of persons from whom the regular juries shall be drawn for trials in the superior criminal court for the parish of Orleans, the commissioners must make their selection from all the qualified voters of the parish.—State v. Newhouse, 29 La. Ann. 824.

[g] (La. 1883) An objection that the panel was selected from the list of "registered" voters instead of from the list of "qualified" voters is without merit in the absence of a showing that the list of "registered" voters did not comprise the names of all the "qualified" voters.—State v. Thomas, 35 La. Ann. 24.

[h] (La. 1883) In absence of any law to the contrary, the jury commissioners may accept names found in the venire box, selected by their predecessors.—State v. Mangrum, 35 La. Ann. 619.

[i] (La. 1885) There is no conflict between Acts 1868, No. 54, defining the qualifications of jurors and providing for the selection of competent and intelligent jurors, and Acts 1868, No. 98, which, by requiring the commissioners to draw a list of 1,000 persons from those qualified to register as voters, from which to select competent jurors, does not thereby determine that all persons entitled to register are competent jurors, their competency being determinable under Act No. 54; and hence a challenge to the array because the jury commissioners, by acting under Act No. 54, excluded many registered voters from their right to serve on defendant's jury, was not well taken.—State v. Chase, 37 La. Ann. 165.

[j] (Mass. 1843) A list of persons to serve as jurors was prepared and laid before a town by its selectmen. The town voted that said list be not accepted, and also voted to elect a list by nomination. Thereupon several persons, part of whom were on the list prepared by the selectmen, and part not on that list, were nominated and declared chosen. *Held*, that these persons were legally selected as jurors.—Page v. Inhabitants of Danvers, 48 Mass. (7 Metc.) 326.

[k] (N. C. 1891) When Acts 1885, c. 180, was passed, prescribing that certain terms of the superior court of the county of Wake should continue for three weeks for the trial of civil business alone (there having previously been no longer terms than two weeks), Code, c. 39, in respect to jurors, providing in terms for the drawing of them by the county commissioners for each week of the terms of the courts lasting two weeks, was, by necessary implication, extended to authorize the commissioners to draw jurors for the third week of the newly-established terms.—Leach v. Linde, 108 N. C. 547, 13 S. E. 212.

[l] (Pa. 1821) It is not ground of challenge to the array that the sheriff and county commissioners occupied between two and three weeks in selecting and placing in the wheel the names of persons who were to serve as jurors for the coming year, since the law places no limit of time, and the officials are only bound to use due diligence, in default of which they might be liable to punishment.—Commonwealth v. Lippard, 6 Serg. & R. 395.

[m] (Pa. 1888) Act April 10, 1867 (P. L. 62), provides that the county jury commissioners and a judge of the common pleas, or a majority of them, shall meet 30 days before the first term of the common pleas in each year, and thereupon alternately select, from the qualified electors of the county, the proper number of jurors for the year. Act March 18, 1874 (P. L. 46) § 1, provides that the array may be quashed when the laws for the selection of the jury list have not been observed. *Held* that, where each jury commissioner prepared a separate list and placed it in the box, the array should be quashed.—Commonwealth v. Baranowski, 5 Pa. Co. Ct. R. 642.

[n] (Pa. 1894) The fact that the jury board occupied two months in selecting jurors and putting their names in the wheel is not ground for complaint for want of care or diligence.—Commonwealth v. Manfredi, 162 Pa. 144, 29 Atl. 404, 34 Wkly. Notes Cas. 437.

[o] (S. C. 1891) The attorneys of a party have no right to be present at the drawing, or to inspect the jury list, or to be furnished with a copy thereof, or to be informed whether any names have been rejected by the commissioners.—State v. Merriman, 34 S. C. 16, 12 S. E. 619.

[p] (S. C. 1891) Under Gen. St. § 2248, providing that jurors shall be drawn "in the presence of the clerk of the court and the sheriff of the county," and since the law requires the

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commissioners to exclude from the list the names of persons who are not of "good moral character" and "good judgment," the commissioners are justified in excluding the public from the drawings.—State v. Merriman, 34 S. C. 16, 12 S. E. 619.

[q] (S. C. 1892) Gen. St. § 2237, as amended in 1888, provides "that in the counties of Charleston, Richland, and Orangeburg the names placed in the tales box shall be in addition to and exclusive of the number of names required by law to be placed in the jury box;" and, further, "that the names of the persons liable to jury duty, and living within seven miles of the court house, may be placed both in the regular jury box and in the tales box, except in the counties of Charleston, Richland, and Orangeburg." *Held* that, as to the excepted counties, the statute does not require that the names of all persons living within seven miles of the court house should be excluded from the general jury box, but merely that the name of no juror shall be put in both boxes.—State v. Lee, 35 S. C. 192, 14 S. E. 395.

§ 276. Making and requisites of list and record.

Designation and identity of jurors after impaneling of jury, see post, § 633.

Effect of errors and irregularities, see post, § 282 [a].

—— *of failure to certify jury list, see* post, § 282 [e].

Necessity of judge's signature to the list of names drawn, see ante, § 282 [t].

Presumption of regularity as to size of list, see post, § 281 [b].

Misnomer of juror in list as ground for new trial, see "New Trial," II. (D).

[a] (Ala. 1846) The certificate of the jury board that the jury has been selected in the mode directed may be made by the attending officers, or the clerk of the county court, when one of them.—State v. Brooks, 9 Ala. 9.

[b] (Conn. 1889) The charter of New Haven requires that the common council shall annually choose 144 freemen to serve as jurors in the city court, and that the common council shall return the names of the jurors chosen, under the hand of the mayor of said city, or of the president of the board of aldermen, to the clerk of the city court. *Held*, that where one common council has appointed the jurymen, but has failed to make the return, the succeeding council may make such return, though before the return a jury could not be drawn from such list.—McGann v. Hamilton, 58 Conn. 69, 19 Atl. 376.

[c] (Fla. 1871) Where the law required a list of 300 names, and the county commissioners furnished to the clerk a list of 302 names, *held* a proper ground of challenge to the array, in a trial for murder.—Gladden v. State, 13 Fla. 623.

[d] (Fla. 1876) Laws 1868, c. 1628, § 3, provides that, after the board of county commissioners has selected the persons qualified to act as jurors for the year, "the list, certified and signed by the chairman of the board, shall be delivered to the clerk, and by him recorded in the minutes." *Held*, that the failure of the clerk to record the certificate as well as the list, if error at all, was not prejudicial.—Keech v. State, 15 Fla. 591.

[e] (Fla. 1890) Act March 11, 1879 (McClel. Dig. 621), provides for the selection, annually, by the board of county commissioners, of a list of persons qualified to serve as jurors, "which list * * * shall be forthwith delivered to the clerk, and by him recorded in the minutes." *Held*, that this requires the list to be recorded in the minutes of the county commissioners, and not in the minutes of the circuit court.—White v. State, 26 Fla. 602, 7 South. 857.

[f] (Ga. 1875) It is not a good ground of challenge to the array that the jury list, made out at the last revisal of the jury box, was not marked "Filed" by the clerk of the superior court, or that the certificate does not state in terms that the list contains the names of all the jurymen in the box.—Brinkley v. State, 54 Ga. 371.

[g] (Ga. 1876) Where a jury list was headed, "A list of names of jurors in the jury box of Ware county," and was followed by "Given under our hands and seals," signed by the commissioners, ordinary and the clerk of the superior court, the law was substantially complied with, notwithstanding there was no certificate attached that the list contained all the names in the jury box.—Carter v. State, 56 Ga. 463.

[h] (Ga. 1883) It is not a good cause of challenge to the poll that the certificate of grand and traverse jurors was not signed by the jury commissioners, where, after examination by the court as to the correctness of the list, the signatures were appended thereto.—McLain v. State, 71 Ga. 279.

[i] (La. 1880) A drawing of jurors is not invalidated by the mere carelessness of the commissioners, resulting in having names of many disqualified persons in the wheel, as where there were names of not less than 1,000 qualified persons, and of over 300 not available.—State v. Foster, 32 La. Ann. 34.

[j] (La. 1891) Where the procès verbal of the jury commissioners simply states their acts in selecting the persons qualified to serve as jurors, a motion to set aside the panel, on the ground that it stated only conclusions of law, was properly overruled, the commissioners not being bound to set forth the evidence on which they acted.—State v. Green, 43 La. Ann. 402, 9 South. 42.

[k] (Mich. 1881) The affidavit required by law to be filed in the clerk's office with the list of 300 jurors need not state in detail the proceedings to select such list, but may state that they were in accordance with the statute.—Gott v. Brigham, 45 Mich. 424, 8 N. W. 41.

[l] (Mich. 1881) The statute requires an affidavit of regularity in selection to be filed with the list of 300 names in the office of the clerk. *Held*, by a divided court, that a challenge to the array, because the affidavit read "as affiant verily believed," was properly overruled.—Gott v. Brigham, 45 Mich. 424, 8 N. W. 41.

[m] (Mich.) How. Ann. St. § 7556, provides that the jury lists "shall contain not less than one for every 100 inhabitants of such township or ward, computing according to the last preceding census, and having regard to the population of the county, so that the whole number of jurors selected in the county shall amount to at least 100, and not exceeding 400, one-half of whom shall be designated as petit jurors, and one-half as grand jurors." *Held*, that where the population of the county exceeds 40,000, thus making the number of jurors returned in the ratio of 1 to 100 exceed 400, the jury lists are not thereby entirely invalidated, but may be corrected by striking from the end of the list all names above the requisite number.—(1888) Hewitt v. Saginaw Circuit Judge, 71 Mich. 287, 296, 39 N. W. 56; (1895) People v. Fuhrmann, 103 Mich. 593, 61 N. W. 865.

[n] (Minn. 1868) The failure to file forthwith, in the office of the clerk of the district

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court, the list of petit jurors selected by the county commissioners, is not ground of challenge to the panel, under Gen. St. 1866, c. 116, § 14, allowing such challenge only in case of a "material departure" from the prescribed forms.—State v. Gut, 13 Minn. 341 (Gil. 315).

[o] (Minn. 1891) Gen. St. 1878, c. 8, § 107, requires the petit jury list drawn by the board of county commissioners, and deposited in the office of the clerk of the court, to be certified and signed by the chairman of the board; and a challenge for want of such certificate and signature is well taken.—State v. Schumm, 47 Minn. 373, 50 N. W. 362.

[p] (Minn. 1895) A jury list, headed "Grand Jurors," followed by the names and residences of grand jurors, under which was a heading "Petit Jurors," followed by the names and residences of petit jurors, to which was attached a certificate of the county auditor and chairman of the county board, *held* a "separate list" of grand and petit jurors, within Gen. St. 1894, § 673.—State v. Peterson, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324.

[q] (Nev. 1866) Act concerning jurors (approved Feb. 8, 1865) by section 2, requires the district judge and county assessor to certify the list of persons qualified to serve as jurors, drawn by them from the assessment rolls. Cr. Prac. Act. § 323, provides that a challenge to the panel can be based only on a material departure from the forms prescribed for drawing and returning jurors, or the willful omission of the sheriff to summon one or more jurors drawn. *Held*, that a challenge to the panel for failure of the district judge and assessor to properly certify their list was properly overruled, in the absence of any showing of prejudice to defendant.—State v. Squaires, 2 Nev. 226.

[r] (Pa. 1889) Where four more names are placed in the jury wheel than the number specified in the order of the court for filling the wheel, but it appears that the placing of such excessive number in the wheel was not intentional, but a mere accident, no cause is shown for quashing the array.—Rizzolo v. Commonwealth, 126 Pa. 54, 17 Atl. 520, 24 Wkly. Notes Cas. 13.

[s] (S. C. 1892) It is not a fatal error for the certificate of the board of jury commissioners to state that it was prepared under the act of 1883, where the facts show that it complies with all the acts and amendments as they stood at the time.—State v. Lee, 35 S. C. 192, 14 S. E. 395.

[t] (Tex. 1879) Failure of the jury commissioners to sign and certify the jury list cannot be cause for challenge to the array.—Coker v. State, 7 Tex. App. 83.

[u] (Wash. 1893) The certificate of the officers who assisted in drawing the jury, to the list returned, should state how the drawing was actually done, and not merely that it was conducted fairly and as provided by law.—State v. Payne, 6 Wash. 563, 34 Pac. 317.

[v] (Wash. 1896) Under Code Proc. § 58, providing that the county commissioners shall select the names of persons to serve as petit jurors, and certify the same to the clerk of the superior court, a certificate stating that, pursuant to the statute, the commissioners have selected the persons to serve as petit jurors, "and hereby instruct the clerk of the board to certify the same to the clerk of the superior court as the list of petit jurors drawn for the ensuing year, as follows," setting out the names, to which is added the signature of the chairman of the board, attested by the county auditor, is sufficient to show that the panel is legal.—State v. Bokien, 14 Wash. 403, 44 Pac. 889.

§ 277. Replacing names and revision and correction of list.

Effect of absence of judge at revision of list, see post, § 282 [m].

—— *of failure to revise list, see* post, § 282.

—— *of improper destruction of names remaining in box, see* post, § 282 [d].

Liability of jurors to be superseded by others selected under new law, see ante, § 267 [a].

[a] (Ala. 1881) Sess. Acts 1878–79, p. 279, approved Feb. 13, 1879, provides that the judge of the county court of Madison shall, when he deems it necessary, 20 days prior to each or either of the regular terms, order the sheriff to prepare a list of the householders and freeholders of the county, from which list 24 names shall be selected, in the manner provided for selecting jurors for the circuit court, to serve as petit jurors. *Held* that, where the judge ordered a list, a panel drawn from the list made for a prior term was sufficient, and that a new list need not be made for each term.—Sale v. State, 68 Ala. 530.

[b] (Ala. 1895) When the jury commissioners were about to draw from the jury box grand and petit juries for the ensuing terms of the circuit court, they discovered there were not enough names remaining in the box to make up said juries, and they thereupon destroyed the slips of paper on which the names already in the box were written, and proceeded to fill another box, from which the juries were subsequently drawn. *Held*, that the juries were not legally drawn in compliance with Act 1886–87, § 12, which requires that the jury box must be exhausted before the commissioners have any power or authority to fill another box.—Steele v. State, 111 Ala. 32, 20 South. 648.

[c] (La. 1877) In the organization of juries, it is not necessary that the sheriff should furnish a list of all persons liable to jury duty, and put them in the jury box, every December; but the box must be exhausted before being refilled.—Gettwerth v. Teutonia Ins. Co., 29 La. Ann. 30.

[d] (La. 1889) When the jury commissioner has failed and neglected to take from the venire box for several years the names of jurors disqualified, absent, and dead, it is competent for a succeeding jury commissioner, to remedy the evil, to empty the venire box, and place therein 300 qualified jurors.—State v. Nockum, 41 La. Ann. 689, 6 South. 729; Same v. Riley, 41 La. Ann. 693, 6 South. 730.

[e] (N. C. 1896) It is not ground of challenge to the array that the jury box was not revised by the county commissioners, in the absence of any claim that any names were improperly in the box, that any had been there fraudulently, or that any had been taken out.—State v. Stanton, 118 N. C. 1182, 24 S. E. 536.

[f] (Pa. 1821) Under Act March 29, 1805, requiring the sheriff and county commissioners, in selecting the jurors to serve for the coming year, to select and place in the jury wheel such a number of names that at the last drawing of the year at least one full jury shall be in the wheel, it is not ground of challenge to the array, by one whose panel was drawn early in the year from a full wheel, that at the last selection of names the old names remaining in the wheel were removed before the newly-selected names were put in, more especially as it must be presumed that sufficient names were placed in the wheel to comply with the law.—Commonwealth v. Lippard, 6 Serg. & R. 395.

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[g] (Pa. 1877) Under Act March 18, 1874, which directs the courts of common pleas, when an array of jurors is quashed for any irregularity in the selection of persons or the depositing of the names in the jury wheel, to order a new selection of such number of jurors as said court shall designate, and that thereupon the jury commissioners shall meet and take out of the wheel all names therein deposited, and make a new selection of persons, and deposit the new names so selected in the wheel, names taken from the wheel at the first drawing cannot be deposited again in the wheel, to be drawn from the second time.—Kell v. Brillinger, 84 Pa. 276.

[h] (Pa. 1888) Where the court orders the jury wheel to be emptied, and a new list of names put in, because the wheel had been improperly opened in the absence of the sheriff, the new list of names should be selected from all the qualified voters of the county, and the names taken from the wheel should not be excluded.—Commonwealth v. Baranowski, 6 Pa. Co. Ct. R. 157.

[i] (W. Va. 1892) Under Code 1891, c. 116, which provides that the jury commissioners shall annually prepare the list of jurors, and place all its names on paper ballots, and deposit these in a box, and draw them from such box, to serve as jurors at each term of the county court, and that ballots cannot be exhausted except by destruction or by drawing, a new list is to be made each year, which supplants the remaining ballots of the old list, and is not to be mingled with them; and a jury drawn from the new list alone is valid.—State v. Welch, 36 W. Va. 690, 15 S. E. 419.

§ 278. Jury wheel or box.

Amendment of law by substituting wheel for box, see ante, § 266 [r].

Box from which trial jury is drawn, see post, § 349.

Necessity of separate boxes for lists of grand and petit jurors, see ante, § 275 [e].

[a] (U. S. 1883) Jury Law 1879 requires that, in districts where there is a clerk for each place of holding United States Courts, there shall be as many jury boxes as there are clerks. *Held*, that in a district in which there was but one clerk of the circuit court, though that court was held in three places, and a clerk of the district court for each of the three places where the district court was held, it was proper in the circuit court to use three jury boxes, instead of one; all being supplied with names by the clerk of the circuit court in conjunction with the general jury commissioner.—United States v. Munford (C. C.) 16 Fed. 164.

[b] (Ala. 1891) Under Act 1888-89, p. 430, amending Act 1886-87, p. 151, § 4, and providing that, as far as it applies to Pike county, the names of the persons from whom jurors are to be drawn shall be placed in fifteen boxes, one for each precinct in the county, a jury for the trial of a capital case in Pike county must be drawn from fifteen boxes, instead of from one box, as provided in the original act.—Hornsby v. State, 94 Ala. 55, 10 South. 522.

[c] (La. 1812) Where the law directs jurors to be drawn from each parish, the names from each being kept in a separate box, and, after the division of one parish into two, the names from both are kept in the same box, the irregularity is fatal; and a juror so summoned is entitled to his discharge.—In re Auzan, 2 Mart. (O. S.) 124.

[d] (Mass. 1883) A revolving barrel, in which the cards containing the names of persons from whom jurors are to be drawn are shaken together, is deemed a "box," within the requirement of Pub. St. c. 170, § 31, regulating the drawing of jurors.—Commonwealth v. Bacon, 135 Mass. 521.

[e] (N. Y.) Laws 1861, c. 210, requiring the county clerk to provide an additional box for the drawing of jurors, in which shall be placed the names of jurors residing in the city or town where courts are to be held, applies to criminal as well as civil trials.—(1863) People v. McGeery, 6 Parker, Cr. R. 653; (1866) Gardiner v. People, Id. 155.

[f] (N. C. 1888) A special venire being ordered, the clerk swore that the boxes containing the names had been properly kept and protected, and were marked, "Jurors drawn," and "Jurors not drawn." The special venire was drawn from the box marked, "Jurors not drawn." *Held*, a substantial compliance with Code, § 1739, providing that the names of jurors shall be kept in boxes marked "1" and "2," and the jurors composing the venire shall be drawn from box 2.—State v. Potts, 100 N. C. 457, 6 S. E. 657.

§ 279. —— Custody and fastenings.

[a] (La. 1892) The facts that the general venire box was not kept locked, and the names of the jurors drawn were not written on the slips by the clerk of the court, being irregularities imputable to the jury commissioners, cannot be taken advantage of by motion to quash the venire, unless it is shown that some injury has been suffered or some fraud practiced, as provided by Acts 1877, No. 44, § 10.—State v. Curtis, 44 La. Ann. 320, 10 South. 784.

[aa] (N. C. 1886) That the jury boxes were kept unlocked in a place accessible to unauthorized persons is not ground of challenge to the array, in the absence of any showing of prejudice to the defendant.—State v. Hensley, 94 N. C. 1021.

[b] (Pa. 1821) Under Act March 29, 1805, requiring the sheriff and county commissioners to select the persons to serve as jurors for the coming year, and to write their names on slips of paper and place them in the jury wheel, it is not ground of challenge to the array that the written slips were not locked up in a fireproof closet, pending the completion of the selection and placing the names in the wheel, in the absence of any evidence that any interference with the names had occurred, since, as long as they were kept inviolate, the fact that they might have been more secure is not ground of challenge.—Commonwealth v. Lippard, 6 Serg. & R. 395.

[c] (Pa. 1873) Under Act April 19, 1867 (P. L. 91), extending to Schuylkill county the provisions of Act March 27, 1865 (P. L. 779), by which the two jury commissioners and the sheriff, or any two of them, might draw the jury panel from the wheel, the fact that in resealing the wheel the sheriff's seal was placed on the wheel by a deputy sheriff is not an irregularity, since, if any two of the jury board may draw the panel, they can open the wheel therefor and refasten it afterwards; and hence the sheriff's seal was not essential.—Commonwealth v. Brown, 1 Leg. Chron. 345.

[d] (Pa. 1876) The clerk's custody of a chest in a vault, in which the jury wheel was deposited, *held* to be custody of the wheel, within the meaning of Act 1867, § 2, requiring the same to be in the custody of the jury commissioners.—Rolland v. Commonwealth, 82 Pa. 306, 22 Am. Rep. 758.

[e] (Pa. 1877) As the jury commissioners had no office, the jury wheel was kept in the vault of the county treasurer, with the condi-

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tion that no one but a jury commissioner should enter the vault for the wheel, and the sheriff kept the key of the wheel. *Held* to be a proper custody of the wheel.—Curley v. Commonwealth, 84 Pa. 151.

[f] (Pa. 1885) Act April 14, 1834, § 90, provides that, as soon as the selection of jurors and depositing of their names is completed, the wheel must be locked and sealed by the sheriff and commissioners. Section 83 provides that the wheel shall remain in the custody of the commissioners, and the key in the custody of the sheriff. *Held*, that the absence of the proper seals was cause for quashing the array; and failure of the sheriff to have the custody of the key, which was left in the hands of the commissioners, rendered the array fatally defective.—Kittanning Ins. Co. v. Adams, 110 Pa. 553, 1 Atl. 443.

[g] (Pa. 1894) Under Act April 10, 1867, providing that the jury wheel shall be kept in the custody of the commissioners, the array will not be quashed because one of the commissioners, resident some miles from the county seat, by agreement between them, took the wheel, and kept it at his home.—Klemmer v. Mt. Penn Gravity R. Co., 163 Pa. 521, 30 Atl. 274, 35 Wkly. Notes Cas. 142.

§ 280. —— Form and requisites of ballots.

[a] (Ala. 1894) Under Acts 1886–87, p. 208, § 5 (Sp. Law, Mobile County), providing that the jury commissioners, after selecting 1,600 names, and entering them on the jury roll, shall write each name on a separate piece of paper, each slip bearing the name of a resident of the city to have written thereon the word "City," and those bearing the names of persons living outside the city the word "County," and three-fourths of such slips shall be put in the city court jury box, it is no ground for quashing the panel that two of the names drawn from the box bore nothing but the names of the jurors, and several others bore, in addition to such names, only the letters "Co."; section 14 providing that the provisions in relation to selecting, drawing, and summoning jurors should be directory merely.—Wilkinson v. State, 106 Ala. 23, 17 South. 458.

[b] (Conn. 1889) The charter of New Haven requires that the clerk of the city court shall write the name of each juror, chosen by the common council, "fairly on a separate piece of paper, and roll up and put the same into a box," from which the sheriff, on receiving a warrant to summon a jury, shall, in the presence of the judge and clerk, take out as many papers as his warrant directs. *Held*, that where the pieces of paper were not rolled up, but were put in unfolded, it was a good ground for challenging an array of jurors whose names were drawn therefrom.—McGann v. Hamilton, 58 Conn. 69, 19 Atl. 376.

[c] (La. 1894) Though Acts 1877, No. 44, requires the clerk to write the names of jurors, with their places of residence, on the ballots placed in the box, a venire will not be set aside, in the absence of a showing of prejudice, because there was merely a number on the ballots to designate the ward of the juror's residence.—State v. White, 46 La. Ann. 1273, 15 South. 623.

[d] (Mass. 1883) A juror's occupation as a dealer in liquors is sufficiently designated on the card to be placed in the jury "box" by the addition of the word, "liquors," after his name, within the requirements of Pub. St. c. 170, § 81, regulating the drawing of jurors.—Commonwealth v. Bacon, 135 Mass. 521.

[e] (N. Y. 1823) It is improper for the clerk to leave the ballots unrolled in an open box, or to draw them in this situation, and the objection may be taken by challenge to the array.—Pringle v. Huse, 1 Cow. 432.

[f] (Pa. 1877) A challenge to the polls, founded on a misdescription of a juror's avocation, may be overruled if the name and residence are correctly given, and the error in naming the employment is not adapted to mislead. So *held* in a capital case.—Quigley v. Commonwealth, 84 Pa. 18.

§ 281. Presumption of regularity.

[a] (Ala. 1893) Where the statute required the jury list to be prepared on the first Monday in January, and the sheriff testified that he prepared the list of jurors on the first day or first Monday in January,—he could not recollect which,—but that he prepared the list according to law, the presumption is that the sheriff properly performed his duty.—Childs v. State, 97 Ala. 49, 12 South. 441.

[b] (Fla. 1892) The provision of Laws 1879, c. 3125, that the boards of county commissioners shall select from the registered voters of their respective counties a list of 300 persons properly qualified to serve as jurors, who shall be such persons only as said commissioners know, or have good reason to believe, are of approved integrity, fair character, sound judgment, and intelligence, provided that if in any counties of this state said commissioners shall not be able to select the number required, they shall be authorized to select a less number, but said number to be the highest possible, invests such boards with authority to pass upon the integrity, character, judgment, and intelligence of the persons to be selected as jurors; and, in the absence of an illegal purpose, fraud, or corruption in the selection of a less number than 300, the discretionary power of the commissioners will not be disturbed.—Reeves v. State, 29 Fla. 527, 10 South. 901.

§ 282. Effect of errors and irregularities.

Effect of failure to enter on minutes the appointment and qualification of jury commissioner till end of term, see ante, § 268 [i].

[a] It is not ground of challenge to the array that the names of those selected by the jury commission to serve as jurors were written on the slips by a clerk, in the presence and under the supervision of the commission; the act of the clerk being the act of the commission.
—(La. 1892) State v. McCarthy, 44 La. Ann. 323, 10 South. 673;
(Pa. 1821) Commonwealth v. Lippard, 6 Serg. & R. 395.

[b] (Ala. 1893) 2 Code, p. 132, §§ 3, 4, requires the jury commissioners to prepare a list of all qualified persons between 20 and 60 years of age, and fill the jury box with their names on separate slips of paper. *Held*, that where, at the time of defendant's trial, the jury commissioners had only partially completed their list, but drew the jurors from such incomplete list, the drawing was in violation of law.—Johnson v. State, 102 Ala. 1, 16 South. 99.

[c] (Ala. 1894) On trial for arson, the fact that the owner of the burned building was one of the jury commissioners, whose duty it was to draw the grand and petit jurors, is not ground for quashing the venire, in the absence of a showing that he actually participated in drawing either the grand or petit jurors.—Prater v. State, 107 Ala. 26, 18 South. 238.

[d] (Ala. 1895) Where jury commissioners have illegally destroyed names remaining in a jury box, and have proceeded to fill another in violation of Act 1886–87, special legislation is

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necessary to legalize the jury box so prepared, or to authorize the preparation and filling of another.—Steele v. State, 111 Ala. 32, 20 South. 648.

[e] (Cal. 1895) Defendant cannot challenge the panel because no certified list of trial jurors, as provided in Code Civ. Proc. § 208, was ever placed in the possession of the county clerk, it appearing that 300 jurors were regularly drawn, their names entered on paper by the clerk of the board of supervisors, the paper placed in the possession of the county clerk, and the names taken from this paper and placed in the jury box, when the clerk of the county and of the board of supervisors was the same person, and offered at the trial to attach the certificate. —People v. Young, 108 Cal. 8, 41 Pac. 281.

[f] (Kan. 1884) Under Comp. Laws 1879, c. 54, § 2, providing that the township trustees and mayors of cities shall select jurors from those assessed on the assessment roll of the preceding year, failure to select from such roll is ground for challenge to the array.—State v. Jenkins, 32 Kan. 477, 4 Pac. 809.

[g] (Ky. 1894) The act concerning juries (approved May 22, 1893) requires the jury commissioners to select annually a jury list in proportion to the population of the county (which in the present case called for 200 names), from which a panel of 50 names should be drawn for each term, and that, when the judge apprehended that the list might be exhausted before the next annual drawing, he might order the commissioners to select further names. *Held*, that where the commissioners made a list containing only 50 names, which were all drawn on the jury panel, and such panel having been exhausted, the commissioners, under order of court, selected a further list of 200, from which defendant's jury was completed, the jury was not properly drawn and a conviction by it must be reversed.—Risner v. Commonwealth, 95 Ky. 539, 26 S. W. 388.

[h] (La. 1868) Where the jury panel for the term was not drawn from the last registered list of voters, as prescribed by law, but from a prior and much less comprehensive list, the irregularity is fatal to a conviction by any jury drawn from such panel.—State v. Da Rocha, 20 La. Ann. 356; Same v. Morgan, Id. 442.

[i] (La. 1872) Under Act 1868, providing that, except in the parish of Orleans, jurors shall be selected 30 days before each jury term, by writing the names of the registered voters on separate ballots and drawing from them, a jury is defective which was drawn from a box which contained only those ballots remaining after three panels had been drawn for previous terms of the court.—Compton v. Legras, 24 La. Ann. 259.

[j] (La. 1873) In the parish of Orleans the jury may be drawn from the jury box until it is exhausted, even though 15 months have elapsed since the list of jurors was furnished by the sheriff.—State v. Petrie, 25 La. Ann. 386.

[k] (La. 1894) Though Act 1877, No. 44, requires the clerk of court to write the names of jurors on the ballots placed in the box before the drawing, in the absence of prejudice, a venire will not be set aside, and the indictment quashed, merely because one of the commissioners wrote the names of the jurors on a portion of the ballots.—State v. White, 46 La. Ann. 1273, 15 South. 623.

[l] (La. 1896) The fact that a nephew of the prosecuting witness was one of the jury commissioners who drew the venire was not fatal to conviction, where it appears that he neither did nor said anything to influence his assistants in selecting the jury.—State v. Magee, 48 La. Ann. 901, 19 South. 933.

[m] (Mich. 1881) The statute required the presence of the judge when the old names were removed from the jury box and the new list was placed therein by the clerk. *Held*, by an evenly divided court, that a challenge to the array on the ground of the absence of the judge was properly overruled.—Gott v. Brigham, 45 Mich. 424, 8 N. W. 41.

[n] (Mich. 1886) Where the county clerk, contrary to statute, put the packages containing the lists of grand and petit jurors into one box, and drew jurors for a trial promiscuously therefrom, and several of the panel were those who had been returned as grand jurors, the panel was properly discharged.—Atkinson v. Morse, 63 Mich. 276, 29 N. W. 711.

[o] (Mich. 1891) How. Ann. St. §§ 7567, 7575, provide that juries shall be drawn from the body of the county, and that the names of jurors shall not be returned to the boxes from which they were drawn till the other names therein are exhausted. *Held*, that where the clerk returned the names of the jurors from one township to the box, they having served at a prior term, but being the only names returned from that township, it was not such error as to vitiate the panel on which they were drawn, where the jury which tried defendant was completed from the other members of the panel, especially as their prior service was good ground of challenge to the polls.—Wise v. Otter Creek Lumber Co., 86 Mich. 40, 48 N. W. 695.

[p] (Mich. 1894) The fact that the assessment roll of 1892, instead of 1893, was used in selecting the names from which jurors were to be drawn, is not ground for challenge to the array. —Niles v. Schoolcraft Circuit Judge, 102 Mich. 328, 60 N. W. 771.

[q] (Miss. 1855) If the name of any person already returned be omitted in the annual list, or the name of an improper person be returned in the annual list, or there are other errors in the annual list, or if the assessor should wholly fail to return an annual list, as required by law, it will not vitiate the list of jurors, provided they are regularly drawn from the box number one.—Sumrall v. State, 29 Miss. (7 Cushm.) 202.

[r] (Mont. 1883) It is not ground for challenge to the array that the panel from which was drawn the jury that tried defendant had been drawn from a box from which panels had previously been drawn for the trial of cases involving United States laws, or in which the United States was a party, so long as enough remained in the box to furnish a full panel of 24, from which the trial jury might be selected. —Territory v. Reed, 5 Mont. 92, 1 Pac. 717.

[s] (N. J. 1822) The incompleteness of the sheriff's books is no cause of challenge to the struck jury.—Maffett v. Tonkins, 6 N. J. Law (1 Halst.) 228.

[t] (N. J.) The provisions of Act April 21, 1876 (Rev. p. 532), as to proceedings in the selection of jurors, are merely directory, except that which requires the certificate of the judges to the list of names drawn, which is mandatory. —(1878) Poulson v. Union Nat. Bank, 40 N. J. Law (11 Vroom) 563; (1892) Gardner v. State, 55 N. J. Law (26 Vroom) 17, 26 Atl. 30.

[u] (N. M. 1894) The mere allegation in a motion challenging the array that the jury list had not been revised by the assessor of the county, and a new list furnished the clerk of court, as designated by the statute, is not sufficient ground for reversal, where no resulting injury is shown. —Territory v. McFarlane, 37 Pac. 1111.

[v] (N. Y. 1876) Laws 1847, c. 495, requires the commissioner of jurors of New York City to prepare a list of jurors whom he deems competent and liable to serve, and to return the

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same to the county clerk's office. The act providing for struck jury requires the selection of 48 names from such list. *Held* that, where the 48 names from which the jury were struck were selected from a list made by the jury commissioner and filed with the county clerk, it was sufficient, though the jury commissioner's list was not complete.—People v. Tweed (No. 1), 50 How. Prac. 262; Id. (No. 3), Id. 280.

[w] (N. C. 1886) Failure of the county commissioners to revise and correct the jury lists, as required by law, will not entitle accused to have the array quashed, in absence of any showing of prejudice; the statute being merely directory.—State v. Hensley, 94 N. C. 1021.

[x] (S. C. 1834) The act of 1799, directing jury lists to be made from the tax returns once in every three years, is merely directory; and if public officers fail to discharge their duty under it, and the jury is drawn from the old list, it is not a cause of challenge to the polls or to the array.—State v. Massey, 2 Hill, 379.

[y] (S. C. 1867) The laws of the state and the military orders require juries to be drawn from those who have paid a tax on property. *Held*, that juries drawn from a box containing the names of all those who had paid a tax (assessed and poll) for the current year were illegal, although an order from the governor directed them to be so drawn.—State v. Jennings, 15 Rich. Law, 42; State v. Pratt, Id. 47.

[z] (S. C. 1891) Under Gen. St. § 2237, as amended by Act 1886 (19 St. at Large, p. 599), requiring the commissioners, on a special venire, to place in the tales box "the names of 150 persons qualified by law to serve as jurors," it is no ground of challenge to the array that two of the slips containing names were, by inadvertence, duplicates of others, so that there were only 148 names in the box.—State v. Merriman, 3[illegible] S. C. 16, 12 S. E. 610.

(C) THE JURY PANEL

1. THE REGULAR PANEL, §§ 283-309.
2. SPECIAL VENIRE, §§ 310-232.
3. TALESMEN OR ADDITIONAL JURORS, §§ 333-348.

Adoption by federal courts of state practice in selection of jurors, see "Courts," vol. 13, cc. 2703–2705, § 929.

Appeal on ground of error in summoning jury in criminal prosecutions dependent upon presentation of objections in lower court, see "Criminal Law," vol. 15, cc. 421, 422, § 2637.

Continuance before justice of the peace as necessitating summoning of new jury, see "Justices of the Peace," vol. 31, c. 1328, § 300 [h].

Defect in summoning jury ground for new trial in criminal prosecution, see "Criminal Law," vol. 15, cc. 58, 59, §§ 2219, 2220.

Harmless error in selecting jurors, see "Appeal and Error," vol. 3, cc. 2051–2055, §§ 4124–4126.

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1. THE REGULAR PANEL.

SELECTION OR DRAWING OF PANEL—IN GENERAL, § 283.
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Power of United States district judge in circuit court to order panel drawn from state jury box see "Judges," vol. 29, c. 1687, § 108 [c].

Review of rulings, see "Appeal and Error," vol. 3, cc. 2051–2056, §§ 4124–4127.

Selection of jurors in condemnation proceedings, see "Eminent Domain," vol. 18, cc. 1606–1610, § 554.

—— *necessity of bill of exceptions to review objection, see* "Appeal and Error," vol. 3, c. 209, § 2430.

§ 283. Selection or drawing of panel—In general.

Effect of irregularities in drawing jurors, see post, § 307 [a].

—— *on panel of drawing from wrong, irregular, or defective list, see* ante, § 282.

Mode of selection of special venire, see post, §§ 324–326.

Selection by jury commissioner after expiration of his term, see ante, § 269 [e, f].

Fees of clerks of United States court for selection of jurors, see "Clerks of Courts," vol. 10, cc. 125, 126, § 75.

[a] (U. S. 1812) A challenge to the array is properly sustained when it appears that the marshal failed to observe the directions of the statute, but summoned the jury without any designation by the court of the part of the district from which they were to be summoned, and not according to the mode of forming juries to serve in the highest court of law in the state.—United States v. Coit, Fed. Cas. No. 14,829.

[b] (Cal. 1887) A departure from the forms prescribed by articles 3, 4, c. 1, Code Civ. Proc., with respect to the "drawing and return" of

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the jury, such as may deprive a defendant of an opportunity to secure a competent and impartial jury, is ground for a challenge to the panel.—People v. Davis, 73 Cal. 355, 15 Pac. 8.

[c] (Ind. 1836) If, in drawing the jury panel, the names of persons unqualified are drawn, they may be rejected, and the names of those drawn who are qualified, with new names, may be put into the box in place of the rejected names.—Lindley v. Kindall, 4 Blackf. 189.

[d] (Ky. 1837) Though Act 1836, altering the mode of summoning juries, does not in terms apply to the city court of Louisville, yet it is not ground of challenge to the array that a jury in that court was summoned under that statute, where there is no objection to the officer who summoned the jurors, since the mere manner and time of giving jurors notice and getting them into court does not affect the defendant:—Vicaro v. Commonwealth, 35 Ky. (5 Dana) 504.

[e] (Mo. 1885) As the statutory method of summoning, drawing, and impaneling jurors is directory, and not mandatory, if the jurors who served were qualified, and it does not appear that defendant was prejudiced, the judgment will not be reversed because of irregularity or informality in their selection.—State v. Matthews, 88 Mo. 121.

[f] (N. J.) Under Act 1888, providing that, where defendant is entitled to service of a special panel of 48 men, it shall be the sheriff's duty to draw such panel from the box, from the whole panel summoned to perform jury duty, it is not necessary for the sheriff to notice the name of a deceased juror, or of one who has been excused.—(1890) State v. Black (Sup.) 20 Atl. 255; (1891) Black v. State, 53 N. J. Law (24 Vroom) 462, 23 Atl. 1081.

[g] (N. Y. 1855) Laws 1847, p. 734, c. 495, providing that jurors thereafter to be summoned for the several courts authorized to try issues of fact in the city of New York shall be drawn by the county clerk, on requisition of the court needing them, applies to the district courts of that city.—City of New York v. Mason, 4 E. D. Smith, 142, 1 Abb. Prac. 344.

[h] (N. Y. 1865) Statutory regulations for the drawing and summoning of jurors are made for the purpose of securing an impartial distribution among citizens of the duty of performing jury services, and a challenge to the array by a prisoner will not lie for a mere omission to follow the directions of the statute.—Friery v. People, 54 Barb. 319, affirmed (1866) 2 Abb. Dec. 215.

[i] (N. Y. 1891) A new jury list had been prepared, but had not been filed with the justice by the town clerk, and the justice drew a jury from the old list. *Held*, that the jury was properly drawn, under Laws 1889, c. 505, providing that the justice shall draw the jury from the last jury list received by him from the town clerk.—Cargain v. Everett, 62 Hun, 620, 16 N. Y. Supp. 668.

[j] (Pa. 1809) The sheriff and county commissioners have no right to select or exclude any juror drawn from the wheel, as an unsuitable or improper character.—Anonymous, 1 Browne, 121.

[k] (S. C. 1835) The commissioner of bail, who has the right to select names to be put in the jury box, may properly exclude the names of those who heard the case on a former trial and could not agree.—Rice v. Sims, 3 Hill, 5.

[l] (Tex. 1888) The provisions of the statute relating to the summoning and formation of juries in civil cases are merely directory, and a challenge to the array will not lie, if there is a substantial compliance with the statute.—Galveston, H. & S. A. Ry. Co. v. Jessee, 2 Willson, Civ. Cas. Ct. App. § 406.

[m] (Wis. 1859) The statute required jurors to be selected "from the list made by the last board of supervisors." *Held*, that the statute referred to the list made at the last meeting at which a list was made, and not to a list made by the supervisors whose term of office had expired.—Perry v. State, 9 Wis. 19.

§ 284. —— Who may or must act.

Effect of failure of clerk to write names on slips, see post, § 279 [a].

—— *of sheriff's performing the manual act of drawing instead of clerk, see* post, § 307 [p].

Interest of jury commissioner as disqualification to act, see ante, § 270.

Interference with selection, see post, § 286.

Selection by de facto officer, see ante, § 269.

Who may or must act in drawing special venire, see post, § 324 [w].

—— *in selecting struck jury panel, see* post, § 369.

—— *in selecting the jury list, see* ante, § 275.

[a] (U. S. 1843) It is not necessary that the marshal or clerk, or any state judge, should be present at the drawing; but when those officers properly certify, as their official act, the panel to the court, this constitutes it the jury for the term. The deputy marshal and deputy clerk are competent officers to superintend the drawing and certify the names drawn to the clerk and marshal.—United States v. Matthews, Fed. Cas. No. 15,741b.

[b] (Ill. 1873) Where the office of county clerk was divided in a county, the fact that the person acting as county clerk for mere county matters assisted in the drawing of a jury, instead of the clerk who attended to the business of the court in probate and other matters, *held* no ground for a challenge to the array; he being de facto a county clerk.—Mapes v. People, 69 Ill. 523.

[c] (Ind. 1832) Where the board doing county business selected the jury panel from the list of eligibles at their own discretion, instead of causing them to be drawn by lot by the clerk, a challenge to the array was improperly overruled.—Jones v. State, 3 Blackf. 37.

[d] (Ind. 1884) Rev. St. 1881, §§ 1387, 1388, make it the duty of the clerk to draw from the box the jury panel, and neither the assistance nor presence of the jury commissioners is necessary.—Doolittle v. State, 93 Ind. 272.

[e] (Kan. 1877) Gen. St. 1868, p. 535, §§ 10, 11, provide that the clerk shall notify two justices of the peace, and the sheriff, in person or by his undersheriff, to attend the drawing of the panel, and that, if any two are present, the clerk shall proceed to draw the jurors. *Held* that, where the proceedings were entirely regular and in full view of both the justices of the peace, the mere fact that the sheriff was represented by a deputy sheriff, instead of by the undersheriff, and that such deputy witnessed the proceedings, and later signed the minutes of the proceedings, was not ground of challenge to the array of the jurors so drawn.—State v. Bohan, 19 Kan. 28.

[f] (La. 1838) Where the panel of jurors was drawn from the box by the sheriff, instead of the clerk, while the clerk and one of the magistrates in attendance wrote down the names as drawn, the irregularity was immaterial.—Pratt v. Grappe, 12 La. 451.

[g] (La. 1875) Under a statute prescribing that juries must be drawn by the parish judge, clerk, and sheriff, a jury was ordered to be drawn, and was drawn by the parish judge, recorder, clerk, and sheriff. *Held* that, as all

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the required officers united, the error of including the recorder was surplusage, and did not vitiate.—Hunt v. Mayo, 27 La. Ann. 197.

[h] (La. 1880) It is sufficient if the panel of jurors was drawn by two of the three who compose the board of jury commissioners.—State v. Arata, 32 La. Ann. 193.

[i] (La. 1881) The clerk of court and two jury commissioners forming a quorum under the law, a venire drawn by them is not illegal because of the absence of the other two commissioners.—State v. Hornsby, 33 La. Ann. 1110.

[j] (La. 1881) A venire drawn by a jury commission, in the absence of a member who had not qualified, is legal and regular.—State v. Wells, 33 La. Ann. 1407.

[k] (La. 1883) Under Acts 1877, No. 44, no jury can be legally drawn without presence of the clerk as one of the jury commission; he being the only commissioned officer of the five members, and the only member elected by the people.—State v. Conway, 35 La. Ann. 350.

[l] (La. 1896) Under Acts 1894, No. 89, § 8, authorizing the district judge to cause a jury to be drawn to try a civil case in which there is a prayer for a jury during the term of court at which the prayer is filed and the jury ordered, the jury must be drawn by the jury commissioners, and cannot be selected by the sheriff under order of court.—Soniat v. Supple, 48 La. Ann. 296, 19 South. 128.

[m] (La. 1896) It was no ground for new trial that one of the jury commissioners was not served with written summons as prescribed by statute, and consequently took no part in the selection of the venire, where the other four commissioners were present and participated in the selection.—State v. Magee, 48 La. Ann. 901, 19 South. 933.

[n] (Mich. 1887) Under How. Ann. St. § 7567, it is the duty of the clerk of the court to take the names of the jurors from the box, and it is cause for challenge to the array that the sheriff drew the names, and that the clerk only announced and made a minute of those drawn.—People v. Labadie, 66 Mich. 702, 33 N. W. 806.

[o] (N. J. 1888) Under Criminal Procedure Act, § 72, the 48 names of jurors constituting the list to be served on the prisoner are to be selected by the sheriff, at discretion, from the general panel; and, if the prosecutor of the pleas co-operates with the sheriff in the act, a conviction founded on such proceedings will be reversed on error.—Peak v. State, 50 N. J. Law (21 Vroom) 179, 12 Atl. 701.

[p] (N. Y. 1823) It is no ground for challenging the array that the deputy clerk, in the clerk's absence, drew the jury and certified the panel.—People v. Fuller, 2 Parker, Cr. R. 16.

[q] (N. Y. 1855) 2 Rev. Laws 1813, p. 374, § 95, directs the justice of a district court of the city of New York, when a jury is needed, to nominate 18 persons, and to issue a venire to the constable, commanding him to summon any 12 of them. *Held*, that an objection to the jury that they were not selected by the constable was not well taken; the constable not being authorized to make the selection.—City of New York v. Mason, 4 E. D. Smith, 142, 1 Abb. Prac. 344.

[r] (N. C. 1890) Code, §§ 1722–1730, providing for the mode of selecting and drawing, and the qualification of, jurors, provides for their drawing for special terms by the county commissioners; the sheriff not being required to act except when the commissioners neglect to act. *Held*, that where a sheriff, who knows that a cause in which he is a party is set for hearing at the next special term, himself, in selecting the jurors for that term, takes the scrolls from the boy who draws them from the box, and reads them to the commissioners, without their actually seeing the names themselves, the irregularity is sufficient ground for sustaining a challenge to the array.—People v. Teague, 106 N. C. 576, 11 S. E. 665.

[s] (Pa. 1814) The fact that the jury was drawn by the sheriff and one county commissioner, instead of two, is an immaterial irregularity.—Commonwealth v. Immell, 6 Bin. 403.

[t] (Pa. 1848) Under the act incorporating the Pennsylvania Railroad Company, which directs an inquest to be held by the sheriff for estimating the damages sustained by owners of land occupied by the railroad company, and which directs a precept to be issued to the sheriff, commanding him to summon a jury, it is irregular for the sheriff to select a jury from a list of names prepared by his deputy.—Pennsylvania R. Co. v. Heister, 8 Pa. (8 Barr) 445.

[u] (Pa. 1888) Act April 10, 1867 (P. L. 62), provides that the names selected by the jury commissioners for service during the year shall be placed in the jury wheel, which shall be locked and kept by the commissioners; the key being kept by the sheriff. Act April 14, 1834, § 79, provides that all juries shall be selected by the sheriff and commissioners in the manner therein prescribed. Act March 18, 1874 (P. L. 46) § 1, provides that the array may be quashed if, by accident, mistake, or neglect of the sheriff or jury commissioners or either of them, the wheel has been opened, unlocked, or unsealed, except in the presence of such sheriff and jury commissioners. *Held* that, where the panel for a term was selected by opening the wheel and drawing the names in the absence of the sheriff, the array must be quashed.—Commonwealth v. Baranowski, 5 Pa. Co. Ct. R. 642.

[v] (S. C. 1891) The fact that a person who sometimes acted as the auditor's deputy was present, and furnished the names from the auditor's books, did not invalidate the drawing when he did not otherwise participate therein.—State v. Merriman, 34 S. C. 16, 12 S. E. 619.

[w] (Wash. 1893) Under Code Proc. § 59, providing that the clerk of court or his deputy, "and the sheriff and auditor," shall place the jury ballots in the box, and section 61, providing that, if the sheriff or auditor or both shall not attend and assist, the clerk may call in such other county officer or officers as he may choose, the deputy sheriff cannot serve in the sheriff's place, without vitiating the panel. Section 80, giving the deputy all the powers of the sheriff, and authorizing him to perform any of the duties prescribed by law to be performed by the sheriff, does not apply to such extraordinary duties.—State v. Payne, 6 Wash. 563, 34 Pac. 817.

§ 285. —— Necessity of separate drawing of different panels.

[a] (Ala. 1878) It is not ground for challenge to the array, or of motion to quash the venire for a petit jury, that the officers drew the grand and petit jurors at the same time, and as the names were taken from the box placed them alternately on the grand and petit juries, according to their respective localities and standing in the county; no unfairness being charged, and jurors having proper qualifications.—Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2.

[b] (Ala. 1893) Under Code 1886, pt. 5, tit. 8, c. 4, § 4299 et seq., relative to the drawing

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of jurors in Marshall county, the separate and successive drawing of grand and petit jurors respectively is unnecessary.—Forney v. State, 98 Ala. 19, 13 South. 540.

[c] (Ga. 1850) Act 1805 alters Act 1799 only in the mode of selecting grand jurors, and under both acts, after the grand jurors have been selected from the list prepared by the clerk from the tax books, the remaining names are the petit jurors, both for civil and criminal cases; and hence the remainder of the list, after the selection of grand jurors by the justices of the inferior court, under Act 1805, was properly certified to the superior court for the trial jurors.—Malone v. State, 8 Ga. 408.

[d] (N. Y. 1812) It is sufficient cause of challenge to the array that the clerk drew 72 names out of the box and put them in a list, and then designated 36 names, so drawn, to be a panel for the circuit, and the other 36 a panel for the court of common pleas.—Gardner v. Turner, 9 Johns. 260.

[e] (N. Y. 1830) It is no cause of challenge to an array of jurors that two sets of jurors are drawn at the same time from the jury box, for two distinct courts, if they are kept separate, and a distinct panel of each is given to the sheriff.—Crane v. Dygert, 4 Wend. 675.

§ 286. —— Interference with selection or drawing.

Effect of exclusion from panel of members of same organization as defendant, see post, § 307 [s, w].

—— *of interference with selection of special venire, see* post, § 331 [b].

Instructions by justice as to who should be summoned, see post, § 548 [h].

Interference with selection of special venire, see post, § 324 [d].

Participation of unauthorized person in selection, see ante, § 284.

Who may or must act, see ante, § 284.

[a] (Conn. 1850) Where an officer, whose duty it was to summon a jury to try a complaint of forcible entry and detainer against the Quinebaug Bank, for the purpose of ascertaining who were legally qualified to act as jurors in that cause, asked the counsel for the defendants to inform him who were stockholders in that institution; and the counsel, thereupon, after expressly disclaiming any wish to influence him in the discharge of his duty, named to him several persons who were not such stockholders, adding an expression of his opinion that they were independent and judicious men; some of whom so named, the officer, without being biased by any representation made by the counsel, summoned as jurors,—it was *held* that there was no ground for the imputation of any blame to either the counsel or the officer, and consequently a challenge of the jurors, founded on these facts, was disallowed.—Quinebaug Bank v. Tarbox, 20 Conn. 510.

[b] (N. J. 1790) Interference by a party with the selection of the jury is good ground of challenge.—McDonald v. Shaw, 1 N. J. Law (Coxe) 6.

[c] (N. J. 1790) Where plaintiff handed the venire to a messenger, with directions to deliver it to the sheriff and request that he select the jurors from a certain part of the county, but not suggesting any individuals to be summoned, it was good ground of challenge to the array; no interference of any kind by the parties being permitted.—McDonald v. Shaw, 1 N. J. Law (Coxe) 6.

[d] (N. Y. 1862) It is a good ground of challenge to the array, that certain of the jurors had not been summoned by any legal authority, and that their names had been put upon the list of the jurors by the clerk of the court at their request, without any order having been entered requiring such jurors to serve.—McCloskey v. People, 5 Parker, Cr. R. 308.

§ 287. —— Time and place.

Appointment of jury commissioners at current term instead of previous term, see ante, § 268 [q, r].

Sufficiency of undated return, see post, § 303 [c].

Time for issue of venire, see post, § 294.

[a] (Colo. 1889) A panel of jurors drawn less than the 30 days prescribed by statute before the term need not be discharged for that reason.—Babcock v. People, 13 Colo. 515, 22 Pac. 817.

[b] (Conn. 1837) Where a city charter required that a certain number of jurors should be chosen on the first Monday of July, and they were not chosen until the 8th of August, it was *held* that this provision was directory, and that a jury, impaneled from the jurors so chosen, was a legal jury.—Colt v. Eves, 12 Conn. 243.

[c] (La. 1830) Where an act directs a jury to be drawn within 30 days from its passage, it cannot be done afterwards.—Buhol v. Boudousquie, 8 Mart. (N. S.) 425.

[d] (La. 1842) Acts March 6, 1840, No. 32, relative to obtaining juries in district courts, does not apply to the First judicial district, in which juries are not required to be drawn 20 days before each term.—Lyon v. Commercial Ins. Co., 2 Rob. 266.

[e] (La. 1880) Acts 1880, No. 7, suspends, as to the first terms of the district courts under the constitution of 1879, that part of Acts 1877, No. 44, which required drawing of the jury 50 days before session of the court.—State v. Red, 32 La. Ann. 819.

[f] (La. 1891) Where the jury commissioners draw the jury in a room adjoining the clerk's office, and it opens into it, and is a part of the office, this is a compliance with Acts 1877, No. 44.—State v. Green, 43 La. Ann. 402, 9 South. 42.

[g] (Mich. 1869) Laws 1864, p. 14, provides that in proceedings to condemn land the court or judge shall order the drawing of a jury from the jury box of the county, and the court or judge shall cause to be drawn 12 names from such box, and shall issue a venire in the usual form. *Held*, that where a jury was not drawn in the presence of the court, nor at the time of making the order and issuing the venire, it was reversible error.—Convers v. Grand Rapids & I. R. Co., 18 Mich. 459.

[h] (Miss. 1837) Jurors are not drawn until the sitting of the court.—Stevens v. Richer, 2 Miss. (1 How.) 522.

[i] (Mo. 1885) The fact that, in a murder trial, a panel of 40 qualified jurors was procured on the 6th, when the cause was not to be tried until the 10th, constitutes no error.—State v. Collins, 86 Mo. 245.

[j] (N. Y. 1830) It is no cause of challenge that the jurors are drawn more than 14 days before the sitting of the court at which they are to serve.—Crane v. Dygert, 4 Wend. 675.

[k] (N. Y. 1875) Where, under Laws 1870, c. 408, § 14, a special term of the court of oyer and terminer is appointed by the governor, the names of the jurors must be drawn 14 days before the holding of the court; and a challenge to the array for a failure so to do is proper,

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and should be sustained.—Powell v. People, 5 Hun, 169.

[l] (S. C. 1867) Act 1825 (7 St. at Large, p. 329) § 1, makes it the duty of the circuit judge, when ordering an extra court, to order jurors to be drawn for said extra court as well as for the next regular court. Act 1839 (11 St. at Large, p. 74) § 13, empowers the clerk and sheriff to draw juries at any regular term when no judge attends, and further provides that, if an extra court shall be ordered, he shall similarly draw the necessary juries, and issue the proper venires for such extra term. *Held* that, where an extra term was ordered by the judge, no jury could be drawn at such extra term for service thereat; the juries for such extra term being required to be drawn at the preceding regular term.—State v. Pratt, 15 Rich. Law, 47.

§ 288. —— Notice.

Effect of failure to give statutory notice, see post, § 307 [d].

[a] (Utah, 1876) Under the act of congress requiring the judge of the district court of Utah territory to give public notice of the drawing of a jury, it is not necessary to give notice thereof by publication in a newspaper. Any public notice is sufficient.—United States v. Reynolds, 1 Utah, 319.

§ 289. —— Necessity of recording names drawn.

[a] (Ind. 1833) Failure of the clerk to comply with the requirement of Act Jan. 29, 1831, § 1, that the names of the panel of petit jurors be recorded, without delay, in the order book, is good ground for challenge to the array.—Mitchell v. Likens, 3 Blackf 258; Same v. Denbo, Id. 259.

§ 290. Size of panel.

Effect of failure to summon full number, see post, § 360.

—— *panel of jurors for oyer and terminer, see* post, § 360 [p].

Number of talesmen to be summoned, see post, § 343.

—— *to be summoned on one venire, see* post, § 295 [j].

Presumption that short panel comprised all names in box, see post, § 306 [e].

Right to summon special venire after exhaustion of short panel, see post, § 316 [a].

Size of special venire, see post, § 323.

Summoning another jury after organizing one jury from regular panel, see post, § 315 [b].

[a] (Ala. 1888) Acts 1886–87, p. 151, § 10, provides that, when any capital case stands for trial, the court shall cause the jury box to be brought into the court room, and the presiding judge shall draw therefrom not less than 25 nor more than 50 names, to constitute a part of the venire from which the jury to try the case shall be selected. Defendant demanded that 50 names should be drawn, but the court only allowed 30 to be drawn. *Held*, that the number to be drawn between the minimum and maximum was discretionary with the court, and that the accused had the right to demand that the lowest number be drawn, but not the highest.—Clarke v. State, 87 Ala. 71, 6 South. 368.

[b] (Ala. 1895) Acts 1886–87, p. 151, § 9 (Code. p. 131), requires the court to organize, from the jurors attending, two petit juries, and authorizes it to discharge any jurors over the number necessary for the two juries. *Held*, that where the jurors summoned were all in attendance, so as to enable the court to form two juries, a defendant on trial for a crime was not injured by the summoning of 24 jurors, instead of 30, as required by Code, §§ 4306, 4316.—Evans v. State, 109 Ala. 11, 19 South. 535.

[c] (Ga. 1892) Under Code, §§ 298, 299c, on a trial in the county court on an indictment transferred from the superior court, the panel from which the trial jury is obtained is not one of 24, but of 12.—Grant v. State, 89 Ga. 393, 15 S. E. 488.

[d] (Iowa, 1862) Where the clerk of the Dubuque city court issued a venire for 15, instead of for 24, jurors, *held*, that a challenge to the jury should be sustained.—Baker v. The Milwaukee, 14 Iowa, 214.

[e] (Iowa, 1874) An order for a special term of court to be held in December, 1873, made in August, 1873, directed that a panel of 15 jurors should be summoned. Rev. 1860, § 2732, as amended by Laws 1870, c. 167, § 7, and then in force, provided that the number of petit jurors should be 15, unless the court should direct the selection of a greater number. Under the Code which took effect September 1, 1873, the number of jurors in that county was increased to 24, unless the judge should order otherwise. *Held*, that the order to summon 15 jurors had the force and effect of an order, aside from the statute; and a change in the statute therefore did not change the order.—Fifield v. Chick, 39 Iowa, 651.

[f] (La. 1823) It is good ground of challenge to the array that a less number were drawn on the panel than are prescribed by law.—Flower v. Livingston, 12 Mart. (O. S.) 681.

[g] (La. 1823) Forty-eight jurors were required to be returned for each term of the parish court of New Orleans.—Flower v. Livingston, 12 Mart. (O. S.) 681.

[h] (La. 1824) It is not ground of challenge to the array that the panel is larger than is required by law, but the objection should be taken by challenge to the individuals drawn in excess of the legal number.—Ramos v. Bringier, 2 Mart. (N. S.) 192; Debuys v. Mollere, Id. 625.

[i] (La. 1832) It is no ground of challenge to a juror that the sheriff summoned 72 jurors, under a law directing him to summon not less than 36.—Prall v. Peet's Curator, 3 La. 274.

[j] (Mich. 1881) No order to draw a particular number of jurors is needed, unless a larger panel than 24 is wanted.—Gott v. Brigham, 45 Mich. 424, 8 N. W. 41.

[k] (Mo. 1857) Under Rev. Code 1855, two defendants jointly indicted, who elect to be tried together, are not entitled to a panel of more than 36 jurors.—State v. Phillips, 24 Mo. 475.

[l] (Mont. 1882) If, between the time of selecting the panel and beginning the trial, the law be changed so as to require a larger panel, a litigant has the right to demand the larger panel.—Kermon v. Gilmer, 2 Pac. 21.

[m] (N. J. 1829) It is not error for the sheriff, in an action of unlawful detainer, to return a panel of 24 jurors, if 12 only are sworn on the jury.—Adams v. Decker, 11 N. J. Law (6 Halst.) 84.

[n] (N. J. 1890) Revision p. 280, § 72, provides that where a prisoner is entitled to peremptory challenges the sheriff shall before his trial deliver to him a list of 48 jurors of the general panel, etc.; but, if that number shall not have been drawn or summoned, the sheriff shall add to the panel as many as may be nec-

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essary. *Held* that, where the prisoner is not so entitled to peremptory challenges, a panel of 36 jurors is sufficient, and the sheriff has no authority to add to them.—Evans v. State, 52 N. J. Law (23 Vroom) 261, 19 Atl. 254.

[o] (Pa. 1890) Since the method of drawing jurors and making challenges, prescribed by Act April 14, 1834 (P. L. 366) § 140, relates only to civil cases, Act 1885 (P. L. 138), which simply amends said section 140, by providing for the drawing of 20 jurors instead of 12, is likewise applicable only to civil cases. —Commonwealth v. Spink, 137 Pa. 255, 20 Atl. 680, 27 Wkly. Notes Cas. 37.

[p] (R. I. 1895) Where 12 "good and lawful" men were secured as jurors, as required by Pub. St. c. 104, § 4, defendant cannot complain that more than that number were summoned.—Barber v. James, 18 R. I. 798, 31 Atl. 264.

[q] (S. C. 1882) Under a statute providing that "no more" than 36 persons shall be summoned to attend court as jurors, it is not necessary that as many as 36 should be in attendance.—State v. Clyburn, 16 S. C. 375.

[r] (Tenn. 1827) Twenty jurors are to be summoned in proceedings before justices of the peace for forcible entries and detainers.—Clements v. Clinton, 8 Tenn. (Mart. & Y.) 198.

[s] (Tex. 1878) Except in the trial of capital cases by special venires, the defendant has no right to demand, nor the court any authority to direct, that the clerk shall draw more than 24 names from the jury box, to form the petit jury.—Burfey v. State, 3 Tex. App. 519; Jones v. State, 3 Tex. App. 575.

[t] (Va. 1890) Under Acts 1877–78, p. 340, providing that "the writ of venire facias, in a case of felony other than where the punishment may be death, shall command the officer * * * to summon 16 persons, * * * to be taken from a list to be furnished him by the judge," and that "where the punishment may be death" the writ shall require 24 persons to be summoned in like manner as above, a venire is invalid, in a case where the punishment may be death, if it commands the sheriff to summon 16 instead of 24 jurors.—Spurgeon v. Commonwealth, 86 Va. 652, 10 S. E. 979.

[u] (Va. 1893) It is not error to refuse to quash a venire facias because the list furnished by the judge contained more than 20 names, the number required to be summoned as jurors, since the law does not limit the names on the list to such number.—Drier v. Commonwealth, 89 Va. 529, 16 S. E. 672; Snodgrass v. Commonwealth, 89 Va. 679, 17 S. E. 238.

§ 291. Summoning jurors—Necessity of venire or other writ.

Amendment of return to show venire issued and returned for oyer and terminer as well as for quarter sessions, see post, § 304 [i].

Effect of issue of venire by clerk without judge's order, see post, § 307 [j].

—— *of nullity of venire caused by absence of seal, see* post, § 295 [c].

Necessity of formal special venire, see post, § 320 [a].

Summoning jurors on struck jury panel, see post, § 371.

[a, b] (Ga. 1853) The grand jury that found the indictment, and the petit jury at the trial, were summoned by the sheriff, and returned without a venire. *Held*, that this was not such a defect as will vitiate the verdict; the trial in other respects being according to law.—Bird v. State, 14 Ga. 43.

[c] (La. 1842) No formal writ of venire facias is required by our laws. An order of court for drawing and summoning jurors is sufficient.—Lyon v. Commercial Ins. Co., 2 Rob. 266.

[d] (La. 1847) No writ is necessary for selecting and summoning a jury, nor is any order under the seal of court. Acts 1831, No. 53, §§ 10, 11, 13, and Acts 1833, No. 36, § 1, direct the clerk and sheriff, or deputy sheriff, to draw, at stated periods, the requisite number of jurors who are to be summoned.—State v. Folke, 2 La. Ann. 744.

[e] (Mo. 1831) It is not necessary that a venire facias should issue to the sheriff to summon a jury before he can proceed to do so, nor need one be awarded on the roll.—Samuels v. State, 3 Mo. 68.

[f] (N. Y. 1804) Where a trial was had without the award of a venire, it was a fatal defect, and not curable by amendment.—Livingston v. Rogers, 1 Caines, 583.

[g] (N. Y. 1820) A conviction for murder, in the court of oyer and terminer, without a venire returned and filed, cannot be sustained. —People v. McKay, 18 Johns. 212.

[h] (N. Y. 1822) A general warrant or venire, under the seal of the court, directing the sheriff to summon grand and petit jurors for the trial of all causes which are to be tried before the court, returned with the panels of jurors annexed, as directed by St. Feb. 1813, is sufficient. A venire in each cause is not necessary.—People v. Herkimer County General Sessions, 20 Johns. 310.

[i] (Pa. 1816) Where a precept for holding court, directed to the sheriff, contains a clause of venire facias, it is unnecessary that venires should be issued for the grand and petit juries. —Commonwealth v. Smith, 2 Serg. & R. 300.

[j] (S. C. 1824) Where the jurors by whom defendant was tried were regularly drawn, under the act relating thereto, and regularly summoned by the sheriff, the fact that no venire was delivered to him, as required by the act, is not fatal.—State v. Crosby, Harp. 90.

[k] (S. C. 1845) The writ of venire by which the petit jurors were summoned is part of the record of conviction; and, if void, the judgment will be arrested.—State v. Williams, 1 Rich. Law, 188.

[l] (Va. 1846) Where several persons are indicted jointly for a felony, and are sent for trial to the superior court, the clerk must issue a separate venire facias for each one.— In re McWhirt, 3 Grat. 594, 46 Am. Dec. 196.

[m] (Va. 1890) The provision of Code, § 3156, that in felony cases "no irregularity in any writ of venire facias, or the drawing, summoning, returning, or impaneling of jurors, shall be sufficient to set aside a verdict, unless," etc., does not apply to a felony case in which there was no venire at all.—Jones v. Commonwealth, 87 Va. 63, 12 S. E. 226.

[n] (Va. 1892) Code, § 4018, provides that, "if more than two cases are to be tried at one term of the court, only two juries shall be summoned, unless the court or judge otherwise direct; and the juries so summoned may be used for the trial of all the cases." *Held*, that defendant, who was convicted of a felony, cannot complain that "there was no venire facias in the case," where it appears that, for the trial of his and two other felony cases during the term, a venire was issued for a jury in each of the three cases, and defendant was tried by a jury composed of persons thus summoned.—Prince v. Commonwealth, 89 Va. 330, 15 S. E. 863.

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[o] (Va. 1894) Failure of the record in a criminal case to show that there was a writ of venire facias is a fatal defect, not cured by the failure of defendant to object below to the deficiency.—Myers v. Commonwealth, 90 Va. 785, 20 S. E. 152; Barker v. Same, 90 Va. 820, 20 S. E. 776.

§ 292. —— Lost venire.

[a] (N. Y. 1804) Where a venire is lost or mislaid, the justice may issue another.—Day v. Wilber, 2 Caines, 134.

§ 293. What court may issue writ.

[a] (Va. 1890) Under Code 1887, § 4020, providing that any court in which a person accused of felony is to be tried may at any time cause a venire facias to issue for his trial, it is proper for the circuit court to issue a venire for trial of one indicted in the county court, but who elects to be tried in the circuit court.—Wilson v. Commonwealth, 86 Va. 666, 10 S. E. 1007.

§ 294. Time for issuance of process.

Necessity of indorsement of date of issue, see post, § 295 [d].

Time for drawing panel, see ante, § 287.

Waiver of error of justice in issuing venire before time to appear expired, see post, § 516 [o].

[a] (U. S. 1820) It is no objection to the verdict that the venire was issued and served before the indictment was returned, where the panel was returned for the trial of all causes pending at the term.—United States v. Cornell, Fed. Cas. No. 14,868 [2 Mason, 91].

[b] (Cal. 1858) It is no objection to the panel that it was summoned by order of the court after the beginning of the term, instead of according to St. May 3, 1852.—People v. Rodriguez, 10 Cal. 50.

[c] (Mo. 1875) Sess. Acts 1873, p. 76, requiring that the regular panel of jurors be summoned 30 days before the term of the circuit court, is merely directory.—State v. Pitts, 58 Mo. 556; Same v. Knight, 61 Mo. 373.

[d] (N. J.) A justice of the peace cannot issue a venire before the appearance of the defendant.—(1806) Sutton v. Coleman, 2 N. J. Law (1 Penning.) 134; (1819) Wills v. McDole, 5 N. J. Law (2 Southard) 501.

[e] (Pa. 1854) By the regular course of proceeding, criminal cases pending in the supreme court ought to be brought to issue before the process issues to summon jurors to try them.—Commonwealth v. Simpson, 2 Grant, Cas. 438.

[f] (Va. 1861) On a criminal trial, it is no ground for quashing the venire facias issued under Code, c. 208, § 5, and Id. c. 105, § 14, because it was not issued more than 20 days before the term of the court, as required by those acts. They are merely directory.—Wash v. Commonwealth, 16 Grat. 530.

§ 295. Contents and requisites of writ.

Amendment of venire, see post, § 296.

Effect of inaccurate statement of jurors' names in venire, see post, § 309.

—— *of irregularities in venire, see* post, § 307 [q, r].

—— *of misrecital in venire, see* post, § 307 [o, v].

Presumption that certain figures on venire referred to residence of jurors named, see post, § 306 [b].

[a] A writ of venire, or an order of court to summon jurors, without the seal of the court, is void.

—(N. Y. 1820) People v. McKay, 18 Johns. 212;
(S. C. 1845) State v. Williams, 1 Rich. Law, 188.

[b] A venire facias is not void for want of the seal of the court from which it issues.

—(Ala. 1854) Powell v. State, 25 Ala. 21;
(Mo. 1865) State v. Marshall, 36 Mo. 400;
(Tenn. 1827) Bennett v. State, 8 Tenn. (Mart. & Y.) 133.

[c] If the venire is without a seal, the verdict will be defective; and it is error for which the judgment will be reversed.

—(N. J. 1822) Howell v. Robertson, 6 N. J. Law (1 Halst.) 142;
(S. C. 1843) State v. Dozier, 2 Speers, 211.

[d] (Ala. 1838) It is no objection to a venire that the day on which it issued is not indorsed upon it, if it appear that it was issued within the proper time.—State v. Stedman, 7 Port. 495.

[e] (Ala. 1838) The statute of 1836, requiring all process to be directed "To any sheriff of the state of Alabama," is limited to process issued in the course of a suit, and does not extend to a venire to summon a grand or petit jury.—State v. Stedman, 7 Port. 495.

[f] (Ala. 1884) Where, under Code, §§ 4739, 4874, the jury in a criminal cause is impaneled from a venire drawn under an order, setting the day for trial at an adjourned term, which directs "that the names of 50 competent persons be drawn and summoned for the trial of this action," and one directing the same number to be drawn "to serve as petit jurors at said adjourned term," there is no available error.—Martin v. State, 77 Ala. 1.

[g] (Mass. 1886) The statute prescribing the manner of summoning jurors (Pub. St. c. 170, § 22) does not require that the drawing shall be certified on the venire by the town clerk or selectmen; and jurors may properly be summoned by a constable, where there is no such indorsement on the venire.—Commonwealth v. Besse, 143 Mass. 80, 8 N. E. 878.

[h] (Mich. 1882) A venire made returnable on the next day is practically "forthwith," and sufficient, under the statute.—Palmer v. Highway Com'r, 49 Mich. 45, 12 N. W. 903.

[i] (Minn. 1885) That the venire in a criminal case describes the action as a civil action is not a ground of objection, where the jurors were properly drawn, and all appeared, so that no prejudice to the defendant was shown.—State v. Nerbovig, 33 Minn. 480, 24 N. W. 321.

[j] (Miss. 1835) More than 12 jurors may be summoned by one venire at common law.—Shaffer v. State, 2 Miss. (1 How.) 238.

[k] (Miss. 1835) A venire issued by the circuit court may be made returnable on the same day it issued, or on any day during the term.—Shaffer v. State, 2 Miss. (1 How.) 238.

[l] (Miss. 1837) A venire directing the sheriff to summon jurors "from the county," instead of "of the county," is good, as such writ does not direct him to summon persons who are out of the county.—Woodsides v. State, 3 Miss. (2 How.) 655.

[m] (Miss. 1837) It is no objection to a venire that it is made returnable at the term at which it bears teste, not being within the provision of the statute that writs shall be made returnable to the next term. Rev. Code, p. 106.—Woodsides v. State, 3 Miss. (2 How.) 655.

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[n] (N. H. 1876) A writ of venire need not be under the seal of the court, nor bear teste of the chief, first, or senior justice.—State v. Bradford, 57 N. H. 188.

[o] (N. J. 1810) A venire out of a justice's court, which directs the summoning of "good and lawful men," instead of "citizens of the state and freeholders in the county," is sufficient.—Sharp v. Hendrickson, 3 N. J. Law (2 Penning.) 685; Cox v. Haines, Id. 687.

[p] (N. J. 1848) In cases where a venire should be "as well" to assess damages as to try an issue, if the award of the venire is right, it is no ground for a new trial that the venire is in the common form, without the tam quam clause.—Caldwell v. West, 21 N. J. Law (1 Zab.) 411.

[pp] (N. Y. 1809) In an action against joint debtors, a venire, mentioning only the defendant brought into court, without taking notice of the other, is sufficient.—Hutchins v. Fitch, 4 Johns. 222.

[q] (N. Y. 1826) A venire tam quam applies only where there is a demurrer or default, as well as an issue of fact.—Roosevelt v. Fulton, 6 Cow. 48.

[qq] (N. Y. 1826) Upon a plea of riens per descent, the venire need not refer to the plea or express any purpose of inquiring into the value of the lands descended.—Roosevelt v. Fulton, 6 Cow. 48.

[r] (Ohio, 1833) A venire for a petit jury should not contain a panel for a grand jury also. They are distinct bodies, and should be separately summoned.—Forsythe v. State, 6 Ohio (6 Ham.) 19.

[rr] (Pa. 1813) A precept directing the sheriff to summon "24 good and lawful men of the body of the county of A, then and there to inquire, etc., and also a competent number of sober and judicious persons as jurors for the trial of all issues at a court of oyer and terminer," is fatally defective in not commanding that the petit jurors also be drawn from the county.—White v. Commonwealth, 6 Bin. 179, 6 Am. Dec. 443.

[s] (Pa. 1813) Precepts for the summoning of jurors for courts of oyer and terminer may issue under the private seal of the judges appointing such courts, as no seals are provided for the courts themselves.—White v. Commonwealth, 6 Bin. 179, 6 Am. Dec. 443.

[ss] (Pa. 1813) A precept to the sheriff to summon the jury is sufficient if it command him to cause to come before the judges 24 good and lawful men, without commanding him in what manner they are to be drawn or selected.—White v. Commonwealth, 6 Bin. 179, 6 Am. Dec. 443.

[t] (Pa. 1816) Upon the receipt of a precept for holding court by the sheriff, it is his duty to give notice thereof to the county commissioners, but it is unnecessary that the precept should be directed to them, as well as the sheriff.—Commonwealth v. Smith, 2 Serg. & R. 300.

[tt] (Pa. 1860) Under Act April 20, 1858, making the sheriff a member of the jury board, and requiring that the board shall draw the jurors from the wheel according to the venire directed to the sheriff, it is not ground for quashing the array that the venire directed the sheriff, and not the board, to draw the jurors, according to law.—Commonwealth v. Miller, 4 Phila. 210.

[u] (Pa. 1895) A venire to "the sheriff and commissioners of L. county" is not invalidated by the clerk's failure to write "jury" before the word "commissioners," as directed by the court.—Commonwealth v. Smith, 16 Pa. Co. Ct. R. 568; Id. 577.

[uu] (S. C. 1814) Though a venire must be made returnable on the first day of the term, yet where the legislature has changed the date of the commencement of the term, after the venire issued, and has declared the venire good for the altered date, no objection based on the noncorrespondence of the dates of the venire and the session can be made.—Potter v. Shackleford, 3 Brev. 487.

[v] (S. C. 1848) Though a seal to the venire facias is necessary, it is not essential that the impression of the device should be manifest on the seal.—State v. McElmurray, 3 Strob. 33.

[vv] (S. C. 1848) It is not necessary that the names of the jurors should be embodied in the writ of venire facias. It is sufficient if they be arranged in lists below the signature of the clerk.—State v. McElmurray, 3 Strob. 33.

[w] (S. C. 1850) A writ of venire facias having a piece of paper stuck on with a wafer, over the clerk's name, is sufficiently sealed; the clerk having verified it by his signature.—State v. Thayer, 4 Strob. 286.

[ww] (S. C. 1858) A venire facias for a jury is good, although the sheriff has not indorsed on it the fact of entry in his office.—State v. Clayton, 11 Rich. Law, 581.

[x] (S. C. 1883) Gen. St. 1882, § 742, requiring the clerk to issue every execution, bench warrant, or other process, issuable or directed to be issued by the courts of sessions, in the name of the attorney general or solicitor of the circuit, does not apply to a writ of venire to summon jurors both for the courts of sessions and common pleas.—State v. Hill, 19 S. C. 435.

[xx] (S. C. 1883) The constitutional provision that "all writs and processes shall run in the name of the state of South Carolina is sufficiently complied with by" a writ of venire beginning: "State of South Carolina, County of Spartanburg. To the Sheriff of Spartanburg County."—State v. Hill, 19 S. C. 435.

[y] (Tenn. 1837) Where a venire facias directed the sheriff to summon "good and lawful men" to serve as jurors, it is sufficient, without showing the particular qualifications necessary to constitute them "good and lawful" jurors.—State v. Alderson, 18 Tenn. (10 Yerg.) 523.

[yy] (Tenn. 1849) A venire ran in these words, "I command you to summon," etc., and was signed by the clerk of the court in his own name, without the addition of his office. The venire was *held* valid.—State v. Cole, 28 Tenn. (9 Humph.) 626.

[z] (Va. 1880) Under Acts 1877–78, p. 340, § 4, requiring jurors for the trial of a capital case to be summoned from those "residing remote from the place where the offense is charged to have been committed," the language of the venire facias was, "where the felony was committed." *Held* no error.—Poindexter v. Commonwealth, 33 Grat. 766.

[zz] (Va. 1890) Under Acts 1877–78, p. 340, providing that "the venire facias in a case of felony, other than where the punishment may be death, shall command the officer to summon 16 persons, to be taken from a list to be furnished him by the judge," and that, "where the punishment may be death," the writ shall require 24 persons to be summoned in like manner as above, a venire is invalid, in a case where the penalty may be death, if it does not show by whom the list was furnished to the officer, or that the writ was directed by the court.—Spurgeon v. Commonwealth, 86 Va. 652, 10 S. E. 979.

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§ 296. —— Alteration and amendment.

[a] (Ga. 1850) Where a juror, summoned by the name of "J. McC. E.," answered the call of his name, and stated that his name was "J. McK. E.," the correction of the mistake and impaneling the juror was not error.—Judge v. State, 8 Ga. 173.

[b] (Miss. 1894) A motion to quash the venire facias on the ground that the clerk's signature was omitted therefrom was properly overruled; process containing errors of omission being amendable on such motion, under Code 1892, § 3439.—Hale v. State, 72 Miss. 140, 16 South. 387.

[c] (N. J. 1808) A justice of the peace cannot order the constable to strike out the names of such jurors as do not appear at the trial, and put other names in the venire.—Lyon v. Tharp, 3 N. J. Law (2 Penning.) 463.

[d] (N. J. 1810) A constable, before he has returned a venire to a justice's court, may strike out the name of a juror and insert another.—Boyles v. McEowen, 3 N. J. Law (2 Penning.) 677.

[e] (N. J. 1888) Where defendants are improperly allowed to challenge three of the twelve jurors originally summoned, and others are substituted by the officer from bystanders, before making his return on the venire, they cannot object thereto, as, in the absence of any statutory direction, the court has implied power to complete the panel in this manner.—O'Hagan v. Crossman, 50 N. J. Law (21 Vroom) 516, 14 Atl. 752.

[f] (N. Y.) Irregularities in the contents, or in the execution of jury process, are amendable.—(1804) Livingston v. Rogers, 1 Caines, 583; (1827) Beach v. Fulton Bank, 7 Cow. 509.

[g] (N. Y. 1825) A venire may be amended, after the term, by adding a seal and filing a sheriff's return thereto nunc pro tunc.—Jackson v. Brown, 4 Cow. 550.

[h] (Pa. 1886) The fact that the sheriff put a bystander, who was a freeholder, on a jury of substantial freeholders, in the place of one who had been summoned, but had failed to appear, will not invalidate the proceedings.—Appeal of Mullin, 5 Atl. 738.

§ 297. Service of writ.

Effect of failure of return to show time of summoning, see post, § 303 [f].

—— *to summon juror who is present, see* post, § 307 [c].

Effect of irregularity in time of summoning, see post, § 307 [b].

[a] (S. C. 1892) Gen. St. § 2246, requiring the sheriff to summon each juror by reading to him the venire, "with his indorsement thereon of his having been drawn," refers to the indorsement to be made by the sheriff in the schedules attached.—State v. Toland, 36 S. C. 515, 15 S. E. 599; Same v. Dearing, Id.

§ 298. Officers who may summon.

Effect of approval of sheriff of panel selected by nominee of party deputized by sheriff, see post, § 307 [t].

—— *of sheriff's failure to take the oath in relation to selecting jurors, see* post, § 307 [u].

—— *of summoning by sheriff instead of police officer, see* post, § 307 [n].

Officer to whom venire should be directed, see ante, § 295.

Return by deputy sheriff in proceedings by landlord to recover possession, see post, § 303 [n].

Sufficiency of return showing summoning of jurors by person professing to act for sheriff, though not regular deputy, see post, § 303 [k].

Waiver of right to object, see post, § 503 [t].

De facto officers in general, see "Officers," I. (D), (E).

—— *sheriffs, see* "Sheriffs and Constables," I. (A), (C).

[a] (Ga. 1855) An undersheriff may appoint a bailiff for the purpose of summoning jurors.—McGuffie v. State, 17 Ga. 497.

[b] (Ga. 1858) Bailiffs may summon a jury under orders from the sheriffs, as they are then his deputies pro hac vice; and a deputy may summon them, under our statute.—Conner v. State, 25 Ga. 515, 71 Am. Dec. 184.

[c] (Ga. 1872) It is no ground for challenge to the array that some of the jurors were summoned by a bailiff, in attendance upon the court and under its direction, unless the defendant shows that he is in some way prejudiced thereby.—Westmoreland v. State, 45 Ga. 225.

[d] (Idaho, 1889) No provision having been made by the territorial legislature for obtaining jurors in cases where the United States is a party, or where the cause arises under the constitution or laws of the United States, the court has common-law power to issue the venire to the marshal of the United States, directing him to summon jurors from the body of the district at large.—United States v. Kuntze, 2 Idaho, 446, 21 Pac. 407.

[e] (Miss. 1844) Jurors may be summoned by a deputy sheriff.—Kelly v. State, 11 Miss. (3 Smedes & M.) 518.

[f] (N. J. 1803) Where a venire was directed to any one of the coroners, without any suggestion to the court that the sheriff was exceptionable, it was *held* a fatal defect, and not cured by verdict.—Hugg v. Kille, 7 N. J. Law (2 Halst.) 435.

[g] (N. Y. 1816) A venire in a justice's court must be executed by a constable of the town from which the jury is summoned and in which the cause is tried.—Louw v. Davis, 13 Johns. 227.

[h] (N. Y. 1819) If a venire be executed and returned by any other person than the sheriff, without a special suggestion of the facts, and an award to such person upon the record, it is an error, for which judgment will be reversed.—Cooper v. Bissell, 16 Johns. 146.

[i] (N. Y. 1865) Laws 1858, c. 322, §§ 1, 41, providing that jurors for Kings county shall thereafter be summoned by the commissioner of jurors, and that the method of summoning provided in the act shall be exclusive, practically abrogates all the sheriff's power to summon jurors in that county.—Kenny v. People, 31 N. Y. 330.

[j] (Pa. 1845) A deputy sheriff cannot deputize another to select and summon a jury of inquest, nor will the subsequent assent of parties validate such act.—McMasters v. Carothers, 1 Pa. (1 Barr) 324.

[k] (S. C. 1892) Where jurors are summoned by a de facto officer, and attend, and are sworn, and serve, the authority of the officer cannot be questioned by the prisoner.—State v. McGraw, 35 S. C. 283, 14 S. E. 630.

[l] (Va. 1819) On a trial for murder, where the venue has been changed by the court from the county of R. to the county of W., the jury are properly summoned by the sheriff of W.—Vance v. Commonwealth, 2 Va. Cas. 162.

[m] (Va. 1849) Where a prisoner was examined before the hustings court of Richmond,

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and sent to Henrico circuit court to be tried, it was *held* that the venire facias was properly executed by the sergeant of the corporation of the city.—Smith v. Commonwealth, 6 Grat. 696.

§ 299. —— Bias of sheriff or other officer as disqualification.

See post, § 300 [c].

Appointment of jury commissioners at current term instead of previous term, see ante, § 268 [q, r].

Bias of sheriff as disqualification to summon special venire, see post, § 327.

Disqualification of officer to select panel for struck jury, see post, § 369 [g, h].

Effect of summoning jurors by deputy sheriffs named by disqualified sheriff, see post, § 300 [f].

Issue of venire to other than sheriff, where sheriff is not shown to be disqualified, see ante, § 298 [f, h].

Special venire in trespass against sheriff in place of regular panel selected by him, see post, § 313 [c].

[a] (Ala. 1833) The statutes relating to juries require that the sheriff shall furnish the clerk with a list of the freeholders and householders of the county; that the county judge, the commissioners of revenue and roads, the clerk, and the sheriff shall select from such list those whom they shall deem qualified to serve as jurors; that the selected names shall be placed in a box by the clerk; that the box shall be shaken, and the clerk and sheriff shall draw 36 jurors, for whom the clerk shall issue a venire, returnable at the next term; that the names so drawn shall be kept separate till the entire list is exhausted; and that from the 36 jurors summoned the grand jurors shall be drawn by lot in open court, and the remainder shall be the panel of petit jurors. *Held*, that it was not ground for challenge to the array, on trial for negro stealing, that the sheriff, who assisted in selecting and drawing the panel, was one of the owners of the slave stolen, since the sheriff, under such statutes, had no chance to pack the jury.—Prince v. State, 3 Stew & P. 253.

[b] (Conn. 1806) It is no ground of challenge to the whole panel that the clerk who issued the warrant to the constables of the several towns, to summon the jury, is party to the suit on trial.—Hart v. Tallmadge, 2 Day, 381, 2 Am. Dec. 105.

[c] (Conn. 1821) Where the officer who served the venire, on a complaint for forcible entry and detainer, had previously, according to his return on an execution, put the complainant in possession, which return the defendants claimed to be false, it was *held* that this was no ground of exception to the array.—Dutton v. Tracy, 4 Conn. 79.

[d] (Conn. 1850) It being indispensable to the pure administration of justice, in trials by jury, that the jurors should be selected with the utmost fairness and integrity, it is a good cause of challenge to them that the officer returning them was interested, or guilty of any partiality or misconduct, in their selection.—Quinebaug Bank v. Tarbox, 20 Conn. 510.

[e] (Fla. 1890) An objection to jurors on a murder trial that they were summoned by F., a witness for the state, is frivolous, where F. did not speak to the jurors about the case, and where the list of jurors to be summoned was furnished by the sheriff, so that F. had no discretion to summon jurors prejudiced against defendant.—Hodge v. State, 26 Fla. 11, 7 South. 593.

[f] (Ind. 1880) If the sheriff, being a party in the cause, have summoned the jurors selected, under the statute of 1827, the array may for that reason be challenged.—Cowgill v. Wooden, 2 Blackf. 332.

[g] (Mass. 1824) Acts 1802, c. 135, § 1, provides that when a jury shall be ordered by the court of general sessions to determine the damages from the location of a highway, and the sheriff, or either of his deputies, be a party, or interested, the jury shall be summoned by a coroner. *Held*, that where a jury was summoned by a deputy sheriff to assess damages from the laying out of a turnpike, and another deputy of the same sheriff was a member of the turnpike corporation, the verdict of the jury must be set aside.—Barre Turnpike Corp. v. Appleton, 19 Mass. (2 Pick.) 430.

[h] (Mich. 1886) A constable shown to be interested in the defendant's conviction, and to have prejudice against him, is disqualified from impaneling a jury, though the constable himself states that he has no feeling that would prevent him from selecting an impartial jury.—People v. Felker, 61 Mich. 114, 28 N. W. 83.

[i] (N. J. 1817) A challenge to the array, because the constable is related to the plaintiff, is not confined to relationship within the third degree.—Vanauken v. Beemer, 4 N. J. Law (1 Southard) 364.

[j] (N. J. 1827) If, upon the trial of an appeal, a jury is demanded, and there is an objection to the sheriff, the common pleas has power to order the coroners to return a jury.—De Wit v. Decker, 9 N. J. Law (4 Halst.) 148.

[k] (N. J. 1845) In a suit brought by the board of chosen freeholders of a county against a late county collector and his sureties on his official bond, it is not a good ground of principal challenge to the array that the sheriff, who summoned the jury, is an inhabitant of the county, and owner of land and other taxable property therein.—Peck v. Freeholders of Essex, 20 N. J. Law (1 Spencer) 457.

[l] (N. Y. 1809) If the sheriff, who is a party in the cause, serves the venire, it is good cause of challenge to the array.—Woods v. Rowan, 5 Johns. 133.

[m] (N. Y. 1813) It is cause of challenge to the array that the jury were summoned by a constable who acts as advocate for the party in a justice's court.—Watkins v. Weaver, 10 Johns. 107.

[n] (N. Y. 1827) It is not a good ground for principal challenge that the circuit clerk is attorney of one of the parties, and was so at the time of drawing, making, and arraying the panel, since the clerk has nothing to do with the selection of the jurors.—Wakeman v. Sprague, 7 Cow. 720.

[o] (N. Y. 1846) It is not a good ground of challenge to the array in a justice's court that the constable who served the venire had appeared and pleaded for one of the parties to the suit, and had, at her request, employed an attorney to appear for her on the trial.—Miles v. Pulver, 3 Denio, 84.

[p] (N. Y. 1876) Where the sheriff's interest in an action conflicts with his duties, though he is not a party of record, the talesmen should be summoned by the coroner.—People v. Tweed, 50 How. Prac. 286.

[q] (Pa. 1823) If the sheriff is brother to one of the parties, it is a good cause of challenge to the array.—Munshower v. Patton, 10 Serg. & R. 334.

[r] (Pa. 1889) It is not ground for quashing an array of petit jurors that the sheriff who drew them made the information on which war-

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rant for arrest was issued.—Clark v. Commonwealth, 123 Pa. 555, 16 Atl. 795, 23 Wkly. Notes Cas. 317.

[s] (Wis. 1850) It is not a good cause of challenge to the array of petit jurors that the sheriff who summoned them is a son of the prosecuting attorney, no proof being offered that he was not indifferent or impartial.—State v. Cameron, 2 Chand. 172, 2 Pin. 490.

§ 300. —— Substitute for disqualified officer.

[a] (Cal. 1859) In trespass against the sheriff, there being no coroner, it was proper for the court to appoint an elisor to summon the special jury.—Pacheco v. Hunsacker, 14 Cal. 120.

[b] (Ga. 1859) Where the sheriff is disqualified to act, the bailiff may summon the jury, if the court so order.—Phillips v. State, 29 Ga. 105.

[c] (Ind. 1845) The circuit court may appoint an elisor for the purpose of summoning a jury, in a cause in which the sheriff is a party, there being no coroner in attendance; and a person, though he have served under the sheriff as bailiff to the petit jury in other causes, may be appointed such elisor.—State v. Bodly, 7 Blackf. 355.

[d] (Iowa, 1892) Under Code 1873, § 350, providing that service of "process" in actions where the sheriff is disqualified to act officially shall be by the coroner, it was error to permit a deputy sheriff to impanel a jury in an action against the sheriff.—Gollsbitsch v. Ranibon, 84 Iowa, 567, 51 N. W. 48.

[e] (Ky. 1888) Cr. Code, § 193, provides that for sufficient cause the court may appoint some one other than the sheriff to summon petit jurors. The court, at defendant's request, appointed another person to summon the jury, who appointed an assistant, to whom defendant objected. It not appearing that defendant was in any manner prejudiced, *held*, that his objection was properly overruled. — Forman v. Commonwealth, 86 Ky. 605, 6 S. W. 579.

[f] (Tenn. 1895) The fact that a jury was summoned by a deputy appointed by the court, assisted by three deputies named by the sheriff, who, being interested in a reward offered for defendant's conviction, was disqualified from acting himself, is such an irregularity as to be ground for new trial.—Clapp v. State, 94 Tenn. (10 Pickle) 186, 30 S. W. 214.

§ 301. —— Appointment of substitute for officer alleged to be disqualified.

[a] (Iowa, 1849) Where a party objecting to a sheriff on account of prejudice asks the court to appoint an elisor to impanel a jury, he sufficiently manifests, by implication, his objection to the coroner also, and the court may appoint an elisor.—Harriman v. State, 2 G. Greene, 270.

[b] (Iowa, 1877) The provision of Code, § 350, that on an affidavit of partiality, prejudice, consanguinity, or interest, on the part of the sheriff, the clerk or court shall direct process to the coroner, whose duty it shall be to execute it in the same manner as if he were sheriff, applies in criminal as well as civil cases. On such an affidavit in a criminal cause, the duty of filling the jury should be devolved on the coroner.—State v. Hardin, 46 Iowa, 623, 26 Am. Rep. 174.

[c] (Ky. 1887) Affidavits being filed in a criminal prosecution stating that the sheriff would not summon fair, competent, and impartial jurors to try the case, the court had authority to appoint another person to summon jurors, under Cr. Code, § 193, providing that the court may, for sufficient cause, designate some other officer or person than the sheriff to summon petit jurors; and under this section the appointment may be made at the instance of either party,—either the prosecution or the accused.—Johns v. Commonwealth, 3 S. W. 369.

[d] (Ky. 1889) Where, during the impaneling of the jury, the judge ascertains that the sheriff is related to the accused, it is proper, without motion or affidavit, to appoint an elisor to act in the sheriff's stead.—Allen v. Commonwealth, 12 S. W. 582.

[e] (Mo. 1888) Rev. St. § 3894, provides that, when it shall appear to the court that the sheriff is prejudiced, the coroner shall execute the process. *Held*, on motion for the appointment of elisors in a criminal case, that defendant's affidavit alleging prejudice in the sheriff and coroner was not conclusive, and that a denial of the motion was not reversible error, in the absence of abuse of discretion.—State v. Mathews, 98 Mo. 119, 10 S. W. 30.

[f] (Mo. 1891) Under Rev. St. 1889, § 3244, providing that, where the sheriff is interested or prejudiced, the court may appoint one or more persons to perform his duties, the fact of the sheriff's interest or prejudice may be ascertained by the court from ex parte affidavits; and it is no abuse of discretion to remove the sheriff, and appoint elisors to summon the venire and perform the other duties of the sheriff in a murder trial, when the prosecuting attorney makes affidavit that the sheriff and coroner are prejudiced in favor of defendant. — State v. Hultz, 106 Mo. 41, 16 S. W. 940.

§ 302. —— Right to opportunity to object to constable as summoning officer.

[a] (N. Y.) 2 Rev. St. p. 243, § 97 (3 Rev. St. [5th Ed.] p. 441, § 88), provides that the justice of the peace issuing a venire shall deliver the same to some constable of the county disinterested between parties, and against whom no reasonable objection shall have been made by either party. *Held*, that where a venire was issued by a justice of the peace on demand of the defendant out of court, and in the absence of the plaintiff, and was delivered to the constable without the knowledge of plaintiff and before he had notice of the application, the panel of jurors summoned thereunder was fatally invalid, since the statute plainly implies that there shall be an opportunity to object to the constable.—(1864) Rice v. Buchanan, 41 Barb. 147; (1878) Becker v. Sitterly, 58 How. Prac. 38.

§ 303. Return of venire or other process or order.

Effect on panel drawn of legislative postponement of term, see post, § 391 [f].
Presumption in favor of timely return, see post, § 306 [d].
Return of special venire, see post, §§ 328, 329.
Time for venire to be made returnable, see ante, § 295 [k].

[a] (Cal. 1854) The time provided by the statute in which a jury shall be returned by the sheriff is directory, and not mandatory.—Mowry v. Starbuck, 4 Cal. 274.

[b] (Conn. 1845) The facts that the return of a constable on a summons for a juror begins with "Whereas," and is not grammatically correct, are not sufficient grounds for an arrest of judgment, where the meaning of the return can be readily understood, and, as so read, it shows the officer to have acted in a legal manner.—Maples v. Park, 17 Conn. 333.

[c] (Me. 1828) Where a venire facias directed the constable to cause a juror to be drawn

not more than twenty nor less than six days before the sitting of the court, a return that the juror was drawn "as above directed," but without date, is sufficient.—In re Fellows, 5 Me. (5 Greenl.) 333.

[d] (Me. 1828) Where the return to a venire was signed by the constable, who styled himself "Constable of the town," without saying of what town, the return was sufficient; the venire being directed to the constable of the town of M.—In re Fellows, 5 Me. (5 Greenl.) 333.

[e] (Me. 1828) The return of a constable, in certifying a name of a juror, that "we have appointed," is sufficient, as "we" will be taken to mean the town of which the constable was an inhabitant.—In re Fellows, 5 Me. (5 Greenl.) 333.

[f] (Mass.) Where the constable had omitted to insert the name of the juror in his return, the juror was put upon the panel on his making oath that he had been summoned. So where it did not appear by the constable's return on the venire at what time he summoned the jurors, they were put upon the panel upon making oath that they had received due notice.—(1810) In re Patterson, 6 Mass. 486; (1822) Anonymous, 18 Mass. (1 Pick.) 196.

[g] (Mich. 1870) The jurisdictional prerequisite (Const. art. 15, § 15), that a jury determining the compensation for taking lands must be composed of disinterested nonresident freeholders, cannot be supplied by parol, but must be shown in the return to the venire.—People v. Village of Brighton, 20 Mich. 57.

[h] (Minn. 1868) The sheriff's return of service of the venire on "the within named" parties, instead of setting out their names, is an immaterial error, where the jurors were present in court.—State v. Gut, 13 Minn. 341 (Gil. 315).

[i] (Minn. 1868) Return of venire to the clerk of the court the day before the court met, instead of at the opening, is an immaterial irregularity.—State v. Gut, 13 Minn. 341 (Gil. 315).

[j] (Minn. 1868) A return of a sheriff to a venire that he did, "at least six days before the sitting of the court, serve the summons upon the within-named parties, to serve as petit jurors, by reading," etc., is not a sufficiently material variance from the statutory direction that he served it on "20 jurors named therein," to afford a ground for challenge.—State v. Gut, 13 Minn. 341 (Gil. 315).

[k] (Miss. 1885) It is sufficient to show on a venire facias that the jurors have been notified to appear by some person professing to act for the sheriff, though not the sheriff or a deputy formally appointed.—Gillum v. State, 62 Miss. 547.

[l] (Nev. 1866) Defendant was not prejudiced by the failure of the sheriff to make return to the venire until the first day of the term, since the statute regulating the summoning of jurors was merely directory.—State v. Squaires, 2 Nev. 226.

[m] (Pa. 1814) The sheriff, in his return to process for drawing jurors, should make it apparent that they were legally drawn.—Eaton v. Commonwealth, 6 Bin. 447.

[n] (Pa. 1870) Under the act requiring the precept, in proceedings by a landlord to recover possession of leased premises, to be issued to the sheriff, the selection of names for jurors must be performed by the sheriff in person; and hence a return, "I summoned," etc., signed by 'A. B., Deputy Sheriff; C. D., Sheriff,"—is irregular; the signing by the sheriff only importing his adoption of the deputy's act.—McMullen v. Orr, 1 Leg. Gaz. R. 92.

[o] (Tex. 1894) The return on a writ of special venire in a criminal cause that certain persons named in the writ, after diligent effort, could not be reached within the time allowed for service, as they resided in a remote part of the county, is sufficient on a motion to quash on the ground that the return did not show what diligence had been used.—Parker v. State, 33 Tex. Cr. R. 111, 21 S. W. 604.

[p] (Va. 1887) A writ, in the usual form, commanded a sheriff to summon a jury from a list to be furnished by the judge, and to have "there this writ and the judge's list of said jurors." There followed in the record "the list of venire referred to above," signed by the judge without adding his official title, and "executed by summoning the within-named parties." *Held*, that it sufficiently appeared that the persons were summoned by a list furnished and signed by the judge.—Coleman v. Commonwealth, 84 Va. 1, 3 S. E. 878.

§ 304. —— Amendment of return.

Alteration and amendment of venire, see ante, § 296.

Amendment of return to special venire, see post, § 329.

Return of venire after term, see ante, § 296 [f, g].

[a] (Ala. 1876) On a motion to quash the venire in a capital case, on the ground that the sheriff's return does not show that a copy was served on the prisoner one entire day before the day appointed for the trial, as required by Rev. Code, § 4171, the sheriff may be allowed to amend his return showing such service.—Gray v. State, 55 Ala. 86.

[b] (Mass. 1822) Where a constable, in his return upon a venire, omitted to mention the day on which he summoned the jurors, he may, after the jury has been sworn and put on the panel, supply this defect in his return, when it appears from the answers of the jurors that they had received notice at least four days before the sitting of the court, as required by St. 1807, c. 140, § 6.—Anonymous, 18 Mass. (1 Pick.) 196.

[c] (N. J. 1794) Where the sheriff annexes the panel to the venire, and not to the distringas, the latter may be amended.—Hill v. Hill, 1 N. J. Law (Coxe) 261, 1 Am. Dec. 206.

[d] (N. J. 1848) A sheriff may amend a return to a venire after it has been actually returned, by adding the name of a juror duly summoned and present, but omitted in the panel.—Berry v. Williams, 21 N. J. Law (1 Zab.) 423.

[e] (N. J. 1888) Where the officer omits to sign the return of the venire for the trial jury, it is proper for the justice to direct him, after defendants have objected on account of the omission, to certify to the return over his official signature before the jury is sworn.—O'Hagan v. Crossman, 50 N. J. Law (21 Vroom) 516, 14 Atl. 752.

[f] (N. C. 1893) The fact that a sheriff was allowed to amend his return, showing the summoning of 150 men, so as to show who were summoned, and who not, and the reason they were not summoned, is not ground for challenge to the array.—State v. Whitt, 113 N. C. 716, 18 S. E. 715.

[g] (Pa. 1839) The neglect of the sheriff to sign his return to the jury process directed to him does not render it incurably vicious, and is not a sufficient reason to induce the court to quash the array of jurors; but the court will quash the return to the process, and, on motion, will direct the sheriff to complete his re-

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turn, by indorsing on his writ the execution thereof, and signing the same.—Commonwealth v. Chauncey, 2 Ashm. 90.

[h] (Pa. 1860) Where the sheriff failed to make his return to a venire under oath, he was properly allowed to supply the omission.—Commonwealth v. Miller, 4 Phila. 210.

[i] (Pa. 1885) Act April 14, 1834, § 112, provides that the judges of the court of quarter sessions may order the issuance of one venire for jurors in that court and in the oyer and terminer and general jail delivery, to be held by them at the same time, and, if separate venires be ordered the same jury panel shall be annexed to the return on each writ. *Held*, that where the precept was regular, directed to the clerk of oyer and terminer, and of the quarter sessions, and prothonotary of the common pleas, there being the same clerk for all three courts, and only one venire was issued and returned, which was to the quarter sessions, the absence of a venire and return thereto to the court of oyer and terminer is an irregularity merely, which may be cured by the return of a venire nunc pro tunc to the oyer and terminer.—Commonwealth v. Seybert, 4 Pa. Co. Ct. R. 152.

§ 305. Filing and publication of list of jurors summoned.

[a] (La. 1867) The law prescribing the mode of drawing juries directs that a list of jurors drawn for each term shall be filed in the clerk's office as soon as completed, subject to the inspection of any person who may desire to examine it, in order that any defects or informalities which may have occurred in the formation, drawing, or summoning of jurors, or any other defect whatsoever in the construction of the jury, shall be made on the first day of the term. Under this law, if the venire is not filed on or before the first day of the term, and the petit jury find a verdict of guilty, a new trial will be granted.—State v. Vegas, 19 La. Ann. 105.

[b] (La. 1892) In a criminal case it is not ground for reversal that the procès verbal of the drawing of the jury was merely deposited in the clerk's office, without being actually filed.—State v. Hall, 44 La. Ann. 976, 11 South. 574.

[c] (La. 1893) Acts 1880, No. 35, providing for the selection of a jury where the punishment is not necessarily imprisonment at hard labor or death, does not require the publication of the names of the jurors.—State v. Wright, 45 La. Ann. 57, 12 South. 129.

§ 306. Presumption of regularity.

Presumptions as to selection of jury in criminal prosecutions, see "Criminal Law," vol. 15, cc. 772–774, § 3023.

[a] In the absence of any showing to the contrary it will be presumed that jurors were regularly drawn and summoned.
—(Ala. 1889) Smith v. State, 88 Ala. 73, 7 South. 52;
(Wis. 1885) Osgood v. State, 64 Wis. 472, 25 N. W. 529.

[b] (Ala. 1893) Where the names of persons on the venire were not followed by a statement of their residences, but by the numbers 1 to 13, the interpretation of the court that these numbers referred to the precincts in which such persons lived will not be disturbed.—Jones v. State, 104 Ala. 30, 16 South. 135.

[c] (S. C. 1892) In the absence of any showing in the record to the contrary it will be presumed that venires were properly served on the jury commissioners.—State v. McGraw, 35 S. C. 283, 14 S. E. 630.

[d] (S. C. 1892) Where the return of a writ of venire facias bears date the first day of the term, it will be presumed to have been made before the opening of court on that day, and so regular, under Gen. St. § 2246, requiring such return to be made "before the opening or time of holding court."—State v. Toland, 36 S. C. 515, 15 S. E. 599; Same v. Dearing, Id.

[e] (Tex. 1880) If the clerk draws from the box a less number of names than the maximum, it will be presumed, in the absence of any showing to the contrary, that he drew all that were remaining in the box, and could not furnish a maximum.—Davis v. State, 9 Tex. App. 634.

§ 307. Effect of errors and irregularities.

Amendment of irregular return, see ante, § 304.
Effect of failure to insert name of juror and time of summoning in return to venire, see ante, § 303 [f].
Arrest of judgment for error in summoning jury in criminal prosecutions, see "Criminal Law," vol. 15, cc. 248–250, § 2441.

[a] A challenge to the array, based on an irregularity in drawing the jury, cannot be sustained, where no positive injury is shown to have been done the defendant.
—(Ill. 1874) Wilhelm v. People, 72 Ill. 468;
(La. 1881) State v. Smith, 33 La. Ann. 1414;
(1885) Same v. Sandos, 37 La. Ann. 376;
(1892) Same v. Taylor, 44 La. Ann. 783, 11 South. 132;
(N. Y. 1865) People v. Ferris, 1 Abb. Prac. (N. S.) 193.

[b] The time of summoning jurors is immaterial, so far as it affects their official acts.
—(Mass. 1822) Inhabitants of Amherst v. Inhabitants v. Hadley, 18 Mass. (1 Pick.) 38;
(Ohio, 1834) Hurley v. State, 6 Ohio (6 Ham.) 399;
(Tex. 1891) Roberts v. State, 30 Tex. App. 291, 17 S. W. 450.

[c] The fact that a juror was not summoned to attend as directed by the statute is no ground of exception, where he is regularly drawn, and attends the court.
—(U. S. 1820) United States v. Cornell, Fed. Cas. No. 14,868 [2 Mason, 91];
(Ga. 1850) Judge v. State, 8 Ga. 173;
(Me. 1828) In re Fellows, 5 Me. (5 Greenl.) 333.

[d] If the officers required by statute to be present at the drawing of the jurors are actually present, the fact that no notice was given them is immaterial.
—(Cal. 1880) People v. Gallagher, 55 Cal. 462;
(Kan. 1883) State v. Yordi, 30 Kan. 221, 2 Pac. 161.

[e] (Ala. 1889) The fact that the clerk had not written up the minutes, and hence there was no record of the order for the venire, is no ground for quashing the venire.—Hawes v. State, 88 Ala. 37, 7 South. 302.

[f] (Ala. 1893) A motion to quash a venire on the ground that the order for the summons of the jurors recited that they should appear "at the next term," and that they appeared and were impaneled at the term during which the order was issued, is frivolous, where

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the exact date on which they were to appear was set out in the order and in the summons, showing that they were to appear at the term during which the order was made.—Peters v. State, 100 Ala. 10, 14 South. 896.

[g] (Colo. 1889) The discharge of the regular panel, because not drawn the statutory 30 days before the term, though not necessary, does not necessitate reversal, where it does not affirmatively appear why the panel was discharged.—Babcock v. People, 13 Colo. 515, 22 Pac. 817.

[h] (Ill. 1887) Eminent Domain Act, § 6, provides that it shall be the duty of the clerk of the court at the time of issuing summons, or making publication, to write the names of 64 freeholders on 64 slips of paper, and cause to be selected from said 64 names 12 of said persons for jurors. The clerk took from the 64 slips made in a previous month for the trial of another case a number of slips, and used them as part of the slips for the present case. *Held*, that the clerk's failure to rewrite the names was not sufficient ground for a challenge to the array of jurors.—Kiernan v. Chicago, S. F. & C. R. Co., 123 Ill. 188, 14 N. E. 18.

[i] (Ill. 1891) A mere irregularity in drawing a jury is not sufficient cause to sustain a challenge to the array, unless the irregularity complained of is of such a character as would probably have produced a change in the panel, or presented a list of names to choose from different from those which would be produced by a compliance with the law.—Nealon v. People, 89 Ill. App. 481.

[j] (Ind. 1881) The inhibition of 2 Rev. St. 1876, p. 418, against the clerk issuing, without an order of the judge, a venire for the attendance of the jurors, constitutes no restriction on the power of the court to organize the panel, if found in attendance, though they have come in response to a summons issued without the prescribed order therefor.—Hess v. State, 73 Ind. 537.

[k] (La. 1874) Acts 1873, No. 96, § 9, provides that it shall not be ground for challenge to the array that some of the jurors are not qualified, nor because of any other defect or irregularity than in the manner of drawing the juries as above provided, and that no such defect or irregularity shall be such ground, unless it appear that some fraud or great wrong has been committed that would work great injury. *Held*, that where one accused of crime challenged the array, on the ground that the venire was drawn under an act not applicable to the place of trial, the challenge was properly overruled, in the absence of any showing of fraud or injury.—State v. Miller, 26 La. Ann. 579.

[l] (La. 1895) Under Acts 1894, No. 152, changing the terms of the county courts, and requiring the action of the district judges to make such changes effective, the drawing of a jury before the requisite orders were made to carry the act into effect is not vitiated, where it appears that such jury was in attendance at the term fixed by the rules in force when they were drawn, and that the term for which they were so drawn coincided with that subsequently fixed by the orders of court under the act.—State v. Desroche, 47 La. Ann. 651, 17 South. 209.

[m] (La. 1896) Judgment will not be arrested for irregularities in summoning the jury.—State v. Dickerson, 48 La. Ann. 308, 19 South. 140.

[n] (Mich. 1871) A conviction by jurors properly drawn and impaneled will not be disturbed because the jurors were summoned by the sheriff, instead of by an officer of the metropolitan police.—People v. Williams, 24 Mich. 156, 9 Am. Rep. 119.

[o] (Mich. 1872) A misrecital in the copy of an order directing the sheriff to summon jurors, upon which the return was made, of the ground on which the order was made, but which had no bearing on the duty either of the sheriff or of the jurors summoned, and no influence upon the selection of the names, *held*, on motion for new trial, to be of no consequence whatever.—People v. Jones, 24 Mich. 215.

[p] (Mich. 1881) The statute requires that the clerk shall draw the names of the panel from the jury box in the presence of the attending officers. *Held*, by a divided court, that a challenge to the array, on the ground that the sheriff actually drew the names while the clerk kept the minutes of the drawing, was properly overruled.—Gott v. Brigham, 45 Mich. 424, 8 N. W. 41.

[q] (Miss. 1840) A challenge to the array cannot be made, since the act of 1836, for informality of the venire facias.—Thomas v. State, 6 Miss. (5 How.) 20.

[r] (N. Y. 1829) Under the present modes of drawing and summoning juries, no defects or irregularities in the venire will affect the judgment or the proceedings at the trial.—Haight v. Holley, 3 Wend. 258.

[s] (N. Y. 1829) A challenge to the array will not be allowed because all persons of a particular fraternity have been excluded from the jury, if those who are returned possess the qualifications required by statute.—People v. Jewett, 3 Wend. 314.

[t] (Pa. 1848) Act March 21, 1772, § 12, commands the sheriff, in proceedings by a landlord to recover possession of leased premises, to summon a jury. *Held* that, where the sheriff deputed this duty to one nominated by the landlord, the subsequent approval by the sheriff of the selection was not sufficient to cure the irregularity; the duty to select, implied in the command to summon, requiring the exercise of judgment, and hence necessary to be performed by the sheriff, personally or by his sworn deputy.—Ayres v. Novinger, 8 Pa. (8 Barr) 412; Armstrong v. Same, Id.

[u] (Pa. 1895) Since the sheriff has no longer anything to do with selecting jurors, his omission to take that part of the oath prescribed by Act 1834, § 87, relating to the selection of jurors and the filling of the jury wheel, will not invalidate a drawing of a panel of jurors in which he did take part.—Commonwealth v. Smith (Com. Pl.) 16 Pa. Co. Ct. R. 577.

[v] (Pa. 1896) The mere fact that the occupations of jurors were misdescribed in the venire is not ground for challenge.—Commonwealth v. Windish, 176 Pa. 167, 34 Atl. 1019.

[w] (Utah, 1886) It is not cause for a challenge to the array that the marshal in summoning the panel purposely excluded members of defendant's church, where it appears that the jurors summoned were unobjectionable.—People v. Hampton, 4 Utah, 258, 9 Pac. 508.

§ 308. —— Summoning person not drawn.

[a] (Ala. 1893) The Mobile county special jury law provides that the jury commissioners shall draw 36 names from the city court jury box for jurors for the first week of the next term, and that the clerk shall preserve the slips, and direct the sheriff to summon the persons drawn; that, on trial for a capital offense, the judge, when he has fixed the number of special jurors allowed defendant, shall direct the clerk to draw such number from the jury box, the slips to be preserved in a separate package; that such slips, together with the slips containing the names of the regular jurors, shall be placed in a box, and drawn out one by one

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till the jury is completed. *Held*, on such a trial, that where the name of one T. M., Jr., was drawn by the commissioners, returned to the clerk, placed in a hat by the sheriff, and drawn out by him, and the person summoned on the venire and who answered the call was one T. M., another person, it was reversible error to put such person on defendant as a juror, over his objection.—Goodwin v. State, 102 Ala. 87, 15 South. 571.

[b] (Ala. 1893) Code, § 4322, provides that a mistake in the name of any person summoned as a juror to try a capital offense, either in the venire or in the list of jurors delivered to defendant, shall not be cause to quash the venire or to delay the trial, unless the court shall deem such action necessary, but that the names of such persons shall be discarded and others forthwith summoned in their places, and that the persons so summoned shall be disposed of as though summoned in the first instance. *Held*, that where on a murder trial the list of jurors served on defendant contained the name of F. G., Jr., and one F. G. answered the call of the venire, stated that F. G., Jr., was his son, and was thereupon excused as over age, the court properly refused to quash the venire and ordered F. G., Jr., to be summoned to attend forthwith, and suspended proceedings till he appeared.—Goodwin v. State, 102 Ala. 87, 15 South. 571.

[c] (Conn. 1837) Where A. was chosen a juror, and his name put into the box and drawn from it, but, by mistake of the sheriff, B. was summoned, and, the mistake being discovered, B. was dismissed and A. summoned, there was no ground for challenging the array.—Colt v. Eves, 12 Conn. 243.

§ 309. —— Mistakes in names of jurors.

Correction of venire as to name of juror, see ante, § 296 [a].

[a] (U. S. 1830) A mistake in the panel as to the middle initial of a juror's name is ground of objection to such juror.—United States v. Wilson, Fed. Cas. No. 16,730 [Baldw. 78].

[b] (U. S. 1843) Under Act Cong. July 20, 1840, making the method of obtaining jurors in United States courts conform to the practice in the courts of the state where they are sitting, and 2 Rev. St. N. Y. pp. 412–414, 734, requiring jury ballots to contain the names and residences of the jurors, the designation, on the panel, of a juror by the initial of his Christian name, instead of giving it in full, is ground of exception to such juror.— United States v. Matthews, Fed. Cas. No. 15,741a.

[c] (U. S. 1843) Under such statutes, a mistake in the panel as to the middle initial of a juror's name is not ground of exception to such juror, in the absence of any claim that defendant was misled, or that any other person than the juror present bore the name on the panel.—United States v. Matthews, Fed. Cas. No. 15,741a.

[d] (Ala. 1856) Defendant cannot have the entire panel set aside for the mere misnomer of one of the jurors, who was actually summoned, but failed to attend.—Bill v. State, 29 Ala. 34.

[e] (Ala. 1856) Defendant cannot have the entire panel set aside because one juror is therein designated by the initial of his Christian name, instead of giving the name in full.—Bill v. State, 29 Ala. 34.

[f] (Ala. 1860) It not appearing that the defendant had been misled by the venire, which only gave the initials of the Christian names, nor that the jurors were not customarily known by their initials, the venire was *held* good.—Aikin v. State, 35 Ala. 399.

[g] (Ala. 1874) The venire in a criminal case cannot be quashed on motion (Rev. Code, § 4175) because of mistakes in the names of the persons summoned as jurors.—Hall v. State, 51 Ala. 9.

[h] (Ala. 1875) The fact that one or more of the jurors summoned were designated by the initial letters of their Christian names, instead of their full Christian names, is not ground of challenge to the array, especially when defendant has not been thereby deceived or misled.—Fields v. State, 52 Ala. 348.

[i] (Ala. 1880) It is no ground for quashing the venire of petit jurors in a criminal case that there were mistakes in the names or the initial letters of the names of two of the persons summoned.—Roberts v. State, 68 Ala. 156.

[j] (Ala. 1884) Code 1876, § 4876, provides that, in case of a mistake in spelling the name of a person summoned as a juror, the venire shall not be quashed, unless the court in its discretion is of the opinion that the ends of justice so require; but it must direct the names of such persons to be discarded, and others to be forthwith summoned to supply their places, and the persons so summoned shall be disposed of in the same manner as if they had been summoned in the first instance. Acts 1882–83, pp. 273, 278, as amended by Acts 1882–83, p. 446, constituting a special law regulating the drawing and impaneling of grand and petit juries in Dallas county, makes no provision for such cases. *Held*, that section 4876 applies in case of mistake in the spelling of a name of a person drawn as a juror in Dallas county.—Jackson v. State, 76 Ala. 26.

[k] (Ala. 1886) Mistakes in the names of persons summoned as jurors in a capital case, are not a ground for quashing the venire.—McKee v. State, 82 Ala. 32, 2 South. 451.

[l] (Cal. 1891) The fact that the sheriff's return on the venire shows two names of jurors summoned as "Garwin" and "Zena," and that two jurors who were sworn and served were "Ganivan" and "Zina," is no ground for reversing a judgment, where it is in no other way made to appear that all the jurors who sat at the trial were not summoned.—People v. O'Brien, 88 Cal. 483, 26 Pac. 362.

[m] (Ga. 1850) It is no objection to a juror that there was a mistake as to his middle name, when the juror appeared and answered that there was a mistake, which being corrected, the juror was then impaneled.—Judge v. State, 8 Ga. 173.

[n] (La. 1832) A mistake in the name of a juror summoned, while the names of the requisite number of proper persons remain, does not vitiate the panel.—Prall v. Peet's Curator, 3 La. 274.

[o] (Md. 1810) Variances in the names of the jurors who tried a murder case and their names as they appear on the venire are not ground for arresting judgment.—Horsey v. State, 3 Har. & J. 2.

[p] (Md. 1881) A mistake in the middle name of a juror in a murder case is not a fatal error, and furnishes no ground for arresting judgment, where there was no mistake as to the identity of the person.—Munshower v. State, 56 Md. 514.

[q] (Nev. 1867) A juror was selected, placed on the jury list, and summoned to attend as a juror, under the name of "E. Barry," but his true name was "E. Berry," or "Edward Berry." *Held*, that the variance was immaterial; it satisfactorily appearing that the person attending as a juror was the one really selected.—State v. McNamara, 3 Nev. 70.

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2. SPECIAL VENIRE.

GROUNDS FOR ORDERING—NO REGULAR PANEL IN ATTENDANCE, § 310.
— DISCHARGE OF REGULAR PANEL, § 311.
— ORIGINAL VENIRE NOT RETURNED, § 312.
— INVALIDITY OF REGULAR PANEL, § 313.
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Competency of special veniremen, see post, § 434 [i].

Constitutionality of local act regarding special venires, see ante, § 266 [q].

Effect of quashing original panel, see post, § 550 [m].

Peremptory challenges, see post, § 606 [j].

Rejection of names on court's own motion, see post, § 525 [h, m].

Repeal of statute authorizing United States court to obtain jurors when needed, see ante, § 266 [a].

Requiring jurors to stand aside, see post, § 501 [e, s].

Right to jury from original panel, see post, § 350.

Summoning talesmen, see post, §§ 333–348.

Power of disqualified judge to issue special venire, see "Judges," vol. 29, c. 1821, § 243.

§ 310. Grounds for ordering—No regular panel in attendance.

Open venire when no jury is returned for term, see post, § 325 [r]

Summoning jury where territorial legislature has provided no means of obtaining jurors, see ante, § 298 [d].

[a] (Ala. 1872) Rev. Code, § 3930, gives the city court of Mobile the same jurisdiction in criminal cases as the circuit court. Acts 1857–58, No. 54, pp. 56, 57, § 3, authorizes the judge of that court to order a special term for general jail delivery. Rev. Code, § 4088, provides that in case no jury is returned to serve at any term of court, or no jury is summoned therefor, the court may direct the sheriff forthwith to summon the requisite number to serve as jurors. *Held* that, where no regular jury was drawn and summoned to attend a special term of the city court of Mobile, the court was authorized to direct the sheriff to summon a special venire to serve at such term.—Levy v. State, 48 Ala. 171; Taylor v. Same, Id. 180.

[b] (Cal.) Comp. Laws, p. 355, § 16, provides that when, for any cause, it becomes necessary during the term, the court may cause to be summoned from citizens of the county, but not from the bystanders, a sufficient number of persons to complete the trial jury, or to form a new trial jury. *Held* that, where no regular panel had been drawn or summoned for the term, the court properly ordered 36 jurors to be summoned, and a trial jury drawn from those who appeared.—(1854) People v. Stuart, 4 Cal. 218; (1863) Same v. Vance, 21 Cal. 400.

[c] (Ill. 1874) Where the time had expired for which the petit jurors had been summoned before the business of the term was completed, and a new jury was drawn in the mode required by the statute, and summoned, except that they were not summoned 20 days before court, *held* no error to overrule a challenge to the array on this ground. Cases will occur where courts must resort to their inherent powers as recognized at common law in the selection of jurors.—Rockford Ins. Co. v. Nelson, 75 Ill. 548.

[d] (Ill. 1882) Where a jury has not been legally summoned, and one is demanded, the court may issue a venire, and retain the jury summoned thereunder for all criminal trials at the term.—Fanning v. People, 10 Ill. App. (10 Bradw.) 70.

[e] (Ind. 1839) Where the jury commissioners have not selected any jurors for the second week of the term, the court has no power to summon a jury, since the provision of Rev. Code 1831, p. 291, that jurors may be obtained as at common law to make up any deficiency, only applies where there has been a regular panel summoned, but enough are not present to form a trial jury.—Wright v. Stuart, 5 Blackf. 120.

[f] (Ind. 1873) Act March 7, 1873 (Acts Reg. Sess. p. 103), empowering the circuit court, whenever its business requires it, to order the impaneling of a special jury for the trial of any cause, was intended to authorize a special jury when the regular panel is engaged or after it has been discharged, but does not authorize the court to impanel such jury before the day to which the regular panel has been summoned.—Wilson v. State, 42 Ind. 224.

[g] (Ind. 1887) Rev. St. 1881, § 1396, provides that if, for any reason, no jury shall be present at any term, a jury may be summoned from the bystanders. Section 1790 provides that the trial jury used in civil cases shall act in criminal cases, and, if a jury be demanded, the sheriff shall call a jury in the manner provided by law, or as directed by the court. Section 522 provides that, if necessary, the court may order a special jury for the trial of any case. *Held* that, where no jury had been returned for the term, the court properly summoned one from the bystanders.—Heyl v. State, 109 Ind. 589, 10 N. E. 916.

[h] (Iowa, 1855) Under Code, §§ 1647, 1777, if no jury is in attendance, the court has power to obtain one.—Claussen v. La Franz, 1 Iowa (1 Clarke) 226.

[i] (Iowa, 1874) Revision, § 2738, provides that where from any cause persons summoned as jurors fail to appear, or the court for any cause shall decide that jurors have been illegally elected or drawn, the court may order the sheriff to summon a sufficient number of jurors from the body of the county to serve at the term then in session. *Held* that, where the jury lists had been destroyed by fire and no jurors had been summoned for the term, the court was authorized to order the sheriff to summon jurors from the body of the county.—State v. Arthur, 39 Iowa, 631.

[j] (La. 1889) When the district judge finds it necessary to prolong the term of his court to transact criminal business, and a jury has

been drawn for only two weeks of the term, under the provisions of Acts 1877, No. 44, he has discretionary power to order the jury commissioner to draw a jury for the third week.—State v. Wright, 41 La. Ann. 600, 6 South. 135.

[k] (N. C. 1891) Where the county commissioners fail to draw jurors for the third week of a term the court may direct a jury to be drawn and summoned, as prescribed by Code, § 1732, providing for drawing a jury in case the commissioners fail to do so.—Leach v. Linde, 108 N. C. 547, 13 S. E. 212.

[l] (Okl. 1893) Code Civ. Proc. art. 18, §§ 5, 17, which prescribe the method of summoning jurors in the district court when the regular panel is exhausted, apply to the probate court, in a case of which it has concurrent jurisdiction with the district court; and a special jury may be summoned in such a case, tried at a term in which there was no regular panel.—Chandler v. Colcord, 1 Okl. 260, 32 Pac. 330.

[m] (Utah, 1893) In the absence of bad faith, the court may, when necessity arises, and there is no regular jury in attendance, impanel a jury to try a case which has been properly set, and is ready for trial.—Bennett v. Tintic Iron Co., 9 Utah, 291, 34 Pac. 61.

[n] (Wash. 1895) Where defendants in mandamus demanded a jury for the trial of issues of fact, the court was not bound to await the regular panel, the proceeding being a summary one, but properly ordered a special venire over defendants' objection.—State v. Trimbell, 12 Wash. 440, 41 Pac. 183.

[o] (W. Va. 1873) Code, c. 116, §§ 3–10, 12, provide that the board of supervisors of each county shall prepare a list of persons qualified to serve as jurors, from which list the jury panels for the courts shall be drawn by the recorder. Chapter 159, § 3, provides that in cases of felony 20 jurors shall be drawn from the list of those in attendance, and that, if a sufficient number cannot be so procured, the court shall cause others to be forthwith summoned, until a panel of 20 be obtained. *Held*, that after January, 1873, when, under the new constitution, boards of supervisors and recorders had ceased to exist, juries in felony cases could still be had, under chapter 159, § 3, by summoning a special venire; such selection not being confined to cases where a part of the regular panel was still available, but being applicable, also, where no regular panel was in attendance.—State v. Miller, 6 W. Va. 600.

§ 311. —— Discharge of regular panel.

Discharge of regular panel for invalidity, see post, § 313.

Open venire to replace panel discharged for term, see post, § 325 [j].

[a] (U. S. 1894) Where, after discharge of the regular panel for the term, an indictment is found, a special venire may issue for jurors for the trial thereof.—St. Clair v. United States, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936.

[b] (Ga. 1890) Code, § 3942, provides that where a term of court is prolonged beyond the time for which juries were drawn, or the judge anticipates the term will be so prolonged, or if for any reason the court is convened or is about to convene, and there is no jury drawn therefor, a jury may be drawn and summoned as prescribed for the regular terms. At a term ordered to try a murder case, a jury having been selected, the rest of the panel was discharged. In the middle of the trial a mistrial was declared, and the court, being then without jurors except certain talesmen, summoned but not put on defendant, drew from the box the proper number of jurors and directed the sheriff to summon them for the next day, when the trial would be recommenced, and ordered the talesmen present to attend at the same time. The following day the jurors so summoned and the talesmen were put on defendant, who challenged the array on the ground that the court had no power to draw jurors at that time, and that defendant was entitled to the panel drawn for the first trial. *Held*, that the challenge was properly overruled; the adjournment over night being substantially an adjournment of the term, and the court being about to convene the next morning without any jury drawn for it, within the meaning of Code, § 3942.—Woolfolk v. State, 85 Ga. 69, 11 S. E. 814.

[c] (Ind. 1857) Under Act 1852, a jury may be called from the bystanders when the regular panel has been discharged.—Shaw v. Wood, 8 Ind. 518.

[d] (Ind. 1892) Under Rev. St. 1881, § 1396, which provides that where the proper officers fail to impanel a traverse jury, or where, for any cause whatever, no traverse jury shall be present at any term of court, it shall be the duty of the circuit court, if the business thereof require it, to order the sheriff to summon a jury from the bystanders, the fact that the court has discharged the regular panel does not deprive it of power to summon a jury from the bystanders.—Ohio & M. Ry. Co. v. Trapp, 4 Ind. App. 69, 30 N. E. 812.

[e] (Ky. 1846) The circuit court has the power, in its discretion, to have juries summoned and impaneled to try causes after the discharge of the regular juries, provided that it be done in good faith and not to evade a trial by the regular jury.—Hunt v. Scobie, 45 Ky. (6 B. Mon.) 469.

[f] (Minn. 1858) Under Rev. St. art. 2, c. 69, § 32, which provides that a judge of the district court may, when there is a deficiency of jurors, order a special venire to the sheriff to summon sufficient jurors to complete the panel, a special venire may be issued, although the entire original panel has been discharged.—Steele v. Malony, 1 Minn. 347 (Gil. 257).

[ff] (Minn. 1871) All the petit jurors of a regular panel were discharged from further attendance. *Held*, that there was an "entire absence of jurors of the regular panel," within Gen. St. 1866, c. 64, § 17, authorizing the issuance of a special venire in such case.—State v. McCartey, 17 Minn. 76 (Gil. 54).

[g] (N. Y. 1830) A court of special sessions have authority to issue a second venire for a jury to try the defendant, if the first jury are discharged because they cannot agree on a verdict.—Vanderwerker v. People, 5 Wend. 530.

[h] (N. Y. 1888) Code Cr. Proc. § 361, authorizes a challenge to the panel only for material departure from the forms prescribed for drawing and return of the jury, or for an intentional omission of the sheriff to summon one or more jurors drawn. *Held*, that where the judge of oyer and terminer discharged the regular panel, which had served four weeks, and ordered a special venire to attend an adjourned term for the trial of a murder case, no challenge to the array of such special venire would lie.—People v. Jackson, 111 N. Y. 362, 19 N. E. 54.

[i] (Ohio, 1846) Under Swan's St. p. 493, providing that when, by absence, sickness, challenge, or otherwise there are none of the regular panel remaining the common pleas may order the sheriff to return a jury of bystanders, that court properly summoned a special venire for a criminal case after having dis-

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charged the regular panel on an earlier day of the term.—Reed v. State, 15 Ohio, 217.

[j] (Or. 1864) Code, § 921, provides that the county court shall make from the last preceding assessment roll of the county a jury list, containing the names of persons to serve as jurors until the following year; and section 926 provides that the jurors for "every term" of the circuit court in the county shall be drawn from the jury list provided for by section 921. Hence, where the whole of the regular panel, thus drawn for a term, are discharged by the court, the court cannot cause a jury to be summoned from the body of the county, since there is no other provision of the Code authorizing the summoning of a jury for the trial of any cause without the consent of parties, excepting to supply deficiencies in the regular panel, caused by default in attendance or incompetency.—Mosseau v. Veeder, 2 Or. 113.

§ 312. —— Original venire not returned.

[a] (N. Y. 1810) If the venire be not returned at the time appointed for trial, it is not a reason for nonsuiting the plaintiff; but another venire may be issued.—Blanchard v. Richly, 7 Johns. 198.

[b] (N. Y. 1811) When the first venire has not been returned, the justice may issue another.—Sebring v. Wheedon, 8 Johns. 460.

§ 313. —— Invalidity of regular panel.

Open venire after sustaining challenge to array, see post, § 321 [ee].

[a] Where the original panel was quashed for irregularity the court properly summoned a special venire.
—(Miss. 1893) Purvis v. State, 71 Miss. 706, 14 South. 268;
(N. C. 1868) State v. Owen, 61 N. C. 425; Same v. McCurry, 63 N. C. 33.

[b] (Ala. 1896) The provisions of Act 1886-87, relating to the drawing of jurors, are mandatory, and, where the commissioners have failed to comply therewith, the court may organize special juries under Cr. Code, § 4316, which provides for such organization in default of regular juries.—Steele v. State, 111 Ala. 32, 20 South. 648.

[c] (Cal. 1859) Under Woods' Dig. tit. "Jurors," p. 512, § 16, placing the ordering of a trial jury in the discretion of the court, it is proper, in an action of trespass against the sheriff, to summon a special venire in place of the regular panel selected by him.—Pacheco v. Hunsacker, 14 Cal. 120.

[d] (Cal. 1873) Where the trial jurors, although legally drawn, have not been legally summoned, the court may by an order direct additional jurors to be summoned.—People v. Devine, 46 Cal. 45.

[e] (Ky. 1894) Where the jurors were not drawn as provided by Act May 22, 1893, and for that reason discharged, the court could draw a new jury pursuant to that act.—Risner v. Commonwealth, 95 Ky. 539, 26 S. W. 388.

[f] (Mich. 1886) Where the regular panel was discharged as irregularly drawn, the court properly summoned new jurors under How. Ann. St. § 7578, authorizing the court to summon jurors forthwith when a sufficient number do not appear.—Atkinson v. Morse, 63 Mich. 276, 29 N. W. 711.

[g] (Minn. 1865) Where a challenge to the panel of regular jurors is allowed, the case may properly be tried by a jury drawn from jurors previously summoned on special venires to supply deficiencies in the regular panel.—Dayton v. Warren, 10 Minn. 233 (Gil. 185).

[h] (Pa. 1879) Act April 14, 1834, §§ 146, 147, provide that in civil cases, when a challenge to the array by either party is sustained, the court may issue a venire, returnable at once, requiring the summoning of 24 jurors. Section 148 grants the same power to the court in criminal trials, in case of challenge to the array by the defendant. *Held*, that where, on the trial of an indictment against the sheriff, a challenge to the array by the prosecution was sustained, the court improperly ordered a venire to be summoned from the body of the county by two elisors, since a challenge to the array by the commonwealth is not within the statute, and the court has no power at common law to summon talesmen unless there are at least some of the array present to serve.—Williams v. Commonwealth, 91 Pa. 493.

§ 314. —— Vacancies in regular panel.

Open venire to fill vacancies in panel, see post, § 325 [b].

Right of judge to fill vacancies in panel before commencement of term, see post, § 324 [l].

[a] (U. S. 1843) Act July 20, 1840 (5 Stat. 394), making the practice of the United States courts in obtaining jurors conform as far as practicable to the practice of the courts of the state in which they are sitting, has changed the method of obtaining juries practiced in the federal courts under Act 1789 (1 Stat. 73); and in case of a deficiency of jurors it is competent for the court during the term to order a second venire.—United States v. Matthews, Fed. Cas. No. 15,741b.

[b] (Ala. 1876) On the trial for a misdemeanor, or a felony less than capital, vacancies in a petit jury, caused by challenges or by the discharge of jurors by the court, may, in the discretion of the court, be supplied either by calling jurors from the other regular juries in attendance or by summoning talesmen, and the exercise of that discretion by calling bystanders will not be reviewed.—Smith v. State, 55 Ala. 1.

[c] (Ala. 1886) When there are only 11 jurors present, and the record fails to show an agreement between the parties to try the cause with less than 12, it is not error for the court to order to be summoned a sufficient number to fill the panel before the selection of the jury commences.—Adams v. Thornton, 82 Ala. 260, 8 South. 20.

[d] (Ga. 1858) Act 1856, regulating the manner of impaneling a jury in criminal cases, does not deprive the court of its previous power to order a special venire in a criminal case, where the regular panel has been reduced by challenges to the polls.—Revel v. State, 26 Ga. 275.

[e] (Ind. 1878) The places of three jurors, excused by the court because they had expressed an opinion that defendant was guilty, were properly filled from a special venire.—Watson v. State, 63 Ind. 548.

[f] (Ind. 1890) Under Rev. St. § 1396, providing that a jury may be drawn from the bystanders when the proper officers have failed to draw and impanel a traverse jury, vacancies in the panel in a criminal case may be filled from the bystanders.—Keyes v. State, 122 Ind. 527, 23 N. E. 1097.

[g] (Kan. 1878) Laws 1876, c. 104, § 6, provides that, when there shall not be enough jurors present to form a panel in any cause, the court may order qualified persons in sufficient number to complete the panel to be summoned from the bystanders or the neighboring citizens by the sheriff. *Held* that, where the court reduced the panel below 12 by excusing jurors, talesmen were properly summoned from the bystanders to complete the jury.—Trembly v. State, 20 Kan. 116.

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[h] (La. 1870) A petit jury was regularly drawn, and a list thereof was served on the accused three days before the trial. On the day of the trial, when the jurors were called, it appeared that six or seven of the number had not been found by the sheriff, after diligent search, and that those who failed to answer to their names had been legally excused for good and valid cause shown. *Held*, that to summon a sufficient number from among the bystanders to fill out the panel was proper.—State v. Ferray, 22 La. Ann. 423.

[i] (Mich. 1846) Rev. St. 1838, p. 490, c. 5, § 3, provides that in forcible entry and detainer justices of the peace shall issue a precept for the summoning of 12 men for the jury, and that, if a sufficient number do not attend at the hearing, the number may be completed by returning others forthwith. *Held*, that where the parties and most of the jurors attended on the return day, and the cause was then adjourned, the court had no power to issue a venire summoning a second jury, but should have required the jurors present to attend on the adjourned day, and then filled any vacancy by summoning additional jurors under the same venire.—Latimer v. Woodward, 2 Doug. 368.

[j] (Mont. 1885) Laws 12th Sess. p. 58, provides that if for any reason the panel of jurors shall not be full at the opening of court, or at any time during the term, the clerk, under direction of the court, shall draw from the jury box furnished by the county commissioners so many additional names as may be needed to fill the panel. *Held*, that where members of the regular panel were found to be residents of a new county, set off from the county in which the court is sitting since the jurors were drawn, the court properly caused further jurors to be drawn from the box.—Wykoff v. Loeber, 5 Mont. 535, 6 Pac. 363.

[k] (Neb. 1876) Civ. Code, § 660, provides that 24 names shall be drawn for the jury panel. Section 664 provides that, if at any period of a term for any cause the panel is not complete, the court may order suitable jurors to be summoned without delay. *Held*, that in a murder trial, after excusing a number of jurors of the panel for cause, the court properly ordered the sheriff to summon sufficient jurors from the body of the county to fill up the panel.—Dodge v. People, 4 Neb. 220.

[l] (N. Y. 1842) A trial for murder had commenced, and the jury summoned were called, but, less than 24 appearing, the court ordered the sheriff to summon 300 to complete the requisite number and adjourned the trial for two days. *Held*, that the summoning of the special venire was within the discretion of the court.—Colt v. People, 1 Parker, Cr. R. 611.

[m] (Ohio, 1874) A sheriff's return that some of the jurymen named in a venire facias "cannot be found in the county" is equivalent to a return that they are absent from the county, and authorizes the clerk, as provided by Act Dec. 4, 1874 (72 Ohio Laws, p. 4), to issue an alias venire facias.—Davis v. State, 25 Ohio St. 369.

[n] (Ohio, 1876) Under Justices' Code, § 81, providing that, if the jury panel in a justice court is not full, the constable shall fill it in the same manner as is done by the sheriff in common pleas, which is by calling in talesmen, a motion for a special venire in such a contingency was properly refused.—Harmonia Lodge v. Schaffer, 5 Ohio Dec. 335.

[o] (Utah, 1875) If from any cause the jurors summoned prior to the term do not appear, the court is authorized to have such additional number drawn and summoned, after the beginning of the term, as may be necessary to complete the panel.—United States v. Reynolds, 1 Utah, 226.

[p] (Va. 1803) Under Code, § 4019, authorizing the court in felony cases to direct another venire facias where sufficient jurors cannot be had from those summoned and in attendance, the court properly ordered a special venire, though one of the regular panel had not been called, he being at the time serving on the grand jury; such juror not being "in attendance" within the meaning of the statute.—Short v. Commonwealth, 90 Va. 96, 17 S. E. 786.

§ 315. —— Regular panel otherwise engaged.

Depletion of venire specially drawn by taking out jury for another case as ground of challenge to array, see post, § 365 [k].

Member of regular panel engaged on grand jury, see ante, § 314 [p].

[a] (Ala. 1881) Where the whole venire with the exception of jurors absent or engaged in the trial of another cause, has been exhausted without obtaining a full jury, the court may properly order an additional number to be summoned to complete the jury, without awaiting the return of absent or detained jurors.—Redd v. State, 69 Ala. 255.

[b] (Ala. 1893) A second jury, summoned and organized by order of the county court of Shelby county, after organizing one jury from the regular venire, is irregular, since the statute clearly contemplates that there shall be but one regular jury at each term of court.—Dean v. State, 100 Ala. 102, 14 South. 762.

[c] (Ind. 1877) 2 Rev. St. 1876, p. 13, provides that the courts shall have power, when the business requires, to order the impaneling of a special jury for the trial of any case. *Held*, that a court may, even over the objection of the defendant, properly impanel a special jury, when, on the calling of a cause for trial, the regular jury is out considering their verdict in another cause.—Winsett v. State, 57 Ind. 26.

[d] (Mo. 1875) Under Sess. Acts 1873, p. 46, § 6, where the regular panel is engaged in the trial of other causes, a jury may be summoned from the bystanders.—State v. Jones, 61 Mo. 232.

[e] (Mont. 1892) Under Laws 16th Sess. p. 168, providing that if, during a trial, where a jury has been drawn, it shall become necessary to summon additional jurors, such jurors may be summoned by open venire, a court is not obliged, before calling a case, to await the return of a portion of the regular panel, who may be out deliberating upon a case which has been previously tried, but a special venire may be issued.—O'Donnell v. Bennett, 12 Mont. 242, 29 Pac. 1044.

[f] (Tex. 1857) Where, the jurors summoned by special venire in a capital case being called, 24 of the same answered, appeared, were duly sworn, tried, and qualified, and a portion of the same accepted as jurors by the state and prisoner, but not a full jury of 12, and the court, on being informed that 12 of the residue of said jurors were engaged in another capital trial pending before the same court, and were out considering their verdict, and, the government and prisoner refusing to waive their right to select a jury from the original venire, ordered said jury to be called, and, after they came into court and were tried and qualified, the state and prisoner accepted each of them as called, after which, the court having asked each of them, as he was called and accepted, if he was on the jury in the said pending case, and if he

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and his fellows had agreed upon a verdict, and each of them having answered that they had not agreed, the court discharged each of them for cause, and ordered them to retire and consider of their verdict, and then ordered a special venire, returnable instanter, for 24 jurors, and from the same, when returned, the state and prisoner selected a full jury, it was *held* that such action of the court was erroneous.—Bates v. State, 19 Tex. 122.

§ 316. —— Exhaustion of regular panel.

See ante, § 315 [a].

Calling talesmen on exhaustion of panel, see post, §§ 333–335.

Exhaustion of regular panel except member serving on grand jury, see ante, § 314 [p].

Necessity of drawing from regular panel for the week, after exhausting special venire, before calling jurors from body of county, see post, § 334.

Open venire on exhaustion of regular panel, see post, § 325 [a, l, n, w, zz].

Part of regular panel otherwise engaged and exhaustion of remainder, see ante, § 315 [f].

Right to special venire on exhaustion of regular panel to prevent adjournment till jury for following week could be had, see post, § 318 [e].

[a] (Fla. 1894) Though the regular panel did not consist of 12 persons, as provided by Laws 1893, c. 4122, § 5, the court can proceed with a special venire, after the regular panel is exhausted.—Lambright v. State, 34 Fla. 564, 16 South. 582.

[b] (Ind. 1878) Under Act March 7, 1873, § 8 (2 Rev. St. 1876, p. 13), the court has power to impanel a special jury whenever the business of the court requires it.—Merrick v. State, 63 Ind. 327.

[c] (La. 1881) A judge, in his discretion, when the jury of talesmen is exhausted, may order a second, or third, or more, if necessary.—State v. Somnier, 33 La. Ann. 237.

[d] (Minn. 1867) The attendance of every juror on the regular panel is not a prerequisite to summoning talesmen, or calling those summoned on a special venire.—State v. Brown, 12 Minn. 538 (Gil. 448).

[e] (Minn. 1867) Even where the defendant has an attachment issue for the absent jurors summoned on the regular panel, the court is not bound to wait its return before placing the names of the special venire in the box.—State v. Brown, 12 Minn. 538 (Gil. 448).

[f] (Mo. 1875) Under Sess. Acts 1873, p. 46, § 6, where the regular panel is exhausted, a jury may be summoned from the bystanders.—State v. Jones, 61 Mo. 232.

[g] (N. Y. 1865) Under 2 Rev. St. pp. 419, 420 (3 Rev. St. [5th Ed.] p. 718), providing that when a sufficient number of jurors, duly drawn and summoned, do not appear or cannot be had to form a jury, the court may cause to be summoned, from the bystanders or from the county at large, so many qualified persons as shall be sufficient, after exhausting the regular panel, a new panel may be summoned forthwith to attend on one day's notice.—Kenny v. People, 31 N. Y. 330.

[h] (S. C. 1887) Gen. St. § 2255, provides that when it is necessary to supply any deficiency of jurors, whether caused by challenge or otherwise, the jury commissioner, under direction of the court, shall draw from the box sufficient names to supply the deficiency. *Held*, that where the court, supposing the regular panel to be exhausted, ordered additional names to be drawn from the box in order that they might be summoned to serve as jurors, and while the names were being drawn it was discovered that one of the regular panel had not been called, the judge properly revoked the order for additional names, and, after presenting the name omitted from the regular panel, ordered a new venire to be drawn and summoned.—State v. Anderson, 26 S. C. 599, 2 S. E. 699.

§ 317. —— Anticipated exhaustion of regular panel.

See ante, § 313 [g].

Effect of summoning special venire before exhaustion of regular panel, see post, § 331 [f].

Open venire in anticipation of exhaustion of panel, see post, § 325 [b].

[a] (Ala. 1893) Under Act Feb. 21, 1887, § 10, providing that if, in a capital case, a jury be not made of those summoned and who appear, the court shall draw from the jury box enough names to complete the jury, it is error to draw such names before the list of those summoned and appearing has been exhausted.—Ezell v. State, 102 Ala. 101, 15 South. 810.

[b] (Fla. 1860) The court may, in anticipation that the jurors duly drawn and summoned will be exhausted, order the sheriff to summon others from the bystanders or the body of the county.—O'Connor v. State, 9 Fla. 215.

[c] (Fla. 1894) The court may issue a special venire for additional jurors in anticipation of the exhaustion of a regular panel.—Lambright v. State, 34 Fla. 564, 16 South. 582.

[d] (N. Y. 1872) Under Acts 1847, c. 495, providing that, after the deposit of the ballots by the county clerk as required by law, the several courts of the city of New York may order as many jurors to be summoned as may be necessary, such court may order an additional panel after the deposit of the ballots without awaiting the exhaustion of the first panel.—In re Foster, 13 Abb. Prac. (N. S.) 372.

[e] (Tex.) Until a special venire has been exhausted or discharged with defendant's consent, it is error for the court to order the issuance and execution of another venire.—(1885) Sharpe v. State, 17 Tex. App. 486; (1889) Hall v. Same, 28 Tex. App. 146, 12 S. W. 739.

§ 318. Right to special venire.

Discretion of court to order special venire when timely application is not made, see post, § 319 [d].

[a] (Ala. 1884) Under Code, § 4874, authorizing special venires only in capital cases, on the second trial of one under indictment for murder, who had previously been found guilty in the second degree, defendant is not entitled to a special venire where the former judgment is properly pleaded.—De Arman v. State, 77 Ala. 10.

[b] (Ala. 1885) Where a special term is called for the trial of a single capital case, the jury must be organized from the venire of 50 persons summoned as required by Code, § 4739, with talesmen if necessary; and an additional venire as required by Code, § 4874, for the trial of capital cases at regular terms, need not be summoned.—Ward v. State, 78 Ala. 441.

[c] (Ala. 1885) Under Sess. Acts 1884–85, p. 181, regulating the drawing of jurors and organization of juries in criminal cases, and providing for a special venire in capital cases, where two or more capital cases are set for the same day, but one special venire should be drawn.—Chamblee v. State, 78 Ala. 466.

[d] (Ala. 1885) Code, § 4874, providing for a special venire only in capital cases, on a second

trial under an indictment for murder, the first having resulted in a conviction of murder in the second degree, defendant is not entitled to a special venire.—Jackson v. State, 78 Ala. 471.

[e] (S. C. 1887) Gen. St. § 2255, provides that whenever necessary to supply a deficiency in the number of jurors duly drawn, whether caused by challenge or otherwise, the jury commissioner, with the clerk of common pleas and general sessions and the sheriff, shall under direction of the court draw from the tales box so many names to serve as jurors as the court may deem necessary. *Held*, that it was improper, where the regular panel for the week was exhausted by peremptory challenges, to continue the cause to the next week, trying other causes in the meantime, and to put defendant on trial before the regular jury of the second week.—State v. Briggs, 27 S. C. 80, 2 S. E. 854.

[f] (Tex. 1886) A special venire must be ordered for the trial of a capital case, and it should affirmatively show by the record that this was done.—Steagald v. State, 22 Tex. App. 464, 3 S. W. 771.

[g] (Tex. 1890) Code Cr. Proc. art. 605, provides for special venires in "capital" cases only; Pen. Code, art. 55, defines "a capital felony" as "an offense for which the highest penalty is death." Article 35 provides that "a person, for an offense committed before he arrived at the age of 17 years, shall in no case be punished with death." Defendant was indicted for murder in the first degree, but the prosecuting attorney admitted in open court that he was under 17 years old. *Held*, that it was not a capital case, and defendant was not entitled to a special venire.—Walker v. State, 28 Tex. App. 503, 13 S. W. 860.

§ 319. Application and order for special venire.

Presumption of making of order for special venire, see post, § 330 [d].

[a] (La. 1892) Under Acts 1877, No. 138, which provides that on the trial of criminal cases in the parish of Orleans, where the jury is not complete, or the judge is of the opinion that talesmen will be required, he "shall enter an order on the minutes" directing a sufficient number of tales jurors to be drawn, it is not necessary that the entry be made by the judge himself, but it is sufficient if made by the minute clerk under the direction of the trial court, and the minutes be approved and signed by the judge.—State v. Walsh, 44 La. Ann. 1122, 11 South. 811.

[b] (Mich. 1895) The judge of the district court may, under Laws 1893, No. 204, on his own motion, order additional jurors, when enough are not drawn, and the fact that his attention was called to it by the county attorney is immaterial.—People v. Considine, 105 Mich. 149, 63 N. W. 196.

[c] (Mo. 1876) A party to an action against a municipality is not required, in order to entitle him to a special venire, to ask for the same until the regular panel has been called and the list of competent jurors exhausted.—Fulweiler v. City of St. Louis, 61 Mo. 479.

[d] (Mo. 1886) Where a motion for a special venire to summon a jury in a criminal case is not made three days before the day on which the case is set for trial, the court has discretion to make the order or not, under Rev. St. § 2802.—State v. Leabo, 89 Mo. 247, 1 S. W. 288.

§ 320. Necessity of formal issue of venire.

Effect of defects in venire for jurors from the tales box, see post, § 331 [d].

Necessity of venire for regular panel, see ante, § 291.

[a] (Kan. 1878) Where the court at the request of a party names certain bystanders for jurors, as provided by Laws 1876, c. 104, § 6, and such jurors enter the box, ready for service as jurors, failure to issue a formal venire to compel their attendance is not error.—Trembly v. State, 20 Kan. 116.

[b] (Mo. 1875) Where a jury is summoned from bystanders, because the regular panel is exhausted or is engaged in other causes, no special venire is necessary.—State v. Jones, 61 Mo. 232.

[c] (S. C. 1876) Under Act Nov. 19, 1873 (15 St. at Large, p. 485), amending Gen. St. c. 111, § 24, and providing when jurors are to be summoned from the bystanders, the sheriff and clerk shall each furnish the judge a list containing the number of names needed, from which the judge shall select those best fitted to serve, who shall be forthwith summoned by the sheriff, the persons so selected may be summoned under a venire, and it is not an irregularity that they were not summoned on the verbal order of the judge.—State v. Coleman, 8 S. C. (8 Rich.) 237.

[d] (S. C. 1879) The action of the circuit court in summoning talesmen by verbal order, without a venire, was proper; the court being without power to issue a venire for talesmen in the absence of statutory authority, and no such authority being given by Act 1877 in relation to juries.—State v. Stephens, 11 S. C. 319.

§ 321. Form and requisites of venire.

Verbal order to sheriff to summon jurors to complete jury, see ante, § 320 [d]; post, § 324 [x].

[a] (Ala.) Code provisions which require that a special venire for the trial of a capital case must include "the regular jury," or "those summoned on the regular jury for the case," include only those who, summoned as regular jurors, are in attendance, and not excused, unless those excused are again specially summoned.—(1876) Floyd v. State, 55 Ala. 61; (1876) Lee v. Same, Id. 259; (1884) Jackson v. Same, 77 Ala. 18; (1888) Dick v. Same, 87 Ala. 61, 6 South. 395; (1888) Cotton v. Same, 87 Ala. 75, 6 South. 396.

[b] (Ala. 1883) Code 1876, § 4874, provides that the court, when ordering a special venire, must order the sheriff to summon not less than 50 nor more than 100 persons, including those "summoned" on the regular juries for the week. *Held*, that where the court ordered the sheriff to summon 100 jurors, "including the regular venire," such order was error, as the statute only directed those "summoned" on the regular jury to be summoned on the special venire, while the order directed the sheriff to summon all persons named in the writ under which the regular jury were summoned, whether or not they were in fact summoned on the regular jury.—Posey v. State, 73 Ala. 490.

[c] (Fla. 1876) Under Act 1868, § 21, providing that when a sufficient number of jurors, duly drawn and summoned, cannot be obtained, the court may summon jurors from the bystanders or from the county at large, a special venire may properly be in the alternative form, directing the jurors to be summoned from the bystanders or from the county at large.—Keech v. State, 15 Fla. 591.

[d] (La. 1893) It is no objection to an order to the jury commissioners to draw talesmen that it specifies the cases for which they are to be drawn.—State v. Chambers, 45 La. Ann. 36, 11 South. 944.

[e] (Mich. 1872) Comp. Laws, § 4374, provides that when no jurors have been drawn, or a sufficient number has not appeared, the

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court may order the sheriff to summon "forthwith" so many jurors as may be needed. Section 4375 requires the sheriff to summon such jurors "forthwith," and section 4377 requires those summoned to attend "forthwith." *Held*, that the court had power, on deficiency of jurors on April 11th, to order the sheriff to forthwith summon jurors to attend at an adjourned term to be held May 4th.—People v. Jones, 24 Mich. 215.

[ee] (Minn. 1871) Under Gen. St. c. 64, § 17, empowering the court, on sustaining a challenge to the array, to order a special venire to issue to the sheriff, commanding him to summon from the county at large a number, therein named, of competent persons to serve as jurors, it is not necessary that the special venire should state the names of the persons to be summoned.—State v. Stokely, 16 Minn. 282 (Gil. 249).

[f] (N. C. 1863) It is no ground of challenge to the array in a capital case that it does not appear from an order for a special venire facias that it was made in the case of the prisoner. It is sufficient if it appears that it was made at the term at which the trial was had. —State v. Murph, 60 N. C. 129.

[g] (Ohio, 1857) A venire for a special jury in a capital case need not be entitled as of the case pending, nor state the name of the person alleged to have been murdered.—Loeffner v. State, 10 Ohio St. 598.

[h] (Pa. 1873) A special venire to summon talesmen need not summon them for the trial of any particular case.—Brown v. Commonwealth, 30 Leg. Int. 382.

[i] (Tex. 1886) A special venire which shows the style and number of the case, and which, though in its preliminary recitals it omitted the name of the court or county in which the case was pending, distinctly stated in the mandatory part that the persons named were to be summoned "to be and appear before the honorable district court of Williamson county, Texas, at the court house thereof, in Georgetown, on the nineteenth day of January, A. D. 1886, then and there to serve as special jurors, as aforesaid, in the above-stated cause," etc., is not obnoxious to the objection that the writ does not show in what case the same was issued, nor in what court the proceedings were pending, as required by Code Cr. Proc. arts. 605, 608.—Murray v. State, 21 Tex. App. 466, 1 S. W. 522, 3 S. W. 104.

[j] (Tex. 1891) Defendant was indicted for murder, and in January the trial was continued to the April term. The district court, on March 30th, ordered a special venire issued, returnable April 9th. Court convened April 6th, and the case was set for trial on the 13th. *Held*, that the special venire was properly made returnable at the term after it issued, under Code Cr. Proc. art. 606, which provides that "the district or county attorney may, at any time after indictment found, * * * obtain an order for a special venire to be issued in such case."—Roberts v. State, 30 Tex. App. 291, 17 S. W. 450.

[k] (Tex.) A writ of special venire facias, which was executed and returned by the sheriff, will not be quashed because it was improperly directed to the "sheriff or any constable," instead of the sheriff alone.—(1891) Suit v. State, 30 Tex. App. 319, 17 S. W. 458; (1892) Jackson v. Same, 30 Tex. App. 664, 18 S. W. 643.

[l] (Va. 1888) Under Cr. Code, p. 340, § 4, which provides that, when a sufficient number of jurors are not obtained from the regular panel, the judge shall issue a venire to summon from the bystanders or from a list furnished by the court, it is not necessary to furnish a list with a venire to summon from the bystanders.—Waller v. Commonwealth, 84 Va. 492, 5 S. E. 364.

[m] (Va. 1889) Under Code, § 4019, providing that in cases of felony the court may direct another venire facias, and cause a jury to be summoned from the bystanders or from a list furnished by the court, where persons are summoned from the bystanders to complete the panel the judge is not required to sign the list. —Williams v. Commonwealth, 85 Va. 607, 8 S. E. 470.

[n] (W. Va. 1890) Code, c. 116, prescribes the manner of selecting and summoning jurors, and by section 14 provides that nothing contained in preceding sections shall prevent any court in term time "from requiring other jurors to be drawn in like manner, or requiring other jurors, whether so drawn or not, to be summoned, whenever it shall be found necessary for the convenient dispatch of business." *Held*, that the circuit court may, in the exercise of a legal discretion, summon a panel of the requisite number of jurors from bystanders without any venire facias, except the order of the court entered of record.—State v. Mills, 33 W. Va. 455, 10 S. E. 808.

§ 322. Time for drawing and notice thereof.

[a] (La. 1882) Acts 1880, No. 98, requires that the number of jurors ordered to be drawn by the court shall be drawn 15 days next preceding the beginning of the month in which the term is held. Acts 1877, No. 138, provides that when, on trial of a felony in the parish of Orleans, the judge shall consider that talesmen will be needed to complete the jury, he may order such a number of talesmen to be drawn from the jury wheel as may be needed to complete the jury. *Held*, that Act 1877 was not impliedly repealed by Act 1880, there being no conflict between them, since Act 1877 provided for a contingency not covered by the later act; and hence an order by the judge to draw 50 additional names from the wheel to meet the needs of a murder trial was properly made.—State v. Alphonse, 34 La. Ann. 9.

[b] (La. 1890) Under Acts 1880, No. 135, § 4, providing that, when a jury is prayed for during a term for which no jury is drawn, the court shall order a special jury to be drawn, which shall consist of 30 qualified jurors, who shall be summoned by service of notice in the usual form, such special venire is not required to be drawn more than 30 days before the term of court, and no advertisement thereof is required.—State ex rel. Leche v. Waggner, 42 La. Ann. 54, 8 South. 209.

§ 323. Size of panel.

Number of talesmen to be summoned, see post, § 343.

—— *to be summoned on special venire in addition to regular jury for the week, see* post, § 324 [a].

Size of regular panel, see ante, § 290.

[a] (Ala. 1879) Code 1876, § 4738, provides that 30 persons shall be drawn as jurors for each week of a regular term. Section 4739 provides that, when a special term is to be held for the trial of a capital offense, 50 names must be drawn to serve as petit jurors. At a special term held to try a murder case, a panel of 50 jurors was quashed on motion of defendant, and a special venire of 100 was summoned. Defendant moved to quash the array, because two names thereon were not on the list served on him; but the court ordered the two names to be discarded and denied the motion. The prisoner then challenged the ar-

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ray, because 48 persons were originally summoned as regular jurors, instead of 30. *Held*, that the challenge was properly overruled under section 4739, and because the statute regarding the summoning jurors being directory only, a departure from it is not ground of challenge to the array.—Bales v. State, 63 Ala. 30.

[b] (Ala.) Under Code 1876, § 4874, within the limits of not less than 50 nor more than 100, it is within the discretion of the court as to how many jurors shall be summoned in addition to the regular panel.—(1880) Blevins v. State, 68 Ala. 92; (1882) Hubbard v. State, 72 Ala. 164.

[c] (Ga. 1855) The number of tales jurors to be summoned on successive panels is in the discretion of the court.—McGuffie v. State, 17 Ga. 497.

[d] (Ga. 1859) Under the statute, a second panel, called after exhausting the first, is sufficient, though it contain less than 48 names.—Thomas v. State, 27 Ga. 287.

[e] (Mich. 1887) How. Ann. St. § 7578, authorizes an order of court for the summoning of a jury for the general purposes of the term, when the regular panel has not been summoned 14 days before the term, or when a sufficient number of the regular panel do not appear. *Held*, that the summoning of 35 jurors, instead of 24, is not cause of challenge to the array.—People v. Coughlin, 67 Mich. 466, 35 N. W. 72.

[f] (N. Y. 1842) Where there is a deficiency of jurors, as specified in 2 Rev. St. p. 733, § 3, the number to be summoned rests in the discretion of the court below.—People v. Colt, 3 Hill, 432.

[g] (Pa. 1869) Act April 20, 1858, provides that whenever talesmen are required the sheriff shall, in presence of the court, draw from the wheel five names for every talesman required, and that a venire shall issue for any one of the five names so drawn, and that no tales juror shall be selected in any other way. Act March 15, 1867, directs the court to fix the number to be brought into court by any venire to be issued. *Held* that, where there were 8 vacancies on the trial jury after exhausting the regular panel, the court properly issued special venires for 50 and 25 talesmen, and was not bound to draw 15 names only, and bring them by 3, 2, and 1 at a time, to fill the vacancies.—Commonwealth v. Eaton, 8 Phila. 428.

[h] (Tenn. 1859) If, after the jury in a criminal case is selected, though not sworn, one of the number is discharged by the court, the prisoner is not entitled to a full panel of jurors out of which to fill the vacancy. He is only entitled to the number allowed if the juror had not been selected.—Lewis v. State, 40 Tenn. (3 Head) 127.

[i] (Tex. 1878) Whatever the reasons for the limitations on the number of persons drawn for a special venire in a capital case, as prescribed by Pasch. Dig. art. 3016, they should be respected and obeyed.—Harrison v. State, 3 Tex. App. 558.

[j] (Tex. 1889) Under Code Cr. Proc. art. 605, defining a "special venire" as a writ issued by order of the court for any number of not less than 36 nor more than 60, in the discretion of the court, to serve as a jury in the particular case, the fact that only 59 names, instead of 60, as asked for by defendant, were upon the list attached to the original writ, neither invalidates the writ, nor the venire summoned under it.—Hall v. State, 28 Tex. App. 146, 12 S. W. 739.

[k] (Tex. 1895) Code Cr. Proc. art. 608, provides that an order for the issuance of a writ for a special venire shall specify the number of persons required to be summoned, and that the clerk shall issue the writ in accordance with such order. *Held*, that where the court orders a special venire of 90 men, and the clerk issues a writ for only 60, defendant's motion to quash the venire should be granted.—Hunter v. State, 34 Tex. Cr. R. 599, 31 S. W. 674.

[l] (Va. 1893) It is not error to refuse to quash a second venire facias containing six names.—Snodgrass v. Commonwealth, 89 Va. 679, 17 S. E. 238.

§ 324. Selection of names or persons.

Appointment of elisor to summon special venire for action in which sheriff is a party, see post, § 335 [c].

Effect of appointment of new jury commissioners, instead of utilizing old ones to draw special venire, see post, § 331 [e].

—— *of inquiries by sheriff into opinions of persons to be summoned on special venire, see* post, § 331 [b].

Open venire, see post, § 325.

—— *after successful challenge to array by prosecution, see* ante, § 313 [h].

Presumption of regularity in selection of names for special venire, see post, § 330 [c].

Repeal of law as to selection of names for special venire, see ante, § 266 [r].

Summoning jurors residing remote from scene of crime, see ante, § 12.

[a] (Ala. 1886) Under the provisions of the act approved February 17, 1885, regulating the drawing and summoning of jurors (Acts 1884–85, pp. 181–187), the special venire for a capital case consists of the regular jurors for the week, and the additional jurors (not being less than 12, nor more than 24) drawn by the presiding judge in open court.—Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193.

[b] (Ala. 1888) On a prosecution for arson, in the city court of Mobile, Ala., the original venire having been exhausted without completing the jury, the city court directed the judge of probate to bring into court the "city court jury box," from which 50 names were drawn as talesmen, in open court. The jury still being incomplete, the same proceeding was repeated, except that, the key of the box not being obtainable, it was opened with another key. *Held* that, under Acts 1882–83, p. 501, Acts 1884–85, p. 534, and Acts 1886–87, p. 201, regulating the mode of drawing jurors, this was a substantial compliance with the statutes in force at the time of trial.—Long v. State, 86 Ala. 36, 5 South. 443.

[c] (Ariz. 1889) Under Code, § 2175 et seq., proceedings for special venires are regular where the venires are issued in term, are directed to the sheriff to serve, and the names returned by him are properly put in the box and drawn by the clerk.—Territory v. Clanton, 20 Pac. 94.

[d] (Colo. 1889) Counsel may request, in the presence of the presiding judge, or the judge himself may direct, that only good and lawful men be summoned as jurors. But to request the sheriff to discriminate in favor of or against any class of citizens eligible to jury duty would be a wrong which might constitute cause for reversal.—Babcock v. People, 13 Colo. 515, 22 Pac. 817.

[e] (Ga. 1880) The judge presiding cannot indicate in any manner what persons shall be

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impaneled as jurors.—Hamlin v. Fletcher, 64 Ga. 549.

[f] (Ga. 1890) Under Code, § 3935, providing that the judge may draw talesmen from "the jury boxes of the county," he may draw from the grand jury box as well as from the petit jury box.—Woolfolk v. State, 85 Ga. 69, 11 S. E. 814.

[g] (Ky. 1806) Where the defendant successfully challenged the array for bias of the deputy sheriff who summoned them, it was error for any of the jurors returned upon the first array to be summoned and sworn for the trial of the cause.—Combs v. Slaughter, 3 Ky. (Hardin) 62.

[h] (Ky. 1894) Where the regular panel was discharged as not drawn as provided by Act May 22, 1893, the court was authorized to appoint jury commissioners to draw a new jury under such act.—Risner v. Commonwealth, 95 Ky. 539, 26 S. W. 388.

[i] (La. 1893) Under Acts 1877, No. 44, the district judge has the power to order the drawing of tales jurors by the jury commission.—State v. Chambers, 45 La. Ann. 36, 11 South. 944.

[j] (Mo. 1879) In a trial upon an indictment for murder, the sheriff returned into court a panel of jurors which was challenged by the defendant, on the ground that the jurors had been summoned and brought into court by persons who were neither sheriff's deputies nor sworn officers. The panel was discharged, and an order issued for another venire, which the sheriff executed by summoning the same men. The defendant filed a challenge to the array. *Held*, in the absence of bias on the part of the sheriff, that the challenge was properly overruled.—State v. Degonia, 69 Mo. 485.

[k] (Mo. 1893) Act April 1, 1891, providing that in counties having a population of between 50,000 and 100,000, when a jury cannot be made up from the regular panel, the judge may deliver to the proper officer a list of jurors sufficient to complete the panel, is substantially complied with when the judge of the criminal court, by his written order, requires the marshal to summon 25 duly-qualified jurors to appear in court to complete the panel, and, on the appearance of such persons, inquires their names, places of residence, and business, and, having satisfied himself in that regard, requires the marshal to summon them. —State v. Sansone, 116 Mo. 1, 22 S. W. 617.

[l] (Mont. 1882) At the time of drawing the jury panel by the county commissioners, they were required by law to draw 18 names from the general jury list. Subsequent legislation (Rev. St. div. 5, § 773) required the commissioners to draw 30 names, and directed the judge at the beginning of the term to examine the jurors present and reduce the panel to 24. Section 246 provides that when the panel is exhausted by challenge, absence, or sickness, the court may cause the sheriff to summon so many persons as might be needed to complete the jury for the pending trial. *Held*, that the court could not select, before the term, additional names to fill the panel from the 18 drawn by the commissioners to the 24 required by the new law for a full panel.—Kennon v. Gilmer, 4 Mont. 433, 2 Pac. 21.

[m] (N. J. 1858) The jury returned for the trial of an appeal in the common pleas cannot be returned by the sheriff, but must be drawn from the box as in other cases.—Patterson Gaslight Co. v. Brady, 27 N. J. Law (3 Dutch.) 245, 72 Am. Dec. 360.

[n] (N. Y. 1870) Laws 1861, c. 528, requires the clerk of the circuit court, in addition to the box containing the names on the general jury list, to provide a box in which the names of all persons qualified to serve as jurors in the city or town where the court is held shall be deposited, and that from such box the court may draw such number of additional names as shall be necessary. 1 Laws 1870, p. 952, empowers the circuit court and courts of oyer and terminer to draw not over 36 additional jurors from the box containing the jurors from which the petit jurors for the county are drawn, whenever a larger number of jurors is required than had been authorized by previous laws. *Held*, that the act of 1870, being merely permissive in its terms, did not repeal the act of 1861; and hence an additional panel of jurors was properly drawn from the city box.—Bennett v. Matthews, 40 How. Prac. 428.

[o] (N. Y. 1886) A challenge to the array will not be sustained on the ground that the names of additional jurors were not properly drawn, where they were drawn in open court and from the box directed by the court, the order of the court specifying the box as the "one containing the names of trial jurors for said court," as prescribed by Code Civ. Proc. § 1035.—People v. Kiernan, 101 N. Y. 618, 4 N. E. 130, affirming (1885) 3 N. Y. Cr. R. 247.

[p] (N. C. 1892) The judge in a capital case having power to select jurors for a special venire from a box as in other cases, or otherwise, "at his discretion," under Code, § 1739, defendants, who have no control over the special venire except to secure a jury of freeholders, cannot object that the jurors were drawn from the box; their right to have freeholders being protected by the right to challenge for lack of legal qualification.—State v. Whitson, 111 N. C. 695, 16 S. E. 332.

[q] (Ohio, 1869) In a criminal case, in making up the petit jury, only five of the regular panel were present, and it became necessary to summon seven talesmen to serve. A summary application was made to the court on behalf of the defendants to issue a venire for that purpose. *Held*, that under Act March 22, 1849, providing that, whenever in any criminal prosecution it shall become necessary to summon talesmen, the court, when so requested, shall issue a venire containing the names of so many discreet and suitable persons as the court shall deem expedient, the court was authorized to select the persons to be summoned, of his own knowledge, without having them drawn from the box or otherwise selected by the clerk and sheriff, as juries are usually selected.—Dayton v. State, 19 Ohio St. 584.

[r] (Ohio, 1882) Code, § 7275, provides that in a capital case, if a full panel be not obtained or the panel be set aside, the court may call talesmen. Act April 18, 1881, adds a proviso authorizing a special venire on demand of either party as provided in section 5173, which requires the court in such case to name the talesmen. *Held*, that a motion by accused in a murder case that the special venire be drawn from the wheel was properly denied.—McHugh v. State, 38 Ohio St. 153.

[s] (Ohio, 1883) Rev. St. §§ 7267–7269, require that for the trial of a capital cause 36 persons shall be summoned, and if the full number are not present the court may, and on defendant's motion shall, issue a special venire to fill vecancies. If by reason of challenges a trial jury cannot be obtained from those so summoned, vacancies must be filled as provided in section 7275, as amended by 77 Ohio Laws, p. 181, requiring such vacancies to be filled from the bystanders or, if demanded by defendant, by a special venire containing names selected by the judge. *Held*, that after exhausting the regular panel summoned for a

murder trial and a special venire summoned to fill vacancies therein, without completing the jury, it was error to order another special venire to be drawn from the box.—Bach v. State, 38 Ohio St. 664.

[t] (S. C. 1878) Where additional jurors are required at a circuit court, the jury commissioners, in the presence of the court, should take from the names of jurors legally in the jury box the names of those residing within five miles of the court house, place them in a separate compartment of the box, and draw the additional jurors from such compartment. —State v. Cardoza, 11 S. C. 195.

[u] (Tenn. 1873) The court may designate the persons to be summoned as jurors on a special venire.—Eason v. State, 65 Tenn. (6 Baxt.) 431.

[v] (Tex. 1851) Neither the defendant nor his counsel is required to be present at the drawing of a special venire in a murder case. —Pocket v. State, 5 Tex. App. 552.

[w] (Tex. 1851) Under Acts 15th Leg. p. 82, § 23, providing for special venires, which requires the tickets to be placed in a box, which shall be well shaken, and from which the clerk, in the presence of the judge, shall draw the number of names required, the fact that the clerk did not with his own hand draw the jurors is merely a technical objection and will be disregarded.—Pocket v. State, 5 Tex. App. 552.

[x] (Tex. 1878) Act Aug. 1, 1876 (Laws 1876, p. 83) § 23, provides that when a special venire is ordered and the whole number of jurors selected by the jury commissioners for the term is less than the number required for the special venire, the judge shall order the sheriff to summon the requisite number of suitable persons to supply the deficiency. *Held*, that on exhaustion of the special venire in a murder case, it not appearing that there were any jurors selected by the jury commissioners left, the court properly made a verbal order that the sheriff summon 20 jurors from which to complete the jury.—Roberts v. State, 5 Tex. App. 141.

[y] (Va. 1880) A prisoner, indicted for murder in the county court, upon arraignment, elected to be tried in the circuit court. A writ of venire for the summoning of a jury, issued by the county court, returnable to the circuit court, was quashed upon motion of the prisoner. The circuit court directed the summoning of another venire, and named the 24 men summoned on the first venire. *Held*, that directing the same 24 men to be summoned was not error.—Mitchell v. Commonwealth, 33 Grat. 845.

§ 325. —— Open venire.

Issue of open venire when regular panel engaged on other case, see ante, § 315 [e].

Open venire after discharge of regular panel, see ante, § 311 [j].

—— *to United States marshal where territorial legislature has made no provision for obtaining jurors, see* ante, § 298 [d].

Power of court to issue open venire when jury lists had been destroyed by fire, see ante, § 310 [i].

Presumption of exhaustion of jury box on ordering open venire, see post, § 330 [a, b].

[a] (U. S. 1885) Where, under Act Cong. June 23, 1874 (18 Stat. 254) § 4, "in relation to courts and judicial officers in the territory of Utah," in the trial of an indictment, the names in the jury box of 200 jurors, provided for by that section, are exhausted, when the jury is only partly impaneled, the district court may issue a venire to the United States marshal to summon jurors from the body of the district, and the jury may be completed from persons thus summoned. The provisions of section 4 are not exclusive of the ordinary methods of obtaining a jury.—Clawson v. United States, 114 U. S. 477, 5 Sup. Ct. 949, 29 L. Ed. 179, affirming United States v. Clawson (1885) 4 Utah, 34, 5 Pac. 689.

[b] (Colo. 1894) Acts 1891, p. 250, § 4, provides that whenever a new panel of jurors is needed the court shall direct that they be drawn from the jury box, and that whenever talesmen are needed the court in its discretion shall direct that they be drawn from said box or summoned from the bystanders, or may issue an open venire, as theretofore practiced. *Held*, that the meaning of the word "talesmen" is not confined to persons summoned to supply vacancies on a jury in process of selection for a particular cause, but that the court may authorize the issue of an open venire in advance to fill up a depleted panel from which a jury was to be selected later, and was not bound to have such talesmen drawn from the jury box by the jury commissioners and certified to the court needing them.—Nesbit v. People, 19 Colo. 441, 36 Pac. 221.

[c] (Fla. 1895) Rev. St. §§ 1157, 2803, providing that whenever for any cause sufficient jurors have not been returned for any term, a special venire may issue to the sheriff commanding him to summon a sufficient number from the bystanders or the body of the county, were not repealed by Act June 2, 1893 (Laws 1893, c. 4122.—Jenkins v. State, 35 Fla. 737, 18 South. 182, 48 Am. St. Rep. 267; Shepherd v. State, 36 Fla. 374, 18 South. 773.

[d] (Ga. 1846) It is prejudicial error for the court to draw the names of additional jurors from the grand jury box and give the list to the sheriff to summon them, instead of leaving the selection of the names to the sheriff.—Boon v. State, 1 Ga. (1 Kelly) 631.

[e] (Idaho, 1895) Under Rev. St. § 3961, providing that where no jurors have been summoned, or a sufficient number does not appear, the court may order a sufficient number to be drawn, or cause the sheriff to summon them from the body of the county, where the court, on taking a recess because of the disturbed condition of the county from strikes, riots, and murders, discharged the regular panel, an open venire was properly issued to provide a jury when the recess was over.—Simmons v. Cunningham, 39 Pac. 1109.

[f] (Ill. 1874) The act relating to jurors, in force July 1, 1872, provides (section 8) that the circuit clerk shall go to the office of the county clerk before a term of court, and in the presence of the county clerk draw the names of not less than 24 persons to serve as jurors for each week that the approaching session will probably last. Section 13 declares that if, at any time during the term, the panel shall not be full, the clerk of the court shall draw more jurors in the same manner as at first. Section 14 provides that when, by reason of challenge in selecting a trial jury, or by reason of the sickness or the absence of a juror for any reason, except his discharge from the panel, the regular panel shall be exhausted, the court may order talesmen to be summoned from the bystanders by the sheriff to complete the jury for the pending trial. *Held* that, where no jury had been drawn for the fourth week of the term, it was error to cause the sheriff to select and summon a panel from the body of the county.—Lincoln v. Stowell, 73 Ill. 246.

[g] (Iowa, 1859) Code, c. 96, § 1647, authorizing the court, where a sufficient number of jurors fails to appear, to direct the sheriff to sum-

mon the number necessary to make up the deficiency, was not impliedly repealed by Act March 22, 1858, entitled "An act to amend chapter 96 of the Code," directing the court, where all the jurors fail to appear or were illegally selected or drawn, to issue a precept to the sheriff for summoning a new list from the county, since the amendatory act only provides for the failure of "all" the jurors,—a contingency not recognized by the former provisions of the Code.—State v. Pierce, 8 Iowa (8 Clarke) 231.

[h] (Ky. 1891) Where the court, on a trial for murder, ordered the sheriff to summon 70 qualified jurors from an adjoining county, the fact that the sheriff inquired of those best informed on the subject as to what residents of such county were best qualified to serve was not an irregularity.—Brafford v. Commonwealth, 16 S. W. 710.

[i, j] (Minn. 1890) Under Sp. Laws 1889, c. 34, regulating trials in the municipal court of Minneapolis, which provides in section 13 that jurors drawn at the quarterly drawings shall serve for three months and until their successors are selected and certified, and that jurors in criminal trials shall be selected from the panel so drawn, the fact that the jury for the month has been formally excused by the court, and no new drawing can be had until the next month, does not justify the court in issuing an open venire in a prosecution commenced after the regular panel was excused, since, though excused, they were still subject to recall.—State v. Maben, 45 Minn. 56, 47 N. W. 306.

[k] (Miss. 1879) A sheriff, in executing a special venire ordered under Code 1871, § 2759, may resort to the assessment roll to aid him in making the list, and give it to his deputies, with directions to summon those persons and any others whom the deputies may meet who are suitable, and he is not bound to go out into the county in person or by his deputies and summon every man he meets who is liable to jury service, taking them indiscriminately and by chance.—Cavanah v. State, 56 Miss. 299.

[l] (Mont. 1885) Where the regular panel becomes exhausted, the court may direct the sheriff to summon from the county enough qualified persons to complete the jury.—Territory v. Reed, 5 Mont. 92, 1 Pac. 717.

[m] (Mont. 1886) Laws 12th Sess. pp. 57, 58, provide that the county commissioners shall select from the assessors' books the names of 100 qualified jurors, and from them shall draw 30 names for service as trial jurors; that at the beginning of the term the judge shall examine the jurors present, and discharge by lot those in excess of 24; that, if at any time during the term the full panel of 24 is not present, the clerk shall draw from the commissioners' list, under direction of the court, sufficient additional names to fill the panel. *Held*, that it was error, after exhausting the regular panel, consisting of only 23 jurors, to issue an open venire, instead of drawing from the names on the commissioners' list.—Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925.

[n] (Nev. 1884) The question of the necessity of summoning an open venire when the regular panel of jurors is exhausted rests in the discretion of the judge.—State v. Angelo, 18 Nev. 425, 4 Pac. 1080.

[o] (N. J. 1795) There may be a challenge to the array of a special jury, that they were not returned by a sheriff.—Lee v. Evaul, 1 N. J. Law (Coxe) 283.

[p] (N. Y. 1865) Laws 1858, c. 322, § 1, provides that all jurors summoned in Kings county shall be summoned by the commissioners of jurors; and section 41 provides that the method of summoning jurors provided in the act shall be exclusive. *Held*, that a challenge to the array of a special venire, because not summoned by the sheriff, was properly overruled.—Kenny v. People, 31 N. Y. 330.

[q] (Tex. 1852) It is not a valid objection to a petit juror, not summoned as a bystander, that his name is not on the list which the law requires should be made out by the county court. The proviso in the first section of the act of 1848 (Hart's Dig. art. 1667) is to be taken simply as a qualification of that section.—Sayle v. State, 8 Tex. 120.

[r] (Tex. 1877) Act Aug. 1, 1876, § 13, provides that if for any cause jury commissioners shall not be appointed, or shall fail to select jurors, or the panel selected shall be set aside, or the jury list returned shall be lost or destroyed, the court shall forthwith order proceedings to supply a sufficient number of jurors, and, if necessary, may appoint commissioners for that purpose. *Held* that, where no jurors had been selected for the term, it was error to issue an open venire to the sheriff, since the court should have appointed commissioners and caused them to select the jurors.—Elkins v. State, 1 Tex. App. 539.

[s] (Tex. 1889) The statutes provide that if a sufficient number of jurors are not in attendance, or the panels are reduced below the adequate number, the sheriff may, after oath, be directed to supply the deficiency, but no court is given power to order a venire for the trial of a civil cause. *Held*, that a special judge, on demand for a jury, and the refusal of the regular judge, who is holding court, to furnish jurors from the regular panel, has no authority to direct the sheriff to summon a venire to serve as jurors, but the cause should be adjourned until the proper jury lists can be obtained.—Daniel v. Bridges, 73 Tex. 149, 11 S. W. 121.

[t] (Tex. 1890) After the discharge of the regular jury selected by the jury commissioners the county court has no power to direct the sheriff to summon a jury to try a civil case.—Lewis v. Merchant (App.) 16 S. W. 173, following Daniel v. Bridges (1889) 73 Tex. 149, 11 S. W. 121.

[u] (Tex. 1891) Under Willson's Cr. St. § 2248, providing that when the special venire has been exhausted, and a jury not selected, "the court shall order the sheriff to summon any number of persons it may deem advisable for the formation of the jury," a defendant in a criminal case cannot object because the list of talesmen thus summoned has not been drawn by the jury commissioners.—Brotherton v. State, 30 Tex. App. 369, 17 S. W. 932.

[v] (Tex.) Under Rev. St. art. 3022, providing that if, from any cause, jury commissioners should not be appointed, the court shall supply a sufficient number of jurors under the provisions of title 57, art. 3054, providing that if the requisite number of jurors be not in attendance the court shall direct the sheriff to summon persons to make up the requisite number, the court has authority, in all cases where jurors were not summoned by commissioners, to cause them to be summoned by the sheriff.—(1894) Smith v. Bates (Civ. App.) 28 S. W. 64, reversing on rehearing 27 S. W. 1044; (1895) Western Union Tel. Co. v. Everheart, 10 Tex. Civ. App. 468, 32 S. W. 90.

[w] (Utah, 1885) Act Cong. June 23, 1874, provides that in January of each year the clerk of the district court and the judge of probate shall make a jury list, from which they shall select 200 names; that the names selected shall be deposited in a box, from which the jurors for each term shall be drawn; that the names drawn shall not be returned to the box until

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a new list is made; and that if, during the term, additional jurors shall be necessary, they shall be drawn from the box by the marshal. *Held*, that where, during a criminal trial, all the names had been drawn from the box without obtaining a jury, the district court properly issued a venire to the marshal, directing him to summon additional jurors from the body of the district, since the court, having common-law jurisdiction, had also common-law powers to obtain a jury after exhausting the manner prescribed by statute.—United States v. Clawson, 4 Utah, 34, 5 Pac. 689.

[x] (Va. 1817) If a jury cannot be formed from the original panel, nor from the bystanders, the court may award a venire facias commanding the sheriff to summon a specified number to attend the court then in session, and, upon a return of the process, the prisoner may be compelled to elect a jury, saving his right of challenge. Such process may be awarded on the report of the sheriff that there are no other bystanders; nor will the court hear proof afterwards that there were other qualified bystanders who were not called.—Gibson v. Commonwealth, 2 Va. Cas. 111.

[y] (Va. 1892) Under Code, § 4019, which provides that, in any case of felony, where a sufficient number of jurors to constitute a panel of 16, free from exception, cannot be had from those summoned, "the court may direct another venire facias, and cause to be summoned from the bystanders, or from a list to be furnished by the court," so many persons as may be necessary, bystanders may be summoned to complete the panel without a list furnished by the court.—Robinson v. Commonwealth, 88 Va. 900, 14 S. E. 627.

[z] (Va. 1893) Where, in a criminal case, a special venire facias is ordered to be directed to the sergeant of another city to summon jurors, under the authority of Code 1887, § 4024, it is not necessary that a list of names of the persons to be summoned be furnished such officer, as is required by sections 4018 and 4019 when jurors are summoned from the county or corporation in which the case is tried.—Clark v. Commonwealth, 90 Va. 360, 18 S. E. 440.

[zz] (Wyo. 1888) Where, on trial for murder, both the petit and general jury boxes are exhausted before completing the trial jury, Rev. St. § 3395, providing that where the panels are for any reason incomplete, or there are no names in the jury box, the court may order the county clerk, probate judge, and a justice to prepare another list of names to put in the box, is not applicable, and, in the absence of any other statutory provision, the district court has power to issue an open venire to complete the jury.—Carter v. Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

§ 326. —— Qualifications of juror on special venire.

See ante, §§ 259 [c], 324 [p].

Disqualification of member of panel quashed for irregularity to serve on special venire as ground of challenge to array, see post, § 362 [g].

—— *to supply the deficiency, see* ante, § 324 [z, j, y].

Exemption from service on special venire, see ante, § 261 [v].

Qualifications for jurors in general, see ante, §§ 243–264.

[a] (Kan. 1883) It is no ground of challenge to a juror when called from the bystanders by the sheriff, or summoned by the court on a special venire, that he was one of an array which had been successfully challenged as being irregularly drawn.—State v. Yordi, 2 Pac. 161.

[b] (Neb. 1876) On a trial for murder, the court ordered the sheriff to summon a special panel of 96 men from a particular portion of the county, which, on defendant's challenge to the array, was quashed, and a direction given to the sheriff to summon jurors from the "body of the county." In the execution of this order the sheriff summoned 47 of those who had been on the special panel so quashed, and, after all the regular panel and defendant's peremptory challenges had been exhausted, it appeared that the 12 trial jurors were of the original special panel, and each had been challenged for cause on that ground, which challenge had been overruled by the court. *Held*, that the jury were legally impaneled.—Smith v. State, 4 Neb. 277.

[c] (N. C. 1884) A juror summoned on a special venire is qualified, if he be a freeholder only.—State v. Carland, 90 N. C. 668.

[d] (N. C. 1885) Code, § 1733, rendering incompetent as a juror one who has served within two years, applies in terms to tales jurors, and does not, therefore, embrace the case of one summoned on a special venire.—State v. Whitfield, 92 N. C. 831.

[e] (N. C. 1885) It is not ground for challenge to a juror, summoned on a special venire in a criminal case, that he had served on a jury within two years; the only qualification required by Code, § 1738, being that he shall be a freeholder of the county where the trial is had.—State v. Kilgore, 93 N. C. 533.

[f] (N. C. 1886) Under Code, § 1738, requiring of jurors summoned on special venire only that they shall be freeholders, it is not ground of challenge to one so summoned that he has served as a juror within two years and has a suit pending and at issue in court.—State v. Starnes, 94 N. C. 973.

§ 327. Who may summon.

Effect of erroneously causing special venire to be summoned by coroner, see post, § 331 [a].

To whom special venire should be directed, see ante, § 321 [k].

[a] (Cal. 1871) Under Cr. Prac. Act, § 337, providing that a challenge may be made to "the panel" on account of any bias of the officer summoning them which would be ground of challenge to a jury, the fact that the officer who summoned a special venire had expressed an opinion that defendant was guilty was good ground of challenge to the array; the word "panel" including those summoned on special venire.—People v. Coyodo, 40 Cal. 586.

[b] (Cal. 1874) When the panel of drawn jurors is exhausted, and the court is about to issue a special venire, it should not, of its own motion and against the objections of the defendant, examine the sheriff as to his bias, and, if it finds him biased, direct the coroner to serve the venire.—People v. Welch, 49 Cal. 174.

[c] (Cal. 1895) Pen. Code, § 1064, provides for challenging a panel formed from persons drawn on a special venire on account of bias of the officer who summoned them. *Held*, that a deputy sheriff who admitted that he once had an opinion as to the guilt of defendant, but that his opinion had since been dispelled, is not disqualified by bias.—People v. Ryan, 108 Cal. 581, 41 Pac. 451.

[d] (Colo. 1890) In quo warranto, in which the sheriff was relator, the main issue being whether an election was fraudulently conducted, the court properly of its own motion ordered an open venire to issue to the coroner, though the regular panel summoned by the sheriff was still available.—Londoner v. People, 15 Colo. 557, 26 Pac. 135.

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[e] (Ky. 1893) Under Cr. Code, § 193, providing that the court may, for sufficient cause, designate some other person than the sheriff to summon petit jurors, the court, in a criminal cause, may designate two persons other than the sheriff to summon petit jurors, needed because of the exhaustion of the original panel.—Roberts v. Commonwealth, 94 Ky. 499, 22 S. W. 845.

[f] (Tex. 1886) Under Rev. St. art. 3056, which requires that whenever it may be necessary to summon jurors who have not been selected by the jury commissioners, a certain prescribed oath must be administered to the sheriff and his deputies, a conviction under a criminal indictment by a jury, part of which had been summoned by an officer to whom the required oath had not been administered, is void.—Wyers v. State, 22 Tex. App. 258, 2 S. W. 722.

[g] (Tex. 1890) Rev. St. art. 3056, provides that, "whenever it may be necessary to summon jurors who have not been selected by jury commissioners under the provision of this title, the court shall administer to the sheriff and each of his deputies the following oath," etc. *Held* that, where it was shown that the oath had been administered already at the term, it was not error to refuse to again administer it, at defendant's request, upon the issuing of a special venire.—Habel v. State, 28 Tex. App. 588, 13 S. W. 1001.

[h] (Tex. 1893) Rev. St. arts. 3027, 3029, provide that the county court shall at the first term after December 31st and June 30th appoint jury commissioners to select jurors to serve at the term to be held six months after that term shall have ended. Article 3022 provides that the district court may appoint commissioners to select other jurors, where jury commissioners have not been appointed at the time prescribed, or fail to act, or the panels are set aside, or the jury lists lost. *Held* that, under such statutes, defendant cannot demand that jury commissioners be appointed to select talesmen to be summoned to fill vacancies in the jury by which he is to be tried, merely because he believes the sheriff is prejudiced against him.—Johnson v. State, 31 Tex. Cr. R. 456, 20 S. W. 985.

[i] (Wis. 1890) The mere fact that a sheriff knew that he was liable to be called as a witness on defendant's trial for keeping a bawdy house, and that he had knowledge of facts which would make against defendant if he should be called, does not disqualify him from serving a special venire; there being nothing to show that he was hostile toward, or felt any prejudice against, defendant.—Sullivan v. State, 75 Wis. 650, 44 N. W. 647.

§ 328. Return.

Time when special venire may be made returnable, see ante, § 321.

[a] (Fla. 1893) It is error for the court in a criminal trial, over defendant's objection, to proceed to impanel the trial jury from persons summoned on a special venire before the sheriff has made his return thereon, since such procedure deprives defendant of his right to demand a list of the jurors summoned, and of his right to an intelligent exercise of his peremptory challenges.—Collins v. State, 31 Fla. 574, 12 South. 906.

[b] (Tex. 1894) A motion to quash a writ of special venire in a criminal cause because the return did not show the diligence used in endeavoring to summon certain persons named in the writ was properly overruled where it did not appear that the jurors summoned were not sufficient to enable defendant to obtain a fair and impartial jury.—Parker v. State, 33 Tex. Cr. R. 111, 21 S. W. 604.

[c] (Tex. 1896) The return of a writ of special venire at 2:45 p. m., made returnable at 10 o'clock a. m., was without prejudice, where it appears that it was served on defendant one full day before trial.—Ryan v. State (Cr. App.) 35 S. W. 288.

[d] (Wash. 1893) It is not a ground of challenge that the officer who summoned the jurors by special venire did not make his return till after the trial had begun.—State v. Payne, 6 Wash. 563, 34 Pac. 317.

§ 329. —— Amendment.

[a] (Tex. 1886) A sheriff's return on a writ of special venire, showing seven names contained in the venire to have been stricken out, but no statement as to the reasons why they were stricken out, may be amended by the court, upon motion. Code Cr. Proc. art. 614.—Murray v. State, 21 Tex. App. 466, 1 S. W. 522, 3 S. W. 104.

[b] (Tex. 1887) Trial courts have the right to permit sheriffs to amend their returns to show the diligence used by them in the service of special venires, as required by Code Cr. Proc. art. 614.—Powers v. State, 23 Tex. App. 42, 5 S. W. 153; Rodriguez v. Same, 23 Tex. App. 503, 5 S. W. 255.

[c] (Tex. 1890) It was not material error that the sheriff, under the direction of the court, amended the return of the special venire, where all the jurors had been summoned by officers of the court, except three, who were excused on peremptory challenge.—Williams v. State, 29 Tex. App. 89, 14 S. W. 388.

[d] (Tex. 1891) A special venire facias ordered to be returned "May 22, 189—," should not be quashed because of the omission after the figure 9, but it should be amended by inserting the proper figure.—Suit v. State, 30 Tex. App. 319, 17 S. W. 458.

[e] (Tex. 1895) The court may permit the sheriff to amend his return to a special venire.—Franklin v. State, 34 Tex. Cr. R. 625, 31 S. W. 643.

§ 330. Presumption of regularity.

[a] (Miss. 1891) After the special venire of 30 drawn from the jury box had, on the motion of defendant, been quashed, it was announced to the court that the names in the box were exhausted, and the court ordered the sheriff to summon a special venire of 30 in defendant's case, and overruled defendant's motion that the court direct the clerk to make up a jury box by depositing therein the names appearing on the jury list for the year. *Held*, that there was no error, as, in the absence of evidence to the contrary, it must be assumed that the officers had discharged the duties imposed on them by law, and that the jury box had been legally exhausted.—Story v. State, 68 Miss. 609, 10 South. 47.

[b] (Mont. 1886) The issue of an open venire in a particular case raises no presumption that the list of 100 names drawn by the county commissioners has been exhausted.—Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925.

[c] (Tex. 1886) Code Cr. Proc. art. 610, provides that when a special venire is ordered the names of all the persons selected by the jury commissioners shall be placed upon tickets, and the tickets placed in a box, from which the clerk, in open court, shall draw the number of names required, and shall attach a list of the names to the writ. *Held* that, in the absence of evidence to the contrary, it will be presumed that the names which appear on the list attached to the writ were properly drawn.—Smith v. State, 21 Tex. App. 277, 17 S. W. 471.

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[d] (Tex. 1890) Where no objection was taken in the trial court that the record did not show an order for a special venire, it will be presumed on appeal that such order as the law prescribes was made and entered, or that it was waived.—Williams v. State, 29 Tex. App. 89, 14 S. W. 388. CONTRA, see (1886) Steagald v. Same, 22 Tex. App. 464, 3 S. W. 771.

§ 331. Effect of errors and irregularities.

[a] (Cal. 1874) Under Pen. Code, § 1064, providing a challenge may be taken to the panel summoned by special venire for any bias of the officer who summoned them which would be good ground of challenge to a juror, *held* that, where the court, being about to order a special venire, examined the sheriff, and, erroneously holding him biased, ordered the special venire to be summoned by the coroner, the defendant could not challenge the array, since the section only permits such challenge for the bias of the officer who does the summoning. — People v. Welch, 49 Cal. 174.

[b] (Minn. 1871) Under Gen. St. c. 116, § 4, providing that a challenge to the panel can be made only for a material departure from the forms prescribed for the drawing and return of the jury, and chapter 64, § 17, prescribing only that a special venire shall issue to the sheriff, commanding him to summon from the county at large a specified number of persons to serve as jurors during the term, inquiries by a sheriff into the bias and opinions of persons, in selecting and summoning a special venire for the trial of a particular case, while reprehensible, is no ground for a challenge to the panel.—State v. McCartey, 17 Minn. 76 (Gil. 54).

[c] (N. Y. 1852) That 1 of 24 additional jurors ordered to be summoned by the court was by mistake 1 of the 36 originally drawn, so that but 23 new ones were drawn, is no ground for challenging the array in a capital case; the panel not having been exhausted.—People v. Thurston, 2 Parker, Cr. R. 49.

[d] (S. C. 1883) There is no authority for the issue of a venire to summon additional jurors drawn from the tales box, and hence defects in such a writ are immaterial.—State v. Hill, 19 S. C. 435.

[e] (Tex. 1882) Where it became necessary during a term of court to summon more jurors, and the judge, instead of calling on the jury commissioners formerly appointed, appointed new ones, it was not reversible error.—Roundtree v. Gilroy, 57 Tex. 176.

[f] (Wash. 1890) A venire for additional jurors, ordered before the regular panel was exhausted, is a harmless irregularity where the regular panel was exhausted before any of the special veniremen were drawn. — Blanton v. State, 1 Wash. St. 265, 24 Pac. 439; State v. So Ho Ge, 1 Wash. St. 275, 24 Pac. 442; Same v. So Ho Me, 1 Wash. St. 276, 24 Pac. 443.

§ 332. —— Amendment of record.

[a] (Tex.) Where the order for a special venire in a murder case was not entered in the minutes by the clerk, it was proper, after the return of the venire, to make the minutes conform to the order.—(1893) Rodriquez v. State, 32 Tex. Cr. R. 259, 22 S. W. 978; (1895) English v. Same, 34 Tex. Cr. R. 190, 30 S. W. 233.

[b] (Tex. 1893) The action of the court in directing the clerk to amend an entry that certain deputy sheriffs were sworn to summon jurors as required by Rev. St. art. 3056, by showing, in addition, that they were instructed in regard to their duties, was proper.—Roderiquez v. State, 32 Tex. Cr. R. 259, 22 S. W. 978.

3. TALESMEN OR ADDITIONAL JURORS.

WHEN PROPER—EXHAUSTION OF PANEL SUMMONED, § 333.
—— NECESSITY OF EXHAUSTING REGULAR PANEL FOR THE WEEK AFTER EXHAUSTING VENIRE SPECIALLY DRAWN FOR MURDER CASE, § 334.
—— ENTIRE JURY FROM TALESMEN, § 335.
COURTS THAT MAY CALL TALESMEN, § 336.
ORDER, § 337.
NECESSITY OF FIRST CALLING REGULAR PANEL AT FRONT DOOR, § 338.
SUMMONING IN ADVANCE, § 339.
SELECTION OF NAMES OR PERSONS, § 340.
—— WHO IS ELIGIBLE, § 341.
—— WHO IS A BYSTANDER, § 342.
NUMBER TO BE SUMMONED, § 343.
WHO MAY SUMMON, § 344.
—— OATH OF OFFICER, § 345.
SUMMONING DURING RECESS OF COURT, § 346.
PRESUMPTION OF REGULARITY, § 347.
EFFECT OF ERRORS AND IRREGULARITIES, § 348.

Absence of negroes among jurors drawn from bystanders, see ante, § 226 [c].
—— *as infringement of right to trial by jury, see* ante, § 226 [c].
Filling vacancies in panel, see ante, § 314.
Repeal of law authorizing United States courts to obtain jurors when needed, see ante, § 266 [a].
Right to call talesmen to fill vacancies in panel for struck jury, see post, § 373.
Summoning talesmen to fill vacancies on special or struck juries, see post, § 377.

§ 333. When proper — Exhaustion of panel summoned.

See ante, § 316 [d]; post, § 335.
Depletion of panel by excusing jurors, rendering talesmen necessary, see post, § 385 [n].
Filling vacancies on panel caused by challenges before return of venire by calling bystanders in place of those challenged, see ante, § 296 [e].
Necessity to call talesman to fill vacancies in panel in justice's court, see ante, § 314 [i, n].
Presumption of exhaustion of regular panel to support call of talesmen, see post, § 347 [b].
Right to exhaustion of regular panel before summoning talesmen, see post, § 350.

[a] (U. S. 1894) Rev. St. § 804, provides that when, from challenges or otherwise, there is no petit jury to determine any civil or criminal case, the court may order the marshal to summon sufficient bystanders to complete the panel. *Held*, that where the court had summoned a special venire to try an indictment found after the regular panel had been discharged for lack of business, and had exhausted such special venire without obtaining a jury, the court properly ordered talesmen to be called from the bystanders.—St. Clair v. United States, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936.

[b] (Ala. 1887) Code 1886, § 4324, provides that on a trial for a capital offense, the names of the special jurors for the case and the regular jurors in attendance must be written on slips of paper, and all placed in the same box, and an officer designated by the court must draw them out, one by one, and if from these names a jury be not obtained, the court must direct the sheriff to summon other jurors. The officers who had charge of the drawing of a jury failed to put all the names of those summoned in the box. All the names put in were drawn

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out, and a jury not obtained. The court ordered the other names to be put in the box, and the drawing to be continued. Defendant insisted that talesmen should be summoned, which the court refused, until all the jurors summoned had been drawn, when talesmen were summoned to complete the jury. *Held*, that the refusal to grant defendant's request was proper.—Morrison v. State, 84 Ala. 405, 4 South. 402.

[c] (Conn. 1879) Where, in a capital case, the number of regular jurors had been exhausted without making up the panel, and the prisoner's counsel moved that the court order additional regularly appointed jurors to be summoned, instead of appointing talesmen, the court committed no error in denying the motion.—State v. Allen, 47 Conn. 121.

[d] (Ind. 1873) Under Civ. Code, § 314 (2 Gav. & H. St. p. 194), providing that when the regular jury is exhausted, or is insufficient for any cause, the sheriff shall call the bystanders, or fill the jury in such manner as the court shall direct, where nine of the regular panel were engaged in the trial of another cause, the court properly summoned bystanders to fill the jury after exhausting what remained of the regular panel.—Bradley v. Bradley, 45 Ind. 67.

[e] (Iowa, 1884) The district court in a criminal prosecution has power to restrict the number of the panel of jurors to 20, and when a portion only of the number so designated appear, and those present are exhausted without obtaining a jury, it is not compelled to delay a trial until the panel can be filled from the jury lists, and summoned from the body of the county, but may order jurors to be summoned from persons present in the court.—State v. Harris, 64 Iowa, 287, 20 N. W. 439.

[f] (Iowa, 1886) Miller's Code, § 2775, provides that, when the requisite number of jurors cannot be otherwise obtained, the sheriff shall select talesmen from the body of the county to supply the deficiency. *Held*, that the court, on exhaustion of the regular panel, having filled four vacancies from the bystanders, properly denied a motion to set aside such talesmen and fill the vacancies with jurors drawn from the jury list.—Brentner v. Chicago, M. & St. P. R. Co., 68 Iowa, 530, 23 N. W. 245, 27 N. W. 605.

[g] (Iowa, 1886) Miller's Code, § 4396, provides that, when needed, the court may order the sheriff to summon jurors from the bystanders or other persons for the trial of an indictment. *Held* that, where the court in advance ordered a special venire to be summoned for service in case they were needed, it was proper, after exhausting the regular panel without getting a jury, to refuse to summon talesmen from the body of the county, and instead to call jurors from the members of the special venire.—State v. Ryan, 70 Iowa, 154, 30 N. W. 397.

[h] (Ky. 1889) Gen. St. c. 62, art. 5, § 4, provides that in criminal cases, where the accused is entitled to more than 3 peremptory challenges, the clerk shall draw from his box 12 names, who shall compose the jury, unless some of them are challenged, in which event he shall draw as many more names as may be required, until a jury be obtained, or the panel exhausted, when the deficiency shall be made up from bystanders. *Held*, that when the court has furnished all the unoccupied jurors of the regular panel, it should be regarded as exhausted, and bystanders may then be summoned.—McClernand v. Commonwealth, 12 S. W. 148.

[i] (La. 1840) Whether the jurors be absent or sworn in another case, the jury may be completed from the bystanders.—Rondeau v. New Orleans Improvement & Banking Co., 15 La. 160.

[j] (La. 1850) Under Code Prac. § 513, providing that if, on account of absence, the jury should not be complete, the court might order the sheriff to summon a certain number of persons present having the legal qualifications to complete it, the court was not bound to await the return of attachments issued for absent jurors before summoning talesmen.—Barthet v. Estebene, 5 La. Ann. 315.

[k] (Me. 1860) Under Rev. St. c. 82, § 67, permitting a talesman to be taken to fill a vacancy on the regular jury, a juror may be returned from the bystanders for the particular case then to be tried; but, if he is wanted for another case, he must be returned and sworn again as before, since, if jurors are needed for the term, a new venire must be issued.—Wallace v. Inhabitants of Columbia, 48 Me. 436.

[l] (Minn. 1867) Where a general and special venire are exhausted without a jury being secured, the court may summon talesmen to complete the panel.—State v. Brown, 12 Minn. 538 (Gil. 448).

[m] (N. J. 1886) The court is bound to wait until all the veniremen have appeared before calling talesmen.—Patterson v. State, 48 N. J. Law (19 Vroom) 381, 4 Atl. 449.

[n] (N. Y. 1861) In impaneling a jury for the trial of a felony at the oyer and terminer in the county of Kings, it is not erroneous for the court, after failing to get a jury from the 36 jurors summoned for the first six days of the court, under the act of April 17, 1858, applicable to that county, to refuse to summon talesmen, and to proceed to complete the jury from the 36 jurors summoned for the next six days of the court.—Lamberton v. People, 5 Parker, Cr. R. 200.

[o] (N. C. 1896) Under Code, § 1739, providing that, where the regular venire proves insufficient, the judge in his discretion may order a further venire drawn from the box or summoned by the sheriff, where the first special venire drawn from the box has been exhausted without completing the jury, the court may order other jurors to be taken from the bystanders.—State v. Stanton, 118 N. C. 1182, 24 S. E. 536.

[p] (S. C. 1834) On exhaustion of the regular panel, talesmen may be called in a criminal case, as well as in civil cases.—State v. Williams, 2 Hill, Law, 381.

[q] (Tex. 1890) Under Code Cr. Proc. § 640, providing that in selecting a jury no cause shall be unreasonably delayed on account of the absence of a juror who has been summoned, where attachments have been issued for absent veniremen the court properly refused to postpone the summoning of talesmen until return was made on such attachments.—Habel v. State, 28 Tex. App. 538, 13 S. W. 1001.

§ 334. —— Necessity of exhausting regular panel for the week after exhausting venire specially drawn for murder case.

See post, § 351 [n].

Exhaustion of special venire as well as regular panel before resort to talesmen, see ante, § 333 [g].

[a] (Tex.) Less than a full jury having been accepted in a murder case from the 33 special veniremen in attendance, it was error to overrule defendant's motion to place the regular panel drawn for the week in the box for examination, and to order talesmen summoned instead.—(1885) Weaver v. State, 19 Tex. App. 547, 53 Am. Rep. 389; (1889) Cahn v. State, 27 Tex. App. 709, 11 S. W. 723.

[b] (Tex.) Under Code Cr. Proc. art. 612, providing that "when from any cause there is a failure to select a jury from those who have

been summoned upon a special venire, the court shall order the sheriff to summon any number of persons that it may deem advisable for the formation of the jury," the court is not bound, in a murder case, to call and exhaust the jury for the week, as selected by the jury commissioners, before directing the sheriff to summon talesmen from the body of the county.—(1890) Weathersby v. State, 29 Tex. App. 278, 15 S. W. 823, overruling Weaver v. State (1885) 19 Tex. App. 547, 53 Am. Rep. 389; Cahn v. Same (1889) 27 Tex. App. 709, 11 S. W. 723; (1894) Thompson v. Same, 33 Tex. Cr. R. 217, 26 S. W. 198.

§ 335. —— Entire jury from talesmen.

[a] (Ind. 1820) Where the entire panel is exhausted by challenges without obtaining a single juror to try the case, talesmen may be summoned to fill the jury.—Fuller v. State, 1 Blackf. 63.

[b] (La. 1880) When the regular venire is exhausted, the entire jury may be formed of talesmen.—State v. Desmouchet, 32 La. Ann. 1241.

[c] (N. C. 1890) Under Code, § 1733, providing that, in order "that there may not be a defect of jurors, the sheriff shall, by order of court, summon, from day to day, of the bystanders, other jurors," and Laws 1889, c. 441, authorizing the appointment by the judge of some suitable person to summon jurors from the bystanders, when the sheriff is a party to or interested in the action, the court may appoint such person to summon a new panel from the bystanders, when a challenge to the array has been sustained because of the irregularity of the sheriff, who was a party to the action to be tried, in drawing it.—People v. Teague, 106 N. C. 576, 11 S. E. 665.

§ 336. Courts that may call talesmen.

[a] (N. J. 1806) A justice of the peace cannot swear any person as a juror who is not on the panel returned by the officer.—Robson v. Archer, 2 N. J. Law (1 Penning.) 107.

[b] (N. J. 1810) Where two jurors were rejected on objection, and two other persons were added by the constable, in a justice's court, this was *held* error.—Russell v. McClain, 3 N. J. Law (2 Penning.) 649.

[c] (N. J. 1881) A tales may always be awarded by the court of oyer and terminer.—State v. Aaron, 4 N. J. Law (1 Southard) 231, 7 Am. Dec. 592.

[d] (N. Y. 1807) A justice of the peace may award a tales de circumstantibus in case of a default of jurors summoned on the venire.—Zeely v. Yansen, 2 Johns. 386.

[e] (N. Y. 1860) A justice of the peace has no power to summon talesmen for the jury to try a summary proceeding by a landlord to recover possession, because the statute gives him none.—Miner v. Burling, 32 Barb. 540.

§ 337. Order.

[a] It makes no difference that the order to the sheriff to procure the attendance of persons from whom talesmen could be taken was made in anticipation of a demand for talesmen, in the absence and without the knowledge of defendant and his counsel.
—(Ark. 1888) Mabry v. State, 50 Ark. 492, 8 S. W. 823;
(Conn. 1879) State v. Allen, 47 Conn. 121.

[b] (Ala. 1887) An order to the sheriff to summon talesmen to complete the jury in a capital case may be made orally, and need not be entered of record.—Morrison v. State, 84 Ala. 405, 4 South. 402.

[c] (Conn. 1879) Where the court orders talesmen to be summoned in anticipation of the need of them, the order may be either oral or written.—State v. Allen, 47 Conn. 121.

[d] (Conn. 1879) It makes no difference that when an order was made to the sheriff to procure the attendance of persons from whom talesmen might be selected, if required, the order being issued in anticipation of that emergency, the court was holden by only one judge, and the case about to be tried was a capital case, requiring two judges.—State v. Allen, 47 Conn. 121.

[e] (N. C. 1824) An order to a sheriff to summon talesmen need not be returnable on the same day on which it was issued.—State v. Lamon, 10 N. C. 175.

§ 338. Necessity of first calling regular panel at front door.

[a] (Ala. 1867) The court is not bound to have absent jurors called at the court house door before summoning talesmen.—Waller v. State, 40 Ala. 325.

[b] (Ga. 1859) Where a judge ordered a sheriff to summon a special venire and to notify them to attend forthwith, and caused those summoned to be called at the court house door, it was proper to summon talesmen in the place of two in the special venire, who failed to attend, without calling the absent jurors the second time at the court house door.—Lingo v. State, 29 Ga. 470.

[c] (La. 1878) A verdict convicting of murder set aside; the absent members of the regular panel not being called at the court house door before the summoning of talesmen to complete the jury.—State v. Ross, 30 La. Ann. 1154.

§ 339. Summoning in advance.

Necessity of presence of defendant at making of order to summon talesmen in advance, see ante, § 337 [a].

Power of single judge in capital case to order talesmen to be summoned in advance, see ante, § 337 [d].

[a] It was not error for the court to order the sheriff to summon persons qualified to serve as jurors in anticipation of a demand for talesmen after the regular panel should be exhausted.
—(Ark. 1888) Mabry v. State, 50 Ark. 492, 8 S. W. 823;
(Ga. 1859) Cobb v. State, 27 Ga. 648;
(Neb. 1895) Pflueger v. State, 46 Neb. 493, 64 N. W. 1094;
(N. J. 1886) Patterson v. State, 48 N. J. Law (19 Vroom) 381, 4 Atl. 449.

[b] (Conn. 1879) The sheriff may, of his own motion or on order of the court, cause suitable persons to attend in anticipation of the need of talesmen.—State v. Allen, 47 Conn. 121.

[c] (Ga. 1853) The court, knowing several capital cases to be on the docket, is authorized on the first day of the term to direct the sheriff to summon a large number of citizens to be in attendance, ready to serve as talesmen when needed.—Bird v. State, 14 Ga. 43.

[d] (La. 1887) An order made by the judge in course of a trial, in anticipation of the exhaustion of the regular jury panel, directing the sheriff to summon tales jurors, and hold them to serve, if necessary, for the purpose of saving time and avoiding delay, is not illegal, and will not invalidate a jury formed, such talesmen having been tendered only after the exhaustion of the regular panel.—State v. Moncla, 39 La. Ann. 868, 2 South. 814.

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[e] (La. 1891) It is a matter within the discretion of the trial judge to order the summoning of tales jurors in advance of the trial.—State v. Green, 43 La. Ann. 402, 9 South. 42.

§ 340. Selection of names or persons.

[a] (Ga. 1879) It is not ground for challenge to the array that the sheriff selected talesmen by taking names alphabetically from the jury list, instead of from the body of the county, since he is not restricted in his method of choice.—Cox v. State, 64 Ga. 374, 37 Am. Rep. 76.

[b] (Ill. 1873) Act April 10, 1872, concerning juries, provides in part that, when talesmen are needed, they shall be drawn from the jury box, and expressly repeals three prior acts relating to the selection and impaneling of jurors, but fails to include Cr. Code, § 178, authorizing talesmen to be returned by the sheriff, and does not contain any general repeal of inconsistent acts. *Held*, that Cr. Code, § 178, was not repealed by implication.—Gropp v. People, 67 Ill. 154.

[c] (Ind. 1857) The statute of 1853, relating to the impaneling of petit jurors, does not repeal or alter Act 1852, authorizing the court to direct the sheriff to summon a jury from the bystanders when the regular panel has been discharged.—Shaw v. Wood, 8 Ind. 518.

[d] (Kan. 1878) In naming persons to be summoned as talesmen to complete a trial jury, under Laws 1876, c. 104, § 6, the court is not bound to examine the assessment roll to see if the persons to be called are named therein, since, if those summoned are disqualified, it can be discovered on examination.—Trembly v. State, 20 Kan. 116.

[e] (La. 1874) In summoning talesmen, it is not necessary that the formalities prescribed for drawing and summoning the regular panel should be observed, and they need not be drawn by the sheriff from list of registered voters, like the regular panel.—State v. Smith, 26 La. Ann. 62.

[f] (N. Y. 1875) Under 2 Rev. St. 437, § 54, authorizing the court to summon sufficient jurors from the bystanders or the body of the county when a sufficient number do not appear, and Laws 1861, c. 210, restricting the power of the court to summon jurors from the bystanders or the county at large to cases where the parties consent thereto, the court has no power to direct the sheriff to summon additional jurors from the bystanders or the body of the county to fill vacancies in the panel, but must cause them to be drawn from the jury box.—Shields v. Niagara Sav. Bank, 3 Hun, 477, 5 Thomp. & C. 585.

[g] (Ohio, 1880) Under Rev. St. § 6705, directing that the provisions of the Code of Civil Procedure which are applicable to the courts of common pleas shall, as far as possible, be applicable to proceedings before justices of the peace, and section 5173, conferring on parties to suits in the court of common pleas the right to have the list of names of the special venire selected by the court, where the jury impaneled in a justice's court is reduced, by challenge or otherwise, it is error for the constable to fill up the panel by summoning talesmen from the bystanders.—Rogan v. Maley, 8 Ohio Dec. 16, 5 Wkly. Law Bul. 51.

[h] (S. C. 1834) Act 1731 (P. L. 127) § 27 (1 Brev. Dig. tit. 106, § 26), provides that, if a sufficient number of the regular panel do not appear, the court may draw the lacking number from the box, and so in case of challenges or nonappearance, until the jury be filled. Act 1769 (P. L. 272) § 17 (1 Brev. Dig. tit. 106, § 37), provides that there shall be "a box containing the names of special jurors, to consist * * * of persons living within five miles of the court house for each district," out of which all tales jurors shall be drawn. *Held* that, in case of deficiency of jurors, the court could not issue a special venire, but was bound to draw jurors singly from the box, cause each one to be called, and, if he appeared, present him to the defendant for acceptance, and, if he did not appear or was rejected, draw another, and so on till the jury was full.—State v. Williams, 2 Hill, Law, 381.

§ 341. —— Who is eligible.

See ante, § 259 [c]; post, § 342.

Abrogation of sheriff's power to summon jurors, see ante, § 298 [i].

Exemption from service as talesmen, see ante, §§ 261–264.

Liability of juror discharged or excused to be summoned as talesman, see post, § 389 [b].

Necessity of taking names of talesmen from list of registered voters, see ante, § 340 [e].

Qualifications of jurors in general, see ante, §§ 243–264.

[a] The question whether or not a talesman is a qualified juror must be determined as of the time when he is called into the jury box.—(Ga. 1855) McGuffie v. State, 17 Ga. 497; (S. C. 1834) State v. Williams, 2 Hill, Law, 381.

[b] (Conn. 1840) By Act 1837, regarding the qualifications of jurors, a freehold qualification is dispensed with in talesmen.—Ladd v. Prentice, 14 Conn. 109.

[c] (Fla. 1880) Under Laws 1868, c. 1628, § 21, the sheriff may, after the regular panel has been exhausted, call persons one at a time from the bystanders to complete the jury, and need not furnish a full list of the bystanders.—Green v. State, 17 Fla. 669.

[d] (Ga. 1883) Under the express provisions of the constitution and Code, § 5175, one who is on the grand jury list is not incompetent to act as a traverse juror or talesman on the trial of a felony.—McLain v. State, 71 Ga. 279.

[e] (Ind. 1889) Under Rev. St. 1881, § 1395, making it unlawful for an officer charged with the selection of a panel of petit jurors to select any person who has served during the year immediately preceding, and providing that such fact shall be cause for challenge, it is a cause for challenge that one called as a talesman has served in the same court as a talesman some days before, and at the same term.—City of Goshen v. England, 119 Ind. 368, 21 N. E. 977.

[f] (Ind. 1890) It is proper for the court to refuse to direct the sheriff to fill vacancies in the jury by summoning persons outside of the court room.—Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249.

[g] (Iowa, 1880) Under Code 1873, § 239, which provides that it shall be a cause of challenge that a proposed juror "has served on a jury in a court of record within one year, unless he be a member of the regular panel," an objection to a talesman, on the ground that he served as a juror at the "last term" of the court, is not available unless it appears that the last term was within one year.—State v. Miller, 53 Iowa, 84, 4 N. W. 838.

[h] (La.) Where the jury cannot be completed by talesmen from among the bystanders, recourse may be had to other persons not within the presence of the court.—(1859) State v. Bunger, 14 La. Ann. 461; (1874) Same v. Gallagher, 26 La. Ann. 46.

[i] (La. 1876) It is not necessary to be a registered voter in order to be a qualified talesman.—State v. Courtney, 28 La. Ann. 789.

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[j] (Mass. 1830) In a capital case, one called as a talesman cannot be sworn, if his name is not in the jury box.—Commonwealth v. Knapp, 27 Mass. (10 Pick.) 477, 20 Am. Dec. 534.

[k] (Mo. 1896) Where an elisor has been appointed by the court for the special purpose of summoning a jury, because the sheriff was disqualified, it is error for the court to call as talesmen members of the regular panel, which had theretofore been summoned by the sheriff, but not by the elisor.—State v. Weeden, 133 Mo. 70, 34 S. W. 473.

[l] (Neb. 1893) Code Civ. Proc. § 665, provides "that no person shall be summoned as a juror in any district court of this state more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge." *Held*, that the section applied to talesmen who had served as jurors within the prescribed period.—Wiseman v. Bruns, 36 Neb. 467, 54 N. W. 858.

[m] (N. J. 1886) It is not necessary to select talesmen from those actually present in or about the court room. The officer may go out into the county and summon them.—Patterson v. State, 48 N. J. Law (19 Vroom) 381, 4 Atl. 449.

[n] (N. C. 1869) The qualifications required for talesmen are the same as those necessary for the original panel.—State v. Bullock, 63 N. C. 570.

[o] (N. C. 1874) It is no objection to a tales juror, otherwise qualified, that his name does not appear on the jury list made by the county commissioners.—Lee v. Lee, 71 N. C. 139.

[p] (N. C. 1876) Under Rev. Code, c. 31, § 29, requiring tales jurors to be freeholders, it is not essential that such a juror shall have a legal freehold, and therefore the equitable freehold of a mortgagor in possession is sufficient to make him competent as a juror.—State v. Ragland, 75 N. C. 12.

[q] (N. C. 1879) A juror, who was summoned on a special venire within the two years next preceding the term at which he was summoned to serve as a talesman, is not disqualified under Act March 12, 1879, providing it shall be ground of challenge that the juror has acted in the same court as grand or petit juror within two years, though he had attended the term for which he was then summoned; his name not having been drawn, and he having been discharged.—State v. Thorne, 81 N. C. 555.

[r] (N. C. 1880) Tales jurors must own real estate of freehold situate in the county where the court in which they are to serve is held.—State v. Cooper, 83 N. C. 671.

[s] (N. C. 1883) A tales juror is required to possess the same qualifications as one of the regular panel, with the additional one of being a freeholder.—State v. Whitley, 88 N. C. 691.

[t] (N. C. 1884) Talesmen must not only be freeholders, but must have paid their taxes for the preceding year; that is, for the year preceding that in which the tax returns are laid before the county commissioners, but not necessarily for the year preceding the trial.—State v. Carland, 90 N. C. 668.

[tt] (N. C. 1888) A tales juror must have paid taxes, as required of a regular juror by Code, § 1722, to render him eligible; but he need not have paid taxes for the current fiscal year in which he is called.—State v. Hargrave, 110 N. C. 484, 6 S. E. 185.

[u] (Pa. 1873) Act 1805 limited the selection of talesmen to "bystanders." Act 1834 allowed talesmen to be taken from the body of the county as well. Cr. Proc. Act 1860, § 41, authorizes the court to issue a tales de circumstantibus when occasion shall render the same necessary. *Held*, that Act 1860 did not repeal Act 1834, so as to limit the selection of talesmen to bystanders, but that the phrase "tales de circumstantibus" is used in Act 1860 merely to designate the writ to be issued.—Brown v. Commonwealth, 30 Leg. Int. 382, 1 Leg. Chron. 347.

[v] (S. C. 1834) It is not a good cause of challenge to a tales juror that, since his name was put into the tales box, he has removed, and was then living more than five miles from the court house.—State v. Williams, 2 Hill, 881.

[w] (Tex. 1895) The sheriff may summon as talesmen, on the exhaustion of the special venire, the original venire.—Adams v. State, 35 Tex. Cr. R. 285, 33 S. W. 354.

[x] (Vt. 1894) St. 1884, No. 111, § 1, providing that every person drawn to serve as a grand or petit juror, from any town containing more than 200 inhabitants, shall be disqualified from again serving as a juror for two years from such drawing, applies only to persons drawn on the regular panel, and not to a talesman.—First Nat. Bank v. Post, 66 Vt. 237, 28 Atl. 989.

§ 342. —— Who is a bystander.

Effect of summoning talesmen within court house yard, see post, § 348 [a].

[a] (U. S. 1876) Under Rev. St. § 804, providing that, when the panel is exhausted, the marshal by order of the court shall return jurymen from the bystanders sufficient to complete the panel, persons may be accepted as "bystanders," though not in the court room or about the court house when summoned by the marshal, where they appear in court at the time they are returned as present.—United States v. Loughery, Fed. Cas. No. 15,631 [13 Blatchf. 267].

[b] (La. 1850) Under Code Prac. § 513, providing that if, on account of absence, the jury should not be complete, the court might order the sheriff to summon a certain number of persons present having the legal qualifications to complete it, where the sheriff under such an order has summoned persons not actually in the court house, and such persons have presented themselves in obedience to such summons, there was no irregularity.—Barthet v. Estebene, 5 La. Ann. 315.

[c] (La. 1883) Under Acts 1877, No. 44, § 7, providing that the judge, when he thinks proper, may require the jury commission to draw additional jurors, but that nothing therein shall be considered as limiting the right of the judge to summon talesmen from among the bystanders or persons in the proximity of the court house, where the court has directed the sheriff to summon talesmen from the bystanders in the court house and vicinity, if the sheriff find no available persons at the court house, he may proceed into the town, summoning suitable persons as he meets them.—State v. Revells, 35 La. Ann. 302.

[d] (N. C. 1824) A sheriff summoned as talesmen persons who were not bystanders in the court house. *Held*, that the calling of them into court was a sufficient summoning, and that, when they came in, they were bystanders and bound to serve.—State v. Lamon, 10 N. C. 175.

[e] (Or. 1879) A juror living several miles from the court house was present at the morning session of the court, in a criminal case, as

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a bystander. Immediately after adjournment he was summoned on a venire to the county. *Held*, that after adjournment he was not a bystander and was of the body of the county.—State v. Brown, 7 Or. 186.

[f] (Pa. 1831) A tales de circumstantibus can be taken from those only who are actually present in court.—Simon v. Gratz, 2 Pen. & W. 412, 23 Am. Dec. 33.

[g] (Tex. 1878) A person found in a house fronting on the court house square is not found "in the court house or yard," within the prohibition of Act 1876, § 23, forbidding the sheriff to summon as a juror any person found within the court house or yard, if they can be found elsewhere.—Baker v. State, 4 Tex. App. 223.

[h] (Tex. 1878) Jury Law 1878, prohibiting the summons of tales jurors from persons found in the court house, does not preclude the summoning of such a juror in the street during recess, though he was in the court room when the talesmen were ordered to be summoned.—Johnson v. State, 4 Tex. App. 268.

[i] (Tex. 1879) Under Jury Law 1876, § 23, directing how a special venire could be obtained, it was declared unlawful for the sheriff to summon as a juror any person found within the court house or yard, if they could be had elsewhere. *Held*, that an uninclosed public square, used as an open market and public resort, about the court house, was not the court house "yard," within the law or spirit of the act.—Matthews v. State, 6 Tex. App. 23.

§ 343. Number to be summoned.

[a] (Ill. 1891) When a case is called for trial, and the regular panel of 24 men is for any cause not full, the court may order it filled from the bystanders; but after the selection of the jury has begun, and this number becomes reduced, so there are not 12 jurors to place in the box, the court should order only enough to be selected from the bystanders to keep 12 men in the box, and need not keep the original panel of 24 full.—Nealon v. People, 39 Ill. App. 481.

[b] (Md. 1809) Where 9 jurors are sworn in a criminal case, and the rest of the original panel is exhausted by peremptory challenges, the court can legally award an order for the summoning of only 3 talesmen, and where 11 are sworn, to summon only 1.—Burk v. State, 2 Har. & J. 426.

[c] (Mo. 1857) When the regular panel of jurors is exhausted, it is not required that any particular number of talesmen be summoned.—State v. Buckner, 25 Mo. 167.

[d] (N. C. 1824) The court may determine what number of talesmen shall be summoned; and, in case the court does not determine, it is left to the discretion of the sheriff.—State v. Lamon, 10 N. C. 175.

§ 344. Who may summon.

[a] (Ala. 1842) Under Act 1826 (Aik. Dig. 298) § 24, providing that, where talesmen were needed, the court might "direct the sheriff, or other attending officer, in case of his absence or inability to serve," to summon a jury, the court cannot appoint the coroner to summon a jury, where the sheriff is incapacitated by illness; the "attending officers" being the deputy sheriffs or bailiffs, who must be appointed by the sheriff to attend on the court.—State v. Monk, 3 Ala. 415.

[b] (Me. 1824) If the sheriff return a talesman, in a cause in which his deputy is a party, it is good ground of challenge to the juror.—Walker v. Green, 3 Me. (3 Greenl.) 215.

[c] (N. C. 1890) Laws 1889, c. 441, authorizing the appointment of some suitable person to summon talesmen, when the sheriff is interested in the action or is a party thereto, is applicable to actions pending at the time of its passage.—People v. Teague, 106 N. C. 576, 11 S. E. 665.

[d] (Pa. 1858) Act April 14, 1834, § 61, provides that, if sufficient competent jurors do not appear, the sheriff or coroner, "or, if the case requires it, two citizens," to be appointed by the court, shall summon a sufficient number of talesmen. *Held*, that the right of the court to appoint two citizens was not limited to cases where the sheriff and coroner were disqualified by bias, but that the court properly made such appointment where the sheriff was in court as a witness for defendant and the coroner was absent.—Commonwealth v. Carson, 3 Phila. 219.

§ 345. —— Oath of officer.

[a] (Tex. 1889) Under Rev. St. art. 3056, providing that a sheriff, when necessary to summon talesmen as jurors, shall be sworn to summon impartial and sensible men, etc., an oath once taken during the term is sufficient.—Blanton v. Mayes, 72 Tex. 417, 10 S. W. 452.

[b] (Tex. 1893) Where the sheriff is sworn and instructed as to his duties in selecting and summoning talesmen, it is not necessary to have the oath repeated every time new and additional talesmen are to be summoned.—Shaw v. State, 32 Tex. Cr. R. 155, 22 S. W. 588.

§ 346. Summoning during recess of court.

[a] (La. 1883) Under Acts 1877, No. 44, § 7, providing that the district judge may, when he thinks proper, require the jury commission to draw additional jurors, but that nothing therein shall be considered as limiting the right of the judge to summon talesmen from among the bystanders, where the court directed the sheriff to summon talesmen from bystanders in the court house and vicinity, and then adjourned for the day, the sheriff was authorized to summon such talesmen the next morning, before the court resumed its sitting.—State v. Revells, 35 La. Ann. 302.

§ 347. Presumption of regularity.

[a] (Iowa, 1887) After the impaneling of a jury, and the statement of counsel, a juror was excused for cause. Thereupon the parties refused to call another juror to take his place, and the court discharged the jury, giving the parties full power to challenge the jury to be called, and thereupon the 11 remaining jurors were recalled, and one bystander. As nothing appeared from the record to disprove that the court first exhausted the regular panel, and then had a talesman summoned, it will be presumed the proceeding was regular and no error was committed.—State v. Laughlin, 73 Iowa, 351, 35 N. W. 448.

[b] (Mo. 1875) Where the record shows that a jury was summoned from the bystanders, it will be presumed, in the absence of any showing to the contrary, that the regular panel was exhausted or was engaged in trial of other causes.—State v. Jones, 61 Mo. 232.

[c] (Tex. 1868) Where jurors not on the list are permitted to serve, it will be presumed that the facts justifying it existed.—Pauska v. Daus, 31 Tex. 67.

[d] (Wash. 1895) Code Proc. § 339, provides that, where jurors are excused, the court may summon the necessary number of bystanders to complete the jury. *Held* that, where jurors summoned failed to appear when drawn, it would be presumed that they were properly excused, so that bystanders were properly summoned to complete the jury.—State v. Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

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§ 348. Effect of errors and irregularities.

[a] (Tex. 1879) The proviso of section 23 of the jury law of 1876, forbidding the summoning of talesmen within the court house yard, being merely directory, the failure to observe it will not be fatal, unless defendant is shown to be prejudiced thereby.—Matthews v. State, 6 Tex. App. 23.

[b] (Wash. 1890) Although it was error to order the United States marshal to summon a talesman when the sheriff was present, such error was harmless, where the talesman summoned was not challenged or shown to be in any way unfit to sit in the case.—Meeker v. Gardella, 1 Wash. St. 139, 23 Pac. 837.

(D) THE TRIAL JURY.

1. DRAWING THE JURY, §§ 349-359.
2. RIGHT TO FULL PANEL TO SELECT FROM, §§ 360-367.

Waiver of objections, see post, § 513.

Error in selection of jury, discretion of trial court in granting new trial, see "Appeal and Error," vol. 8, c. 1704, § 3867.

1. DRAWING THE JURY.

MANNER OF DRAWING—IN GENERAL, § 349.
RIGHT TO JURY OF ORIGINAL PANEL, § 350.
ORDER OF CALLING NAMES, § 351.
—— WAITING FOR RETURN OF ATTACHMENT, § 352.
—— DRAWING FROM JURORS STOOD ASIDE, § 353.
—— CALLING JUROR NOT AVAILABLE WHEN FIRST CALLED, § 354.
RIGHT TO PARTICULAR JUROR OR JURY, § 355.
NUMBER TO BE DRAWN BEFORE PARTY MUST EXAMINE, § 356.
NUMBER TO BE DRAWN OR PRESENTED BEFORE CHALLENGES MUST BE MADE, § 357.
PRESUMPTION OF REGULARITY, § 358.
EFFECT OF ERRORS AND IRREGULARITIES, § 359.

§ 349. Manner of drawing—In general.

Box or wheel from which panel is drawn, see ante, §§ 278–280.

Calling names from list instead of drawing by lot, see post, § 351.

Mode of drawing as infringement of right, see ante, § 230 [k, m].

[a] (Ala. 1870) Under a statute requiring the names of the members of the panel to be written on "separate" slips of paper, and the slips drawn one by one to form the trial jury, the court improperly refused to quash the venire where one slip drawn showed a name on each side, and three other names had not been placed in the box at all; the statute being mandatory.—Brazier v. State, 44 Ala. 387.

[b] (Iowa, 1866) When jurors in addition to the regular panel are summoned for the term, their names should be placed on ballots and drawn by lot. If summoned merely for one trial, it is better to place their names in the box, although no law requires it.—State v. Green, 20 Iowa, 424.

[c] (Me. 1872) In impaneling a sheriff's jury, summoned to assess damages for land taken for the location of a railroad, the parties are not entitled to have the names of all the jurors summoned placed separately in a box, and the jury drawn in accordance with Rev. St. c. 82, § 66, which in terms applies only to civil and criminal cases pending in a judicial court, and relates to the impaneling of ordinary juries.—Davis v. Bangor & P. R. Co., 60 Me. 303.

[d] (Nev. 1867) A jury drawn while the court was in session, in the presence of the court and its officers, must be held to have been drawn in open court, whether it was done in the room where the court usually sits or in any other room of the court house.—State v. Millain, 3 Nev. 409.

[e] (N. Y. 1878) 2 Edm. St. p. 243, relating to jurors in justices' courts, provides (section 100) that the justice shall draw from the receptacle in which the names of the jurors returned on the panel have been placed the names of 6 persons, one after the other, and, if any person so drawn shall be challenged and set aside, "then" such further number shall be drawn as may be needed. *Held* that, where the justice drew all the 12 names from the box and called them, his refusal to replace the names in the box and draw out 6, one by one, was reversible error.—Becker v. Sitterly, 58 How. Prac. 38.

[f] (Ohio, 1892) Cleveland City Ord. § 733, provides that jurors for a trial in a police court shall be drawn in the presence of such persons interested in the cause as may desire to be present. Section 735 provides that jurors drawn may be required to serve as jurors in the trial of any cause during the term in which they are summoned. *Held*, that it was not error to permit jurors to sit in a case who had previously been drawn for a prior case, though plaintiff was thereby deprived of the right to be present when they were drawn.—Molitor v. State, 6 Ohio Cir. Ct. R. 263, affirming (1888) 20 Wkly. Law Bul. 323.

[g] (S. C. 1844) Under Act 1841, providing that in civil cases each party may challenge two jurors, before they are charged with the trial of the issue, without showing cause, when either party has so challenged, the vacancy must be filled by drawing one of the supernumerary jurors by lot.—State v. Kleinback, 2 Speers, 418.

[h] (S. C. 1878) In trials for misdemeanors, the jury should be drawn anew in each case in the presence of the defendant and in open court from the whole panel of jurors.—State v. Cardoza, 11 S. C. 195.

[i] (Tex. 1879) Acts 15th Leg. p. 82, § 21, provides that the clerk shall write the names of all jurors on separate similar slips of paper, and when a jury is needed the same shall be drawn from the box in which they shall have been deposited and mixed, and further directs the clerk to provide and keep for that purpose "a suitable box with a sliding lid." Section 22 provides that, in ordinary jury trials, the clerk shall draw the names from "the" box. Section 23, providing for special venires, directs that the tickets be placed in "a" box, "which shall be well shaken up, and from this box the clerk shall draw the necessary names." *Held*, that the box to be used in cases of special venires may be a different box from the one with the sliding lid provided for ordinary juries, and, its structure not being described, an ordinary cigar box was sufficient.—Pocket v. State, 5 Tex. App. 552.

[j] (Va. 1859) Under a statute requiring the jury to be chosen by lot, after the panel of 24 had been selected, the prisoner struck out 8, and the court *held* it immaterial whether 4 more were selected by lot to be discharged, or 12 were selected by lot to serve.—Bristow v. Commonwealth, 15 Grat. 634.

[k] (Wis. 1851) Where the statute is silent as to the manner in which the clerk shall draw the names of the jurors, it is sufficient if the draw-

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ing is fortuitous.—Benaway v. Conyne, 3 Chand. 214, 3 Pin. 196.

[l] (Wis. 1855) Correct practice requires the names of the jurors to be drawn from a box; but, if they are drawn from a hat, the verdict will not be disturbed.—Birchard v. Booth, 4 Wis. 67.

§ 350. Right to jury of original panel.

Effect of improper discharge of juror on challenge for cause, see post, § 598.

[a] (Ga. 1850) Act 1811, § 8, as amended by Act 1816, requires 24 of the jurors summoned to be impaneled for the trial of a slave for a capital offense. Section 9 provides that the owner or manager of the slave may challenge 7, and the state 5, of this number, "and that the remaining 12 shall proceed to the trial of the slave." *Held*, that where a jury panel, regularly drawn and summoned, was discharged by the court without cause, it was good ground of challenge of the array of another panel called to try the same offense.—Judge v. State, 8 Ga. 173.

[b] (Ind. 1870) The statute (2 Gav. & H. p. 408), which provides that "when a jury trial is demanded the sheriff shall call a jury in the manner prescribed by law, or as directed by the court," does not confer authority on the court to direct the calling of a jury of bystanders against the consent of the party to be tried, when there is a regular panel of jurors in attendance.—Rogers v. State, 33 Ind. 543.

[c] (Ind. 1876) 2 Gav. & H. St. p. 30, § 1, authorizes the court, on the first day of the term, to set aside a panel where one of the officers who acted in drawing it had a cause pending for trial at the same term. *Held*, that where the regular panel was discharged on the sixth day of the term, and a new panel summoned, because the clerk, who assisted in drawing such panel, had a cause pending for trial at that term, a party to another cause was entitled to demand a jury of the original panel.—Hight v. Langdon, 53 Ind. 81.

[d] (Ind. 1891) Under Rev. St. § 522, which provides that "the court shall have power, when the business thereof requires it, to order the impaneling of a special jury for the trial of any cause," it is proper to order the impaneling of a special jury because the regular panel is out deliberating on another case, and to direct such special jury to hear the case, even though the regular panel is discharged from the other case before the special jury is fully impaneled.—Myers v. Moore, 3 Ind. App. 226, 28 N. E. 724.

[e] (La. 1877) Persons on trial for alleged crimes have a right to demand that all of the regular venire of jurors present, and not then engaged on other jury duty, shall be submitted to their acceptance or rejection, before talesmen are resorted to for the formation of juries.—State v. Atkinson, 29 La. Ann. 543.

[f] (Miss. 1852) In a capital case the prisoner is entitled to a trial by a jury selected from the special venire facias, if a sufficient number can be obtained therefrom.—Boles v. State, 24 Miss. (2 Cushm.) 445.

§ 351. Order of calling names.

[a] (Iowa, 1886) In drawing a jury for the trial of a criminal case from a special venire, it is proper, instead of selecting them by lot, to begin with the first name on the list, and so continue until the jury is obtained.—State v. Ryan, 70 Iowa, 154, 30 N. W. 397.

[b] (La. 1856) The court may commence at a particular number on the list, and call it consecutively until a jury is formed or the panel exhausted.—State v. Kennedy, 11 La. Ann. 479.

[c] (La. 1884) The additional jurors whom, by Acts 1877, p. 57, § 7, the judge is empowered to have drawn, are a part of the regular panel, and their names were properly placed in the jury box for acceptance or rejection along with those drawn before the meeting of the court.—State v. Brooks, 36 La. Ann. 334.

[d] (La. 1891) The action of the court in a murder trial in calling the names of the jury panel from the list, and in refusing defendant's motion to have the names placed in a box and drawn therefrom, was not erroneous; the former being the local practice, and not forbidden by any law.—State v. Woodson, 43 La. Ann. 905, 9 South. 903.

[e] (Md. 1881) It is no ground of objection by a traverser that the persons summoned as jurors or talesmen were not called to the book in the order in which their names appeared in the list or the order in which they may have been drawn.—Johns v. State, 55 Md. 350.

[f] (N. C. 1844) Where, on trial of a capital case, there were only 11 members present of the regular venire, and, a special venire of 75 having been summoned, the names of both venires were placed together in the box, the irregularity was harmless, where all the names on both venires were submitted to the accused for acceptance before a full jury was obtained.—State v. Lytle, 27 N. C. 58.

[g] (S. C. 1829) The fact that the clerk, in calling the jury to be challenged, called their names in the order in which they were impaneled, instead of that in which their names appeared on the venire, is not ground for new trial.—State v. Slack, 1 Bailey, 330.

[h] (S. C.) In organizing a jury for the trial of a criminal case, the practice is to present to the prisoner for challenge the juries Nos. 1 and 2, impaneled and sworn, beginning with the foreman of jury No. 1, and, after these are exhausted by challenge, then to present successively the supernumeraries, as drawn on the first day of the term.—(1830) State v. Sims, 2 Bailey, 29; (1831) Same v. Crank, Id. 66, 23 Am. Dec. 117; (1849) Same v. Brown, 3 Strob. 508.

[i] (Tex. 1875) In impaneling a jury in a capital case, the names of the persons summoned should be called in the order in which they stand on the list.—Horbach v. State, 43 Tex. 242.

[j] (Tex. 1877) Code Cr. Proc. art. 556 (Pasch. Dig. art. 3034), provides that in forming a jury for the trial of a capital case, the names of the persons summoned shall be called in the order in which they stand on the list, and, if present, shall be tried as to their qualifications, and, unless challenged, shall be impaneled. Jury Act 1876 prescribes by section 22 the method of forming juries from the regular venire for the term, but has no reference to special venires; by section 23 prescribes the mode of obtaining names for a special venire, but not the method of impaneling them; and by section 29 repeals all laws or parts of laws conflicting with its provisions. *Held*, that the act of 1876 did not repeal article 556 of the Code.—Taylor v. State, 3 Tex. App. 169; Garza v. Same, 3 Tex. App. 286.

[k] (Tex. 1880) Under Pen. Code, art. 640, requiring that jurors' names be called in the order in which they appear on the list furnished to defendant, where the list summoned on special venire and delivered to defendant varied from the list returned by the sheriff as to the order of names, the court properly required defendant either to expose his list or to inform the sheriff of the order in which they stood on his list.—Clark v. State, 8 Tex. App. 350.

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[l] (Tex. 1887) Code Cr. Proc. art. 617, provides that no defendant in a capital case shall be brought to trial until he has had one day's service of the list of persons summoned on special venire. Section 640 provides that in selecting the jury the names of the jurors summoned shall be called in the order in which they stand on the list served on defendant. *Held*, that where, before completing the jury in a capital case, the sheriff stated that one of the jurors, who had just been called, had not been summoned, the court erred in completing the jury from the other veniremen, without waiting to have the missing juror summoned and brought in.—Osborne v. State, 23 Tex. App. 431, 5 S. W. 251.

[m] (Tex. 1889) After a cause was ready for trial the clerk handed defendant the list of jurors already prepared. Defendant objected, and demanded that the list be regularly drawn from the box, which the court refused. *Held*, that the clerk should have drawn the jury one name at a time from the box, as required by statute, and defendant was not required to state any reason for his demand that they should be so drawn.—Gulf, C. & S. F. Ry. Co. v. Keith, 74 Tex. 287, 11 S. W. 1117.

[n] (Tex. 1890) Defendant cannot complain that the court refused, after the special venire was exhausted, to postpone the case till some of the regular panel should be through deliberating on another case, so that they could be passed on in their order, where such jurors were actually called and passed on before talesmen were ordered.—Hudson v. State, 28 Tex. App. 323, 13 S. W. 388.

[o] (Tex. 1892) On a murder trial, where 3 out of a special venire of 100 persons fail to appear, the overruling of a motion to postpone the trial, made by defendant, when he reached the names of the absent jurors, until such jurors should be returned, is not error prejudicial to defendant where, after the special venire was exhausted, the judge stated that he would then delay the organization until the absent veniremen were brought in, and defendant's counsel thereupon stated that they were willing to proceed with talesmen, but that they would not waive their objection to the original refusal of the court to postpone the organization of the jury.—Stephens v. State, 31 Tex Cr. R. 365, 20 S. W. 826.

[p] (Tex. 1895) At the calling of the special venire on a murder trial, two of the jurors failed to answer, and during the impaneling of the jury their names were passed over, in spite of defendant's objection; the court inquiring each time if defendant desired an attachment, to which he replied that he stood upon his rights. On exhaustion of the venire the court ordered the sheriff to summon talesmen, but on request of defendant proceedings were suspended and attachments issued for the two absent jurors, under which they were brought in. On their examination one was challenged by the state, and the other was excused as disqualified. *Held*, that defendant's rights were not prejudiced.—Sinclaire v. State, 35 Tex. Cr. R. 130, 32 S. W. 531.

§ 352. —— Waiting for return of attachment.

Waiting for return of attachment before calling talesmen, see ante, § 333 [j, q].

—— *return of attachment before proceeding with special venire, see* ante, § 316 [e].

[a] (Cal. 1895) The absence of a veniremen when his name is called in a criminal case does not necessitate a suspension of proceedings until an attachment can be served, but the court may fill the panel from the veniremen present.—People v. Collins, 105 Cal. 504, 39 Pac. 16.

[b] (Tex. 1892) Where an attachment was issued against an absent veniremen at the instance of both the defendant and the state, the court properly refused to suspend the further impaneling of the jury till the sheriff brought in the veniremen.—Jones v. State, 31 Tex. Cr. R. 177, 20 S. W. 354.

§ 353. —— Drawing from jurors stood aside.

[a] (N. C.) Jurors of the original panel constitute a distinct panel; and, when the same is gone through with without forming a jury for the trial of a capital offense, the jurors stood aside at the instance of the prosecution must be brought forward and challenged, or tendered to the prisoner, before resort can be had to the special venire.—(1836) State v. Benton, 19 N. C. 196; (1843) Same v. Shaw, 25 N. C. 532; (1884) Same v. Washington, 90 N. C. 664.

[b] (Pa. 1895) Where 12 of the 48 jurors drawn were out on another case at the time defendant's jury was called, and when 11 jurors had been accepted, and all the rest of those present had been challenged or stood aside, there was no error in calling a juror from those stood aside, instead of waiting for the return of the jurors out on the other case, especially where defendant's peremptory challenges had not been exhausted.—Commonwealth v. Weber, 167 Pa. 153, 36 Wkly. Notes Cas. 193, 31 Atl. 481.

§ 354. —— Calling juror not available when first called.

See post, § 355 [i].

[a] (Cal. 1895) The fact that jurors summoned on a special venire fail to answer when called in the morning does not render it erroneous to put their names in the box in the afternoon when they appear, though the names of those put in the box in the morning are not exhausted.—People v. Collins, 105 Cal. 504, 39 Pac. 16.

[b] (Fla. 1893) Where a second special venire is drawn in a criminal case because of the exhaustion of a previous special venire, and such second venire is resorted to for a completion of the panel, it is error to put such second venire down, and to resort again to the first special venire, and to put on defendant a juror of the first venire who made his appearance in court after the second venire had been resorted to, since, when the second venire was resorted to, any member of the first venire lost his status as a veniremen and became merely a bystander.—Collins v. State, 31 Fla. 574, 12 South. 906.

[c] (La. 1886) Where, while proceeding with the list of talesmen, a jury previously engaged reports and is discharged, the judge must resume the call under the regular venire before continuing to form a jury from talesmen.—State v. Creech, 38 La. Ann. 480.

[d] (Minn. 1867) The clerk, having called all the names of a special venire without a jury being secured, was ordered by the court to replace in the box and recall the names of those failing to answer. *Held*, that such proceeding, though not according to general practice, was not ground for reversing the judgment.—State v. Brown, 12 Minn. 538 (Gil. 448).

[e] (N. Y. 1872) A panel of jurors having been regularly drawn and summoned, on the call of the roll in court there were discovered to be several absentees, whose names were not put in the box. The eleventh juror having been impaneled, the names in the box were exhausted, and, the names of the absentees being called, only one was found to be present, who, under exception, took his place in the

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jury box, and, being found qualified, was sworn in as the twelfth juror. *Held* no error.—People v. Rogers, 13 Abb. Prac. (N. S.) 370.

[f] (S. C. 1890) Where, in a murder trial, a number of the panel were engaged in the consideration of another case when the drawing of the jury commenced, the court properly directed their names to be placed in the hat on their return to the court room before the completion of the trial jury.—State v. Jackson, 32 S. C. 27, 10 S. E. 769.

[g] (Va. 1853) Where a juror summoned specially to try a prisoner for murder fails to appear at the proper time, but, under a rule to show cause why he should not be fined, appears on another day, he may, if qualified, be put upon the panel.—Wormeley v. Commonwealth, 10 Grat. 658.

§ 355. Right to particular juror or jury.

Effect of improper discharge of juror on challenge for cause, see post, § 598.

Excusing and discharging jurors, see post, §§ 384–386.

[a] (U. S. 1881) The drawing of a juror's name from the jury box to try defendant does not give defendant the right to have the impaneling of the jury stopped until the juror, who left the court room without permission before the jury was impaneled, can be found.—United States v. Byrne (C. C.) 7 Fed. 455.

[b] (Cal. 1893) The fact that a competent juror was excused by the court is not ground of objection; defendant's right to an impartial jury not being a right to any particular juror.—Asevado v. Orr, 100 Cal. 293, 34 Pac. 777.

[c] (Kan. 1887) In an action against a city for injuries from a defective sidewalk, the court instructed the clerk that, in drawing the jury he might omit the names of residents of the city, and he did omit the names of two of such persons, but the jury, notwithstanding, was made up from the regular list of jurors, and an unexceptionable jury was obtained. *Held*, that no error was committed.—City of Abilene v. Hendricks, 36 Kan. 196, 13 Pac. 121.

[d] (Mich. 1892) How. Ann. St. § 7555, requires the officers who make return of persons for jurors to select such as are not exempt from serving, and section 7571 exempts persons over 60 years of age from jury duty. *Held*, that when persons over 60 years of age are so returned, it is not error for the court to discharge them on a challenge for cause.—McGrail v. City of Kalamazoo, 94 Mich. 52, 53 N. W. 955, distinguishing People v. Rawn (1892) 90 Mich. 377, 51 N. W. 522.

[e] (Miss. 1882) If the two regular juries are considering submitted cases when a case for grand larceny is called for trial, the court may form a third jury out of members of the regular panels who have been excused or challenged, making up any deficiency with talesmen.—Barnes v. State, 60 Miss. 355.

[f] (N. H. 1856) It is not the right of either party to have a cause tried by a particular jury, as they may happen to be organized when the cause comes on for trial, though the practice may be to try the causes in their order upon the trial list by the two juries alternately, and according to that practice the cause would come in order before that particular jury.—Watson v. Walker, 33 N. H. 131.

[g] (N. H. 1856) In the absence of any statute regulating the organization of traverse juries from the panel of jurors returned, it is within the discretion of the court to organize them in any manner which the court may deem proper, and rearrange and organize them anew at any time, either with or without reference to the trial of a particular cause; and this may be done by removing any number of the jurors from one jury, and substituting others from the other jury, without motion of either party, and when no cause of challenge exists against the jurors so removed.—Watson v. Walker, 33 N. H. 131.

[h] (N. H. 1856) The organization of the trial jury being in the discretion of the court, there was no error in calling a talesman in place of a juror of the regular panel, on representation of the plaintiff's counsel that such juror was an important witness for the plaintiff, so long as an impartial jury was obtained.—Walker v. Kennison, 34 N. H. 257.

[i] (N. Y. 1827) 1 Rev. Laws, p. 331, § 20, directs that, if any juror whose name shall be drawn shall fail to appear, such further number shall be drawn as shall be needed to make up the number of 12, who appear, after all causes of challenge allowed, to be fair and indifferent. *Held*, that where, on call of the jurors, one did not answer, defendant was not entitled to have him called, on his subsequent appearance before the jury was completed.—People v. Vermilyea, 7 Cow. 369.

[j] (S. C. 1845) A judge may, in his discretion, send a case to either jury. There is no law rendering it imperative on him to send cases in turn to the juries, although it is convenient and usual to do so.—Durant v. Ashmore, 2 Rich. Law, 184.

[k] (Vt. 1884) Where on the adjournment of the court on the first day 11 jurors have been accepted, 5 of them talesmen, it is not error for the court on the next day to discharge the 11 and begin de novo from a panel not present on the preceding day.—Quinn's Adm'rs v. Halbert, 57 Vt. 178.

§ 356. Number to be drawn before party must examine.

[a] (Cal.) Under the various provisions of the civil and criminal practice acts, prescribing the method of forming juries in civil and criminal actions, 12 names must be drawn from the jury box in a criminal action, and those not challenged or excused must then be sworn to try the issue, after which as many more names as will make up the deficiency must be drawn from the box, when the same process must be repeated until the jury is complete.—(1869) People v. Scoggins, 37 Cal. 676; (1880) People v. Iams, 57 Cal. 115.

[b] (Ill. 1865) Scates' Comp. c. 58, § 8, provides that, when a jury is required, the clerk, sheriff, or coroner shall, in presence of the court, draw 12 names from the jury box, which shall designate the 12 to be sworn on the jury, and in like manner for the second jury. *Held*, that where 2 jurors were drawn, and, after acceptance by plaintiff, were tendered to defendant, who insisted that 4 be tendered to him at once, and the court caused 2 more names to be drawn and tendered the 4 to defendant, defendant's objection to passing on the 2 last drawn until after plaintiff should have done so was properly overruled; there being nothing in the law requiring any particular number to be passed on at one time.—Walker v. Collier, 37 Ill. 362.

[c] (Ill. 1875) Under Rev. Laws 1874, p. 634, § 21, providing that, on the impaneling of the jury in a civil case, the court shall "order the full number of 12 jurors into the jury box, before either party shall be required to examine any of the said jurors," and that the jury shall be passed on and accepted in panels of 4, if the plaintiff by his challenges reduces the number in the box to less than 12, defend-

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ant is entitled to have 12 men in the box before he examines them.—Sterling Bridge Co. v. Pearl, 80 Ill. 251.

[d] (Tex. 1886) Under Code Cr. Proc. arts. 595, 646, a jury in the county court is composed of 6 men, and is formed by drawing from the box the names of 12 jurors, "or so many as there may be," etc. In this case there were but 6 regular jurors, and the defendant was required to pass upon them before others were summoned and placed in the box. *Held* correct, and that the court could not be required to have the panel filled to 12 unless there were 12 regular jurors, nor could it be required to fill the panel to 12 before passing on the 6 in the box.—Goforth v. State, 22 Tex. App. 405, 3 S. W. 332.

§ 357. Number to be drawn or presented before challenges must be made.

[a] (Ala. 1858) Code, § 3474, provides that the clerk shall by lot organize the jurors summoned for the term into two separate juries of 12 each, and, if there are any jurors left over, they may be placed on a third jury, or put on either of the others as needed, and that jurors may be transferred from one jury to another. Section 3475 provides that when, by reason of challenge or otherwise, it is needed, the court may cause jurors to be summoned from the bystanders or the county at large to supply deficiencies in juries, or to form one or more entire juries. *Held*, that where, in organizing a jury to try a misdemeanor, 3 of the regular panel were objected to by the state, the court properly required the defendant to make his objection to the remaining 9 before filling the vacant places, and then directed the sheriff to summon sufficient jurors from the other regular jury to fill all vacancies thus created.—Wilson v. State, 31 Ala. 371.

[b] (Cal. 1873) A party is not bound in a civil action to exercise his right of peremptory challenge to jurors until there are in the jury box 12 persons whom the court has adjudged competent.—Taylor v. Western Pac. R. Co., 45 Cal. 323.

[c] (Idaho, 1885) Under Cr. Prac. Act, §§ 318–353, regulating the impaneling of juries, defendant may be required to exercise his peremptory challenges as each juror appears and before another is called.—People v. Kuok Wah Choi, 2 Idaho, 85, 6 Pac. 112.

[d] (Ky. 1887) Under the Criminal Code, each party to a criminal prosecution is entitled to a full jury of 12 jurors, found, upon examination, qualified to try the case, before being required to exercise the right of peremptory challenge to the individual juror; and, whenever the number is lessened by challenge of either party, the panel must be again filled before being passed on, and so on until the jury is completed.—Jenkins v. Commonwealth, 4 S. W. 816; Wilson v. Commonwealth, Id. 818.

[e] (Miss. 1884) In a capital case, the court may compel the accused to challenge the jurors as they are presented.—Smith v. State, 61 Miss. 754.

[f] (Miss. 1888) One accused of a crime not capital cannot be required to make peremptory challenges from a jury containing less than 12 men.—Thompson v. State, 58 Miss. 62.

[g] (Miss. 1893) Under Code 1892, § 1423, providing that the peremptory challenge of the state shall be made before the juror is presented to the prisoner, and in all cases the accused shall have presented to him a full panel before being called on to make his peremptory challenge, a prisoner is entitled to have the jury filled to the number of 12 by the state after he has refused any of the jurors tendered him before again exercising his peremptory challenges.—Gibson v. State, 70 Miss. 554, 12 South. 582; State v. Mitchel, 12 South. 710.

[h] (Neb. 1891) An order of the court on a trial for a felony, compelling defendant to exercise his first 3 peremptory challenges before the panel is filled, is an undue exercise of judicial power, since the uniform practice has been not to peremptorily challenge until the jurors have been passed for cause, and 12 men are in the box.—Rutherford v. State, 32 Neb. 714, 49 N. W. 701.

[i] (Ohio, 1889) In a prosecution for murder, the court may require the defendant to decide whether or not he will exercise his right of peremptory challenge to each juror as called and not set aside for cause, and not allow him to wait until 12 persons not challenged for cause were in the jury box before he exercised his peremptory challenges.—Thurman v. State, 2 O. C. D. 466.

[j] (S. C. 1894) Defendant is not entitled to have the panel entirely called over before entering on his right of challenge.—State v. Hallback, 40 S. C. 298, 18 S. E. 919.

[k] (Tex. 1873) No peremptory challenge should be made until the full jury of 12 is in the box.—Cooley v. State, 38 Tex. 636.

[l] (Tex. 1888) Under Rev. St. arts. 3091–3094, when 12 jurors are present, and their names have been drawn and entered on the slips, the parties may be required to exercise their peremptory challenges.—Gulf, C. & S. F. Ry. Co. v. Greenlee, 70 Tex. 553, 8 S. W. 129.

[m] (Wis. 1874) Rev. St. c. 179, providing for a peremptory challenge "when the jury is impaneled," construed to require 12 jurors to be called in the cause before the accused can be put to his challenges, and the jury not to be sworn until the challenges are exhausted or the jury accepted.—Lamb v. State, 36 Wis. 424.

§ 358. Presumption of regularity.

[a] (Ill. 1888) Where there is no showing to the contrary, it will be presumed that the clerk drew the jury in the manner required by law.—People v. Madison County Sup'rs, 125 Ill. 334, 17 N. E. 802.

§ 359. Effect of errors and irregularities.

Disqualified jurors in panel as infringement of right, see ante, § 232 [f].

Effect of service on jury of person not drawn therefor, see post, § 634.

[a] (Ga. 1882) A conviction is not affected because the middle initial of one of the jurors is different from that placed in the jury box, where it appears that the juror was the person summoned.—Williams v. State, 69 Ga. 11.

[b] (La. 1888) An objection that the names of persons summoned as tales jurors were not written on ballots and placed in the venire box, and drawn therefrom, but were called from a list made out and furnished to the counsel by the sheriff, will not prevail, in case it appears that the entire list was exhausted before the panel was completed.—State v. Dorsey, 40 La. Ann. 739, 5 South. 26.

[c] (N. C. 1847) Where 100 tales jurors were summoned, and after the original panel was exhausted, the court ordered the names of 36 tales jurors to be put into the box, which was done, and that number also exhausted, and the court then ordered the remainder of the tales jurors to be drawn from, the prisoner making no objection, it was *held* that the proceeding was a correct one, as the prisoner had in fact an opportunity to have tendered to him all the tales jurors.—State v. Nash, 30 N. C. 35.

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[d] (N. C. 1884) That one "J. L. B.," summoned as a juror, had his name entered on the scroll as "J. S. B.," is immaterial.—State v. Mills, 91 N. C. 581.

[e] (Tex. 1886) Code Cr. Proc. arts. 618–621, requiring the court, in obtaining a jury for a capital case from a special venire, to call the jurors summoned at the court house door, to grant attachments for those absent, to seat those present in the jury box, and to test their qualifications under oath and hear their excuses, are merely directory; and hence, where such directions were not followed, but the court instead proceeded under article 640, by calling the jurors present separately in the order in which they stood on the list, and testing their qualifications separately by the court, the state, and the defense, there was no reversible error, where the whole trial jury was drawn from the special venire originally summoned without exhausting it.—Murray v. State, 21 Tex. App. 466, 1 S. W. 522.

2. RIGHT TO FULL PANEL TO SELECT FROM.

FAILURE TO SUMMON FULL VENIRE, § 360.
—— REPETITION OF NAME ON LIST, § 361.
DISQUALIFIED JURORS SUMMONED, § 362.
EXEMPT PERSONS SUMMONED, § 363.
FULL PANEL NOT PRESENT, THOUGH SUMMONED, § 364.
PART OF PANEL ENGAGED ON ANOTHER CASE, § 365.
PART OF PANEL EXCUSED, § 366.
EFFECT OF ERRORS AND IRREGULARITIES, § 367.

Effect of issuing venire for less than proper number, see ante, § 290.

Right to attachment for absent jurors, see post, § 381.

Special venire to provide full panel, see ante, §§ 310–332.

§ 360. Failure to summon full venire.

Failure to order maximum special venire as asked by defendant, see ante, § 323 [b, j].

[a] (U. S. 1893) In a federal court it constitutes no ground of challenge to the array of jurors that three of the persons named in the venire had died after their names were placed in the wheel, and before the time of the drawing.—Pullman's Palace Car Co. v. Harkins, 55 Fed. 932, 5 C. C. A. 326, 17 U. S. App. 22.

[b] (Ala.) The failure of the sheriff to find a person whose name was on the list of jurors drawn and ordered to be summoned by the court is no ground to quash the venire.—(1883) McElroy v. State, 75 Ala. 9; (1884) Jackson v. State, 76 Ala. 26.

[c] (Ala. 1889) Under Code 1886, § 4322, providing that, where there are mistakes in the names of persons summoned as jurors, such names shall be discarded and others summoned, it is not a ground of challenge to the array that one of the names on the venire is that of a deceased person and another that of a nonresident of the county.—Gibson v. State, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96.

[d] (Ala. 1893) A special venire will not be quashed because two of the persons drawn were not summoned, when neither could be found in the county.—Webb v. State, 100 Ala. 47, 14 South. 865.

[e] (Ala. 1893) A venire will not be quashed because a juror whose name has been drawn cannot be found.—Ezell v. State, 103 Ala. 128, 15 South. 818.

[f] (Fla. 1860) Where the court, anticipating the exhaustion of the regular panel, has ordered the sheriff to summon other jurors, it is not ground of objection that the sheriff was unable to summon the full number ordered.—O'Connor v. State, 9 Fla. 215.

[g] (La. 1881) When a venire has been regularly drawn, the failure to summon a juror, resulting from mere mistake or error on the part of the officer, without fraud or collusion, or material injury to the accused, affords no ground upon which to quash the panel.—State v. Dozier, 33 La. Ann. 1362.

[h] (Miss. 1876) Where a special venire of 60 names was returned executed by summoning 32, "the others not being found in the county," the court properly denied a motion to quash the venire, based on the ground that accused was prejudiced by having so small a panel to select from, since the return must be held to be true, in the absence of proof that the officer had not acted in good faith, though perhaps greater diligence might have found more jurors to summon.—Logan v. State, 53 Miss. 431.

[i] (Mont. 1886) Laws 12th Sess. pp. 57, 58, provides that the county commissioners shall select from the assessors' books the names of 100 qualified jurors, and from them shall draw 30 names for service as trial jurors; that at the beginning of the term the judge shall examine the jurors present, and discharge by lot those in excess of 24; and that, if at any time during the term the full panel of 24 is not present, the clerk, under direction of the court, shall draw from the commissioners' list additional names to fill the panel. *Held*, that it was error to compel defendant to proceed to select the jury from a panel consisting of only 23 jurors.—Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925.

[j] (N. C. 1886) That the sheriff returned a writ for a special venire that he had not summoned one of the jurors because he was dead, and that he had not summoned three others because they could not be found, is not ground for a challenge to the array.—State v. Speaks, 94 N. C. 865.

[k] (N. C. 1886) The fact that one drawn on a special venire was dead, and that another had removed from the county before the time when the commissioners should have revised the jury list, is not ground for a challenge to the array.—State v. Hensley, 94 N. C. 1021.

[l] (N. C. 1893) It is not ground for a challenge to the array that one named on the venire was not summoned, or that, by mistake in copying the list of the venire, the name of one was omitted, so that he was not summoned.—State v. Whitt, 113 N. C. 716, 18 S. E. 715.

[m] (N. C. 1893) The fact that one of the men named on the list of a special venire was dead, and another had removed from the county, is not ground for a challenge to the array.—State v. Whitt, 113 N. C. 716, 18 S. E. 715.

[n] (N. C. 1896) It is not ground of challenge to the array of a special venire that the sheriff failed to summon several persons named thereon.—State v. Stanton, 118 N. C. 1182, 24 S. E. 536.

[o] (Ohio, 1851) Under Act Feb. 9, 1831, § 8, providing that, if any person selected as a juror shall die or remove from the township before the time of drawing for jurymen of any court, when such person's name shall be drawn out it shall be thrown aside, and another taken in lieu thereof; and section 16, providing that, when a petit jury shall be drawn contrary to the provisions of the act, the whole array may be challenged and set aside, and a new venire facias awarded,—if the clerk omit to throw aside the name of the juror who has died or

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removed, the whole array may be challenged.—Jones v. State, 1 Ohio Dec. 390, 8 West. Law J. 508.

[p] (Pa. 1890) Act March 31, 1860 (Purd. Dig. p. 388), § 53, provides that no conviction shall be set aside for any defect or error in the precept issued by the court or the venire for the summoning or returning of jurors, but that a trial on the merits shall be a waiver of all errors and defects therein. Act April 14, 1834, § 113, requires that no less than 48 jurors shall be summoned to serve in a court of oyer and terminer. *Held*, that the omission to return the full number of 48 jurors to a court of oyer and terminer was not cured by a trial on the merits; such defect being fatal to the constitution of the court.—Donaldson v. Commonwealth, 95 Pa. 21.

[q] (Pa. 1885) Where the sheriff, in summoning a jury panel for a court of oyer and terminer, failed to serve two of the persons drawn, one of whom he could not find and the other of whom had removed from the county, such failure was no ground of challenge to the array.—Commonwealth v. Seybert, 4 Pa. Co. Ct. R. 152.

[r] (Pa. 1888) In the absence of evidence of improper or corrupt conduct on the part of the officers charged with the duty of filling the jury wheel, and drawing the names of jurors, the fact that, out of the minimum number of 48 jurors whose names were drawn, 1 was found to have removed, and 2 others were dead, is no ground for a challenge to the array.—Showers v. Commonwealth, 120 Pa. 573, 14 Atl. 401.

[s] (S. C. 1895) The failure of the sheriff to serve a summons on a petit juror who had left the county will not affect the array.—State v. Derrick, 44 S. C. 344, 22 S. E. 337.

[t] (Tex. 1886) The fact that one of the men named on the list was dead and another was outside the state is not a sufficient ground for quashing the venire.—Smith v. State, 21 Tex. App. 277, 17 S. W. 471.

[u] (Tex. 1887) It is not required that every person drawn as a juror upon a venire shall be summoned, but only that the sheriff shall exercise reasonable diligence to summon the jurors.—Rodriguez v. State, 23 Tex. App. 503, 5 S. W. 255.

§ 361. —— Repetition of name on list.

[a] (Ala. 1881) A failure of the sheriff to summon the exact number of jurors ordered, through the repetition of one name, is sufficient ground for quashing the venire, and is not a "mistake in the name of a person summoned," declared by Code, § 4876, to be insufficient as such ground.—Roberts v. State, 68 Ala. 515.

[b] (Ala. 1886) The fact that one name appeared twice on the panel of jurors summoned in a capital case and on the copy served on defendant is not ground of challenge to the panel.—McKee v. State, 82 Ala. 32, 2 South. 451.

[c] (Ala.) Where the court orders a special venire of 50 jurors to be drawn, and one of them proves to be on the regular panel, defendant is deprived of his rights to the full number of jurors ordered, and the venire must be quashed.—(1890) Darby v. State, 92 Ala. 9, 9 South. 429; (1891) McQueen v. Same, 94 Ala. 50, 10 South. 433.

§ 362. Disqualified jurors summoned.

See ante, § 331 [c].

Purging panel of disqualified jurors, see post, § 550 [d].

[a] Disqualification of members of the panel is not ground of challenge to the array.—(Ala. 1875) Fields v. State, 52 Ala. 348; (1881) Roberts v. Same, 68 Ala. 515;
(Miss. 1837) Woodsides v. State, 3 Miss. (2 How.) 655;
(Tex. 1875) Mitchell v. State, 43 Tex. 512;
(Wis. 1857) Conkey v. Northern Bank, 6 Wis. 447.

[b] (Ala.) The defendant in a capital trial has no right to demand that the entire list of persons summoned as jurors shall be set aside because some nonresidents of the county have been inadvertently summoned.—(1867) Hall v. State, 40 Ala. 698; (1876) Gray v. Same, 55 Ala. 86.

[c] (Ala. 1878) It is not a ground for quashing the venire summoned for the trial of a capital offense that it included the names of two jurors who on a previous day had convicted prisoner's codefendant, as to whom there had been a severance. Such persons may be challenged for cause.—Wesley v. State, 61 Ala. 282.

[d] (Ala. 1889) It is not ground for quashing a venire that one name on the list was that of a minor, and another of a female, under Code 1886, § 4322, providing that, where there are mistakes in the names of parties summoned as jurors, such names shall be discarded and others summoned.—Gibson v. State, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96.

[e] (Ala. 1893) It is no objection to the venire from which a jury was drawn to try three of four persons indicted for the same crime that the jury which convicted the other was drawn from the same venire, as all the jurors were subject to challenge.—Woodley v. State, 103 Ala. 8, 15 South. 820.

[f] (Ala. 1893) The fact that two persons on the venire had served as jurors within 12 months last past forms no grounds for quashing the venire.—Jones v. State, 104 Ala. 30, 16 South. 135.

[g] (Cal. 1892) The fact that, after a challenge to a panel had been sustained on the ground of bias and prejudice of the deputy sheriff summoning the jurors, a few of the persons composing it were summoned on a second venire, is no ground for challenge to the second panel, but the objections should be made to the individual jurors.—People v. Vincent, 95 Cal. 425, 30 Pac. 581.

[h] (Ga. 1892) It is not ground of challenge to the array that the jurors of the panel put on defendant were in the court room when he was moving for a continuance, and heard part of the evidence to be introduced in the case.—Jones v. State, 90 Ga. 616, 16 S. E. 380.

[i] (Ga. 1893) It is no cause of challenge to the array that 12 out of the 18 jurors constituting the array had just served as a jury for the trial of another person indicted for a like offense growing out of the same transaction, that a verdict of guilty was rendered in that case, and that the witnesses and the evidence in the present case would be the same as they were in the former.—Schnell v. State, 92 Ga. 459, 17 S. E. 966.

[j] (Ga. 1895) An objection to the entire panel of jurors, in a criminal case, on the ground that all of the jurors had heard the evidence on the trial of other persons jointly indicted with accused, and had likely formed and expressed an opinion, was properly overruled.—Brown v. State, 97 Ga. 215, 22 S. E. 403.

[k] (Kan. 1885) The fact that there were unintentionally drawn and summoned on the jury for the June term of court for 1884, previous to the making up of the list for that year, names which were not on the jury list selected in 1883 from the assessment rolls of 1882, is not ground for a challenge to the array.—Atchison, T. & S. F. R. Co. v. Davis, 34 Kan. 199, 8 Pac. 146.

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[l] (Mich. 1884) The fact that two of three talesmen are over 60 years old is ground for challenge for cause, but not to the array.—People v. Bowman, 52 Mich. 584, 18 N. W. 369.

[m] (Mich. 1886) Where, in a proceeding to condemn property for public use, the sheriff has returned a summons of 24 freeholders, the fact that some of them are not competent jurors will not affect the whole array; and, where the jury sworn contains none but resident freeholders, their verdict will be valid.—In re Opening First St., 58 Mich. 641, 26 N. W. 159.

[n] (Miss. 1852) The fact that disqualified persons were summoned on a special venire could not be objected to by a challenge to the array, and is no ground to quash, unless upon proof of partiality or corruption in the sheriff.—Boles v. State, 24 Miss. (2 Cushm.) 445.

[o] (Miss. 1870) It is not ground to quash a special venire in a criminal case that one of the jurors summoned under it was an alien, such objection going only to the poll.—Durrah v. State, 44 Miss. 789.

[p] (Mo. 1892) It is not ground for quashing the panel in a criminal case that, when defendant was applying for a continuance, some of the panel had heard statements of counsel in regard to defendant's efforts to delay the trial, which were calculated to prejudice them against him.—State v. Dusenberry, 112 Mo. 277, 20 S. W. 461.

[q] (Nev. 1866) Act Feb. 8, 1865, § 1, relating to jurors, requires the selection from the assessment rolls of 200 persons qualified to act as jurors. Cr. Prac. Act, § 323, provides that a challenge to the array shall be based only on a material departure from the forms prescribed for drawing and returning the jury, or the willful omission to summon one or more jurors drawn. *Held*, that a challenge to the array, because some of the panel selected were not registered voters, and hence not competent as jurors, was not well taken, in the absence of any showing of prejudice; the statute being merely directory.—State v. Squaires, 2 Nev. 226.

[r] (N. Y. 1894) Where an objection that a jury in a justice court was not drawn in accordance with Code Civ. Proc. § 2994, is sustained, the party is not entitled to a new venire on the ground that the jurors may have been prejudiced against him because of his technical objection; such objection going only to the individual jurors.—Bloomingdale v. Adler, 7 Misc. Rep. 182, 27 N. Y. Supp. 321.

[s] (Pa.) It is no cause of challenge to the array in the oyer and terminer that but 48 jurors were summoned, one of whom was not qualified.—(1859) Foust v. Commonwealth, 33 Pa. 338; (1886) McPhilliamy v. Commonwealth, 6 Atl. 704.

[t] (Tenn. 1873) The fact that all the jurors of the panel, except two, had sat in two of three cases in which the same depositions were to be used, entitled the parties to a new panel.—Apperson v. Logwood, 59 Tenn. (12 Heisk.) 262.

[u] (Tex. 1882) A panel of petit jurors will not be quashed because several of the jurors live in the neighborhood of land the subject of the suit, and have relatives living thereon.—Veramendi v. Hutchins, 56 Tex. 414.

[v] (Tex. 1895) It is not ground for challenge to the array of jurors that they had heard and tried a case against another party charged with an offense of the same character.—Staley v. State (Cr. App.) 29 S. W. 272; Anderson v. State, 34 Tex. Cr. R. 96, 29 S. W. 384.

[w] (Tex. 1896) That a jury commissioner selected himself as a member of a jury is not ground for motion to quash the array, whatever its value as ground of challenge to the poll.—McCamant v. State (Cr. App.) 34 S. W. 610.

[x] (Va. 1886) Under a statute requiring a jury to be made up of persons residing remote from the scene of the crime, if one juror lives too near, the objection should be made to him, and not to the array.—Lawrence v. Commonwealth, 81 Va. 484.

[y] (Va. 1892) The objection that a juror resides at the place where the offense is alleged to have been committed can only be raised as to the individual juror, rather than to the array.—Prince v. Commonwealth, 89 Va. 330, 15 S. E. 863.

§ 363. Exempt persons summoned.

Effect of replacing in box names of jurors who had already served, see ante, § 282 [o].

[a] (S. C. 1891) It is no ground of challenge to the array on special venire that some of the persons whose names are put in the box are exempt from jury service, since exemption is a privilege personal to the juror, and he may waive it.—State v. Merriman, 34 S. C. 16, 12 S. E. 619.

[b] (Wis. 1857) A challenge to the array on the ground that some of the jurors on the panel served at a previous term was properly overruled, the ground being merely the personal exemption of the jurors.—Conkey v. Northern Bank, 6 Wis. 447.

§ 364. Full panel not present though summoned.

See ante, § 356 [d].

Right to full panel at commencement of selection of jury as prerequisite to issue of open venire on exhaustion of panel, see ante, § 325 [m].

[a] (Cal. 1860) After the sheriff had returned that two absent jurors, for whom attachments had been issued, could not be found, the court properly ordered a jury to be impaneled without any further delay.—People v. Lee, 17 Cal. 76.

[b] (La. 1826) Under Code Prac. arts. 496, 497, 513, requiring that before a cause is tried by a jury, the original venire should be called over, and if 20 of them be present the clerk shall draw 12 of them from the box to try the case, the court erroneously overruled an objection to commencing to draw a jury where only five of the venire were known to be present.—Bayoujon's Heirs v. Criswell, 5 Mart. (N. S.) 232.

[bb] (La. 1874) Where a sufficient number of jurors was present to form the panel, an objection to the absence of part of the jurors summoned at the time and when the case was called for trial cannot be sustained on the ground that defendants were deprived of the opportunity of inquiring into the character and qualifications of the jurors.—State v. Hoozer, 26 La. Ann. 599.

[c] (La. 1880) The fact that jurors summoned are absent is not ground for delaying the trial till the absent jurors could be brought in by attachments, when the jury can be completed from the jurors present.—State v. Rountree, 32 La. Ann. 1144.

[d] (Miss. 1852) It is no abridgment of a prisoner's right to select a jury in a capital case from the whole of the special venire that some of them fail to appear, provided that a jury is obtained from those who do appear.—Boles v. State, 24 Miss. (2 Cushm.) 445.

[e] (N. J. 1886) The list having been duly served in the case, it was not a legal ground of

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exception that three of the jurors did not answer to their names when the trial proceeded.—Patterson v. State, 48 N. J. Law (19 Vroom) 381, 4 Atl. 449.

[f] (N. J. 1886) It is not a ground of exception that some of the general panel of jurors failed to answer to their names when the case was moved for trial. The statute requires that the 48 jurors shall be summoned for service, and that a list of them shall be served on the defendant. It does not require that all the jurors shall be present when the case is moved.—Patterson v. State, 48 N. J. Law (19 Vroom) 381, 4 Atl. 449.

[g] (S. C. 1880) The whole number of 36 jurors need not be present at the commencement of a murder trial.—State v. Stephens, 13 S. C. 285.

[h] (S. C. 1890) Gen. St. § 2251, declaring that "no more than 36 persons to serve as petit jurors shall be drawn and summoned to attend, at one and the same time, at any court unless the court shall otherwise order," does not make it necessary that the whole number of 36 jurors should be present at the commencement of the trial.—State v. Jackson, 32 S. C. 27, 10 S. E. 769.

[i] (S. C. 1894) Defendant in a criminal case is not entitled to have the panel full, before entering on the selection of a jury.—State v. Hallback, 40 S. C. 208, 18 S. E. 919.

[j] (S. C. 1896) A special venire having been summoned to complete a jury after defendant had exhausted his challenges, defendant had no right to insist that the names of those veniremen who arrived in advance of the others should not be drawn until the others were present.—State v. Kelley, 46 S. C. 55, 24 S. E. 60.

[k] (Tex. 1892) On a murder trial, where 3 out of a special venire of 100 persons fail to appear, the court properly refused to postpone the trial and ordered process to issue instanter for the absentees.—Stephens v. State, 31 Tex. Cr. R. 365, 20 S. W. 826.

[l] (Tex. 1893) Where one of the veniremen fails to respond as his name is called, it is not error to refuse a postponement until the juror can be brought in.—Shaw v. State, 32 Tex. Cr. R. 155, 22 S. W. 588.

[m] (Tex. 1895) As Code Cr. Proc. art. 640, provides that no cause shall be delayed on the ground of absence of persons summoned as jurors, there was no error in proceeding without one whose presence the court sought by due diligence to secure.—Mitchell v. State (Cr. App.) 33 S. W. 367.

§ 365. Part of panel engaged on another case.

See ante, § 315 [f].

[a] (Ala. 1878) The fact that one or more of the persons on the venire served on a prisoner charged with a capital offense were on the regular juries for the week, and could not be obtained as jurors for the prisoner's trial, because then engaged on the trial of another cause, *held* to give the prisoner no right to delay the impaneling of the jury for his own trial, until such persons might be discharged as jurors on the other case, or to otherwise delay the trial.—Kimbrough v. State, 62 Ala. 248.

[b] (Ala. 1882) The court should not delay the impaneling of a jury in a capital case because some of the persons whose names are on the venire served on the prisoner are absent from the court room, engaged in deliberating on their verdict in another case.—Shelton v. State, 73 Ala. 5.

[c] (Ala. 1885) Under Code, § 4874, requiring special jurors to be drawn for the trial of capital cases in addition to the regular jurors, where the trial of two persons indicted for separate capital offenses are set on the same day, and the same persons are drawn or summoned as special jurors for both trials, should one or more of them be engaged in the case of one of the accused, while a jury is being selected for the trial of the other, so as to render him unable to serve on the latter jury, such jury is illegally impaneled, and a conviction must be reversed.—Evans v. State, 80 Ala. 4.

[d] (Ala. 1891) Where it appeared that a certain person was summoned as a regular juror for the week, but did not attend, that the regular jury had been impaneled without him, and that his name was on the venire, a copy of which was served on defendant's counsel, it was not error for the court to order the drawing to proceed, on such juror failing to answer to his name when called.—Johnston v. State, 94 Ala. 35, 10 South. 667.

[e] (Ala. 1894) Under Acts 1887, p. 156, § 10, requiring the drawing of not less than 25 nor more than 50 special jurors "for each capital case" set for the same day, and providing that such jurors, "together with the panel of petit jurors organized for the week, shall constitute the venire from which the juries to try said capital case or cases shall be selected," where a venireman summoned specially to try defendant's case, and whose name was on the list served on defendant, was taken for the trial of another case, the court may properly organize the jury without him.—Cole v. State, 105 Ala. 76, 16 South. 702.

[f] (Ala. 1894) It was proper to require defendant to go to trial, though at the time five of the persons whose names were on the special venire summoned to try him were engaged in considering their verdict in another case.—Goodwin v. State, 106 Ala. 670, 18 South. 694.

[g] (Ala. 1894) Defendant is not entitled to draw a juror who is engaged in the trial of another case.—Prater v. State, 107 Ala. 26, 18 South. 238.

[h] (Ala. 1894) In a criminal case, where a juror who is on the jury in another case is drawn, the judge may properly direct the name to be set aside, and the drawing to proceed.—Dorsey v. State, 107 Ala. 157, 18 South. 199.

[i] (Cal. 1894) Prior to entering on defendant's case, the clerk withdrew from the box the names of jurors out on another case. Pending the selection of defendant's jury, the other jury reported and was discharged, but the clerk did not at once return their names to the box. When 10 of defendant's jury had been accepted and sworn, the clerk's omission was called to the attention of the court, which ordered the names into the box and denied defendant's motion to discharge the jurors sworn and to impanel a new jury. Defendant exhausted his peremptory challenges and was forced to take an unacceptable juror. *Held*, that the court erred in refusing to discharge the 10 jurors on defendant's motion; defendant being entitled to have all the available jurors to select from.—People v. Edwards, 101 Cal. 543, 36 Pac. 7.

[j] (D. C. 1879) When a cause came on for trial, 12 of the regular jurors were out in another cause. *Held*, that the defendant had no right, before the impaneling commenced, to have all the array present and subject to his challenge.—United States v. Bowen, 3 Mac Arthur, 64.

[k] (La. 1894) Act 1880, No. 135, § 4, provides that "where a special jury is necessary, the judge shall order the drawing of 30 qual-

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lified jurors, who shall be summoned, and, on the trial, * * * talesmen may be summoned as in other cases." *Held*, that the fact that, from a special venire so drawn, a panel of 12 had been selected for the trial of another case did not render the whole special venire void, as the 18 remaining constituted a sufficient nucleus to which talesmen could be drawn to complete the panel.—State ex rel. Breazeale v. Cannon, 15 South. 626.

[l] (Mich. 1892) Comp. Laws, § 6020, provides that, when a jury has been sworn to try an issue, the ballots containing their names shall be kept apart from the other ballots until the jury is discharged. *Held*, that it is not necessary to wait until the jury is discharged and the ballots returned to the slip box before proceeding to draw another jury from the slip box for the trial of the next case, whether criminal or civil.—People v. Craig, 48 Mich. 502, 12 N. W. 675.

[m] (S. C. 1890) The refusal of the court to await the return of another jury, which was out on another case, in order that defendant in murder case might have the full panel to select from, was not error.—State v. Jackson, 32 S. C. 27, 10 S. E. 769.

[n] (S. C. 1892) The defendant in a murder trial is not entitled to a delay in drawing the jury until 12 jurors who are sitting in another case come in and make the panel full.—State v. Campbell, 35 S. C. 28, 14 S. E. 292.

[o] (Tex. 1885) Where a special venire has been summoned to try defendant's case, he has just cause of complaint, if five of them are trying another case when his panel is being filled.—Thuston v. State, 18 Tex. App. 26.

[p] (Tex. 1896) Where 12 of the 26 jurymen are out, considering their verdict in a case, a party to another case called for trial is not entitled to postponement until all of the jurymen are in the jury box.—Gulf, C. & S. F. Ry. Co. v. Duvall, 12 Tex. Civ. App. 848, 35 S. W. 699.

[q] (Tex. 1896) Code Cr. Proc. art. 683, provides that the clerk shall draw 24 names, if so many are in the box, or so many as are there, if the number be less. Article 684 provides that, if there are less than 12 names in the box, the court shall direct the sheriff to summon such number of qualified persons as may be necessary to complete the panel. Article 686, provides that, if the number of jurors be reduced below 12 by challenge, the court shall order other jurors to be drawn and summoned, and placed on the lists, to replace those set aside. *Held*, that where a number of the regular jury were considering their verdict in another case, and the names of 16 jurors, being all then in attendance, were placed in the box, defendant, on trial for theft, was not prejudiced by the refusal of the court to wait until the return of the other jury to complete the panel to 24.—Thurmond v. State, 37 Tex. Cr. R. 422, 36 S. W. 965.

§ 366. Part of panel excused.

See ante, §§ 314, 315 [f].

[a] (Ga. 1877) Where 2 of the panel of 24 jurors are discharged as relatives of defendant, the petit jury was properly taken from the remainder of the panel, without filling the places of those stricken.—Odom v. Gill, 59 Ga. 180.

[b] (Neb. 1878) Five of the original panel of 24 jurors having been excused for cause, it was proper to proceed with the selection of the trial jury, without first filling the places of those excused.—Clough v. State, 7 Neb. 320.

[c] (N. Y. 1889) Under Code Cr. Proc. § 362, providing that a challenge to the panel shall be founded only on a material departure from the forms prescribed by the Code of Civil Procedure for drawing and return of a jury, to the prejudice of defendant, an objection that the court had discharged 12 jurors from the panel for the term is not one that can be taken by such a challenge.—People v. Packenham, 115 N. Y. 200, 21 N. E. 1035.

[d] (Ohio, 1847) On a trial for murder, where one of the panel summoned by the sheriff is excused on his own application, it is not error in the court to refuse to order the sheriff to summon another in his place before exhausting the panel.—Martin v. State, 16 Ohio, 364.

§ 367. Effect of errors and irregularities.

[a] (Ala. 1873) Where defendant had a juror set aside upon the ground that his name was illegibly written on the list furnished to him, it was not prejudicial error for the court to refuse to fill his place by a talesman, where the trial jury was completed without any necessity for calling such a talesman.—Levy v. State, 49 Ala. 390.

[b] (Cal. 1895) Defendant cannot challenge the panel because the names of two jurors were not found on the assessment roll for the preceding years, when they were excused for cause, and no possible harm could have resulted to defendant from their names being placed in the list.—People v. Young, 108 Cal. 8, 41 Pac. 281.

[c] (Tex. 1883) The refusal to quash a venire for failure to summon all the jurors is no ground for reversal, where it does not appear but that the jury was made up of those who were summoned.—Charles v. State, 13 Tex. App. 658.

(E) SPECIAL OR STRUCK JURY.

QUALIFICATIONS FOR SERVICE ON SPECIAL OR STRUCK JURY, § 368.
SELECTION OF PANEL IN GENERAL, § 369.
SIZE OF PANEL, § 370.
SUMMONING THE PANEL, § 371.
RIGHT TO FULL PANEL TO STRIKE FROM, § 372.
FILLING VACANCIES IN PANEL BEFORE STRIKING, § 373.
RIGHT TO STRIKE FROM PANEL AS AGAINST TALESMEN, § 374.
ORDER OF STRIKING, § 375.
NUMBER TO BE STRICKEN OFF, § 376.
FILLING VACANCIES AFTER STRIKING, § 377.
—— RECALLING JUROR STRUCK OFF TO FILL VACANCY, § 378.
EXCUSING STRUCK JUROR, § 379.
EFFECT OF ERRORS AND IRREGULARITIES, § 380.

Challenges for cause, see post, § 553.
Competency of jurors, see post, § 404.
Drawing trial jury after striking, see ante, § 349 [j].
Nature of and right to special or struck jury, see ante, §§ 9–11.
Number of peremptory challenges, see post, § 617.
Peremptory challenges, see post, § 605.
Rejection of jurors on court's own motion, see post, § 539.
Requiring struck jury as infringement of right, see ante, § 226 [f, i].
Waiver of right to special or struck jury, see ante, § 191.

§ 368. Qualifications for service on special or struck jury.

[a] (La. 1875) Members of a special jury must possess the general qualifications prescribed for

all jurors by Rev. St. § 2125, as well as those prescribed for special jurors by section 2153.—Golding v. Petit, 27 La. Ann. 86.

[b] (N. J.) A struck juror is not a petit juror, within the meaning of Revision, p. 532, § 6, which provides that if any person shall be summoned as a petit juror at any stated term of any court, who served as such at any of the three stated terms next preceding that to which he may be summoned, it shall be good ground of challenge to any such juror.—(1891) Moschell v. State, 53 N. J. Law (24 Vroom) 498, 22 Atl. 50; (1892) Id., 54 N. J. Law (25 Vroom) 390, 25 Atl. 964.

§ 369. Selection of panel in general.

Effect of drawing panel for struck jury from defective jury list, see ante, § 282 [s, v].

[a] (Ga. 1882) A special jury may be stricken from the panel of traverse jurors.—Maddox v. Cunningham, 68 Ga. 431, 45 Am. Rep. 500.

[b] (Mo. 1896) Act March 17, 1885 (Rev. St. 1889, p. 2169, § 29), authorizing special juries, provided that certain other sections of the act, designated by number, relating to the summoning of common juries, should be construed as applying to the summoning of special juries; but the section providing that the names of the jurors should be drawn from the jury wheel was not included in those so designated. *Held*, that the omission must be construed as an expression of the intent of the legislature that special juries should not be drawn in the same manner as common juries.—State ex rel. St. Louis, K. & N. W. Ry. Co. v. Withrow, 133 Mo. 500, 36 S. W. 43.

[c] (Mo. 1896) Rule 37 of the St. Louis circuit court, providing that, when a special jury is ordered, the jury commissioner shall draw the number designated from the jury wheel in the same manner as juries for ordinary service are drawn, is invalid, in that it contravenes the statute authorizing special juries.—State ex rel. St. Louis, K. & N. W. Ry. Co. v. Withrow, 133 Mo. 500, 36 S. W. 43, reversing (1896) 133 Mo. 500, 34 S. W. 245.

[d] (Mo. 1896) Act March 17, 1885 (Rev. St. 1889, p. 2169, § 29), provides that special juries shall be selected by the jury commissioner as he may be directed by the court. *Held*, that the authority given by Const. art. 6, § 27, to the circuit court to make rules, does not empower the court to direct by rule that special juries shall be drawn from the jury wheel, such a method being clearly opposed to the spirit of the statute authorizing special juries.—State ex rel. St. Louis, K. & N. W. Ry. Co. v. Withrow, 133 Mo. 500, 36 S. W. 43, reversing (1896) 133 Mo. 500, 34 S. W. 245.

[e] (N. J. 1896) Revision, p. 528, § 18, requires that in making a list from which a struck jury is to be taken defendant shall have notice when and where the sheriff shall attend with his general jury book before the judge, and that then the judge, in presence of the parties, or their agents or attorneys, or such of them as shall attend for that purpose, shall select a list of 48 names from the sheriff's jury book. *Held*, that an objection that the list was not selected by the judge in presence of defendants or their counsel was untenable; the statutes not requiring their presence, but only that they have notice of the time and place.—Fowler v. State, 58 N. J. Law (29 Vroom) 423, 34 Atl. 682.

[f] (N. Y. 1876) 2 Edm. St. p. 418, § 48, provides that when a struck jury is needed 48 names shall be selected by the clerk from the general jury list as being the most impartial and best qualified to try the cause, from which the parties shall strike. *Held*, that the written designation of the 48 names was conclusive, and that evidence could not be admitted to show that the name "G. W. S." on the list was a mistake for "J. C. S.," both names representing actual persons.—People v. Tweed, 50 How. Prac. 273.

[g] (Ohio, 1861) The fact that a clerk of a court was formerly of counsel in the case for the plaintiff in error, he making no objection at the time of striking the jury, and such a relation having ceased, is not a disqualification of the clerk to make up a struck jury in the case, of which the plaintiff in error can take advantage.—Beatty v. Hatcher, 13 Ohio St. 115.

[h] (Ohio, 1876) Under 70 Ohio Laws, p. 172, § 16, providing that if either of the officers, whose duty it is to select the list of names from which a struck jury is to be taken, is interested in the cause, or sick, or absent, or related to either party, or does not stand indifferent between them, the judge may appoint a substitute, the officers designated are not disqualified by having expressed an opinion on the cause to be tried.—Webb v. State, 29 Ohio St. 351.

[i] (Ohio, 1880) Neither a deputy clerk of the court of common pleas, nor a deputy county auditor, has any power to act in selecting the names of persons for a struck jury. That duty must be performed by the clerk, auditor, and recorder, in person, except as otherwise provided in the statute.—Hulse v. State, 35 Ohio St. 421.

[j] (Tenn. 1879) Under Code, § 3993, providing that if there is a deficiency of jurors the court shall designate other good and lawful men, and cause them to be summoned by the sheriff, and section 3997, providing that when special juries are allowed by law the sheriff shall summon the jurors from the body of the county as prescribed in section 3993, the judge who orders a special jury has the power to designate the jurors to be summoned therefor by the sheriff.—Clingan v. East Tennessee, V. & G. R. Co., 70 Tenn. (2 Lea) 726.

[k] (W. Va. 1888) Code, c. 159, § 3, provides that "in case of felony 20 jurors shall be drawn from those in attendance for the trial of the accused. If a sufficient number of jurors for such panel cannot be procured in this way, the court shall order others to be forthwith summoned and selected until a panel of 20, free from exceptions, be completed." *Held*, enough if the sheriff, under the direction of the court, select a panel of 20 from the jurors in attendance, from which the trial jury might be struck; their names need not be put in a box and drawn by ballot.—State v. Hall, 31 W. Va. 505, 7 S. E. 422.

§ 370. Size of panel.

[a] (Ala. 1892) Under Code 1886, § 2752, giving either party the right to demand a struck jury, and be furnished with a list of 24 jurors in attendance, from which each party is to strike alternately, till 12 be stricken, where each of two defendants demands a struck jury they are not entitled to a list of 30 jurors.—Richmond & D. R. Co. v. Greenwood, 99 Ala. 501, 14 South. 495.

§ 371. Summoning the panel.

[a] (Minn. 1886) The provisions of Gen. St. 1878, c. 107, § 8, and Id. c. 71, §§ 4, 15, as to the mode of summoning grand and petit jurors, are both applicable to struck juries; hence leaving a notice at the place of residence of the juror with some person of proper age is sufficient.—Branch v. Dawson, 36 Minn. 193, 30 N. W. 545.

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[b] (Pa. 1871) When a case is ordered to be tried by a struck or special jury, no special venire is necessary to summon the jury.—McDermott v. Hoffman, 70 Pa. (20 P. F. Smith) 31.

§ 372. Right to full panel to strike from.

[a] (Mo.) Under Wag. St. p. 1102, § 7, providing that an accused shall not be required to make peremptory challenges until a full panel is obtained, the state cannot, by offering to waive peremptory challenges, force the defendant, in an indictment for murder, to enter upon impaneling a jury, unless a full panel is present.—(1872) State v. McCarron, 51 Mo. 27; (1876) Same v. Waters, 62 Mo. 196, affirming (1876) 1 Mo. App. 7.

[b] (N. Y. 1876) 2 Edm. St. p. 418, § 48, provides that when a struck jury is needed 48 names shall be chosen by the clerk from the names on the general jury list as the most impartial and best qualified to try the cause; that the parties shall alternately strike one name from this list of 48 names till each has stricken off 12 names, and that the clerk shall certify the remaining 24 names to the sheriff, to be summoned as the panel from which the jury shall be drawn. *Held*, where one of the names certified to and summoned by the sheriff was not on the general jury list, and represented a person not in fact in the minds of the elisors, who acted instead of the clerk, when they made their selection from the jury list, it was good ground of challenge to the array.—People v. Tweed, 50 How. Prac. 262.

[c] (N. Y. 1876) In a struck jury case, after the parties had finished striking from the 48 names selected from the general jury list, it was discovered that one of the 24 remaining names from which the trial jury was to be drawn was that of a person who had been declared exempt from jury duty since his name was placed on the general jury list. *Held* not to be ground of challenge to the array.—People v. Tweed, 50 How. Prac. 280.

[d] (N. Y. 1876) Nor is it ground for such challenge that another of the names remaining after striking was that of a resident of another county.—People v. Tweed, 50 How. Prac. 280.

[e] (N. Y. 1876) The fact that the elisors, in selecting the list of 48 names from which a struck jury is to be taken, have placed on such list certain individuals who had been on a similar list, made for a prior similar cause between the same parties, from which they had been stricken by the parties, is not ground for challenge to the array in the later cause.—People v. Tweed, 50 How. Prac. 280.

[f] (Tex. 1888) Under Rev. St. arts. 3091–3094, a party to a civil case is not entitled to have the names of members of the panel for the week, who are engaged in another cause, placed in the box in drawing the jury.—Gulf, C. & S. F. Ry. Co. v. Greenlee, 70 Tex. 553, 8 S. W. 129.

§ 373. Filling vacancies in panel before striking.

[a] (Ala. 1890) Where there were only 23 jurors in attendance on the court when defendant demanded a struck jury, the court properly instructed the sheriff to summon another juror, and place him on the list furnished to defendant.—Kansas City, M. & B. R. Co. v. Smith, 90 Ala. 25, 8 South. 43, 24 Am. St. Rep. 753.

[b] (Ala. 1893) Where, in selecting a struck jury, after two jurors have been struck from the list by each party, the judge interrogates the remaining twenty, and discharges two for incompetency, six jurors should be summoned to complete the panel, and not two only, to take the place of those discharged.—Smith v. Kaufman, 100 Ala. 408, 14 South. 111.

[c] (Ga. 1880) Under Const. 1877, art. 6, § 18, par. 2, providing that the general assembly shall provide by law for the selection of the most experienced, intelligent, and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors, and that, nevertheless, the grand jurors shall be competent to serve as traverse jurors, the court may not fill up vacancies in the grand jury panel from which a special jury is to be selected, by calling members of the traverse jury panel.—Hamlin v. Fletcher, 64 Ga. 549.

[d] (Mo. 1881) Where one who had been accepted on the panel from which a jury was to be struck was discharged on account of sickness before completion of the panel, and his place supplied by another juror, there was no error.—State v. Baber, 74 Mo. 292.

[e] (N. Y. 1876) Rev. St. pt. 3, c. 7, tit. 4, is entitled "Of the Trial of Issues of Fact." Article 1 contains "general provisions concerning trials and the proceedings preparatory thereto." Article 2 treats "of the return and summoning of juries." Article 3 treats "of special juries," and provides by section 50 that a jury shall be formed, as thereinafter directed with respect to other juries, "from the persons summoned and appearing," who shall try the case in which the struck jury shall have been ordered, but the court shall have the same power to excuse or discharge any such juror as in other cases. Article 4 treats "of the trial and its incidents," and provides by section 53 for the trial of causes "by jurors drawn, summoned, and returned as hereinbefore directed"; that is, by common jury as provided by article 2, or by special jury as provided by article 3. Section 54 provides that whenever a sufficient number of jurors, duly drawn and summoned, do not appear or cannot be obtained, the court may order the sheriff to summon, from the bystanders or from the county at large, so many qualified persons as shall be sufficient. Article 5, § 1, provides for a trial by jurors summoned by one or the other of such processes; and section 2 declares that, "whenever a sufficient number of jurors * * * cannot be obtained, then talesmen can be summoned." *Held*, that under such statute the court may order the summoning of talesmen to complete the panel of a struck jury.—People v. Tweed, 50 How. Prac. 286.

[f] (Tex. 1888) Under Rev. St. arts. 3091–3094, a party to a civil cause is not entitled to insist that talesmen shall be drawn to fill the places of regular jurors for the week who are engaged in another trial, so long as 12 jurors of such panel remain.—Gulf, C. & S. F. Ry. Co. v. Greenlee, 70 Tex. 553, 8 S. W. 129.

§ 374. Right to strike from panel as against talesmen.

[a] (Mo. 1895) Where the regular panel was insufficient, owing to the engagement of some of the members in another case, and the jury panel from which a jury was to be stricken had been filled up from the bystanders, and the challenges made, but not announced, and the remainder of the regular panel returned with their verdict into court, it was discretionary with the court to refuse to set aside the bystanders summoned to complete the panel in favor of the members of the regular panel just returned.—Citizens' Nat. Bank v. Durrill, 61 Mo. App. 543, 1 Mo. App. Rep'r, 429.

[b] (Tex. 1892) Where talesmen have been summoned to complete a struck jury, sworn touching their qualifications, and a list furnished, the refusal of the court to set aside the

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talesmen, and complete the jury with regular jurors who had just come in from another case, is not error, though such regular jurors came in before the striking of any of the talesmen.—Prince v. State (Cr. App.) 20 S. W. 582.

§ 375. Order of striking.

[a] (Ala. 1884) Under Code, § 3018, giving "either party" in a civil action the right to demand a struck jury, the right of plaintiff thereto cannot be defeated because the several defendants did not agree among themselves as to the names to be struck off, for the court may, in such case, allow each defendant to strike off a name in rotation.—Montgomery & E. Ry. Co. v. Thompson, 77 Ala. 448.

[b] (Tex. 1879) The provision of Jury Law 1876, § 22, that a copy of the list of jurors shall be handed to the prosecuting attorney, and one to the defendant's attorney, from which each may strike a number of names equal to the number of peremptory challenges allowed, does not import that the defendant is entitled to be furnished the stricken list of the state before being required to strike from his own.—Phillips v. State, 6 Tex. App. 44.

[c] (Tex. 1895) Defendant, in a murder case, was not entitled to wait until the state should make its challenges and furnish him with its list of jurors, before striking from his list.—Vernon v. State (Cr. App.) 33 S. W. 864.

§ 376. Number to be stricken off.

Effect of striking too many names, see post, § 380 [c].

Number of peremptory challenges in general, see post, §§ 607–618.

[a] (Ga. 1891) In a civil action against several defendants each is not entitled to strike the full number of jurors, but all of them must join in striking the jury.—Pool v. Gramling, 88 Ga. 653, 16 S. E. 52.

[b] (Md. 1887) Under Code, art. 50, §§ 9, 13, providing that in civil cases before a jury, and in all criminal cases not punishable by death or penitentiary confinement, the clerk shall draw 20 names from the jury box, which shall be written on two lists, and one of said lists shall be forthwith delivered "to the respective parties or their counsel in the cause, and the said parties or their counsel may each strike out 4 persons from said lists," the remaining 12 to be sworn as the trial jury, two defendants on trial jointly for such a crime are entitled to strike off only 4 names between them.—Hamlin v. State, 67 Md. 333, 10 Atl. 214, 301.

§ 377. Filling vacancies after striking.

[a] (U. S. 1797) The court has power to order a tales in special jury causes.—Anonymous, Fed. Cas. No. 443 [2 U. S. (2 Dall.) 382, 1 L. Ed. 425].

[b] (Mo. 1894) Both under the common law and under Act April 1, 1891 (Acts 1891, p. 172, § 6), providing that when a jury for the trial of a cause cannot be made up from the regular panel the judge may make and deliver to the proper officer a list of jurors sufficient to complete the panel, which jurors shall be summoned only for the trial of the particular case, the court has power to order the summoning of certain designated persons to fill vacancies on a special jury caused by absence of the jurors regularly summoned.—Barr v. City of Kansas City, 121 Mo. 22, 25 S. W. 562.

[c] (N. J. 1795) Talesmen may be summoned to fill vacancies on a special jury, though it was summoned from another county.—Lee v. Levaul, 1 N. J. Law (Coxe) 283.

[d] (Ohio, 1880) If the panel for a struck jury is exhausted, a deputy sheriff may, under direction of the court, call a bystander, although the criminal bailiff, provided for in 76 Ohio Laws, p. 54, is present, and competent to perform the service.—Hulse v. State, 35 Ohio St. 421.

[e] (Pa. 1805) Under the jury act of March 29, 1805, the court may award a tales de circumstantibus in case the jurors of a struck jury fail to appear.—Atlee v. Shaw, 4 Yeates, 236.

[f] (Pa. 1878) If a special jury be struck, and, on the trial, some of the jurors are not present, a tales should be ordered.—Carter v. Ramsey (Com. Pl.) 1 Del. Co. R. 423.

§ 378. —— Recalling juror struck off to fill vacancy.

[a] (Ala. 1890) Under Code, § 2752, providing that, where either party demands a struck jury, the sheriff shall furnish a list of 24 jurors, from which the struck jury must be obtained by the attorneys alternately striking 12 from the list, if, after the jury has been thus obtained, one of them is excused, the court cannot replace him by recalling those stricken off, but must have another jury struck from a new list.—Birmingham Union St. R. Co. v. Ralph, 92 Ala. 273, 9 South. 222.

[b] (Mich. 1846) Detroit & P. R. Co. Charter (Laws 1834, p. 44) § 11, provides for the summoning of the 18 freeholders from whom to select a jury to assess the value of lands required for railroad purposes, and that, on their attendance, each party may strike from the panel the names of 3 jurors, the remaining 12 to form the jury of inquest. *Held*, that the sheriff had no authority to resummon any of the jurors who had been stricken out to fill the place of one of the selected jurors discovered to be incompetent.—In re Detroit & P. R. Co., 2 Doug. 367.

§ 379. Excusing struck juror.

[a] (Ohio, 1852) It is not error to excuse a struck juror for good cause.—Stewart v. State, 1 Ohio St. 66.

§ 380. Effect of errors and irregularities.

Waiver of defects, see post, § 523.

[a] (U. S. 1830) If a special jury list has been struck by the parties before the marshal, and the list has been lost by him so that no venire had issued, the court will direct the striking anew from the same list and a venire to issue, returnable 10 days thereafter, during the term.—Hall v. Perott, Fed. Cas. No. 5,942 [Baldw. 123].

[b] (Ark. 1895) Under Sand. & H. Dig. § 4303, providing that, if either party desire a panel, the names of 24 jurors shall be placed in a box, from which 18 shall be drawn and entered upon a list, and section 4304, providing that each party shall be furnished with a copy of said list, from which each may strike the names of 3 jurors, and return the list so struck to the judge, who shall strike from the original list the names so stricken, and the first 12 names remaining on said original list shall constitute the jury, it is not reversible error for the judge to refuse to let defendant's counsel see the list of the 18 jurors called, after the plaintiff had struck 3 names, in order that he might know whom plaintiff had challenged, where, as a matter of fact, each counsel challenged different jurors.—St. Louis S. W. Ry. Co. v. Dobbins, 60 Ark. 481, 30 S. W. 887.

[c] (Ga. 1891) Where the regular number of strikes has been exceeded, and the jury is thus reduced to 11, the last man stricken should be restored to the list.—Pool v. Gramling, 88 Ga. 653, 16 S. E. 52.

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[d] (N. J. 1790) Where the judge who had selected the panel from which the jury was to be struck, at the time of striking altered the list by excluding the names of certain incompetent persons who were objected to by plaintiff, his action, though improper, was not ground of challenge to the array of the jury after striking, since it in no way impeached the fitness of the jury selected.—Inskeep v. Lecony, 1 N. J. Law (Coxe) 39.

[e] (N. Y. 1879) Where irregularities have occurred in the striking of the jury, the court may set aside the order, and cause a new jury to be struck.—People v. Dillon, 17 Hun, 1.

(F) CONTROL OF COURT OVER JURORS.

1. COMPELLING ATTENDANCE, §§ 381, 382.
2. PUNISHMENT FOR FAILURE TO ATTEND OR SERVE, § 383.
3. EXCUSING AND DISCHARGING JURORS FROM ATTENDANCE, §§ 384-390.

1. COMPELLING ATTENDANCE.

RIGHT TO ATTACHMENT, § 381.
LIABILITY TO ATTACHMENT, § 382.

§ 381. Right to attachment.

[a] (La.) The defendant in a criminal trial has no right to demand attachments for absent jurors, when a sufficient number to form a panel is present.—(1854) State v. Lovenstein, 9 La. Ann. 313; (1874) Same v. Shonhausen, 26 La. Ann. 421; (1880) Same v. Breaux, 32 La. Ann. 222.

[b] (La. 1856) No law authorizes defendant to move for attachments against absent jurors on the list, to bring into court a great number, when there are enough present to complete the panel. It is a matter in the judge's discretion.—State v. Ballerio, 11 La. Ann. 81.

[c] (La. 1883) Where four jurors were absent who resided 25 miles from the court house, a motion for attachments, made after going to trial, was properly refused.—State v. Farrer, 35 La. Ann. 315.

[d] (La. 1885) Refusal to grant attachments, after trial has begun, for members of the regular venire who are absent, is not error.—State v. Saunders, 37 La. Ann. 389; Same v. Washington, Id. 828.

[e] (Miss. 1894) It was not error to refuse to direct compulsory process for a special venireman who had been summoned, but did not appear; Code 1892, § 2386, requiring the jury to be impaneled merely from those "summoned and in attendance."—Hale v. State, 72 Miss. 140, 16 South. 387.

[f] (Tex. 1889) Code Cr. Proc. art. 617, provides that no capital case shall be brought to trial until the defendant shall have had one day's service of a copy of the list of the persons summoned as jurors under special venire. Article 618 provides that a person who, being summoned, fails to attend, may, on motion of defendant, be attached. Article 640 prescribes that in selecting the jury from the persons summoned their names shall be called in the order in which they appear upon the list furnished, and a person summoned, but who does not appear when the examination is begun, may, if he appears before the jury is selected, be examined and impaneled, but a cause shall not be unreasonably delayed for the absence of such person. Out of the list of 60 included in a special venire but 50 were summoned, and of these only 33 attended. *Held*, that it was error to proceed to select a jury from those in attendance, without first issuing process to compel the attendance of the other 17 veniremen.—Cahn v. State, 27 Tex. App. 709, 11 S. W. 723.

[g] (Tex. 1890) Code Cr. Proc. art. 618, authorizes attachment, at the instance of either party, for jurors who do not appear. Article 640 provides that "no cause shall be unreasonably delayed" for such absent jurors. Defendant demanded attachment; and, after 18 or 20 hours, the officer not having had time to execute the process, the jury was completed. Though defendant exhausted his peremptory challenges, he did not show that any juror sat on the trial against whom such cause for challenge existed as would affect his competency or impartiality. *Held*, that an abuse of discretion, in refusing to await the execution of the writ of attachment, was not shown.—Hudson v. State, 28 Tex. App. 323, 13 S. W. 388.

[h] (Tex. 1892) Under Code Cr. Proc. § 618, providing that on motion of either party an attachment may issue for any absent defendant summoned, where, on calling the special venire in a criminal case, four veniremen failed to appear, and it was shown that they lived so far distant that it would take several days to bring them in, the action of the court in refusing to postpone the trial and issue attachments for the absentees was not reversible error, in the absence of any showing of prejudice to defendant, since the statute is directory only, and defendant cannot unreasonably delay a trial on account of the absence of jurors.—Jackson v. State, 30 Tex. App. 664, 18 S. W. 643.

[i] (Va. 1891) Under Code, § 4019, providing that, in cases of felony, when a sufficient number of jurors to form a panel of 16 persons free from exception cannot be had from those summoned, the court may supply the deficiency by special venire or summoning talesmen, where only 16 jurors attended out of 20 ordered by the judge to be summoned, the court properly proceeded to procure other jurors on failing to complete the jury from those present, without issuing attachments for the jurors who failed to appear.—Custis v. Commonwealth, 87 Va. 589, 13 S. E. 73.

§ 382. Liability to attachment.

[a] (Tex. 1887) Accused is not entitled to an attachment for a venireman who has not been summoned.—Osborne v. State, 23 Tex. App. 431, 5 S. W. 251; Rodriguez v. Same, 23 Tex. App. 503, 5 S. W. 255.

2. PUNISHMENT FOR FAILURE TO ATTEND OR SERVE.

§ 383. Punishment for failure to attend or serve.

[a] (U. S. 1803) Where a juror is fined for failure to attend court, and at the same term comes in and offers a sufficient excuse, and the court thereupon orders the fine to be struck out, but the clerk neglects to enter such order, the court will, at the next term, on proper affidavits of the fact, order the fine to be struck out.—United States v. Smith, Fed. Cas. No. 16,324 [1 Cranch, C. C. 127].

[b] (N. J. 1838) Under Revision, p. 629, § 22, authorizing a justice of the peace to fine absent jurors "unless some reasonable cause shall be assigned," a justice of the peace may not fine such juror until after notice to appear and show cause why a fine should not be imposed has been given, though the statute makes no provision for the issue or service of such a notice, and allows no costs therefor.—State v. Hollinshead, 16 N. J. Law (1 Har.) 539.

[c] (N. J. 1838) Under a statute authorizing a justice of the peace to issue an execution

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against the goods and chattels of a juror, to collect a fine imposed by the justice for non-attendance, he may not issue an execution against the goods and chattels, and, in default of satisfaction, against the body of the juror.—State v. Hollinshead, 16 N. J. Law (1 Har.) 539.

[d] (N. J. 1838) A joint conviction of two or more defaulting jurors is improper.—State v. Hollinshead, 16 N. J. Law (1 Har.) 539.

[e] (N. Y. 1858) A justice of the peace has jurisdiction by statute in the matter of non-attendance of a juror, with authority to try the question and impose a fine; the nonattending juror being present and having an opportunity to be heard.—Robbins v. Gorham, 26 Barb. 586, affirmed (1862) 25 N. Y. 588.

[f] (N. Y. 1858) The justice has authority to issue a warrant to secure the presence of such a person, and has jurisdiction of his person when brought up on the warrant.—Robbins v. Gorham, 26 Barb. 586, affirmed (1862) 25 N. Y. 588.

[g] (N. Y. 1862) The validity of a conviction, under 2 Rev. St. pp. 241, 245, providing for the punishment of a defaulting juror in a justice court, is not affected by the omission of the justice to enter in his docket a minute of the conviction as made up by him.—Robbins v. Gorham, 25 N. Y. 588.

[h] (N. Y. 1862) Under 2 Rev. St. pp. 241, 245, providing a summary proceeding for the punishment of a defaulting juror in a justice court, the justice may issue a warrant to bring the offender before him without a prior summons.—Robbins v. Gorham, 25 N. Y. 588.

[i] (Va. 1885) One exempt from jury service by reason of his membership in a military company is not guilty of contempt if, having been summoned, he does not attend to make excuses.—Miller v. Commonwealth, 80 Va. 33

3. EXCUSING AND DISCHARGING JURORS FROM ATTENDANCE.

GROUNDS—IN GENERAL, § 384.
—— DISCRETION OF COURT, § 385.
—— CONFLICTING PUBLIC DUTIES, § 386.
WHO MAY EXCUSE, § 387.
APPLICATION FOR EXCUSE OR DISCHARGE, § 388.
LIABILITY OF EXCUSED OR DISCHARGED JUROR TO RECALL, § 389.
PRESUMPTION OF REGULARITY, § 390.

Discharge of panel, see ante, § 311 [h].
—— *during or after impaneling of jury for trial of cause, see* post, §§ 524–531.
Effect of discharge before completion of jury, see post, § 636.
—— *pending trial, see* post, § 635.
Effect of discharging or excusing jury pending trial, see post, § 637.
Excusing jurors as ground of challenge to the array, see ante, § 366.
—— *struck juror, see* ante, § 379 [a].
Failure to object as waiver, see post, § 512.
Filling vacancies on panel caused by excusing jurors, see ante, § 314 [e].
Presumption that absent jurors were excused in favor of regularity in calling talesmen, see ante, § 347 [d].
Right of juror to compensation for time during which he was excused, see post, § 394 [c–e, i].
Sufficiency of evidence of exemption to justify excusing or discharging juror, see ante, § 263.
Compelling discharge of exempt person improperly held to jury duty, see "Mandamus," II. (A).
Excusing juror temporarily during trial, see "Trial," VIII.

§ 384. Grounds—In general.

See ante, §§ 278 [c], 355 [b, h, k].
Excusing panel because of riotous condition of locality, see ante, § 325 [e].

[a] (U. S. 1821) A juror who has a cause at issue in the circuit court of the District of Columbia, which he expects will be tried at the same term, will be discharged.—In re Claggett, Fed. Cas. No. 2,779 [2 Cranch, C. C. 247].

[b] (Ala. 1853) When a juror is summoned in a criminal case, the sickness of his family, if of such a character as to demand his personal attention, is a sufficient excuse to authorize his discharge, on application to the presiding judge.—Parsons v. State, 22 Ala. 50.

[c] (Ala. 1871) The fact that a juror, after being regularly drawn and summoned, is convicted of an assault, and is, at the time of the trial for which he is summoned, confined in jail, will not, in the absence of a statute making it a ground of discharge, authorize the court to discharge him and draw a substitute, against the objection of the accused.—Boggs v. State, 45 Ala. 30, 6 Am. Rep. 689.

[d] (Ala. 1887) Where special jurors, in addition to the regular panel, are summoned, it is not error to excuse five regular jurors without defendant's knowledge, though they were afterwards drawn on the trial jury.—Fariss v. State, 85 Ala. 1, 4 South. 679.

[e] (Cal. 1860) In a trial for murder, when the court directed the clerk to call and impanel the jury, it was objected that several jurors of the original panel, summoned for the term, had been previously excused without consent of the defendant. *Held*, that there was no error in overruling the objection.—People v. Lee, 17 Cal. 76.

[f] (Cal. 1867) The court may, for sufficient reason, excuse a qualified person from serving as a juror in a criminal case. This alone, when in other respects the trial is formally and properly conducted, will not be sufficient ground for a reversal.—People v. Arceo, 32 Cal. 40.

[g] (Cal. 1890) Where, before entering on the selection of a jury in a murder trial, the court granted the motion of the state that those members of the panel who had served on a jury which tried a prior murder case at the same term should be discharged from further service as jurors, on the ground that their verdict in such case was so entirely against the evidence as to show them to be unworthy to serve, a challenge to the panel on that ground was properly overruled, since, the panel not having been summoned for any particular case, or for any particular length of service, the court was entitled to discharge the whole panel, or any part thereof, for any reason which seemed to him sufficient, or for no reason.—People v. Murray, 85 Cal. 350, 24 Pac. 666.

[h] (D. C. 1891) Under Rev. St. § 874, permitting a person to be excused from service on a jury when his interests or those of the public will otherwise be materially injured, or when he is to be a party in a jury trial at that term, or where his own health or death or sickness in his family require his absence, a juror may be excused at any time before the jury is impaneled and sworn, though defendant has exhausted all his peremptory challenges.—United States v. Heath, 20 D. C. 272.

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[i] (Ga. 1892) That some of the jurors drawn, but not impaneled, were excused by the court for causes not expressly provided for by the statute, is not ground for challenge to the array.—Fulton County v. Amorous, 89 Ga. 614, 16 S. E. 201.

[j] (Mass. 1829) One who has served on a grand jury within three years will be excused from serving as a traverse juror, although it is a little more than three years since he was drafted.—Ex parte Brown, 25 Mass. (8 Pick.) 504.

[k] (Mich. 1884) The court may exclude a juror who is unfitted to serve owing to the excessive use of intoxicating liquor.—Torrent v. Yager, 52 Mich. 506, 18 N. W. 239.

[l] (Miss. 1852) A circuit judge cannot, without sufficient cause, discharge one of the jurors summoned by a special venire.—Boles v. State, 24 Miss. (2 Cushm.) 445.

[m] (Mo. 1827) The court may, on the day of trial, excuse a member of the panel in a murder case, on the ground of his wife's illness.—King v. State, 1 Mo. 717.

[n] (N. J. 1893) For reasonable cause, a juror whose name is on the list of 48 names served upon the prisoner may be discharged by the court.—Aarenson v. State, 56 N. J. Law (27 Vroom) 9, 27 Atl. 937.

[o] (N. C. 1845) Jurors may be excused for a good cause when summoned to serve on a capital case.—State v. Craton, 28 N. C. 164.

[p] (S. C. 1866) Excusing a juror should always be done publicly, in open court. The time when, and the reason why, should be put in writing and left with the clerk, and the fact should be entered on the minutes.—State v. Whitman, 14 Rich. Law, 113.

§ 385. —— Discretion of court.

[a] (Ala. 1889) The discharge of two of the jurors drawn for the special venire before the case is called for trial, and in the absence of the defendant, and also of one who had been drawn for the regular panel, is impliedly authorized by the Jefferson county act (Act Feb. 11, 1889); and, if not, the discharge would involve no reversible error.—Maxwell v. State, 89 Ala. 150, 7 South. 824.

[b] (Ala. 1893) Under proviso to Act Feb. 21, 1887, § 10, that, should a juror drawn to complete the jury, after the list of those summoned and appearing has been exhausted, reside more than two miles from the court house, the court may, in its discretion, relieve him from attendance, it cannot pass over or excuse any one living at a less distance.—Ezell v. State, 102 Ala. 101, 15 South. 810.

[c] (Cal. 1896) Overruling a challenge to the panel of a special venire, based on the ground that such special venire was made necessary by the court's liberality in excusing members of the regular panel, is not ground of reversal, in the absence of a showing of an abuse of discretion in granting such excuses.—People v. Hickman, 113 Cal. 80, 45 Pac. 175.

[d] (Ga. 1892) Under a statute requiring jurors to be drawn separately for each week of a term, it is not ground of challenge to the array that the court, in its discretion, temporarily excused certain jurors at their own request, and stood them over to a later week of the term, in the absence of any showing of injury to any of the parties.—Fulton County v. Amorous, 89 Ga. 614, 16 S. E. 201.

[e] (La. 1881) A judge, in his discretion, may excuse jurors of the regular venire.—State v. Somnier, 33 La. Ann. 237.

[f] (La. 1883) Under Acts 1877, No. 44, § 7, vesting in the judge discretionary power to order the summoning of talesmen, there was no abuse of discretion in the judge's discharge of 40 talesmen, summoned for the fourth week of the term, where the regular panel of 40 jurors, drawn for that week, was in attendance; power to discharge, when apparently no longer needed, being implied in the power to summon.—State v. West, 35 La. Ann. 28.

[g] (Me. 1883) The court, in its discretion, may exclude from the panel one who is not legally disqualified to sit.—Snow v. Weeks, 75 Me. 105.

[h] (Mich. 1881) The fact that a juror in a criminal case is a witness in a case next on call warrants the judge in excusing him, since the judge may grant an excuse for any reason personal to the juror which to the judge seems sufficient.—People v. Carrier, 46 Mich. 442, 9 N. W. 487.

[i] (Mich. 1896) The court may excuse a juror, before he is sworn, for any reason personal to the juror which seems sufficient to the court, even though counsel for defendant is not present.—People v. Thacker, 108 Mich. 652, 66 N. W. 562.

[j] (Neb. 1893) Excusing a juror for cause is not ground for reversal, unless there has been an abuse of discretion.—Omaha Southern Ry. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557.

[k] (N. H. 1879) Juries are organized under the discretion of the court, and, for cause, the name of a juror may be excluded before the drawing begins.—Rowell v. Boston & M. R. R., 58 N. H. 514.

[l] (N. Y. 1865) Where the judge, without cause shown, discharged 764 out of an extra panel of 1,000 jurors, it was no abuse of discretion; more than the usual number remaining, and no prejudice being shown.—People v. Ferris, 1 Abb. Prac. (N. S.) 193.

[m] (N. Y. 1888) Under Code Cr. Proc. § 358, providing that the jury shall be formed as prescribed by the Code of Civil Procedure, which, by sections 34, 1058, allows the court of oyer and terminer to summon jurors when deemed necessary, and, by section 1033, allows the court to excuse a juror in its discretion, the court may discharge a panel of jurors who have served for four weeks, preparatory to summoning another panel for an adjourned term.—People v. Jackson, 111 N. Y. 362, 19 N. E. 54.

[n] (N. Y. 1892) The fact that a number of jurors are excused before adjournment of court, on Saturday, to allow of their reaching home before Sunday, that only 10 of the regular panel remain, and 2 therefore have to be taken from the bystanders, cannot be urged as an objection, so long as the jurors finally impaneled are all competent, impartial men.—Cotton v. New York, L. E. & W. R. Co., 65 Hun, 625, 20 N. Y. Supp. 347.

[o] (N. C. 1893) The court may, in its discretion, excuse a juror, at his own request, as a favor to him, and before he is accepted as one of the panel.—State v. Barber, 113 N. C. 711, 18 S. E. 515.

[p] (S. C. 1866) Whether a juror shall be excused is a matter of discretion with the circuit judge.—State v. Whitman, 14 Rich. Law, 113.

[q] (Vt. 1867) No exception can be taken to the decision of the county court in excusing a juror on the ground that he is a member of a regularly organized fire engine company in the city where the court is in session.—State v. Ward, 39 Vt. 225.

§ 386. —— Conflicting public duties.

[a] (Ala. 1892) A policeman summoned as a juror may be excused by the court, under Cr. Code, § 4335, allowing the court to excuse a

juror for any "reasonable or proper cause."—Pierson v. State, 99 Ala. 148, 13 South. 550.

[b] (Fla. 1889) It is not error for a court, in the exercise of a sound discretion, to excuse an assessor of taxes from jury duty, though such office constitutes neither an exemption nor a disqualification, when the interests of the public require the exercise of such discretion.—Ellis v. State, 25 Fla. 702, 6 South. 768.

[c] (Mass. 1835) A member of the legislature was properly excused from serving on a jury while the legislature was in session, though not exempt by statute.—Commonwealth v. Walton, 34 Mass. (17 Pick.) 403.

[d] (Mich. 1889) The court exercised a reasonable discretion in excusing one summoned as a juror, on the ground that service on the jury might interfere with his duties as a justice of the peace.—Michigan Condensed Milk Co. v. Wilcox, 78 Mich. 431, 44 N. W. 281.

[e] (Miss. 1894) It was a proper exercise of discretion for the court to set aside a jailer who had been summoned as a special venireman in a criminal case.—Hale v. State, 72 Miss. 140, 16 South. 387.

[f] (Ohio, 1852) That a juror summoned is postmaster is ground for excusing him from service.—Stewart v. State, 1 Ohio St. 66.

[g] (Pa. 1811) The court will excuse one from the jury if he holds a public trust that cannot be deputed. Contra, if the trust is private, or if it can be deputed.—In re Piper, 2 Browne, 59.

§ 387. Who may excuse.

[a] (N. Y. 1831) Where a sheriff or other officer is authorized to select and summon a jury, he cannot, after summoning a person to serve as a juror, discharge him from attendance, and summon another in his stead; after the juror is summoned, the court only can discharge him.—Village of Brooklyn v. Patchen, 8 Wend. 47.

§ 388. Application for excuse or discharge.

Liability of exempt person to process for contempt for failure to appear when summoned, see ante, § 383 [i].

[a] (Ala. 1853) Clay's Dig. p. 459, §§ 53–55, provide that in capital cases the prisoner shall have 20 peremptory challenges, and that the court shall order the sheriff to summon not less than 50 or more than 100 persons to serve as jurors, including the regular panel, and that the prisoner should be furnished a list of the jurors two entire days before his trial. *Held*, that where the list of jurors summoned under a special venire had been served on the accused, the court erred in excusing, two days before the trial, 2 of the panel so summoned, on the ground of sickness in their families, though it might have been otherwise if such jurors had appeared on the day of trial, and then requested to be excused on the same ground.—Parsons v. State, 22 Ala. 50.

[b] (Ala. 1893) The fact that a sheriff supposes or knows that a person whose name appears on the venire is exempt or disqualified as a juror does not excuse his failure to summon him; the questions of exemption and qualification being for the court.—Ezell v. State, 102 Ala. 101, 15 South. 810.

[c] (Ark. 1894) A juror may be excused for a cause made known to the judge out of court.—Vaughan v. State, 58 Ark. 353, 24 S. W. 885.

[d] (Ga. 1891) The court may excuse a juror selected, but not sworn, if he has become sick, without calling a physician to prove the sickness.—Ozburn v. State, 87 Ga. 173, 13 S. E. 247.

[e] (Ill. 1876) Proof of sickness of a juror, to warrant the court in discharging him and filling up the panel with another person, may be made by testimony of a person who is not a physician. The mere fact of sickness does not need expert testimony.—City of Shawneetown v. Mason, 82 Ill. 337, 25 Am. Dec. 321.

[f] (La. 1812) A juror irregularly summoned, may be discharged on his own motion.—In re Auzan, 2 Mart. (O. S.) 124.

[g] (Tex. 1879) The court has no power to excuse jurors summoned on a special venire until they have appeared at the time and place designated in the venire facias. The fact that on calling them in another case they had shown themselves exempt, and had given notice that they would claim the exemption in this case also, is immaterial.—Robles v. State, 5 Tex. App. 346.

[h] (Tex. 1885) Only on the most satisfactory evidence of absence from unavoidable necessity should the court excuse a juryman in his absence.—Thompson v. State, 19 Tex. App. 593.

[i] (Tex. 1894) After the jury had been impaneled, one of the jurors failed to appear, but the judge, on receiving a telegram stating that said juror was sick, excused him. *Held* that, there being no dispute that said juror was sick, no error was committed.—Houston City St. Ry. Co. v. Ross (Civ. App.) 28 S. W. 254.

§ 389. Liability of excused or discharged juror to recall.

See ante, § 325 [j].

[a] (Ind. 1880) It is in the power of a court to recall at any time during the same term, without summons, the regular panel of jurors, even after having discharged them.—Telford v. Wilson, 71 Ind. 555.

[b] (La. 1868) Where a juror has been excused from serving on the jury, he cannot be summoned to serve as a talesman juror in the same panel from which he was discharged.—Golding v. The Castro, 20 La. Ann. 458.

[c] (S. C. 1866) After a juror has been excused, he ceases to be a juror, and cannot be recalled.—State v. Whitman, 14 Rich. Law, 113.

[d] (Tenn. 1859) After the court has discharged a juror because of his persistent refusal to be sworn, the court has no power to recall him and force him on the prisoner, without the latter's consent.—Isaac v. State, 39 Tenn. (2 Head) 458.

[e] (Utah, 1880) After the court has once discharged jurors from service, they cannot be again placed upon the panel, except as provided in the act of congress of June 23, 1874.—Anderson v. Wasatch & J. V. R. Co., 2 Utah, 518.

§ 390. Presumption of regularity.

[a] (Ala. 1894) Where the court, on excusing, of its own motion, jurors summoned on a regular panel, whose names were on the special venire from which the jury to try defendant was to be impaneled, stated in the orders that they were excused "for reasons that seemed sufficient by the court," it will be presumed that it was for sufficient reasons; and, the contrary not being shown, it will be *held* that there was no error.—Moseley v. State, 107 Ala. 74, 17 South. 932.

[b] (La. 1880) In the absence of any showing why the judge excused 2 jurors of the 30 drawn for the week in which defendant was tried for murder, it will be presumed that he acted on sufficient grounds.—State v. Breaux, 32 La. Ann. 222.

[c] (Neb. 1895) It will be presumed that the court, in excusing a juror on the ground that

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he was a party to an action then pending in the trial court, acted advisedly as to whether the juror was such a party.—Gran v. Houston, 45 Neb. 813, 64 N. W. 245.

[d] (S. C. 1881) In the absence of any showing to the contrary, it will be presumed that the action of the court in excusing two jurors was based on affidavits, as required by statute.—State v. Gill, 14 S. C. 410.

(G) TERM OF SERVICE AND COMPENSATION.

1. TERM OF SERVICE, § 391.
2. COMPENSATION OF JURORS, §§ 392-399.

1. TERM OF SERVICE.

Fees and expenses of juror as costs in criminal cases, see "Costs," vol. 13, cc. 1081, 1082, §§ 1175, 1176.

—— *of coroner's jury, see* "Coroners," vol. 11, cc. 2393, 2394, §§ 26, 27.

Garnishment of fees or compensation, see "Garnishment," vol. 24, c. 2025, § 132.

§ 391. Term of service.

Liability of juror to recall after excuse or discharge, see ante, § 389.

[a] (Ga. 1860) A statute provided that "the judge of the superior court of W. county is authorized and required to draw * * * a panel of petit jurors for each week of W. superior court, so long as the same shall continue, for the space of two weeks." *Held*, that it was not error to retain a jury drawn one week, for service during the next week, the jurors themselves not objecting.—McAffee v. State, 31 Ga. 411.

[b] (Ga. 1875) When, at the adjournment at the regular term of a court, it is ordered that an adjourned term will be held, a jury is drawn therefor, and the adjourned term continues more than one week, it is competent for the judge to hold the jury for the second week, and it is not a good ground of challenge to the array that this is done.—Brinkley v. State, 54 Ga. 371.

[c] (Ga. 1883) Under Code, § 3938, providing that no person shall serve as juror more than four weeks in one year, *held* that a juror who had served four weeks in December was not disqualified from serving in the next January, though the same term was continued.—Atlanta & C. A. L. Ry. Co. v. Ray, 70 Ga. 674.

[d] (Ga. 1892) Where a statute requires jurors to be drawn separately for each week of the term, it contemplates that the jurors drawn for a given week shall be impaneled for the service of that week; but the court may, with the consent of the jurors concerned, excuse them from serving in the week for which they were drawn, and assign them for service in a succeeding week.—Fulton County v. Amorous, 89 Ga. 614, 16 S. E. 201.

[e] (Ind. 1859) A final adjournment of the court for the term operates as a legal discharge of a jury, and terminates their functions as such.—Ashbaugh v. Edgecomb, 13 Ind. 466.

[f] (Kan. 1884) A jury was regularly drawn and summoned to attend the February, 1883, term of the Butler county district court. That county was then a part of the Thirteenth judicial district, and the regular term fixed for the third Tuesday of February. Thereafter, and on February 6, 1883, a law took effect creating the Eighteenth judicial district, and assigning Butler county to that district. The first term fixed by that law thereafter commenced on the first Tuesday of May, 1883. Without any new drawing or summoning, the jury above named appeared at the May term. The act creating the Eighteenth district provided that all proceedings and processes of every kind and character, pending in any of the courts of the counties named in the law, should stand, be returnable, and triable at the first term of the court for said counties, the same as if the change therein contemplated had not been made. *Held*, that a challenge to the array was properly overruled.—State v. McKinney, 3 Pac. 356.

[g] (Ky. 1822) Where a jury do not return a verdict before the end of the term, the termination of the court is their discharge.—Shearer v. Clay, 11 Ky. (1 Litt.) 260.

[h] (La. 1854) In the First district court of New Orleans jurors serve by monthly terms, beginning the first Monday of each month. This custom began under Acts 1813, No. 12, § 5, in accordance with which Acts 1813, No. 53, is to be construed.—State v. Raymond, 9 La. Ann. 530.

[i] (La. 1878) Owing to the want of a proper saving clause in the jury law of April 2, 1878, the panel for Orleans parish drawn previous to that date could not serve thereafter.—State ex rel. Maurice v. Superior Dist. Ct. Judge, 30 La. Ann. 603.

[j] (Mass. 1880) Under St. 1873, c. 44, providing that "no person shall serve as a traverse juror in the county of Suffolk more than 30 days at any term of court," it is no ground for a challenge to the array that, at the time it was made, more than 30 days had elapsed since the jurors had begun to serve, if during that time the court had been in session less than 30 days.—Provident Ins. for Sav. v. Burnham, 128 Mass. 458.

[k] (S. C. 1871) The presiding judge, at the October term, 1845, of the court for Edgefield district, ordered an extra court to be holden for that district on the fourth Monday in February, 1846. In December, 1845, the legislature extended the judicial term for that district to two weeks instead of one, but omitted to provide for juries for the second week of this extended term. In January, 1846, the judge who had ordered the extra court made an order, at chambers, postponing it to the second Monday in March, which was the second week of the extended regular term. The juries for the extra court had been summoned, and the sheriff, after this order was made, notified them to attend on the second Monday in March. An indictment was found by the grand jury at the spring term, 1846, against a person for murder, and on the second week he was tried and found guilty. *Held*, that whether the judge had authority or not to postpone the extra court, the jurors summoned for that court could not be regarded as juries of the regular term, and consequently that the trial was illegal and the conviction void.—State v. Harden, 2 Rich. Law, 533.

2. COMPENSATION OF JURORS.

FIXING RATE OF COMPENSATION, § 392.
RIGHT—IN GENERAL, § 393.
—— WHAT SERVICES WILL BE COMPENSATED, § 394.
AMOUNT, § 395.
WITHHOLDING VERDICT TILL PAYMENT OF FEES, § 396.
LIABILITY OF STATE, COUNTY, OR MUNICIPALITY—JUROR'S FEES, § 397.
—— EXPENSES OF JURORS IN CRIMINAL CASES, § 398.
CERTIFICATES OF SERVICE, § 399.

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Payment of jury fee as prerequisite of right to demand jury, see ante, §§ 174, 175.
Recovery as costs of fees of jurors, see "Costs," vol. 18, c. 664, §§ 698, 699.

§ 392. Fixing rate of compensation.

[a] (Ga. 1892) Under Code, § 3940, authorizing the grand jury impaneled at the fall term of the superior court to fix the compensation of jurors for the next succeeding year, when that grand jury continues to serve until the succeeding calendar year has in part expired, it may still fix such compensation; and the use of the words "for the next succeeding year" in the report on general presentments will be construed as applicable to the year touching which that particular grand jury has power to act,—the year succeeding the one in which it was impaneled.—Tanner v. Rosser, 89 Ga. 811, 15 S. E. 750.

§ 393. Right—In general.

[a] (U. S. 1819) If the verdict be below the jurisdiction of the court, the jury is not entitled to the trial fee.—Skinner v. McCaffrey, Fed. Cas. No. 12,024 [2 Cranch, C. C. 193].

[b] (Colo. 1886) A juror who attends a court at a place where there was no legal authority for holding such court is not entitled to his fees.—Coulter v. Routt County Com'rs, 9 Colo. 258, 11 Pac. 199.

[c] (Colo. 1895) A complaint in an action against county commissioners for jury fees which fails to show that in the selection of the jurors the statutory requirements were observed does not state a cause of action.—Pitkin County Com'rs v. First Nat. Bank, 6 Colo. App. 423, 40 Pac. 894.

[d] (Tenn. 1874) Compensation for services as a juror is not a common-law right, the protection which the government furnishes to persons and property compensating in part therefor.—Neely v. State, 63 Tenn. (4 Baxt.) 174.

§ 394. —— What services will be compensated.

[a] (U. S. 1849) Jurors living at a distance, and not receiving mileage during adjournments, are entitled to a per diem for those days during which the jury stands adjourned, and on which the jurors appear and answer to their names.—Parker v. Kempton, Fed. Cas. No. 10,741 [Wall. Jr. 344].

[b] (U. S. 1851) When a person is summoned as a juror, and at the same term is subpœnaed by the United States as a witness, and attends in obedience to each process, and according to the practice of the court makes affidavit of such attendance, he is entitled to compensation for each service.—Edwards v. Bond, Fed. Cas. No. 4,294 [5 McLean, 300].

[c] (Ariz. 1875) Jurors are entitled to full pay though excused from daily attendance.—Woffenden v. Pima County Sup'rs, 1 Ariz. 237, 25 Pac. 647.

[d] (Cal. 1894) Under St. 1871–72, p. 188, § 1, amending Act 1870, § 28, and providing that jurors shall receive a certain sum per diem for "attendance" upon court, a juror is not entitled to fees for the time during which he is dismissed from attendance on the court before his final discharge.—Jacobs v. Elliott, 104 Cal. 318, 37 Pac. 942.

[e] (Cal. 1895) Under Act March 1, 1872, declaring that jurors shall receive three dollars per day "for attendance upon courts of record," a juror who has been impaneled for trial of a case is not entitled to fees for days that he is excused from attendance on account of continuance of the case.—Mason v. Culbert, 108 Cal. 247, 41 Pac. 464.

[f] (Nev. 1865) Under the act of November 29, 1861, regulating fees and costs, a juror is entitled to compensation for every day's attendance upon the court, whether actually impaneled or not, except in the case of jurors in criminal trials who reside within five miles of the court house.—Thornburg v. Hermann, 1 Nev. 473.

[g] (Nev. 1886) Under the fee bill of 1883 (St. 1883, p. 62), as amended by the act of 1885 (St. 1885, p. 25), allowing jurors in criminal cases the same fees as in civil cases "provided they are accepted and sworn to try the cause," trial jurors in the regular panel are not entitled to receive from the county mileage and also per diem, where they are not sworn and do not sit at the trial of the cause.—Phillips v. Eureka County, 19 Nev. 348, 11 Pac. 32.

[h] (N. Y. 1886) Under Code, § 3315, providing for extra compensation to jurors "when the trial occupies more than 30 days," Sundays, days of adjournment, etc., are not to be counted in the 30 days.—De Wolf v. Day, 39 Hun, 484.

[i] (Or. 1893) Under Code, § 2348, allowing a juror two dollars per diem for attendance on a court of record, and providing that a talesman shall be entitled to the same, a person summoned on a special venire, who attends court in obedience to the process, is entitled to juror's fees, though he does not serve.—Bloch v. Multnomah County, 25 Or. 169, 35 Pac. 30.

[j] (Tenn. 1872) Under Code, § 4033, allowing tales jurors "no compensation unless they serve more than one day, in which case they receive the same pay for each day's service as the regular jurors," a talesman remaining undischarged for 10 days is entitled to compensation for 10 days, although not sitting at any time for 2 days consecutively.—Cannon v. Whitthorne, 54 Tenn. (7 Heisk.) 557.

§ 395. Amount.

[a] (U. S. 1808) The jurors in civil cases attending the circuit court of the United States for the district of Pennsylvania are entitled to one dollar and twenty-five cents each for each day's attendance.—Ex parte Lewis, 8 U. S. (4 Cranch) 433, 2 L. Ed. 670.

[b] (Minn. 1895) Laws 1895, c. 304, providing that all jurors in every county shall receive two dollars per day for attendance, and repealing all acts and parts of acts inconsistent therewith, repealed the special law fixing a smaller compensation for jurors in Ramsey county.—State v. Sullivan, 62 Minn. 283, 64 N. W. 813.

[c] (N. Y. 1816) Electors in the grand assize, on a writ of right, are entitled to three dollars a day for going to and returning from the court; being the same fees for attending court which are allowed to the sheriff.—Bryan v. Seely, 13 Johns. 123.

[d] (N. Y. 1841) On the execution of a commission of lunacy, the jury, who should not exceed 23 in number, are entitled to 12½ cents to each juror sworn.—In re Root, 8 Paige, 625.

[e] (N. Y. 1891) Code Civ. Proc. § 2333, provides that the jurors, on an inquisition of insanity, "are entitled to the same compensation as jurors upon the trial of an issue in an action in the same court." Section 3313 provides that "a trial juror, in an action or special proceeding in a court of record, is entitled, except as otherwise specially prescribed by statute in a particular court or a particular county, to the following fees: Twenty-five cents for each cause in which he is impaneled." *Held*, that the jurors on an inquisition of insanity are entitled to only 25 cents as their compensation, and they are not entitled to a per diem for each day served by them, as is allowed persons attend-

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ing the same court as jurors by Code Civ. Proc. § 3314.—In re Sanford, 61 Hun, 33, 15 N. Y. Supp. 291; In re Howe, Id.

[f] (N. C. 1800) Where the same jury try ten caveats in three days for different claims to different parcels of land, the caveators being the same persons, while defendants are different persons, each juror is entitled to one day's pay, consisting of eight shillings, in each case, instead of only eight shillings for each of the three days, the statute allowing eight shillings per day in each case.—Harris v. Lenoir, 1 N. C. 304.

[g] (Pa. 1885) Act Feb. 28, 1873, fixing the pay of jurors in the commonwealth at two dollars per day, applies only to regular jurors summoned to attend upon the sessions of the courts; hence jurors in an inquisition of lunacy are entitled to but one dollar a day, as provided for by Act June 13, 1836.—Commonwealth v. Henderson, 1 Pa. Co. Ct. R. 679.

[h] (S. C. 1820) The act of 1816, allowing to a juror one dollar a day for his services, did not repeal the part of the fee bill of 1791 by which jurors were entitled to five shillings for every verdict.—Cleary v. Wells, 2 Nott & McC. 442.

[i] (Va. 1851) Under Code 1849, c. 28, § 50, jurors in criminal cases are entitled to compensation of one dollar for each day they attend on the jury.—Souther v. Commonwealth, 7 Grat. 673.

§ 396. Withholding verdict till payment of fees.

[a] (S. C. 1820) Under Act 1791, allowing jurors five shillings for each verdict, jurors may retain their verdict from the record until this fee be paid.—Cleary v. Wells, 2 Nott & McC. 442.

§ 397. Liability of state, county, or municipality—Juror's fees.

[a] (Cal. 1884) Where a party to a suit is ordered to pay the jury fees, the court has not the power to order the clerk to issue certificates for their payment out of the county treasury on the mere neglect or refusal of the party to comply with the order.—Ex parte Makinney, 3 Pac. 253.

[b] (Ill. 1881) Counties are not liable for the fees of jurors in city courts.—People v. Stookey, 98 Ill. 537.

[c] (Ill. 1891) Rev. St. 1889, c. 37, § 200, provides that the fees of jurors for the law terms of the county court shall be paid out of the county treasury, and Id. c. 53, § 44, provides that jurors shall receive fees "for their services in attending courts of record, including the county court, when sitting for or doing probate business." *Held*, that the fees of jurors serving in the county court at the trial of a condemnation suit in vacation should be paid out of the county treasury.—Chicago, P. & St. L. Ry. Co. v. Eaton, 136 Ill. 9, 26 N. E. 575.

[d] (Me. 1880) The county, and not the city, should bear the expense of a jury and attending officer, when a jury is summoned by the county commissioners to determine the damages sustained by landowners from flowage caused by a dam erected by the city across a river.—Penobscot County v. City of Bangor, 70 Me. 497.

[e] (Mass. 1771) Under St. 4 W. & M. c. 12, authorizing justices of the quarter sessions of each county to raise money for all proper county charges, no money can be raised for an allowance to jurors for services in a criminal trial.—In re Jurors, Quincy, 882.

[f] (Mich.) Jury fees, in municipal courts of record having a seal, are payable from the county treasury.—(1877) Covell v. Kent County, 36 Mich. 332; (1879) People v. Treasurer of Wayne, 40 Mich. 62.

§ 398. —— Expenses of jurors in criminal cases.

[a] (Ark. 1861) Where jurors are locked up in a criminal case, being deprived of the privileges permitted them in civil cases, their board and lodging should be treated as a part of the expenses of the court incidental to the administration of justice, and chargeable to the county.—Bates v. Independence County, 23 Ark. 722.

[b] (Ga. 1858) A county is not liable on an account for food and lodging furnished to a jury in a criminal case at the direction of the court, and by the court ordered to be charged to the county.—Justices of Inferior Court v. State, 24 Ga. 82.

[c] (Mich. 1885) When the court, on trial of a murder case, considers it necessary to have the jury secluded, and by its order they are boarded at a hotel, the county where the case is tried will be held liable for the expense thus incurred.—Stowell v. Jackson County Sup'rs, 57 Mich. 31, 23 N. W. 557.

[d] (Mo. 1873) Board and lodging of the jury, provided in pursuance of an order of the court, are part of the costs for which the county is liable, if liable for costs at all.—Watson v. Moniteau County, 53 Mo. 133.

[e] (Mo. 1879) A county in which an indictment for murder is found cannot be made liable for the expense of boarding the petit jury who tried the case in another county.—Bright v. Pike County, 69 Mo. 519.

[f] (Mo. 1879) The expense of boarding a petit jury in the trial of a criminal case cannot be taxed against the county, in the absence of a statute providing therefor.—Bright v. Pike County, 69 Mo. 519.

[g] (Mo. 1883) Act March 8, 1883, makes the state liable for the board and lodging of a jury unable to agree on the trial of a felony and not allowed to separate. Before the passage of that act the state was not liable for the expense.—State ex rel. Allen v. Walker, 80 Mo. 610.

[h] (Mo. 1884) Act 1883, p. 80, authorizing a court to tax against a county the expenses of boarding and lodging jurors, kept together by order of court in cases of felony, does not validate any such taxation made prior to the passage of the act.—Person v. Ozark County, 82 Mo. 491.

[i] (Mo. 1884) Prior to the act of 1883, the expense of boarding and lodging juries, kept together by order of the court, in cases of felony, was not a proper item of costs.—Person v. Ozark County, 82 Mo. 491.

[j] (N. C. 1877) Under Battle's Revisal, c. 105, § 23, providing that the pay of jurors is whatever the county commissioners shall allow, not exceeding $1.50 per day, the county is not liable for the board of a jury in a capital case during pendency of the trial.—Young v. Buncombe County Com'rs, 76 N. C. 316.

[k] (Ohio, 1850) Courts have power to provide at the expense of the county for the maintenance and care of juries in criminal cases.—State v. Armstrong, 19 Ohio, 116.

[l] (Pa. 1838) The county is liable for the expenses of boarding and lodging a jury impaneled and kept together in a capital case.—Commissioners v. Hall, 7 Watts, 290.

§ 399. Certificates of service.

Fees of clerk, for certificates of attendance, see "Clerks of Courts," vol. 10, cc. 109, 110, § 56.

—— *of United States court for certifying fees, see* "Clerks of Courts," vol. 10, cc. 135, 136, § 80.

[a] (Ohio, 1880) The clerk of a police court, in issuing jurors' certificates of service, is

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only authorized to certify whether the juror was a regular juror or a talesman, and the length of service, and has no authority to certify the amount of compensation to be paid therefor.—State v. Capeller, 5 Wkly. Law Bul. 363.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

(A) COMPETENCY FOR TRIAL OF ISSUES IN GENERAL, §§ 400-406.
(B) PECUNIARY INTEREST, §§ 407-412.
(C) RELATIONSHIP OR BUSINESS CONNECTION, §§ 413-422.
(D) PRIOR SERVICE AS JUROR, §§ 423-430.
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(I) CHALLENGE TO PANEL OR ARRAY, AND MOTION TO QUASH VENIRE, §§ 541-550.
(J) CHALLENGES FOR CAUSE, §§ 551-598.
(K) PEREMPTORY CHALLENGES, §§ 599-630.

Grounds for rejection on court's own motion, see post, § 525.

Prescribing grounds of incompetency as infringement of right to trial by jury, see ante, § 228.

Continuance for incompetency of jurors, see "Continuance," vol. 10, c. 2681, § 24.

Grounds for arrest of judgment in civil actions, see "Judgment," vol. 31, cc. 676-678, §§ 481-483.

—— *arrest of judgment in criminal prosecutions, see* "Criminal Law," vol. 15, cc. 250, 251, §§ 2442, 2443.

—— *new trial in civil cases, see* "New Trial," II. (D).

—— *new trial in criminal prosecutions, see* "Criminal Law," vol. 15, cc. 63-77, §§ 2225-2237; c. 190, § 2364; cc. 210-218, §§ 2392-2395.

Review of discretion of court, see "Appeal and Error," vol. 3, cc. 1664-1667, § 3843.

—— *presumptions as to competency of jurors, see* "Appeal and Error," vol. 3, cc. 1487, 1488, § 3723.

(A) COMPETENCY FOR TRIAL OF ISSUES IN GENERAL.

IN GENERAL, § 400.
STATUTORY PROVISIONS, § 401.
WITNESS IN CAUSE, § 402.
OFFICIAL POSITION, § 403.
SPECIAL OR STRUCK JURY, § 404.
DISCRETION OF COURT, § 405.
REMOVAL OF DISQUALIFICATION, § 406.

§ 400. In general.

[a] (Mo. 1894) The fact that one summoned as a juror in a homicide case, on his examination touching his qualifications as a juror in a prior homicide case, showed himself to be incompetent to serve in that case, does not render him incompetent in the case at bar.—State v. Fairlamb, 121 Mo. 137, 25 S. W. 895.

[b] (Pa. 1829) It is a good cause of challenge that a juror has acted as arbitrator in a cause.—Lloyd v. Nourse, 2 Rawle, 49.

[c] (Pa. 1853) It is good cause for challenging a juror who has been already chosen, but not sworn, that he grossly misbehaved himself as a juror on a former occasion, declaring that he had tried to acquit every one whom the judge desired to convict, and would as lief swear on a spelling book as on a Bible, because he was a Tom Paine man.—McFadden v. Commonwealth, 23 Pa. (11 Harris) 12, 62 Am. Dec. 308.

§ 401. Statutory provisions.

[a] (Ga. 1856) All criminal cases must be tried under the act of 1856, relating to the qualifications of jurors, whether the offense was committed before or after that statute was enacted.—Reid v. State, 20 Ga. 681.

[b] (Ind. 1885) The fact that the statute enumerates grounds which will disqualify a juror does not preclude a rejection on other grounds.—Block v. State, 100 Ind. 357.

[c] (La. 1831) The Code of Practice does not repeal Acts 1825, No. 14, by which, when a corporation, public or religious, is a party, its members are good jurors.—City of New Orleans v. Ripley, 2 La. 344.

[d] (Ohio, 1884) Act March 18, 1884 (Rev. St. § 727), which provides that, if a juror has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall proceed to examine such juror, and if he shall say that he can render an impartial verdict notwithstanding such opinion, and the court is satisfied that such juror will render an impartial verdict on the evidence, it may admit him as competent to serve in such case, was applicable to a prosecution for murder, though the crime was committed before the passage of the act.—Palmer v. State (D. C.) 12 Wkly. Law Bul. 258.

§ 402. Witness in cause.

Permitting juror to testify in cause as infringing right, see ante, § 221 [b].

[a] A juror is not incompetent because he is a witness in the case.
—(Ala. 1870) Bell v. State, 44 Ala. 393;
(La. 1840) Rondeau v. New Orleans Improvement & Banking Co., 15 La. 160;
(Tex. 1887) East Line & R. R. R. Co. v. Brinker, 68 Tex. 500, 3 S. W. 99.

[b] (Ala. 1877) It is error not to allow defendant's challenges for cause to jurors summoned as talesmen who have been subpœnaed and sworn as witnesses for the state.—Atkins v. State, 60 Ala. 45.

[c] (Ala. 1895) A juror summoned as a witness both by the prosecution and the accused may be challenged for cause.—Baldwin v. State, 111 Ala. 11, 20 South. 528.

[d] (Me. 1828) The mere fact that a juror was a witness against the defendant on a former trial of the case does not render him incompetent.—In re Fellows, 5 Me. (5 Greenl.) 333.

[e] (Mo. 1884) A juror who has testified for the state on a motion for a change of venue on the ground of local prejudice, in regard to the state of feeling of the neighborhood toward defendant, is not thereby disqualified to sit as a juror on the trial of the defendant for murder.—State v. Wisdom, 84 Mo. 177.

[f] (N. Y. 1887) The fact that a juror was subpœnaed as a witness in the case, and paid his fees as such, does not disqualify him, where

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he was not sworn on the trial, and had no knowledge of the facts and questions in controversy.—Rankin v. Nelson, 10 N. Y. St. Rep. 337.

[g] (N. C. 1898) It is sufficient ground on which to challenge a juror that he is attending court in the expectation of being called as a witness for the opposite party, the danger of bias not being removed by showing that he expects to testify only as to the character of a defendant charged with felony.—State v. Barber, 113 N. C. 711, 18 S. E. 515.

[h] (Pa. 1838) It is a principal cause of challenge that a juror has been summoned as a witness by the prisoner.—Commonwealth v. Joliffe, 7 Watts, 585.

[i] (S. C. 1892) In a prosecution for larceny, where it was alleged that the money was taken from a certain mining camp, there was no error in allowing one of the jurors trying the case to testify that the mining camp was within the county alleged, and then take part in the verdict.—State v. Vari, 35 S. C. 175, 14 S. E. 392.

[j] (Tex. 1895) The fact that one who has no knowledge of any facts bearing on a material issue in a criminal case has been summoned as a witness will not disqualify him as juror on challenge, under Code Cr. Proc. art. 636, subd. 6, making the fact that one is a witness in a case a challenge for cause against him as a juror.—Seals v. State, 35 Tex. Cr. R. 138, 32 S. W. 545.

§ 403. Official position.

Pecuniary interest, see post, § 407 [e].

Relationship to person in official position, see post, § 416 [g].

[a] (Ind. 1886) The bailiff of a grand jury is not on that account disqualified from acting as a juror on the trial of an indictment returned by them, unless it appears that he was present or knew something of their deliberations in regard to the case.—Spittorff v. State, 108 Ind. 171, 8 N. E. 911.

[b] (Me. 1846) A judge of a town court is not, by reason of holding that office, rendered incompetent to serve as a juror in the supreme judicial court.—Page v. Lewis, 26 Me. (13 Shep.) 360.

[c] (Mass. 1885) A member of the common council of Boston is not eligible as a juror in suits in which that city is a party, since the common council is a branch of the municipal government, and the municipal government has authority and control over all suits prosecuted by or against the city.—City of Boston v. Baldwin, 139 Mass. 315, 1 N. E. 417.

[d] (Pa. 1889) Under Act April 16, 1840 (P. L. 411), which declares that "no person shall be excluded from being a juror in any suit * * * in which any county, city, incorporated district, borough, or township is a party or is interested, by reason of such person being or having been an officer, rated citizen, or inhabitant of such county, city," etc., it is reversible error to exclude a juror on the sole ground that he is a member of the select council of the defendant city.—City of Scranton v. Gore, 124 Pa. 595, 17 Atl. 144, 23 Wkly. Notes Cas. 419.

[e] (Pa. 1895) In an action against a city on a claim which had been presented to the city councils and rejected as not being a valid claim, members of the councils are properly excluded from the jury.—Lancaster County v. City of Lancaster, 170 Pa. 108, 32 Atl. 567.

[f] (R. I. 1889) The fact that one, as constable, is specially charged with enforcing the liquor law, does not disqualify him from acting as a juror on a trial for keeping a liquor nuisance in another precinct.—State v. Cosgrove, 16 R. I. 411, 16 Atl. 900.

[g] (Va. 1891) The persons filling the offices of treasurer and councilman of a city are not disqualified to serve in the hustings court thereof, in a criminal case.—Thompson v. Commonwealth, 88 Va. 45, 13 S. E. 304.

§ 404. Special or struck jury.

[a] (Tenn. 1874) The law, in its provision for a special jury, contemplates the selection of men with reference to their superior competency and fitness to try and determine the particular issues involved in the case, and not with reference to their relation to the parties, as being or not being of their race or color.—City of Nashville v. Sheperd, 62 Tenn. (3 Baxt.) 373.

§ 405. Discretion of court.

As to examination of jurors, see post, § 562.

[a] (Ala. 1884) A motion on behalf of defendant to set aside as a juror the officer before whom defendant's preliminary examination was had, on his own statement that he had not recognized defendant, and that he had a fixed opinion, which would bias his verdict, is addressed to the discretion of the court, where it appears that the officer was summoned as a regular juror, and accepted without objection, after examination by the court in the presence of defendant.—Henry v. State, 77 Ala. 75.

[b] (Conn. 1860) One of the jurors who sat on the case was a second cousin, by blood, of the prisoner. The prisoner relied upon insanity as his defense, and attempted to show that insanity was hereditary in his family, and that there was a constitutional tendency to it in the common relatives of the juror and himself. *Held*, that the relationship of the juror, in these circumstances, while it might be a proper matter for the consideration of the court, in the exercise of its discretion, was not to be regarded as a positive disqualification of the juror.—State v. Andrews, 29 Conn. 100, 76 Am. Dec. 593.

[c] (Ind. 1860) If a person called as a juror is challenged for cause, the court, after hearing the examination, etc., should exercise a sound legal discretion in determining his competency.—Bradford v. State, 15 Ind. 347.

[d] (Ind. 1883) Under Rev. St. 1881, § 1793, it is within the discretion of the trial court to permit a person called as a juror in a criminal case to act, though he has formed an opinion based only on rumor or newspaper statements.—Stout v. State, 90 Ind. 1.

[e] (Iowa, 1862) Under clause 2, § 3039 of the Revision, if the court, in the exercise of a sound discretion, is brought to the conclusion that a challenged juror will not act with entire impartiality, the challenge should be sustained.—Davenport Gaslight & Coke Co. v. City of Davenport, 13 Iowa, 229.

[f] (Iowa, 1866) In an action to which an incorporated city is a party, the court has the discretion to admit on the jury taxpayers of such city.—Dively v. City of Cedar Falls, 21 Iowa, 565.

[g] (Iowa, 1889) Code 1873, § 4405, subd. 11, provides that a challenge for cause may be made where the juror has formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted at the trial. *Held*, that the question whether an opinion formed by a juror, from reading evidence upon the trial of another de-

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fendant for the same offense, would prevent his rendering a true verdict upon the evidence in the subsequent trial is for the discretion of the trial court, under section 4409, declaring that "in all challenges the court shall determine the law and the fact."—State v. Munchrath, 78 Iowa, 268, 43 N. W. 211.

[h] (Miss. 1853) It is the duty of the court to see that a competent, fair, and impartial jury is impaneled, and nothing can interfere with this duty but the right of the parties of peremptory challenge, or of challenge for cause good and sufficient in law, to be judged of by the court.—McCarty v. State, 26 Miss. (4 Cushm.) 299.

[i] (Mo. 1887) In an action to recover damages under the statute for causing the death of a person, the competency of a juror who testified that he had no prejudice against this particular case, but that he was opposed to personal damage cases generally, but that, if the evidence showed that the plaintiffs were entitled to damages, then he would be in favor of awarding them, is a question for the determination of the trial court in the exercise of its discretion.—McCarthy v. Cass Avenue & Fair Grounds Ry. Co., 92 Mo. 536, 4 S. W. 516.

[j] (Mo. 1892) The fact that a juror was consulting engineer of the defendant street railway company, and had a prejudice in general against personal injury suits, such as that on trial, is not enough to show error in the trial court in overruling a challenge for cause, since such court has discretion as to grounds of challenge not covered by statute.—Coppersmith v. Mound City Ry. Co., 51 Mo. App. 357.

[k] (Nev. 1895) The allowance of a challege to a juror is a matter within the discretion of the court.—State v. Vaughan, 22 Nev. 285, 39 Pac. 733.

[l] (N. H. 1891) Lndependently of, as well as under, Act 1754 (Prov. Laws 1771, p. 191, § 3), providing that on motion of either party a juror shall be required to answer whether he has given his opinion, or is sensible of any prejudice in the cause, and, if it shall appear that such juror is not indifferent in the cause, he shall stand aside, the fact that a juror has formed an opinion is ground for challenge to the favor only and the question whether the juror is indifferent is one of fact for the trial court.—State v. Sawtelle, 66 N. H. 488, 32 Atl. 831.

[m] (Ohio, 1876) If a juror has formed or expressed an opinion in relation to a portion of the facts embraced in the issue, but not upon the whole issue, and, otherwise, stands indifferent between the parties, the allowance or refusal of the challenge is within the discretion of the court.—Dew v. McDivitt, 31 Ohio St. 139.

[n] (Ohio, 1884) The trial court may, in its discretion, overrule a challenge to a juror, where the juror stated that he worked for the defendant whenever he was sent for, and that he was not on the pay roll, and not then employed by the defendant, where such disclosure was volunteered in answer to a general question put to the whole jury.—Thompson v. Cleveland, C., C. & I. Ry. Co., 9 Ohio Dec. 209, 11 Wkly. Law Bul. 211.

[o] (Okl. 1894) It is not necessarily an abuse of discretion to sustain a challenge to a juror who has formed an opinion based on rumors or newspaper reports, when he states that he will render a fair and impartial verdict, though St. 1890, § 5466, provides that such an opinion shall not disqualify a juror.—Bradford v. Territory, 2 Okl. 228, 37 Pac. 1061.

§ 406. Removal of disqualification.

[a] (Md. 1844) Where it was discovered during the trial that the defendant in an action of ejectment had conveyed his lands to A., who died intestate, and that one of the jurors was brother and heir at law to A., the court permitted the juror to execute a deed of reconveyance and release to the defendant, and then declared him competent.—Isaac v. Clarke, 2 Gill, 1.

[b] (Mich. 1879) One's disqualification as a juror, arising from his having given his note to a party, cannot be removed by stipulation between the parties.—Michigan A. L. Ry. Co. v. Barnes, 40 Mich. 383.

(B) PECUNIARY INTEREST.

IN GENERAL, § 407.
SURETY OR BAIL, § 408.
MEMBERSHIP IN ASSOCIATION FOR PROSECUTION OF OFFENSES, § 409.
MEMBER OR STOCKHOLDER IN ASSOCIATION OR CORPORATION, § 410.
CITIZEN OR TAXPAYER OF MUNICIPALITY, § 411.
—— CRIMINAL PROSECUTIONS, § 412.

Extent of examination of juror, see post, § 565.
Receiving fees as witness in cause, see ante, § 402 [f].
Relationship to person interested, see post, § 416.
Removal of disqualification, see ante, § 406 [a].
Waiver of objections, see post, § 508.

§ 407. In general.

[a] (Conn. 1792) Judgment will be arrested if one of the jurors was interested in the question in controversy, and the verdict is in favor of his interest.—Talmadge v. Northrop, 1 Root, 454.

[b] (Fla. 1884) A holder of municipal bonds is an incompetent juror to try a case involving the liability of the municipality on other bonds of the same issue.—Jefferson County v. Lewis, 20 Fla. 980.

[c] (Ga. 1884) The appellate court will grant a new trial to one convicted of murder, where it appears that one of the jurors had stated that if he got on the jury he would hang the accused, as there was big money in it for him, and that he had been induced by threats of the prosecuting attorney to swear to an affidavit exculpating himself from having made such statements.—Doyal v. State, 73 Ga. 72.

[d] (Ga. 1886) The petitioners for a new road over the land of another are, when objected to, incompetent jurors to pass on the question of damages between the county and the landowner.—Almand v. Rockdale County, 78 Ga. 199.

[e] (Ind. 1888) One employed by the sheriff to serve subpœnas in a prosecution is incompetent as a juror, since the sheriff, not being entitled to fees for serving such subpœnas unless the accused is convicted, is pecuniarily interested.—Zimmerman v. State, 115 Ind. 129, 17 N. E. 258.

[f] (Iowa, 1882) One who has a bet on the result of an election, and has agreed that the bet shall depend on the result of an election case, is incompetent to sit as a juror in the case; and it is immaterial how small the bet may be.—Seaton v. Swem, 58 Iowa, 41, 11 N. W. 726.

[g] (Mass. 1831) It is good ground of challenge to a juror that the same facts which will

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warrant a verdict for the plaintiff in the suit will support an action on the trustee statute against the defendant, on a judgment against the plaintiff which has been assigned to the juror.—Davis v. Allen, 28 Mass. (11 Pick.) 466, 22 Am. Dec. 386.

[h] (Mass. 1851) In a proceeding against a city or town to assess damages occasioned to adjoining land by the raising or lowering of a highway, a person who, though not residing in the city or town, has a claim against the respondents of like character to that in controversy, and feels himself aggrieved and injured by the alteration in question, is not competent to sit on the jury.—Flagg v. City of Worcester, 62 Mass. (8 Cush.) 69.

[i] (Ohio, 1860) A trustee of a township which ordered an election, at which election he was again elected a trustee thereof, is not an incompetent juror on the trial of an indictment for illegal voting, if no question touching the validity of the juror's proceedings as trustee, or his re-election, came before the jury.—State v. McGinly, 2 Ohio Dec. 398.

[j] (Pa. 1825) A juror not interested in the suit, nor in land where the title depends on the principles to be settled in the suit, is not liable to challenge on the ground that he is interested in another tract held by the plaintiff under the same title as the one in question.—Gratz v. Benner, 13 Serg. & R. 110.

[k] (S. C. 1792) The smallest degree of interest is a decisive objection to a juror.—Lynch v. Horry, 1 Bay, 229.

[l] (Va. 1886) A venireman is properly discharged in a murder case if he has made a bet on the result of the trial.—Cluverius v. Commonwealth, 81 Va. 787.

§ 408. Surety or bail.

In other cause pending, see post, § 434 [m].
Relationship to surety, see post, § 416 [n].

[a] (Ala. 1880) A person who is security on the appearance bond of one charged with an offense is not competent to serve as a juror on his trial.—Brazleton v. State, 66 Ala. 96.

[b] (Ark. 1861) The plaintiffs in a suit for freedom were hired out by the sheriff, under an order of court, and a bond was taken by him under Gould's Dig. c. 75, § 8, for their appearance and hire. *Held*, that a surety on the bond was not incompetent as a juror in the suit, as the plaintiffs were to be returned, and the hire paid, whatever the issue of the suit.—Daniel v. Guy, 23 Ark. 50.

[c] (Ga. 1879) Where an accused is at large on bail at the time of the trial, his bail is an incompetent juror to try him, if objected to by the state, since it is a ground of challenge for cause.—Anderson v. State, 63 Ga. 675.

[d] (Ill. 1844) The fact that one of the jurors is security for costs in the suit is good cause for challenge.—Bradshaw v. Hubbard, 6 Ill. (1 Gilman) 390.

[e] (Miss. 1840) It is good cause for excluding a juror from the jury that he is surety of one of the parties for a debt not in controversy, which party is insolvent, and that the person considers himself unfit to sit upon the jury.—Ferriday v. Selser, 5 Miss. (4 How.) 506.

[f] (N. Y. 1823) It is a good objection to a talesman who is called as a juror that he is bail for the prisoner's appearance.—People v. McCollister, 1 Wheeler, Cr. Cas. 391.

[g] (S. C. 1887) Under Gen. St. § 2261, providing that "if it appears to the court that the juror is not indifferent in the cause he shall be placed aside, * * * and another shall be called," when, upon the trial of a joint indictment for murder, it appears to the circuit judge, from the fact that the juror in question is surety on the recognizance of one of the defendants, that the juror is not indifferent in the cause, it is his duty to reject the juror, and have another called in his place.—State v. Prater, 26 S. C. 198, 613, 2 S. E. 108.

[h] (Vt. 1803) It is a good cause of challenge to a petit juror, in a civil cause, that he has been recoguized as surety for the plaintiff's costs, though since discharged from recognizance; and although he may have remained on the panel, by consent of parties, yet this shall not conclude him from challenge on a reimpaneling of the jury to try the issue.—Phelps v. Hall, 2 Tyler, 399.

§ 409. Membership in association for prosecution of offenses.

Not involving pecuniary interest, see post, § 433.

[a] (Ind. 1858) That a juror is one of a committee who caused the defendant to be arrested for the offense to be tried, without a warrant, and may be liable to contribute to defend an action for malicious prosecution therefor, is good cause of challenge.—Fleming v. State, 11 Ind. 234; Pierson v. Same, Id. 341.

[b] (La. 1896) The members of an association to aid in the prosecution of a particular class of offenses, and those who contribute money for the purposes of the organization, are not competent jurors to try indictments for that class of offenses.—State v. Moore, 48 La. Ann. 380, 19 South. 285.

[c] (Mass. 1855) The members of any association of men, combining for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for that purpose, are incompetent to sit as jurors on the trial of an indictment for violating that law.—Commonwealth v. Eagan, 70 Mass. (4 Gray) 18.

[d] (Mass. 1856) Members of an association to prosecute offenses against certain laws, who have each, by subscribing a certain sum to the funds of the association, rendered themselves liable to pay, to the extent of their subscriptions, their proportion of expenses incurred in such prosecutions, are not incompetent to sit as jurors on the trial of such a prosecution commenced by the agent of the association, and carried on at its expense, if it does not appear but that they have paid their subscriptions before this prosecution was commenced.—Commonwealth v. O'Neil, 72 Mass. (6 Gray) 343.

[e] (Mass. 1886) A member of the law and order league (a voluntary association, formed for the enforcement of the law against the illegal sale of intoxicating liquor, and the prosecution of liquor sellers) is incompetent to sit as a juror upon the trial of a complaint charging the defendant with maintaining a liquor nuisance where the complainant is an agent of the league, and employed by it to carry out the purposes for which it is formed.—Commonwealth v. Moore, 143 Mass. 136, 9 N. E. 25.

[f] (N. Y. 1892) Persons in a community who contribute to a fund for the prevention of illegal sales of intoxicating liquors are incompetent as jurors in an action to recover penalties for such illegal sales.—Jackson v. Sandman, 64 Hun, 634, 18 N. Y. Supp. 894; Same v. Claudio, Id.; Same v. De Grief, Id.; Same v. McMillan, Id.

[g] (R. I. 1885) Contribution of money for the prosecution of persons generally charged with maintaining liquor nuisances does not render

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the contributor incompetent as a juror on the trial of such a prosecution.—State v. Hoxsie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. Rep. 838.

[h] (Tex. 1882) Subscribers to a general fund to secure counsel for the prosecution of a defendant are not private prosecutors within the statute incapacitating such persons from serving on the jury trying the case.—Heacock v. State, 13 Tex. App. 97.

§ 410. Member or stockholder in association or corporation.

Relationship to stockholder, see post, § 416 [a, f].

Repeal of statute, see ante, § 401 [c].

Where not involving pecuniary interest, see post, § 433.

[a] (Ala. 1861) The society of Free Masons being a purely charitable corporation in its financial policy, a member of a subordinate lodge is a competent juror in an action in which the grand lodge is a party.—Burdine v. Grand Lodge of Alabama, 37 Ala. 478.

[b] (Mass. 1809) A remote and small corporate interest is no legal objection to a juror's trying a cause, if, by the necessary construction of the law on the subject, the cause could not otherwise be tried.—Commonwealth v. Ryan, 5 Mass. 90.

[c] (Mass. 1849) The same persons being summoned as jurors to assess the damages severally sustained by two railroad corporations for the taking of their lands lying contiguous to each other by a third railroad corporation for the road of the latter, it was *held* to be no objection to the competency of one of the jurors to sit as such in the cause first tried that he was a stockholder in the other corporation petitioning, whose cause was to be tried immediately afterwards.—Commonwealth v. Boston & M. R. Co., 57 Mass. (3 Cush.) 25.

[d] (Nev. 1867) Under the act of 1862, providing for the formation of corporations, and making stockholders personally liable for their portion of all debts contracted while members of the corporation, one who was a stockholder when a suit was commenced is disqualified to act as a juror in the case.—Fleeson v. Savage Silver Min. Co., 3 Nev. 157.

[e] (N. H. 1850) A stockholder in a railroad company is disqualified to sit as juror in a cause wherein the company in which he owns stock is pecuniarily interested to any amount.—Page v. Contoocook Val. R. Co., 21 N. H. (1 Fost.) 438.

[f] (N. Y. 1826) In an action against the keeper of a turnpike gate, for the penalty imposed by the act relative to turnpike companies for shutting the gate and taking or demanding toll after the commissioners of inspection have ordered it to be opened, a stockholder of the company is not disqualified to serve on the jury; the company not being responsible in any event on account of the recovery.—Williams v. Smith, 6 Cow. 166.

[g] (N. C. 1829) It is no cause of challenge that a juror and one of the parties are stockholders in the same company, not in any way concerned in the action.—Brittain v. Allen, 13 N. C. 120.

[h] (Tenn. 1871) In actions between the trustees of different religious denominations, involving the right of possession of lands, the members of each denomination are, by reason of interest, incompetent to act as jurors.—Cleage v. Hyden, 53 Tenn. (6 Heisk.) 73.

§ 411. Citizen or taxpayer of municipality.

Discretion of court, see ante, §§ 405 [f], 525 [b].

In case of evenly balanced evidence, see post, § 436 [f].

Infringement of right to trial by jury, see ante, § 228 [i, l–n].

Officer, see ante, § 403.

Omission of names of taxpayers in drawing jury in action against city, see ante, § 355 [c].

Relationship to citizen or taxpayer, see post, § 416 [b, d, e].

[a] A resident and taxpayer of a city is incompetent as a juror in an action wherein the city is interested, and where a verdict against the city would impose additional burdens upon all the taxpaying residents thereof.

—(Del. 1889) Robinson v. City of Wilmington, 8 Houst. 409, 32 Atl. 347;
(Iowa, 1875) Cramer v. City of Burlington, 42 Iowa, 315;
(Kan. 1878) Gibson v. Wyandotte, 20 Kan. 156;
(N. Y. 1873) Diveny v. City of Elmira, 51 N. Y. 506;
(Or. 1865) Garrison v. City of Portland, 2 Or. 123.

CONTRA, see
(Ky. 1878) Kemper v. City of Louisville, 77 Ky. (14 Bush) 87;
(Neb. 1877) City of Omaha v. Olmstead, 5 Neb. 446;
(Tenn. 1892) City of Jackson v. Pool, 91 Tenn. (7 Pickle) 448, 19 S. W. 324;
(Tex. 1896) Missouri, K. & T. Ry. Co. v. Bishop (Civ. App.) 34 S. W. 328.

[b] A taxpayer of a municipal corporation is not a competent juror in an action against the municipality.

—(Iowa, 1885) McGinty v. City of Keokuk, 66 Iowa, 725, 24 N. W. 506;
(Mo. 1876) Fulweiler v. City of St. Louis, 61 Mo. 479;
(Or. 1874) City of Portland v. Kamm, 5 Or. 362.

[c] In a suit in which a town is a party interested, the citizens of such town are not competent jurors.

—(Ga. 1872) Johnson v. City of Americus, 46 Ga. 80; (1882) City of Cartersville v. Lyon, 69 Ga. 577;
(Mo. 1848) Eberle v. St. Louis Public Schools, 11 Mo. 247.

[d] Jurors are not disqualified by their interest as inhabitants of a town or province from sitting in a civil action brought by it to recover money due it.

—(Mass. 1762) Province of Massachusetts Bay v. Paxton, Quincy, 548.

CONTRA, see
(Ill. 1839) Russell v. Hamilton, 3 Ill. (2 Scam.) 56.

[e] (U. S. 1808) Citizens of a municipality are not competent jurors in an action of debt by the municipality for a penalty under a by-law or ordinance thereof, where such penalty inures to the benefit of the municipality.—Alexandria v. Brockett, Fed. Cas. No. 181 [1 Cranch, C. C. 505].

[f] (Colo. 1892) Civ. Code 1887, c. 13, provides that the interest of a juror as a member or citizen of a municipal corporation shall not be made the subject of a challenge. Gen. Laws 1877, § 9 (Mills' Ann. St. § 1723), relating to the trial of condemnation proceedings, provides that

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the same right of challenge exists therein as in all other civil cases. *Held*, that in the trial of such proceedings, instituted by a town, a juror was not subject to challenge on the ground that he was a resident of such town.—Warner v. Town of Gunnison, 2 Colo. App. 430, 31 Pac. 238.

[g] (Conn. 1863) An owner of land and taxpayer of the town was disqualified to sit as juror in an action against the town for an injury from a defective highway.—Bailey v. Town of Trumbull, 31 Conn. 581.

[h] (Ga. 1849) The citizens of an incorporated city who are liable to be taxed for the payment of the verdict are incompetent to sit as special jurors, on the trial of a cause in which the city council are defendants.—City of Columbus v. Goetchius, 7 Ga. 139.

[i] (Ga. 1852) Citizens of a county are competent as jurors to try an issue made on an execution issued against the tax collector and his sureties for the county taxes, not collected and paid over according to law.—Bassett v. Governor, 11 Ga. 207.

[j] (Ga. 1854) Where the interest of the citizens of a county in the event of a suit is of the same kind which the citizens of a county have in the result of an indictment for an offense punishable by fine, they are not disqualified, by such interest, to serve as jurors in that suit.—Justices of Inferior Court of Pike County v. Giffin & W. P. Plank Road Co., 15 Ga. 39.

[k] (Ga. 1879) In a suit relating to land which had been conveyed by a county treasurer to his sureties to cover a defalcation for which the sureties were liable, and which conveyance was attacked by the mother of the treasurer, other citizens of the county had no such interest as to disqualify them as jurors.—Phipps v. Mansfield, 62 Ga. 209.

[l] (Ind.) In an action against a city to recover damages for injury occasioned by a badly constructed sidewalk which the city negligently allowed to be out of repair, *held* that, by the common law and under the statutes, the fact that a juror was a citizen and taxpayer of the city afforded sufficient cause for his challenge by the plaintiff.—(1875) Hearn v. City of Greensburgh, 51 Ind. 119; (1883) Town of Albion v. Hetrick, 90 Ind. 545, 46 Am. Rep. 230.

[m] (Ind. 1878) The fact that a proposed juror, in an action brought by the city for the violation of a city ordinance, is a taxpayer in the city, does not render him incompetent.—Williams v. City of Warsaw, 60 Ind. 457.

[n] (Ind. 1889) In an action against a city for personal injuries caused by a defective street, it is a good cause for challenge of a juror that he resides in the city, and pays taxes on personal property therein.—City of Goshen v. England, 119 Ind. 368, 21 N. E. 977.

[o] (Iowa, 1883) In an action against a city, defendant has no right to challenge a juror on the ground that, though a resident, he is not a taxpayer.—Hollenbeck v. City of Marshalltown, 62 Iowa, 21, 17 N. W. 155.

[p] (Iowa, 1887) In a suit against a municipal corporation, it is good ground of challenge by plaintiff that the juror is a taxpayer of the corporation; and the fact that he is a nonresident does not remove the disqualification.—Kendall v. City of Albia, 73 Iowa, 241, 34 N. W. 833.

[q] (Iowa, 1887) The fact that one called as a juror in a litigation in which the city is a party is a taxpayer in the city is no ground for challenge by the city.—Conklin v. City of Keokuk, 73 Iowa, 343, 35 N. W. 444.

[r] (Mich. 1895) How. Ann. St. § 466, providing that, in a trial in which a county is interested, the electors and inhabitants of the county shall be competent jurors, does not deprive the party opposed to the county of a trial by an impartial jury, as their interest as taxpayers is too remote to influence their conduct.—Smith v. German Ins. Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368.

[s] (Mo. 1860) The inhabitants of St. Louis are competent as jurors in a case in which the board of direction of the public schools of that city is a party.—Fine v. St. Louis Public Schools, 30 Mo. 166.

[t] (Mo. 1860) Where the city of St. Louis is interested in the case, the jurors to try it should be summoned by special venire from that portion of the county outside of the city limits.—Fine v. St. Louis Public Schools, 30 Mo. 166.

[u] (Mo. 1879) The city of St. Louis is included within the meaning of the words "any county" in Wag. St. § 7, whereby its taxpaying citizens are competent as jurors in a case where the city is a party.—O'Brien v. Vulcan Iron Works, 7 Mo. App. 257.

[v] (N. J.) In a suit brought by the board of chosen freeholders of a county against a late county collector and his sureties on his official bond, it is not a good ground of principal challenge to the polls that the jurors are inhabitants of the county, and the owners of land and other taxable property therein.—(1845) Peck v. Freeholders of Essex County, 20 N. J. Law (Spencer) 457, reversed (1847) 21 N. J. Law (1 Zab.) 656.

[w] (N. Y. 1807) In an action qui tam to recover a penalty, one moiety of which would go, by statute, to the poor of the town where the offense was committed, it is good cause of challenge against the jury that they are inhabitants of that town.—Wood v. Stoddard, 2 Johns. 194.

[x] (N. Y. 1886) In an action against the city of Troy, a citizen is qualified to sit as a juror by its charter (section 16, c. 1, Laws 1816).—Hildreth v. City of Troy, 101 N. Y. 234, 4 N. E. 559.

[y] (R. I. 1874) In an action against a city for damages sustained owing to its neglect to keep one of its streets safe for public travel, taxpayers of the city are disqualified by interest, at common law and also by Gen. St. c. 189, §§ 1, 2, to serve as jurors in the cause.—Watson v. Tripp, 11 R. I. 98, 33 Am. Rep. 420.

§ 412. —— Criminal prosecutions.

Rejection on court's own motion, see post, § 525 [d].

[a] (Ga. 1859) The citizens of the county are competent to try an indictment for burning the county jail.—Phillips v. State, 29 Ga. 105.

[b] (Ga. 1883) Where an attorney was employed by a city council to prosecute the murderer of a policeman, residents within the corporate limits are not disqualified as jurors because they are liable to taxation for attorney's fees.—Doyal v. State, 70 Ga. 134.

[c] (Iowa, 1877) Residence in the city does not disqualify a person to sit upon a trial for violation of a city ordinance.—State v. Wells, 46 Iowa, 662.

[d] (Me. 1849) On the trial of an indictment for maliciously secreting a book of town records, an inhabitant of the town is not a competent juror.—State v. Williams, 30 Me. (17 Shep.) 484.

[e] (Mass. 1861) An inhabitant of the same town with a complainant who has instituted proceedings under St. 1859, c. 239, relating to the bastardy process, is incompetent to sit as a juror in the trial of the case.—Hawes v. Gustin, 84 Mass. (2 Allen) 402.

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[f] (Mass. 1888) On a charge of forging and uttering discharges for money payable from a town and county treasury, the inhabitants of that town and county are not disqualified to serve as grand or trial jurors, there being no provision for finding or trying an indictment for such offense in another county.—Commonwealth v. Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736, 1 L. R. A. 620.

[g] (N. Y. 1867) On a trial for stealing property of a county, an inhabitant thereof is not disqualified by interest to act as juror.—People v. Bennett, 4 Abb. Prac. (N. S.) 89.

[h] (Vt. 1835) On a criminal complaint before a justice of the peace, it is no objection to a juror that he is an inhabitant of the town to which the penalty will accrue.—Middletown v. Ames, 7 Vt. 166.

[i] (Wash. 1895) In a prosecution for the embezzlement of city funds, a taxpayer of the city is a competent juror.—State v. Krug, 12 Wash. 288, 41 Pac. 126.

(C) RELATIONSHIP OR BUSINESS CONNECTION.

RELATIONSHIP TO PARTY OR PERSON INTERESTED, § 413.
RELATIONSHIP TO PARTY BY AFFINITY, § 414.
RELATIONSHIP TO PARTY BY CONSANGUINITY, § 415.
RELATIONSHIP TO PERSONS INTERESTED BUT NOT PARTIES, § 416.
RELATIONSHIP TO PERSONS INJURED BY COMMISSION OF OFFENSE, § 417.
RELATIONSHIP TERMINATED BY DEATH OR OTHERWISE, § 418.
RELATIONSHIP TO ATTORNEY OR COUNSEL, § 419.
BUSINESS CONNECTION OR TRANSACTIONS WITH PARTY, § 420.
BUSINESS CONNECTION OR TRANSACTIONS, WITH ATTORNEY, § 421.
INFLUENCE ON VERDICT § 422.

Rejection on court's own motion, see post, § 531.
Relationship of summoning officer to parties, see ante, § 299 [i, q].
Requiring jurors to stand aside, see post, § 501 [u].
Waiver of objections, see post, § 509.

§ 413. Relationship to party or person interested.

[a] (Conn. 1787) The same degree of relationship between a juror and a party as would by statute exclude a judge from sitting in a cause is sufficient ground for arrest of judgment.—Woodbridge v. Raymond, Kirby, 279.

[b] (Ga. 1895) It will not prevent a new trial, for the juror, who was disqualified because akin to the prosecutor, to assert that he did not know of the relationship until after the trial.—Ledford v. State, 75 Ga. 856.

[c] (Ga. 1895) Jurors alleged to have been of kin to the prosecutor, who were not related to him either by consanguinity or affinity, were not disqualified.—Keener v. State, 97 Ga. 388, 24 S. E. 28.

[d] (Iowa, 1885) A juror, having stated that his son was married to defendant's daughter, was challenged and excluded. *Held*, that although he was not disqualified on the ground of consanguinity or affinity, under Code 1873, § 2772, subd. 4, the relationship stated justified his exclusion on the ground of prejudice.—Wisehart v. Deitz, 67 Iowa, 121, 24 N. W. 752.

[e] (N. Y. 1847) By the common law, it is a good cause of challenge to a juror, that he is of kin to either of the parties, by consanguinity or affinity within the ninth degree.—Paddock v. Wells, 2 Barb. Ch. 331.

[f] (N. C. 1853) The relationship of a juror to the prisoner, whether by consanguinity or marriage, is a good cause of principal challenge on the part of the state, but such relationship must be within the ninth degree.—State v. Perry, 44 N. C. 330.

[g] (Pa. 1852) The relationship of a juror to the plaintiff, in a suit by an administrator, is a good ground of challenge.—Balsbaugh v. Frazer, 19 Pa. (7 Harris) 95.

[h] (Tenn. 1883) A verdict of manslaughter will be reversed, if a juror related to the defendant within the prohibited degree has been passed as competent.—Parrish v. State, 80 Tenn. (12 Lea) 655.

[i] (Vt. 1839) Affinity or consanguinity within the fourth degree, reckoned according to the civil law, disqualifies a juror.—Churchill v. Churchill, 12 Vt. 661.

§ 414. Relationship to party by affinity.

See ante, § 413.
Terminated by death, see post, § 418.

[a] (U. S. 1830) The court will not grant a new trial because one of the jurors was brother-in-law of the plaintiff.—Orme v. Pratt, Fed. Cas. No. 10,578 [4 Cranch, C. C. 124].

[b] (Colo. 1888) Where a juror states that the plaintiff is a sister-in-law of his brother, he should be excused.—Buddee v. Spangler, 12 Colo. 216, 20 Pac. 760.

[c] (Del. 1841) Kindred by affinity is a cause of challenge to a juror.—Armstrong v. Timmans, 3 Har. 342.

[d] (Ga. 1872) A juror who married the widow of the prosecutor's uncle is not, on that account, an incompetent juror.—Oneal v. State, 47 Ga. 229.

[e] (Ga. 1883) Where the wife of a juror and the wife of the propounder of a will both had the same great-grandfather, the juror was incompetent to sit.—McKinney v. McKinney, 72 Ga. 80.

[f] (Ga. 1892) Since marriage relates a husband to his wife's kindred, but does not relate any of his kindred to hers, a man whose brother married defendant's sister is not incompetent as a juror to try defendant for an offense.—Burns v. State, 89 Ga. 527, 15 S. E. 748.

[g] (Ga. 1893) The fact that a juror's grand-uncle married the grandmother of the prosecutor establishes no relationship, either by blood or marriage, between the juror and the prosecutor, where it appears that the latter was not a descendant of that marriage.—McDuffie v. State, 90 Ga. 786, 17 S. E. 105.

[h] (Ga. 1893) A juror is not incompetent to try a case because his stepdaughter married plaintiff's brother.—Central R. & Banking Co. of Georgia v. Roberts, 91 Ga. 513, 18 S. E. 315.

[i] (Ind. 1851) The fact that a juror is related to one of the parties by marriage with his niece is a sufficient cause of challenge.—Trullinger v. Webb, 3 Ind. 198.

[j] (Ind. 1894) A juror whose wife's mother is a first cousin of the mother of defendant's wife is not incompetent.—Tegarden v. Phillips (App.) 39 N. E. 212.

[k] (Ind. 1894) Under Rev. St. 1894, § 240, par. 11 (Rev. St. 1881, § 240, par. 11), providing

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that when a person is required to be disinterested in acting on any question affecting other parties, "consanguinity or affinity within the sixth degree, inclusive, by the civil-law rules, or within the degree of second cousins, inclusive, shall disqualify such person from acting except by consent of parties," one whose wife is a second cousin of defendant's wife is related to defendant by affinity within the prohibited degree, and hence disqualified to serve as a juror.—Tegarden v. Phillips (App.) 39 N. E. 212.

[l] (Ind. 1895) Husbands whose wives are second cousins are not related by affinity, and one of them is not disqualified as a juror in an action to which the other is a party, under Rev. St. 1894, § 240 (Rev. St. 1881, § 240), prohibiting a person from serving as a juror in a case where he is related to a party by affinity within a certain degree.—Tegarden v. Phillips, 14 Ind. App. 27, 42 N. E. 549.

[m] (Me. 1850) A person related to a party to a suit by affinity in the fourth degree, according to the rules of the civil law, cannot act as a juror in such suit.—Hardy v. Sprowle, 32 Me. 310.

[n] (Me. 1854) A juror is not disqualified by his brother's being the husband of the sister of one of the parties.—Chase v. Jennings, 38 Me. 44.

[o] (N. J. 1794) A juror who married the daughter of a brother of a party is disqualified from serving.—Hinchman v. Clark, 1 N. J. Law (Coxe) 446.

[p] (Pa. 1835) It is no cause of principal challenge that the juror's sister is the wife of the nephew of one of the parties.—Rank v. Shewey, 4 Watts, 218.

[q] (S. C. 1882) It is no disqualification that a juror is the husband of a third cousin of defendant.—Todd v. Gray, 16 S. C. 635.

[r] (Tex. 1880) The fact that the wives of two brothers of a party to a civil action were the sister and the niece of a juror trying the cause, *held* not to disqualify him.—Johnson v. Richardson, 52 Tex. 481.

§ 415. Relationship to party by consanguinity.

See ante, § 413.
Discretion of court, see ante, § 405 [b].

[a] (Fla. 1860) A person summoned as a juror in a criminal case who states in voir dire that he is related by blood to the prisoner, and that he thinks he is not so nearly related as second cousin, but that he may be a third cousin, is incompetent as a juror.—O'Connor v. State, 9 Fla. 215.

[b] (Ga. 1873) A juror who is a cousin of one of the defendants is incompetent to sit on the trial of the cause.—Rust v. Shackleford, 47 Ga. 538.

[c] (Ga. 1885) In a criminal case, a third cousin of the prosecutor is disqualified to sit as a juror.—Ledford v. State, 75 Ga. 856.

[d] (Mo. 1881) Under Rev. St. 1879, § 1894, excluding all persons of kin to prosecutor or defendant from the jury, *held* that one who stated that "his father was second cousin to defendant's mother" was properly excluded from the jury.—State v. Walton, 74 Mo. 270.

[e] (N. Y. 1891) Under Code Cr. Proc. § 377, making consanguinity to the complainant within the ninth degree a good cause for challenge in criminal prosecutions, one is not competent as a juror who is a third cousin to the complainant, for third cousins are related in the eighth degree.—People v. Clark, 62 Hun, 84, 16 N. Y. Supp. 473, 695.

[f] (Ohio, 1894) A second cousin, once removed, of a certain person, is not a kin of such person by consanguinity or affinity within the fourth degree, so as to render a juror subject to challenge.—Kahn v. Reedy, 8 Ohio Cir. Ct. R. 345.

[g] (S. C. 1895) It is not error to reject a juror when he and plaintiff are fourth cousins, and their wives first cousins.—Sims v. Jones, 43 S. C. 91, 20 S. E. 905.

[h] (Tex. 1895) In trespass to try title against a tenant and grantees of his lessor, where such tenant disclaims, but still has a claim for improvements, which both plaintiffs and defendants have agreed to pay in case of success, a brother of such tenant is incompetent as a juror.—Davidson v. Wallingford (Civ. App.) 30 S. W. 286.

§ 416. Relationship to persons interested but not parties.

Influence on verdict, see post, § 422 [c].

[a] (U. S. 1807) In an action against an insurance company, a nephew of a stockholder is not a competent juror.—Young v. Marine Ins. Co., Fed. Cas. No. 18,163 [1 Cranch, C. C. 452].

[b] (Conn. 1791) Judgment in favor of a town will not be arrested because some of the jurors were related to some of the inhabitants of the town.—Carew v. Howard, 1 Root, 323.

[c] (Conn. 1797) Judgment will not be arrested on motion of the defendant because one of the jurymen was nephew to a creditor in a foreign attachment served upon the plaintiff.—Starr v. Tracy, 2 Root, 528.

[d] (Conn. 1859) Relationship on the part of one of the jurors, in a proceeding for the reassessment of damages for land taken for a highway, to a resident and taxpayer of the town which is the defendant in the highway petition, is not a disqualification of such juror.—Pettis v. Town of Pomfret, 28 Conn. 566.

[e] (Conn. 1872) Where a bastardy complaint was prosecuted by, and in the name of, the mother of the child, without the advice of, or any consultation with, the authorities of the town, except that her counsel requested the selectmen to give bonds for the prosecution of the suit, one of whom gave such bond, but individually, in his own name, the town could not be regarded as legally interested in such proceeding, so as to disqualify a juror who was related to a taxpayer of the town.—Manion v. Flynn, 39 Conn. 330.

[f] (Ga. 1878) The son of a stockholder is incompetent as a juror in a case to which the corporation is a party.—Georgia R. Co. v. Hart, 60 Ga. 550.

[g] (Ga. 1878) On trial of an indictment for homicide, the nephew of a county commissioner who has aided the prosecution by employing counsel and performing other acts not within the legal function of the office is not a competent juror.—Dumas v. State, 62 Ga. 58.

[h] (Ga. 1887) An action was brought by a city to recover the amount of damages it had been obliged to pay on a judgment rendered against it for personal injuries resulting from the defendant's negligence in excavating the public street adjacent to his building. The husband of the party who recovered in the suit against the city was one of the panel from which the jury was drawn. He was objected to on the ground that his wife would be a witness in the case. *Held*, that the juror was not incompetent, on account of the relationship, to sit in the case.—Faith v. City of Atlanta, 78 Ga. 779, 4 S. E. 3.

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[i] (Ind. 1892) In a proceeding to establish a highway, that a juror was related to the wife of one of the landowners whose land was assessed, but who was not a party to the proceedings before the board or to the appeal to the circuit court, is no reason for setting aside the verdict.—Fulton v. Cummings, 132 Ind. 453, 30 N. E. 949.

[j] (La. 1878) A statement by the defendant's counsel, made in a criminal case after the jury is impaneled, that he will impeach a certain witness for the state, may sometimes be a ground for excusing a juror who is a brother of such witness.—State v. Christian, 30 La. Ann. 367.

[k] (Miss. 1884) The court properly set aside a juror in a criminal case who was a cousin of one indicted for the same offense as defendant.—Smith v. State, 61 Miss. 754.

[l] (N. H. 1849) In an action against a sheriff for the act of his deputy, who has been released and has been admitted to testify on the trial, the father of the deputy may properly serve as a juror, not having been prejudiced in the cause.—Seavy v. Dearborn, 19 N. H. 351.

[m] (N. C. 1847) On an indictment of a slave for murder, it is good cause of challenge of a juror, on the part of the government, that he is nearly related to the owner of the slave.—State v. Anthony, 29 N. C. 234.

[n] (N. C. 1859) It is good cause of challenge to a person tendered as a juror in a civil case that he is the son-in-law of one who is the surety for the prosecution of the suit, and where the relation is admitted or found, it is purely a question of law.—Sehorn v. Williams, 51 N. C. 575.

[o] (N. C. 1879) On a prosecution of a jailer for negligently allowing the escape of prisoners, it was proper to reject a juror related to the escaped prisoners.—State v. Baldwin, 80 N. C. 390.

[p] (N. C. 1888) A juror related to the prisoner's wife in the ninth degree is disqualified, on objection by the state for cause.—State v. Potts, 100 N. C. 457, 6 S. E. 657.

[q] (Tex. 1882) Upon defendant's trial for stealing A.'s horse, a juror, after defendant had exhausted his peremptory challenges, was forced upon him, against his objection, who was related within the prohibited degree to B., whose horse defendant, by another indictment, was charged with stealing at the same time and place. *Held*, that the juror should have been rejected.—Wright v. State, 12 Tex. App. 163.

§ 417. Relationship to persons injured by commission of offense.

[a] (Ala. 1889) In a murder case the fact that one is a cousin of deceased's step-father does not render him incompetent as a juror.—Kirby v. State, 89 Ala. 63, 8 South. 110.

[b] (Tenn. 1850) One called as a juror in a case of murder stated that the sons of his wife by a former husband were second cousins to the deceased, and that his wife was still living. *Held*, that the juror was not akin to the deceased, and was a competent juror.—Moses v. State, 30 Tenn. (11 Humph.) 232.

[c] (Tex. 1886) Second cousins are related to each other within the third degree; and under Code Cr. Proc. art. 636, subd. 10, disqualifying as jurors those related within the third degree to the person injured by the commission of the offense, a second cousin of the owner of the stolen property is disqualified to sit as a juror on the trial of one charged with the larceny.—Page v. State, 22 Tex. App. 551, 3 S. W. 745.

[d] (Tex. 1889) The brother-in-law of a person from whom cattle were stolen is not a competent juror on the trial of one for the theft, under Code Cr. Proc. art. 636, subd. 10.—Powers v. State, 27 Tex. App. 700, 11 S. W. 646.

[e] (Va. 1853) On trial for arson, the fact that a juror is a nephew of the deceased wife of the person whose house was burned, if she left children, is a cause of principal challenge.—Jaques v. Commonwealth, 10 Grat. 690.

§ 418. Relationship terminated by death or otherwise.

[a] (Conn. 1807) A juror who had married the sister of a party in another case depending on the same principles, though his wife was then dead, was excused from sitting on the trial.—Bank v. Hart, 3 Day, 491.

[b] (Ind. 1858) In an action by a widow, there being issue alive, a juror who would have been incompetent during the life of the husband, by reason of the fact that plaintiff's first husband was a brother of the juror's wife, is still incompetent.—Dearmond v. Dearmond, 10 Ind. 191.

[c] (Mass. 1886) The fact that an uncle of plaintiff married an aunt of the juror, and that two uncles of the juror married aunts of the plaintiff, but that each marriage had been dissolved by the death of one of the parties, and there were no issue of the marriage, does not disqualify the juror from acting as such.—Bigelow v. Sprague, 140 Mass. 425, 5 N. E. 144.

[d] (N. Y. 1827) That a juror's father had married the widow of the defendant's brother, the father being dead at the time of the trial, is not a ground of principal challenge by the plaintiff.—Cain v. Ingham, 7 Cow. 478.

[e] (N. C. 1843) A juror was challenged for cause, and it appeared that his wife was cousin to the prisoner's former wife, who was now dead, leaving no children. *Held*, that this was no cause of challenge; the affinity having ceased at her death.—State v. Shaw, 25 N. C. 532.

§ 419. Relationship to attorney or counsel.

[a] (Ga. 1879) Where plaintiff's attorneys are to receive part of the money recovered as fees, their relatives are incompetent as jurors.—Melson v. Dickson, 63 Ga. 682, 36 Am. Rep. 128.

[b] (Ga. 1884) A second cousin of an attorney for plaintiff, who has a fee conditional on recovery, is not a competent juror.—Crockett v. McLendon, 73 Ga. 85.

[c] (Mich. 1888) That a juror, in a criminal case, is an own cousin of the prosecuting attorney within the second degree of consanguinity, does not avoid the judgment.—People v. Waller, 70 Mich. 237, 38 N. W. 261.

[d] (Mo. 1877) A juror in a criminal case is not rendered incompetent by the fact that he is the father-in-law of the prosecuting attorney.—State v. Jones, 64 Mo. 391.

[e] (Mont. 1895) A juror who has not on his voir dire shown himself disqualified, under Pen. Code 1895, § 2048, by implied or actual bias, is not disqualified, under section 2046, by the fact that he is a brother-in-law of the prosecuting attorney.—State v. Cadotte, 17 Mont. 315, 42 Pac. 857.

[f] (Pa. 1827) It is no cause of challenge to a juryman that he is brother of the counsel of one of the opposite party.—Pipher v. Lodge, 16 Serg. & R. 214.

[g] (Pa. 1863) It is not ground of challenge for cause that the juror challenged is a brother-in-law of one of the counsel concerned in the cause.—Funk v. Ely, 45 Pa. (9 Wright) 444.

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§ 420. Business connection or transactions with party.

Discretion of court, see ante, § 405 [j, n].
Extent of examination, see post, § 569 [m].
In case of evenly balanced evidence, see post, § 436 [b].
Influence on verdict, see post, § 422.
Removal of disqualification, see ante, § 406 [b].
Sufficiency of jurors' answers to questions propounded, see post, § 582 [j].

[a] An employé of a railroad company is an incompetent juror to try an action to which the company is a party.
—(Ga. 1879) Central R. Co. v. Mitchell, 63 Ga. 173;
(Neb. 1884) Burnett v. Burlington & M. R. R. Co., 16 Neb. 332, 20 N. W. 280.

[b] (Ala. 1888) There is no error in disallowing plaintiff's challenge of a juror who was the servant of a defendant in another action of the same kind, brought by plaintiff and involving the same issues; but these facts are sufficient to support a challenge for favor, the effect of which would be an inquiry by the court as to whether the jury is biased in point of fact.—Calhoun v. Hannon, 87 Ala. 277, 6 South. 291.

[c] (Colo. 1885) One who has business relations with a party indicted jointly with defendant for a crime is incompetent to act as juror.—Minich v. People, 8 Colo. 440, 9 Pac. 4.

[d] (Colo. 1890) Where a juror in an action of replevin is shown to be a clerk in the employ of a firm on intimate relations with one of the parties in interest, and which became their bondsmen upon the instrument which secured them in possession of the property in controversy, he is properly excused.—Hill v. Corcoran, 15 Colo. 270, 25 Pac. 171.

[e] (Conn. 1846) The relation of landlord and tenant between a juror and the bondsman for the prosecution of the suit is not a disqualification of such juror.—Brown v. Wheeler, 18 Conn. 199.

[f] (Miss. 1879) One who is in the service of another as a clerk is incompetent as a juror on the trial of a case wherein his employer is defendant.—Hubbard v. Rutledge, 57 Miss. 7.

[g] (Miss. 1887) The fact that a juror is in the employment of the defendant disqualifies him.—Louisville, N. O. & T. Ry. Co. v. Mask, 64 Miss. 738, 2 South. 360.

[h] (N. Y. 1857) It has always been considered a principal ground of challenge to a juror that he is the tenant of either party. The act of the legislature, abolishing the landlord's right to distrain the goods of his tenant for rent, has not removed this ground of challenge.—Hathaway v. Helmer, 25 Barb. 29.

[i] (N. Y. 1896) It is not reversible error to reject a juror because he was connected with a corporation which manufactured articles for a company of which defendant was a member.—Laidlaw v. Sage, 2 App. Div. 374, 37 N. Y. Supp. 770.

[j] (Pa. 1827) A tenant who holds from year to year as a cropper cannot serve on a jury in a suit in which his landlord is a party.—Pipher v. Lodge, 16 Serg. & R. 214.

[k] (Pa. 1839) It is a good cause of challenge that a juror is tenant of one of the parties.—Harrisburg Bank v. Forster, 8 Watts, 304.

[l] (Pa. 1843) In an action of ejectment by the heirs at law of an insolvent debtor, the executor of a deceased person is not a competent juror, and may be challenged for that cause.—Smull v. Jones, 6 Watts. & S. 122.

[m] (Pa. 1866) A principal challenge to a juror propter affectum is not supported by evidence that the juror lodges at his own expense, temporarily, with the defendant, who is an innkeeper.—Cummings v. Gann, 52 Pa. (2 P. F. Smith) 484.

[n] (Tex. 1887) One who had been in a party's employ a year before is not thereby disqualified to sit as a juror in the case.—East Line & R. R. R. Co. v. Brinker, 68 Tex. 500, 3 S. W. 99.

[o] (Tex. 1895) In an action against a bank, the court may allow plaintiff to ask a veniremen if he is indebted to the bank.—Davis v. Panhandle Nat. Bank (Civ. App.) 29 S. W. 926.

[p] (Wash. 1891) Code, § 212, subd. 2, provides that a person standing in the relation of master to the adverse party may be challenged as a juror in civil cases, and section 1078 provides that the law relating to the selection of jurors in civil cases shall apply also to criminal cases. *Held*, in a trial for murder, that a former master of decedent is disqualified as a juror.—State v. Coella, 3 Wash. St. 99, 28 Pac. 28.

[q] (W. Va. 1891) A juror should not be excluded in a civil case merely because he is indebted to defendant, in the absence of any showing that he is by reason thereof at the mercy of defendant, or that he has been treated with such indulgence as to make him favor him.—Thompson v. Douglass, 35 W. Va. 337, 13 S. E. 1015.

§ 421. Business connection or transactions with attorney.

Extent of examination of juror, see post, § 563 [h].

[a] (Colo. 1890) That a person called as a juror is acquainted with the attorney of one of the parties to the suit, and had employed him at one time to do certain legal business, is not sufficient ground upon which to base a challenge for cause.—Fairbanks v. Irwin, 15 Colo. 366, 25 Pac. 701.

[b] (Ga. 1889) A juror who lodges, as a paying boarder, in the house of an attorney at law during court week, up to the call of a criminal case in which the attorney is counsel for the prosecution, is not, on that account alone, absolutely disqualified to serve as a juror in such case.—Statham v. State, 84 Ga. 17, 10 S. E. 493.

[c] (Ind. 1885) The fact that the statute enumerates grounds which will disqualify a juror does not preclude a rejection on other grounds, as, for instance, that the juror is the deputy of the prosecuting attorney.—Block v. State, 100 Ind. 357.

[d] (Ind. 1892) The fact that a person who is an insurance agent has his office in the rooms occupied by an attorney does not disqualify him to sit as a juror in a case in which the attorney is interested, where there is no other connection between them.—State v. Taylor, 5 Ind. App. 29, 31 N. E. 543.

[e] (N. H. 1879) A juror is not disqualified because counsel in the case is also the prosecuting counsel of the city in which the juror lives; the counsel being paid by the city for his services.—O'Connor v. Bucklin, 59 N. H. 589.

[f] (N. Y. 1888) Under Code Cr. Proc. § 377, enumerating causes of challenge for implied

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bias, among which is the relation of client and attorney between the juror and an attorney engaged in the trial of the cause, and limiting the causes of challenge for implied bias to the enumerated cases; and section 376, defining actual bias as the existence of a state of mind on the part of a juror which satisfies the court that he cannot impartially try the case,—the exclusion of a juror because he was acquainted with one of defendant's counsel, and had advised with him on an occasion not connected with the cause on trial, is error.—People v. McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273.

§ 422. Influence on verdict.

Bias and prejudice, see post, § 437.
Formation and expression of opinion, see post, §§ 461–479.
Presumptions and burden of proof, see post, § 584 [h].
Sufficiency of juror's answers to questions propounded, see post, § 582 [g].

[a] (Mo. 1891) Three or four days before the trial defendant negotiated with one juror for a team of mules, and with another for employment in defendant's business. The mule trade was consummated during the trial, and a fair price was paid. The jurors were strangers to defendant, did not know he had a case in court, or that they would be called as jurors therein, and defendant had no reason to believe his case would be tried that term. In the evening of the day before the verdict defendant invited two of his friends to partake of some oysters, and, on the suggestion of some one in a crowd standing near, defendant invited them all to join. Among these was the juror whom defendant had agreed to employ, but he was not aware of this. During the progress of the meal another juror came in, and by all the party, except defendant, was asked to partake of the treat, which he did, and defendant paid the bill for the entire party. There was nothing to show that the jurors were influenced by any of these matters, or that the evidence did not justify the verdict. *Held*, a new trial was properly refused.—Kennedy v. Holladay, 105 Mo. 24, 16 S. W. 688.

[b] (Neb. 1893) In an action against a railroad company, a juror stated on his voir dire that he was engaged in buying and shipping grain over the railroad; that he had received favors from the company, and desired to retain its favorable consideration; but that he had no personal feeling in the matter, and could render an impartial verdict. *Held*, that a challenge for cause was properly sustained.—Omaha & R. V. R. Co. v. Cook, 37 Neb. 435, 55 N. W. 943.

[c] (N. H. 1849) Where a juror upon the panel, on an appeal from an award by the railroad commissioners of damages for land taken for a railroad, was the son of another appellant, and, upon his examination as to his impartiality, denied that he was sensible of any bias, but was excluded because, without any further testimony, it appeared to the court that he had strong feelings in relation to the case, it was not erroneous.—March v. Portsmouth & C. R. R., 19 N. H. 372.

[d] (Wis. 1891) A juror who states on the voir dire that he does not know defendant, and that he has no feeling or prejudice, is qualified, notwithstanding it is shown that defendant, acting as constable, had, years before, served him with legal processes,—a fact that the juror had forgotten.—Carthaus v. State, 78 Wis. 560, 47 N. W. 629.

(D) PRIOR SERVICE AS JUROR.

NATURE OF PRIOR SERVICE IN GENERAL, § 423.
REJECTION AT FORMER TRIAL, § 424.
SERVICE IN SAME CAUSE, § 425.
—— MEMBER OF GRAND JURY FINDING INDICTMENT, § 426.
—— EFFECT OF DISCHARGE BEFORE VERDICT, § 427.
SERVICE IN SIMILAR CAUSE, § 428.
—— OFFENSES BY SAME DEFENDANT, § 429.
—— SIMILAR OFFENSES BY PERSONS OTHER THAN DEFENDANT, § 430.

Hearing evidence at trial, see post, §§ 458–460.
Prior service in other cause, see ante, §§ 259, 326, 341, 391 [a].
Rejection from panel of juror who served at former trial, see ante, § 283 [k].
—— *on court's own motion, see* post, § 529.
Sufficiency of juror's answer to interrogatories, see post, § 582 [a].
Time to challenge or object, see post, § 558 [d, g, j, t, w].
Waiver of objections, see post, § 510.

§ 423. Nature of prior service in general.

[a] (Conn. 1786) It is not sufficient cause for an arrest of judgment that a jury who tried the cause also sat upon the trial of the same cause in the court below.—Bellows v. Williams, Kirby, 166.

[b] (Tex. 1880) Rev. St. art. 3012, subd. 5, disqualifying as a juror "any person who has sat as a petit juror in a former trial of the same case, or of another case involving the same question of fact," applies to criminal as well as civil cases.—Dunn v. State, 7 Tex. App. 600; Jacobs v. Same, 9 Tex. App. 278; Willis v. Same, Id. 297.

§ 424. Rejection at former trial.

[a] A juror is not rendered incompetent by the mere fact that he was on the panel and was peremptorily challenged by the accused on a former trial.
—(Ga. 1888) Blackman v. State, 80 Ga. 785, 7 S. E. 626;
(Tenn. 1880) Robertson v. State, 72 Tenn. (4 Lea) 425;
(Tex. 1890) Nalley v. State, 28 Tex. App. 387, 13 S. W. 670.

[b] (Ga. 1837) It is not good ground for challenge for cause, that the juror offered was challenged peremptorily when offered at a former trial of the prisoner, in the same indictment, and at the same term.—State v. Henley, R. M. Charlt. 505.

[c] (Mich. 1878) That a juror has already been peremptorily challenged upon the trial of another prisoner for the same crime is no ground for a challenge for cause of said juror.—Cargen v. People, 39 Mich. 549.

[d] (Mo. 1888) It is not ground of objection to a juror that he was summoned on a previous panel ordered by the regular judge, who did not try the case, because of prejudice subsequently alleged against him; nor that he was summoned on the trial of a codefendant, and was then challenged peremptorily.—State v. Mathews, 98 Mo. 119, 10 S. W. 30, 11 S. W. 1136; Same v. Walker, 98 Mo. 135, 11 S. W. 727.

[e] (N. Y. 1876) The fact that a juror on a struck jury was stricken from a list made in a previous trial between the same parties does

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not render him incompetent to try the issues in the subsequent trial.—People v. Tweed, 50 How. Prac. 280.

[f] (Tenn. 1833) No juror who has been once challenged can be again summoned in that cause.—Garner v. State, 13 Tenn. (5 Yerg.) 160.

[g] (Tex. 1877) On the trial of a criminal action, it is no ground for challenging jurors impaneled that they were peremptorily challenged by the defendant at a former trial, unless they evince bias on their voir dire against defendant on account of such challenge.—Wilson v. State, 3 Tex. App. 63.

[h] (Tex. 1895) The mere fact that a juror had been challenged peremptorily on a former trial is not ground for a challenge for cause on the second trial.—Easterwood v. State, 34 Tex. Cr. R. 400, 31 S. W. 294.

[i] (Va. 1850) Where a prisoner was indicted for advising two slaves to abscond, and on the first trial a person summoned as juror was stricken from the panel by the prisoner, this was *held* to be no valid objection to his sitting on the second trial.—Smith v. Commonwealth, 7 Grat. 593.

§ 425. Service in same cause.

Influence on verdict, see post, § 470.

[a] (La. 1825) Either party who discovers during the trial that a juror had served on the first trial may demand that another be substituted.—Henry v. Cuvillier, 3 Mart. (N. S.) 524.

[b] (N. C. 1794) A juror who tried the cause below cannot try it again on appeal.—Kaighn v. Kennedy, 1 N. C. 60.

[c] (Va. 1841) A juror who has been sworn and served upon an inquest of damages is not competent to be sworn and serve upon a new jury to try and decide the same matter.—Hunter v. Matthews, 12 Leigh, 228.

§ 426. —— Member of grand jury finding indictment.

Discharge by court pending trial, see post, § 537.

For other offense against same defendant, see post, § 429 [b].

On grand jury not finding indictment, see ante, § 259 [e].

[a] One who served as grand juror on the finding of an indictment is incompetent to serve as petit juror on trial of the offense.
—(Ala. 1872) Birdsong v. State, 47 Ala. 68; (1886) Finch v. Same, 81 Ala. 41, 1 South. 565; (1895) Williams v. Same, 109 Ala. 64, 19 South. 530;
(Ind. 1827) Barlow v. State, 2 Blackf. 114; (1861) Rice v. Same, 16 Ind. 298;
(Mass. 1816) Commonwealth v. Hussey, 13 Mass. 221;
(Miss. 1857) Beason v. State, 34 Miss. 602;
(Tex. 1871) Greenwood v. State, 34 Tex. 334;
(W. Va. 1876) State v. McDonald, 9 W. Va. 456.

[b] (Ind. 1832) In an action of malicious prosecution for causing the plaintiff to be indicted, etc., he may challenge any of the jurors who were on the grand jury that found the indictment.—Rogers v. Lamb, 3 Blackf. 155.

§ 427. —— Effect of discharge before verdict.

[a] (Ala. 1882) Though Code, § 3018, provides that the members of a struck jury must not be challenged for any cause, it was improper to overrule the objection to such jurors that they had been members of a former jury to whom the cause had been submitted and who had disagreed.—Dothard v. Denson, 72 Ala. 541.

[b] (Fla. 1868) A juror who has been regularly sworn and impaneled in a case where no verdict has been rendered on account of a disagreement is not thereby incapacitated from serving as a juror at a second trial of the case, if, in the judgment of the court, it does not appear that he is prejudiced, partial, or biased in respect to the facts submitted to the jury.—Whitner v. Hamlin, 12 Fla. 18.

[c] (Ga. 1889) A juror who was unable to agree with his fellow jurors, causing a mistrial, is incompetent as a juror when the case is again called for trial in the same court.—Scott v. McDonald, 83 Ga. 28, 9 S. E. 770.

[d] (Ga. 1895) The fact that jurors regularly drawn and impaneled had been members of a jury before whom a trial of the accused was formerly begun, which trial, after the introduction of a portion only of the state's evidence, was brought to an end on motion of defendant for a mistrial, afforded no ground for their exclusion.—Cunneen v. State, 96 Ga. 406, 23 S. E. 412.

[e] (Kan. 1878) The fact that one was a juror upon a former, although merely partial, trial of the cause, incapacitates him as a juror.—Weeks v. Medler, 20 Kan. 57.

[f] (Mich. 1891) In a proceeding under Const. art. 15, § 15, which provides that when it is sought to condemn lands in cities and villages for public purposes the jury shall determine the necessity for the condemnation as well as the amount of compensation, the jury disagreed. Afterwards a new proceeding was had, and, unknown to the defeated party, one of the same jurors was impaneled, swearing that he had not formed or expressed an opinion as to the necessity for the condemnation. *Held*, that the verdict should have been set aside, and a new trial had.—Hester v. Chambers, 84 Mich. 562, 48 N. W. 152.

[g] (Vt. 1839) It is no objection to the competency of a juror that he had been impaneled in the same cause at a former term, and sat and heard the testimony; a verdict being directed by the court.—Atkinson v. Allen, 12 Vt. 619, 36 Am. Dec. 361.

§ 428. Service in similar cause.

Prior service of member of panel in similar cause as ground of challenge to array, see ante, § 362 [c, e, i, t, v].

Province of court and triors, see post, § 594 [yy].

[a] (Ala. 1876) It is cause for challenge that the venireman has sat as juror in a previous cause involving the same question, as this imports he has formed a fixed opinion.—Smith v. State, 55 Ala. 1.

[b] (Ark. 1860) Where the issues and evidence in a case are the same as in a previous case against the same defendant before the same jury, the law presumes the jury to be under a disqualifying bias, from their previous verdict.—Garthwaite v. Tatum, 21 Ark. 336, 76 Am. Dec. 402.

[c] (Cal. 1859) A jury tried a suit for burning a fence by sparks from the defendant's steamer; another case for burning another man's fence on another trip of the same steamer being called, the defendant objected that the same jury was not competent to sit on the second case after deciding the first. *Held*, that the court could not know, until the evidence was heard, that the facts or the proofs were the same, or similar, in the two cases; that,

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even if the court knew that they were the same, the same jury could hear both cases.—Algier v. The Maria, 14 Cal. 167.

[d] (Cal. 1861) In a suit in ejectment, it appeared that, in a former suit of forcible entry and detainer, the title to the land in question had been discussed, and one of the jurymen impaneled for the present trial had been on the jury at such former trial, and stated that his mind was made up as to the title; the juror had been previously accepted by both parties, but being now challenged by the plaintiff, it was *held*, that he was properly excused by the court.—Grady v. Early, 18 Cal. 108.

[e] (Ga. 1895) A juror was not disqualified to serve on the trial of an action against a railroad company, to recover for injuries received in an accident, by the fact that two years before he was a member of a jury which rendered a verdict against the defendant railroad company in an action against it by another person who was injured in the same accident.—Central R. & Banking Co. v. Ogletree, 97 Ga. 325, 22 S. E. 953.

[f] (Ill. 1871) A new trial will be granted where it appears that two of the jurors who sat upon the trial of the case had, at a former term, served upon a jury which found a verdict against defendant, in a similar case against her.—Swarnes v. Sitton, 58 Ill. 155.

[g] (La. 1812) A juror is not incompetent because he has already tried a suit by the same plaintiff against another party to the note sued on.—Nugent v. Trepagnier, 2 Mart. (O. S.) 205.

[h] (N. C. 1803) The fact that a jury decides that a bond is valid does not render the same jury incompetent to try the same question between the same parties on another bond exactly similar in its nature.—Seppard's Ex'rs v. Crook's Ex'rs, 3 N. C. 238.

[i] (N. C. 1864) A challenge to a jury, in an action for fraudulently removing a debtor, on the ground that it is the same jury which tried a case by a different plaintiff against the same defendant for the same act, should have been allowed, as the jurors were under a legal bias.—Baker v. Harris, 60 N. C. 271.

[j] (Pa. 1853) It is a good cause of challenge that one has already acted as a juror in a cause between the same parties, involving the same questions, and determined on the same evidence; but where the second action is submitted on different grounds, he is competent.—Smith's Ex'rs v. Wagenseller, 21 Pa. (9 Harris) 491.

[k] (Tenn. 1873) The fact that all the jurors of the panel except two had sat in two of three cases in which the same depositions were to be used entitled the parties to a new panel.—Apperson v. Logwood, 59 Tenn. (12 Heisk.) 262.

[l] (Vt. 1881) A case on trial was continued because of the sickness of a juror. Pending the continuance two of the jurors served in the trial of another case, in which a verdict was rendered. An important question in each case was as to the ability of the plaintiffs so to manipulate hernia as to aggravate it, and deceive the attending physician. *Held*, that the two jurors aforesaid by taking part in the rendition of the verdict in the second case, disqualified themselves from proceeding with the trial of the first case.—Weeks v. Lyndon, 54 Vt. 638.

§ 429. —— Offenses by same defendant.

[a] (U. S. 1829) It is no objection to a juror that he has been one of the jury in another cause against the same defendant, for a different offense.—United States v. Watkins, Fed. Cas. No. 16,649 [3 Cranch, C. C. 441].

[b] (U. S. 1830) Where there are separate trials on a joint indictment, it is no cause of challenge that a juror was sworn on the first trial and found a verdict of guilty, though it is good cause to submit his indifference to triors.—United States v. Wilson, Fed. Cas. No. 16,730 [Baldw. 78].

[c] (Iowa, 1848) Jurors who rendered a verdict against the defendants on an indictment are not competent jurors in an action of trespass against the same defendants, involving the same questions, and in relation to the same subject-matter; nor are they rendered competent by declaring upon their voir dire that they have not formed or expressed an opinion.—Spear v. Spencer, 1 G. Greene, 534.

[d] (Mass. 1862) The fact that jurors have tried and convicted a defendant of a crime does not disqualify them from sitting as jurors in the trial of another indictment against him, for a similar offense, at the same term.—Commonwealth v. Hill, 86 Mass. (4 Allen) 591.

[e] (Mo. 1893) A juror is not disqualified to serve on a trial for robbery by the fact that he was a juror on a former prosecution in which defendant was convicted of maiming, the record of which was, without objection, read in evidence on the trial for robbery.—State v. Maloney, 118 Mo. 112, 23 S. W. 1084.

[f] (N. J. 1886) The fact that a juror had served in another case of the state against the same defendant, at the same term, and that he had formed an opinion in that case, is not sufficient to sustain a challenge by the state.—Patterson v. State, 48 N. J. Law (19 Vroom) 381, 4 Atl. 449.

[g] (N. J. 1891) A juror who has sat in a previous trial of defendant for one of a series of embezzlements closely connected with each other cannot sit, if challenged, on the pending trial of another of such series of misdemeanors.—Stephens v. State, 53 N. J. Law (24 Vroom) 245, 21 Atl. 1038.

[h] (Tex. 1895) A juror who was on the grand jury which presented a bill charging the defendant with an offense is not disqualified from trying a similar offense against the same defendant.—Johnson v. State, 34 Tex. Cr. R. 115, 29 S. W. 473.

[i] (Tex. 1895) Jurors are not disqualified to try one charged with illegally giving a prescription to buy whisky because they previously sat on a similar case against the same defendant, wherein he was convicted.—West v. State, 35 Tex. Cr. R. 48, 30 S. W. 1069.

§ 430. —— Similar offenses by persons other than defendant.

[a] (U. S. 1806) A juror who has sat on the trial of a person indicted for the same offense as defendant is not competent.—United States v. Smith, Fed. Cas. No. 16,342b.

[b] (Ala. 1876) That one proposed as a juror in the trial of a person for selling intoxicating liquor to a man of "known intemperate habits" has previously served as a juror on trial of a different person for selling liquor to the same man is a proper ground for challenge.—Smith v. State, 55 Ala. 1.

[c] (Ala. 1895) On trial for betting at a game of cards or dice, jurors who tried another person at the same term of court for gaming at the place at which it was claimed defendant played and bet, and who, in rendering their verdict, passed on the material ingredients of the facts against defendant, are incompetent.—Wickard v. State, 109 Ala. 45, 19 South. 491.

[d] (Iowa, 1863) It is not good cause of challenge to a juror, under Revision 1860, § 4771, that he has served on a trial jury which has convicted another person of a similar offense.—State v. Sheeley, 15 Iowa, 404.

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[e] (Mich. 1893) In the absence of a showing of prejudice, the fact that defendant was obliged to go to trial before the jury of the term that had tried and convicted his two accomplices was not error.—People v. Betts, 94 Mich. 642, 54 N. W. 487.

[f] (Mich. 1893) It was error to permit several jurors who had at the same term of court served on the trial of one F. for resisting an officer, and returned a verdict of guilty, to sit as jurors on trial of defendant for an assault on the officer in connection with the arrest.—People v. Troy, 96 Mich. 530, 56 N. W. 102.

[g] (S. C. 1889) Gen. St. § 2261, provides that the court shall, on motion, examine a person called as a juror, and, if it shall appear to the court that he is not indifferent, he shall set him aside. Defendant in a murder trial challenged three jurors who had tried the case of one who had been jointly indicted with defendant for the same offense and convicted. The court, after examination, held them competent. *Held*, that this was not error.—State v. Williams, 31 S. C. 238, 9 S. E. 853.

[h] (Tex. 1874) It is not a cause of challenge to the array that the same jurors had been impaneled and sworn as a jury on the trial of another defendant and in another case, in which there had been two trials, one of defendant and the other of his codefendant; the whole of such trials comprehending the question of theft of four horses.—Bowman v. State, 41 Tex. 417.

[i] (Tex. 1896) Jurors who tried a person for playing at a game with cards in a public place, and rendered a verdict of guilty, were incompetent to sit on a subsequent trial of another person for playing with the former at the same game, where the evidence on the second trial was the same as that on the first.—Obenchain v. State, 35 Tex. Cr. R. 490, 34 S. W. 278.

(E) BIAS AND PREJUDICE.

IN GENERAL, § 431.
PERSONAL RELATIONS IN GENERAL, § 433.
MEMBERSHIP IN ASSOCIATION OR ORGANIZATION, § 433.
INTEREST IN OTHER CAUSE PENDING, § 434.
BIAS OR PREJUDICE OF NEIGHBORS OF JUROR, § 435.
EVENLY BALANCED TESTIMONY, § 436.
INFLUENCE ON VERDICT, § 437.

Changing venue on account of local prejudice as infringing right, see ante, § 229 [s].
Discharge by court pending trial, see post, § 533 [f].
Discretion of court, see ante, § 405 [e].
Extent of examination, see post, § 566.
Formation and expression of opinion, see post, §§ 438–479.
Infringement of right to trial by jury, see ante, § 228 [k, q].
Official position, see ante, § 408.
Pecuniary interest, see ante, §§ 407–412.
Personal opinions and conscientious scruples, see post, §§ 480–496.
Province of court and triors, see post, § 594.
Rejection on court's own motion, see post, § 525 [g].
Relationship or business connection, see ante, §§ 413–422.
Waiver of objections, see post, § 508.
Weight and effect of evidence, see post, § 585.
Witness in cause, see ante, § 402.

§ 431. In general.

[a] (Cal. 1855) The law contemplates that each and every juror who sits in a cause should have a mind entirely free from all bias or prejudice of any kind whatsoever; and if the juror is prejudiced in any manner, he is not a fit or proper person to sit in the box.—People v. Reyes, 5 Cal. 347.

[b] (Cal. 1855) Prejudice, as a disqualification for service as juror, is a state of mind which, in the eye of the law, has no degrees.—People v. Reyes, 5 Cal. 347.

[c] (Cal. 1860) The question of actual bias is one regarding which no exact rule can be laid down; it being for the triors to decide upon all the facts whether or not, in their discretion, the juror under examination is capable of acting with entire impartiality.—People v. Reynolds, 16 Cal. 128.

[d] (Colo. 1888) Where a juror states that he knows more of the case than he should, and that he has some bias in the case because it interests his friends, he should be excused.—Buddee v. Spangler, 12 Colo. 216, 20 Pac. 760.

[e] (Ill. 1862) The prejudice of a juror against a person not a party to the suit will not disqualify him.—Strawn v. Cogswell, 28 Ill. (18 Peck) 457.

[f] (Mass. 1831) Many causes which would not render a witness incompetent, such as kindred, prejudice, interest in the question, though not in the event of the suit, are sufficient to disqualify a juror.—Davis v. Allen, 28 Mass. (11 Pick.) 466, 22 Am. Dec. 386.

[g] (Nev. 1876) The great purpose of the right to challenge a juror for actual or implied bias is to secure to the defendant and the state a fair and impartial jury.—State v. McClear, 11 Nev. 39.

[h] (N. Y. 1857) A juror was challenged for favor. *Held*, that on the inquiry as to his prejudices, the triors might ascertain, not only his state of mind when he came to court, but also whether anything which had taken place in court had influenced his mind for or against the prisoner.—Thompson v. People, 3 Parker, Cr. R. 467.

[i] (N. Y. 1870) The acknowledgment by a person that he is biased against accused from his knowledge of his bad character renders such person incompetent to sit as a juror in the case.—Allen v. People, 57 Barb. 338, reversed People v. Allen (1870) 43 N. Y. 28.

[j] (Pa. 1883) In an action for damages, it is a good ground for a new trial that one or more of the jurymen had signed a petition taking strong sides for the plaintiff.—Hawker v. Goldsmith, 5 Law T. (N. S.) 122.

[k] (Pa. 1892) The fact that a man signs a petition to the trial judge setting out that the signers are informed as to the testimony produced at the former trial, that they are of opinion that the ends of justice will be satisfied by the entry of a plea of murder in the second degree, and that they therefore petition such plea to be accepted in order to save the expense of a second trial,—the judgment in the first having been reversed on appeal,—is sufficient to disqualify him as a juror on the second trial; and it is not error for the judge to reject him, though not challenged by either the prosecution or the defense.—Commonwealth v. Cleary, 148 Pa. 26, 23 Atl. 1110, 30 Wkly. Notes Cas. 1.

[l] (S. D. 1892) The word "bias," as used in Comp. Laws, § 5040, in reference to the disqualification of a juror to sit in a case, means such a leaning of the mind or propensity towards an object as does not leave the mind

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indifferent, but shows that it is under an influence which sways it to one side, and will tend to prevent the juror from deciding the case according to the evidence.—Haugen v. Chicago, M. & St. P. Ry. Co., 8 S. D. 394, 53 N. W. 769.

[m] (Va. 1850) One who signed a petition to the legislature for the establishment of a ferry is competent to act as a juror on the question of the public convenience of the proposed ferry.—Somerville v. Wimbish, 7 Grat. 205.

§ 432. Personal relations in general.

Influence on verdict, see post, § 437 [a, e].

[a] (Ga. 1858) Where a juror at the trial of a case declared in court that he had such a prejudice resting on his mind against one of the parties to the case as would, he feared, prevent his doing him justice, it was error for the court, without further examination, to pronounce him competent.—McLaren v. Birdsong, 24 Ga. 265.

[b] (Kan. 1872) An intimate acquaintance with one of the parties in an action does not disqualify a person from serving on a jury in such action.—Moore v. Cass, 10 Kan. 288.

[c] (Minn. 1871) The mere fact that one of the jurors officiated as clergyman at the funeral of the party murdered does not disqualify him as a juror on the trial of a party indicted for the offense.—State v. Stokely, 16 Minn. 282 (Gil. 249).

[d] (Mo. 1891) On a trial for seduction on a promise of marriage, one of the jurors, after they had been sworn, and before the introduction of evidence, used brutal language in regard to defendant, showing prejudice. The matter was at once brought to the attention of the court, and the juror's right to sit on the trial challenged, and he did not deny using the words attributed to him. *Held*, that the overruling of such challenge was ground for a new trial.—State v. Wheeler, 108 Mo. 658, 18 S. W. 924.

[e] (Neb. 1894) A juror who testifies that his acquaintance with one of the parties will interfere with his judgment and finding in the case should be excused.—Omaha St. Ry. Co. v. Craig, 39 Neb. 601, 58 N. W. 209.

[f] (N. C. 1829) General hostility between a juror and a party is good cause of challenge.—Brittain v. Allen, 13 N. C. 120.

[g] (Pa. 1890) Defendant cannot object to the exclusion of a juror, challenged for favor by the commonwealth, where it appears that he had conversed with accused, and exchanged cigars and drinks with him.—Commonwealth v. Mosier, 135 Pa. 221, 19 Atl. 943, 26 Wkly. Notes Cas. 182.

[h] (Wash. 1894) It is proper to exclude jurors who state that they are friends of one of the parties, and would believe his statement when contradicted only by some witness whom they did not know.—Stinson v. Sachs, 8 Wash. 391, 36 Pac. 287.

§ 433. Membership in association or organization.

Extent of examination of juror, see post, § 566 [b, d].

Influence on verdict, see post, § 437 [f].

Where pecuniary interest is involved, see ante, § 409.

[a] (Colo. 1878) Members of an association combined to check a certain crime, as here, larceny of cattle, are not per se incompetent as jurors in a trial of such crime.—Boyle v. People, 4 Colo. 176, 34 Am. Rep. 76.

[b] (Iowa, 1859) The fact that a person called as a petit juror, on the trial of an indictment in which the defendant is charged with stealing a horse, was a member of "an association or organized company for the prosecution of persons, generally, arrested for horse-stealing," will not disqualify the juror.—State v. Wilson, 8 Iowa (8 Clarke) 407.

[c] (Kan. 1891) The fact that a person is a member of the "Good Templars" society, the object of which is, not the enforcement of the prohibitory liquor law, but the promotion of temperance among its members by moral suasion, does not disqualify such person from serving as a juror in a criminal prosecution for the violation of the prohibitory liquor law.—State v. Estlinbaum, 47 Kan. 291, 27 Pac. 996.

[d] (Kan. 1892) On a prosecution for larceny of a horse the fact that it is shown by the answers of some of the jurors on their voir dire that they are members of an association for the prevention of horse stealing, and to reclaim stolen horses, and bring the offender to justice, does not render them incompetent, where there is nothing in the rules of the association or elsewhere that would require them to prosecute or convict an innocent person, or to convict on less or weaker evidence than is required, or that would affect their duties as jurors.—State v. Flack, 48 Kan. 146, 29 Pac. 571.

[e] (La. 1895) One who, as a member of a posse, expended three days in a search for defendant, is disqualified to serve on the jury to try him.—State v. Defee, 47 La. Ann. 193, 16 South. 734.

[f] (Neb. 1883) It is no ground of objection to a juror that he is a member of a religious denomination (but not of the particular congregation) whose property rights are involved in the issue to be tried.—Barton v. Erickson, 14 Neb. 164, 15 N. W. 206.

[g] (N. Y. 1808) In an action on the case for a libel, for publishing an address adopted at a political meeting, a person present and acting at such meeting cannot be sworn as a juror.—Lewis v. Few, Anth. N. P. 75.

[h] (N. Y. 1834) It is no cause of challenge to a juror that he is a freemason, where one of the parties to the suit is a member of that fraternity, and the other not. Nor does the oath taken by a master mason, or a royal arch mason, on his admission to the fraternity, disqualify him from serving as a juror in such a case.—Purple v. Horton, 13 Wend. 9, 27 Am. Dec. 167.

[i] (Wis. 1888) On a trial for selling intoxicating liquors without a license, the examination of certain jurors as to qualification showed that they had been members of a club, formed for the purpose of obtaining liquor, and which the accused had been active in organizing, or with which he was connected. They swore that they were sensible of no bias, and were accepted. *Held*, an objection to these jurors on the part of defendant should be overruled.—Boldt v. State, 72 Wis. 7, 38 N. W. 177; Id., 35 N. W. 935.

§ 434. Interest in other cause pending.

[a] (U. S. 1821) A juror who has a cause at issue in the circuit court of the District of Columbia, which he expects will be tried at the same term, may be challenged for cause.—In re Claggett, Fed. Cas. No. 2,779 [2 Cranch, C. C. 247].

[b] (Ala. 1893) On the trial of a banker for receiving money on deposit, knowing the bank to be insolvent, one who is prosecuting witness in another like case pending against accused, and who believes him guilty in that, is not a competent juror.—Carr v. State, 104 Ala. 4, 16 South. 150.

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[c] (Ga. 1878) That the plaintiff has had against a juror a suit exactly like the one on trial and involving like issues is at most only a cause of challenge to the favor, and not a principal cause of challenge to the juror, in the absence of any showing that such suit against the juror is still pending.—Austin v. Cox, 60 Ga. 520.

[d] (Ill. 1874) The fact that a juror, whether of the regular panel or not, has a suit at law or in equity pending for trial in the same court at the same term, whether the same is actually tried or not at such term, is a good ground of challenge, and it is error to disallow the same.—Plummer v. People, 74 Ill. 361.

[e] (Iowa, 1869) The rejection of persons as jurors on acount of bias, one of whom was plaintiff in a similar suit in the same court, was not erroneous.—May v. Elam, 27 Iowa, 365.

[f] (Mass. 1817) It is a good objection to a juror, in the trial of an action in which the value of betterments is to be ascertained, that he is himself interested in a similar question in another case.—Jeffries v. Randall, 14 Mass. 205.

[g] (Miss. 1859) A juror indicted for the same offense (selling liquor) is partial and incompetent.—McGuire v. State, 37 Miss. 369.

[h] (N. J. 1810) It is ground of challenge to a juror that he is interested in another suit depending upon the same circumstances with the present.—Gardner v. Lanning, 3 N. J. Law (2 Penning.) 651.

[i] (N. C. 1886) Under Code, § 1738, providing that persons summoned on special venire shall be freeholders, it is no cause of challenge to a juror that he has a suit pending in court; the statute not disqualifying jurors so summoned for reasons that would disqualify a tales juror.—State v. Starnes, 94 N. C. 973.

[j] (N. C. 1887) Code, § 1728, relating to the qualifications of jurors, which provides that, "if any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jurybox," applies only to civil suits so pending; and the existence of a criminal prosecution for assault against a juror, wherein no plea has been filed, does not render him incompetent to serve in the trial of a cause.—Hodges v. Lassiter, 96 N. C. 351, 2 S. E. 923.

[k] (N. C. 1889) Code, § 1728, providing for withdrawing the names of jurors having a suit pending and at issue, does not disqualify one interested, as a creditor, in a fund for which a receiver has sued.—Vickers v. Leigh, 104 N. C. 248, 10 S. E. 308.

[l] (N. C. 1890) The prosecuting witness in a criminal action is not disqualified as a juror in another criminal action to be tried at the same term, as he is not a party to the action within the purview of the statute.—State v. Brady, 107 N. C. 822, 12 S. E. 325.

[m] (N. C. 1892) In an action against a corporation, a juror is not disqualified from sitting because he is a surety on the prosecution bond of another plaintiff, or related to him, in an action against the same defendant for a similar cause.—Jenkins v. Wilmington & W. R. Co., 110 N. C. 438, 15 S. E. 193.

[n] (Tenn. 1870) Under Code, § 3988, which forbids the appointment of a juror who has a suit pending at the term to which he is nominated, and section 4010, making the fact that a juror has a cause pending for trial at the same term of the court ground for a challenge for cause, a juror who has a cause pending, but not for trial at the term to which he is nominated, may be challenged for cause.—Riley v. Bussell, 48 Tenn. (1 Heisk.) 294.

[o] (Tenn. 1882) Under Code, § 3988, forbidding the appointment as a juror of any person "who has an action pending in the court at the term to which he is nominated," *held* that the fact that such person has been tried and acquitted at that term does not render him eligible.—Murphy v. State, 77 Tenn. (9 Lea) 373.

§ 435. Bias or prejudice of neighbors of juror.

[a] (Fla. 1882) It was proper in a murder case to refuse to permit defendant's counsel to ask a talesman whether a verdict of acquittal would not create prejudice against the members of the jury finding that verdict, among their friends and neighbors.—Savage v. State, 18 Fla. 909.

§ 436. Evenly balanced testimony.

[a] (U. S. 1813) In a suit for freedom, one of the jurors on his examination declared that if the evidence should be equal he should give his verdict in favor of the petitioners. *Held*, that the court properly rejected him.—Queen v. Hepburn, 11 U. S. (7 Cranch) 290, 3 L. Ed. 348.

[b] (Colo. 1889) In an action against a railroad company for personal injuries, a juror upon his voir dire answered that he had some business dealings with the defendant company; that he had received some special commercial rates for traveling, and favors in shipping goods over the road; that he expected to continue business, and ship over the road, and that this fact might influence him, and affect his verdict; if the case should be evenly balanced, he would give the benefit of the doubt to the company. *Held*, that plaintiff's challenge was properly sustained.—Denver, S. P. & P. R. Co. v. Driscoll, 12 Colo. 520, 21 Pac. 708, 13 Am. St. Rep. 243.

[c] (Ill. 1870) A juryman who, on his voir dire, was asked, if the evidence was evenly balanced, which way he would be inclined to find, answered that in such case he would "lean against the defendant." *Held*, that such juryman was incompetent, and it was error to refuse his challenge by the defendant.—Chicago & A. R. Co. v. Adler, 56 Ill. 344.

[d] (Mich. 1895) On a prosecution for violation of the local option law, one who testifies, on his examination, that if the proof is equally balanced he would render a verdict of guilty, is incompetent as a juror.—People v. O'Neill, 107 Mich. 556, 65 N. W. 540.

[e] (Mo. 1876) In a suit for damages, the affirmative answer of a juryman to the question, whether, if the evidence was evenly balanced, he might not incline to the side of plaintiff, would not render him incompetent.—Keegan v. Kavanaugh, 62 Mo. 230.

[f] (Neb. 1884) Where a juror testifies on his voir dire, in an action against a city for damages, that his interests as a taxpayer might affect his verdict in an evenly balanced case, he should be rejected.—City of Omaha v. Cane, 15 Neb. 657, 20 N. W. 101.

§ 437. Influence on verdict.

Formation and expression of opinion, see post, §§ 461–479.

Form of questions propounded to juror, see post, § 579 [c].

Presumptions and burden of proof, see post, § 584 [f].

Relationship or business connection, see ante, § 422.

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[a] (Ga. 1885) A juror is competent, although he once had some trivial misunderstanding with the defendant, if he has not affirmed or expressed any opinion as to his guilt or innocence, and has no bias or prejudice for or against him, and is perfectly impartial between him and the prosecution.—Memmler v. State, 75 Ga. 576.

[b] (Ill. 1853) A challenge to a juror is properly allowed where he states on oath that he would be reluctant to render a verdict of guilty even if his judgment was convinced of the prisoner's guilt, but that he might be starved to render it.—Gates v. People, 14 Ill. (4 Peck) 433.

[c] (Ill. 1886) Where a juror stated that if he had any sympathy it would be with the "young man that lost his limb," and that he "would have no sympathy for the railroad," yet he did not "know as there was any reason why" he could not "try the case fairly and impartially," and that notwithstanding his sympathy he would not violate his oath, and would "endeavor to do justice between the parties," it was *held* that he was competent.—Chicago & W. I. R. Co. v. Bingenheimer, 116 Ill. 226, 4 N. E. 840.

[d] (Mich. 1884) In an action on an insurance policy a challenge of a juror was properly sustained, on the ground that an agent of defendant had on that day been talking to him about an alleged case of incendiarism, and ceased to do so on the approach of plaintiff's counsel, although the juror stated that another fire was under discussion.—Monaghan v. Agricultural Fire Ins. Co., 53 Mich. 238, 18 N. W. 797.

[e] (Neb. 1886) Unfriendly feeling towards an attorney engaged in a trial by a juror who had made threats of violence against such attorney is not sufficient ground for a challenge of the juror for cause, he being competent in all other respects, when it is shown by his testimony that he would render a fair and impartial verdict, uninfluenced by such feeling.—Hutchinson v. State, 19 Neb. 262, 27 N. W. 113.

[f] (Neb. 1891) The fact that a person belongs to a political organization which has for its object the suppression of the liquor traffic does not disqualify him from acting as a juror in an action against liquor sellers for loss of support caused by the sale of liquor to plaintiff's husband, where he states in his voir dire examination that he can give the same weight to the testimony of a liquor dealer as to that of other men, and that he would not allow the fact that defendants were engaged in the liquor business to influence his verdict.—Scott v. Chope, 33 Neb. 41, 49 N. W. 940.

[g] (N. Y. 1889) A juror who states that, notwithstanding his sympathies, he can render a fair verdict, is not necessarily incompetent.—McKinney v. Long Island R. Co., 53 Hun, 633, 6 N. Y. Supp. 168.

[h] (N. Y. 1896) A juror on voir dire, after testifying that he would as willingly render a verdict for defendant as for plaintiff, if the evidence warranted it, stated that he might have some reluctance to decide in favor of defendant, because of sympathy. *Held*, that it was not error to overrule a challenge by defendant for bias.—Laidlaw v. Sage, 2 App. Div. 374, 37 N. Y. Supp. 770.

[i] (Tex. 1889) A proposed juror stated on his voir dire that he was prejudiced in favor of defendant, but that he could find a verdict upon the evidence alone. *Held*, that the court properly sustained the state's challenge for cause.—Giebel v. State, 28 Tex. App. 151, 12 S. W. 591.

(F) FORMATION AND EXPRESSION OF OPINION AS TO CAUSE.

1. IN GENERAL, §§ 438-448.
2. FROM RUMOR AND NEWSPAPER REPORTS, §§ 449-457.
3. FROM EVIDENCE ADDUCED AT TRIAL, §§ 458-460.
4. INFLUENCE OF OPINION ON VERDICT, §§ 461-479.

Discharge by court pending trial, see post, § 534.
Discretion of court, see ante, § 405 [a, g, m].
Extent of examination of juror, see post, § 567.
Infringement of right to trial by jury, see ante, §§ 228 [a–c, e–g, j, o, p, r–v, x], 232 [d].
Personal opinions and conscientious scruples, see post, §§ 480–496.
Presumptions and burden of proof, see post, § 584 [a, c, e].
Prior service as juror, see ante, § 429 [c, f].
Province of court and triors, see post, § 594.
Rejection on court's own motion, see post, § 527.
Retroactive effect of statute, see ante, §§ 401 [d], 497 [c].
Waiver of objections by failure to challenge, see post, § 511.
Weight and sufficiency of evidence, see post, § 585 [a, i, j].
As ground for arrest of judgment, see "Judgment," vol. 31, c. 677, § 482.
Review of discretion of court, see "Appeal and Error," vol. 3, cc. 1664–1667, § 3843.

1. IN GENERAL.

KNOWLEDGE OF MATTERS IN GENERAL, § 438.
FORMATION AND EXPRESSION OF OPINION IN GENERAL, § 439.
AS TO PARTICULAR MATTERS, § 440.
IMPRESSIONS, § 441.
UNQUALIFIED OR FIXED OPINION, § 442.
QUALIFIED OR HYPOTHETICAL OPINION, § 443.
OPINIONS AND IMPRESSIONS REQUIRING EVIDENCE TO REMOVE, § 444.
INTENT IN MAKING UTTERANCE OR EXPRESSING OPINION, § 445.
OPINIONS FORMED BUT NOT EXPRESSED, § 446.
INCONSIDERATE OR PURPOSELESS REMARKS, § 447.
SOURCE OF INFORMATION ON WHICH OPINION IS BASED, § 448.

§ 438. Knowledge of matters in general.

[a] (Ala. 1892) It is not error to excuse a juror on the ground that he was told by plaintiff and a friend of plaintiff that defendant was trying to beat plaintiff out of her money, and that the jury ought to give her a good verdict.—United States Rolling Stock Co. v. Weir, 96 Ala. 396, 11 South. 436.

[b] (Ind. 1863) One who swears that he is a resident of the county, never heard of the case on trial, and knows nothing about it, is a competent juror.—Meyers v. State, 20 Ind. 511.

[c] (Kan. 1864) A person summoned as a juror in a murder case is not incompetent merely because he has heard and remembers a detailed statement of the circumstances of the killing, where he swears he had not formed nor expressed an opinion.—Roy v. State, 2 Kan. 405.

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[d] (Mich. 1893) On trial for an offense against the local option law, while the existence of the law is a fact to be proven, the question of the sufficiency of that proof is a matter for the court, and not for the jury, and therefore a juror is not disqualified because he states on his examination that he knows a local option election was held, and knows the result of it was to supersede the general law respecting the sale of intoxicating liquors.—People v. Keefer, 97 Mich. 15, 56 N. W. 105.

[e] (Neb. 1883) A juror, in an action to recover damages against a railroad company for setting out fire in plaintiff's timber, stated on his voir dire that he had passed over the burnt district, but knew nothing about the amount of the damage done, nor how the fire was caused, and had formed no opinion as to defendant's liability. *Held*, that the juror's competency was not affected by the mere fact that he had passed over the burnt district, and that he was properly allowed to sit in the case.—Burlington & M. R. R. Co. v. Beebe, 14 Neb. 463, 16 N. W. 747.

[f] (N. H. 1845) A juror who has heard much concerning a case is competent provided he has formed no opinion.—State v. Howard, 17 N. H. 171.

[g] (Pa. 1891) Where a defendant, who was on intimate terms with one summoned as a juror, has, after he was summoned as a juror, and shortly before the trial, explained to him the nature of plaintiff's claim, and given his views of the facts, and explained away newspaper articles bearing on the case, such juror should be excluded, though the refusal of the court to sustain plaintiff's challenge to him is not ground for reversal.—Catasauqua Mfg. Co. v. Hopkins, 141 Pa. 30, 21 Atl. 638, 28 Wkly. Notes Cas. 146.

§ 439. Formation and expression of opinion in general.

Derived from reading newspapers, see post, § 451.

—— *from rumor, see* post, § 450.

Statutory provisions, see post, § 552 [b].

[a] Where a juror has formed or expressed an opinion as to the guilt or innocence of a prisoner, it is a good cause of challenge to the favor.
—(Ark. 1857) Meyer v. State, 19 Ark. 156;
(Ga. 1854) Ray v. State, 15 Ga. 223;
(Me. 1852) State v. Jewell, 33 Me. 583.
CONTRA, see
(W. Va. 1884) State v. Schnelle, 24 W. Va. 767.

[b] (U. S. 1807) The forming and delivering of an opinion that a person indicted for treason entertained the treasonable designs with which he is charged, and that he retained those designs, and was prosecuting them when the act charged in the indictment was alleged to have been committed, is good cause of challenge.—United States v. Burr, Fed. Cas. No. 14,692g.

[c] (U. S. 1830) It is good cause for challenge if a juror does not stand indifferent on account of bias, prejudice, having made up his mind, or expressed an opinion touching the prisoner's guilt or innocence.—United States v. Wilson, Fed. Cas. No. 16,730 [Baldw. 78].

[d] (Ga. 1848) It is a sufficient disqualification of a juror, on a trial for murder, that he was heard to say, before the trial, that "from what he knew he would stretch the prisoner."—Monroe v. State, 5 Ga. 85.

[dd] (Ill. 1822) An opinion formed, but not expressed, does not disqualify a juror.—Noble v. People, 1 Ill. (Breese) 54.

[e] (N. J. 1856) A juror is not disqualified from serving in a capital case merely by having formed and expressed an opinion on the prisoner's guilt.—State v. Fox, 25 N. J. Law (1 Dutch.) 566.

[f] (N. Y. 1806) It is a good cause of challenge to a juror that he has previously given his opinion on the question in controversy between the parties.—Blake v. Millspaugh, 1 Johns. 316.

[g] (Tenn. 1853) A juror said on the morning of the trial: "I have formed my opinion as to that case. I believe he ought to be hung." Again: "Damn him, he ought to be hung." *Held*, on error, that he should have been rejected as incompetent.—Brakefield v. State, 33 Tenn. (1 Sneed) 215.

[h] (Tex. 1888) Rev. St. art. 3079, disqualifies a juror for "a bias or prejudice in favor of or against either of the parties." Art. 3080 provides that "a challenge for cause is an objection made to a particular juror alleging some fact which, under the provisions of the first chapter of this title, disqualifies him to serve as a juror in any case, or in the particular case, or which, in the opinion of the court, renders him an unfit person to sit on the jury. *Held*, that the language of article 3079 is not to be restricted to mere bias for or against either party, but to the formation of an opinion with respect to the merits of the case as well.—Houston & T. C. Ry. Co. v. Terrell, 69 Tex. 650, 7 S. W. 670.

§ 440. As to particular matters.

Derived from hearing evidence at trial, see post, § 458 [d, e].

—— *rumor and newspaper accounts, see* post, § 453.

Influence on verdict, see post, § 469.

[a] A person is not disqualified to serve as a juror simply because he has a bad opinion of defendant's character.
—(Miss. 1890) Helm v. State, 67 Miss. 562, 7 South. 487;
(N. Y. 1848) People v. Lohman, 2 Barb. 216, affirmed Lohman v. People (1848) 1 N. Y. (1 Comst.) 379, 49 Am. Dec. 340; (1870) Same v. Allen, 43 N. Y. 28.
CONTRA, see
(N. Y. 1870) Allen v. People, 57 Barb. 338.

[b] A juror who has formed a fixed opinion as to the guilt or innocence of the principal offender ought not to sit on the trial of the person charged as an accessory.
—(Mont. 1895) State v. Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294.
CONTRA, see
(Pa. 1886) Weston v. Commonwealth, 111 Pa. 251, 2 Atl. 191.

[c] The opinion of a juror merely that the accused killed the deceased, where that fact is not disputed, is not such an opinion as will render the juror incompetent.
—(Kan. 1882) State v. Wells, 28 Kan. 321;
(Tenn. 1883) Conatser v. State, 80 Tenn. (12 Lea) 436.

[d] (U. S. 1800) In a prosecution for seditious libel, the only question which can be put to a juror, challenged for favor, is whether he has ever formed and delivered an opinion upon the charge against the accused; and it is improper to ask whether he has ever formed and delivered an opinion on the book in which the alleged libelous passages occur.—United States v. Callender, Fed. Cas. No. 14,709.

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[e] (U. S. 1851) One who, without forming or expressing any opinion as to the matter to be tried, had "formed an opinion that the laws had been outraged," is competent as a juror.—United States v. Hanway, Fed. Cas. No. 15,299 [2 Wall. Jr. 139].

[f] (Cal. 1858) A juror who has formed an opinion adverse to the general land grant under which the plaintiff claims is incompetent.—White v. Moses, 11 Cal. 68.

[g] (Ga. 1857) A juror is not disqualified for having expressed an opinion on a question involved in the litigation.—Royston v. Royston, 21 Ga. 161.

[h] (Ga. 1872) It is no ground of challenge against a juryman that he has formed and expressed an opinion upon some one of the facts necessary to make out the charge against the prisoner. Hence it is not error for the court to say, in the presence of the panel, that the formation and expression of an opinion as to the guilt or innocence of the principal in a crime does not, of itself, render them incompetent to sit upon the trial of the accessory before the fact.—Loyd v. State, 45 Ga. 57.

[i] (Ill. 1860) A juror who has talked with a witness, and who believed what he heard from the witness, and formed an opinion so far as he heard from him, but formed no opinion as to the prisoner's guilt or innocence, is competent.—Thompson v. People, 24 Ill. (14 Peck) 60, 76 Am. Dec. 733.

[j] (Ill. 1873) Since the construction of a written resolution of the directors of an insurance company is a question of law for the court, in an action on a policy, there is no error in overruling a challenge to a juror on the ground that he had formed an opinion as to the construction of such resolution.—Wischover v. German Mut. Fire Ins. Co., 71 Ill. 65.

[k] (Ind. 1867) Where the partnership of the plaintiffs is a material issue, it is error to refuse to allow a person called as juror to be asked whether he has formed or expressed an opinion as to their being partners.—Trout v. Williams, 25 Ind 18.

[l] (Ind. 1885) An opinion formed from conversation with "witnesses of the transactions" absolutely disqualifies a proposed juror in a criminal case; but this applies only to opinions formed from conversations with witnesses to transactions constituting the gravamen of the offense charged, and not to opinions based on conversations with witnesses to some merely incidental or collateral matter connected with the trial.—Walker v. State, 102 Ind. 502, 1 N. E. 856.

[m] (Iowa, 1859) In a trial for manslaughter, an expression by a juror of his opinion as to the fact of the killing of deceased by defendant is not a sufficient cause for challenge.—State v. Thompson, 9 Iowa, 188, 74 Am. Dec. 342.

[n] (Iowa, 1861) The question proposed to the jurors for the purpose of ascertaining whether they have formed an opinion in the case must relate to the general point of the guilt or innocence of the prisoner, and not as to whether they have formed an opinion as to a particular line of defense (in this case insanity), which may or may not be set up.—State v. Arnold, 12 Iowa, 479.

[o] (Kan. 1886) A juror is not incompetent in a contested will case because he knew and saw the testator prior to the time of the unsoundness of mind alleged by those attacking the will to exist, though he had an opinion as to the condition of the testator's mind at the time he last saw him.—Delaney v. City of Salina, 34 Kan. 532, 9 Pac. 271.

[p] (La.) Where the extent of punishment is left to the discretion of the jury, the fact that a juror has made up his mind as to the measure of punishment to be awarded, in case of conviction, is a sufficient cause to reject him.—(1844) State v. George, 8 Rob. 535; (1860) Same v. Bill, 15 La. Ann. 114. CONTRA, see (1860) Same v. Bennett, 14 La. Ann. 651.

[q] (Miss. 1879) On the trial of A., who was convicted of arson, B. swore to an alibi in A.'s behalf. On the trial of B. for perjury, a juror was incompetent who said that he had a decided opinion as to the guilt or innocence of A., but not as to that of B.—Brown v. State, 57 Miss. 424.

[r] (Mo. 1859) Where a juror, summoned in a trial of a person indicted for stealing cattle alleged to belong to C., stated upon his voir dire that he knew the cattle, that his brother had once owned them and had sold them to K., who had sold them to C., it was *held* that the juror was competent; the ownership of the cattle not being controverted.—State v. Martin, 28 Mo. 530.

[s] (Nev. 1881) A juror stated that he had an unqualified opinion that there was a deficiency in the accounts of defendant, as county treasurer, but had no opinion as to defendant's guilt or innocence. *Held*, that a challenge to him for implied bias was properly disallowed.—State v. Carrick, 16 Nev. 120.

[t] (N. Y. 1848) In an action against a sheriff for trespass, where the defendant justified under a distress warrant for rent in arrear, issued by A., as landlord, it was *held* that a person who had formed and expressed an opinion that A. had no right or title to the rent, for which the distress was made, was incompetent to serve as a juror.—Lord v. Brown, 5 Denio, 345.

[u] (N. Y. 1863) Challenge for cause, because the juror had expressed the opinion that the prisoner had killed the person for whose murder he was indicted, was *held* to have been properly overruled, on the ground that there was no expression of opinion as to the prisoner's guilt or innocence, as he might have killed the man without committing murder.—Lowenberg v. People, 27 N. Y. 336, affirming (1863) 5 Parker, Cr. R. 414.

[v] (Pa. 1893) A juror who, on being sworn to make true answers, said he did not think a man who would commit such an offense as defendant had committed was of sound mind, and it would require evidence to change that opinion, was disqualified, since the law presumed defendant sane until proven insane.—Commonwealth v. Buccieri, 153 Pa. 535, 26 Atl. 228, 32 Wkly. Notes Cas. 113.

[w] (Tex. 1880) A juror on the trial of an accomplice is disqualified by an opinion of the guilt of the alleged principal, since the accomplice, under the Code, is the same as accessory before the fact by the common law, and in order to convict the accomplice the state must prove the guilt of his principal.—Arnold v. State, 9 Tex. App. 435.

[x] (Tex. 1893) It is error in a murder case to refuse to permit defendant to ask the jurors whether, from hearsay or otherwise, they have an opinion as to the guilt or innocence of a person indicted with defendant, but not yet tried, though the theory of the state is that such person was the instigator of the conspiracy to murder deceased, and defendant was in his employ, and in his company, immediately preceding the homicide.—Peddy v. State, 31 Tex. Cr. R. 547, 21 S. W. 542.

[y] (Va. 1822) On the trial of an indictment, in which the prisoner was charged in some counts with the embezzlement of a check, and in others with the embezzlement of notes and

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dollars to the same amount, a juror on his voir dire declared that he had formed, and frequently expressed, a decided opinion of the prisoner's guilt, but that he did not know that such opinion applied particularly to the charge laid in the indictment (there being other indictments, for the larceny of other checks and money); that his opinion was a general one that the prisoner was guilty of embezzling checks of the bank; and that it related as much to one check as another. *Held*, that such juror ought to be excluded.—Lithgow v. Commonwealth, 2 Va. Cas. 297.

[z] (Wash. 1895) In a prosecution against a city treasurer for using public funds for personal profit, a challenge for actual bias to a juror, testifying that he had formed an opinion that defendant had loaned money, but that he did not know whether it was his own money or not, is properly overruled.—State v. Krug, 12 Wash. 288, 41 Pac. 126.

§ 441. Impressions.

Derived from hearing evidence at trial, see post, § 460 [h].

—— *from rumor and newspaper accounts, see* post, § 452.

Influence on verdict, see post, § 463 [c].

Province of court and triors, see post, § 594 [q].

[a] An impression sustained by a juror as to the guilt of the accused is not sufficient to disqualify him.

—(La. 1859) State v. Ward, 14 La. Ann. 673;
(Pa. 1884) Traviss v. Commonwealth, 106 Pa. 597;
(Wash. 1895) State v. Krug, 12 Wash. 288, 41 Pac. 126.

[b] In order to exclude a juror on the ground of "implied bias," he must, according to the statute, have formed, or expressed, an unqualified opinion. An impression, or an inclination of mind towards a conclusion, is not enough. He must have reached a conclusion upon which he would be willing to act in ordinary matters.

—(Cal. 1860) People v. Reynolds, 16 Cal. 128;
(Iowa, 1859) State v. Thompson, 9 Iowa, 188, 74 Am. Dec. 342; Same v. Gillick, 10 Iowa, 98.

[c] (Cal. 1863) A juror in a capital case, in answer to a challenge on the ground of a bias, stated that he had not formed an unqualified opinion, but only an impression of the guilt or innocence of the prisoner. *Held*, that the challenge was properly overruled.—People v. Symonds, 22 Cal. 348.

§ 442. Unqualified or fixed opinion.

As to particular matters, see ante, § 440.

Derived from rumor and newspaper accounts, see post, § 454.

Influence on verdict, see post, § 463.

Source of opinion, see post, § 448.

[a] When a fixed and definite, or settled and abiding, or deliberately formed opinion exists in the mind of a juror, as to the guilt or innocense of a defendant, it is a good ground of challenge for cause.

—(Ga. 1853) Willis v. State, 12 Ga. 444; (1855) Wright v. Same, 18 Ga. 383;
(La. 1844) State v. George, 8 Rob. 535;
(N. Y. 1846) People v. Honeyman, 3 Denio, 121; (1848) Same v. Hayes, 1 Edm. Sel. Cas. 582;
(Va. 1831) Osiander v. Commonwealth, 3 Leigh, 780, 24 Am. Dec. 693.

[b] A juror in a criminal trial who has formed and expressed a decided opinion as to the prisoner's guilt, before being impaneled, was disqualified.

—(Ga. 1852) Wade v. State, 12 Ga. 25;
(Va. 1823) Sprouce v. Commonwealth, 2 Va. Cas. 375.

[c] (U. S. 1807) Persons who have deliberately formed and delivered an opinion on the guilt of an accused are disqualified to serve as jurors.—United States v. Burr, Fed. Cas. No. 14,692g.

[d] (Cal. 1856) Where a juror, in a trial for murder, stated on his voir dire that he had expressed an opinion as to the guilt or innocence of the prisoner, and that such opinion, when expressed, was without qualification, it was *held* that he was properly challenged by the prisoner, and should have been rejected.—People v. Williams, 6 Cal. 206; Same v. Cottle, Id. 227.

[e] (Cal. 1856) It was the intention of the legislature to exclude from the jury box every one who had formed an unqualified opinion, or, having formed an opinion, had expressed it without qualification.—People v. Cottle, 6 Cal. 227.

[f] (Cal. 1860) An unqualified opinion involves a belief in the facts, as well as a conclusion from them.—People v. Reynolds, 16 Cal. 128.

[g] (Cal. 1865) In order to render a juror in a criminal case incompetent on the ground of implied bias, it must appear that he entertains a fixed and settled conviction of the guilt or innocence of the defendant, or that he has expressed such a conviction.—People v. King, 27 Cal. 507, 87 Am. Dec. 95.

[h] (Cal. 1882) The fact that one summoned to serve as a juror on the trial of a criminal case has formed an unqualified opinion is not now a ground of disqualification.—People v. Cochran, 61 Cal. 548.

[i] (Iowa, 1859) In a criminal case, it is good cause of challenge to a petit juror by the state that he had formed an unqualified opinion, and this, whether it be for or against the prisoner. —State v. Shelledy, 8 Iowa (8 Clarke) 477.

[j] (La. 1888) The formation of opinion which disqualifies a juror is a fixed, deliberate, and determined one, which will not yield to evidence.—State v. Dorsey, 40 La. Ann. 739, 5 South. 26.

[k] (N. H. 1843) If a juror holds such opinions that he cannot, in a particular case, and upon a certain state of the facts, render a verdict according to the laws of the state, he is not a competent juror in that case.—Pierce v. State, 13 N. H. 536.

[l] (Pa. 1873) A prejudgment of a cause to disqualify a juror is that condition of mind which has formed a conclusion so irrevocably fixed as not to be liable to be changed, or to be free to persuasion, or to be open to a different conviction, upon the production of testimony or evidence which ought reasonably to produce a different conclusion.—Scott v. Reyer, 5 Leg. Gaz. 73.

[m] (Tex. 1885) A juror is properly rejected if he has talked about the case and has strong opinions on the question of guilt, which he has expressed.—Ward v. State, 19 Tex. App. 664.

§ 443. Qualified or hypothetical opinion.

Derived from hearing evidence at trial, see post, § 460 [d, i].

—— *from rumor and newspaper accounts, see* post § 455.

Influence on verdict, see post, § 464.

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[a] The expression of a mere hypothetical opinion, one dependent on the truth of information received, is no legal ground of challenge to a juror.
—(N. J. 1833) Mann v. Glover, 14 N. J. Law (2 J. S. Green) 195;
(N. Y. 1823) People v. Fuller, 2 Parker, Cr. R. 16;
(Va. 1873) Jackson v. Commonwealth, 23 Grat. 919.
CONTRA, see
(N. Y. 1830) People v. Mather, 4 Wend. 229, 21 Am. Dec. 122.

[b] (Cal. 1860) The expression of an opinion, less decided than an unqualified one, will not, as matter of law, exclude a juror; but it may, by itself, or in connection with other proof, be sufficient to warrant his exclusion by the triors. —People v. Reynolds, 16 Cal. 128.

[c] (Cal. 1872) An unqualified expression of an opinion, even though the opinion itself is of a qualified character, is ground of challenge for implied bias, and when, after proper investigation, doubts, more or less grave, as to the actual state of mind of the juror still remain, the challenge for implied bias should be allowed.—People v. Brotherton, 43 Cal. 530.

[d] (Mont. 1888) On trial for murder, a juror who has said, "If B. is the man who killed O., he is liable to be cinched plenty, and sent over the road," is not for that reason disqualified as having expressed an opinion as to the guilt of defendant.—Territory v. Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

[e] (N. Y. 1847) On the trial of a challenge for favor, it is erroneous to instruct the triors, as a matter of law, that an impression or hypothetical opinion adverse to the prisoner, though not conclusive, does not disqualify the juror. —Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.

§ 444. Opinions and impressions requiring evidence to remove.

As to particular matters, see ante, § 440 [v].
Derived from hearing evidence at trial, see post, § 458 [c].
—— *of other cause, see* post, § 460 [e].
Derived from rumor and newspaper accounts, see post, § 456.
Influence on verdict, see post, §§ 465, 466.

[a] The fact that a juror has formed an opinion as to defendant's guilt does not disqualify him where the opinion may be changed by the evidence.
—(Ala. 1882) Beason v. State, 72 Ala. 191;
(Ind. 1879) Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99.

[b] Light impressions which may be fairly supposed to yield to the testimony to be offered, and which leave the mind open to its fair consideration, are no objection to a juror; but those strong and deep impressions which close the mind against the testimony, and combat and resist its force, constitute a sufficient objection.
—(La. 1844) State v. George, 8 Rob. 535;
(Tex. 1875) Black v. State, 42 Tex. 377.

[c] (Cal. 1873) A venireman, under an examination on a challenge for favor, testified that from what he had heard he had formed an opinion as to the guilt or innocence of the accused; that it was a "fixed opinion," and would require evidence to remove it; that he still retained that opinion after having heard what purported to be the facts of the case; and that it would require evidence to change it. On cross-examination he said the opinion he had formed depended on the truth or falsity of what he had heard; that, if what he had heard was true he had the opinion stated; but "if it turns out that what I have heard is not true then I will have no opinion in the matter." *Held*, that the challenge was sustained. The point to be determined as to the qualification of the juror was whether at the time of his examination he had an unqualified opinion as to the guilt or innocence of the accused, and not what might be the state of his mind after hearing the evidence.—People v. Johnston, 46 Cal. 78.

[d] (Ind. 1883) The question whether a juror has an opinion which can only be removed by evidence affords no certain or proper test of his qualifications. The proper test is, can and will the juror render a fair and impartial verdict, upon the evidence, regardless of his preconceived opinion.—Stout v. State, 90 Ind. 1.

[e] (Iowa, 1893) Under Code 1873, § 4405, subd. 11, providing that a juror is disqualified who has such an opinion as would prevent him from rendering a true verdict on the evidence, an opinion does not disqualify a juror, even though some evidence is necessary to remove it. —State v. Field, 89 Iowa, 34, 56 N. W. 276.

[f] (La. 1875) Where a juror states that the opinion he had referred to on his voir dire was not an opinion, but an impression, which would yield to evidence, he was not disqualified.—State v. Hugel, 27 La. Ann. 375.

[g] (La. 1883) Where a juror, on his voir dire, says he has no fixed opinion as to the guilt or innocence of defendant, and no bias or prejudice against him, he is competent, though he may have had an opinion previously, if such opinion will yield to the evidence in the case.—State v. Revells, 35 La. Ann. 302.

[h] (Mich. 1886) Any opinion or impression in a person's mind that requires removal by evidence is sufficiently "positive" to disqualify him, under How. Ann. St. § 9564, from acting as a juror, where life or liberty is involved.—People v. Shufelt, 61 Mich. 237, 28 N. W. 79.

[i] (Miss. 1849) Though no general rules of competency can be fixed, each case depending on its peculiar circumstances, it may be stated generally that a juror is incompetent to sit in a case on which his mind is so far prejudiced as to require evidence to annul the opinions he has formed.—Sam v. State, 21 Miss. (13 Smedes & M.) 189.

[j] (Mo. 1879) A juror in a criminal trial is not disqualified by the fact that he has an opinion which it will require evidence to remove.—State v. Barton, 71 Mo. 288; Id., 8 Mo. App. 15.

[k] (N. Y. 1888) A proposed juror, on an inquisition de lunatico inquirendo, who confesses that he has formed some opinion on the question, "and that it would require some little evidence to overcome it," is incompetent.—In re Klock, 49 Hun, 450, 3 N. Y. Supp. 478.

[l] (N. Y. 1890) A juror in a civil case who had made up his mind against defendant, and whose opinion against it is so strong as to require evidence to remove it, is incompetent.—Halsted v. Manhattan Ry. Co., 58 N. Y. Super. Ct. 270, 11 N. Y. Supp. 44, distinguishing McKinney v. Long Island R. Co. (1889) 53 Hun, 633, 6 N. Y. Supp. 168, affirmed (1890) 119 N. Y. 631, 23 N. E. 1144.

[m] (Tex. 1880) Where a juror in a capital case avowed on his voir dire that he had formed an opinion that the accused was guilty, and, unless he heard something to change it, he in-

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tended to act upon it, *held*, that he was subject to challenge for bias.—Rothschild v. State, 7 Tex. App. 519.

[n] (Tex. 1894) One who, by affidavit, shows that he was prejudiced against defendant in a murder trial, that he believed him guilty, and that he ought to be hung, and that he would so find unless appellant proved his innocence, was disqualified to sit as juror in the cause.—Randle v. State, 34 Tex. Cr. R. 43, 28 S. W. 953.

§ 445. Intent in making utterance or expressing opinion.

[a] (Ga. 1854) A juror is not disqualified by a jesting remark, made just before being sworn, to the effect that if he was on the jury he would hang the prisoner, when in fact he knew neither the offense nor the prisoner and made the remark for the purpose of getting off from the jury.—John v. State, 16 Ga. 200.

[b] (Ga. 1877) Grossly improper remarks by a juror before his qualification will not make him incompetent, if uttered for the purpose of avoiding jury duty.—Moughon v. State, 59 Ga. 308.

[c] (Ga. 1893) Where two witnesses testified that a juror, before the trial, said that if he was taken on the jury he would convict defendant, but the juror, in explanation, testified that all he said was addressed to the prisoner's counsel, and was, "That if the evidence warranted it, he would hang the defendant;" also that he said this without any prejudice whatever against the prisoner, and was rather in hopes that he would be rejected as a juror, there was no error in treating the explanation as sufficient, and in holding the juror competent.—Cornwall v. State, 91 Ga. 277, 18 S. E. 154.

[d] (La. 1877) A mere opinion as to the guilt of an accused, unassociated with any bias or prejudice, does not disqualify a person to serve as a juror.—State v. Lartigue, 29 La. Ann. 642.

[e] (N. H. 1845) An expression of opinion by a juror, prior to his summons, if unexplained, or if shown to have been accompanied with malice, ill-will, interest, or a fixed opinion, becomes a ground for a principal challenge.—State v. Howard, 17 N. H. 171.

[f] (N. J. 1856) To disqualify a juror in a capital case, the declaration of opinion must have been such as to imply malice or ill-will against the prisoner.—State v. Fox, 25 N. J. Law (1 Dutch.) 566.

§ 446. Opinions formed but not expressed.

Derived from rumor and newspaper accounts, see post, § 457.

Influence on verdict, see post, § 463 [d, n].

[a] A man must not only have formed but declared an opinion to disqualify him as a juror.

—(U. S. 1807) United States v. Burr, Fed. Cas. No. 14,693; (1827) Same v. Devaughan, Fed. Cas. No. 14,952 [3 Cranch, C. C. 84];

(Ga. 1854) Baker v. State, 15 Ga. 408;

(Vt. 1831) Boardman v. Wood, 3 Vt. 570; (1875) State v. Phair, 48 Vt. 366.

CONTRA, see

(Miss. 1831) State v. Johnson, 1 Miss. (Walk.) 392;

(N. Y. 1830) People v. Mather, 4 Wend. 229, 21 Am. Dec. 122;

(Va. 1841) Armistead v. Commonwealth 11 Leigh, 657, 37 Am. Dec. 633.

§ 447. Inconsiderate or purposeless remarks.

[a] (Ga. 1878) A juror is not disqualified in a criminal case by loose remarks made by him in bare jest before he was sworn, which he explained after the trial by affidavit showing himself impartial.—Lovett v. State, 60 Ga. 257.

[b] (La. 1883) One's inconsiderate remark, made just before being summoned as juror, will not avail against his declaration on his voir dire that he has formed no opinion as to the guilt of the accused.—State v. Diskin, 35 La. Ann. 46; Same v. Revella, Id. 302.

[c] (Tex. 1859) A jocular remark, made by a juror drawn on a murder case before the trial, to the effect that "the defendant ought to have been hung 20 years ago," without reference to the particular case, is not necessarily a ground of disqualification.—Monroe v. State, 23 Tex. 210, 76 Am. Dec. 58.

§ 448. Source of information on which opinion is based.

As to particular matters, see ante, § 440 [l].

From evidence at trial, see post, §§ 458–460.

—— *rumor and newspaper reports, see* post, §§ 449–457.

Influence of opinion on verdict, see post, §§ 461–479.

[a] The opinion which disqualifies depends on the nature and strength of the opinion, and not upon its source or origin.

—(Ga. 1846) Boon v. State, 1 Ga. (1 Kelly) 631;

(Iowa, 1858) State v. Gillick, 7 Iowa (7 Clarke) 287;

(Va. 1841) Armistead v. Commonwealth, 11 Leigh, 657, 37 Am. Dec. 633; (1873) Jackson v. Same, 23 Grat. 919.

[b] When a juror has formed an opinion on the merits of a cause, on information derived from witnesses, he is disqualified.

—(Colo. 1885) Minich v. People, 8 Colo. 440, 9 Pac. 4;

(Ind. 1853) Goodwin v. Blachley, 4 Ind. 488;

(Miss. 1850) Nelms v. State, 21 Miss. (13 Smedes & M.) 500, 53 Am. Dec. 94;

(Tex. 1896) Trotter v. State, 37 Tex. Cr. R. 468, 36 S. W. 278.

[c] A juror who, upon the facts being submitted to him by the plaintiff, had formed or expressed an opinion as to the liability of the defendant, is not an indifferent juror, and upon a challenge must be excluded.

—(Iowa, 1869) May v. Elam, 27 Iowa, 365;

(N. Y. 1835) Rogers v. Rogers, 14 Wend. 131.

[d] (Ill.) If a juror has made up a decided opinion on the merits of the case either from a personal knowledge of the facts, from the statements of witnesses, from the relations of parties, or either of them, or from rumor, and that opinion is positive and not hypothetical, and such as will probably prevent him from giving an impartial verdict, the challenge should be allowed.—(1841) Smith v. Eames, 4 Ill. (3 Scam.) 76, 36 Am. Dec. 515; (1852) Neely v. People, 13 Ill. (3 Peck) 685.

[e] (Ind. 1893) A proposed juror, who has formed an opinion as to the guilt or innocence of a defendant in a criminal case, based on reading an affidavit of a witness to the transaction, and acts constituting the crime charged, is within the reason, if not within the letter, of Cr. Code 1881, § 1793, subd. 2, which renders incompetent jurors who have formed or expressed opinions based "on conversations with witnesses to the transaction, or reading their testimony,

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or hearing them testify."—Woods v. State, 184 Ind. 35, 33 N. E. 901.

2. FROM RUMOR AND NEWSPAPER REPORTS.

HEARING RUMORS OR READING NEWSPAPER ACCOUNTS IN GENERAL, § 449.
FORMATION AND EXPRESSION OF OPINION DERIVED FROM RUMOR IN GENERAL, § 450.
FROM NEWSPAPER ACCOUNTS IN GENERAL, § 451.
IMPRESSIONS, § 452.
AS TO PARTICULAR MATTERS, § 453.
UNQUALIFIED OR FIXED OPINION, § 454.
QUALIFIED OR HYPOTHETICAL OPINIONS, § 455.
OPINIONS REQUIRING EVIDENCE TO REMOVE, § 456.
OPINIONS FORMED BUT NOT EXPRESSED, § 457.

See ante, § 448.
Influence on verdict, see post, §§ 471–474.

§ 449. Hearing rumors or reading newspaper accounts in general.

Discretion of court, see ante, § 405 [d].

[a] (Ill. 1882) A person who testified on his voir dire that he had read a newspaper account of the case, but that it made no impression on him and that he had forgotten it, was not disqualified to act as juror.—Gradle v. Hoffman, 105 Ill. 147.

[b] (Ill. 1888) In an action for damages for an accident causing death, it was not error to overrule a challenge of a juror for cause, where he stated that he had heard of the killing at the time, and had heard people talk about it, but had no opinion in the case.—Chicago, B. & Q. R. Co. v. Perkins, 125 Ill. 127, 17 N. E. 1.

[c] (Kan. 1895) The fact that one heard detailed statements of occurrences in relation to the commission of the offense charged did not render him incompetent, where he had neither formed nor expressed an opinion as to defendant's guilt or innocence, nor as to any material fact involved.—State v. Bane, 1 Kan. App. 537, 42 Pac. 376.

[d] (Mich. 1888) Where it is evident that the sentiment of the community is unfavorable to respondent it is error to overrule his challenge to a juror who admits that people have been talking in his presence about the facts in the case, and the state of public sentiment in regard to it, though the juror believes that he has not been influenced thereby.—People v. Evans, 72 Mich. 367, 40 N. W. 473.

[e] (Mo. 1893) Under Rev. St. 1889, § 4197, declaring it a good cause of challenge to a juror that he has formed or delivered an opinion on the issue or any material fact to be tried, but providing that, if such opinion is founded only on rumor and newspaper reports, and not such as to bias the juror's mind, he may be sworn, jurors who have read in newspapers what "purported" to be the evidence taken at the coroner's inquest, and what "purported to be" defendant's confession of the crime for which he is being tried, are competent.—State v. Robinson, 117 Mo. 649, 23 S. W. 1066.

[f] (Neb. 1886) It is not error for a trial court to sustain a challenge to a juror who testifies, upon examination as to his competency, that he resided in the neighborhood where one of the parties resided, and had heard a great deal of talk about the case; that he was not free from bias; and that he thought this condition of his mind would influence him in his verdict.—Hutchinson v. State, 19 Neb. 262, 27 N. W. 118.

[g] (Neb. 1895) Where it appeared that a juror had read newspaper accounts of the killing under investigation, it was error not to permit him to answer on the voir dire whether he had formed an opinion as to whether defendant was guilty, or whether murder had been committed.—Basye v. State, 45 Neb. 261, 63 N. W. 811.

§ 450. Formation and expression of opinion derived from rumor in general.

[a] An opinion, formed and expressed by a juror in a criminal case, which is based wholly on rumor, and where there is no bias or prejudice in the mind of the juror, is not a disqualification.

—(Ga. 1872) Westmoreland v. State, 45 Ga. 225;
(La. 1859) State v. Bunger, 14 La. Ann. 461;
(Miss. 1850) Nelms v. State, 21 Miss. (13 Smedes & M.) 500, 53 Am. Dec. 94;
(Mo. 1860) State v. Davis, 29 Mo. 391; (1884) Same v. Wilson, 85 Mo. 134.

CONTRA, see
(Ga. 1846) Boon v. State, 1 Ga. (1 Kelly) 618; (1854) Anderson v. Same, 14 Ga. 709;
(Iowa, 1844) Wau-kon-chaw-neek-kaw v. United States, 1 Morris, 332.

[b] It is no objection to the competency of a juror that he has formed or expressed an opinion respecting the guilt of a prisoner, if that opinion be founded on public rumor only.

—(Ind. 1877) Gillooley v. State, 58 Ind. 182;
(La. 1871) State v. Caulfield, 23 La. Ann. 148;
(Mo. 1862) State v. Rose, 32 Mo. 346;
(Tenn. 1857) Major v. State, 36 Tenn. (4 Sneed) 597.

[c] A juror who has formed and expressed an opinion in a capital case, founded wholly on rumor, is incompetent.

—(Iowa, 1850) Trimble v. State, 2 G. Greene, 404.

CONTRA, see
(Ga. 1858) Thompson v. State, 24 Ga. 297.

[d] (Ala. 1833) Under the statute of 1831, which provides that, if a juror in a capital case has formed and expressed an opinion founded upon rumor, he shall be sworn in chief, it must appear that such opinion was formed upon mere rumor. Where it appears that the opinion was formed upon facts well authenticated by persons in whom the juror had confidence, it is good ground for challenge for cause.—Quesenberry v. State, 3 Stew. & P. 308.

[e] (Ind. 1835) A petit juror in a criminal case testified on his voir dire that he had formed and expressed an opinion as to the guilt of the defendant from report; that he had heard no witness, as he knew of, speak of the transaction; that he lived 18 miles from the neighborhood of the defendant, and had not been there since the alleged commission of the offense. *Held*, that this was not sufficient to sustain a challenge for cause.—McGregg v. State, 4 Blackf. 101.

[f] (Mich. 1893) On the trial of an offense against the local option law, a juror who, on his examination, stated that he knew defendant, supposed he ran a saloon, understood from what he heard that he had been running one a certain length of time, and from what he heard supposed that he sold intoxicating liquors there, should have been excluded.—People v. Keefer, 97 Mich. 15, 56 N. W. 105.

[g] (Pa. 1841) That a juror had formed and expressed an opinion, from the statements of

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others, of a general state of indebtedness by one party to the other, without any particular knowledge of the facts himself, is not good cause of challenge.—Irvine v. Lumbermen's Bank, 2 Watts & S. 190.

[h] (Tenn. 1842) Individuals offered as jurors stated that, from rumor and reports in their neighborhood, they had heard that a man had been killed, that the defendant was accused of the murder and had attempted to make his escape, and that upon these facts and circumstances they had formed and expressed an opinion. *Held*, that they were competent as jurors.—Payne v. State, 22 Tenn. (3 Humph.) 375.

[i] (Tenn. 1850) A juror who has an opinion, formed from public rumor merely, that the accused may or may not be guilty, is not disqualified to sit in a capital case. To be disqualified he must have made up his mind as to the guilt of the accused, either from his own personal knowledge, or from the statements of others professing to know the circumstances.—Moses v. State, 30 Tenn. (11 Humph.) 232.

[j] (Tenn. 1883) A juror upon a capital trial is not incompetent for having said that from what he found out he thought the prisoner would be hanged or imprisoned for life; it not appearing that his statement was based upon evidence that would be introduced at the trial, and, moreover, hearsay and rumor only tending to show that he made the statement.—Johnson v. State, 79 Tenn. (11 Lea) 47.

§ 451. From newspaper accounts in general.

Influence on verdict, see post, § 461.

[a] (Mo. 1884) A person who has formed an opinion from reading the evidence, as published in the papers, taken before the coroner, is absolutely disqualified from serving as a juror.—State v. Culler, 82 Mo. 623.

[b] (Mo. 1884) A juror in a criminal case, when examined on his voir dire, stated that he had formed an opinion from what he had read of the crime in the newspapers, and that he "would naturally suppose the defendant guilty." *Held* not sufficient evidence of bias or prejudice to disqualify him as a juror in the case.—State v. Wilson, 85 Mo. 134.

[c] (Ohio, 1873) A juror whose opinion has been formed from reading newspaper reports and the testimony of witnesses at a former trial is incompetent to serve as a juror.—Frazier v. State, 23 Ohio St. 551.

[d] (Ohio, 1882) A juror who admits upon the voir dire that he has formed and expressed an opinion as to the guilt of the defendant in a capital case, such opinion being founded on newspaper accounts, is incompetent to serve as a juror.—McHugh v. State, 38 Ohio St. 153.

§ 452. Impressions.

[a] An opinion of a juror, not founded on evidence, and which is no more than a mere impression, based on rumor and newspaper statements, does not disqualify him.
—(Ariz. 1886) Territory v. Davis, 10 Pac. 359;
(Mo. 1896) State v. Taylor, 134 Mo. 109, 35 S. W. 92.

[b] (Kan.) Impressions not amounting to opinions, received from newspaper articles or rumor, do not disqualify a juror, and are not cause for challenge, under Gen. St. p. 853, § 205, making it a good cause of challenge that a juror has formed or expressed an opinion on the issue or any material fact to be tried.—(1872) State v. Medlicott, 9 Kan. 257; (1873) Same v. Crawford, 11 Kan. 32; (1895) Same v. Treadwell, 54 Kan. 507, 38 Pac. 799.

§ 453. As to particular matters.

Influence on verdict, see post, § 461 [b].

[a] (Fla. 1894) The fact that a venireman had read of the trial of one person for a murder, and had formed an opinion as to that person's guilt or innocence, did not disqualify him as a juror for the trial of other persons for the same murder.—Lambright v. State, 34 Fla. 564, 16 South. 582.

[b] (Kan. 1888) When the only controverted question is defendant's insanity, it is not material error to overrule a challenge for cause to jurors who it is not shown had any opinion on the question of insanity, but who in their voir dire examination admitted that they had a slight and indefinite opinion, obtained from newspapers or from rumor, that defendant had killed his wife, for which he was on trial.—State v. Gould, 40 Kan. 258, 19 Pac. 739.

[c] (Kan. 1893) Defendant claimed that he killed deceased in self-defense. Several jurors stated that they had read and heard of the killing, and thought that defendant did it, but that they had not formed or expressed any opinion as to his guilt. It appeared from the examination that their minds were free from any previously formed opinions on material facts. *Held*, that no substantial error was committed in retaining such jurors.—State v. Sortor, 52 Kan. 531, 34 Pac. 1036.

[d] (N. Y. 1848) When a person called as a juror testified that he had read the newspaper statements of the occurrence, and that they left no particular impression on his mind as to the guilt or innocence of the prisoner, but that he believed, as a newspaper statement, that a homicide had been committed, and by the person named, he was *held* not disqualified to sit in the case.—People v. Hayes, 1 Edm. Sel. Cas. 582.

§ 454. Unqualified or fixed opinion.

Requiring evidence to remove, see post, § 456.

[a] An opinion as to the matters in issue, formed by a juror on mere rumor or uncertain report, and which has not taken firm hold upon the mind, does not disqualify him.
—(Colo. 1875) Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 565;
(Ind. 1860) Bradford v. State, 15 Ind. 347.

[b] (U. S. 1869) A challenge to a juror for principal cause is properly overruled where it appears that the juror, although he has read about one-half of a column in a newspaper concerning the case, has never formed any fixed opinion, or made up his mind, respecting the guilt of the prisoner.—United States v. McHenry, Fed. Cas. No. 15,681 [6 Blatchf. 503].

[c] (Ga. 1861) On a trial for murder, a juror who has formed from hearsay a fixed opinion of the guilt of the accused is incompetent.—Maddox v. State, 32 Ga. 581, 79 Am. Dec. 307.

[d] (Ga. 1894) A juror who, in answer to questions for testing his competency, after receiving from the judge a correct definition of the word "bias" and the phrase "perfectly impartial," testifies that he is perfectly impartial between the state and the accused, is competent if he has neither seen the crime committed, nor heard any part of the evidence delivered on oath, and has no fixed opinion, though he may entertain a floating opinion, founded on rumor, hearsay, or newspaper reports, and may have expressed the same.—Hinkle v. State, 94 Ga. 595, 21 S. E. 595.

[e] (Ill. 1841) If the opinion of a juror be of a light and transient character, such as is usually formed by persons in every community on hearing a current report, and which may be

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changed by the relation of the next person met with, and which does not show a conviction of the mind and a fixed conclusion thereon, or if it be hypothetical, the challenge ought not to be granted.—Smith v. Eames, 4 Ill. (3 Scam.) 76, 36 Am. Dec 515.

[f] (Mich. 1865) Where, in a trial for murder, a juror, examined as to his competency, said, "I have formed a partial opinion as to the guilt or innocence of the defendant from rumors heard in the street, but not a positive opinion," it was *held* that such opinion did not disqualify him.—Holt v. People, 13 Mich. 224.

[g] (N. C. 1836) If a juror has not definitely made up and expressed his mind on the question at issue, he is not liable to exception, though he has read and heard concerning it.—State v. Benton, 19 N. C. 196.

[h] (Vt. 1881) The formation and expression of an opinion are not alone the test of a juror's competency. If it is only a transitory inclination of the mind, based upon rumor or newspaper report, the truth of which the juror does not inquire into, nor judge, it is not a disqualifying opinion. To work a disqualification there must be an abiding bias of the mind caused by substantial facts, the truth of which the juror believes; an opinion upon the merits of the case based upon the evidence likely to be presented upon the trial.—State v. Meaker, 54 Vt. 112.

§ 455. Qualified or hypothetical opinions.

Influence on verdict, see post, § 472.
Requiring evidence to remove, see post, § 456.

[a] In a criminal prosecution, a juror stated that he had heard what purported to be the facts of the case reported as rumor, not by a witness or person professing to have knowledge thereof; that from this he had formed an opinion, and if the facts turned out the same as he had heard them, his opinion was formed. *Held*, that he was not disqualified for bias.
—(Cal. 1860) People v. Williams, 17 Cal. 142; (1872) Same v. Murphy, 45 Cal. 137;
(Ill. 1870) Leach v. People, 53 Ill. 311;
(Iowa, 1865) State v. Ostrander, 18 Iowa, 435;
(Mo. 1881) State v. Farrow, 74 Mo. 531;
(N. J. 1846) State v. Spencer, 21 N. J. Law (1 Zab.) 196.

[b] A juror was not disqualified by an opinion of the guilt of the accused, formed without consideration from reading an account of it in a newspaper, and dependent upon the correctness of the account, but which is so indefinite as not to create a bias inconsistent with impartiality in trying the case.
—(Conn. 1880) State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89;
(N. Y. 1870) People v. Mallon, 3 Lans. 224.

[c] (Ill. 1846) Where, upon a trial for murder, a juror, when first examined, stated that he had formed and expressed an opinion from reports, a part of which he believed, and, when further examined, he stated that the opinion was formed on the hypothesis that the rumors, only a part of which he believed, were true, that in fact he had no opinion whether those rumors were true or false, and that the opinion which he had formed was not of a fixed and definite character, he was *held* to be competent.—Baxter v. People, 8 Ill. (3 Gilman) 368.

[d] (Ill. 1861) A juror who says that he has formed no opinion of the prisoner's guilt or innocence, but who also says that he believes the statements in the papers that the crime had been committed, and that if the prisoners are the persons named in the papers, he has an opinion as to their guilt, is incompetent to sit as a juror in the case.—Gray v. People, 26 Ill. (16 Peck) 344.

[e] (Ky. 1886) The statement by a juryman before trial, that if what he had heard was true the accused ought to be hung, is not sufficient of itself to disqualify him from sitting on the trial.—Fowler v. Commonwealth, 7 Ky. Law Rep. 529.

[f] (Mich. 1886) Where the opinion of a juror as to defendant's guilt is conditional on the truth of "flying reports" not received from any particular person whom the proposed juror can remember, he is competent.—People v. Shufelt, 61 Mich. 237, 28 N. W. 79.

[g] (Mo. 1886) A juror said, just before the trial, that, from what he knew and heard, he had both formed and expressed an opinion, and that he believed the defendant guilty, and would be in favor of sending him up for 10 years. The juror stated that he said that, from what he had heard, he did not believe he could be one of the jurors, because, if the evidence should turn out as he had heard, he thought that defendant should be sent up for 10 years. He also explained that he had talked with no witness about the case, but only with his wife and the affiant; that his wife had informed him of the matter; and that it was to this information that the above conversation referred. *Held*, that such information was mere rumor, and the juror unprejudiced.—State v. Reed, 89 Mo. 168, 1 S. W. 225.

[h] (N. Y. 1811) A juror, summoned before a justice, said that, "if the reports of the neighbors were correct, the defendant was wrong and the plaintiff was right." *Held*, that this was not a sufficient objection to his being sworn and impaneled.—Durell v. Mosher, 8 Johns. 445.

[i] (N. Y. 1858) Where, on a trial for murder, a juror who was drawn was challenged by the prisoner for principal cause, on the ground that he had expressed an opinion, and such challenge was traversed, and it appeared by the testimony of the juror that he thought he had an impression as to the prisoner's guilt or innocence; that he rather thought he had formed an opinion; that he presumed he had expressed it, and thought he retained it; that he had formed an opinion, if the newspaper accounts of the transaction, of which he had read only a part, were true, and that so far as he read he gave them credence; that it might or might not require evidence to remove his impression of the prisoner's guilt, and that he had not arrived at any definite opinion, and the court overruled the challenge, and decided the juror to be competent, it was *held* on review that the decision was correct.—People v. Stout, 4 Parker, Cr. R. 71.

[j] (S. D. 1892) An unqualified opinion or belief, as used in Comp. Laws, § 5040, is such a settled conviction in the mind of the juror, founded on a knowledge of the facts of the case, as would raise a strong presumption of partiality; but a hypothetical opinion, founded on hearsay or information, and unaccompanied with malice or ill will, will not support a challenge for bias.—Haugen v. Chicago, M. & St. P. Ry. Co., 3 S. D. 394, 53 N. W. 769.

[k] (Tex. 1887) On the voir dire of a juror he said that he heard a person in whom he had confidence make a statement of the case upon hearsay, and that thereupon he (the juror) formed an opinion, provided the statement was true, but had formed no conclusion as to whether or not it was true. *Held* not a disqualifying conclusion.—Bolding v. State, 23 Tex. App. 172, 4 S. W. 579.

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§ 456. Opinions requiring evidence to remove.

See ante, § 455 [i].

Influence on verdict, see post, §§ 473, 474.

[a] (Cal. 1895) Where a juror stated that he had an opinion as to defendant's innocence, not based on public rumor, and it would require considerable evidence to change it, the court properly sustained a challenge for cause.—People v. Fultz, 109 Cal. 258, 41 Pac. 1040.

[b] (Ind. 1879) A juror impaneled to try a criminal prosecution who states, from the evidence given on a former trial, as reported in a newspaper read by him, he had formed and expressed an opinion on the merits, to change which would require some evidence, but which would readily yield thereto, is not incompetent.—Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99.

[c] (La. 1875) Where a juror declares that he has formed an impression based on newspaper statements, which impression would give way to evidence, there is no cause for challenge.—State v. Coleman, 27 La. Ann. 691.

[d] (Miss. 1831) The formation of hypothetical opinion from rumor only, and which is subject to be changed by the testimony, will not disqualify a juror from sitting in a capital case.—State v. Johnson, 1 Miss. (Walk.) 392.

[e] (Miss. 1859) An opinion formed from rumor, so fixed as to require evidence to remove it, disqualifies a juror.—Alfred v. State, 37 Miss. 296.

[f] (Miss.) That a juror had formed and expressed an opinion in the case from rumor, but such as required no testimony to remove it, is not a disqualification in a capital case.—(1871) Lee v. State, 45 Miss. 114; (1874) Logan v. Same, 50 Miss. 269.

[g] (Pa. 1889) A juror who states that he has an opinion, or a fixed opinion, as to defendant's guilt or innocence, which it would take strong evidence to change, but that it was formed from newspaper reports and the talk of neighbors, and that the evidence he might hear might change it, is not disqualified.—Clark v. Commonwealth, 123 Pa. 555, 16 Atl. 795, 23 Wkly. Notes Cas. 317.

[h] (Pa. 1893) Where, in a murder case, it appears from the examination of a juror on his voir dire that he has the ability and disposition to render a verdict on the evidence alone, he is competent, though it will require evidence to change an impression formed from what he has read.—Commonwealth v. Crossmire, 156 Pa. 304, 27 Atl. 40, 33 Wkly. Notes Cas. 77.

[i] (Tenn. 1850) A juror in a capital case said he had formed an opinion in regard to the guilt of the defendant from rumor, but that he did not know whether his information was derived from the witnesses, or from any person who knew the facts, nor did he know who the witnesses were, and if proof turned out differently from rumor, he could do justice to the prisoner. The court said that a mere hypothetical opinion, or loose impression, having no foundation to rest on, would not disqualify a person as a juror; that, in testing his competency, the character of the impression made on his mind was of more consequence than the source from which he derived his information; and that, in the present case, the opinion formed by the juror being of so fixed a character that it required evidence to remove that opinion, he was therefore incompetent.—Moses v. State, 29 Tenn. (10 Humph.) 456.

[j] (Utah, 1875) A juror who states that he has formed an unqualified opinion on the merits of a case, which it will require evidence to remove, should be (on challenge) excluded, whether his opinion is founded on rumor, or on fact.—Conway v. Clinton, 1 Utah, 215.

[k] (Va. 1889) A juror who states that he has formed and expressed an opinion as to defendant's guilt; that it was based on newspaper reports and rumor; that the opinion was "right positive;" that it would take evidence to remove it, but that he could give defendant a fair and impartial trial, and, if the evidence was different from what he had heard, he would change his mind,—is incompetent.—Washington v. Commonwealth, 86 Va. 405, 10 S. E. 419.

§ 457. Opinions formed but not expressed.

[a] That a jury has formed an opinion on mere rumor, but never expressed it, is not ground of challenge for cause.

—(Ala. 1841) State v. Morea, 2 Ala. 275;
(Ga. 1847) Hudgins v. State, 2 Ga. (2 Kelly) 173; (1854) Griffin v. Same, 15 Ga. 476.

[b] (U. S. 1851) A person who has come to a conclusion as to the offense charged from reading newspaper accounts, though he has not expressed an opinion, either as to the offense, or that defendant was engaged therein, is incompetent as a juror.—United States v. Hanway, Fed. Cas. No. 15,299 [2 Wall. Jr. 139].

3. FROM EVIDENCE ADDUCED AT TRIAL.

IN GENERAL, § 458.
EVIDENCE AT FORMER TRIAL, § 459.
EVIDENCE AT TRIAL OF OTHER CAUSE, § 460.

See ante, § 448.

Influence on verdict, see post, § 467.

Prior service as juror, see ante, §§ 423–430.

Reading newspaper reports of evidence, see ante, §§ 449–457.

§ 458. In general.

[a] (Ala. 1838) It is good cause of challenge to a juror that he has formed and expressed an opinion of the innocence or guilt of a prisoner from conversations held with jurors who had been previously charged with the trial of the prisoner.—Ned v. State, 7 Port. 187.

[b] (Fla. 1860) The fact that a person presided as coroner at an inquest does not disqualify him as a juror in the trial of an indictment for the murder of the party on whose body the inquest was held, when he testifies that he has neither expressed, nor formed, any opinion as to the guilt or innocence of the prisoner.—O'Connor v. State, 9 Fla. 215.

[c] (Fla. 1886) A juror on his voir dire stated that he had formed an opinion on what he had been told of the evidence by one who was at the preliminary hearing, but that his impressions would readily yield to the evidence on the trial. *Held*, that he was competent.—Denham v. State, 22 Fla. 664.

[d] (Iowa, 1861) It is not good cause of challenge to jurors that they have heard the evidence as to the preliminary question of the sanity of the prisoner tried under Revision 1860, pars. 5015–5019, as such evidence could not conclude their minds on the question of the defendant's mental condition at the time of the commission of the offense.—State v. Arnold, 12 Iowa, 479.

[e] (Kan. 1895) The fact that a juror was in the court room and heard the evidence on a plea in bar did not disqualify him to serve in the main case subsequently tried.—State v. Scott, 1 Kan. App. 748, 42 Pac. 264.

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[f] (Tex. 1859) A juror on a trial for murder who on his voir dire stated that he had heard part of the evidence before the examining committee, and had formed a partial opinion which might influence his verdict to some extent, but that he had no fixed opinion to influence his verdict, is not disqualified.—Monroe v. State, 23 Tex. 210, 76 Am. Dec. 58.

§ 459. Evidence at former trial.

[a] (Ga. 1889) The array is not disqualified by the jurors hearing the evidence on oath, without forming or expressing any opinion thereon.—Robinson v. State, 82 Ga. 535, 9 S. E. 528.

[b] (Miss. 1893) A juror was not "impartial," who had heard parts of a former trial of the case, declared that he had a "fixed and definite opinion," and would not say positively that he could try the case as though he had no opinion.—Mabry v. State, 71 Miss. 716, 14 South. 267.

[c] (Mo. 1891) A juror testified on his voir dire that he was on the general panel at a former term, when the same case was first tried, though not on the panel which tried it; that he was present at that trial, and probably formed an opinion then, but did not think he had any opinion now. *Held*, that the juror was qualified.—Spangler v. Kite, 47 Mo. App. 230.

[d] (Neb. 1886) Under Cr. Code, § 468, it is proper to excuse a person who, on examination, it appears has heard the testimony of a part of the witnesses in a previous trial of the same cause, and has formed an opinion as to the guilt or innocence of the party on trial, founded on the testimony heard, which is still retained by him.—Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825.

[e] (Tex. 1880) The fact that a petit juror had heard the testimony at the former trial of accused is not cause for challenge; it not appearing that, when impaneled, he had any opinion in the case.—Shields v. State, 8 Tex. App. 427.

[f] (Tex. 1885) The mere fact that a juror heard the evidence on a prior trial of the same case will not disqualify him.—Thompson v. State, 19 Tex. App. 503.

§ 460. Evidence at trial of other cause.

[a] (Ark. 1895) In an action by a passenger against a railroad company to recover the statutory penalty for making an overcharge for carriage between certain stations, the main issue was the distance between those stations. Several jurors stated that they had sat as jurors in several cases tried that term, wherein defendants had been sued for like penalties for overcharges in fares between the same stations, and that they had opinions as to the merits of those cases, and had rendered verdicts upon the facts therein, and it appeared that four of the jury were plaintiffs in actions against defendants, in which the same issues were involved. *Held*, that under Sand. & H. Dig. § 4257, providing that no person who has formed or expressed an opinion concerning the matter in controversy, which might influence his judgment, shall be a juror, said jurors were disqualified.—Missouri Pac. Ry. Co. v. Smith, 60 Ark. 221, 29 S. W. 762.

[b] (Del. 1854) An opinion formed on evidence given at the trial of another party for the same murder, such as without counteracting testimony the juror says would be conclusive against the prisoner, is a good cause for a challenge.—State v. Anderson, 5 Har. 493.

[c] (Ill. 1838) On the trial of a suit for crim. con. between the defendant and the plaintiff's wife, a juror was proposed who, on being examined, stated that he had heard the testimony against the wife of the plaintiff, who was indicted for adultery with the defendant, and from that testimony had formed an opinion, but had not formed an opinion in this case, not knowing that there was a civil suit then. *Held*, that he was a competent juror, it not appearing that the crime for which the wife was indicted was committed before or after the commencement of the suit for crim. con.—King v. Dale, 2 Ill. (1 Scam.) 513.

[d] (Ill. 1878) In a suit on a policy of insurance, where a juror had heard a part of the evidence in a case just tried between the same plaintiff and another insurance company, where the questions involved were similar, *held*, that the juror was improperly challenged, as, if he had any opinion whatever from what he had heard, it was merely hypothetical, and would not prevent a fair and impartial judgment on the facts as they might be proved on the trial.—Lycoming Fire Ins. Co. v. Ward, 90 Ill. 545.

[e] (Ind. 1880) A juror was disqualified to sit on the trial of B. where he had read the evidence produced at the trial of A., who was accused with B. of having committed the same murder, and had formed and expressed an opinion as to B.'s guilt, which he said he thought he could lay aside, if the evidence at B.'s trial should be materially different.—Brown v. State, 70 Ind. 576.

[f] (Iowa, 1889) The fact that jurors have formed an opinion as to the guilt or innocence of defendant from reading reports of evidence upon the trial of another defendant for the same offense is not sufficient to show them disqualified under Code 1873, § 4405, subd. 11, where it is not shown that the evidence given at the first trial is that relied on at the second, and it appears that the first defendant was charged with having committed the offense, while the second defendant is charged with being a party thereto through a conspiracy.—State v. Munchrath, 78 Iowa, 268, 43 N. W. 211.

[g] (Iowa, 1896) A juror who heard part of the evidence and of the argument on the trial of one who was jointly indicted with defendant is not disqualified to serve as juror on the trial of defendant, where he says he has no opinion as to the guilt of accused.—State v. Philpot, 97 Iowa, 365, 66 N. W. 730.

[h] (Miss. 1840) That a juror has impressions as to the guilt of the prisoner, derived from hearing the testimony in another case, is not sufficient to disqualify him.—Noe v. State, 5 Miss. (4 How.) 330.

[i] (Neb. 1884) A juror who was one of a jury that had rendered a verdict for defendant in a similar case the day before, when challenged for cause by plaintiff, stated that he knew nothing about the present case, and as yet had no opinion in regard to it, but that, if the facts were exactly the same as in the previous case, he should have the same opinion. *Held*, he was a competent juror.—Chariton Plow Co. v. Deusch, 16 Neb. 384, 20 N. W. 268.

[j] (N. H. 1843) Where jurors had heard the prisoner tried on another indictment before another jury, and found guilty, and answered, on inquiry, that they had formed an opinion of his guilt on the second indictment, which was pending at the same time, from the evidence which they had heard on the other trial, they were *held* to be incompetent.—State v. Webster, 13 N. H. 491.

[k] (Tex. 1886) A juror who states that he heard the evidence on the trial of persons who were indicted with defendant, and that he had formed an opinion as to the guilt of such persons, but had formed no opinion as to the guilt

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or innocence of defendant, and could give defendant a fair trial, is competent.—Pierson v. State, 21 Tex. App. 14, 17 S. W. 468.

[l] (Tex. 1894) Where a juror states that his opinion was formed from hearing the testimony in the trial of defendant's accomplice, he is incompetent.—Shannon v. State, 34 Tex. Cr. R. 5, 28 S. W. 540.

4. INFLUENCE OF OPINION ON VERDICT.

WEIGHT AND EFFECT OF OPINION IN GENERAL, § 461.
EFFECT ON PRESUMPTION OF INNOCENCE, § 462.
BELIEF OF JUROR THAT OPINION WILL NOT AFFECT VERDICT IN GENERAL, § 463.
QUALIFIED OR HYPOTHETICAL OPINIONS, § 464.
OPINIONS REQUIRING EVIDENCE TO REMOVE, § 465.
OPINIONS WHICH WILL YIELD TO EVIDENCE, § 466.
OPINIONS DERIVED FROM READING OR HEARING EVIDENCE IN CAUSE, § 467.
OPINIONS FOUNDED ON CONVERSATIONS WITH PARTIES, WITNESSES, OR PERSONS CLAIMING TO KNOW THE FACTS, § 468.
OPINIONS OR IMPRESSIONS AS TO PARTICULAR MATTERS OR ISSUES, § 469.
OPINIONS DERIVED FROM PRIOR SERVICE AS JUROR, § 470.
OPINIONS FOUNDED ON RUMOR, § 471.
—— QUALIFIED OR HYPOTHETICAL OPINION, § 472.
—— OPINIONS REQUIRING EVIDENCE TO REMOVE, § 473.
—— OPINIONS WHICH WILL YIELD TO EVIDENCE, § 474.
OPINIONS FOUNDED ON NEWSPAPER ARTICLES, § 475.
—— QUALIFIED OR HYPOTHETICAL OPINION, § 476.
—— OPINIONS REQUIRING EVIDENCE TO REMOVE, § 477.
—— OPINIONS WHICH WILL YIELD TO EVIDENCE, § 478.
DOUBT AS TO WHETHER OPINION WILL AFFECT VERDICT, § 479.

Bias and prejudice, see ante, § 437.
Business connection, see ante, § 422.
Extent of examination of juror, see post, § 567.
Infringement of right to trial by jury, see ante, §§ 228 [a–c, e–g, j, o, p, r–v, x], 232 [d].
Personal opinions and conscientious scruples, see post, §§ 492–496.

§ 461. Weight and effect of opinion in general.

[a] The fact that a venireman has formed an opinion as to the guilt or innocence of an accused, based on rumor, newspaper reports, or hearsay, does not preclude him from sitting on the jury, where such an opinion will not interfere with his rendering an impartial verdict on the evidence as adduced.
—(Colo. 1882) Jones v. People, 6 Colo. 452, 45 Am. Rep. 526;
(Conn. 1881) State v. Smith, 49 Conn. 376;
(Iowa, 1894) State v. Foster, 91 Iowa, 164, 59 N. W. 8;
(Kan. 1880) State v. Spaulding, 24 Kan. 1;
(Mass. 1850) Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711;
(Neb. 1877) Curry v. State, 5 Neb. 412; (1884) Murphy v. Same, 15 Neb. 383, 19 N. W. 489; (1885) Bohanan v. Same, 18 Neb. 57, 24 N. W. 390, 53 Am. Rep. 791;
(N. Y. 1824) People v. Johnson, 2 Wheeler, Cr. Cas. 361; (1886) Same v. Crowley, 102 N. Y. 234, 6 N. E. 384, affirmed (1886) 4 N. Y. Cr. R. 26;
(Pa. 1866) Commonwealth v. Berger, 8 Brewst. 247.

[b] (U. S. 1807) An opinion formed and delivered, not on the full case, but on a point so essential as to go far towards a decision of the whole case, and to have a real influence on the verdict, will disqualify the person as a juror.—United States v. Burr, Fed. Cas. No. 14,692g.

[c] (U. S. 1854) If a juror in a criminal case has formed an opinion that the prisoners are guilty, and entertains that opinion without waiting to hear the testimony, he is incompetent. But if from reading the newspapers, or hearing reports, he has impressions on his mind unfavorable to the prisoners, but has no opinion or prejudice which will prevent him from doing impartial justice when he hears the testimony, he is competent.—Anonymous, Fed. Cas. No. 469.

[d] (Mont. 1880) A juror was incompetent, who, on trial of K. for murder, stated on his voir dire that he had not formed or expressed any opinion as to the guilt or innocence of the accused, and was accepted, but who, after the conviction, testified that he had forgotten a statement made by him before the trial, that K. was guilty and he would hang him, adding that when he was so sworn he had no prejudice against K.—Territory v. Kennedy, 3 Mont. 520.

[e] (N. Y. 1879) Under Laws 1872, c. 475, providing that the formation or expression of an opinion or impression in reference to circumstances, or to the guilt or innocence of a person charged with crime, by a proposed juror, shall not be a sufficient ground of challenge for principal cause to any person otherwise legally qualified, provided the juror declares on oath that he verily believes he could render an impartial verdict according to the evidence submitted to the jury, an opinion not formed upon reading sworn evidence relating to the commission of the offense does not, of itself, render the person incompetent as a juror, where the final testimony establishes the fact that he can impartially hear and determine it without being biased or influenced by his preceding opinion.—Pender v. People, 18 Hun, 560.

[f] (N. Y. 1883) Under Cr. Code, § 376, which re-enacts Laws 1875, c. 475, a juror is competent to act as such on the trial of a capital case, although he has read and talked about it, and has formed an opinion, if his verdict will not be influenced by his opinion.—People v. Cornetti, 92 N. Y. 85.

[g] (Pa.) The inquiry as to a juror's incompetency from previous opinion is whether his opinion is a prejudgment with such fixedness and strength as would probably control his judgment, or has been formed upon the same evidence as will be given on the trial.—(1874) O'Mara v. Commonwealth, 75 Pa. (25 P. F. Smith) 424; (1875) Ortwein v. Same, 76 Pa. (26 P. F. Smith) 414, 18 Am. Rep. 420.

§ 462. Effect on presumption of innocence.

See post, §§ 477 [d], 481 [g].
Extent of examination of juror, see post, § 568 [f].

[a] (Mich. 1865) It is not required that jurors shall come to the investigation of criminal charges with minds entirely unimpressed by what they may have heard in regard to them, or entirely without information concerning them, if they would not be thereby precluded from giving due weight to the presumption of the in-

nocence of the accused.—Holt v. People, 13 Mich. 224.

[b] (Mich.) A juror is disqualified where his opinion as to defendant's guilt or innocence would prevent his giving due weight to the presumption of innocence.—(1878) Stephens v. People, 38 Mich. 739; (1886) People v. Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

[c] (Neb. 1881) If it be shown by the voir dire examination of a juror that his mind is impressed so thoroughly with the idea of the prisoner's guilt that he cannot presume him to be innocent, and can only admit the "possibility" of his being so, it is good ground for challenge. —Olive v. State, 11 Neb. 1, 7 N. W. 444.

§ 463. Belief of juror that opinion will not affect verdict in general.

[a] A juror is not ineligible because of having formed or expressed an opinion, if he states that that opinion is not so strong as to prevent his giving a true verdict according to the evidence.
—(Colo. 1884) Denver, S. P. & P. R. Co. v. Moynahan, 8 Colo. 56, 5 Pac. 811;
(La. 1889) State v. Dent, 41 La. Ann. 1082, 7 South. 604; (1894) Same v. Le Duff, 46 La. Ann. 546, 15 South. 397;
(Mich. 1895) People v. O'Neill, 107 Mich. 556, 65 N. W. 540;
(Miss. 1877) Parker v. State, 55 Miss. 414;
(Pa. 1891) Commonwealth v. Beucher (Orph. Ct.) 10 Pa. Co. Ct. R. 3;
(S. C. 1892) State v. Summers, 36 S. C. 479, 15 S. E. 369;
(Tex. 1898) Miller v. State (Cr. App.) 20 S. W. 1103.

[b] A juror who, while admitting that he has formed and expressed an opinion, states that his mind is unbiased, and that he can render a verdict on the evidence, is competent.
—(La. 1885) State v. George, 37 La. Ann. 786;
(Md. 1881) Zimmerman v. State, 56 Md. 536;
(Neb. 1875) Palmer v. People, 4 Neb. 68;
(N. Y. 1878) Phelps v. People, 72 N. Y. 334, affirming (1876) 6 Hun, 401;
(N. C. 1885) State v. Kilgore, 93 N. C. 533;
(Pa. 1872) Commonwealth v. Morrow, 9 Phila. 583; (1873) Same v. Work, 3 Pittsb. R. 493.

[c] It is not cause for a challenge for favor, that the venireman entertains, or even that he admits or has expressed, some mental impression as to the guilt or innocence of the accused, if it is unaccompanied by prejudice, and the venireman swears it will not embarrass him in rendering a true verdict upon the evidence.
—(Ill. 1874) Plummer v. People, 74 Ill. 361;
(Ind. 1877) Hart v. State, 57 Ind. 102;
(La. 1890) State v. Ford, 42 La. Ann. 255, 7 South. 696;
(Mo. 1876) Eckert v. St. Louis Transfer Co., 2 Mo. App. 36;
(N. Y. 1876) Thomas v. People, 67 N. Y. 218; (1886) People v. Clark, 102 N. Y. 735, 8 N. E. 38, affirming (1885) 38 Hun, 214;
(Pa. 1877) Curley v. Commonwealth, 84 Pa. 151.

[d] (U. S. 1878) A petit juror in a criminal case having testified on his voir dire that he had formed an opinion, although not upon evidence produced in court, as to the question of the innocence or guilt of the prisoner, but that he had not expressed it, and did not think that it would influence his verdict, he was challenged by the prisoner for cause, and the challenge was overruled by the court. *Held*, that the action of the court was not erroneous.—Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244.

[e] (Ala. 1891) Code, § 4331, declares it to be a good ground for challenge by either party in a criminal case that the proposed juror has a fixed opinion as to the guilt or innocence of the defendant, which will bias his verdict; and section 4332 declares that this ground of challenge may be proved by the oath of the juror alone. *Held*, that one who testifies that he has an opinion as to defendant's guilt, but that it will not bias his verdict, is competent. — Hammil v. State, 90 Ala. 577, 8 South. 380.

[f] (Ga. 1888) The fact that a juror who stated on his voir dire that he had no prejudice against defendant, and could render an impartial verdict, was shown to have stated before the trial that he believed defendant guilty, because two juries had found him guilty, is not ground for new trial, as the two statements are not inconsistent.—Blackman v. State, 80 Ga. 785, 7 S. E. 626.

[g] (Ind. 1894) One examined as a juror stated that he thought the filing of the affidavit and information against defendant was some evidence of his guilt, but that, if they were not used in evidence, he would decide the case impartially. *Held*, that he was a competent juror.—Pemberton v. State, 11 Ind. App. 297, 38 N. E. 1096.

[h] (Iowa, 1862) In an action against the city, a juror stated that he was a city taxpayer and did not believe that it was right for the inhabitants to pay their share of the taxes and get no gas, but that he had no opinion which would disqualify him from rendering a verdict in conformity to the law and the evidence. *Held*, that a challenge for cause was properly sustained.—Davenport Gaslight & Coke Co. v. City of Davenport, 13 Iowa, 229.

[i] (Iowa, 1887) A juror who admits that he has formed an opinion regarding the guilt of the accused, but says that such opinion will not prevent his rendering a true verdict according to the evidence, is not incompetent, under Code 1873, § 4405, which provides that a person who has "formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict according to the evidence" may be challenged for cause.—State v. Vatter, 71 Iowa, 557, 32 N. W. 506.

[j] (Iowa, 1887) A juror who states that he has not formed or expressed such an opinion as will prevent him from rendering a true verdict upon the evidence may properly be permitted to serve unless he discloses facts that contradict his statement, and it is not error to overrule a challenge of such juror for cause.—State v. Smith, 73 Iowa, 82, 34 N. W. 597.

[k] (La. 1895) An intimate friend of the deceased, who has formed and expressed an opinion that the accused was guilty of his murder, is incompetent as a juror, although he states on his voir dire that he can, notwithstanding, give the accused a fair trial.—State v. Jackson, 37 La. Ann. 768.

[l] (N. Y. 1876) A person called as a juror in a criminal case who states "that he believed the defendant guilty from what he had heard, but, if the evidence should show him to be innocent, his belief would not bias his verdict, and he would do what was right," is competent as a juror. Rev. Code Ala. § 4180.—Phelps v. People, 6 Hun, 401.

[m] (Ohio, 1857) A juror, challenged for cause, who states on his voir dire that he has formed an opinion as to the commission of the crime and as to the guilt or innocence of the prisoner, and further states that he does not think that the opinion thus formed will influence his verdict, should be set aside as an unsuitable juror —Fouts v. State, 7 Ohio St. 471.

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[n] (Vt. 1870) A venireman who admits he has expressed an opinion should be excluded from the jury in a criminal case, on a challenge for cause, notwithstanding he declares he has no opinion at the trial, and can try the case impartially. Merely having formed an opinion does not disqualify, but one who has expressed an opinion, also, is incompetent, and should not be allowed to serve merely because he thinks it will not prevent him from trying the case impartially.—State v. Clark, 42 Vt. 629.

[o] (Va. 1848) Where, on the impaneling of a jury for a trial for murder, a juror states that he has formed and expressed a decided opinion as to the prisoner's guilt, based upon the information that he has received, but that he is not prejudiced, and is capable of forming a fair opinion upon the evidence that may be offered, he is competent to serve as a juror upon the trial.—In re Epes, 5 Grat. 676.

[p] (Va. 1874) The fact that one called as a juror in a murder trial has formed and expressed an opinion from what he has heard of the case, his information not coming from any witness, does not render him incompetent where he testifies that his opinion is not a fixed one, and that he can give the prisoner fair trial without reference to the opinion already expressed.—Little v. Commonwealth, 25 Grat. 921.

[q] (W. Va. 1869) An expression of opinion, to disqualify a juror, must be deliberate and decided. Where a juror in a case involving in issue the validity of a will of one Steenrod was alleged to have made to different persons the following statements: "They are going to break the Steenrod will." "It is right to break it." "Mrs. T. [a devisee] informed her father how to make it." "T. drew it himself." "It's no use for T. to sue. He'll get beat,"—and he swore he might possibly have made them, but had formed no opinion, and knew of nothing about the case he could put confidence in, he was *held* not to be disqualified.—Thompson v. Updegraff, 3 W. Va. 629.

§ 464. Qualified or hypothetical opinions.

Opinions founded on rumor, see post, § 472.
Reading newspaper accounts, see post, § 476.

[a] Where a juror stated that he had not formed an unqualified opinion, that if what he had heard should be proved upon the trial he had an opinion made up, but that he thought he had no prejudice or bias to prevent him from hearing the evidence, and giving a verdict in accordance with the law and the testimony, he was *held* to be competent.

—(Iowa, 1859) State v. Sater, 8 Iowa (8 Clarke) 420;
(La. 1880) State v. Desmouchet, 32 La. Ann. 1241.

[b] (Ala. 1884) Under Code, § 4881, one who states on his voir dire that he has a fixed opinion as to the guilt of defendant, which would bias his verdict if the facts prove to be those he had heard, but which he does not think would bias it if those proved were different, and that then he could act on the facts as proved, is incompetent as a juror on a trial for murder.—Jackson v. State, 77 Ala. 18.

[c] (Cal. 1870) Where a juror in a criminal proceeding, upon examination as to his qualification to try the case, states that he has formed a fixed decided opinion in regard to the guilt or innocence of the defendant, a subsequent statement by him, on cross-examination, that his opinion is not an unqualified one, and that he could try the case and render a verdict according to the evidence, notwithstanding any previously formed opinion, will not remove his disability as a juror.—People v. Weil, 40 Cal. 268.

[d] (Colo. 1891) Where a juror heard "some of the facts," and formed "a slight opinion" at the time, but afterwards forgot even the facts, and another "heard of the case," and formed a conditional opinion, not, however, on the merits, and each swore on his voir dire that he thought he could try the case fairly and without regard to his previous opinion, it was not error to disallow challenges thereto, inasmuch as such opinions were not "unqualified * * * as to the merits of the action" within Civ. Code, § 182.—Collins v. Burns, 16 Colo. 7, 26 Pac. 145.

[e] (Va. 1823) A venireman who had heard a relation of what the principal witness for the prosecution had sworn to, and had said that if these things were true, he believed the prisoner guilty, but who declared on his voir dire that he felt no prejudice, was open to conviction, and, if the facts did not turn out as they had been represented, that he was ready to change his opinion, was *held* a good juror, and the prisoner's challenge for cause was overruled.—Sprouce v. Commonwealth, 2 Va. Cas. 375.

[f] (Va. 1881) On voir dire a juror answered that he had formed a hypothetical opinion, but that he could not now say that he had such an opinion that evidence could not remove it, but that he preferred not to sit as a juror; and that he could give the prisoner a fair trial. *Held*, that he was incompetent.—Dejarnette v. Commonwealth, 75 Va. 867.

§ 465. Opinions requiring evidence to remove.

Opinions founded on rumor, see post, § 473.
Reading newspaper reports, see post, § 477.

[a] A juror who states on his voir dire that he has formed an opinion as to defendant's guilt or innocence that will require evidence to remove is disqualified, though he also states that he can discard that opinion, and give defendant a fair and impartial trial.

—(Ark. 1885) Polk v. State, 45 Ark. 165; (1892) Vance v. Same, 56 Ark. 402, 19 S. W. 1066;
(Mich. 1878) Stephens v. People, 38 Mich. 739;
(Wash. 1895) State v. Wilcox, 11 Wash. 215, 39 Pac. 368.

CONTRA, see
(Ark. 1881) Casey v. State, 37 Ark. 67;
(Tex. 1888) Livar v. State, 26 Tex. App. 115, 9 S. W. 552.

[b] Where a juror testified on his voir dire that he should go into the jury box with an opinion which it would require conclusive or strong evidence to change, the court abused its discretion in admitting him, though he testified that he believed he could render an impartial verdict.

—(Fla. 1885) Andrews v. State, 21 Fla. 598;
(N. Y. 1893) Doherty v. Lord (City Ct. N. Y.) 5 Misc. Rep. 596, 25 N. Y. Supp. 752, affirmed (Com. Pl. 1894) 8 Misc. Rep. 227, 28 N. Y. Supp. 720;
(Ohio, 1885) Palmer v. State, 42 Ohio St. 596.

[c] (Ala. 1889) A juror, on examination on voir dire, stated that he heard the evidence at a previous investigation, and had formed an opinion as to the guilt or innocence of the accused, that "evidence would have to be very strong to change it," and that "it would be a hard matter to set aside the evidence he had based his opinion on." *Held*, that he was not a qualified juror.—King v. State, 89 Ala. 146, 7 South. 750.

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[d] (Cal. 1861) A juror stated that, from what he had heard and read about the defendant, he had received an impression that he was a bad man, which it might require evidence to remove, and that he should think him more likely to be guilty of a crime than one of whom he had not heard such things, but that he was not conscious of any bias which would prevent his giving him a fair trial. *Held*, that he was a competent juror.—People v. Mahoney, 18 Cal. 180.

[e] (Fla. 1893) On a trial for murder, a veniremen stated on his voir dire that he had formed and expressed an opinion in regard to the guilt of the accused, but that this opinion was not of a fixed nature, and that he would be governed by the evidence, though it would take evidence to change his opinion. The defense then challenged him for cause, and thereupon the court asked him if he would be influenced by the opinion he had, or would be guided entirely by the evidence, and he answered that he would be governed by the evidence allowed to go to the jury. *Held*, that there was no error in overruling the challenge for cause.—English v. State, 31 Fla. 356, 12 South. 689.

[f] (Iowa, 1890) Where a juror states on the voir dire that he has heard one of the parties to the suit make a statement relative to its merits, and that he has formed an opinion which it will take evidence to change, but thinks that he can render a just verdict, it is within the discretion of the court to sustain the challenge of the adverse party, made under Code 1873, § 2772, subd. 9, providing that "when it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows such a state of mind as will preclude him from rendering a just verdict," he may be challenged for cause.—Sprague v. Atlee, 81 Iowa, 1, 46 N. W. 756.

[g] (Kan. 1893) Where persons called to try a cause hold strong and deep impressions, which amount to opinions, and which are of a fixed and positive character, such as will require evidence to change, they should not be retained as jurors, although they may testify that they believe they can render an impartial verdict.—State v. Snodgrass, 52 Kan. 174, 34 Pac. 750.

[h] (Mich. 1889) The refusal of the court to excuse a juror for cause who stated that it would require considerable evidence to remove the opinion which he had formed as to the merits of the case, but afterwards stated that he could try the case fairly, is not an abuse of its discretion.—Michigan Condensed Milk Co. v. Wilcox, 78 Mich. 431, 44 N. W. 281.

[i] (Miss. 1874) If the mind of a juror is so far prejudiced as to require testimony to annul a preopinion derived from any source or origin; or if the opinion has been engendered from personal knowledge, from hearing the witnesses on a former trial, although the juror may disclaim that it would influence his verdict and claim that he was unbiased, he is an incompetent juror.—Logan v. State, 50 Miss. 269.

[j] (Nev. 1870) Where a juror on examination as to his qualifications said that he had heard something of the matter, and had an impression which it would require testimony to remove, but that he had no bias, and his impression was very vague, and that he had never talked with any one who pretended to know the facts, a challenge for cause was properly overruled.—Estes v. Richardson, 6 Nev. 128.

[k] (N. Y. 1887) A juror who, on his voir dire, states that he knows the parties to the action, and has partially formed an opinion about the controversy, which opinion it would require evidence to remove, but that he believes he could try the case impartially without being biased by his previous impression, is not competent.—Young v. Johnson, 46 Hun, 164, affirmed (1890) 123 N. Y. 226, 25 N. E. 363.

[l] (N. Y. 1892) A juror stating that he had an opinion as to defendant's guilt or innocence, which he would take with him into the jury box, and which it would require evidence to remove, cannot on that account be rejected, as the statute (Cr. Code, § 376, subd. 2), which allows an impartial juror, who may have formed a previous opinion, to act, does not imply that he must lay aside the opinion before acting.—People v. McGonegal, 136 N. Y. 62, 32 N. E. 616.

[m] (Pa. 1874) An opinion formed by a juror in reading evidence given in the former trial of a capital case, "which it would take some evidence to remove," *held* to disqualify him, although he said it would not influence his judgment if he were sworn as a juror.—Staup v. Commonwealth, 74 Pa. (24 P. F. Smith) 458.

[n] (Pa. 1875) A juror on being asked whether he had formed or expressed an opinion in a case replied that if what he had read was true he thought the prisoner was guilty, but that his opinion would not hinder him from rendering a just verdict according to the evidence. He had read the testimony taken on the hearing before the coroner and formed his opinion from that, and stated that it would take contrary evidence to remove the opinion from his mind. *Held*, that a challenge for cause was properly overruled.—Myers v. Commonwealth, 79 Pa. (29 P. F. Smith) 308.

[o] (Tex. 1891) A juror upon examination on his voir dire said that he lived eight miles from the house of deceased, and knew him, and that he had met defendant several times; that he had not talked with the witnesses about the case; that he had an opinion as to defendant's guilt or innocence, which evidence would be required to remove; that, if the evidence was as he had heard it, his mind would be unchanged, but that he could render a fair and impartial verdict upon the evidence and instructions, uninfluenced by his present opinion. *Held*, that he was a competent juror, under Code Cr. Proc. art. 636, subd. 13, which provides that a juror may be challenged for cause when there is "established" in his mind such a conclusion of defendant's guilt or innocence as will influence his verdict.—Suit v. State, 30 Tex. App. 319, 17 S. W. 458.

[p] (Tex. 1894) A juror who testifies on his voir dire that he has formed an opinion as to defendant's guilt, and that evidence will be required to remove it, but that he can try the case without being influenced by such opinion, is competent, within Code Cr. Proc. art. 636, providing that a juror may be challenged for cause where there is "established" in his mind such a conclusion of defendant's guilt or innocence as will influence his verdict.—Shannon v. State (Cr. App.) 26 S. W. 410, following Suit v. Same (1891) 30 Tex. App. 319, 17 S. W. 458.

[q] (Utah, 1895) 2 Comp. Laws 1888, § 5024, disqualifying a juror who has formed or expressed an unqualified opinion as to defendant's guilt or innocence, does not disqualify a juror testifying on voir dire examination that he had formed an "impression," but not an "opinion," as to defendant's guilt, and that, although it would take evidence to remove it, he could try the case impartially, and would give defendant the benefit of the presumption of innocence.—People v. Thiede, 11 Utah, 241, 39 Pac. 837.

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[r] (Wash. 1891) A juror stated that he had talked about the case with 30 or 40 people, including one of the jury who had tried a person indicted jointly with the defendant, and had read newspaper reports of the testimony before the coroner's jury and at the preliminary examination; that his opinion was confirmed, and strong evidence would be required to remove it, but that he would be governed by the law and the evidence, and could lay aside all previous impressions. *Held* incompetent.—Rose v. State, 2 Wash. St. 310, 26 Pac. 264.

[s] (Wash. 1891) Where a juror in a murder case states that he has formed and expressed an opinion which would require evidence to remove, but that he would try the case on the evidence and the law, he is disqualified on the ground of "actual bias," within Code, § 211, subd. 2.—State v. Coella, 3 Wash. St. 99, 28 Pac. 28.

[t] (Wash. 1895) In a criminal case it is error to overrule a challenge to a juror stating on voir dire examination that he had formed an opinion which it would take evidence to remove, though, in answer to a leading question on cross-examination, he stated that he could give accused an impartial trial.—State v. Rutten, 13 Wash. 203, 43 Pac. 30.

§ 466. Opinions which will yield to evidence.

Opinions founded on rumor, see post, § 474.
Reading newspaper reports, see post, § 478.

[a] A juror who on his voir dire says he has formed an opinion, but it would yield to sworn evidence, and he is free from prejudice as to the guilt or innocence of the accused, is competent.
—(Ala. 1874) Carson v. State, 50 Ala. 134;
(Iowa, 1886) State v. Sopher, 70 Iowa, 494, 30 N. W. 917;
(La. 1851) State v. Brette, 6 La. Ann. 652; (1881) Same v. Johnson, 33 La. Ann. 889; (1882) Same v. De Rancé, 34 La. Ann. 186, 44 Am. Rep. 426; (1883) Same v. Dugay, 35 La. Ann. 327; (1891) Same v. Garig, 43 La. Ann. 365, 8 South. 934;
(Mo. 1881) State v. Walton, 74 Mo. 270; (1881) Same v. Baber, 74 Mo. 292, 41 Am. Rep. 314;
(N. Y. 1876) Phelps v. People, 6 Hun, 401;
(S. C. 1895) Sims v. Jones, 43 S. C. 91, 20 S. E. 905.
CONTRA, see
(N. Y. 1858) Cancemi v. People, 16 N. Y. 501.

[b] (Fla. 1885) Where a juror says that his opinion was formed from rumor, that it would yield readily to evidence, but that he would rather not have heard what he has heard, if he is to go into the jury box, he is competent.—Andrews v. State, 21 Fla. 598.

[c] (Ind. 1875) It is not a good cause for the challenging of a juror, that he testifies that he has formed and expressed an opinion upon the merits of the cause and the rights of the parties, as the result of a conversation with one of the parties or from rumor, but that the opinion formed will readily yield to the evidence presented on the trial, and that he can hear the evidence and decide the case as impartially as though he had not formed and expressed an opinion.—Scranton v. Stewart, 52 Ind. 68.

[d] (La. 1880) One who stated on his voir dire that he had formed his fixed opinion in regard to the guilt or innocence of the accused, but that said opinion would yield to testimony showing the facts to be different from what he heard, was incompetent.—State v. Ricks, 32 La. Ann. 1098.

[e] (Va. 1841) A person called as a juror who had had a conversation with the prosecutor shortly after the offense was committed, and had formed and expressed a decided opinion that the prisoner was guilty, is not indifferent, and a challenge upon such ground should be sustained, although he stated the opinion he had formed was not such but that it would yield to evidence, that he would try the prisoner's case by the evidence alone, that he had no prejudice against him, and would give him a fair trial.—Armistead v. Commonwealth, 11 Leigh, 657, 37 Am. Dec. 633.

§ 467. Opinions derived from reading or hearing evidence in cause.

From prior service as juror, see post, § 470.
Reading reports of evidence in newspapers, see post, §§ 475–478.
Requiring evidence to remove, see ante, § 465 [c, n].

[a] A juror who states that he has formed an opinion from evidence he heard at the preliminary trial and the report of the evidence in a local paper, but that he can discard his formed opinion, and render an unbiased verdict, is incompetent.
—(Mo. 1891) State v. Hultz, 106 Mo. 41, 16 S. W. 940;
(Tenn. 1830) Rice v. State, 9 Tenn. (1 Yerg.) 432.

[b] In a civil case it is not error to reject a juror testifying that he had formed and expressed an opinion on the case from reading the evidence in former trials, though he also testified that he would not be swayed by such opinions.
—(Ind. 1885) Dugle v. State, 100 Ind. 259;
(N. Y. 1896) Laidlaw v. Sage, 2 App. Div. 374, 37 N. Y. Supp. 770.

[c] (Del. 1854) An impression not founded on evidence does not disqualify a juror, although he has heard part of the evidence given on the trial of another person charged with the same offense, where he thinks it cannot have any bias on his judgment.—State v. Anderson, 5 Har. 493.

[d] (Ind. 1895) Testimony of a juror on voir dire examination that he had read a part of the evidence given on a former trial does not show that his opinion was formed from reading reports of the testimony of "witnesses to the transaction," within the meaning of Rev. St. 1894, § 1862 (Rev. St. 1881, § 1793), rendering a juror incompetent whose opinion has been formed from reading reports of the testimony of such witnesses, though the juror may state that he can render an impartial verdict.—Siberry v. State (Sup.) 39 N. E. 936.

[e] (Pa. 1826) Where a juror had heard the testimony in a former trial, and had made up his mind, it is a good cause of challenge, though he professes to be open to new convictions.—Irvine v. Kean, 14 Serg. & R. 292.

[f] (Tex. 1886) A juror in a criminal case stated on his voir dire that he "had heard a portion of the evidence on the habeas corpus trial, and had then formed an opinion in reference to the guilt or innocence of defendant, but that this opinion, so formed, would not now influence his verdict, and that he could, notwithstanding such former opinion, render an impartial verdict according to the law and the evidence." *Held*, that the juror was not rendered incompetent by Code Cr. Proc. art. 636, subd. 13, which provides that a juror in a criminal case may be challenged for cause on the ground "that, from hearsay or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as will influence him in his action in finding a verdict."—Johnson v. State, 21 Tex. App. 368, 17 S. W. 252.

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[g] (Va. 1834) Persons called to serve as jurors in a criminal case, when examined on their voir dire, said that they had heard part of the evidence on a former investigation, and formed some opinion thereon, yet the opinion so formed would in nowise influence their minds as jurors, but that they could act upon the case impartially. *Held*, that such persons were good and impartial jurors.—Hendrick v. Commonwealth, 5 Leigh, 707.

[h] (Va. 1839) On a trial for murder, a juror stated on his voir dire that he had made up no decided opinion; that he had heard a part of the evidence of one witness and formed an impression, and, if the balance of the testimony should run in that way, that impression would be confirmed; that, as far as the evidence went, he had a decided opinion, if the rest should not run against it; but that he had no prejudice, had not expressed any opinion, and was prepared to decide the case according to the evidence which might be given in, uninfluenced by the portion of evidence he had heard. *Held*, that the juror was competent.—In re Moran, 9 Leigh, 651.

[i] (Va. 1843) On a murder trial, the fact that the jurors have heard and read evidence in regard to the defendant's guilt and gave their opinions thereon will not render them incompetent, where they state on their voir dire that they would try him according to the evidence, free from any leaning or bias, and decide the case as impartially as if they had previously heard nothing of it.—McCune v. Commonwealth, 2 Rob. 771.

[j] (Va. 1889) Where a juryman states on his examination that he had read the evidence on the trial of the companion of accused when the murder was committed, and had formed an opinion, but not a positive one, and that he could try the case fairly on the evidence, he is competent.—Williams v. Commonwealth, 85 Va. 607, 8 S. E. 470.

§ 468. Opinions founded on conversations with parties, witnesses, or persons claiming to know the facts.

Opinions requiring evidence to remove, see ante, § 465 [f, i, o, r].

—— *which will yield to evidence, see* ante, § 466 [c, e].

Qualified opinion, see ante, § 464 [e].

Source of opinion in general, see ante, § 448.

[a] If the opinion of a juror is based on conversations with witnesses of the crime, he is incompetent, although he may feel confident of being able to render an impartial verdict.

—(Ind. 1885) Dugle v. State, 100 Ind. 259;

(Tenn. 1830) Rice v. State, 9 Tenn. (1 Yerg.) 432.

CONTRA, see

(La. 1893) State v. Covington, 45 La. Ann. 979, 13 South. 266.

[b] (U. S. 1877) A juror in a civil action, who, on his voir dire, expresses an entire willingness, as well as ability, to accept the facts as they shall be developed by the evidence, and return a verdict in accordance with them, is not rendered incompetent by having previously conversed with a person about the case, and received an impression in relation to the facts.—Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. Ed. 648.

[c] (Cal. 1893) Pen. Code, § 1076, provides that no person shall be disqualified as a juror because he has formed an opinion on the cause, founded on public rumor or common notoriety, if it appear to the court on his oath that he will nevertheless act impartially. *Held*, that where one's examination simply showed that he had an opinion as to the merits of the case which was based on what parties directly interested had told him regarding the facts, there was nothing to justify the conclusion that his opinion was formed from public rumor or common notoriety, and he was disqualified, though he stated under oath that he could and would give defendant a fair and impartial trial.—People v. Wells, 100 Cal. 227, 34 Pac. 718.

[d] (La. 1815) A juror who declares "he was consulted as a friend in the transaction by defendant's agent, before the suit, and had given his opinion that defendant was entitled to the property in dispute, but, as he had only heard one side of the question, his mind was open to conviction," is incompetent.—Laverty v. Gray, 3 Mart. (O. S.) 617.

[e] (La. 1882) A juror, on his voir dire, the indictment being for murder, stated that his opinion could be removed by testimony, and that his verdict would be rendered according to law and evidence. The judge rejected him, he having talked with one of the principal witnesses for the prosecution, and having assisted in burying the deceased. The judge thought it evident that he was familiar with the facts of the case, and that he wanted to get on the jury. *Held*, that he was properly rejected.—State v. Barnes, 34 La. Ann. 395.

[f] (Mich. 1896) A juror called in the trial of a defendant for murder by poison, who had talked with a number of persons about the case, and, among others, with a member of the coroner's jury, who stated to him that poison was found in the stomach of the woman charged to have been murdered, which statement he believed, and who, from such conversations, had formed an opinion which it would require evidence to remove, was disqualified to act as a juror, although he believed himself able to render an impartial verdict.—People v. Thacker, 108 Mich. 652, 66 N. W. 562.

[g] (Mo. 1836) On the trial of an indictment, one of the venire stated on the voir dire that "he had formed an opinion from having conversed with the defendant, but that he felt himself then in a state of mind to do justice between the parties." *Held*, that it was not ground for a new trial that the court ordered him to stand aside.—Stoner v. State, 4 Mo. 368.

[h] (Ohio, 1889) Rev. St. § 7278, provides that, "if a juror has formed * * * an opinion, * * * the court shall thereupon proceed to examine such juror on oath as to the grounds of such opinion; and, if such juror shall say that he believes he can render an impartial verdict notwithstanding such opinions, and if the court is satisfied that such juror will render an impartial verdict on the evidence, may admit him as competent to serve in such case as a juror." *Held*, that a juror who states on his examination that he has formed an opinion on a matter affecting the guilt of the defendant from having heard the circumstances of the crime related by one who claimed to know them, may nevertheless be competent to sit as a juror if he says on oath that he believes he can render an impartial verdict in the case, and the court is satisfied he can do so.—Goins v. State, 46 Ohio St. 457, 21 N. E. 476.

[i] (Tex. 1895) One who has formed an opinion of the guilt of accused, but states that he can try the case uninfluenced by his opinion, is not incompetent as a juror because he has talked with a witness; it not appearing that he got his opinion from talking with the witness.—Wade v. State, 35 Tex. Cr. R. 170, 32 S. W. 772, 60 Am. St. Rep. 31.

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[j] (Va. 1827) A juror who had heard the testimony of a witness in the cause and then formed an opinion upon it, and was doubtful whether he had expressed the opinion or not, though he thought it most probable that he had expressed it, but who declared that, at that time, he had no prejudice against the prisoner or his cause, and could, as he believed, give the prisoner as fair a trial as if he had not heard anything on the subject, was *held* an impartial juror, and the challenge against him for cause was overruled.—Pollard v. Commonwealth, 5 Rand. 659.

§ 469. Opinions or impressions as to particular matters or issues.

From newspaper reports, see post, § 475 [p].
Requiring evidence to remove, see ante, § 465 [d].

[a] (Ala. 1879) A person is not disqualified as a juror who, on being challenged, stated that from what he had heard he believed the defendant guilty, but did not know that this would bias his judgment; that he had an opinion, formed from rumor, as to the guilt of the prisoner; that he could not help believing what he had heard; that from conversations with the best citizens, in whom he had confidence, he had formed the opinion that the prisoner had killed some one, but none as to whether it was justifiable or not, and that it would require some evidence to remove said opinion, which would not bias his verdict.—Bales v. State, 63 Ala. 30.

[b] (Ga. 1854) When a juror admits that from the general bad character of the prisoner he had an unfavorable opinion of him, but asserts that if the evidence had allowed it he would have acquitted him, this will not suffice to set aside the verdict, when the record gives strong evidence of the prisoner's guilt.—Anderson v. State, 14 Ga. 709.

[c] (Ill. 1893) Where jurors show by their answers that they have fixed opinions as to the guilt of the defendant, and as to most of the facts and circumstances necessarily relied upon for a conviction, in regard to many of which the evidence is conflicting, and that they have a prejudice against a secret society to which the defendant belongs, and which is not shown to be a criminal organization, though it is claimed by the prosecution that the crime of which the defendant is accused was committed by order of such society, they are not competent jurors under Rev. St. c. 78, § 14, even though, after a long cross-examination by the judge, in which the duty of jurors to lay aside their opinions and prejudices is dwelt upon at length, they say that they could render a fair and impartial verdict.—Coughlin v. People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57.

[d] (Ind. 1855) A juror who was called and challenged in a civil suit answered on his voir dire "that he had not formed nor expressed an opinion in the case, nor had he formed or expressed any opinion as to which of the parties should succeed, that his mind was free to decide the case according to the evidence, though he had formed an opinion as to some of the matters in controversy." *Held* that, in the absence of all further evidence, the challenge should have been overruled, and the juror sworn.—Morgan v. Stevenson, 6 Ind. 169.

[e] (Iowa, 1875) A juror who stated upon his examination that he had not formed an opinion as to the guilt or innocence of the accused, but had in regard to some of the transactions in the case, stating further that he could render an impartial verdict upon the evidence, was *held* to be competent to serve.—State v. Bryan, 40 Iowa, 379.

[f] (Iowa, 1895) Code 1873, § 4405, provides that a juror who has formed such an opinion as to the guilt of the prisoner as would prevent him from rendering a verdict on the evidence shall be subject to challenge. *Held*, that a conviction of murder will not be disturbed because a juror had formed the opinion that deceased was "murdered," where he stated that he knew of no reason why he could not render a verdict according to the evidence, and the facts on which his opinion was formed were not disputed.—State v. Weems, 96 Iowa, 426, 65 N. W. 387.

[g] (Mich. 1878) A juror in a murder case who testifies that he has a positive opinion as to whether deceased had been murdered, but has formed none as to the guilt of the accused, and has no bias and believes that he can render an impartial verdict according to the evidence, is not disqualified.—Cargen v. People, 39 Mich. 549.

§ 470. Opinions derived from prior service as juror.

[a] (Ind. 1872) After part of plaintiff's evidence had been introduced, it was found that the title of the cause had been wrongly stated, and the court, on motion of the plaintiff, discharged the jury, the defendants objecting. The same jurors were then impaneled to try the cause, and defendants challenged the array on the ground that the jurors, having heard the evidence in part, were incompetent; but the court overruled this objection. The defendants then asked one of the jurors whether or not he had formed an opinion as to the merits of the case, and he answered "No." They then asked him if he had, from the evidence which he had heard, formed an opinion as to any of the facts set up in the complaint, to which he again answered "No." On these answers, and on the fact that part of the evidence had been heard by the juror, defendants challenged the juror, but the court overruled the challenge. *Held*, that the challenge to the array of the new jury was properly overruled.—Leas v. Patterson, 38 Ind. 465.

[b] (Ind. 1892) Rev. St. § 1793, provides that if a person called as a juror state that he has formed or expressed an opinion, and on examination the opinion does not appear to have been founded on conversation with witnesses, or from reading reports of their testimony, or hearing them testify, and the juror states on oath that he can render an impartial verdict, the court, in its discretion, may permit him to serve. On a trial for selling intoxicating liquor to be drunk on the premises, two of the jurors had served the day before on a criminal action against the same defendant, which involved the question as to how defendant used his premises in the matter of the sale and drinking of liquors. The jurors stated on their voir dire that they had formed and expressed an opinion, as the result of that trial, as to how the premises were kept; that such opinion would yield to evidence; that they could try the case as impartially on the evidence and law as if they had not heard the other; that it would not require any more evidence favorable to defendant to enable them to render a verdict in his favor in the present case than if they had not heard the evidence in the former case. *Held*, that the trial court did not abuse its discretion in allowing the jurors to serve.—Howell v. State, 4 Ind. App. 148, 30 N. E. 714.

[c] (S. C. 1891) A juror who states that he served on a jury which convicted one of defendant's confederates in the crime, that in that case he discredited some of the witnesses, and that if they were again examined in the present case he would do likewise, is properly rejected, as not being indifferent between

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the parties, though he also states that he can find a verdict according to the law and to the evidence.—State v. James, 34 S. C. 49, 12 S. E. 657.

§ 471. Opinions founded on rumor.

Doubt as to effect of opinion, see post, § 479.

[a] A juror who has formed an opinion from hearsay, but can try the cause impartially, and uninfluenced by his previously formed impressions, is competent.

—(Fla. 1880) Montague v. State, 17 Fla. 662;
(Ga. 1854) Anderson v. State, 14 Ga. 709;
(Miss. 1831) State v. Johnson, 1 Miss. (Walk.) 392;
(Mont. 1892) State v. Sheerin, 12 Mont. 539, 31 Pac. 543, 33 Am. St. Rep. 600;
(N. C. 1886) State v. Green, 95 N. C. 611;
(Or. 1892) Kumli v. Southern Pac. Co., 21 Or. 505, 28 Pac. 637;
(Tex. 1895) Adams v. State, 35 Tex. Cr. R. 285, 33 S. W. 354; (1896) Long Mfg. Co. v. Gray, 13 Tex. Civ. App. 172, 35 S. W. 32; (1896) Trotter v. State, 37 Tex. Cr. R. 468, 36 S. W. 278;
(Wash. 1891) Rose v. State, 2 Wash. St. 310, 26 Pac. 264.

[b] An impression founded on general report does not disqualify a juror, where he states that he is not sensible of any bias that might prejudice defendant.

—(Del. 1854) State v. Anderson, 5 Har. 493;
(Kan. 1895) State v. Treadwell, 54 Kan. 513, 38 Pac. 813;
(S. C. 1891) State v. James, 34 S. C. 49, 12 S. E. 657; Id., 34 S. C. 579, 13 S. E. 325.

[c] (Fla. 1894) A juror who states that he had heard what purported to be a detailed statement of the facts of the homicide, and had formed an opinion, but would render a verdict according to the evidence in the case, is competent.—Olive v. State, 34 Fla. 203, 15 South. 925.

[d] (Kan. 1882) One is not competent to serve as a juror on a criminal case, if he has formed and entertains an opinion as to the correctness of which he has no doubt; although he admits that it is founded on rumor, that he has no bias or prejudice against the prisoner, that he should be governed by the evidence, and believes that he could decide impartially.—State v. Miller, 29 Kan. 43.

[e] (La. 1889) On an indictment for murder, a "fixed" opinion as to defendant's guilt will not disqualify a juror where it is the result of rumor, and not of bias or prejudice against the defendant, and he states that he would be governed solely by the evidence in making up his verdict, and that he can render a fair and impartial verdict on the evidence.—State v. Dent, 41 La. Ann. 1082, 7 South. 694.

[f] (Mass. 1858) A juror who states that he has heard of the case upon which he is summoned to sit, but has not heard enough to form any opinion, and is not sensible of any bias or prejudice, is competent to sit on the jury.—Commonwealth v. Thrasher, 77 Mass. (11 Gray) 57.

[g] (Miss. 1870) A juror is not disqualified by the fact of his having formed an impression of defendant's guilt entirely from outside sources, and not from having heard the testimony, where he states that it would not require testimony to remove it, and that such impression would not interfere with the free exercise of his judgment.—White v. State, 52 Miss. 216.

[h] (N. C. 1846) On a challenge for cause, the juror stated "that he had formed and expressed an opinion adverse to the prisoner, on rumors which he had heard, but that he had not heard a full statement of the case, and that his mind was not so made up as to prevent the doing of impartial justice to the prisoner." The court found the juror indifferent, and the supreme court refused to revise its decision.—State v. Ellington, 29 N. C. 61.

[i] (S. D. 1892) A juror swore that he had formed an opinion, but that it was based on conversations had with persons who knew nothing about any of the facts in the case; that the conversations were general current talk; and that, notwithstanding his opinion, he could sit as a juror in the case, unprejudiced and unbiased, and render a verdict according to law and evidence. *Held* the trial court committed no error in permitting the juror to sit.—Haugen v. Chicago, M. & St. P. Ry. Co., 3 S. D. 394, 53 N. W. 769.

[j] (Va. 1830) A person called as a juror said on his voir dire "that he had expressed an opinion on the circumstances, as he had heard them narrated in the country, but had not heard any of the evidence given on the examination of the prisoner, or conversed with any of the witnesses or parties, and that he did not think his opinion, so formed, would have any influence on his mind in trying the case." The juror was then challenged for cause. *Held*, that he was indifferent, and that the challenge should be disallowed.—Brown v. Commonwealth, 2 Leigh, 769.

[k] (Va. 1891) Objection to the competency of a juror is properly overruled where he states that he is impartial, and can give the prisoner a fair trial, and that he has no opinion about the case, though he had previously stated that at the time of its commission he heard some talk about it, and might then have had some opinion about it, but did not remember whether he had or not.—Lyles v. Commonwealth, 88 Va. 396, 13 S. E. 802.

§ 472. —— Qualified or hypothetical opinion.

See post, § 476.

Requiring evidence to remove, see post, § 473 [c].

[a] (Ala. 1831) In a capital case, it is not ground of peremptory challenge of a juror that he has formed and expressed an opinion on common report of the guilt of the prisoner, if the juror believes that such opinion would have no influence in the formation of his verdict should the evidence on the trial be different from the report of the facts.—State v. Williams, 3 Stew. 454.

[b] (Iowa, 1885) It cannot be said that a juror has formed an unqualified opinion who states that the opinion which he has formed is based upon hearsay, and not on statements made by any one claiming to have personal knowledge, and that he still thinks that he can render a true verdict.—State v. Ormiston, 66 Iowa, 143, 23 N. W. 370.

[c] (Neb. 1895) Under Cr. Code, § 468, providing that a juror who has formed an opinion as to the guilt or innocence of the accused from reading newspaper statements, or from rumor or hearsay, who shall say on oath that he can render an impartial verdict, is competent to serve, in the court's discretion, where a juror, who had formed a hypothetical opinion, founded solely on rumor and reading of newspapers, stated on oath that his opinion would not interfere with his rendering an impartial verdict, he was not disqualified.—Basye v. State, 45 Neb. 261, 63 N. W. 811.

[d] (Va. 1839) On a trial for murder, a juror examined on his voir dire stated that he was not present at the preliminary examination of

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the prisoner, and had heard no statement of the evidence from any witness or any person who was present; that he had heard the case spoken of in the town, and rumors in regard to its circumstances upon which he had expressed no opinion, though he believed those rumors to be true, and, if they should turn out upon the trial to be true, he had a decided opinion in regard to the case; but he felt no prejudice, and was satisfied he should be able to decide the case upon the evidence which might be given in, uninfluenced by the rumors he had heard; that the opinion he had formed was that, if the prisoner had stabbed the deceased under the circumstances which he had heard, he ought to be punished. *Held*, that the juror was competent.—Moran v. Commonwealth, 9 Leigh, 651.

§ 473. —— Opinions requiring evidence to remove.

[a] An opinion formed from rumor, but existing on the mind at the time, and to which he will stick unless the evidence turns out different from what rumor had reported it to be, is not good cause of challenge by the prisoner, where the juror says he has no prejudice or partiality for or against the prisoner, and he believes he can give him a fair and impartial trial according to the evidence.

—(Ark. 1881) Casey v. State, 37 Ark. 67;
(Fla. 1860) O'Connor v. State, 9 Fla. 215;
(Ind. 1864) Fahnestock v. State, 23 Ind. 231;
(Iowa, 1873) State v. Lawrence, 38 Iowa, 51;
(Mo. 1887) State v. Bryant, 93 Mo. 273, 6 S. W. 102;
(N. C. 1864) State v. Cockman, 60 N. C. 484;
(Tex. 1893) Reed v. State, 32 Tex. Cr. R. 25, 22 S. W. 22;
(Va. 1851) In re Clore, 8 Grat. 606.

CONTRA, see
(Cal. 1857) People v. Gehr, 8 Cal. 359;
(Kan. 1891) State v. Beatty, 45 Kan. 492, 25 Pac. 899;
(Neb. 1881) Olive v. State, 11 Neb. 1, 7 N. W. 444; (1886) Marion v. Same, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; (1887) Cowan v. Same, 22 Neb. 519, 35 N. W. 405; (1889) Thurman v. Same, 27 Neb. 628, 43 N. W. 404; (1890) Miller v Same, 29 Neb. 437, 45 N. W. 451; (1891) Owens v. Same, 32 Neb. 167, 49 N. W. 226.

[b] (Ark. 1886) Talesmen who testify on their voir dire that they can and will try a cause impartially on the evidence, are competent, though they also testify that they have impressions as to the case which it will require evidence to remove, where such impressions are founded on rumor only.—Sneed v. State, 47 Ark. 180, 1 S. W. 68.

[c] (Cal. 1874) A person is not disqualified as a juror in a cause, because he has formed an opinion from what he has heard concerning the guilt or innocence of the accused which it would require evidence to remove, if the opinion is not an unqualified one, and the juror is willing to give the accused a fair trial.—People v. Brown, 48 Cal. 253.

[d] (La. 1893) One called as a juror is competent who declares that he had formed an opinion from rumor, which would take strong evidence to remove, but that he had no bias, and could render an impartial verdict, according to the law and the evidence, without being in any way influenced by what he had heard or the opinion he had formed.—State v. Frier, 45 La. Ann. 1434, 14 South. 296.

[e] (Miss. 1895) Under Code, § 2355, declaring that any person, otherwise competent, who makes oath that he is impartial, shall be competent, as a juror, though he has formed an opinion as to the guilt or innocence of the accused, if he is not prejudiced, a juror who stated that he lived in the immediate neighborhood where the crime was committed, had heard it discussed, and had formed an opinion as to defendant's guilt or innocence, which was of such a fixed character that it would require evidence to remove it, but that he thought he could try the case fairly according to the evidence, was a competent juror.—Green v. State, 72 Miss. 522, 17 South. 381.

[f] (Mo. 1879) A juror is not disqualified, under Wag. St. p. 1103, § 13, allowing a juror to be sworn, although he has an opinion founded on rumor, etc., where in a trial for murder he states on the voir dire that he has formed and expressed an opinion which would require evidence to remove, but that he has not talked with any witness in the case, and thinks he could decide according to the law and the evidence.—State v. Core, 70 Mo. 491.

[g] (Mo. 1890) A juror who has no fixed and settled opinion, and can try the cause without bias, is not disqualified by an impression from rumor only, though it would take evidence to remove it.—State v. Elkins, 101 Mo. 344, 14 S. W. 116.

[h] (Tex. 1881) Where a juror stated on his voir dire that he had formed an indefinite opinion which it would require evidence to remove, but stated that he never heard the facts stated by any one pretending to know them, and that he had no present conviction, and could render a verdict on the evidence, it does not render him incompetent.—Post v. State, 10 Tex. App. 579.

[i] (Tex. 1886) A juror is qualified, although he has formed an opinion which it will require evidence to remove, if he states that the opinion was formed upon hearsay, which he values little, and that he can render an impartial verdict.—Steagald v. State, 22 Tex. App. 464, 3 S. W. 771.

§ 474. —— Opinions which will yield to evidence.

[a] Where a juror said that he had formed and expressed an opinion from rumor only, but that his mind was free to act upon the testimony, he was *held* competent.

—(Ind. 1845) Van Vacter v. McKillip, 7 Blackf. 578;
(Miss. 1841) King v. State, 6 Miss. (5 How.) 730;
(Tenn. 1883) Conatser v. State, 80 Tenn. (12 Lea) 436;
(Utah, 1881) People v. O'Loughlin, 3 Utah, 133, 1 Pac. 653.

CONTRA, see
(Miss. 1856) Cotton v. State, 31 Miss. 504.

[b] (Cal. 1851) Having formed and expressed an opinion from report does not disqualify a person to sit as a juror in a criminal case, if he declares he can sit on the jury without bias, that evidence can change his opinion, and that he will be governed by the evidence. Under the Criminal Code a challenge for implied bias can be taken only where the juror has formed and expressed an unqualified opinion or belief that the prisoner is guilty of the offense charged.—People v. McCauley, 1 Cal. 379.

[c] (N. C. 1893) When a juror was challenged, and it appears that his opinion, adverse to the accused, was based on rumors only, and he testified that, after hearing the evidence, he could render a fair and impartial verdict, the court's finding that he was impartial will not be disturbed.—State v. De Graff, 113 N. C. 688, 18 S. E. 507.

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§ 475. Opinions founded on newspaper articles.

See ante, § 467.

Doubt as to effect of opinion, see post, § 479.

[a] An opinion as to the guilt of a defendant in a criminal case, based on newspaper statements, does not disqualify one from acting as a juror, where he testifies that the opinion will not prevent him from acting impartially.

—(Ark. 1883) Dolan v. State, 40 Ark. 454;
(Cal. 1895) People v. Collins, 105 Cal. 504, 39 Pac. 16;
(D. C. 1893) United States v. Barber, 21 D. C. 456;
(Fla. 1880) Montague v. State, 17 Fla. 662;
(Iowa, 1878) State v. Bruce, 48 Iowa, 530, 30 Am. Rep. 403; (1896) Same v. Yetzer, 97 Iowa, 423, 66 N. W. 737;
(Md. 1879) Waters v. State, 51 Md. 430;
(Mo. 1887) State v. Brooks, 92 Mo. 542, 5 S. W. 257; (1894) Same v. Duffy, 124 Mo. 1, 27 S. W. 358;
(Ohio, 1887) Doll v. State, 45 Ohio St. 445, 15 N. E. 293;
(Pa. 1875) Myers v. Commonwealth, 79 Pa. (29 P. F. Smith) 308; (1888) Hall v. Same, 12 Atl. 163; (1889) Rizzolo v. Same, 126 Pa. 54, 17 Atl. 520, 24 Wkly. Notes Cas. 13;
(Wash. 1891) Rose v. State, 2 Wash. St. 310, 26 Pac. 264.

[b] A veniremen who has formed an opinion as to the guilt or innocence of an accused from reading reports of the testimony of witnesses is incompetent to sit in the case, though he swears that, notwithstanding such opinion, he is able to render an impartial verdict on the law and the evidence.

—(Neb. 1876) Carroll v. State, 5 Neb. 31; Smith v. Same, Id. 181;
(N. Y. 1888) People v. McQuade, 48 Hun, 620, 1 N. Y. Supp. 155.

CONTRA, see
(La. 1885) State v. Ford, 37 La. Ann. 443.

[c] Where an opinion formed or expressed by a juror as to the guilt or innocence of the accused is formed from newspaper accounts only, and not from the testimony of witnesses, and the juror states on his voir dire that he can render an impartial verdict upon the evidence, and the court upon such statement accepts him as a juror, he is not incompetent, under a statute providing that in such case, if the juror makes such statement, and the court is satisfied that he will render an impartial verdict on the evidence, he may be accepted as a juror.

—(Mo. 1848) Baldwin v. State, 12 Mo. 223;
(Mont. 1889) Territory v. Bryson, 9 Mont. 32, 22 Pac. 147;
(Ohio, 1891) Blair v. State, 5 Ohio Cir. Ct. R. 496.

[d] A juror testifying on voir dire examination that, from reading newspaper reports of the case, he had formed and expressed some opinion, but that his opinion was not fixed, and would not influence his verdict, is competent.

CONTRA, see
—(Or. 1895) State v. Kelly, 28 Or. 225, 42 Pac. 217, 52 Am. St. Rep. 777.
(N. Y. 1830) People v. Mather, 4 Wend. 229, 21 Am. Dec. 122.

[e] (U. S. 1887) Evidence, or what purports to be evidence, in a criminal case, printed in a newspaper, is "a statement in a public journal," within the meaning of the act of Utah declaring that no person shall be disqualified as a juror by reason of his having formed or expressed an opinion upon the matter or cause to be submitted to him, founded upon public rumor, statements in public journals, or common notoriety, provided it appear to the court, upon his declaration under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him.—Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708, affirming People v. Hopt (1886) 4 Utah, 247, 9 Pac. 407.

[f] (Ala. 1888) A juror, in response to the question whether he had a fixed opinion which would bias his verdict, replied, he knew nothing but what he read in the newspapers; that he had an opinion to a certain extent, and "I am afraid I would go into the jury with a biased opinion, but after being sworn as a juror, I could lay that opinion aside, and find a verdict upon the evidence alone, without reference to any opinion I now have." *Held*, that there was no error in holding the juror competent.—Long v. State, 86 Ala. 36, 5 South. 443.

[g] (Mo. 1896) On a trial for murder, a juror who states on his voir dire that he is in sympathy with defendant, and cannot render a fair and impartial verdict without being influenced by what he has read in newspapers and the opinion he has formed, is incompetent.—State v. Punshon, 133 Mo. 44, 34 S. W. 25.

[h] (Mont. 1892) A juror who does not know defendant, and asserts his impartiality, although he has formed and expressed an opinion on the case from reading the newspapers and from rumor, is competent, under Comp. St. div. 3, § 287, subd. 11, providing that the court may admit a juror as competent, although he has formed or expressed an opinion, if it be founded upon reading newspapers, or on rumor or hearsay, and the juror state on oath that, notwithstanding such opinion, he can render an impartial verdict.—State v. Sheerin, 12 Mont. 539, 31 Pac. 543.

[i] (Neb. 1891) Comp. St. 1889, p. 951, § 6691, which provides that the reading of newspaper statements shall not disqualify a juror in a criminal case, if he states on oath that he can render an impartial verdict according to the evidence, also furnishes the correct rule as to how far the reading of newspaper statements disqualifies jurors in civil cases.—Scott v. Chope, 33 Neb. 41, 49 N. W. 940.

[j] (N. Y. 1878) One who has formed an opinion or impression from reading a report, whether partial or complete, of the testimony against the prisoner on a former trial, however strong his belief and purpose that he will decide the case on the evidence before him, and give an impartial verdict, cannot be readily received as an indifferent and uncommitted juror.—Greenfield v. People, 74 N. Y. 277, 6 Abb. N. C. 1, reversing (1878) 13 Hun, 242.

[k] (N. Y. 1879) On trial of an Italian for murder, a juror, on being challenged, swore that he had read a newspaper account, whence he had formed an opinion of the guilt or innocence, etc.; that, judging from the Italians we have here, he did not think much of them; that he thought he could give full effect to the evidence as though he had no opinion. *Held*, that the challenge was properly overruled.—Balbo v. People, 19 Hun, 424, affirmed (1880) 80 N. Y. 484.

[l] (N. Y. 1886) Where a juror has read some notice of a crime in the newspapers, but has not formed impressions about it, or a firm opinion, and such opinion or impression as he has he could lay aside, and sit as a juror in this case, and render an impartial verdict according to the evidence, and the prisoner challenges for cause, it is for the court to determine whether he entertains such opinion or impression as would influence his verdict; and when it is apparent that he has no prejudice against the

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prisoner, and his mind is free to receive the evidence, and decide upon it fairly and impartially, he is qualified to sit.—People v. Otto, 101 N. Y. 690, 5 N. E. 788, affirming (1885) 38 Hun, 97.

[m] (Ohio, 1873) Under Act Feb. 10, 1872, providing that where a person called as a juror in a criminal case is challenged on the ground that he has formed or expressed an opinion as to the guilt or innocence of the accused, and if it shall appear that such opinion was formed upon reading what purported to be a report of the testimony of witnesses of the transaction, he is incompetent to serve as a juror, an opinion formed from reading newspaper reports, or upon rumor or hearsay, and not upon conversation with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, does not disqualify a juror where he states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, and the court is satisfied that the juror is impartial, and will render an impartial verdict.—Frazier v. State, 23 Ohio St. 551.

[n] (Or. 1892) On his voir dire a juror testified that he had an opinion on the matter in controversy which he could disregard, and try the case on the law and the evidence. His opinion was a loose, hesitating one, formed from reading the newspapers and from hearing persons talk about the matter. *Held*, that the challenge to such juror was properly overruled; Hill's Code, § 187, providing that on the trial of a challenge for actual bias, where the juror has formed an opinion on the merits of the cause, "such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied from all the circumstances that the juror cannot disregard such opinion, and try the issue impartially."—Kumli v. Southern Pac. Co., 21 Or. 505, 28 Pac. 637.

[o] (Or. 1893) Where a juror, on his voir dire, testified that he had no opinion that would affect his judgment after hearing all the testimony, he is not disqualified, under Hill's Code, § 185, subd. 2, as having an actual bias prejudicial to the substantial rights of the party challenging, though he had read a newspaper report of a former trial.—State v. Ingram, 23 Or. 434, 31 Pac. 1049.

[p] (Pa. 1889) On trial of an indictment for murder, a juror is not disqualified on account of an opinion formed from reading newspaper reports of the trial of one convicted as an accomplice of defendant, where such reports did not give all the testimony, and where the juror swears that he can and will render a true verdict on the evidence alone.—Taylor v. Commonwealth, 129 Pa. 534, 18 Atl. 558.

[q] (S. C. 1884) A juror, on his voir dire, stated that he had no bias for, nor prejudice against, defendant; that he stood entirely indifferent, and would be governed by the law and the testimony, and could and would give him a fair trial. *Held*, that such juror was competent, though he had read newspaper accounts of the alleged crime, and said that any man who commits such a crime should be hanged.—State v. Coleman, 20 S. C. 441.

[r] (Va. 1850) Where a juror, in his examination on the voir dire, testified that he had read the evidence in the newspapers and was satisfied of the guilt of the accused, that he was able to try him impartially, but according to the law and evidence, and to discard his previous opinion, he was permitted to sit on the trial.—Smith v. Commonwealth, 7 Grat. 593.

§ 476. —— Qualified or hypothetical opinion.

[a] (Conn. 1846) While the jury were being impaneled for the trial of an indictment for murder, A. was called as a talesman, and, being inquired of whether he had formed any opinion as to the prisoner's guilt, said that soon after the prisoner's arrest he read certain newspaper accounts of what purported to be his confessions; and, upon reading them, he was of opinion that, if those accounts were true, a horrid murder had been committed; but he had formed no opinion as to the truth or falsity of them, and remarked to his family, while reading the accounts, that the case, on the trial, would probably turn out to be a very different affair. He added that he had not any settled opinion upon the subject, and felt that he could render an impartial verdict. *Held*, that A. was not disqualified by bias to sit as a juror in the cause.—State v. Potter, 18 Conn. 166.

[b] (Conn. 1880) Where a juror had formed an indefinite opinion of the guilt of the accused from reading an account of it in the newspaper, and the opinion was dependent upon the correctness of the account, and he stated that it would not prevent his trying the case impartially, he was not disqualified.—State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

[c] (Ill. 1880) A juror is competent who states that from newspaper accounts read, and conversations heard by him, he has formed an opinion which he would retain, if the facts as he has heard them should be established, and that, although he thinks it would take some evidence to remove such opinion, he would be governed by the evidence, and can give the accused a fair and impartial trial, according to the law and the evidence.—Wilson v. People, 94 Ill. 299.

[d] (Ind. 1855) Certain jurors included in the venire at a trial for murder, on examination by the court, stated that they had heard considerable talk about the case and had read the newspaper accounts of it; that they were rather inclined to think, if what they had read was correct, the prisoner was guilty; that they had never talked with any of the witnesses, nor formed, nor expressed, an opinion, had no ill-will against the prisoner, and could give him a fair trial, according to the law and evidence. They were *held* competent to try the issue.—Rice v. State, 7 Ind. 332.

[e] (Md. 1879) A juror who, on his voir dire, in a murder trial, stated that he had formed and expressed an opinion as to the guilt or innocence of the defendant from reading the newspapers, and from rumor; that he did not know whether such publication and rumor were true or false; that he resided more than 30 miles from the place of the commission of the crime; that he had not conversed with any witness in the case, nor with any person who claimed to have knowledge of the facts of the case, nor with any one who professed to detail to him any portion of the testimony in the former trial; that he had no prejudice or bias for or against the prisoner, and felt confident that he could give him a fair and impartial trial, according to the evidence produced upon the stand by the witnesses,—was a competent juror.—Waters v. State, 51 Md. 430.

[f] (Mo. 1889) A juror, in a prosecution for rape, stated on his voir dire that he did not know the defendant or the prosecutrix, but remembered reading of the case when it occurred, and thought it a hard case, and could not say that he had no opinion, but that his opinion would not prejudice him as a juror. On cross-examination he said that the newspaper report produced an opinion in his mind, which could only be removed by evidence, and that the defendant would have to prove his innocence. On re-examination he said that if the newspaper report were shown to be true he would retain his opinion, but that if the facts were shown to be different he would arrive at a different con-

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clusion. If sworn as a juror, he would be governed only by the evidence, and would pay no attention to what he had read; that his attention would be drawn from the newspaper account; and that he could give defendant a fair trial. *Held*, construing his whole examination together, he was qualified. It being a question of fact, all doubts should be resolved favorably to the finding of the trial court, and as it did not clearly appear that the juror had such an opinion as to bias his mind, the decision favorable to his competency should be sustained.—State v. Cunningham, 100 Mo. 382, 12 S. W. 376.

[g] (N. Y. 1880) A person is not disqualified as a juror, who, on being challenged, stated that he had formed a decided opinion as to the prisoner's guilt, which it would require evidence to remove, and on his examination by the district attorney testified that his opinion was formed from reading newspaper accounts,—among other things, a statement purporting to be a confession by defendant; that he accepted these accounts as true, because he had read nothing to the contrary; that he believed statements in the newspapers which were not unreasonable, until they were contradicted; that in that sense he had an opinion of defendant's guilt; that his opinion was a contingent one, based upon the supposed truth of the newspaper statements; and that he believed he could decide the case according to the evidence, uninfluenced by what he had read.—Cox v. People, 80 N. Y. 500, affirming (1879) 19 Hun, 430.

[h] (N. Y. 1881) A juror, in a capital case, is not disqualified for having formed an opinion, hypothetical and contingent upon the truth of newspaper statements, if he testifies that the opinion thus formed would not influence his judgment upon the testimony, and that he could render an impartial verdict upon the evidence.—Abbott v. People, 86 N. Y. 460.

[i] (Va. 1879) In a trial upon an indictment for murder, a juror, in his examination on the voir dire, stated that he had read newspaper accounts, and had made up and expressed an opinion, and he did not think he could do the prisoner justice. Upon a question put to him by the court, he said that, if the evidence was different from what he had heard, his opinion would be changed, and that he could come to the trial unprejudiced. *Held*, that he was incompetent.—Wright v. Commonwealth, 32 Grat. 941.

§ 477. —. Opinions requiring evidence to remove.

Qualified or hypothetical opinion, see ante, § 476.

[a] A juror who believes that he can render an impartial verdict according to the evidence is not disqualified by having read newspaper items from which he has formed an opinion which would require evidence to remove.

—(Iowa, 1873) State v. Lawrence, 38 Iowa, 51;
(Mich. 1878) Ulrich v. People, 39 Mich. 245;
(Pa. 1891) Commonwealth v. McMillan, 144 Pa. 610, 22 Atl. 1029;
(Tex. 1893) Reed v. State, 32 Tex. Cr. R. 25, 22 S. W. 22.

CONTRA, see
(Kan. 1891) State v. Beatty, 45 Kan. 492, 25 Pac. 899;
(Neb. 1881) Olive v. State, 11 Neb. 1, 7 N. W. 444; (1886) Marion v. Same, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; (1887) Cowan v. Same, 22 Neb. 519, 35 N. W. 405; (1889) Thurman v. Same, 27 Neb. 628, 43 N. W. 404; (1890) Miller v. Same, 29 Neb. 437, 45 N. W. 451; (1891) Owens v. Same, 32 Neb. 167, 49 N. W. 226.

[b] A juror is not incompetent in a murder case from having read in newspapers statements merely amounting to rumors, nor from having formed therefrom opinions requiring evidence to remove, if he is able to do impartial justice.

—(Neb. 1885) Bohanan v. State, 18 Neb. 57, 24 N. W. 390, 53 Am. Rep. 791;
(Tenn. 1885) Spence v. State, 83 Tenn. (15 Lea) 539.

[c] On a trial for murder, one is not disqualified as a juror by the fact that he has read newspaper versions of evidence adduced at a former trial of the case, which he believes would not influence his verdict, although he acknowledges, on his voir dire, that other evidence would be required to change the impression he had received.

—(Mo. 1887) State v. Bryant, 93 Mo. 273, 6 S. W. 102;
(Tex. 1878) Grissom v. State, 4 Tex. App. 374.

[d] (N. Y. 1879) A juror stated that he had formed a decided opinion which would require evidence to remove, and that it would require evidence in the case to prove the prisoner's innocence, and that he would enter the jury box with the assumption that the prisoner was guilty. Upon further examination, he stated that his opinion was based entirely upon what he had read in the newspapers; that the opinion would not prevent him from fairly and impartially rendering a verdict on the evidence in the case, and that he did not have any bias or prejudice against the defendant; that he did not believe all newspaper accounts that he read; and that what he meant to say was that, assuming the truth of what he had read, he had formed and expressed an opinion as to the guilt of the accused. *Held*, that the juror was competent.—Pender v. People, 18 Hun, 560.

[e] (N. Y. 1879) A juror stated on his voir dire that he had formed and expressed an opinion from what he had read of the case; that such opinion was a decided one, but it could be removed by the evidence; that it would require evidence to remove it; that he could render a verdict according to the evidence, without being biased or prejudiced by the opinion he had formed. On a subsequent examination he was asked, "Do you now entertain any such opinion as would influence you at all in rendering your verdict?" to which he answered, "Not at all, by any means." He was then asked whether his opinion would interfere with his passing fairly on the merits of the case if he was sworn as a juror, to which he answered, "Not at all." *Held*, that the juror was competent.—Pender v. People, 18 Hun, 560.

[f] (N. Y. 1881) A juror on examination stated that he had read of the case in the newspapers and had thereby formed an opinion, which it would require evidence to remove; but that such opinion was the general impression which one naturally derives from newspaper statements, and that he believed he could discard it and render an impartial verdict, without being at all influenced or biased by such opinion. *Held*, that he was competent.—People v. Court of Oyer & Terminer, 83 N. Y. 436.

[g] (N. Y. 1886) Where a juror, on being challenged, testifies that he has read the newspaper reports about the occurrence on which the indictment is brought, but has formed no opinion as to the guilt or innocence of the prisoner; that his mind is free from any impression in regard thereto, or the charge contained in the indictment, but he is of the opinion, from what he has read, that such occurrence is the result of culpable negligence on the part of some one, and that it will require evidence

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to remove the impression; or where a juror testifies that, from reading the papers, he has formed an opinion as to the guilt or innocence of the defendant which it will require evidence to remove; but in both cases the juror swears that he can nevertheless go into the jury box, and render an impartial decision upon the evidence, without being influenced by the opinion or impression derived from what he has read,—there is no ground for a challenge, and the court may, in its discretion, allow such jurors to try the issue, as they are competent to do so within the letter of the New Code of Criminal Procedure.—People v. Buddenseick, 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766, affirming (1886) 4 N. Y. Cr. R. 230.

[h] (N. Y. 1891) A juror stated on his voir dire that he had formed an opinion as to the guilt or innocence of defendant from what he had read in the newspapers, which it would require strong evidence to remove; but he subsequently declared that the opinion or impression which he had would not influence the verdict, and that he would decide the question involved upon the evidence uninfluenced by anything else whatever. *Held*, that he was competent to serve.—People v. Wah Lee Mon, 59 Hun, 626, 13 N. Y. Supp. 767.

[i] (N. Y. 1891) The fact that a person offered as a juror on a trial for manslaughter has read newspaper accounts of the coroner's inquest, and formed an opinion from such accounts, not knowing that they were derived from the evidence of witnesses under oath, which opinion he states it would take evidence to remove, does not render him incompetent if it also appears that, on the evidence produced, uninfluenced by any opinion thus acquired, he could determine the issues involved.—People v. McGonegal, 62 Hun, 622, 17 N. Y. Supp. 147.

[j] (Ohio, 1891) On a trial for homicide a juror stated on his voir dire that he did not know defendant, and had formed a prejudice or bias against him from newspaper accounts, which it would require evidence to remove, but that he would try to lay aside all former opinions, and that he believed he could do so, and give defendant a fair trial. No other prejudice or feeling against defendant on the part of such juror appeared. *Held*, the court below, being satisfied that he would render an impartial verdict, properly admitted him as a juror.—McCarthy v. State, 5 Ohio Cir. Ct. R. 627.

[k] (Tex. 1893) On his voir dire a juror stated that he had no prejudice against defendant nor had he established in his mind such a conclusion as to his guilt or innocence as would influence his action in finding a verdict, but that he had formed from newspaper accounts an opinion which would require evidence to remove. *Held*, that the court did not err in overruling a challenge for cause, since Code Cr. Proc. art. 636, subd. 13, as amended March 31, 1885, provides that, if the opinion of a juror appears to be formed from newspaper accounts, etc., and the juror states that he is able, notwithstanding such opinion, to render an impartial verdict, the court, if satisfied that he will render such a verdict, may, in its discretion, admit him as a juror.—Ashton v. State, 31 Tex. Cr. R. 479, 21 S. W. 47.

[l] (Wash. 1894) A juror stated that he had formed and expressed an opinion as to the guilt or innocence of the defendant, that he still entertained that opinion, that it would require evidence to remove it, that he could not disregard that opinion until it was removed by evidence, that he could determine the facts with the same impartiality that he could had he heard nothing about it, that he was unbiased, except by the newspaper reports. *Held*, that a challenge for cause should have been sustained.—State v. Murphy, 9 Wash. 204, 37 Pac. 420.

[m] (W. Va. 1889) A juror who had read in newspapers a report of the evidence given on a former trial, and stated that from that he had formed a decided opinion as to the guilt or innocence of the accused, which it would require stronger evidence than he had read to remove, and who stated that he had no bias against the prisoner, and that he would regard it a duty, as a juror, to discard that opinion, and that he thought he could discard it, and that, while he would as a citizen entertain that opinion, yet as a juror he would not, but would hear and consider the evidence, and render a fair verdict, uninfluenced by such opinion, and whose statements satisfy the court of his fairness, is a competent juror.—State v. Baker, 33 W. Va. 319, 10 S. E. 639.

[n] (Wyo. 1888) Under Rev. St. § 3283, opinions formed by persons summoned as jurors, as to the guilt or innocence of the accused, from newspaper reports and neighborhood rumor, are not cause for challenge, if they swear they can disregard such opinions, and render an impartial verdict, though such jurymen also say it will require proof to remove such opinions.—Carter v. Territory, 3 Wyo. 193, 18 Pac. 750.

§ 478. —— Opinions which will yield to evidence.

[a] (Ind. 1872) The fact that a juror has formed some opinion as to the guilt or innocence of accused from reading newspapers about the time of the homicide is not a sufficient ground for challenge, if such juror states that he has now no opinion as to the guilt or innocence of the defendant and has forgotten the circumstances of the case, and that any opinion formed would be controlled by the evidence and the law.—Cluck v. State, 40 Ind. 263.

[b] (Ind. 1883) A juror who states on his voir dire that he had formed an opinion from reading the newspaper reports of a former trial of the same case, but did not recollect whether they contained the evidence, and that his opinion would readily yield to evidence, and that he could render an impartial verdict, is competent, under Rev. St. § 1793, subd. 2, providing that if a person called as a juror state that he has formed an opinion as to defendant's guilt or innocence, and if on examination it appears that it was founded on reading newspapers, and the juror states that he feels able to render an impartial verdict on the evidence, the court may allow him to serve in the case.—Noe v. State, 92 Ind. 92.

[c] (N. Y. 1859) A juror, on a challenge for favor, swore that he had read part of the newspaper accounts at the time, and had formed an idea with regard to the prisoner's guilt or innocence, that he had no bias either way, that his verdict would not be influenced by his preconceived idea, but would be governed entirely by the evidence produced. He was adjudged competent.—Sanchez v. People, 18 How. Prac. 72, 4 Parker, Cr. R. 535, affirmed (1860) 22 N. Y. 147.

[d] (Pa. 1881) A juror, upon his voir dire in a capital case, admitted that he had formed a deliberate conviction as to the defendant's guilt from what he had read, and that it would require evidence to remove the conviction so formed from his mind. On cross-examination he said that he had only an impression, which would yield to evidence, and that he would act impartially and decide according to the evidence. *Held*, that he was competent.—Allison v. Commonwealth, 99 Pa. 17.

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[e] (Va. 1893) A juror in a trial for murder stated on his voir dire that newspaper accounts of the tragedy had made an impression on his mind, but that it would yield to evidence, and that he could give defendant a fair and impartial trial. Another stated the same thing, and, further, that he would not be willing to act on what he had read, but that it would take evidence to remove his impression. A third juror stated that he had not made up a "decided opinion," but had formed an impression that "would be a right hard thing to get over, but that it would not require sworn statements to remove it." *Held*, that all these jurors were competent.—Hall v. Commonwealth, 89 Va. 171, 15 S. E. 517.

[f] (Wash. 1894) Where, in a case of manslaughter, a juror states that he knows nothing about the case except what he read in a newspaper, which created a kind of impression on his mind which he "expected" would require evidence to remove, but that he could entirely disregard such impression, and his mind would yield as readily to the evidence as if he had never heard anything about the case, it is not an abuse of discretion to disallow a challenge to such juror.—State v. Gile, 8 Wash. 12, 35 Pac. 417.

[g] (Wis. 1894) One who has formed an opinion from newspaper accounts, but testifies that it would not weigh against testimony submitted, and that he could return a just verdict, as if he had never heard of the case, is a competent juror.—Baker v. State, 88 Wis. 140, 59 N. W. 570.

§ 479. Doubt as to whether opinion will affect verdict.

[a] (Ala. 1874) A juror who states that from what he has heard he did not know whether he could give the defendant or the state justice, but supposed he could, is not one with a "fixed opinion which would bias his verdict," within Rev. Code, § 4180, and is competent as a juror.—Hall v. State, 51 Ala. 9.

[b] (Ga. 1859) Where one of the jurors, on his voir dire, answers to the question, "Is your mind perfectly impartial between the state and the accused?" "I think that I am, as I understand it," and the court then asks if he understands the question, to which he replies, "Yes," there is no objection to the questions or to his serving.—Thomas v. State, 27 Ga. 287.

[c] (Kan. 1873) Where a technical disqualification is, by statute, ground for principal challenge of a juror, a juror must come within the very terms of the disqualification, or the challenge will be overruled. On a challenge for cause, when the trial judge is in doubt as to the impartiality of a juror, he should give the parties the benefit of the doubt, and excuse the juror.—Missouri, K. & T. Ry. Co. v. Munkers, 11 Kan. 223.

[d] (La. 1856) Where a juror admits an opinion, expressed and deliberately formed from hearing a great deal about the case in the presence of the witnesses, and so decided that it cannot be changed by any circumstantial evidence whatever, and which the juror feels to be so strong that he twice states it might bias his mind, though by cross-interrogation, by the state and court, he is gradually led to contradict his first answers as to his bias, he may be challenged for cause.—State v. Bunger, 11 La. Ann. 607.

[e] (Mass. 1830) A juror having said, on the voir dire, that he had formed an opinion from what he had heard, but did not know how much he might be influenced by it, was allowed to be challenged for cause.—Commonwealth v. Knapp, 26 Mass. (9 Pick.) 496, 20 Am. Dec. 491.

[f] (Mich. 1895) A juror testified that he had known both parties to the action for a long time, but that he did not know that he had formed any opinion on the merits, though he might have formed some impressions. He answered a question as to whether he could try the case as fairly as if he had not heard of it and formed those impressions, "Possibly not"; and to the question, "You think you could not?" answered, "I presume I could not." *Held*, that the juror was not legally disqualified.—Rice v. Rice, 104 Mich. 371, 62 N. W. 833.

[g] (Mo. 1887) A proffered juror upon the trial of a criminal case, having stated that he had formed an opinion from what he had read, was asked whether, notwithstanding such opinion, he could give the accused a fair and impartial trial, and replied, "That is very doubtful." *Held*, that no error was committed in sustaining a challenge by the state to the juror.—State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330.

[h] (Mont. 1894) A juror's opinion, expressed before he was called, that defendant was a "tough citizen," would not show that he was prejudiced, in the face of his voir dire testimony that he had no prejudice, and had formed no opinion as to defendant's guilt or innocence.—State v. Anderson, 14 Mont. 541, 37 Pac. 1.

[i] (Neb. 1876) A juror challenged for cause, after stating that he had formed and expressed an opinion, added, "I talked pretty loud when I heard of the assault. My opinion is based upon general rumor and newspaper reports. Think I could return a fair and impartial verdict. I think I could now, but I might possibly lean a little the other way." *Held* incompetent.—Curry v. State, 4 Neb. 545.

[j] (N. Y. 1870) In a capital case a proposed juror stated upon principal challenge that he had read accounts, and formed an opinion as to the prisoner's guilt or innocence, which was unaltered, and which it would require evidence to remove, and that he could not exactly sit indifferently from the facts which he had heard. Afterwards, when cross-examined, he stated that, if sworn, he would try to be governed by the evidence, but would have a little prejudice, and again that he meant by his answer that he had read the evidence given in the newspapers, and, assuming the statements to be true, he had formed an opinion, but that it would not affect his mind in determining the case on evidence. *Held*, that the acceptance of the juror was error for which a new trial would be granted, as it might be inferred that the juror had formed an opinion of which he had not been able to devest himself; the prisoner being entitled to the benefit of the doubt.—People v. Mallon, 3 Lans. 224.

[k] (N. Y. 1880) A person is not disqualified as a juror who, on trial of B., an Italian, for murder, on being challenged, answered that he had formed a positive and clearly marked opinion as to the guilt or innocence of B.; that the Italians were "a race he was not particularly fond of, and did not think much of, judging from those we have here"; that all he remembered of the newspaper account was that a man killed his wife; that he was not conscious of having any impressions that would prevent his acting impartially in the case, the record stating that the court, "from observation of the appearance of the juror, his age, intelligence, his manner on the stand, and his answers, found that he was impartial and unprejudiced."—Balbo v. People, 80 N. Y. 484, affirming (1879) 19 Hun, 424.

[l] (N. Y. 1884) Under Code, § 876, a person who has formed or expressed an opinion

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or impression in reference to the guilt or innocence of the defendant is still disqualified to sit as a juror on the trial of a criminal action, unless he declares on oath, substantially, that he believes such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence. It is not sufficient for him to declare that he supposes he can determine the case according to the evidence, or that his opinion ought not to influence his verdict.—People v. Casey, 96 N. Y. 115.

[m] (N. Y. 1885) Merely having formed and expressed an opinion does not disqualify one from serving as a juror, if he declares on oath that he believes that he can render an impartial verdict on the evidence, nor need he declare that he knows that he can.—People v. Willett, 36 Hun, 500.

[n] (N. Y. 1888) A juror who states on his preliminary examination that he has an opinion in the case, founded on the testimony given on a former trial, which amounts to a conviction, and whose declaration that he could render an impartial verdict is qualified by a doubt, is not within Code Cr. Proc. § 376, providing that an existing opinion as to the guilt or innocence of the accused shall not disqualify a juror if he declare on oath his belief that such opinion will not influence his verdict, and the court is satisfied of that fact.—People v. McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273, affirming (1888) 21 Abb. N. C. 417, 6 N. Y. Cr. R. 1, reversing (Sup. 1888) 1 N. Y. Supp. 155.

[o] (N. Y. 1890) A juror challenged by the defense said: "I have formed an opinion. I don't know as I have an opinion now particularly. What I heard said created an impression on my mind, and I have that impression now. It would require evidence to remove that impression. I think I could sit and try this case fairly and impartially * * * without being biased by my previously formed opinion, but it would take evidence to remove the opinion formed." *Held*, sufficient to warrant a finding that he had formed and entertained an opinion.—Young v. Johnson, 123 N. Y. 226, 25 N. E. 363, affirming (1887) 46 Hun, 164.

[p] (N. Y. 1892) Under Cr. Code, § 376, subd. 2, requiring a juror who has formed or expressed an opinion on the guilt or innocence of the accused to state on oath that he can, notwithstanding such opinion, render an impartial verdict according to the evidence, such statement must be certain, unequivocal, and absolutely free from doubt.—People v. McGonegal, 136 N. Y. 62, 32 N. E. 616.

[q] (N. Y. 1893) Under Code Cr. Proc. § 376, prescribing what shall be causes of challenge to jurors, and providing that the previous expression or formation of an opinion as to the guilt or innocence of defendant is not ground of challenge for actual bias to a person otherwise legally qualified, if he declare on oath that he "believes" such opinion will not influence his verdict, it is sufficient for a juror to swear that he "thinks" such opinion will not influence such verdict; the words "think" and "believe" being substantially equivalent.—People v. Martell, 138 N. Y. 595, 33 N. E. 838.

[r] (N. Y. 1896) Under Code Cr. Proc. § 376, subd. 2, providing that an opinion as to guilt or innocence of defendant is not ground of challenge to a person, if he declare, on oath, that he believes such opinion will not influence his verdict, the acceptance of a juror cannot be *held* erroneous, merely because he made some answers apparently inconsistent with his belief, as finally declared, that his opinion would not influence his verdict.—People v. McLaughlin, 2 App. Div. 419, 37 N. Y. Supp. 1005.

[s] (Pa. 1875) Where, on examination of a talesman, he designates his "opinions" as "conclusions," he was not thereby incompetent.—Ortwein v. Commonwealth, 76 Pa. (26 P. F. Smith) 414, 18 Am. Rep. 420.

[t] (Pa. 1888) A juror admitted that he had formed an impression from what he had read, but it was not what he would call a fixed opinion. *Held*, that the question as to what he meant by the impression, "whether it was the same thing as an opinion," was properly overruled, and that the juror was competent.—Hall v. Commonwealth, 12 Atl. 163.

[u] (S. C. 1895) Where a juror states that he has formed an opinion, and that, while he does not think it would prevent him from rendering an impartial verdict, yet he would prefer not to act as a juror, it is not error to reject him.—Sims v. Jones, 43 S. C. 91, 20 S. E. 905.

[v] (Tenn. 1853) The mere fact that a person has an opinion, "has made up his mind," as to the guilt or innocence of the prisoner, does not render him an incompetent juryman; but where his opinion is formed on his own knowledge of the facts, or a statement of them by the witnesses, or by others professing to know the circumstances, or is entertained, but from the examination it is left doubtful whether it is so formed, or not, he is disqualified.—Alfred v. State, 32 Tenn. (2 Swan) 581.

[w] (Tex. 1896) A juror who, from having heard the evidence in a former trial, is unable to say positively that he could try the cause just as if he had never heard of it, is incompetent.—Long Mfg. Co. v. Gray (Civ. App.) 35 S. W. 32.

[x] (Va. 1845) Hasty expressions of a juror, who swears that he has formed no opinion of the guilt of the prisoner, and feels no prejudice against her, do not render him incompetent.—Commonwealth v. Hailstock, 2 Grat. 564.

[y] (W. Va. 1884) Where a juror has entertained an opinion of the prisoner's guilt, and on his voir dire hesitates in saying whether that opinion would influence his verdict, he is incompetent.—State v. Schnelle, 24 W. Va. 767.

(G) PERSONAL OPINIONS AND CONSCIENTIOUS SCRUPLES.

1. SUBJECT-MATTER OF CAUSE AND PARTICULAR DEFENSES, §§ 480-485.
2. WEIGHT AND EFFECT OF EVIDENCE, §§ 486-488.
3. PUNISHMENT PRESCRIBED FOR OFFENSE, §§ 489-491.
4. INFLUENCE ON VERDICT, §§ 492-496.

Discretion of court, see ante, § 405 [l].
Province of court and triors, see post, § 594 [w, z].
Grounds for new trial in civil cases, see "New Trial," II. (D).

1. SUBJECT-MATTER OF CAUSE AND PARTICULAR DEFENSES.

IN GENERAL, § 480.
CRIMES AND CRIMINALS, § 481.
SALE OF INTOXICATING LIQUORS, § 482.
RELIGIOUS BELIEFS, § 483.
QUESTIONS OF LAW AND PARTICULAR STATUTES, § 484.
PARTICULAR DEFENSES, § 485.

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Extent of examination of juror, see post, § 568 [l, q, s].

Influence on verdict, see post, §§ 492-496.

Where evidence is evenly balanced, see post, § 436 [a].

§ 480. In general.

[a] (U. S. 1895) On an indictment under Rev. St. § 5511, for violation of the election laws, questions asked a juror on his voir dire as to his political affiliations, partisanship, etc., are properly refused.—Connors v. United States, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033.

[b] (U. S. 1880) A juror is not rendered incompetent, on the trial of an indictment for running a lottery, by the fact that he has a prejudice against the lottery business or those who are engaged in it, or that he is disposed in his mind to put an end to the traffic in lottery tickets, or that he is in favor of active measures for the suppression of such business.—United States v. Noelke (C. C.) 1 Fed. 426.

[c] (U. S. 1881) Prejudice against a person engaged in an illegal business, arising solely from the fact that he was engaged in such business, does not disqualify a juror from sitting upon the trial of such person for the exercise of such unlawful calling.—United States v. Borger (C. C.) 7 Fed. 193.

[d] (Cal. 1887) In the trial of an action for treble rent and restitution of premises, after the jury was complete, one of the jurors, being informed of the nature of the action, declared himself hostile to all landlords, whereupon the court dismissed him. *Held*, a proper exercise of discretion, since the juror evinced actual bias.—Lawlor v. Linforth, 72 Cal. 205, 13 Pac. 496.

[e] (Fla. 1891) Where the party on trial for murder belongs to the negro race, it is error to refuse the putting of the question to the jurors on the voir dire: "Could you give the defendant, who is a negro, as fair and impartial a trial as you could a white man, and give him the same advantage and protection as you could a white man, upon the same evidence?" such question being pertinent to test fully the existence of bias or prejudice.—Pinder v. State, 27 Fla. 370, 8 South. 837, 26 Am. St. Rep. 75.

[f] (Ill. 1871) The action was for damages for disease alleged to have been communicated to the plaintiff's cattle, by Texas cattle driven near plaintiff's farm by defendant, and was brought under an act (St. 1867) declaring the owner of Texas cattle liable for disease communicated by them, and which was founded on the theory that such cattle, though not individually diseased, may communicate disease to other cattle. *Held*, that the question whether disease could be so communicated was one of the issues in the cause, and that a venireman who testified he believed it could be was incompetent to serve, against defendant's objection.—Davis v. Walker, 60 Ill. 452.

[g] (Ill. 1879) In an action against a foreign insurance agent to recover the premium tax, a juror answered that he had "an opinion upon the question of the right of a foreign insurance company to do business in this state on the same terms and conditions as home companies." *Held*, that this was not conclusive against his competency as a juror.—Hughes v. City of Cairo, 92 Ill. 339.

[h] (Kan. 1896) In an action against a railroad company for personal injuries, a juror admitted that it would require a continual effort to deal with the railroad company in the same way that he would with an individual, and that, perhaps, he could not consider the case in an impartial way. *Held* incompetent.—Atchison, T. & S. F. R. Co. v. Chance, 57 Kan. 40, 45 Pac. 60.

[i] (La. 1882) A juror cannot be asked, upon his voir dire, in a slander suit, whether he has any bias or prejudice against such suits, as, if so, it does not disqualify him.—Young v. Bridges, 34 La. Ann. 333.

[j] (Me. 1876) On trial of a civil action founded on a charge for which the same defendant has been prosecuted criminally, it is ground for challenge of a juror that he has expressed a belief that the defendant has been sufficiently punished for the offense, and has signed a petition for his pardon.—Asbury Life Ins. Co. v. Warren, 66 Me. 523.

[k] (Md. 1870) The mere forming or expressing of an opinion that a judge of election ought to receive, without further question, the votes of all persons who are duly registered, does not disqualify the person, who formed and expressed such opinion, from acting as juror in an action for damages against a judge of election for not receiving the vote of a citizen who was duly registered.—Elbin v. Wilson, 33 Md. 135.

[l] (Mich. 1860) A person who holds an opinion that milldams generally in that part of the country are nuisances, and that all he is acquainted with are such, is not a competent juror for the trial of an indictment for nuisance in keeping up a milldam, though he states that he is not much acquainted with the dam in question, and has not formed or expressed any opinion regarding it.—Crippen v. People, 8 Mich. 117.

[m] (Mo. 1845) In a suit for freedom, it is a good objection to a juror that he would feel bound in conscience to find for the plaintiff, although the law and the evidence should be against him; and, in such a case, the court should allow a juror to be questioned to that point.—Chouteau v. Pierre, 9 Mo. 3.

[n] (N. Y. 1893) On a murder trial, where the killing was done by defendant with a pistol which he had been in the habit of carrying, a juror on his voir dire stated that he had a great prejudice against defendant because he carried a pistol, and that there were many cases where persons had pistols when assaulted, when, if they had none, there would have been no murder nor any great bodily harm. He was not asked to declare on oath that he believed such prejudice would not influence his verdict, and that he could render an impartial verdict according to the evidence.—*Held*, that it was error to overrule a challenge for actual bias.—People v. Larubia, 69 Hun, 197, 23 N. Y. Supp. 579.

[o] (Tex. 1891) Under Code Cr. Proc. art. 636, subd. 12, which provides that a juror who "has a bias or prejudice in favor of or against the defendant" may be challenged for cause, a juror is incompetent when he states on his voir dire that the fact of defendant being a woman and a mother would prevent him from rendering a verdict according to the law and evidence.—Withers v. State, 30 Tex. App. 383, 17 S. W. 936.

[p] (Wis. 1891) In an action for damages for shooting plaintiff while he was giving defendant a charivari, it is improper to ask jurors on their voir dire whether they are prejudiced in regard to charivari parties, since the fact that a juror is prejudiced against unlawful and riotous assemblies does not incapacitate him.—Higgins v. Minaghan, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L. R. A. 138.

§ 481. Crimes and criminals.

Influence on verdict, see post, § 492 [a, g, h].

[a] A bias or prejudice against crime is not good ground of challenge for cause.
—(Ga. 1847) Williams v. State, 3 Ga. (3 Kelly) 453;
(Mo. 1884) State v. Burns, 85 Mo. 47.

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[b] (U. S. 1851) A person who has expressed an unfavorable opinion against persons who have engaged in the transaction constituting the offense charged, but has not formed or expressed any opinion as to the guilt or innocence of the prisoner, is a competent juror.—United States v. Hanway, Fed. Cas. No. 15,299 [2 Wall. Jr. 139].

[c] (Cal. 1860) A person is not disqualified as a juror by reason of his having been connected with the police department of San Francisco, and having thereby acquired an opinion generally unfavorable to parties accused of crime.—People v. Reynolds, 16 Cal. 128.

[d] (Ga. 1859) It is no ground for exception that a jury, impaneled to try a prisoner indicted for murder, heard the judge charge the grand jury that "almost all the homicides committed in the county could be traced to carrying concealed weapons, and that it was high time that a stop should be put to such offenses," and complimented them on their vigilance.—Thomas v. State, 27 Ga. 287.

[e] (Ga. 1866) A juror was not incompetent where he stated that he was not satisfied that he was impartial, that he had partiality in his mind, that he did not personally know the prisoner or the facts of the case, and that he was prejudiced because of the offense.—Parker v. State, 34 Ga. 262.

[f] (Ill. 1887) A prejudice against socialists, communists, and anarchists is nothing more than a prejudice against crime, which would not force a jury to prejudge an innocent and honest man, and would not, therefore, disqualify a juror, in the trial of an indictment for a conspiracy of an anarchical nature.—Spies v. People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320.

[g] (Kan. 1895) One who had heard the case talked about, and who asserted that, in order to be acquitted, defendant should prove himself innocent, and that he had such an abhorrence of the offense charged that he should convict unless the evidence satisfied him that defendant was innocent, though he also stated that he had formed no opinion, was incompetent.—State v. Vogan, 56 Kan. 61, 42 Pac. 352.

[h] (Miss. 1847) A person, on being tendered as a juror to a prisoner and accepted by him, stated voluntarily that he had conscientious scruples against finding a man guilty of murder, and could not conscientiously take the oath, and the court discharged him without challenge by either party. *Held*, that he was rightly discharged.—Lewis v. State, 17 Miss. (9 Smedes & M.) 115.

§ 482. Sale of intoxicating liquors.

In case of evenly-balanced testimony, see post, § 436 [d].

Influence on verdict, see post, § 493.

Weight and effect of evidence, see post, § 488.

[a] (U. S. 1895) On the trial of a saloon keeper for murder a juror is not disqualified by the fact that he has a prejudice against the business of saloon keeping, the matter at issue having no reference to such business.—Thiede v. Utah Territory, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237.

[b] (Ill. 1874) In a suit against a manufacturer of lager beer, by a wife, for selling beer to her husband, a juror stated, under oath, that he thought the business of manufacturing and selling beer was a perfect nuisance, that it was a very low business, that no man should be allowed to engage in it, that he had no sympathy at all for a man engaged in it, that it was a curse to the community, and that he would do all in his power, except raising mobs, to break down places for the manufacture and sale of beer, *held*, that he was incompetent, on account of his prejudices.—Albrecht v. Walker, 73 Ill. 69.

[c] (Ill. 1876) That a person has a prejudice against liquor sellers does not necessarily disqualify him from sitting as juror on the trial of an action under the civil damage law.—Robinson v. Randall, 82 Ill. 521.

[d] (Ind. 1877) Where, on appeal to the circuit court of an application for license to sell intoxicating liquors, a juror, on being examined as to his competency to serve, answers that he is "opposed to granting license to any person, under any circumstances," a challenge to him for cause should be sustained.—Keiser v. Lines, 57 Ind. 431.

[e] (Ind. 1882) One who believes that only an immoral man would sell liquor is incompetent to serve as a juror upon an application for a license.—Chandler v. Ruebelt, 83 Ind. 139.

[f] (Ind. 1884) A juror who stated that he would not as readily believe a man who was engaged in the business of selling liquor as one who was not is not incompetent to try defendant for selling liquor without a license; it not appearing that he had any personal aversion to defendant, or that the latter was engaged in the "business" of liquor selling.—Shields v. State, 95 Ind. 299.

[g] (Ind. 1886) The mere fact that a man may be opposed to the policy of permitting the sale of intoxicating liquors, and may have some prejudice against those engaged in their sale, does not necessarily disqualify him from serving as a juror on the trial of a prosecution for selling intoxicating liquors.—Stoots v. State, 108 Ind. 415, 9 N. E. 380.

[h] (Ind. 1894) In a prosecution for selling liquor to a minor, a juror is not rendered incompetent by answering in the affirmative the question: "Do you believe that a man engaged in the sale of intoxicating liquors under a license is a moral man?"—Pemberton v. State, 11 Ind. App. 297, 38 N. E. 1096.

[i] (Iowa, 1882) A juror called on trial for the unlawful sale of intoxicating liquors stated that he was opposed to saloon keeping, and to the law regulating the sale of intoxicating liquors, "but as long as it stands as it now is I am not prejudiced against a man for selling beer or wine." *Held* a competent juror.—State v. Nelson, 58 Iowa, 208, 12 N. W. 253.

[j] (Ky. 1895) A wholesale liquor dealer is not disqualified to act as a juror in an action by a wife for the sale of liquor to her husband.—Owen v. Kamer, 29 S. W. 437.

[k] (Mich. 1888) In an action for damages for sale of liquor to plaintiff's minor son, a juror may be properly asked whether he is in favor of stringent prohibitory laws, or is prejudiced against the sale of liquor.—Theisen v. Johns, 72 Mich. 285, 40 N. W. 727.

[l] (Mich. 1893) On the trial of an offense against the local option law, a juror is not disqualified by reason of the fact that he states on his examination that he voted for the law, or that he is in favor of it and its enforcement, or is in favor of prohibition.—People v. Keefer, 97 Mich. 15, 56 N. W. 105.

[m] (N. Y. 1892) In an action against the proprietor of a saloon for assault and battery, it is improper to ask the jury if any of them "have a prejudice against a man who sells drinks by the glass," as such prejudice would not disqualify a juror.—Fortune v. Trainor, 65 Hun, 619, 19 N. Y. Supp. 598.

[n] (Tex. 1884) On the trial of a suit for the violation of a liquor dealer's bond, it is no cause of challenge to a juror that he has a bias

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in favor of or a prejudice against the business of selling liquor by retail.—Grady v. Rogan, 2 Willson, Civ. Cas. Ct. App. § 263.

§ 483. Religious beliefs.

[a] (Mass. 1834) On the trial of an indictment for burglary and arson in destroying a Roman Catholic convent, which was burned down by a great number of persons, it was *held* that, if a juror thought such destruction was not a crime, he would entertain a prejudice in the cause.—Commonwealth v. Buzzell, 33 Mass. (16 Pick.) 153.

[b] (Utah, 1875) A person who has conscientious scruples against indicting a person for the crime of polygamy is wholly incompetent to sit upon a petit jury.—United States v. Reynolds, 1 Utah, 226.

[c] (Utah, 1877) A juror, in a prosecution for bigamy, who is a member of the Mormon Church, and, as such, believes that polygamy is a direct command from God, and thus above the laws of man, is disqualified.—United States v. Miles, 2 Utah, 19, affirmed Miles v. United States (1880) 103 U. S. 304, 26 L. Ed. 481.

§ 484. Questions of law and particular statutes.

Extent of examination of juror, see post, § 568 [m].

Influence on verdict, see post, § 492 [e].

[a] (U. S. 1851) Where a person, upon being called as a juror, states that he has made up his mind as to the subject of treason, but not as to the guilt of the prisoner, it appearing that the definition of "treason" has not been perfectly settled by judicial decision, the court will recommend his withdrawal.—United States v. Hanway, Fed. Cas. No. 15,299 [2 Wall. Jr. 139].

[b] (Conn. 1788) An opinion formed and declared upon a general principle of law does not disqualify a juror to sit in a cause in which that principle applies.—Pettis v. Warren, Kirby, 426.

[c] (Mass. 1847) A person called as a juror on the trial of an indictment, who, on examination on oath according to the provision of Rev. St. c. 95, § 27, answers that he has formed and expressed an opinion that the statute on which the defendant is indicted is in force and was constitutionally enacted, is not thereby shown not to stand indifferent in the cause.—Commonwealth v. Abbott, 54 Mass. (13 Metc.) 120.

[d] (Mass. 1856) The judge presiding at a criminal trial may exclude from the panel jurors who state, in answer to his questions, that they have formed and hold such an opinion of the unconstitutionality of the statute on which the prosecution is founded, and that, if persisted in, they cannot convict the defendant, whatever the evidence may be.—Commonwealth v. Austin, 73 Mass. (7 Gray) 51.

[e] (N. Y. 1869) It is no objection to the competency of a juror that he believes the law, under which the proceeding is instituted, to be a good law.—McNall v. McClure, 1 Lans. 32.

§ 485. Particular defenses.

Extent of examination of juror, see post, § 563 [m].

Influence on verdict, see post, §§ 492 [d], 494.

[a] Statements by a juror that in his opinion the defense of insanity should be carefully scrutinized, and that he was opposed to feigned defenses of that kind, though he was not prejudiced against those which were genuine, do not disqualify him.

—(Ind. 1884) Butler v. State, 97 Ind. 378;
(Mo. 1887) State v. Pagels, 92 Mo. 300, 4 S. W. 931;
(N. Y. 1886) People v. Carpenter, 102 N. Y. 238, 6 N. E. 584, affirming (1886) 38 Hun, 490.

2. WEIGHT AND EFFECT OF EVIDENCE.

IN GENERAL, § 486.
CIRCUMSTANTIAL EVIDENCE, § 487.
EVIDENCE OF PARTICULAR CLASSES OF PERSONS, § 488.

In case of evenly balanced evidence, see ante, § 436.

Influence on verdict, see post, § 495.

Where moved by bias, see ante, § 432 [h].

§ 486. In general.

[a] It is a good ground of challenge to the favor, in an action upon a life policy, that a juror holds the opinion that the fact that a man has committed suicide is conclusive proof that he was insane at the time he committed the act.

—(U. S. 1872) Hiatt v. Mutual Life Ins. Co., Fed. Cas. No. 6,449a [2 Dill. 572];
(Pa. 1874) Boileau v. Life Ins. Co., 9 Phila. 218;
(Tex. 1880) Texas Mut. Life Ins. Co. v. Brown, 2 Posey, Unrep. Cas. 160.

[b] (Mass. 1855) A person indicted is not entitled to have the jury asked, before they are impaneled, whether they have formed or expressed an opinion as to the credibility of a witness, whose testimony is to be relied on in support of this indictment, and who testified, and whose credibility was in question, in another case before them, nor can the defendant be allowed to prove, on the trial of this indictment, that the jury have declared that they would believe this witness.—Commonwealth v. Porter, 70 Mass. (4 Gray) 423.

[c] (N. Y. 1880) In an action on a policy of insurance upon the life of one who committed suicide, a juror's having said that he should consider the fact that a man had committed suicide to be some evidence of insanity, was not a ground of challenge.—Hagadorn v. Connecticut Mut. Life Ins. Co., 22 Hun, 249.

[d] (Wash. 1896) In examination of the jury in a criminal case, defendant's counsel is not entitled to question a juror as to how he would regard the testimony of the defendant should he go on the stand as a witness.—State v. Everitt, 14 Wash. 574, 45 Pac. 150.

§ 487. Circumstantial evidence.

Examination of juror by court, see post, § 570 [f].

Right of defendant to challenge, see post, § 554 [c].

[a] A challenge to a juror is properly allowed where he states on oath that no degree of circumstantial evidence will induce him to render a verdict of guilty against the prisoner, who is charged with a capital offense.

—(Ill. 1853) Gates v. People, 14 Ill. (4 Peck) 433;
(Miss. 1880) Jones v. State, 57 Miss. 684;
(Mo. 1879) State v. West, 69 Mo. 401, 33 Am. Rep. 506; (1894) State v. Young, 119 Mo. 495, 24 S. W. 1038;
(Neb. 1892) Johnson v. State, 34 Neb. 257, 51 N. W. 835;

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(Nev. 1880) State v. Pritchard, 15 Nev. 74;
(Ohio, 1891) Blair v. State, 5 Ohio Cir. Ct. R. 496;
(Tex. 1879) Shafer v. State, 7 Tex. App. 239; (1882) Clanton v. State, 13 Tex. App. 139.

[b] It is not error for the court to exclude from the jury, on the trial of a person indicted for murder, those who declared on their voir dire that they would not convict of murder on circumstantial evidence alone.
—(Mo. 1886) State v. Leabo, 89 Mo. 247, 1 S. W. 288;
(Pa. 1893) Commonwealth v. Heist (O. & T.) 14 Pa. Co. Ct. R. 239.

[c] One who states that he has no such conscientious scruples as would prevent him from finding a verdict of guilty in a case where the punishment is death, but that he would have if the evidence were wholly circumstantial, is incompetent as a juror.
—(Fla. 1894) Olive v. State, 34 Fla. 203, 15 South. 925;
(Mo. 1896) State v. Punshon, 133 Mo. 44, 34 S. W. 25.

[d] (Ala. 1876) On trial of any indictment, whether for felony (Rev. Code, § 4182) or for misdemeanor, it is cause of challenge that a juror declares he would not convict on circumstantial evidence, however strong.—Smith v. State, 55 Ala. 1.

[e] (Ala.) Under the Code, making a juror subject to challenge who "has a fixed opinion against capital punishment, or thinks that a conviction should not be had on circumstantial evidence," a juror who stated on his voir dire that he was not opposed to a conviction on circumstantial evidence, but that he was opposed to punishing capitally on such evidence, was subject to challenge.—(1883) Jackson v. State, 74 Ala. 26; (1884) Garrett v. Same, 76 Ala. 18; (1886) Tatum v. Same, 82 Ala. 5, 2 South. 531; (1891) Griffin v. Same, 90 Ala. 596, 8 South. 670.

[f] (Cal. 1880) A challenge by the prosecution to a juror who, on his examination at a trial for murder, answered that he would not convict on circumstantial evidence, was properly sustained.—People v. Ah Chung, 54 Cal. 398.

[g] (La. 1881) In answer to a question by the district attorney, a juror said that he had some prejudice against convicting on circumstantial evidence. *Held* not sufficient to sustain a challenge for cause.—State v. Shields, 33 La. Ann. 991.

[h] (La.) The state has the right to have rejected, as jurors, persons who declare that under no circumstances would they render a verdict of guilty, based solely upon circumstantial evidence.—(1893) State v. Frier, 45 La. Ann. 1434, 14 South. 296; (1894) Same v. Barker, 46 La. Ann. 798, 15 South. 98.

[i] (Miss. 1882) Jurors who will not convict of murder with the death penalty on circumstantial evidence may be rejected in a case depending on direct testimony, as in any other case.—Coleman v. State, 59 Miss. 484.

[j] (N. Y. 1892) A juror, examined as to his qualifications, who, to questions as to his views of circumstantial evidence, says that it must be precise and exact, and such that there would be no doubt whatever in his mind, and states that if the court instructed him in a certain way with respect to the weight and effect, under certain circumstances, to be given to circumstantial evidence, he would still follow his own views, is incompetent.—People v. Fanshawe, 65 Hun, 77, 19 N. Y. Supp. 865, 8 N. Y. Cr. R. 326.

§ 488. Evidence of particular classes of persons.

Extent of examination of juror, see post, § 568 [b, e, l, p, t].
Influence on verdict, see post, § 495 [d].

[a] (Cal. 1880) In impaneling a jury to try a criminal case, in which the defendant is a Chinaman, a juror is properly asked whether, other things being equal, he would credit the testimony of a Chinaman as soon as that of a white man.—People v. Car Soy, 57 Cal. 102.

[b] (Ill. 1876) Where a juror declares that he will give less weight to one's testimony on account of his being in the liquor business, he is disqualified from sitting in a suit against a party engaged in the liquor business, under the civil damage law.—Robinson v. Randall, 82 Ill. 521.

[c] (Ind. 1886) Where a juror states that he would not give the testimony of one engaged in the sale of intoxicating liquors as much weight or credit as if he were engaged in some other business, he is prima facie incompetent to serve as a juror in such cause.—Stoots v. State, 108 Ind. 415, 9 N. E. 380.

[d] (Mass. 1893) On a prosecution for selling intoxicating liquor, a juror is not incompetent because he answers in the affirmative a question whether he would have any prejudice against a person accused of such crime, and against whom some evidence had been introduced, which would prevent his giving to the testimony of accused the same weight as he would give to one accused of any other offense, and against whom some evidence had been offered.—Commonwealth v. Poisson, 157 Mass. 510, 32 N. E. 906.

[e] (Mich. 1888) A juror who entertains a prejudice against a liquor seller to such an extent that he cannot give his testimony the same credit that he would that of a person not engaged in such business is not a competent juror against a liquor seller sued for damages for the death of a person caused by an intoxicated person.—Brockway v. Patterson, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708.

[f] (N. Y. 1888) Under Code Cr. Proc. § 376, defining, as a ground for challenging a juror, the existence of a state of mind on his part which satisfies the court that he cannot try the issue without prejudice to the party challenging, it is not error to permit the prosecutor, after stating to jurors that certain persons had turned state's evidence, and it was supposed would testify that they were engaged with defendant in the transaction for which he was indicted, to ask the jurors if they were so prejudiced against such persons as to prevent them from giving their testimony its lawful weight.—People v. O'Neil, 48 Hun, 36, affirmed (1888) 109 N. Y. 251, 16 N. E. 68.

[g] (N. Y. 1893) A proposed juror who states that his prejudice against informers is very strong, and who speaks hesitatingly as to whether he would believe such testimony, even if corroborated by other witnesses, is properly excluded where the testimony of an informer is a part of the evidence relied on by the prosecution.—People v. Mahoney, 73 Hun, 601, 26 N. Y. Supp. 257.

[h] (Utah, 1895) In a prosecution of a saloon keeper for murder, a juror, testifying on voir dire examination that the fact that a person is a saloon keeper would influence him as to his credibility, is competent.—People v. Thiede, 11 Utah, 241, 39 Pac. 837.

[i] (Vt. 1888) It is not error to allow counsel for the state to ask jurors whether they would disregard the testimony of an accomplice.—State v. Flint, 60 Vt. 304, 14 Atl. 178.

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3. PUNISHMENT PRESCRIBED FOR OFFENSE.

IN GENERAL, § 489.
STATUTORY PROVISIONS, § 490.
CAPITAL PUNISHMENT, § 491.

Extent of punishment of accused, see ante, § 440 [p].

Infringement of right to trial by jury, see ante, § 228 [h, w].

§ 489. In general.

Extent of examination of juror, see post, § 568 [k].

[a] (Ala. 1856) That a juror has a fixed opinion against penitentiary punishment is good challenge for cause by the state.—Stalls v. State, 28 Ala. 25.

[b] (Kan. 1895) A conviction would not be reversed because the court retained on the jury, over defendant's objection, one who believed the punishment fixed by law too severe for the offense charged.—State v. Vogan, 56 Kan. 61, 42 Pac. 352.

§ 490. Statutory provisions.

[a] (Ga. 1855) The act authorizing jurors to be questioned on the subject of entertaining scruples as to capital punishment was intended to apply to all trials taking place after its passage, without regard to the time of the commission of the offense.—Mercer v. State, 17 Ga. 146.

[b] (Neb. 1894) Cr. Code, making conscientious scruples of a juror against capital punishment ground of challenge for cause in prosecutions for murder, was not repealed by the amendment of 1893, conferring on the jury discretion to fix the punishment for murder in the first degree at imprisonment for life, instead of the death penalty.—Hill v. State, 42 Neb. 503, 60 N. W. 916.

§ 491. Capital punishment.

Conviction on circumstantial evidence, see ante, § 487.

Discharge by court pending trial, see post, § 536.

Effect of failure of state to challenge, see post, § 554 [b].

Extent of examination of juror, see post, § 568 [a, c, g, h, o, r].

Influence on verdict, see post, § 496.

Rejection on court's own motion, see post, § 528.

Repeal of statute, see ante, § 490 [b].

Retroactive operation of statute, see ante, § 490 [a].

Time for making challenge, see post, § 556 [b].

[a] It is good cause of challenge by the state that a juror declares, on his voir dire, that he has conscientious scruples against finding any person guilty of a crime punishable with death.
—(U. S. 1830) United States v. Wilson, Fed. Cas. No. 16,730 [Baldw. 78]; (1844) Same v. Hewson, Fed. Cas. No. 15,360;
(Ala. 1856) Stalls v. State, 28 Ala. 25; (1861) Murphy v. Same, 37 Ala. 142;
(Fla. 1881) Metzger v. State, 18 Fla. 481;
(Ga. 1847) Williams v. State, 3 Ga. (3 Kelly) 453;
(Ind. 1850) Gross v. State, 2 Ind. (2 Cart.) 329; (1864) Fahnestock v. Same, 23 Ind. 231; (1893) Davidson v. Same, 135 Ind. 254, 34 N. E. 972;
(La. 1856) State v. Costello, 11 La. Ann. 283; (1858) Same v. Nolan, 13 La. Ann. 276; (1893) Same v. Stewart, 45 La. Ann. 1164, 14 South. 143;
(Me. 1852) State v. Jewell, 33 Me. 583;
(Miss. 1856) Williams v. State, 32 Miss. 389, 66 Am. Dec. 615;
(Neb. 1892) Johnson v. State, 34 Neb. 257, 51 N. W. 835;
(Nev. 1881) State v. Hing, 16 Nev. 307;
(N. H. 1845) State v. Howard, 17 N. H. 171;
(N. Y. 1856) People v. Wilson, 3 Parker, Cr. R. 199; (1863) Lowenberg v. People, 5 Parker, Cr. R. 414; (1865) Walter v. Same, 32 N. Y. 147, affirming People v. Walters (1864) 18 Abb. Prac. 147, and Walters v. People (1864) 6 Parker, Cr. R. 15; (1867) O'Brien v. People, 36 N. Y. 276, affirmed (1867) 48 Barb. 274;
(Ohio, 1847) Martin v. State, 16 Ohio, 364;
(Pa. 1828) Commonwealth v. Lesher, 17 Serg. & R. 155;
(S. C. 1891) State v. James, 34 S. C. 49, 12 S. E. 657; (1891) Id., 34 S. C. 579, 13 S. E. 325;
(Tex. 1856) White v. State, 16 Tex. 206; (1856) Hyde v. Same, 16 Tex. 445, 67 Am. Dec. 630; (1857) Burrell v. Same, 18 Tex. 713; (1885) Kennedy v. Same, 19 Tex. App. 618;
(Vt. 1867) State v. Ward, 39 Vt. 225;
(Va. 1851) In re Clore, 8 Grat. 606.

[b] Where the jury are required to fix the punishment of the crime charged at either death or imprisonment for life, in a verdict of guilty, prejudice against the death penalty is not a ground of challenge for cause.
—(Iowa, 1894) State v. Dooley, 89 Iowa, 584, 57 N. W. 414; Same v. Lee, 91 Iowa, 499, 60 N. W. 119.
CONTRA, see
(La. 1856) State v. Melvin, 11 La. Ann. 535;
(Miss. 1881) Spain v. State, 59 Miss. 19.

[c] (U. S. 1892) On the trial of defendant for a crime punishable by death, where the jury is to find the punishment, jurors who state on their voir dire that they have "conscientious scruples in regard to the infliction of the death penalty for crime" may be challenged for cause by the government.—Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, reversing United States v. Logan (C. C. 1891) 45 Fed. 872.

[d] (U. S. 1824) It is good cause of challenge, in a capital case, that the juror is a Quaker, and has conscientious scruples as to the lawfulness of taking away human life for any offense. —United States v. Ware, Fed. Cas. No. 16,641 [2 Cranch, C. C. 477].

[e] (Ark. 1894) On trial of an indictment for being an accessory before the fact to a murder in the first degree, the prosecuting attorney may examine the jurymen on their voir dire in order to exclude such as may have conscientious scruples against returning a verdict of guilty when the law and evidence justify such verdict, since the indictment charges a capital offense.—Jones v. State, 58 Ark. 390, 24 S. W. 1073.

[f] (Cal. 1852) By the laws, the crime of grand larceny is punishable by imprisonment in the state prison or death, in the discretion of the jury; and, by the same laws, a man is declared incompetent to sit as a juror, on the trial of an indictment for a crime "punishable with death," who entertains such conscientious opinions as would preclude his finding the defendant guilty. On the trial of an indictment for grand larceny, one summoned as a juror was asked, by the counsel for the state, wheth-

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er he had any conscientious scruples against the infliction of capital punishment. He replied that he would hang a man for murder, but not for stealing. The court below decided that he was incompetent; and this court confirmed the decision of the court below.—People v. Tanner, 2 Cal. 257.

[g] (Cal. 1857) That a juror is "opposed to capital punishment on principle" does not imply that he has a conscientious opinion which would preclude him from finding a prisoner guilty in a capital case.—People v. Stewart, 7 Cal. 140.

[h] (Cal. 1884) Code Civ. Proc. § 1074, providing that, "if the offense charged be punishable with death," a person entertaining conscientious scruples as to capital punishment should not be allowed to serve as a juror, applies to a trial for murder, though that is not necessarily punishable with death.—People v. Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295.

[i] (Ga. 1892) Where a juror on his voir dire answered that he was opposed to capital punishment in cases of extreme youth, and by consent of counsel for accused was put on the court as a trior, and then stated that he was not opposed to capital punishment, the court did not err in setting him aside for cause; the juror finally explaining that he was conscientiously opposed to such punishment, though it might be shown that the accused was over the age of 14.—Bell v. State, 91 Ga. 15, 16 S. E. 207.

[j] (La. 1845) Where, on a trial for murder, a juror answers, on his voir dire, that he has conscientious scruples against finding a verdict of guilty in any case involving life, he may, on principles of common law, independently of any statutory enactment, be set aside for cause.—State v. Kennedy, 8 Rob. 590.

[k] (Miss. 1881) It was proper to discharge a special venireman, in a murder case, who testified that he had conscientious scruples on the subject of capital punishment.—Smith v. State, 58 Miss. 867.

[l] (Neb.) If a juror, upon a trial for a capital offense, on his voir dire examination, answers that his convictions are such as would preclude him from returning a verdict of guilty, where the punishment would be death, whether upon direct or merely circumstantial evidence, it is good ground of challenge for cause on the part of the state.—(1879) St. Louis v. State, 8 Neb. 405, 1 N. W. 371; (1885) Bradshaw v. State, 17 Neb. 147, 22 N. W. 361.

[m] (N. Y.) A juror who has conscientious scruples against the death penalty is disqualified from sitting in a case of murder, even though he is not a member of any religious denomination having such scruples.—(1835) People v. Damon, 13 Wend. 351; (1845) Same v. Jones, 1 Edm. Sel. Cas. 112.

[n] (N. Y. 1849) A mere hostility to capital punishment will not exempt a juror from service, but he must possess conscientious scruples against rendering a verdict of guilty where capital punishment would follow, which must be derived from a membership in some religious denomination.—People v. Donaldson, 2 Edm. Sel. Cas. 78.

[o] (Va. 1886) A venireman is properly discharged in a murder case if he has expressed opinions repugnant to inflicting capital punishment.—Cluverius v. Commonwealth, 81 Va. 787.

4. INFLUENCE ON VERDICT.

IN GENERAL, § 492.
SALE OF INTOXICATING LIQUORS, § 493.
PARTICULAR DEFENSES, § 494.
WEIGHT AND EFFECT OF EVIDENCE, § 495.
PUNISHMENT PRESCRIBED FOR OFFENSE, § 496.

Grounds for new trial in civil cases, see "New Trial," II. (D).

§ 492. In general.

[a] (U. S. 1896) On a trial for libel a juror stated that he had no prejudice against newspapers, though he thought papers published articles which they should not; that his first impression would be against newspapers, on a charge of libel; that he had no doubt of his ability to be impartial; that his feeling would affect his deliberation as to whether defendant had exercised fair care in publishing the article in question, but he did not mean that he would assume the newspaper had not exercised due care. *Held* competent.—Press Pub. Co. v. McDonald, 73 Fed. 440, 19 C. C. A. 516, 38 U. S. App. 557.

[b] (U. S. 1851) One who has formed an opinion as to the crime, which may be removed by instructions of the court, is competent as a juror.—United States v. Hanway, Fed. Cas. No. 15,299 [2 Wall. Jr. 139].

[c] (Ill. 1871) Where, in a suit against an insurance company, a juror, on his examination, stated that he had a prejudice against all insurance companies, that it was founded on the fact that he could not comprehend their proceedings, but that it would not affect his verdict, held, it was error to disallow a challenge for cause, as he did not stand indifferent between the parties.—Winnesheik Ins. Co. v. Schueller, 60 Ill. 465.

[d] (La. 1890) On an indictment for murder, the fact that a juror states that he thinks one ought to be sent to the penitentiary for killing another in self-defense will not disqualify him, where he further states that, if instructed by the court to acquit in case defendant killed deceased in self-defense, he would do so.—State v. Ford, 42 La. Ann. 255, 7 South. 696.

[e] (N. H. 1890) The fact that, some time before the trial of an action against a town for injuries received from a defective highway, one of the jurors expressed his opinion that the law awarding damages for injuries received from a defective highway was unwise, does not incapacitate him from serving on such a trial, provided it appears that in rendering a verdict he will be guided by the law as laid down by the court.—Judd v. Town of Claremont, 66 N. H. 418, 23 Atl. 427.

[f] (N. Y. 1879) On trial of an Italian for murder, a juror, who stated on his voir dire that from what he knew of Italians in his community he did not think much of them, but that he could give defendant a fair trial, was a competent juror.—Balbo v. People, 19 Hun, 424, affirmed (1880) 80 N. Y. 484; Cox v. People, 19 Hun, 430.

[g] (N. Y. 1892) Where a juror states that he has a strong prejudice against a person charged with the crime in question, but has no prejudice against defendant apart from the crime, and knows nothing of the case in question, such prejudice will not necessarily disqualify him, but presents only a question of fact, as to his competency.—People v. McGonegal, 136 N. Y. 62, 32 N. E. 616.

[h] (S. C. 1883) A juror stated on his voir dire that he had expressed an opinion that "any man who commits such a crime should be hanged," and "that a man committing so shocking a crime as this was reported to be did not deserve a trial by jury." *Held*, that it was not an abuse of discretion to permit the juror to serve, where he stated that he had neither formed nor

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expressed any opinion as to the guilt or innocence of the prisoner at the bar.—State v. Coleman, 20 S. C. 441.

§ 493. Sale of intoxicating liquors.

Estoppel to assert competency, see post, § 503 [ww].

[a] (Ill. 1875) It is not ground of challenge, on the trial of one indicted for keeping open a tippling house on the Sabbath day, that a juror has a bias or feeling against persons engaged in the business of saloon keeping and a prejudice against the selling of liquors, when he states that such feeling and prejudice would not influence his judgment, and that his feeling and prejudice was against the business, and not against the persons engaged in it, and that he would do the defendant justice.—Kroer v. People, 78 Ill. 294.

[b] (Ill. 1885) On a prosecution for selling liquors without a license, a juror is not rendered incompetent by his mere disapproval of the liquor business, either with or without a license; but he should be excluded if he is so prejudiced against such business and persons engaged therein, or against any other crime or misdemeanor, that he cannot give the accused a fair and impartial trial.—Carrow v. People, 113 Ill. 550.

[c] (Ind.) A juror who states that he believes a licensed liquor dealer cannot be a moral man, and is not engaged in a legitimate business, is disqualified to sit on the trial of a prosecution against a licensed liquor dealer for violating the liquor law, although the juror also states that he believes he can give him a fair and impartial trial.—(1879) Swigart v. State, 67 Ind. 287; (1880) Elliott v. State, 73 Ind. 10.

[d] (Ind. 1890) A person who states that he has a prejudice against the sale of intoxicating liquors, and would think that a man engaged in such business would be of bad moral character, but that the fact that a witness was in such business would have no effect on his opinion of the witness' credibility, that he had not formed or expressed any opinion in the case, that he could give defendant an impartial trial, and that he had no opinion as to the facts,—is a competent juror in a trial for selling liquor to a drunkard.—Dolan v. State, 122 Ind. 141, 23 N. E. 761.

[e] (Ind. 1894) A juror who states that his prejudice is strong against saloons, or that, in his opinion, to engage in the sale of liquor is an evidence of immorality, is incompetent to serve in proceedings to compel the granting of a license, even though he may also be of the opinion that he could lay his prejudice aside, and give a verdict according to the law and the evidence.—Fletcher v. Crist, 139 Ind. 121, 38 N. E. 472.

[f] (Mich. 1888) In an action under the civil damage law for selling liquor to plaintiff's minor son, one who testifies that he believes that "a minor is as able to buy a glass of beer or whisky as a man 40 years old," and that he does not think it is a good law, and is not in favor of it; or one who testifies that he is not exactly in favor of enforcing the law, but thinks "they should go according to law if it was a minor,"—is incompetent as a juror, though he states that he thinks he can render a verdict in accordance with the law and evidence.—Theisen v. Johns, 72 Mich. 285, 40 N. W. 727.

[g] (Mich. 1893) In a prosecution for keeping a saloon open on Sunday, a juror testified on his voir dire that he had always been "down on liquor selling"; that, when sitting as a juror in a case where a liquor seller was interested as defendant or a witness, he had a prejudice against such person, and that, in the case of respondent, he could not say that such prejudice would be entirely removed. To the court he said that he would not be prejudiced against a liquor dealer by reason of his business; but he was prompted by the prosecuting attorney, who stated that it was his understanding that the juror was prejudiced, not against the person, but against the business. *Held*, that a challenge for cause to the juror should have been allowed.—People v. Wheeler, 96 Mich. 1, 55 N. W. 371.

[h] (N. Y. 1891) The fact that a proposed juror, in an action under the civil damage act (Laws 1873, c. 646), is prejudiced against the business of selling intoxicating liquors, does not disqualify him, where he further states on his voir dire that he is not prejudiced against defendant, and that he could give an impartial verdict, according to the evidence, irrespective of what he thought of the business.—De Puy v. Quinn, 61 Hun, 237, 16 N. Y. Supp. 708.

§ 494. Particular defenses.

[a] (Cal. 1895) A prejudice against the defense of insanity in criminal cases does not disqualify a juror, where no such defense is made or contemplated.—People v. Collins, 105 Cal. 504, 39 Pac. 16.

[b] (Mo. 1893) The aversion of a juror, in a murder case, to a plea of insanity, does not disqualify him, where the trial court is satisfied from the juror's answers that he will give defendant a fair and impartial trial.—State v. Welsor, 117 Mo. 570, 21 S. W. 443.

[c] (N. Y. 1886) Jurors admitted that they had a prejudice against the defense of insanity, which would remain with them, but that they felt that they would be guided and controlled by the evidence, notwithstanding the prejudice. *Held*, that they were not disqualified, since no sufficient existing bias was shown.—People v. Carpenter, 38 Hun, 490, affirmed (1886) 102 N. Y. 238, 6 N. E. 584.

[d] (Pa. 1888) On a trial for murder, where the defense of insanity was interposed, two of the jurors admitted on their voir dire that they had a prejudice against that defense, one stating that he believed it to be constantly used where there is no occasion for it; the other, that he never thought it ought to be a plea for murder. Each declared that he could go into the jury box and try the case according to the evidence, and be governed by the evidence under the law. *Held*, that they were competent.—Hall v. Commonwealth, 12 Atl. 163.

§ 495. Weight and effect of evidence.

[a] (Ill. 1881) A juror in a civil case, after stating that if the evidence should be evenly balanced he would find for plaintiff, stated that he had formed no opinion, was not biased, and knew no reason why he could not sit impartially and decide the case according to the evidence. *Held*, that it was proper to overrule a challenge for cause.—Richmond v. Roberts, 98 Ill. 472.

[b] (La. 1890) On an indictment for murder the fact that a juror states that he would not give the prisoner the benefit of a reasonable doubt, but would convict if there was a preponderance of evidence for the state, will not disqualify him where he further states that if instructed by the court to give the accused the benefit of a reasonable doubt he would do so.—State v. Ford, 42 La. Ann. 255, 7 South. 696.

[c] (Mo. 1886) Where, on the trial of an action for damages against a railroad, a juror, challenged for cause, answers to a question whether, if, in his opinion, when he heard the

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evidence, it were equally balanced, he would find against the defendant, that he would so find, but, in answer to further questions by the court, answers that he has not formed or expressed any opinion as to the rights of the parties, and that he has no prejudice against defendant, and will determine the cause according to the evidence, and instructions of the court, the court is justified in disallowing, in its discretion, the challenge of such juror for cause.—Montgomery v. Wabash, St. L. & P. Ry. Co., 90 Mo. 446, 2 S. W. 409.

[d] (N. Y. 1887) A juror who, on his voir dire, states that his life was saved by a physician, who is expected to testify as an expert in the action, and that he has such confidence in the physician's opinion that he would give it more weight than that of any other doctor, in case of a difference between them, is incompetent, though he states that he would try to render an impartial verdict, and believes he could do so.—Lewke v. Dry Dock, E. B. & B. R. Co., 46 Hun, 283.

§ 496. Punishment prescribed for offense.

[a] A juror who states that he has conscientious scruples against the death penalty is directly within the inhibition of the statute thereon, and his competency is not restored by his avowal that he would render a verdict of guilty if the evidence required it.
—(N. Y. 1867) O'Brien v. People, 48 Barb. 274, 3 Abb. Prac. (N. S.) 368, affirmed (1867) 36 N. Y. 276.

CONTRA, see
(Colo. 1880) Stratton v. People, 5 Colo. 276.

[b] (Ark. 1855) Under Dig. c. 52, § 158, providing that "persons whose opinions are such as to preclude them from finding any defendant guilty of any offense punishable with death shall not be allowed or compelled to serve as jurors on the trial of an indictment for any offense punishable with death," where jurors stated on their voir dire that they were opposed to capital punishment, it was error to discharge them as incompetent and refuse to permit the defendant to ask them whether their opinions would preclude them from finding the defendant guilty of an offense punishable with death.—Atkins v. State, 16 Ark. 568.

[c] (Ind. 1855) A juror, included in the venire at a trial for murder, being examined by the court at the impaneling, said that he was opposed to punishing a man with death, and could not find a verdict that a man should suffer death, but that, when the law and evidence warranted a verdict of guilty, he could find that the accused be imprisoned for life. *Held*, that the juror was incompetent.—Driskill v. State, 7 Ind. 338.

[d] (Mass. 1850) One who is opposed to capital punishment, and fears that his opinion may influence others of the jury, is, notwithstanding, competent to be sworn as a juror, if he believes he can give an unbiased verdict.—Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711.

[e] (Miss. 1856) Conscientious scruples in regard to capital punishment, but which would not prevent a juror from finding a true verdict according to the evidence, are no disqualification to his serving in a capital case; and, since no better means exist for learning what influence such scruples will have than the declarations of the juror, if he declare on his examination that he has conscientious scruples upon the subject of capital punishment, and that it would be against his conscience to render a verdict by which a party would be subjected to the punishment of death, but that he thinks he could do justice between the state and the accused, he will be competent.—Williams v. State, 32 Miss. 389, 66 Am. Dec. 615.

[f] (Mo. 1895) Jurors stating that they had conscientious scruples against the infliction of the death penalty, and that they would not render a verdict of guilty knowing that the penalty would be death, were properly excused, though they did not say that their opinion would preclude such a verdict.—State v. David, 131 Mo. 380, 33 S. W. 28.

[g] (N. Y. 1864) Where a person called as juror in a capital case, on being challenged, testified that he had conscientious scruples as to the propriety of the death penalty in any case, and on cross-examination stated that if he was sworn to render a verdict according to the evidence he would respect his oath and do so, but that he would not feel willing to be a juror on the case, he is properly excluded.—Walters v. People, 6 Parker, Cr. R. 15, affirmed Walter v. Same (1865) 32 N. Y. 147.

[h] (N. Y. 1889) Code Cr. Proc. § 377, provides that in capital cases a person entertaining such conscientious opinions in regard to capital punishment "as would preclude his finding the defendant guilty shall neither be permitted nor compelled to se e as a juror." *Held*, that the court properly excluded persons, each of whom said that his scruples were such as would render him "extremely reluctant to find the defendant guilty of murder in the first degree," though they modified their position slightly on further examination.—People v. Carolin, 115 N. Y. 658, 21 N. E. 1059.

[i] (N. C. 1879) It was proper on a murder trial to allow a challenge of one called as a juror who stated that he had conscientious scruples against capital punishment, and that it would do violence to his conscience to render a verdict of guilty, but that he would do so if the evidence satisfied him of the prisoner's guilt beyond a reasonable doubt.—State v. Bowman, 80 N. C. 432.

(H) CHALLENGES AND OBJECTIONS IN GENERAL.

1. IN GENERAL, §§ 497-502.
2. WAIVER OF RIGHT TO OBJECT OR CHALLENGE, §§ 503-523.
3. REJECTION OR DISCHARGE ON COURT'S OWN MOTION, §§ 524-540.

Adoption of state practice by federal courts, see "Courts," vol. 13, cc. 2703–2706, §§ 929, 930.

Allowance of challenges in certain cities as denial of equal protection of the laws, see "Constitutional Law," vol. 10, c. 2130, § 711 [a].

Harmless error in failure to warn defendant of right to challenge juror in criminal prosecutions, see "Criminal Law," vol. 15, c. 901, § 3113.

—— *in sustaining or overruling challenges in criminal prosecutions, see* "Criminal Law," vol. 15, cc. 907–910, §§ 3116, 3117.

Review as dependent on aspect of record on appeal in criminal prosecutions, see "Criminal Law," vol. 15, c. 563, § 2793; c. 580, § 2813.

1. IN GENERAL.

STATUTORY PROVISIONS, § 497.
ORDER OF CHALLENGES ON DIFFERENT GROUNDS, § 498.
ORDER OF PARTIES IN MAKING CHALLENGES, § 499.

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OBJECTIONS AND EXCEPTIONS, § 500.
REQUIRING JURORS TO STAND ASIDE, § 501.
WITHDRAWAL OF ACCEPTANCE OR CHALLENGE OF JUROR, § 502.

§ 497. Statutory provisions.

[a] (U. S. 1851) Whether the act of July 20, 1840 (5 Stat. 394), applies only to the mode of selecting the jury, that is, by ballot, lot, or otherwise, as prescribed by the state laws, and does not affect the questions involved in the right of challenging the jurors called, whether peremptorily or for cause, quære.—United States v. Douglass, Fed. Cas. No. 14,989 [2 Blatchf. 207].

[b] (Ala. 1842) The alteration of the law relative to challenges of jurors, enlarging the privilege of the prisoner, applies to the trial of one offending before the alteration.—Lore v. State, 4 Ala. 173.

[c] (N. Y. 1873) Laws 1872, c. 745, providing that a juror's opinion in reference to the circumstances of the case, or the guilt or innocence of the prisoner, is not a sufficient ground of challenge for principal cause, if he can render an impartial verdict, and the court is satisfied that his opinion will not influence his verdict, is applicable on the trial of an offense charged to have been perpetrated prior to its passage.—Stokes v. People, 53 N. Y 164, 13 Am. Rep. 492.

§ 498. Order of challenges on different grounds.

Peremptory challenges, see post, § 625.

[a] (Kan. 1891) All challenges to the array upon the ground that the jury was not selected, drawn, or summoned according to law must precede those made to the poll for favor, undue influence, or prejudice.—State v. Wright, 45 Kan. 136, 25 Pac. 631; Same v. Eigle, 45 Kan. 138, 25 Pac. 632.

[b] (N. Y. 1892) By Cr. Code, § 385, "challenges to an individual juror must be taken first by the people and then by the defendant." By section 386, "challenges of either party must be taken (1) to the panel; (2) to an individual juror for a general disqualification; (3) to an individual juror for implied bias; (4) to an individual juror for actual bias; (5) peremptory." *Held*, that under these sections challenges must first be made by the people, and then by the defendant, in the order named, and the people cannot be required to go through all their challenges before the defendant makes a challenge upon any ground, though in practice all the challenges for cause may be grouped.—People v. McGonegal, 62 Hun, 622, 17 N. Y. Supp. 147, affirmed (1892) 136 N. Y. 62, 32 N. E. 616.

[c] (N. D. 1890) Under Code Cr. Proc. §§ 322–324, providing that challenges to an individual juror must be taken when he appears, and before he is sworn, it is proper to require all challenges to individual jurors to be exhausted as each juror appears.—Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003.

[d] (Ohio, 1831) A person on trial, entitled to peremptorily challenge jurors, may first challenge for cause, and reserve his peremptory challenge.—Hooker v. State, 4 Ohio (4 Ham.) 348.

§ 499. Order of parties in making challenges.

Peremptory challenges, see post, § 625.

[a] (U. S. 1877) In presenting jurors for challenge, the government must first exercise its right, and then the defense.—United States v. Butler, Fed. Cas. No. 14,700 [1 Hughes, 457].

[b] (Ind. 1831) Challenges to petit jurors are first made by the prisoner, and afterwards by the prosecuting attorney.—Jones v. State, 2 Blackf. 475.

[c] (Iowa, 1864) Under section 4780 of the Revision of 1860, the prosecution, in forming the jury, in a criminal case, should complete its challenges before the defendant commences to exercise his right of challenge.—State v. Bowers, 17 Iowa, 46.

[d] (La. 1850) The state should first exercise the right of challenge, whether for cause or peremptorily, and cannot do so after the prisoner has accepted the juror.—State v. Cummings, 5 La. Ann. 330; State v. Florez, Id. 429.

[e] (Minn. 1874) It is error to require defendant to exhaust all his challenges to each and all of the jurymen before the state begins its challenges, except challenges for cause after the state shall have begun; the true construction of the statute being that defendant shall exhaust all his challenges to an individual juror before the state shall begin its challenges to that juror, and so on, to the end of the list.—State v. Smith, 20 Minn. 376 (Gil. 328).

[f] (Minn. 1878) Under Gen. St. 1866, c. 116, §§ 10, 32, providing that, in criminal cases, all challenges to an individual juror shall be taken when he appears, and before he is sworn, first by the defendant and then by the state, each party to exhaust all his challenges before the other begins, a defendant cannot reserve his challenges until 12 jurymen have been called and placed in the box, but must make and exhaust all his challenges to each juror as he is called, in the order prescribed, and before he is sworn.—State v. Armington, 25 Minn. 29.

§ 500. Objections and exceptions.

[a] (Fla. 1889) When a person interested objects to a juror being excused, he should make his objection before the juror is excused, and it is too late to object after the juror is excused.—Ellis v. State, 25 Fla. 702, 6 South. 768.

[b] (N. C. 1879) Objection to the right of the state to challenge for cause must be taken before verdict.—State v. Boon, 80 N. C. 461.

§ 501. Requiring jurors to stand aside.

Necessity of exhausting jurors stood aside after exhaustion of rest of panel, see ante, § 353.

[a] A juror objected to by the state may properly be required to stand aside until the panel is exhausted.

—(Pa. 1860) Warren v. Commonwealth, 37 Pa. (1 Wright) 45;

(S. C. 1880) State v. Stephens, 13 S. C. 285.

[b] On the trial of a prosecution for felony, the commonwealth may "stand aside" jurors, without assigning cause, until the panel be exhausted.

—(Pa. 1869) Commonwealth v. Marra, 8 Phila. 440;

(S. C. 1879) State v. McNinch, 12 S. C. 89.

[c] (U. S. 1851) Whether a qualified peremptory challenge in a criminal case—that is, a right to set aside a juror without challenging him for principal cause or to the favor, and to have him finally excluded from the jury unless the panel is exhausted by the challenges of the prisoner—exists in favor of the government in the courts of the United States, quære. —United States v. Douglass, Fed. Cas. No. 14,989 [2 Blatchf. 207].

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[d] (U. S. 1877) As the government is allowed the right of peremptory challenge, it cannot ask a juror to stand aside until the panel is exhausted, before challenging for cause, or peremptorily.—United States v. Butler, Fed. Cas. No. 14,700 [1 Hughes, 457].

[e] (Fla. 1893) On a prosecution for murder, after four jurors had been accepted by the state and the accused, and the regular and a special venire had been exhausted, the state objected to the last juror sworn from the special venire on the ground that he was present at the inquest held by the coroner, and heard the evidence given there, and that this fact was not known when the juror was accepted. Without passing on this objection, on motion of the state attorney, the judge ordered that the juror be taken from the jury box, and that his name be placed at the foot of the list of a third venire of jurors summoned against the objection of the accused. The jury was completed from the list before reaching this juror, and after the accused had exhausted all his peremptory challenges. *Held*, that it was error for the judge, without passing on the objections raised to the juror, to stand him aside, and proceed to organize the jury.—Mathis v. State, 31 Fla. 291, 12 South. 681.

[f] (Ga. 1846) The practice in England, under St. 33 Edw. I., of passing jurymen in criminal cases, until the whole panel is exhausted, and a jury not made, before the crown can be called upon to show cause, is not authorized, since the adoption of the Penal Code.—Sealy v. State, 1 Ga. (1 Kelly) 213; Reynolds v. Same, Id. 222.

[g] (N. C. 1844) Where one of the venire, upon being called, was challenged by the state, and directed to retire until the panel was gone through with, and was not afterwards recalled, the prisoner making no motion to that effect, and it being known that the juror was a witness for the prisoner, it was *held* that this was no ground for a venire de novo on the part of the prisoner.—State v. Lytle, 27 N. C. 58.

[h] (N. C. 1845) Where the state challenges for cause, the panel may be gone through with before trying the question.—State v. Craton, 28 N. C. 164.

[i] (N. C. 1859) The prisoner has no right to postpone showing cause of challenge to a juror, and to have him stand aside, until the panel is finished; this being entirely the privilege of the state.—State v. Bone, 52 N. C. 121.

[j] (N. C. 1887) The extent to which the state will be permitted to stand aside jurors without assigning present cause of challenge being mostly discretionary with the trial judge, the latter should not commit himself by answering a question from the state's solicitor as to how many such jurors the state will be permitted to stand aside; but the mere fact that the judge did answer the question does not constitute error.—State v. Sloan, 97 N. C. 499, 2 S. E. 666.

[k] (Pa. 1853) On the trial of an indictment for felony, a juror may, at the request of the prosecuting officer, be directed to stand aside, but shall be again called when the panel is exhausted, when he may be challenged for cause.—Jewell v. Commonwealth, 22 Pa. (10 Harris) 94.

[l] (Pa. 1869) After a juror has been called, and handed over to the defendant, the state cannot stand him aside.—Commonwealth v. Twitchell, 1 Brewst. 551.

[m] (Pa. 1872) The commonwealth can stand aside a juror in a capital case, after he has been sworn on his voir dire, and challenged for cause by the commonwealth, and had been examined as to his competency to sit in the case.—Commonwealth v. Mayland, 29 Leg. Int. 150.

[n] (Pa. 1873) It is the practice of the federal courts, and of such of the states as have not superseded in this respect the common law by statutes, to allow the government to stand aside jurors without assigning cause of challenge. At common law the government has no peremptory challenges, but, unlike the defendant, it is not required to show cause until after the panel is exhausted, having the power of setting aside individual jurors till that period.—Commonwealth v. Keenan (Quart. Sess.) 30 Leg. Int. 416, 10 Phila. 194.

[o] (Pa. 1873) While in prosecutions for felony and misdemeanors the commonwealth is allowed at common law, there being no legislation on the subject, to stand aside jurors, without assigning cause, until the panel is exhausted, if the jury box be not filled, the set aside jurors will be severally called, and, unless adequate cause be shown against them, they will be chosen.—Commonwealth v. Keenan (Quart. Sess.) 30 Leg. Int. 416, 10 Phila. 194.

[p] (Pa. 1881) In misdemeanors, notwithstanding that 12 jurors have been called and seated in the box, the commonwealth has (when the prisoner has not exhausted his peremptory challenges) the right to stand aside one of them, and have a new juror called in his place.—Commonwealth v. Noonan (Quart. Sess.) 38 Leg. Int. 184, 15 Phila. 372.

[q] (Pa.) The commonwealth has the right, upon the trial of misdemeanors and felonies, capital and not capital, to stand aside jurors, without assigning cause, until the entire panel has been called.—(1882) Haines v. Commonwealth, 100 Pa. 317; (1882) Smith v. Same, Id. 324; (1888) Commonwealth v. Fry (Quart. Sess.) 5 Lanc. Law Rev. 75.

[r] (Pa. 1886) The right of the commonwealth to stand jurors aside, as derived from the common law, was not abrogated by Act 1834, which provided that in drawing a jury some disinterested person, by direction of the court, should draw 12 names from the jury box, one after another, "and if any of the jurors whose names shall be so drawn shall not appear, or shall be challenged and set aside," further names shall be drawn until a jury of 12 is obtained, nor by Act June 23, 1885, amendatory thereof, which provides that in drawing a jury 20 names shall be drawn, "and if any of the persons whose names shall be drawn shall not appear, or shall be challenged and set aside for cause," further names shall be drawn until 20 names are secured, from which number each party shall strike 4.—Commonwealth v. Todd, 1 Pa. Co. Ct. R. 416.

[s] (Pa.) The right of the commonwealth to "stand aside" jurors may be exercised on trials for both felonies and misdemeanors, and applies equally to jurors brought in on a special venire; and this rule is not changed by Cr. Proc. Act 1860, § 37, which allows peremptory challenges to the commonwealth.—(1889) Rudy v. Commonwealth, 128 Pa. 500, 18 Atl. 344, 24 Wkly. Notes Cas. 502; (1891) Commonwealth v. O'Brien, 140 Pa. 555, 21 Atl. 385.

[t] (S. C.) The state has no right to challenge peremptorily, but may challenge for cause; and the cause need not be shown until the prisoner has gone through with his challenges.—(1805) State v. Stalmaker, 2 Brev. 1; (1820) State v. Barrontine, 2 Nott & McC. 553.

[u] (S. C. 1896) Under Rev. Civ. St. 1893, § 2403, providing that, if it appears to the court

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that a juror is not indifferent in a cause, he shall be placed aside, it is not an abuse of discretion for the court to order a juror to stand aside, without presenting him to the defendant, where the juror states on his voir dire that he is related to the defendant, is not sure he could be impartial, and asks to be excused. —State v. Murphy, 48 S. C. 1, 25 S. E. 43.

§ 502. Withdrawal of acceptance or challenge of juror.

As waiver of defects, see post, § 521.
Peremptory challenges, see post, § 629.

[a] (Ala. 1889) The state may revoke an acceptance of a juror before the defendant has accepted him, and before the impaneling of the jury is completed, or the trial commenced.—Daniels v. State, 88 Ala. 220, 7 South. 337.

[b] (Fla. 1860) Defendant in a capital case may retract his acceptance of a juror at any time before they are sworn in chief.—O'Connor v. State, 9 Fla. 215.

[c] (Minn. 1876) Where a challenge to a juror is made and admitted he is excused, and the challenge cannot thereafter be withdrawn.—State v. Lautenschlager, 22 Minn. 514.

[d] (N. Y. 1880) The prisoner, having challenged the array, may withdraw the challenge, and, by so doing, waive the irregularity.—Rierson v. People, 79 N. Y. 424, 35 Am. Rep. 524, affirming (1879) 18 Hun, 239.

2. WAIVER OF RIGHT TO OBJECT OR CHALLENGE.

IN GENERAL, § 503.
FAILURE TO CHALLENGE OR OBJECT, § 504.
—— RESIDENCE AND CITIZENSHIP, § 505.
—— ELECTORS, FREEHOLDERS, OR TAXPAYERS, § 506.
—— AGE OF JUROR, § 507.
—— PECUNIARY INTEREST AND PREJUDICE, § 508.
—— RELATIONSHIP AND BUSINESS CONNECTION, § 509.
—— PRIOR SERVICE AS JUROR, § 510.
—— FORMATION AND EXPRESSION OF OPINION, § 511.
—— SUMMONING AND EXCUSING JURORS, § 512.
—— DRAWING AND IMPANELING, § 513.
—— OATH, § 514.
FAILURE TO EXAMINE JUROR, § 515.
APPEARANCE AND PARTICIPATION IN CAUSE, § 516.
PASSING OR TENDER OF JUROR, § 517.
ACCEPTANCE OF JUROR AS WAIVER OF CHALLENGE, § 518.
EFFECT OF EXERCISE OF CHALLENGES, § 519.
EFFECT OF FAILURE TO EXHAUST PEREMPTORY CHALLENGES, § 520.
WITHDRAWAL OF CHALLENGE, § 521.
PEREMPTORY CHALLENGES, § 522.
SPECIAL OR STRUCK JURY, § 523.

Conclusiveness of decision on challenge to array, see post, § 550 [h].
Defects in number of jurors in civil cases, see ante, § 189.
—— *in criminal cases, see* ante, § 201.
Effect of waiver of right to examine juror, see post, § 561 [b].
Waiver of triors on challenge to array, see post, § 550 [j].
Grounds for new trial in civil cases, see "New Trial," II. (D).
Review as dependent on presentation of questions in trial court, see "Criminal Law," vol. 15, c. 420, § 2636.

§ 503. In general.

[a] It is the prisoner's duty to know when the court meets, and to apply, if in custody at the time, to be brought into court for the purpose of challenging; and, if he fails to do so, he waives his privilege of excepting to the panel or to any member.
—(Cal. 1861) People v. Romero, 18 Cal. 89;
(Minn. 1860) State v. Hinckley, 4 Minn. 345 (Gil. 261).

[b] (Colo. 1896) A challenge to the array of jurors on the ground that they were summoned by the sheriff, and not by the coroner, as previously ordered, was properly overruled, where defendant's attorney expressly admitted that the jurors were personally unobjectionable, and were not illegally summoned save in the respect specified.—Boykin v. People, 22 Colo. 496, 45 Pac. 419.

[c] (Ga. 1849) The owner or manager of a slave charged with a capital offense, when acting as the counsel of his slave on the trial, can lawfully waive the number of jurors required by the statute to be impaneled for the trial of such slave, and consent to take the first 12 on the jury list.—Alfred v. State, 6 Ga. 483.

[d] (Ga. 1850) Where a juror, called in a capital felony, has answered negatively all the questions propounded to him, by St. 1843, and been found competent by triors, who were not especially sworn as triors, but who had been sworn in chief, and was accepted by the prisoner, and sworn in chief, and the court, discovering the irregularity, to cure it, causes the juror again to be put upon the prisoner, who objected on the ground that he was already sworn in chief, and was thereby understood by the presiding judge to insist on the juror's sitting in the cause, it was *held* that nothing had transpired in relation to such juror to constitute a good cause of challenge, and that, if there had, the prisoner had waived it.—Malone v. State, 8 Ga. 408.

[e] (Ga. 1859) A prisoner may waive a trial, and still more any lesser right or privilege, and therefore, if he consent that the jury be taken from the grand jury list, that consent binds him. —Sarah v. State, 28 Ga. 576.

[f] (Ga. 1884) Where 11 jurors had been procured out of a panel of 48, and defendant's counsel answered in response to a question by the court that they were willing to take a panel of 12 from those remaining on the list, and selected the remaining juror from that list, any error was waived.—Inman v. State, 72 Ga. 269.

[g] (Ind. 1861) Where, after the return of the verdict, it was discovered that one of the jurors had been a member of the grand jury which found the indictment, it was *held* that the defendant was not chargeable with negligence in not sooner discovering the fact.—Rice v. State, 16 Ind. 298.

[h] (Ind. 1891) Where a counsel made a full examination of a juror, and there was no indication that his eyesight was defective, the fact that during the trial such juror, coming in late, stumbled, and in reply to a question by the court stated that his eyesight was poor, cannot charge defendant with notice of that fact, when such incident was not observed by his counsel.—Rhodes v. State, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429.

[i] (Ind. 1892) Rev. St. 1881, § 1396, provides that, where for any cause no jury shall be in attendance, the court may, if necessary, summon a jury from the bystanders. *Held*, that where a party waives a jury trial and consents to the discharge of the regular panel, but afterwards demands a jury, he cannot question the court's right to summon a jury from the by-

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standers.—Ohio & M. Ry. Co. v. Trapp, 4 Ind. App. 69, 30 N. E. 812.

[j] (Kan. 1876) Where a juror, upon his voir dire, testifies that he has no knowledge of the case, the fact that there has been a previous trial of the cause does not, in the absence of any suspicion on his part of the truth of the juror's testimony, place any obligation upon the party challenging him to examine the record of such previous trial to ascertain whether the juror did serve upon such trial, nor is he ordinarily chargeable with gross negligence or laches in forgetting the fact of such service.—Lane v. Scoville, 16 Kan. 402.

[k] (Ky. 1881) One who fails to move to set aside an indictment waives any error in the summoning or formation of a grand or petit jury.—Haggard v. Commonwealth, 79 Ky. 366.

[l] (La. 1821) It is doubtful whether a juror should be challenged before he is sworn; but, if the party who objects to him refuse to have another substituted, he cannot assign the juror's incompetency as error.—Livingston v. Heerman, 9 Mart. (O. S.) 656.

[m] (La. 1859) After the jury list had been called over in the presence of the accused and his counsel, and five jurors had been sworn, and four peremptory challenges had been made by the prisoner, his counsel moved for a continuance, on the ground that various jurors in the list were not in attendance, nor within the jurisdiction of the court, and were not liable to jury service, and that some of them had been excused previous to the list being served on the prisoner. *Held*, that the accused must be considered as having waived any objection he might have had to the panel.—State v. Lindsey, 14 La. Ann. 42.

[n] (Mich. 1890) Where defendant challenges the array on the ground that the court, in sustaining his challenge to the array in another case at the same term, discharged, not only those jurors who had been impaneled in the case, but all who had been summoned for the term, he cannot object to the court's refusal to sustain his challenge, on the ground that the second array was improperly drawn.—Robinson v. Mulder, 81 Mich. 75, 45 N. W. 505.

[o] (Minn. 1890) The trial of an action terminated in a disagreement and discharge of the jury. On plaintiff's motion for a retrial at the same term, the court ordered that the cause stand continued, unless the plaintiff should consent to try it to a "struck jury." Plaintiff consented in writing, participated in the selection of such a jury, and tried his case. *Held*, that he could not question the regularity of the order, after verdict.—Bennet v. Syndicate Ins. Co., 43 Minn. 45, 44 N. W. 794.

[p] (Mo. 1880) The right in a criminal case to have 12 more jurors summoned than the number of challenges allowed is a statutory provision, and is waived if not claimed before conviction.—State v. Robertson, 71 Mo. 446.

[q] (Mo. 1884) A party may waive his right to have a jury resworn.—Merrill v. City of St. Louis, 83 Mo. 244, 53 Am. Rep. 576, affirming (1882) 12 Mo. App. 466.

[r] (Mo. 1894) There being in attendance 28 qualified members of the regular panel, the other 19 were supplied on the judge's list (Act April 1, 1891, § 6); defendant's counsel stating that he had no objection to any one of the panel. Four, on their voir dire, had said they were over age. The court allowed the defense 64 hours, instead of 48, to make its challenges, and the state offered to challenge at once. Before court met, the state's attorney handed defendant the state's challenges, but defendant, as not having had these before, moved for 48 hours more, which the court granted. Thereafter defendant moved to quash the panel for the age of 3 of the jurors, and was compelled by the court to include the fourth. These were discharged, and their places filled (under section 6), defendant stating that he had no objections to the new 4, nor to any of the 47, of whom he was then given a full list with the state's challenges, and allowed 48 hours more. Thereafter he moved to quash the panel, on grounds unsupported by the record, and, being overruled, refused to challenge, and the first 12 named were called. Rev. St. 1889, § 4205. *Held*, that any error there might have been was waived.—State v. Clark, 121 Mo. 500, 26 S. W. 562.

[s] (N. H.) The constitutional objection to the use of a referee's report as evidence in a jury trial, under the referee law of 1874, c. 97, § 13, is waived when the referee was appointed by consent of the parties.—(1877) Deverson v. Eastern R. Co., 58 N. H. 129; (1877) Garland v. Towne, Id. 187; (1878) Daniels v. Lebanon, Id. 284.

[t] (N. Y. 1813) Where defendant expressly assented to the summoning of the jury by a constable who acts as advocate for the plaintiff in a justice's court, he cannot afterwards challenge the array on such ground.—Watkins v. Weaver, 10 Johns. 107.

[u] (N. Y. 1830) Where an accused party waives his right to object to a juror, against whom good cause of challenge existed on his part, it was *held* that the public prosecutor could not insist upon having the juror excluded, under an agreement that all should be considered as challenged by both parties.—People v. Mather, 4 Wend. 229, 21 Am. Dec. 122.

[v] (N. Y. 1855) An objection to an order of court, made after the jury have been impaneled and sworn, and directing that some of the jurors be withdrawn and others substituted, not insisted on at the time such change is made, is not open.—Cook v. Ritter, 4 E. D. Smith, 253.

[w] (N. Y. 1889) Where a case is tried by 10 jurors by consent, it is a waiver of any objection to the exclusion of a juror by the court on its own motion.—Corbett v. City of Troy, 53 Hun, 228, 6 N. Y. Supp. 381.

[ww] (N. Y. 1891) In an action under the civil damage act, a person who was prejudiced against the sale of liquor was permitted to serve on the jury after stating that he was not prejudiced against defendant, and that he would give an impartial verdict. *Held*, that plaintiff is not estopped to insist on the competency of such juror by the fact that she had procured a ruling by the court that a juror was disqualified if he was prejudiced against the civil damage act.—De Puy v. Quinn, 61 Hun, 237, 16 N. Y. Supp. 708.

[x] (Ohio, 1871) A plaintiff consenting to the continuance of a juror who, on a previous trial of the cause, found against the plaintiff, will not, after the second verdict, be heard to complain of his retention on the panel.—Williams v. True, 1 Cin. R. 321.

[xx] (Pa. 1794) A defendant, knowing that a certain juror was plaintiff's brother-in-law, and yet refusing to accept plaintiff's offer to waive the juror, if defendant would consent to have some other juror in the room sworn, and go on with the trial, is not entitled to a new trial, on the ground of such relationship.—Spong v. Lesher, 1 Yeates, 326.

[y] (Pa. 1891) The omission to reswear the jury on the addition of new plaintiffs is not error, in the absence of a request so to do.—Vann v. Downing (Com. Pl.) 10 Pa. Co. Ct. R. 59.

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[yy] (Tex. 1885) If a juror is excused in his absence because of the sheriff's suggestion that he is postmaster, and defendant fails to apply for an attachment in order to test the bona fides of the excuse, he cannot afterwards complain. —Kennedy v. State, 19 Tex. App. 618.

[z] (Tex. 1895) It is no ground for reversal that one of the jurors, accepted by defendant and by the state, was omitted in the call for the jury, and that another juror served in the case, where defendant did not, upon discovering the mistake, ask that such juror be impaneled, and the last one be set aside.—Granger v. State (Cr. App.) 31 S. W. 671.

[zz] (Va. 1848) Where the prisoner objected to a juror, on the ground that the sheriff summoned 56 persons, when he was ordered to summon 48, and the court sustained the objection, set aside the whole return, and directed another venire facias, it was *held* that the prisoner had no right to complain of such direction.—In re Epes, 5 Grat. 676.

§ 504. Failure to challenge or object.

Time to object to panel or array, see post, § 544.

To exhaust peremptory challenges, see post, § 520.

Grounds for new trial in civil cases, see "New Trial," II. (D).

[a] An objection to a juror which is good cause of challenge must be made in time, or it will be considered as waived, and will not vitiate the trial.

—(Ark. 1861) Daniel v. Guy, 23 Ark. 50;
(La. 1858) State v. Nolan, 13 La. Ann. 276; (1878) Same v. Harris, 30 La. Ann. 90; (1878) Same v. Shay, Id. 114; (1885) Same v. Robinson, 37 La. Ann. 673;
(Mich. 1844) The Milwaukie v. Hale, 1 Doug. 306; (1883) Clark v. Drain Com'rs, 50 Mich. 618, 16 N. W. 167;
(Mo. 1881) State v. Ward, 74 Mo. 253;
(Neb. 1891) Van Etten v. Butt, 32 Neb. 285, 49 N. W. 365;
(N. M. 1873) Territory v. Abeita, 1 N. M. 545; (1894) United States v. Gomes, 37 Pac. 1101;
(N. Y. 1884) Paulitsch v. New York Cent. & H. R. Co., 50 N. Y. Super. Ct. (18 Jones & S.) 241; (1888) Stedman v. Batchelor, 49 Hun, 390, 3 N. Y. Supp. 580;
(N. C. 1851) Briggs v. Byrd, 34 N. C. 377; (1885) State v. Lambert, 93 N. C. 618;
(Tex. 1868) Tweedy v. Briggs, 31 Tex. 74.

[b] A failure by a party to a civil action to object to the competency of a juror, when he has notice of his condition or qualifications, operates as a conclusive waiver.

—(Ala. 1875) Brown v. State, 52 Ala. 345; (1894) Oliver v. Herron, 106 Ala. 639, 17 South. 387;
(Ill. 1834) Wickersham v. People, 2 Ill. (1 Scam.) 128;
(Kan. 1876) Lane v. Scoville, 16 Kan. 402;
(Mass. 1841) Hallock v. Franklin, 43 Mass. (2 Metc.) 558;
(Mo. 1894) City of Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678.

[c] When a ground for challenge existed at the time the jury was impaneled, but no objection was made, the party will be held to have waived his right, in the absence of proof that injustice has been done.

—(N. Y. 1888) Stedman v. Batchelor, 49 Hun, 390, 3 N. Y. Supp. 580;
(Va. 1895) Barnes v. Commonwealth, 92 Va. 794, 23 S. E. 784.

[d] (Ga. 1869) Objections to the qualifications of a juror cannot be raised after verdict, though the party objecting was ignorant of the facts. —Gormley v. Laramore, 40 Ga. 253.

[e] (Ga. 1891) When facts, and a witness by whom they can be proved, showing the incompetency of a juror, become known to counsel for the accused after the jury are sworn, but before any further step in the trial has been taken, the question of the juror's competency must then be raised. Counsel cannot remain silent and urge the juror's incompetency as a ground for setting the verdict aside.—Lampkin v. State, 87 Ga. 516, 13 S. E. 523.

[f] (Iowa, 1860) Failure of a defendant in a criminal action to object to a juror, on the ground of incompetency, is not cured by verdict.—State v. Groome, 10 Iowa, 308.

[g] (Me. 1880) An objection to a juror, which, if seasonably made, would have been valid, will not avail after verdict without proof affirmatively that the objection was unknown to the party making it, or his attorney, at or before the trial.—State v. Bowden, 71 Me. 89.

[h] (Mass. 1873) In the absence of proof that an objection to the competency of a juror was unknown to the objecting party and his attorney until after the juror was sworn, such objection is not available after verdict.—Russell v. Quinn, 114 Mass. 103.

[i] (Mich. 1873) In civil cases the proper time to make the necessary inquiries into the qualifications of jurors is before the trial, and not afterwards; and, if not made, then the objection will be deemed to have been waived.—Johr v. People, 26 Mich. 427.

[j] (Minn. 1873) A defendant in a criminal proceeding cannot, after verdict, take objections to a juror for reasons existing before the trial, and which might have been available on a challenge for cause had he been aware of the fact upon which the objection is based.—State v. Thomas, 19 Minn. 484 (Gil. 418).

[k] (N. H. 1860) Where alleged causes of exception to a juror appear from the venire and return, and the juror sits in the case without objection, it is too late to make objection for such reasons, after verdict.—Pittsfield v. Barnstead, 40 N. H. 477.

[l] (N. Y. 1855) An omission to challenge is a waiver of all objection to a juror, although there was no appearance.—Clark v. Van Vranken, 20 Barb. 278.

[m] (N. C. 1823) Where any irregularity in forming a jury is silently acquiesced in at the time by the prisoner, he waives his right to except, after conviction.—State v. Ward, 9 N. C. 443.

[n] (Ohio, 1850) When a party discovers the incompetency of a juror before the verdict, but makes no objection until after the verdict, he waives the objection.—Lowe v. McCorkle, 1 Ohio Dec. 352.

[o] (Va. 1895) The failure to take exception to a juror, on the ground of his incompetency, before verdict, is fatal, where it appears that the prisoner knew the facts of the incompetency prior to the trial.—Gray v. Commonwealth, 92 Va. 772, 22 S. E. 858.

§ 505. —— Residence and citizenship.

[a] The objection to a juror, on the ground of alienage, comes too late, if made in the first instance after verdict.

—(U. S. 1895) Kohl v. Lehlback, 160 U. S. 293, 16 Sup. Ct. 304, 40 L. Ed. 432;
(Ga. 1880) Hill v. State, 64 Ga. 453;
(Ill. 1866) Chase v. People, 40 Ill. 352;

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(La. 1892) State v. Beeder, 44 La. Ann. 1007, 11 South. 816;

(N. M. 1887) Territory v. Baker, 4 N. M. (Gild.) 236, 13 Pac. 30;

(Wis. 1866) Brown v. La Crosse City Gaslight & Coke Co., 21 Wis. 51.

[b] Objection that a juror is an alien is raised too late after verdict; and this, though knowledge of alienage was not received until after verdict.

—(U. S. 1801) Hollingsworth v. Duane, 4 U. S. (4 Dall.) 353, 1 L. Ed. 864, Fed. Cas. No. 6,618 [Wall. Sr. 147];

(S. C. 1798) State v. Quarrel, 2 Bay, 150, 1 Am. Dec. 637.

[c] (Me. 1859) Where a town, after issuance of a venire in its county, was annexed to another county, a party to an action in the old county, if he fails to challenge a juror summoned on the venire, who is a resident of the town, on the ground that he is not a resident of the trial county, will be deemed to have waived the objection.—Inhabitants of Mt. Desert v. Inhabitants of Cranberry Isles, 46 Me. 411.

[d] (N. M. 1873) Any objection to the fact that some of the jurors are nonresidents, if known to the defendant in a criminal case at the time of impaneling the jury, and not made at that time, will be deemed waived, and cannot be insisted upon after verdict.—Territory v. Abeita, 1 N. M. 545.

[e] (W. Va.) An objection that one of the jurors in a civil cause was not a resident of the county one year before the trial comes too late after judgment, especially if the objecting party had ready means of ascertainment thereof before the juror was sworn.—(1877) Zickefoose v. Kuykendall, 12 W. Va. 23; (1878) Sweeney v. Baker, 13 W. Va. 158, 31 Am. Rep. 757.

[f] (Wis. 1856) Under Rev. St. c. 97, § 1, providing that all persons who are citizens of the United States and qualified electors of this state shall be liable to be drawn as jurors, an objection that a juror was not a citizen of the United States may be taken after verdict; such disqualification not being known to the parties until after trial.—Schumaker v. State, 5 Wis. 324.

[g] (Wis. 1868) Alienage is purely a legal disqualification of a petit juror, and an objection based thereon comes too late after verdict, in a criminal cause not capital.—State v. Vogel, 22 Wis. 471.

[h] (Wis. 1882) An objection to a juror on the ground that he was not a citizen of the United States, and understood the English language imperfectly, is waived when not taken until after verdict.—Bonneville v. State, 53 Wis. 680, 11 N. W. 427.

§ 506. —— Electors, freeholders, or taxpayers.

[a] Objection cannot be made after verdict that a juror is not a freeholder.

—(U. S. 1884) Brewer v. Jacobs (C. C.) 22 Fed. 217:

(Ala. 1830) Hamner v. Eddins, 3 Stew. 192;

(Tex. 1882) Schuster v. La Londe, 57 Tex. 28;

(W. Va. 1894) Ohio River R. Co. v. Blake, 38 W. Va. 718, 18 S. E. 957.

[b] (Cal. 1872) Where, in a criminal case, a juror, whose name is on the poll tax list only, is sworn, and the defendant receives such juror without objection, he cannot be heard, after the verdict is rendered, to object that the juror was incompetent thereby.—People v. Sanford, 43 Cal. 29.

[c] (Kan. 1882) The objection that a juror was not an elector must be raised before verdict, even in a capital case; it not being an absolute disqualification, but only ground of challenge.—State v. Jackson, 27 Kan. 581, 41 Am. Rep. 424.

[d] (La. 1869) The objection that one of the jurors was not a registered voter comes too late if not made until after verdict.—State v. McLean, 21 La. Ann. 546.

[e] (Miss. 1861) The fact that one of the jury was not a householder or freeholder does not vitiate the verdict. Objection to a juror on that ground comes too late after verdict, even in a capital case, where the juror, on his examination by the judge, under a mistake, answered that he was a householder or freeholder.—Frank v. State, 39 Miss. 705.

[f] (Vt. 1801) If a juror, qualified as a freeholder at the time his name was put into the town box, afterwards devest himself of the freehold, this must be objected on challenge, and will not prevail after verdict.—Orcutt v. Carpenter, 1 Tyler 250, 4 Am. Dec. 722.

[g] (Va. 1880) The objection to a juror that he was incompetent, not having paid his capitation tax of the previous year, comes too late after verdict.—Poindexter v. Commonwealth, 33 Grat. 766.

§ 507. —— Age of juror.

[a] It is too late after verdict to raise the question of the minority of a juror.

—(Ky. 1895) Combs v. Commonwealth, 97 Ky. 24, 29 S. W. 734;

(La. 1891) State v. Garig, 43 La. Ann. 365, 8 South. 934.

[b] (U. S. 1884) The objection that one of the jury is not of lawful age comes too late after verdict, in the Tennessee practice, unless something more is shown vitiating the verdict.—Brewer v. Jacobs (C. C.) 22 Fed. 217.

[c] (Ill. 1857) Where defendant in a criminal trial fails to object to a juror whom he knows to be over 60 years of age, he cannot make this matter of exception after verdict.—Davis v. People, 19 Ill. (9 Peck) 74.

[d] (Mass. 1876) Although an infant is disqualified from serving as a juror, yet, if his name is on the list of jurors returned and impaneled, his serving as juror does not entitle a party against whom a verdict has been rendered to have the verdict set aside, even where he is ignorant of the fact of minority until after the verdict.—Wassum v. Feeney, 121 Mass. 93, 23 Am. Rep. 258.

[e] (Miss. 1859) Under Rev. Code, p. 497, art. 126, the objection that a juror over 60 is incompetent is waived, unless made at the trial, whether the party then actually knew the fact or not.—Williams v. State, 37 Miss. 407.

[f] (N. J. 1819) Under St. 1797 which provides that jurors returned for the trial of issues shall be between the ages of 21 and 65, and that a want of such qualification shall be good ground of challenge, provided the challenge be taken before the juror is sworn, it is not a ground for reversing a judgment that one of the jurors before whom the cause was tried was above the age of 65; it not appearing that any objection was made to him at the trial, either by challenge or otherwise.—Sutton v. Petty, 5 N. J. Law (2 Southard) 504.

[g] (N. M. 1894) Disqualification of two jurors, for over age, will not vitiate the verdict, if not objected to during the trial, unless defendant can show that injury has resulted to him by such condition.—United States v. Folsom, 7 N. M. 532, 38 Pac. 70.

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[h] (N. Y. 1845) Though an objection to the juror's age, if taken in time, would have been a good one, yet after verdict it is too late to interpose the objection.—Seacord v. Burling, 1 How. Prac. 175.

§ 508. —— Pecuniary interest and prejudice.

[a] (Ill. 1844) While the fact that a juror is security for costs in the suit is a good cause for challenge, the defect is waived by failure to object at the proper time.—Bradshaw v. Hubbard, 6 Ill. (1 Gilman) 390.

[b] (La. 1844) A party who does not appear and challenge a juror cannot, for his interest, object to the verdict. Still less can a mere guardian of property attached collaterally question the verdict on such ground.—Cressap v. Winchester, 6 Rob. 458.

[c] (Mass. 1830) If a party knows of any prejudice entertained by a juror, and makes no exception when the jury is impaneled, however good his cause of challenge then is, it must be deemed to be waived.—Fox v. Hazelton, 27 Mass. (10 Pick.) 275.

[d] (N. H. 1850) A stockholder in a railroad corporation is disqualified to sit as juror in a cause wherein his company is pecuniarily interested, though such fact is not known and is not objected to until after verdict.—Page v. Contoocook Val. R. R., 21 N. H. (1 Fost.) 438.

§ 509. —— Relationship and business connection.

[a] (Ga. 1880) An objection that a juror was a son of a first cousin of one of the parties comes too late if first raised after verdict.—Moody v. Griffin, 65 Ga. 304.

[b] (Me. 1830) An objection after verdict, that a juror is related to a party in the cause comes too late.—McLellan v. Crofton, 6 Me. (6 Greenl.) 307.

[c] (Me. 1889) Rev. St. c. 82, § 88, provides that if a party knows any objection to a juror in season to propose it before trial, and omits to do so, he shall not afterwards make it, unless by leave of court for special reasons. The morning after the evidence had been submitted to the jury, defendant's principal witness and cousin came to the room of one of defendant's attorneys, and told him that he thought the foreman of the jury was akin to the plaintiff; that he was not sure, but would find out, when he went home that day, and telegraph the attorney. The latter testified that he put no confidence in the information. *Held*, that he had reasonable notice, and should have objected before verdict.—Brown v. Reed, 81 Me. 158, 16 Atl. 504.

[d] (N. Y. 1819) An objection to a juror, on account of his relationship to the parties, was *held* to be made too late after the trial, where he was not challenged at the trial and there appeared to be no unfairness in it.—Eggleston v. Smiley, 17 Johns. 133.

[e] (Pa. 1891) Error in refusing to excuse a juror, who asked to be excused on the ground of his business relations with one of the parties, is waived, where no objection was taken below.—Bradwell v. Pittsburgh & W. E. P. Ry. Co., 139 Pa. 404, 20 Atl. 1046.

§ 510. —— Prior service as juror.

[a] The objection that a juror was a member of the grand jury which found the indictment is waived, where the prisoner, with knowledge of that fact, accepts him without objection.

—(Ind. 1861) Rice v. State, 16 Ind. 298;
(La. 1885) State v. Jackson, 37 La. Ann. 897.

[b] (N. J. 1890) An objection to a juror on the ground that he served on a former inquisition as to the lunacy, at that time, of the same person, is waived where no actual bias or misconduct is imputed to him, and the same attorney who represented the alleged lunatic on her former trial fails to object, and proceeds with the trial after the fact has appeared.—In re Lindsley, 46 N. J. Eq. (1 Dick.) 358, 19 Atl. 726.

[c] (Ohio, 1870) The objection that, contrary to Cr. Code, §§ 134, 135, prescribing grounds of challenge, a petit juror was also one of the grand jurors that found the indictment, comes too late in the first instance after verdict, even though the fact was unknown to the defendant or to his counsel.—Beck v. State, 20 Ohio St. 228.

§ 511. —— Formation and expression of opinion.

[a] (Ark. 1883) Objections to a juror because of an expressed opinion cannot be made after verdict, unless it appears that he had imposed himself on the panel by concealment or prevarication.—Casat v. State, 40 Ark. 511.

[b] (Me. 1871) An objection that the opposite party had conversed with the jurors on his case before the trial comes too late after verdict.—Hussey v. Allen, 59 Me. 269.

[c] (Neb. 1879) Where a party to a suit, being informed by a juror before the case was submitted that he had formed and expressed an opinion as to the merits of the case, fails to call the attention of the court to the matter or to challenge the juror, he will not, after verdict, be allowed to object on the ground that the juror had formed and expressed an opinion.—Tower v. Densmore, 8 Neb. 384, 1 N. W. 315.

§ 512. —— Summoning and excusing jurors.

[a] An irregularity in summoning a jury is waived by omission to challenge or object.

—(La. 1880) State v. Beasley, 32 La. Ann. 1162;
(Mass. 1861) Tripp v. Bristol County Com'rs, 84 Mass. (2 Allen) 556;
(Mo. 1875) State v. Jones, 61 Mo. 232;
(N. Y. 1827) Cole v. Perry, 6 Cow. 584; (1890) Bergman v. Wolff (Super. Buff.) 11 N. Y. Supp. 591;
(Va. 1893) Short v. Commonwealth, 90 Va. 96, 17 S. E. 786;
(Wyo. 1887) Haines v. Territory, 3 Wyo. 167, 13 Pac. 8.

[b] (Ala. 1887) Under Act Feb. 21, 1887, providing for the selection and organization of juries in Montgomery county (Sess. Acts 1886-87, pp. 190-197), the presiding judge has a discretionary power, in drawing talesmen after the original venire has been exhausted, to relieve from attendance any person drawn who resides more than two miles from the court house; and this being done in open court, presumptively in the presence of defendant's counsel, he cannot complain that they were not "specially informed" as to the names of the persons so excused, when it does not appear that they could not hear the names when called, or asked to be informed as to the names, or proposed to take issue as to the residence of those excused.—Steele v. State, 83 Ala. 20, 3 South. 547.

[c] (Ga. 1859) An objection that the panel is not full, if not taken at the proper time by challenge to the array, is waived.—Thomas v. State, 27 Ga. 287.

[d] (Ga. 1860) The statute requires that a panel of petit jurors shall be drawn for each

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week of the term of the superior court. *Held* that, where the same jurors who served during the first week voluntarily serve during a second week, the statement by defendant's counsel during the second week that he is ready for trial whenever it suited the convenience of the court, and his omission to challenge the array, constituted a waiver of an objection to the panel, taken for the first time on motion in arrest of judgment.—McAfee v. State, 31 Ga. 411.

[e] (Ga. 1895) Where a tales juror was discharged at the instance of the solicitor general, on the ground that his name did not appear on the jury list of the county, and another was summoned in his place, defendant could not complain that his name in fact appeared on the jury list, where such list was accessible to his counsel, who did not object to the discharge.—Hardison v. State, 95 Ga. 337, 22 S. E. 681.

[f] (Ill. 1879) An irregularity in filling the regular panel of jurors, where some of the jurors drawn and summoned do not respond, by directing others to be summoned by the sheriff, instead of having the panel filled by the clerk from the jury box, is waived by failing to challenge the array and proceeding to draw a trial jury from the regular panel as thus organized.—Mueller v. Rebhan, 94 Ill. 142.

[g] (Iowa, 1849) Where a jury was selected by the sheriff after a prisoner made affidavit that the sheriff was prejudiced against him, but the jury was not objected to, the irregularity was waived.—Harriman v. State, 2 G. Greene, 270.

[h] (Mass. 1809) Where the jury was summoned by a constable, instead of the sheriff or his deputy, but the parties were present when the jury was impaneled, and no challenge was made on account of the summons, the objection did not prevail.—Commonwealth v. Court of Session of Norfolk County, 5 Mass. 435.

[i] (Mass. 1839) Where, at the trial of an action against an insurance company, it appeared that the sheriff, who had returned a talesman to serve on the jury, was a stockholder in such company, and this circumstance was known to the junior counsel for the plaintiff soon after the trial began, but no objection was made till after the trial had proceeded for some time, *held*, that this was a waiver of any exception to the competency of such juror.—Orrok v. Commonwealth Ins. Co., 38 Mass. (21 Pick.) 456, 32 Am. Dec. 271.

[j] (Mass. 1843) A verdict will not be set aside, upon motion of the losing party, merely on the ground that some of the jurors were irregularly selected, although he did not know of such irregularity before the verdict was returned.—Page v. Inhabitants of Danvers, 48 Mass. (7 Metc.) 326.

[k] (Mass. 1863) An objection to the competency of jurors on a sheriff's jury, on the ground that they were not regularly certified or summoned, will be deemed to have been waived unless taken at the trial.—Fowler v. Middlesex County Com'rs, 88 Mass. (6 Allen) 92.

[l] (Minn. 1858) In the absence of fraud or collusion in the selection of a jury, an objection to the array, or to a single juror, is too late after the verdict, unless it is shown that the party objecting was prejudiced by the irregularity.—Steele v. Malony, 1 Minn. 347 (Gil. 257).

[m] (Minn. 1885) Irregularity in a direction by a justice of the peace to the sheriff to make a list of jurors in a criminal case is waived, if not objected to at the time.—State v. Nerbovig, 33 Minn. 480, 24 N. W. 321.

[n] (Mo. 1827) Where the court, during the impaneling of a jury in a murder case, excused a member of the panel because of his wife's illness, and defendant did not object until after the discharge, and failed to request that the vacancy be filled and that he have two days after service of the full list of the panel, the error, if any, was waived.—King v. State, 1 Mo. 717.

[o] (Mo. 1888) The court may fill the panel by calling two jurors from the regular venire to take the place of two unavoidably absent, who were on neither challenge list, defendant having declined to challenge the two thus called, and having waived his statutory right to additional time to make further challenges.—State v. Gilmore, 95 Mo. 554, 8 S. W. 359, 912.

[p] (Mo. 1888) The excusing of a qualified juror from serving without legal reason, there being no pretension that the jurors who tried the case were not qualified, was waived by failure to object thereto.—State v. Jackson, 96 Mo. 200, 9 S. W. 624.

[q] (Neb. 1879) Where objection to the mode of summoning the jury is not raised by challenge or plea in abatement, it is waived.—Brown v. State, 9 Neb. 157, 2 N. W. 378.

[r] (Neb. 1889) Where the court sustained a challenge to the array, and ordered the sheriff to summon "from the body of the county good and lawful men," the fact that the sheriff summoned the same persons as composed the challenged jury was waived by failure to challenge or object.—Burrell v. State, 25 Neb. 581, 41 N. W. 390.

[s] (N. H. 1859) During the period between the passage of the act of division by which two towns were constituted out of one and the organization of the new towns, the old officers acted, jurors were drawn who attended court, and the acting town clerk seasonably made return of his doings upon the venire to the court. *Held*, that an objection for that cause to a juror thus drawn, if not made until after verdict, must be considered as having been waived, because not seasonably made.—Bodge v. Foss, 39 N. H. 406.

[t] (N. J. 1806) While the statutory qualifications of jurors should be stated in a venire in a justice's court, yet a failure so to do cannot be objected to after verdict and judgment, where no challenge was made to any juror at the trial.—Bartow v. Murry, 2 N. J. Law (1 Penning.) 97.

[u] (N. J. 1807) The want of a seal upon a venire is cured by a verdict, no objection being made thereto at the trial.—Johnson v. Cole, 2 N. J. Law (1 Penning.) 266.

[v] (N. J. 1862) If no challenge to an array is made because the clerk has discharged so many of the jurors, who wish to be excused, that enough are not left to make a full jury, and the deficiency is supplied by summoning talesmen, though exception is taken to this mode of procedure, the verdict will not be set aside for illegality in impaneling the jury.—Smith v. Clayton, 29 N. J. Law (5 Dutch.) 357.

[w] (N. Y. 1855) Parties may waive an objection to an order making a venire for a second jury returnable at a different time than that prescribed by 2 Rev. St. p. 245, § 111, where, immediately after the disagreement of the first jury and their discharge, there was no objection made to a proposal of the justice to make such an order.—Fiero v. Reynolds, 20 Barb. 275.

[x] (Pa. 1804) Though defendant and the sheriff by whom the jury trying the case were returned are the same person, plaintiff waives

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the defect by failing to challenge the array.—Legaux v. Wells, 4 Yeates, 43.

[y] (Pa. 1816) Under St. Feb. 21, 1814, providing that no verdict should be set aside, nor any judgment reversed or sentence stayed, for any defect or error in the precept or in the venire, or in drawing, summoning, or returning any jury panel or juror, but that a trial or pleading guilty or the general issue should be a waiver of all errors and defects in or relative to the precept, venire, or drawing, summoning, or return of jurors, it is not error, after trial on the merits, that the sheriff's name was not on the return of the precept and writs of venire facias.—Commonwealth v. Smith, 2 Serg. & R. 300.

[yy] (Pa. 1816) So, after a trial on the merits, all defects in the form of a precept and writs of venire, and in the return thereof, are cured by that statute.—Commonwealth v. Smith, 2 Serg. & R. 300.

[z] (Utah, 1893) On the day set for a trial defendant requested a postponement for 10 days, as his counsel was absent, which was given; the court remarking that he would issue a special venire if the regular jury were discharged by that day. To this the defendant made no objection at the time, and, the regular jury having been in the meanwhile discharged, a special jury was summoned for the adjourned day. *Held*, that defendant was estopped to object to such jury, it appearing that the jury was unobjectionable, and the proceedings on the part of the court were fair.—Bennett v. Tintic Iron Co., 9 Utah, 291, 34 Pac. 61.

§ 513. — Drawing and impaneling.

[a] Error in ruling on a challenge for cause is waived by failure to object.

—(Iowa, 1865) State v. Ostrander, 18 Iowa, 435;

(N. Y. 1858) People v. Stout, 4 Parker, Cr. R. 71; (1858) Stout v. People, Id. 132; (1868) Voorhees v. Dorr, 51 Barb. 580;

(Tenn. 1853) Isham v. State, 33 Tenn. (1 Sneed) 111.

[b] A party may object to the examination of a juror without oath as to his competency; but, if he permits the question to be put to the juror and answered by him without requiring him to be sworn, he waives the objection.

—(Ind. 1851) Trullinger v. Webb, 3 Ind. 198;

(Mo. 1896) Preston v. Hannibal & St. J. R. Co., 132 Mo. 111, 33 S. W. 783;

(Pa. 1880) Zell v. Commonwealth, 94 Pa. 258.

[c] When a defendant in a criminal action omits to object to any irregularity in impaneling the jury at the time, he is deemed to have waived his objection.

—(U. S. 1895) Turner v. United States, 66 Fed. 280, 13 C. C. A. 436, 30 U. S. App. 90;

(Ala. 1895) Howard v. State, 108 Ala. 571, 18 South. 813;

(Cal. 1864) People v. Coffman, 24 Cal. 230;

(N. C. 1879) State v. Boon, 80 N. C. 461.

[d] (Ark. 1891) Where no demand that the jurors be drawn from a jury box is made, and no objection made at the time to the manner in which they were drawn, objection that they were not so drawn is waived.—Wells v. State, 16 S. W. 577.

[e] (Cal. 1858) The objection that one of the jurors' names was not in the venire returned by the sheriff is taken too late after the verdict is given.—Thrall v. Smiley, 9 Cal. 529.

[f] (Cal. 1894) In a criminal case the bailiff selected from the persons present, and placed in the jury box, 12 men, who had been regularly returned to serve as jurors. The clerk obtained from each man his name, wrote it on a sheet of paper, returned to his place, and called the names. The jurors were then sworn to answer as to their qualifications. *Held* that, though such mode of impaneling the jury was reversible error, defendant waived the error by failure to object thereto.—People v. Johnson, 104 Cal. 418, 38 Pac. 91.

[g] (Ga. 1855) On a trial for murder, the name "Ogilvie" appeared on the list of jurors handed to prisoner's counsel, instead of "Olive," which was the right name, and the error was not discovered until the name of the juror was called in the progress of forming the jury, when the prisoner's list was corrected by order of the court, the juror put upon the prisoner, and challenged by him. *Held* that, if the prisoner were deprived of any right thereby, it should have been then objected to.—Pressley v. State, 19 Ga. 192.

[h] (Ga. 1879) An objection that the name of a juror was not in the box or on the list cannot be raised after verdict.—Osgood v. State, 63 Ga. 791.

[i] (Ga. 1892) Though the formality of putting the panel upon the accused be not expressly waived, if, without informing the court that he declines to waive it, he acquiesces in the omission, and takes part in the selection of particular jurors from the panel, raising no question touching the failure to put the panel upon him until after the full traverse jury has been selected and sworn, and the evidence in behalf of the state introduced, he will be deemed to have waived the formality.—Vaughn v. State, 88 Ga. 731, 16 S. E. 64.

[j] (La. 1876) Accused cannot avail himself of the pretended illegality of the drawing of the array in a different case. He should himself have objected at the proper time, and not acquiesced in the drawing of the jury.—State v. Courtney, 28 La. Ann. 794.

[k] (La. 1885) An accused who, after three jurors have been impaneled, objects for the first time that the list has not been called in regular order, cannot complain, where the names were thereafter called in regular order.—State v. Washington, 37 La. Ann. 828.

[l] (Me. 1860) Where a juryman is irregularly returned and sworn, it is too late to make the objection after trial, if the facts were known before, and no prejudice is shown. Rev. St. c. 82, § 73.—Wallace v. Inhabitants of Columbia, 48 Me. 436.

[m] (Mo. 1895) An objection that an improper question was asked of the entire panel on their voir dire comes too late for the first time on appeal.—State v. David, 131 Mo. 380, 33 S. W. 28.

[n] (N. H. 1853) Where, after verdict, the exception is taken that only one selectman was present at the drawing of a juror who sat in the trial, the verdict will not be set aside, though it appear such was the fact.—Wilcox v. School Dist. No. 1 in Lempster, 26 N. H. (6 Fost.) 303.

[o] (N. Y. 1866) During the impaneling of a jury, after a challenge to a juror had been overruled, the prisoner's counsel was informed by the court that the juror who was challenged should stand aside and not sit, if he desired it, and that the number of the prisoner's peremptory challenges should not be lessened thereby, and the prisoner chose to stand mute, though told by the court that his conduct would be construed to be a consent to the juror's sitting. *Held*, that an objection to the juror was waived.—Gardiner v. People, 6 Parker, Cr. R. 155.

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[p] (N. D. 1890) The clerk in calling the names of jurors did not obtain the names from any jury box, and did not use either a jury box or ballots, but called off the names of those who served as jurors from a list of names before him. The irregularity was discovered by counsel of accused while it was going on, but he made no objection until after verdict. *Held*, that the irregularity was waived.—Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003.

[q] (Or. 1887) Where a defendant asked certain questions of a juror which the court struck out as improper, defendant should have challenged the juror for cause, specifying his grounds for challenge, and, failing to do so, he waived the defect.—Ford v. Umatilla County, 15 Or. 313, 16 Pac. 33.

[r] (Pa. 1850) Where a person is called as a juror whose name is not in the venire, and a party suffers him to remain on the jury without objection, and takes his chance of a verdict, it is a waiver of the objection.—Burton v. Ehrlich, 15 Pa. (3 Harris) 236.

[s] (S. C. 1886) On the trial of a colored woman for murder, the presiding judge, in examining the jurors on their voir dire, propounded to colored jurors questions as to "relationship," etc., to prisoner, as provided by Gen. St. § 2261, but omitted such questions when a white juror was called. *Held*, that the circuit judge is trior of challenges, and, as the law does not prescribe the questions to be propounded, but only indicates the points on which the judge is to be satisfied, if counsel were not satisfied with the interrogatories, they should object at the time.—State v. Nance, 25 S. C. 168.

[t] (Tex. 1868) Where the appellants made no objection before the trial because the jurors were not questioned as to their qualifications under the statute, the defect was waived.—Tweedy v. Briggs, 31 Tex. 74.

[u] (Tex. 1884) Where, in a criminal case, the clerk failed to draw the names of the jury from the box and enter them on two slips of paper at the trial, as required by Code Cr. Proc. arts. 645, 646, but, prior to the announcement of ready for trial, had prepared the lists for the parties, defendant's failure to object at the time was a waiver of the irregularity.—McMahon v. State, 17 Tex. App. 321.

§ 514. —— Oath.

[a] Defects in the form of the oath administered to the jury are waived by failure to object.

—(Ga. 1857) Candler v. Hammond, 23 Ga. 493;
(Ill. 1863) Edwards v. Edwards, 31 Ill. 474;
(Ind. 1836) Lindley v. Kindall, 4 Blackf. 189;
(Iowa, 1855) Wrocklege v. State, 1 Iowa (1 Clarke) 167;
(W. Va. 1890) State v. Ice, 34 W. Va. 244, 12 S. E. 695.

[b] Irregularity in swearing the jury, not objected to at the time, is waived.

—(Fla. 1891) Jacksonville, T. & K. W. Ry. Co. v. Neff, 28 Fla. 373, 9 South. 653;
(Ill. 1820) Cornelius v. Boucher, 1 Ill. (Breese) 32;
(Tenn. 1858) Looper v. Bell, 38 Tenn. (1 Head) 373;
(Tex. 1884) Freiberg v. Lowe, 61 Tex. 436.

[c] A verdict in a civil action is not void or irregular, merely because the trial proceeded to verdict without the jury being sworn, where neither party requested that they be sworn.

—(Ill. 1896) McDonald v. Fairbanks, Morse & Co., 161 Ill. 124, 43 N. E. 783;
(N. Y. 1885) Jenkins v. City of Hudson, 16 Abb. N. C. 137.

[d] (Ind. 1890) When defendant proceeds with the trial without making objection to the fact that the jury were sworn before he was arraigned, he waives any informality in the manner or time of swearing the jury.—Dolan v. State, 122 Ind. 141, 23 N. E. 761.

[e] (Iowa, 1866) Objection cannot be taken that the jury were not sworn to try the issue created by an amended answer, where the court was not asked to have the jury resworn.—Arnold v. Arnold, 20 Iowa, 273.

[f] (Kan. 1886) Where a party desires to avail himself of irregularity in administering the oath to the jury, the attention of the court should be called to it at the time the oath is taken. A party cannot sit silently by, and take the chances of acquittal, and subsequently, when convicted, make objections to irregularity in the form of the oath.—State v. Baldwin, 36 Kan. 1, 12 Pac. 318.

[g] (Ky. 1857) The appellate court will not reverse a decision of a jury and judgment of the court in a will case, because the jury were not sworn to say how much of the paper produced was the will of the testator. If the oath of the jury required them to decide upon the validity of the whole will, such objection should have been made at the swearing of the jury.—Thompson v. Blackwell, 56 Ky. (17 B. Mon.) 609.

[h] (Mo. 1884) Where, in an action by a married woman for personal injuries, her husband is joined as a nominal plaintiff by amendment, a failure to reswear the jury is waived, if the defendants proceeded to trial without objection on that account.—Merrill v. City of St. Louis, 83 Mo. 244, 53 Am. Rep. 576, affirming (1882) 12 Mo. App. 466.

[i] (N. Y. 1857) A juror arrived at the court house after the panel had been called and sworn for the term, and consequently sat as a juror without having been sworn at all, and without objection on the part of the defendants. *Held* that, the defendants not having shown themselves prejudiced by the irregularity, they could not take advantage of it to have the verdict against them set aside.—Hardenburgh v. Crary, 15 How. Prac. 307.

[j] (N. D. 1890) In a criminal trial, where the jurors are called and sworn singly, and without calling 12 jurors into the box, and, after the completion of the panel, the jury are sworn collectively, and no exception is taken to the second swearing, there is no error.—Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003.

[k] (Tex. 1875) The rule adopted in criminal cases, requiring the statutory form of the oath to be administered to the jury, does not obtain in civil cases; and it is too late, after verdict and judgment, to object to the formality of the oath administered.—Clements v. Crawford, 42 Tex. 601.

[l] (Tex. 1881) Objections to a form and manner in which a jury is sworn should be made at the time, so as to give the court an opportunity to correct the irregularity.—McConnell v. Ryan, 1 White & W. Civ. Cas. Ct. App. § 1020.

§ 515. Failure to examine juror.

[a] Where a party in a civil case accepted a juror without examination as to his qualifications, he waives objection on account of want of qualifications discovered afterwards.

—(Iowa, 1885) Faville v. Shehan, 68 Iowa, 241, 26 N. W. 131;
(Neb. 1888) Everton v. Esgate, 24 Neb. 235, 38 N. W. 794;
(Ohio, 1858) Hull v. Albro, 2 Disn. 147;
(1872) Kenrick v. Reppard, 23 Ohio St. 333.

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[b] It cannot be objected that a juror was prejudiced, if he was not examined under oath.—(Ind. 1854) Alexander v. Dunn, 5 Ind. 122; (Iowa, 1864) State v. Funck, 17 Iowa, 365.

[c] (Ala. 1875) A defendant, who has neither made inquiry, nor requested the court to make inquiry, relative to certain qualifications of petit jurors, until after the jury is completed, cannot then raise the objection that the court has failed to ascertain that the jurors possess the statutory qualifications.—James v. State, 53 Ala. 380.

[d] (Ark. 1889) An objection to the prejudice of a juror is too late after verdict, where the party has failed to examine him on the voir dire, and was not misled or deceived in reference thereto.—Brown v. St. Louis, I. M. & S. Ry. Co., 52 Ark. 120, 12 S. W. 203.

[e] (Cal. 1894) Counsel appointed for defense on the day of trial, who knew that defendant had been examined on the claim of insanity, but not that the cause was alleged to be excessive drinking, being denied a continuance, proceeded to the examination of, and accepted, six jurors, not having examined them as to their views on the plea of insanity caused by excessive drinking as a defense, and the court then adjourned for four days. After the resumption of the trial, he failed to show cause, or call to the attention of the court his desire, to further question or challenge the six jurors. *Held*, that his action was a waiver of defendant's right so to do.—People v. Ward, 105 Cal. 335, 38 Pac. 945.

[f] (Colo. 1894) Objection to a juror on the ground of alienage is waived by failure to examine him as to that point on his voir dire.—Brown v. People, 20 Colo. 161, 36 Pac. 1040.

[g] (Ga. 1855) Where a juror on examination stated that he resided in the city, but that he had not resided there for six months, and the state's counsel challenged him for cause, and the challenge was sustained, it was *held* that the silence of the opposing counsel at the time was an acquiescence in the construction put by the court on the answer; and especially since he made no effort to show such juror to have been competent.—Boyd v. State, 17 Ga. 194.

[h] (Ill. 1892) That a juror, on his examination, did not clearly state that he was acquainted with one of the parties, is waived, as it is the attorney's duty to procure a clear answer when the question is asked.—Wolff Mfg. Co. v. Wilson, 46 Ill. App. 381.

[i] (Ind. 1873) A party, accepting a juror without interrogating him in reference to whether he is a householder or freeholder of the county, thereby waives the right to object to the competency of the juror on such grounds.—Estep v. Waterous, 45 Ind. 140.

[j] (Ind. 1874) On the trial of a criminal cause, the defendant, as well as the state, by failing to interrogate the jury as to their being householders or freeholders, or to take other steps to ascertain their competency in that respect before accepting them and before they are sworn to try the cause, waives objection on the ground of the want of such qualifications, and the defendant, as well as the state, will be bound by the verdict of such jury, though one or more of them may not be householders or freeholders.—Kingen v. State, 46 Ind. 132.

[k] (Ind. 1877) Where, in a criminal cause, the defendant accepts a juror without questioning him as to his qualifications, he cannot afterwards object that the juror was neither a freeholder nor householder.—Gillooley v. State, 58 Ind. 182.

[l] (Ind. 1894) Where it is not shown that defendant was engaged in selling liquor under a license, he cannot complain of a ruling on the competency of a juror, based on his opinion of the morality of those so engaged.—Pemberton v. State, 11 Ind. App. 297, 38 N. E. 1096.

[m] (Iowa, 1885) Where a party in a civil action accepts a juror without examination as to his qualifications, he cannot, without showing fraud or concealment, object thereafter that the juror was a nonresident.—Faville v. Shehan, 68 Iowa, 241, 26 N. W. 131.

[n] (Mass. 1817) Where a party neglects to take an objection to a juror because he is interested in a similar question, and to put the juror on his voir dire, the exception comes too late after trial.—Jefferies v. Randall, 14 Mass. 205.

[o] (Mich. 1850) If a party or his counsel interpose a challenge for favor, or raise any other preliminary question involving an inquiry, and then neglects or refuses to move the trial or examination thereof, he thereby waives such challenge or question.—People v. Doe, 1 Mich. (Man.) 451.

[p] (Mich. 1873) In all civil causes the proper time to make the necessary inquiries into the qualifications of jurors is before the trial, and not afterwards, and, if not made then, the objections will be deemed to have been waived.—Johr v. People, 26 Mich. 427.

[q] (Mich. 1885) It cannot be urged after trial and conviction that one of the jurors was not a freeholder or resident of the county, when his answers on examination were sufficient to suggest a probability that he was disqualified.—People v. Lange, 56 Mich. 550, 23 N. W. 217.

[r] (Miss. 1876) The fact that the trial judge in a criminal case does not examine the jurors as to their prescribed qualifications does not render the jury illegal, or entitle defendant to have their verdict set aside, where defendant accepts the jury and makes no objection to them.—Skinner v. State, 53 Miss. 399.

[s] (Mo. 1879) Counsel took an exception to the refusal of the court to allow him to ask the jury on their voir dire as to their prejudice against corporations. The court then stated to the jury that, if any of them had a prejudice against corporations, counsel desired them to leave the box, and, upon no reply being made, the jury were sworn in without objection. *Held*, that the point was waived.—Lœffler v. Keokuk Northern Line Packet Co., 7 Mo. App. 185.

[t] (Mo. 1893) The fact that a juror may have been heard to express an opinion in a criminal case of defendant's guilt does not show that there was error in allowing him to sit, where, for anything that appears, defendant may have known of such opinion.—State v. Phillips, 117 Mo. 389, 22 S. W. 1079.

[u] (N. C. 1881) On a trial for murder, a juror, in reply to the question whether he had formed and expressed an opinion as to the guilt or innocence of the prisoner, stated that he had, and the prisoner challenged him for cause. Thereupon the court suggested to prisoner's counsel to ask the juror whether the opinion expressed was that the prisoner was guilty, which counsel declined to do, and the challenge was disallowed. *Held*, no error.—State v. Efler, 85 N. C. 585.

[v] (Ohio, 1874) Act April 26, 1873, § 11, requires the court to ask whether any of the jury have served as talesmen within the preceding year. The court asked this question,

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and no response was made. Neither party interposed a challenge, and the jury proceeded to verdict. *Held*, that this amounted to a waiver of the right to object on the ground that some of the jury had so served within the past year.—Woodward v. Stein, 5 Ohio Dec. 171.

[w] (Ohio, 1876) Failure of a party to make any inquiry of a juror as to his competency at the time he is impaneled is a waiver of all objections to the competency of such juror that could have been ascertained by such inquiry, except such as the court is required to ascertain of its own motion.—Watts v. Ruth, 30 Ohio St. 32.

[x] (Ohio, 1883) An objection to the competency of a juror on the ground that he could neither understand nor speak English is waived, unless such juror is examined and challenged.—Dokes v. Soards, 8 Ohio Dec. 621, 9 Wkly. Law Bul. 76.

[xx] (Ohio, 1885) A juror stated on his voir dire that he had both formed an expressed an opinion as to the guilt of the defendant, but further stated that he believed that he could, notwithstanding such opinion, render a fair and impartial verdict upon the evidence in the case. *Held*, that the defendant waived any disqualification of the juror by reason of his having formed and expressed an opinion by his failure to further examine the juror.—Schmeider v. State, 2 Ohio Cir. Ct. R. 420, 1 O. C. D. 565.

[y] (S. C. 1891) Under the statute, which provides that "on motion of either party" the court shall examine a juror as to whether he is related to either party, an omission to so examine him cannot be assigned as error when no motion therefor is made.—State v. Merriman, 34 S. C. 16, 12 S. E. 619.

[yy] (Tex. 1886) A venireman in a criminal case, who stated, as a reason why he thought he was disqualified, that he was one of defendant's compurgators on an application for a change of venue, was held competent by the court, and was accepted by the state. The venireman then objected that, if he served on the jury, he would be blamed if defendant should be acquitted, whereupon the court excused him. Defendant excepted, and the venireman was recalled at the instance of the state's attorney and tendered to defendant. When asked if he would have the venireman sworn as a juror, defendant's counsel replied, "Defendant stands mute." The venireman was then discharged. *Held*, that defendant could not complain.—Pierson v. State, 21 Tex. App. 14, 17 S. W. 468.

[z] (Utah, 1885) Where a juror does not reply to an interrogation made to the entire jury generally as to whether they have an opinion as to the guilt or innocence of defendant, failure to elicit, on the examination of such juror on his voir dire, that he served on the grand jury which indicted defendant, and to challenge him on that ground, is a waiver of the objection.—People v. Lewis, 4 Utah, 42, 5 Pac. 543.

[zz] (Wash. 1859) On a trial for murder, a failure on the part of the defendant to ascertain the qualifications of a juror, by putting him upon his oath prior to being impaneled, is a waiver of any objections on that ground.—Clarke v. Territory, 1 Wash. T. 82.

§ 516. Appearance and participation in cause.

[a] (Ala. 1847) When a jury has been irregularly impaneled to try whether a slave was the property of an administrator in his own right, or assets of the estate, and a verdict was returned against the administrator, ascertaining the value of the slave, his consent that a judgment should be entered in the form in which the finding of the jury was expressed is not a waiver of the irregularity, but a mere agreement that the court may, in conformity to the verdict, declare that the slave was assets of the estate, and the value such as the jury had assessed.—Reynolds' Adm'rs v. Reynolds' Distributees, 11 Ala. 1023.

[b] (Cal. 1895) After much evidence was taken, a juror was improperly, and against defendant's objection, discharged by the court, because he stated that he did not believe the statements of certain witnesses, and defendant afterwards consented to proceed with the remaining 11 jurors, instead of commencing the trial anew. *Held*, that defendant did not thereby waive his objection to the discharge of the juror.—Mahoney v. San Francisco & S. M. Ry. Co., 110 Cal. 471, 42 Pac. 968.

[c] (Iowa, 1885) Where a party objects to the jury because of the absence of one juror, and such objection is overruled, he does not waive the defect by going to trial, and moving for judgment on the special findings.—Eshleman v. Chicago, B. & Q. R. Co., 67 Iowa, 296, 25 N. W. 251.

[d] (Mich. 1844) By going to trial a party waives objection to the sufficiency of the oath administered to the jury.—The Milwaukee v. Hale, 1 Doug. 306.

[e] (Mich. 1844) By going to trial, a party waives objection on the ground of the want of proper qualifications of the jurors.—The Milwaukee v. Hale, 1 Doug. 306.

[f] (Mo. 1876) Where a party to an action against a municipal corporation has objected at the proper time to jurors on the ground that they are taxpaying inhabitants of the corporation, and has saved an exception to the action of the court in admitting them, he does not then waive his objection to the panel by proceeding with the trial.—Fulweiler v. City of St. Louis, 61 Mo. 479.

[g] (Mont. 1885) One who consents to a trial by the court waives his right to object to any defect in making up the jury.—Wykoff v. Loeber, 5 Mont. 535, 6 Pac. 363.

[h] (N. Y. 1806) If the objection to a juror on the ground of opinion formed or expressed be overruled, and the party goes to trial on the merits, he does not thereby waive the objection, nor is he precluded from taking advantage of it in error.—Blake v. Millspaugh, 1 Johns. 316.

[i] (N. Y. 1848) Where a defendant appears on the trial of a cause, and consents that it be tried with five jurors only, and introduces evidence on his part, he cannot afterwards object that the venire was issued without any issue having been joined in the cause.—Keeler v. Delavan, 4 Barb. 317.

[j] (Pa. 1839) Under Act Feb. 21, 1814, pleading the general issue and going to trial is a waiver of any error or defect in drawing, summoning, or returning juries; but, quære, is it a waiver, if the defendant refuse to plead at all, and the court direct the plea of "not guilty" to be entered for him, under the provisions of section 3 of the act of September 23, 1791.—Commonwealth v. Chauncey, 2 Ashm. 90.

[k] (Pa. 1839) Under section 5 of the act of September 23, 1791, where a prisoner, on being arraigned, stands mute, and the plea of not guilty is entered for him, and the trial proceeds, and he by his counsel cross-examines the witnesses for the commonwealth, and calls and examines witnesses in his defense, and there is a verdict and judgment, the case comes within

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the act of February 21, 1814, and no error can afterwards be assigned appertaining to the precept, venire, drawing, summoning, and returning of jurors, etc.—Dyott v. Commonwealth, 5 Whart. 67.

[l] (Pa. 1887) Under Act Feb. 21, 1814, a plea of not guilty is a waiver of all defects in the precept, venire, drawing, summoning, and returning of jurors.—Commonwealth v. Seybert, 4 Pa. Co. Ct. R. 152.

[m] (Pa. 1890) The proper practice at a criminal trial is to swear the juror prior to his examination on his voir dire, and if the prisoner requests it to be done, and is refused, it is error; yet when he voluntarily examines the juror without his being sworn, and without objection or exception, he cannot take advantage of it after a trial upon the merits, even though the case be a capital one.—Commonwealth v. Ware, 137 Pa. 465, 20 Atl. 806, 26 Wkly. Notes Cas. 462.

[n] (Pa. 1895) Under Act Feb. 21, 1814, providing that pleading the general issue shall be a waiver of all errors and defects in or relating and appertaining to the drawing of jurors, defendant, after pleading not guilty, cannot complain of irregularities in drawing the jury, which occurred prior to the plea, though he did not know of them, as he might have.—Commonwealth v. Freeman, 166 Pa. 332, 31 Atl. 115.

[o] (W. Va. 1893) When either party demands a jury, it is error for a justice, without consent of parties, to issue a venire facias before the summons to commence the suit has been served and returned and the time fixed for the appearance of defendant has arrived; but where defendant appears and has the case continued, and the jury thus summoned is adjourned to the time set for trial, he will be held to have waived such irregularity in the writ of venire facias, if it appear that he was not injured thereby.—Greer v. Wilson, 38 W. Va. 100, 18 S. E. 380.

§ 517. Passing or tender of juror.

[a] (Cal. 1856) A juror in a capital case, on his examination on his voir dire by the defendant, stated that he had formed and expressed an unqualified opinion, etc. The defendant passed him to the prosecution for examination, on which the juror stated that his opinion was formed by reading the newspapers. The prosecution accepted the juror, but the defendant requested leave to question him further for cause, which was denied, but a peremptory challenge allowed. *Held* not to be error.—People v. Stonecifer, 6 Cal. 405.

[b] (Ga. 1877) After a juror has been put upon a prisoner, but before he is sworn to try the case, the court may allow the solicitor general to ask him whether he has been naturalized, the solicitor having just been informed that the juror had not been naturalized; and, on ascertaining that he has not been naturalized, the court may set him down for cause.—Johnson v. State, 58 Ga. 491.

[c] (Ga. 1882) Objection that the name of one of the jurors has been incorrectly written on the list comes too late after the full panel answering their names have been put upon the prisoner.—Moon v. State, 68 Ga. 687.

[d] (N. C. 1879) A juror who stated upon his voir dire that he had expressed an opinion that the prisoner was not guilty could properly be challenged by the state after he had been passed to the prisoner and while he was under examination by the latter.—State v. Jones, 80 N. C. 415.

[e] (N. C. 1886) The court, in its discretion, may permit a juror to be challenged by the state for cause after he has been tendered to the defendant and before the jury is impaneled.—State v. Green, 95 N. C. 611.

[f] (Pa. 1854) The mere passing of a juror over to the court or the other party is not an absolute waiver of the right to challenge, if good cause be shown afterwards.—McFadden v. Commonwealth, 23 Pa. (11 Harris) 12, 62 Am. Dec. 308.

[g] (S. C. 1883) Plaintiff announced that she had no challenges to make. Two jurors were afterwards challenged by defendant. *Held*, that plaintiff could not afterwards claim the right of challenge.—Ward v. Charleston City Ry. Co., 19 S. C. 521, 45 Am. Rep. 749.

§ 518. Acceptance of juror as waiver of challenge.

Peremptory challenges, see post, § 522 [h, k, u].

[a] (U. S. 1870) Where defendant accepts a juror with knowledge that he has had a conversation with a third person about the case, he cannot afterwards object to a verdict on that account.—United States v. Smith, Fed. Cas. No. 16,341 [1 Sawy. 277].

[b] (Ala. 1876) The rule observed in capital felonies, that a juror, once accepted, cannot afterwards be set aside without consent of prisoner for any cause existing when he was sworn, although not then known, cannot be applied to trials for felony not capital or misdemeanor.—Smith v. State, 55 Ala. 1.

[c] (Ala. 1881) Where, at the time of a juror's acceptance, his disqualification to serve was not known, or was concealed without lack of diligence to discover it, he may be challenged for cause at any time before he is sworn.—Roberts v. State, 68 Ala. 515.

[d] (Cal. 1856) A party who accepts a juror, knowing him to be disqualified, is estopped from afterwards availing himself of such disqualification.—People v. Stonecifer, 6 Cal. 405.

[e] (Iowa, 1860) By accepting a jury, the defendant waives all right of objection to the jurors for bias or prejudice, but not for disqualification to act as jurors, unless he knew of such disqualification at the time.—State v. Groome, 10 Iowa, 308.

[f] (Mich. 1874) The rejection on a challenge of a talesman as a juror, against the objection of the opposite party, will not be considered as error, whether the cause of challenge be valid or not, where, after other talesmen were summoned and other challenges made by the parties respectively, 12 jurors were obtained with whom both parties announced themselves contented.—Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

[g] (Mo. 1891) After the opening statement for the prosecution, the court stated in the hearing of the jury that he had been informed of serious illness in the family of one of the jurors, and asked if both sides would consent to his discharge. Both sides consenting, the juror was excused, but shortly afterwards defendant's counsel announced his intention to "save the point," whereupon the judge called counsel for both sides together, and stated to them privately that, unless defendant's counsel consented to excusing such juror, he would be recalled and the trial proceeded with. Thereupon defendant's counsel stated he would consent, and would not raise the point, and another juror was called, and, being accepted by both sides, the whole jury was sworn again and the trial proceeded. *Held*, that while it would have been preferable for the judge to have informed counsel privately of the illness in the juror's family, yet the defendant could not complain that he was forced

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to excuse the juror, or retain him and thereby risk his displeasure, since defendant, by failing to except at the time of the private conference between the court and counsel, waived his right to raise the point later.—State v. Thornton, 108 Mo. 640, 18 S. W. 841.

[h] (Neb. 1892) By waiving all objections to the jury, after they had been called into the box, and also his peremptory challenges, a party waives his challenge to the array.—Weeping Water Electric Light Co. v. Haldeman, 35 Neb. 139, 52 N. W. 892.

[i] (N. Y. 1857) Where a justice of the peace overruled a challenge to a juror as a tenant of a party, and the decision was duly excepted to, it was *held* that a subsequent reply in the negative by the party excepting to a question by the justice as to whether he had any objection to the jurors as they stood was no waiver of the challenge.—Hathaway v. Helmer, 25 Barb. 29.

[j] (N. C. 1868) Where a prisoner has already accepted as jurors three colored persons, he cannot challenge a fourth juror on the ground of his color.—State v. Holmes, 63 N. C. 18.

[k] (S. C. 1887) Where the defense accepted a juror, it is too late, after verdict, to object that he was not summoned on the regular venire, but, being in court when his name was called, answered and was placed on the jury.—State v. Anderson, 26 S. C. 599, 2 S. E. 699.

§ 519. Effect of exercise of challenges.

[a] Where the challenge of a juror for bias was improperly overruled, an exception to the overruling is good, though the juror was afterwards excluded peremptorily, as the due number of peremptory challenges was thereby lessened.

—(Ill. 1846) Baxter v. People, 8 Ill. (3 Gilman) 368; (1880) Meaux v. Town of Whitehall, 8 Ill. App. (8 Bradw.) 173;
(Ind. 1894) Fletcher v. Crist, 139 Ind. 121, 38 N. E. 472;
(N. Y. 1892) People v. McGonegal, 136 N. Y. 62, 32 N. E. 616;
(Va. 1852) Dowdy v. Commonwealth, 9 Grat. 727, 60 Am. Dec. 314.

CONTRA, see
(Miss. 1840) Ferriday v. Selser, 5 Miss. (4 How.) 506;
(N. M. 1881) Territory v. Young, 2 N. M. 93;
(N. Y. 1847) Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216; (1865) Friery v. People, 54 Barb. 319;
(N. C. 1888) State v. Freeman, 100 N. C. 429, 5 S. E. 921.

[b] Where defendant peremptorily challenges a juror, after having excepted to a ruling of the court in not excluding him, as disqualified, he is presumed to waive the exception, and is not injured if he has sufficient peremptory challenges to subsequently exclude him and all other objectionable jurors.

—(Conn. 1880) State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 86;
(D. C. 1880) United States v. Neverson, 1 Mackey, 152;
(N. J. 1890) Drake v. State, 53 N. J. Law (24 Vroom) 23, 20 Atl. 747;
(N. Y. 1889) People v. Price, 53 Hun, 185, 6 N. Y. Supp. 833;
(Vt. 1884) State v. Gaffney, 56 Vt. 451.

CONTRA, see
(Va. 1822) Lithgow v. Commonwealth, 2 Va. Cas. 297.

[c] A challenge to the array will not be entertained after the party interposing the challenge has made challenges to the polls.

—(Ill. 1879) Mueller v. Rebhan, 94 Ill. 142;
(Iowa, 1875) State v. Davis, 41 Iowa, 311;
(Kan. 1891) State v. Wright, 45 Kan. 136, 25 Pac. 631; (1891) Same v. Eigle, 45 Kan. 138, 25 Pac. 632;
(Mo. 1896) State v. Taylor, 134 Mo. 109, 35 S. W. 92;
(Ohio, 1833) Forsythe v. State, 6 Ohio (6 Ham.) 19.

[d] Peremptory challenge of an incompetent juror will not cure the erroneous overruling of an objection to him, if the objector's challenges are exhausted before the panel is complete.

—(Cal. 1870) People v. Weil, 40 Cal. 268;
(Miss. 1879) Hubbard v. Rutledge, 57 Miss. 7;
(N. Y. 1878) People v. Casey, 96 N. Y. 115.

[e] (U. S. 1871) Interposing a peremptory challenge or a challenge for cause to an individual juror does not waive an inherent and fatal objection to the entire panel.—Clinton v. Englebrecht, 80 U. S. (13 Wall.) 434, 20 L. Ed. 659.

[f] (Ala. 1890) The fact that a party peremptorily challenges the stricken jurors thus recalled against his objection to complete the jury, is not a waiver of his right to a new struck jury.—Birmingham Union St. R. Co. v. Ralph, 92 Ala. 273, 9 South. 222.

[g] (Ark. 1853) If a party challenges a juror peremptorily, when he is not obliged to do so, he waives his exception, and cannot avail himself on error of the exception thus abandoned; and this, although he may exhaust his right of peremptory challenges.—Stewart v. State, 13 Ark. (8 Eng.) 720.

[h] (Fla. 1889) Error in refusing to allow witnesses to be called to show that a venire man had expressed an opinion as to defendant's guilt was cured where, before defendant had exhausted his peremptory challenges, the state withdrew its tender of said juror, and challenged him peremptorily.—Ellis v. State, 25 Fla. 702, 6 South. 768.

[i] (Ga. 1855) It is unnecessary for the court above to notice any overruled objections to jurors who have been challenged and passed for other cause.—McGuffie v. State, 17 Ga. 497.

[j] (Ind. 1887) A party is not estopped from complaining of the error of the court in allowing the opposite party, over his objection, to peremptorily challenge struck jurors, by thereafter challenging jurors, himself.—May v. Hoover, 112 Ind. 455, 14 N. E. 472.

[k] (Iowa, 1855) At a term where there was no jury a party claimed one. The court ordered 12 bystanders to be returned. The party objected to that unusual method. They were so returned, and he challenged some for cause. *Held*, that they were a good jury.—Suttle v. Batie, 1 Iowa (1 Clarke) 141.

[l] (La. 1891) In case a prisoner's objection to a juror for cause is overruled, and he subsequently peremptorily challenges him, and it does not appear that he was thereby necessitated to accept on the panel persons inimical to his interest, he fails to discover injury entitling him to relief.—State v. Garig, 43 La. Ann. 365, 8 South. 934.

[m] (Miss. 1882) Where a juror in a capital case, absent by leave of court, is brought back and tendered to defendant, who challenges him peremptorily, no ground for complaint exists.—Coleman v. State, 59 Miss. 484.

[n] (Mo. 1894) A challenge based on the disqualification by age of four of the panel, though in form to the array, is in fact to the polls, and

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waives further challenge to the array.—State v. Clark, 121 Mo. 500, 26 S. W. 562.

[o] (Mo. 1896) Where the court appointed an elisor to summon a jury because of the sheriff's disqualification, but called as jurors the regular panel theretofore summoned by the sheriff, defendant's objection to the jurors, after the regular panel had qualified, on the ground that they were not summoned by the elisor, was a challenge to the array, and not one to the polls, which would operate as a waiver of defects in the array.—State v. Weeden, 133 Mo. 70, 34 S. W. 473.

[p] (N. J. 1833) A juror cannot be challenged a second time for matter that might have been given in evidence on the trial of the first challenge, and which, if so proved, would have sustained that challenge; but it is otherwise as to matter constituting a different challenge and triable by a different forum.—Mann v. Glover, 14 N. J. Law (2 J. S. Green) 195.

[q] (N. Y. 1820) A peremptory challenge, made by the prisoner to the polls, is no waiver of his right to object to the want of the venire.—People v. McKay, 18 Johns. 212.

[r] (N. Y. 1849) After a challenge for principal cause has been tried, a challenge to the favor cannot be made.—People v. Donaldson, 2 Edm. Sel. Cas. 78.

[s] (N. Y. 1851) Where a challenge to a juror by the prisoner for principal cause has been overruled, the same juror may be challenged to the favor.—Carnal v. People, 1 Parker, Cr. R. 272.

[t] (N. Y. 1851) After a juror has been challenged, and the triors have pronounced him indifferent, and he is then challenged peremptorily, the prisoner cannot avail himself of exceptions taken to the admission of improper evidence before the triors.—People v. Knickerbocker, 1 Parker, Cr. R. 302.

[u] (Or. 1887) In a suit against a county for damages defendant challenged one of the jurors because he was a taxpayer in the county. The court overruled the challenge, and defendant then challenged peremptorily. *Held*, that it was a sufficient ground of challenge for implied bias by either party; but the defendant, by his peremptory challenge, waived his challenge for cause.—Ford v. Umatilla County, 15 Or. 313, 16 Pac. 33.

§ 520. Effect of failure to exhaust peremptory challenges.

[a] An accused cannot complain because of the overruling of a challenge to a juror for cause, where he did not thereupon peremptorily challenge the juror, and his peremptory challenges were not exhausted.

—(Ark. 1880) Wright v. State, 35 Ark. 639;
(Cal. 1893) Asevado v. Orr, 100 Cal. 293, 34 Pac. 777;
(Ill. 1887) Spies v. People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320;
(Iowa, 1877) State v. Elliott, 45 Iowa, 486;
(Mont. 1895) Davidson v. Bordeaux, 15 Mont. 245, 38 Pac. 1075;
(Neb. 1894) Jenkins v. Mitchell, 40 Neb. 664, 59 N. W. 90;
(Tex. 1882) Lum v. State, 11 Tex. App. 483; (1887) Powers v. Same, 23 Tex. App. 42, 5 S. W. 153; (1891) Williams v. Same, 30 Tex. App. 354, 17 S. W. 408.

CONTRA, see
(N. Y. 1845) People v. Bodine, 1 Denio, 281.

[b] (Ill. 1872) Error in accepting a juror whose name was not drawn by lot was waived by failure to exhaust peremptory challenges.—St. Louis & S. E. Ry. Co. v. Lux, 63 Ill. 523.

[c] (Iowa, 1896) Defendant cannot complain that a challenge for cause was improperly refused, where he afterwards waives a peremptory challenge by which the objectionable juror might have been excused.—State v. Yetzer, 97 Iowa, 423, 66 N. W. 737.

[d] (La. 1885) Where several defendants are jointly put on trial, an error of the court in disallowing a challenge of one for cause is not ground for reversing the verdict, although his peremptory challenges may be thereby exhausted, provided a satisfactory jury is obtained without exhausting the combined peremptory challenges of all the accused.—State v. Ford, 37 La. Ann. 443.

[e] (Mich. 1892) The exclusion of a juror because he is more than 60 years old will not be deemed prejudicial to a party, where there still remains a sufficient number of jurors on the panel to form a jury, to whom no objection is taken, and the party's peremptory challenges are not exhausted.—Luebe v. Thorpe, 94 Mich. 268, 54 N. W. 41.

[f] (Miss. 1889) Where, on summoning a special venire in a murder trial, the name of one of the jury is omitted from the list furnished the prisoner by inadvertence, and the person whose name is left off is set aside by the court, and a jury selected from the balance, without the prisoner exhausting his peremptory challenges, no injury is done of which the prisoner can complain.—Shubert v. State, 66 Miss. 446, 6 South. 238.

[g] (Mont. 1887) When an accused, objecting to the alienage of a juror, fails to exercise the right of peremptory challenge, such disqualification is thereby waived.—Territory v. Hart, 7 Mont. 42, 14 Pac. 768.

[h] (Mont. 1892) On a murder trial, the court, under an erroneous construction of a statute, which defendant's attorney did not try to correct, excused a number of the jurors, but at the same sitting discovered the error, and revoked the ruling before it had been reduced to writing and recorded by the clerk. Four of those so excused were ordered by the court back to the jury box, and to this defendant objected, in that they were excused without being cautioned not to speak concerning the case, and that, after being excused, they could not serve as jurors. When questioned by the court they denied having talked with any one of the case after being excused. The court offered defendant six additional peremptory challenges, and the prosecution waived all not exhausted, but defendant refused to challenge further. *Held*, that the excusal of the jurors was an irregularity which was cured by the subsequent action of the court, and did not vitiate the verdict.—State v. Linebarger, 12 Mont. 292, 30 Pac. 140.

[i] (N. Y. 1831) In a murder trial, after 11 jurors had been accepted, it was discovered that the box was empty, and that the name of one member of the panel had accidentally not been placed in the box. The name was placed in the box by order of the court, and, being drawn out, the juror was not peremptorily challenged by defendant, who had still three peremptory challenges remaining. *Held*, that the failure to place the name in the box was not such irregularity as to necessitate setting aside the verdict, since defendant could not have been injured thereby.—People v. Ransom, 7 Wend. 417.

[j] (N. Y. 1868) A juror who states on his preliminary examination that he has an opinion in the case, founded on the testimony given on a former trial, which amounts to a conviction, and whose declaration that he could render an impartial verdict is qualified by a doubt, is not within Code Cr. Proc. § 376, providing

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that an existing opinion as to the guilt or innocence of the accused shall not disqualify a juror, if he declare on oath his belief that such opinion will not influence his verdict, and the court is satisfied of that fact; and a refusal to set him aside is not cured by the fact that, at the time the jury was sworn, defendant had unused peremptory challenges.—People v. McQuade, 110 N. Y. 284, 18 N. E. 156, reversing (1888) 48 Hun, 620, 1 N. Y. Supp. 155.

[k] (N. C. 1892) Where a jury in a criminal case is obtained from the regular panel and special venire without exhausting defendant's peremptory challenges, he cannot object that the special venire was improperly granted.—State v. Brogden, 111 N. C. 656, 16 S. E. 170.

[l] (S. C. 1881) The error, if any, committed by the court in excusing two jurors, was waived, where defendant failed to object until after verdict and did not exhaust his peremptory challenges.—State v. Gill, 14 S. C. 410.

[m] (S. C. 1882) It is no objection that the required number of persons were not in attendance as jurors, if the defendant, being aware of the deficiency, did not object, and a jury was obtained from those present without the defendant exhausting his right of peremptory challenge.—State v. Clyburn, 16 S. C. 375.

[n] (S. C. 1887) Where the judge, thinking the regular panel exhausted, ordered other names to be drawn from the box, and after drawing one of them it was discovered that one of the regular panel had not been called, whereupon the judge revoked the order for the additional names and caused the name so omitted from the regular panel to be presented to defendant, an objection to the action of the judge is not tenable where the jury was completed without exhausting defendant's peremptory challenges.—State v. Anderson, 26 S. C. 599, 2 S. E. 699.

[o] (S. C. 1892) The fact that, after the drawing of a jury in a murder trial had commenced, the court allowed the clerk to place six accidentally omitted names in the hat, is not reversible error, where the drawing is completed without exhausting defendant's peremptory challenges. State v. Jackson, 32 S. C. 27, 10 S. E. 769, followed.—State v. Campbell, 35 S. C. 28, 14 S. E. 292.

[p] (S. D. 1896) After swearing the jury in a criminal case, the court adjourned until the next morning, when one of such jurors did not appear. Another juror was selected, defendant being given three additional peremptory challenges, none of which were used. *Held*, that a conviction would not be set aside.—State v. La Croix, 8 S. D. 369, 66 N. W. 944.

[q] (Tex. 1882) A juror, examined on his voir dire, did not disclose the existence of any opinion disqualifying him from serving. He was, however, challenged for cause by the state, and the court, over defendant's objection, sustained the challenge. *Held*, that defendant was entitled to a new trial, and that it was immaterial that, at the time such juror was rejected, defendant had not exhausted his peremptory challenges.—Wade v. State, 12 Tex. App. 358.

[r] (Tex. 1889) Under Rev. St. art. 3010, disqualifying a juror who has served for six days within a certain time, it was error to dismiss a juror who had served five days only, on a challenge by the state for incompetency, though defendant did not exhaust his peremptory challenges.—Monk v. State, 27 Tex. App. 450, 11 S. W. 460.

[s] (Tex. 1890) Error in overruling a motion to quash a special venire for discrepancies between it and the copy served on defendant was waived by failure to exhaust peremptory challenges.—Scott v. State, 29 Tex. App. 217, 15 S. W. 814.

§ 521. Withdrawal of challenge.

[a] (Minn. 1860) Where, in a trial of an indictment for murder, a challenge for actual bias is interposed on the part of the state, and then withdrawn, it may be renewed at any time before the jury is complete.—State v. Dumphey, 4 Minn. 438 (Gil. 340).

[b] (N. Y. 1879) An omission of the clerk to bring into court the box containing the names of the jurors who had already served, as required by Code, § 1059, is waived by the prisoner's withdrawing his challenge made on such ground, although sustained.—Pierson v. People, 18 Hun, 239.

§ 522. Peremptory challenges.

Time for exercising challenges, see post, §§ 619–623.

[a] A party is not, by a waiver of peremptory challenge in the first instance, estopped from challenging a juror after the opposite party has challenged one.
—(Iowa, 1867) Fountain v. West, 23 Iowa, 9, 92 Am. Dec. 405;
(Pa. 1842) Kennedy v. Dale, 4 Watts & S. 176.
CONTRA, see
(Pa. 1821) Patton v. Ash, 7 Serg. & R. 116.

[b] (Ala. 1872) The allowance of a challenge of a juror, before the jury is completed, to a party who has not exhausted his challenges, is not error, notwithstanding the party has hastily expressed himself satisfied with the juror challenged.—Adams v. Olive, 48 Ala. 551.

[c] (Ala. 1874) In a criminal case, the prisoner's right to challenge a juror peremptorily, if not waived, is not lost until the juror is sworn, or until the oath is tendered to him; and a waiver of the right will not be implied, especially in a case of felony, because the prisoner, after twelve jurors had been drawn and had taken their seats in the jury box, and the places of two who were challenged had been filled, being asked by the court "if he was now satisfied," replied, "I have nothing to say at present," and did not object to any of them until after some had been sworn, when he challenged one of the others, who was rising to take the oath.—Drake v. State, 51 Ala. 30.

[d] (Cal. 1895) The parties alternately exercised their peremptory challenges, and when the panel was filled, on being asked if he was satisfied with the jury, plaintiff stated that he waived his right to challenge for the present, and defendant then waived any challenge. *Held*, that plaintiff was not afterwards entitled to a peremptory challenge.—Vance v. Richardson, 110 Cal. 414, 42 Pac. 909.

[e] (Del. 1849) The right of striking jurors, though waived as to one challenge by passing the panel, may be used, after the other party has exercised his right, as well on two jurors of the original panel as on two of those newly drawn.—How v. Chesapeake & D. Canal Co., 5 Har. 245.

[f] (Ill. 1887) Under Rev. St. c. 78, § 21, which provides that on the impaneling of a jury the jurors shall be "passed on and accepted in panels of four," a party who has accepted a panel cannot thereafter challenge any member thereof, though the jury has not yet been sworn.—Mayers v. Smith, 25 Ill. App. 67, affirmed (1887) 121 Ill. 442, 13 N. E. 216.

[g] (Ky. 1831) Where one of two counsel for the defense accepts a juror and the other ob-

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jects to him, observing that he had been inadvertently accepted, and both counsel then challenge him peremptorily, the challenge should be allowed.—Clarke v. Goode, 29 Ky. (6 J. J. Marsh.) 637.

[h] (La.) The state does not waive the right to peremptorily challenge a juror after he has been examined and turned over to the defense.—(1887) State v. Durr, 39 La. Ann. 751, 2 South. 546; (1896) Same v. Wren, 48 La. Ann. 803, 19 South. 745.

[i] (Minn. 1889) The defendant in a criminal trial, who waives his right to challenge a juror peremptorily when the juror is called as prescribed by statute, has not the right to do so after the panel is completed, although the jury has not been sworn.—State v. Scott, 41 Minn. 365, 43 N. W. 62.

[j] (Neb. 1895) Believing that the state was entitled to eight peremptory challenges, the challenging proceeded by the state challenging once, and the defense then twice. After the state exhausted five, and defendant ten, challenges, it was discovered that the state was originally entitled to but six challenges. *Held*, that it was not error for the court, in order to give the state the last challenge, to hold, after notifying defendant in advance, that by waiving his eleventh challenge he waived his remaining five.—Gravely v. State, 45 Neb. 878, 64 N. W. 452.

[k] (N. Y. 1885) Accepting a juror after the court has ruled that peremptory challenges must be made before the juror takes his seat in the box is not a waiver of the right to peremptorily challenge him before he is sworn.—People v. Carpenter, 16 Abb. N. C. 128.

[l] (N. Y. 1889) After 12 jurors had taken their seats, but before they were sworn, plaintiff's attorney examined them, and stated that he was content with the jury "as then constituted." The defendant then peremptorily challenged two jurors, whose places were supplied. *Held*, that plaintiff's attorney had not waived his right to then challenge peremptorily one of the original panel.—Dorman v. Broadway R. Co. (City Ct. Brook.) 5 N. Y. Supp. 769.

[m] (Ohio, 1891) Where defendant was entitled to 16 peremptory challenges, and his fifteenth challenge was overruled, and his counsel announced that the next person called as a juror was satisfactory to defendant, and that he was satisfied with the jury as constituted, error in overruling the challenge was without prejudice, since, if the challenge had been sustained, defendant, having but one challenge left, would not have found it necessary to use it; the next juror called being acceptable to him.—McCarthy v. State, 5 Ohio Cir. Ct. R. 627.

[n] (Pa. 1824) Where plaintiff has waived his right of challenge altogether, and defendant thereupon challenged two of the twelve jurors, plaintiff may not challenge one of the jurors called in the place of those challenged by defendant.—Wenrick v. Hall, 11 Serg. & R. 153.

[o] (Pa. 1839) Where a jury is called to try an issue, and the list of jurors is handed to the counsel for the plaintiff, who declines striking any names therefrom, and hands it over to the counsel for the defendant, who strikes off one of the persons named, the plaintiff's right to challenge is confined to the juror last called, and he cannot object to any of the jurors whose names were on the list at the time it was first handed to him.—Hotz v. Hotz, 2 Ashm. 245.

[p] (Pa. 1854) A party who refuses to challenge any jurors, giving as a reason that, if he does, the panel will be filled from the bystanders, all the drawn jurors except 12 having been discharged by the court, thereby waives his right to challenge, and cannot afterwards object, on writ of error, to the jury.—Miller v. Wilson, 24 Pa. (12 Harris) 114.

[q] (Pa. 1861) The commonwealth is not compelled to exercise her right of challenge in the order of calling the jury, so that, if the challenges to the first four called are waived, she cannot afterwards challenge, but is entitled to four peremptory challenges out of all the jurors that may be called at any time before the panel is full; and passing by individual jurors, and permitting them to be challenged by the prisoner, or sworn, is no waiver of the right.—Hartzell v. Commonwealth, 40 Pa. (4 Wright) 462.

[r] (Pa. 1863) Where the allowance of a peremptory challenge to the plaintiff was not excepted to by the defendant, but only the refusal of the court to allow him to peremptorily challenge a new juror after his challenges had been exhausted, the error in allowing such additional challenge was waived.—Funk v. Ely, 45 Pa. (9 Wright) 444.

[s] (Pa. 1868) On trial for a misdemeanor, if the commonwealth has waived the right to challenge the first four called, and the defendant has exhausted his challenges, the commonwealth cannot challenge.—Commonwealth v. Frazier, 2 Brewst. 490.

[t] (Pa. 1870) Under Act March 29, 1860, providing that "the plaintiff and defendant shall each have four peremptory challenges," after the parties had alternately exercised their right to challenge three times, and plaintiff declined to challenge again, but defendant challenged the fourth time, the plaintiff was entitled to resume and exercise his right to a fourth challenge, since the statute grants the right of challenge unconditionally and provides no method for its exercise.—Zug v. Printers' Paper Mill, 1 Lanc. Bar, No. 50, p. 1.

[u] (Tex. 1870) In a criminal case it is not error to allow the district attorney to challenge a juror after the panel has been accepted.—Hubotter v. State, 32 Tex. 479.

[v] (Wis. 1883) Where a party who has waived one of his challenges to a jury, under Rev. St. § 2851, by declining to challenge in his turn, afterwards undertakes to exercise the right, and the other party makes no objection at the time, the objection also is to be deemed waived.—Gilchrist v. Brande, 58 Wis. 184, 15 N. W. 817.

§ 523. Special or struck jury.

Effect of exercise of peremptory challenges, see ante, § 519 [f, j].

[a] (Ga. 1879) Any right to have a special jury taken from the grand jury is waived by selecting without objection a jury from the petit juries.—Milledgeville Mfg. Co. v. Etheridge, 63 Ga. 568.

[b] (Ga. 1891) After a jury has been stricken, it is not error to refuse to allow a restriking because counsel for one of the parties simply states in his place that he had by oversight left on the jury a man who, for reasons alleged, would, in his opinion, be partial and prejudiced against his client; it not appearing that, even if these things were true, any diligence was shown to ascertain the same, or that they might not easily have been known by proper and timely inquiry.—Central R. & Banking Co. v. Kent, 87 Ga. 402, 13 S. E. 502.

[c] (Ind. 1894) A party who demands a struck jury, and then joins in striking it, cannot object to the persons selected simply on the ground

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that the selection of the list from which the striking was done was improperly made by the clerk, instead of by the jury commissioner.—Ohio & M. Ry. Co. v. Stein, 140 Ind. 61, 39 N. E. 246.

3. REJECTION OR DISCHARGE ON COURT'S OWN MOTION.

POWER OF COURT, § 524.
GROUNDS IN GENERAL, § 525.
— QUALIFICATIONS, § 526.
— FORMATION AND EXPRESSION OF OPINION, § 527.
— PERSONAL OPINIONS AND CONSCIENTIOUS SCRUPLES, § 528.
— PRIOR SERVICE AS JUROR, § 529.
— PHYSICAL DISABILITY, § 530.
— RELATIONSHIP, § 531.
AFTER SWEARING OF JURY, § 532.
— GROUNDS IN GENERAL, § 533.
— FORMATION AND EXPRESSION OF OPINION, § 534.
— QUALIFICATIONS AND EXEMPTIONS, § 535.
— PERSONAL OPINIONS AND CONSCIENTIOUS SCRUPLES, § 536.
— PRIOR SERVICE AS JUROR, § 537.
— PHYSICAL DISABILITY OR OTHER PROVIDENTIAL CAUSE, § 538.
SPECIAL OR STRUCK JURY, § 539.
EFFECT ON CHALLENGES, § 540.

As infringement of right to trial by jury, see ante, § 232 [h].

Discharge of juror impaneled on telegraphic news of his illness, see ante, § 388.

—— or withdrawal of jurors pending trial in general, see post, § 635.

Effect of discharge before completion of jury, see post, § 636.

Excusing jurors from panel, see ante, §§ 384–390.

§ 524. Power of court.

After swearing of jury, see post, § 532.

Special or struck jury, see post, § 539.

[a] The court may excuse, of its own motion, incompetent jurors.

—(Ark. 1894) Vaughan v. State, 58 Ark. 353, 24 S. W. 885;

(Mo. 1896) State v. Taylor, 134 Mo. 109, 35 S. W. 92;

(Nev. 1876) State v. Larkin, 11 Nev. 314.

CONTRA, see

(Ill. 1855) Van Blaricum v. People, 16 Ill. (6 Peck) 364, 63 Am. Dec. 316;

(N. J. 1794) Bickham v. Pissant, 1 N. J. Law (Coxe) 220.

[b] (U. S. 1820) Before a jury is made up, incompetent jurors who have been summoned may be discharged, and others summoned in their places.—United States v. Dickinson, Fed. Cas. No. 14,957a [Hemp. 1].

[c] (Ark. 1878) The court may, of its own motion, excuse a juror who has been found incompetent after his acceptance by the parties.—Robinson v. State, 33 Ark. 180.

[d] (La. 1894) Where a juror, after examination, was accepted by the state and defendant, and then informed the court of a disqualification in regard to which he had not been questioned, there was no error in discharging him.—State v. West, 46 La. Ann. 1009, 15 South. 418.

[e] (Mich. 1871) Comp. Laws, § 4392, providing that the first 12 persons whose names are drawn and who are approved as indifferent between the parties shall be sworn as the jury to try the cause, does not deprive the court of the power to set aside a juror whose examination satisfies the court that he is not unbiased, though neither party challenge him.—Atlas Min. Co. v. Johnston, 23 Mich. 36.

[f] (Mich. 1890) The court has no right, of its own motion, to discharge a juror with whom both sides are satisfied, without satisfactory cause, and against the protest of a party.—Welch v. Tribune Pub. Co., 83 Mich. 661, 47 N. W. 562, 21 Am. St. Rep. 629, 11 L. R. A. 233.

[g] (Nev. 1876) The court may, without a challenge from either party, upon good cause shown, discharge a juror at any time before he is sworn.—State v. Larkin, 11 Nev. 314.

[h] (N. Y. 1818) A justice has no right, of his own mere motion, without any exception being taken by either party, to challenge the panel of jurors and issue a new venire.—Cross v. Moulton, 15 Johns. 469.

[i] (Tex. 1883) If defendant and state's attorney waive an objection to jurors for bias, the judge is without authority to reject the jurors upon his own motion.—Greer v. State, 14 Tex. App. 179.

[j] (Va. 1892) Code 1887, § 3156, provides that no irregularity in drawing, summoning, returning, or impaneling of jurors shall be sufficient to set aside a verdict, unless the party objecting was injured by such irregularity. Section 3152 gives the court authority to discharge persons summoned as jurors. *Held*, that there was no such irregularity for a judge in trial court, in the exercise of his discretion, and for cause shown, to reject a man drawn as a juror.—Burch v. Hylton, 89 Va. 441, 16 S. E. 342.

§ 525. Grounds in general.

[a] (Ala. 1845) Notwithstanding the enumerated causes of challenge in the Penal Code, the court may, in its discretion, reject such as are unfit or improper persons to sit upon the jury, and may excuse those from serving who, for reasons personal to themselves, ought to be exempt from serving on the jury. So, also, the court may reject any juror who admits himself open to any of the enumerated challenges for cause, without putting him on the prisoner.—State v. Marshall, 8 Ala. 302.

[b] (Iowa, 1866) In an action in which a city is a party, the court has the discretion to reject from the jury taxpayers of such city.—Dively v. City of Cedar Falls, 21 Iowa, 565.

[c] (Kan. 1884) Where counsel, even in a capital case, agree that the court shall name the persons to be summoned to attend as jurors, and that no person shall be named residing in certain townships, and by mistake one is named who resides therein, the court did not err in setting him aside, although such juror on his examination did not appear personally disqualified.—State v. McKinney, 3 Pac. 356.

[d] (Mass. 1855) It is within the discretion of the presiding judge to allow a juror who resides in the same town with the defendant to leave the panel before the commencement of the trial.—Commonwealth v. Hayden, 70 Mass. (4 Gray) 18.

[e] (Mich. 1886) When a juror, after his selection, but before the completion of the panel, has exhibited such reckless disregard of his duty as to make it evident that he is unfit to serve, the judge may properly exclude him from the panel.—People v. Barker, 60 Mich. 277, 27 N. W. 539.

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[f] (Miss. 1883) It is proper in a criminal case to excuse from service jurors who are already serving on the grand or petit juries; the petit jury being at the time engaged in consultation upon a felony case.—Guice v. State, 60 Miss. 714.

[g] (Miss. 1884) It is discretionary with the trial court in a criminal case to set aside a juror who acknowledges that "he had a sympathy for the boys" on trial.—Smith v. State, 61 Miss. 754.

[h] (Miss. 1884) The court may properly order that the box be purged of the fraudulent names, and the drawing then proceed, upon its appearing during the drawing of a special venire that certain names were fraudulently placed in the box.—Smith v. State, 61 Miss. 754.

[i] (N. Y. 1894) It is in the discretion of the court to exclude a juror on the ground of general incompetency, and because the situation of his business was such that his attention would be distracted.—People v. Spiegel, 75 Hun, 161, 26 N. Y. Supp. 1041, affirmed (1894) 143 N. Y. 107, 38 N. E. 284.

[j] (Pa. 1892) The fact that a man signs a petition to the trial judge, setting out that the signers are informed as to the testimony produced at the former trial, that they are of opinion that the ends of justice will be satisfied by the entry of a plea of murder in the second degree, and that they therefore petition such plea to be accepted in order to save the expense of a second trial,—the judgment in the first having been reversed on appeal,—is sufficient to disqualify him as a juror on the second trial, and it is not error for the judge to reject him, though not challenged by either the prosecution or the defense.—Commonwealth v. Cleary, 148 Pa. 26, 23 Atl. 1110, 30 Wkly. Notes Cas. 1.

[k] (Tenn. 1859) The court has the power, in a criminal case, before the jurors are sworn, to discharge one of the number upon his persistent refusal to take the oath.—Isaac v. State, 39 Tenn. (2 Head) 458.

[l] (Tenn. 1884) The court may discharge a juror for a cause other than one of those expressly specified in the law.—Boyd v. State, 82 Tenn. (14 Lea) 161.

[m] (Tex. 1857) A special venire having been summoned to try a murder case, the judge permitted a jury to be taken therefrom to try another case, and while such jury were out called the murder case for trial, but failed to obtain a full jury from the remainder of the special venire. Thereupon the judge called the other jury into court, swore the several members, who were accepted by the state and defense, and interrogated them as to whether they were on such other jury and had agreed on their verdict, and, on their replying that they were not agreed, discharged them for cause, and sent them back to consider their verdict. *Held*, that the action of the court was improper, since the court should not excuse a juror as a means of curing its previous improper action in derogation of the prisoner's rights, but that the jury should have been discharged from considering the other case when their services were needed in the murder case, or the murder case should have been postponed till the verdict in the other case was rendered.—Bates v. State, 19 Tex. 122.

[n] (Va. 1853) The court cannot of its own motion, where no challenge is made, without good and sufficient cause, set aside a juror, except for mental or physical disability.—Montague v. Commonwealth, 10 Grat. 767.

[o] (Va. 1853) On a trial for a felony, the court may, without the suggestion of either party, but on its own motion, examine upon oath all who may have been summoned to serve upon the jury touching any disability created by statute, such as infancy or want of freehold or property qualifications; and upon any such disability being thus made to appear, or if it be shown that any one so summoned has been convicted of perjury, such court may lawfully, and should, set aside any such juror of its own action, though neither party objects.—Montague v. Commonwealth, 10 Grat. 767.

§ 526. —— Qualifications.

[a] The court may, on its own motion, discharge jurors who cannot understand the English language.

—(N. Y. 1894) People v. Spiegal, 75 Hun, 161, 26 N. Y. Supp. 1041, affirmed (1894) 143 N. Y. 107, 38 N. E. 284;

(Va. 1853) Montague v. Commonwealth, 10 Grat. 767.

[b] (Ala. 1888) By Code 1886, § 4335, "the court may excuse from service any person summoned as a juror, if he is disqualified or exempt, or for any other reasonable or proper cause, to be determined by the court," and by section 4325 it is made the imperative duty of the court, before administering the oath, to ascertain that the juror possesses the qualifications required by law. *Held*, that the court had power to excuse one summoned who could not understand the English language sufficiently to qualify him as a juror.—Long v. State, 86 Ala. 36, 5 South. 443.

[c] (Cal. 1867) The proviso of the act which excepts certain counties from the provisions requiring the jurors to understand the language in which the proceedings of the courts are carried on does not deprive a court in one of those counties of the power of excusing jurors who are ignorant of the language.—People v. Arceo, 32 Cal. 40.

[d] (Colo. 1889) It is proper to excuse from the jury a person who is not a citizen of the United States, and who has never declared his intention to become such.—Babcock v. People, 13 Colo. 515, 22 Pac. 817.

[e] (La. 1877) The judge is authorized, on his own motion, to strike a juror from a regular panel, if satisfied that the juror is morally unfit to return a just verdict.—State v. Lartigue, 29 La. Ann. 642.

[f] (Minn. 1882) One called as a juror, and appearing on examination not to have sufficient knowledge of the English language to perform intelligently the duties of a juror, may be excluded by the court on the ground of general disqualification, though there is no challenge for that cause.—State v. Ring, 29 Minn. 78, 11 N. W. 233.

[g] (Tenn. 1848) Where the court decided that a certain juror was competent and he was thereupon accepted by both sides, but not sworn, the question whether he was of age being then raised for the first time by his own statement that he was not, the court properly directed him to stand aside.—Hines v. State, 27 Tenn. (8 Humph.) 597.

[h] (Wis. 1882) The proceedings on a trial being required by Rev. St. § 2578, to be in English, it is within the power of the court to exclude a juror because of his want of knowledge of the English language, though the same is not mentioned in the statute as a ground of challenge.—Sutton v. Fox, 55 Wis. 581, 13 N. W. 477, 42 Am. Rep. 744.

§ 527. —— Formation and expression of opinion.

[a] (Idaho, 1888) Where a juror states that he has an opinion in favor of defendant, but

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that he can act on the evidence and law of the case, the court may, in the exercise of its discretion, discharge him.—United States v. Alexander, 2 Idaho, 354, 17 Pac. 746.

[b] (Miss. 1856) It is the duty of the court in a criminal trial to see that the jury is composed of men above all exception. If, on examination, a juror is found to have formed an opinion as to the issue to be passed upon, he may be set aside before either party have had the opportunity to challenge him.—Marsh v. State, 30 Miss. 627.

[c] (Tex. 1880) If the juror answers that a conclusion in his mind as to the guilt or innocence of defendant will not influence his verdict, and the court, on further examination, is not satisfied of his impartiality, he must be discharged, whether challenged or not.—Stagner v. State, 9 Tex. App. 440.

[d] (Tex. 1884) Code Cr. Proc. art. 636, declares that where, on a trial for murder, a juror states under oath that there is an established conclusion as to defendant's guilt or innocence that would influence his verdict, "he shall be discharged." *Held* that, when a juror thus answers, he should be set aside, whether challenged or not.—Spear v. State, 16 Tex. App. 98.

§ 528. —— Personal opinions and conscientious scruples.

[a] A juror who, after having been accepted by both parties, though not yet sworn, voluntarily states he has conscientious scruples against the infliction of capital punishment, may be rejected by the court.
—(La. 1856) State v. Reeves, 11 La. Ann. 685;
(Va. 1853) Montague v. Commonwealth, 10 Grat. 767.

[b] (U. S. 1820) It is no ground of exception that jurors were set aside because they were Quakers, and as such opposed to the infliction of capital punishment, without objection being made by either party, and on their mere statement that they were such.—United States v. Cornell, Fed. Cas. No. 14,868 [2 Mason, 91].

[c] (Ala. 1856) If a juror is accepted by the state, and afterwards by the prisoner, the state's right of challenge is lost, and cannot be again revived, and the court cannot order a juror to stand aside who announces that he has conscientious scruples against capital or penitentiary punishment.—Stalls v. State, 28 Ala. 25.

[d] (Ala. 1861) There is no duty imposed upon the court ex mero motu to set aside a juror on the ground that he has a fixed opinion against capital or penitentiary punishment.—Murphy v. State, 37 Ala. 142.

[e] (Ala. 1867) Under Pen. Code, § 630, the court may, against the objection of the defendant, discharge a juror on account of his opinions on the subject of capital punishment, although it is not obligatory on the court so to act ex mero motu.—Waller v. State, 40 Ala. 325.

[f] (Tex. 1893) Under Pen. Code 1879, art. 609, which provides that the punishment for murder in the first degree shall be death or imprisonment for life, it is the duty of the court to see that a jury is organized which will be willing to assess either penalty, as the facts and circumstances should warrant; and it may, on its own motion, excuse jurors who, on their voir dire, state that they have conscientious scruples against the infliction of the death penalty.—Gonzales v. State, 31 Tex. Cr. R. 508, 21 S. W. 253.

§ 529. —— Prior service as juror.

[a] (Cal. 1890) It was proper for the court to discharge those members of a panel who had served on a jury which tried a prior murder case at the same term, where their verdict in that case was so entirely against the evidence as to make it evident that they were unworthy to serve on a subsequent murder case.—People v. Murray, 85 Cal. 350, 24 Pac. 666.

[b] (Nev. 1865) On a trial for murder, the court may excuse a juror where he does not remember whether he was on the grand jury that found the indictment, and the court cannot find the record which would give information as to whether he was on such jury.—State v. Kelly, 1 Nev. 224.

§ 530. —— Physical disability.

[a] The court, on its own motion, may challenge and set aside a juror for intoxication.
—(Ga. 1859) Thomas v. State, 27 Ga. 287;
(Miss. 1883) Guice v. State, 60 Miss. 714;
(N. Y. 1823) Bullard v. Spoor, 2 Cow. 430.

[b] (Ga. 1856) The court may excuse a juror for deafness without the prisoner's consent.—Jesse v. State, 20 Ga. 156.

[c] (Ga. 1891) Where, on the trial of a felony, after several of the jury have been selected, but not sworn in chief, one of them becomes sick, it is not error to excuse him.—Ozburn v. State, 87 Ga. 173, 13 S. E. 247.

[d] (La. 1895) The court can excuse a juror, before he has been sworn in a criminal case, on account of his health.—State v. Madison, 47 La. Ann. 30, 16 South. 566.

[e] (Va. 1853) On a trial for felony the court without the suggestion of either party, but by its own motion, may excuse or set aside a juror who is competent in all other respects, but who, from disease, domestic affliction, loss of hearing, or other like cause, is disabled physically from performing the duties of a juror.—Montague v. Commonwealth, 10 Grat. 767.

§ 531. —— Relationship.

[a] (La. 1894) The fact that the wife of a juror, selected for the trial of the cause, was a second cousin of the accused, justified the court in discharging him from the jury before completion of the panel.—State v. Hobgood, 46 La. Ann. 855, 15 South. 406.

[b] (S. C. 1891) It is within the discretion of the trial judge to reject a juror because his father and the grandfather of the accused were brothers.—State v. Merriman, 34 S. C. 16, 12 S. E. 619.

§ 532. After swearing of jury.

Effect of discharge, see post, §§ 635, 637.

[a] (U. S. 1823) After the jury is sworn in a capital case, and the cause has been opened, the court cannot, without the prisoner's consent, discharge a juror at his own request.—United States v. Randall, Fed. Cas. No. 16,117 [2 Cranch, C. C. 412].

[b] (Ill. 1843) A court has a discretion, on discovering that a juror has been inadvertently sworn who cannot render a legal verdict, to discharge him.—Thomas v. Leonard, 5 Ill. (4 Scam.) 556.

[c] (N. Y. 1835) A juror, who is discovered to be incompetent to serve after he has been sworn and taken his seat, may, in the exercise of a sound discretion, be set aside by the court at any time before evidence is given; and this may be done in a capital case, and as well for cause existing before as after the juror was sworn.—People v. Damon, 13 Wend. 351.

[d] (N. Y. 1886) A request to discharge a juror, made after he has been accepted and sworn, but before evidence has been given in a criminal case, is within the discretion of the trial judge.—People v. Beckwith, 103 N. Y.

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360, 8 N. E. 662, affirming (1886) 4 N. Y. Cr. R. 335.

[e] (S. C. 1837) A presiding judge may excuse and discharge a juryman on his own application; but, after the parties announce themselves ready for trial before a particular jury, the judge cannot discharge one of that jury, at the instance of one party and contrary to the consent of the other, unless the ground of challenge be legally and properly sustained.—Greer v. Norvill, 3 Hill, 262.

[f] (Tex. 1883) After a juror has been sworn and impaneled in a felony case, the court has no power to excuse him without consent of defendant.—Sterling v. State, 15 Tex. App. 249.

§ 533. —— Grounds in general.

[a] (U. S. 1829) After a juror is sworn, he cannot be challenged, except for a cause subsequently arising; and the court cannot discharge him without consent of the party, although he should state to the court matters which would be proper evidence on a challenge for favor.—United States v. Watkins, Fed. Cas. No. 16,649 [3 Cranch, C. C. 441].

[b] (Ala. 1831) After a juror is accepted and sworn, the court cannot discharge him from the panel, without the consent of the prisoner, for any cause in esse at the time he was sworn, although the cause may have been discovered after he was impaneled.—State v. Williams, 3 Stew. 454.

[c] (Ga. 1851) It is error to discharge one of the jurors impaneled to try a criminal case, on the ground that he had absented himself from the court house without leave, without giving defendant an opportunity to explain the absence and show that the juror did not thereby become disqualified.—Standley v. State, 10 Ga. 82.

[d] (Ill. 1888) It was proper for the court to interpose and withdraw jurors who had been accepted and sworn when it appeared that they were unfit to sit in the case.—Ochs v. People, 25 Ill. App. 379, affirmed (1888) 124 Ill. 399, 16 N. E. 662.

[e] (La 1884) The belief of the judge, apparently well founded, that the jurors already sworn were illegally drawn, justified him in discharging such jurors and in reassigning the case for another day.—State v. Lawson, 36 La. Ann. 275.

[f] (Miss. 1859) At any time before evidence is given to the jury, the court may, of its own motion, remove a juror incompetent from partiality.—McGuire v. State, 37 Miss. 369.

[g] (Nev. 1881) Courts are legally authorized to discharge a juror or a jury, after the jury has been sworn to try the case, whenever from any cause such a necessity exists as to make it apparent that the ends of justice would otherwise be defeated.—State v. Pritchard, 16 Nev. 101.

§ 534. —— Formation and expression of opinion.

[a] (Ind. 1878) The court discharged the jury until a specified day of the term, against the objection of the defendant in a criminal case, the trial of which was pending, and also excused three of the jurors, who had expressed an opinion that the defendant was guilty, from returning on that day. When the case was called the defendant demanded to be tried by the full regular panel, and the court offered to send for the three jurors who had been excused, if the defendant requested it. *Held*, that the action of the court in excusing the jurors was a fair exercise of discretion.—Watson v. State, 63 Ind. 548.

[b] (S. C. 1835) A juror is properly excused before the introduction of evidence, on his own motion, where he states that he has formed an opinion, though the parties had not objected to him as a juror.—Rice v. Sims, 3 Hill, 5.

[c] (S. C. 1876) Where it becomes known, after a jury has been impaneled, that one of the jurors has expressed an opinion in relation to the case, it is not the duty of the court to set aside the juror, where the prisoner declines to make a motion to that effect.—State v. Coleman, 8 S. C. (8 Rich.) 237.

[d] (S. C. 1894) When, after the jury has been sworn in a criminal case, a juror states to the court that he has heard his brother-in-law talk about the case, and has formed and expressed an opinion, the court is not obliged to let the trial proceed with said juror, and, if it do so, there is error.—State v. Cason, 41 S. C. 531, 19 S. E. 918.

§ 535. —— Qualifications and exemptions.

[a] (Fla. 1876) If, after the jury is sworn and before testimony is taken, it is discovered that one of the jurors is a foreigner who has taken no steps toward naturalization, the court should discharge him and supply his place with a competent person.—Keech v. State, 15 Fla. 591.

[b] (Mich. 1886) An alien not being qualified to sit on a jury, it is not improper for the court, upon discovering one on the panel after its completion, but before further proceedings in the case, to order such person to stand aside, and another juror to be drawn in his stead, giving permission to the defendant to challenge the other 11 jurors, either peremptorily or for cause.—People v. Barker, 60 Mich. 277, 27 N. W. 539.

§ 536. —— Personal opinions and conscientious scruples.

[a] (La. 1882) When a juror, after his examination on his voir dire, has been accepted by the prisoner and sworn, the court may yet discharge him upon discovering from the statement and further examination of said juror that he is opposed to capital punishment.—State v. Diskin, 34 La. Ann. 919, 44 Am. Rep. 448.

[b] (Nev. 1896) After a jury has been sworn, and evidence admitted, in a capital case, the court may excuse a juror against defendant's objection on proof that he is opposed to capital punishment, such fact having come to the knowledge of the prosecution during the trial.—State v. Vaughan, 23 Nev. 103, 43 Pac. 193.

§ 537. —— Prior service as juror.

[a] (Ky. 1873) Under Cr. Code, § 211, authorizing challenge where a juror was a member of the grand jury that found the indictment, where accused accepts the juror and protests against his discharge by the court after the jury was sworn, the court's action in discharging him and selecting another was error.—O'Brian v. Commonwealth, 72 Ky. (9 Bush) 333.

[b] (Miss. 1876) Where the jury were impaneled and sworn to try a case of murder, and the indictment was being read to the jury, and one of the jurors arose in his place and stated that it then occurred to him for the first time that he was a member of the grand jury who found the bill of indictment, *held*, that it was competent and within the discretion of the court to direct the juror to stand aside, and substitute another in his stead, and have the whole jury resworn.—Jefferson v. State, 52 Miss. 767.

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§ 538. —— Physical disability or other providential cause.

[a] (Ala. 1889) Sickness of a juror's wife, of such a nature that, in the opinion of her physician, her life depends on her husband's presence, and the knowledge of which incapacitates the juror from performing his duties as such, warrants his discharge, even after the jury has been sworn, especially as Code, § 4453, authorizes the court to discharge a juror on account of his illness, or for any other cause which in the opinion of the court renders it necessary, and such discharge does not operate as an acquittal of defendant.—Hawes v. State, 88 Ala. 87, 7 South. 302.

[b] (Ala. 1893) It is not error to excuse a juror, after he has been selected and sworn, because of sickness.—Webb v. State, 100 Ala. 47, 14 South. 865.

[c] (Ala. 1894) After the jury is completed, but before the indictment is read to them, if a juror states that he is sick, and cannot proceed with the trial, the court may excuse him.—Yarbrough v. State, 105 Ala. 43, 16 South. 758.

[d] (Ark. 1894) It was not error to refuse to discharge the jury on account of sickness of one of their members, when the jury were called into court, and told that they would be discharged if the juror who was ill could no longer remain, and that such juror replied that he was about well, and not inconvenienced by remaining.—Johnson v. State, 60 Ark. 45, 28 S. W. 792.

[e] (Ill. 1876) Where one of the jurors is taken ill after a trial has begun, the court may order his discharge.—City of Shawneetown v. Mason, 82 Ill. 337, 25 Am. Dec. 321.

[f] (La. 1887) When, immediately after the swearing of the complete jury, and before any further proceeding is taken, one of the jurors is incapacitated by illness from serving, the judge may excuse him.—State v. Moncla, 39 La. Ann. 868, 2 South. 814.

[g] (La. 1896) If, before the jury has been completely impaneled, one of the jurors, who has been accepted and sworn, is taken ill and cannot serve, it is no ground of complaint that the court should have excused him.—State v. Johnson, 48 La. Ann. 437, 19 South. 476.

[h] (Tenn. 1845) Where a juror in a criminal case becomes physically or mentally unable to proceed with the trial of a case, the court may in its discretion discharge such juror.—State v. Curtis, 24 Tenn. (5 Humph.) 601.

[i] (Tenn. 1845) The court may discharge a juror, in case of felony, after he has been sworn, on the ground of physical inability, without the consent of the prisoner.—Fletcher v. State, 25 Tenn. (6 Humph.) 249.

[j] (Tenn. 1859) Where the court before the completion of the jury excused two jurors selected for the trial of the case, one on the ground of intoxication, and the other for the reason that his wife was very ill, both sides consenting thereto, no error was committed.—Nolen v. State, 39 Tenn. (2 Head) 520.

[k] (Tex. 1878) Under Const. art. 5, § 13, giving the remainder, after jurors not exceeding three have been disabled, the power to render the verdict, it is within the discretion of the court to discharge a juror on account of his sickness.—Ray v. State, 4 Tex. App. 450.

[l] (Tex. 1882) Const. art. 5, § 13, provides that "when, pending the trial of any case, one or more jurors * * * may die or be disabled from sitting, the remainder of the jury shall have the power to render the verdict." *Held*, that mental distress caused by the news that his child is sick does not "disable" a juror within the meaning of such section.—Houston & T. C. Ry. Co. v. Waller, 56 Tex. 331.

[m] (W. Va. 1888) Where, after most of the evidence had been heard in a felony case, a juror was told that his son had just died, and the court certified that it "appeared to the satisfaction of the court that the juror, by reason of his affliction, was unable to discharge his duties as a juror," he was properly discharged.—State v. Davis, 31 W. Va. 390, 7 S. E. 24.

§ 539. Special or struck jury.

[a] (Ala. 1893) Where a struck jury is demanded by a party to an action, the court may of its own motion examine the jurors from which the struck jury is to be impaneled, as to their qualifications, and excuse those who are for any reason disqualified; it being entirely proper for it to ascertain if any were disqualified before the parties were required to strike from the list such as were deemed objectionable.—Steed v. Knowles, 97 Ala. 573, 12 South. 75, following Dothard v. Denson (1882) 72 Ala. 541, and Davis v. Hunter (1844) 7 Ala. 135.

[b] (Ala. 1893) The statute provided that for the trial of a capital felony the court should order the sheriff to summon not less than 50, nor more than 100, persons, including the regular jurors for the week, the court to inquire into and pass on the qualifications of all who appeared in response; the names of all whom it might hold competent to be listed, and the defense to strike 2, and the prosecution 1, till 12 remained, who were to be sworn as the jury. *Held*, that the court had no power, ex mero motu, to discharge a person because he had been summoned by a wrong Christian name, and such error would be presumed prejudicial.—Sullivan v. State, 102 Ala. 135, 15 South. 264, 48 Am. St. Rep. 22.

§ 540. Effect on challenges.

[a] (Ga. 1883) A person over 60 years of age not being a qualified juror (Code, § 4681), the court, at the request of such juror, may excuse him against defendant's objection, even though defendant used peremptory challenges to secure such person as a juror.—Doyal v. State, 70 Ga. 134.

[b] (Kan.) It is not a substantial error for the district court to discharge a juror during the time the jury are being impaneled, although the juror be discharged for an insufficient reason, where an unexceptionable jury is afterwards obtained, and where the party complaining has not exhausted his peremptory challenges.—(1874) Stout v. Hyatt, 13 Kan. 232; (1879) Atchison, T. & S. F. R. Co. v. Franklin, 23 Kan. 74.

[c] (Mass. 1885) In an action against a city, the direction by the court to the jury that any residents or taxpayers of defendant city must leave their seats does not deprive plaintiff of the statutory right (Pub. St. c. 170, § 35) to have the jurors examined on oath and challenged.—Daniels v. City of Lowell, 139 Mass. 56, 29 N. E. 222.

[d] (Mich. 1887) Where a juror did not appear to be very conversant with the English language, *held*, that the judge might of his own motion excuse a disqualified juror, although the plaintiff objecting had exhausted all his peremptory challenges.—O'Neil v. Lake Superior Iron Co., 67 Mich. 560, 35 N. W. 162.

[e] (Tenn. 1857) In a capital case, a juror, after taking his seat in the box, stated to the court that he remembered having formed and expressed an opinion as to the prisoner's guilt. The court asked the counsel for the prisoner

what they proposed to do with reference to the juror. They replied, that "they had nothing to say." The court discharged the juror, allowing the prisoner the same number of challenges as if the juror had been challenged for cause. *Held*, that the court erred in discharging the juror, on the ground that his incompetency did not sufficiently appear.—Norfleet v. State, 36 Tenn. (4 Sneed) 340.

(I) CHALLENGE TO PANEL OR ARRAY, AND MOTION TO QUASH VENIRE.

NATURE AND RIGHT IN GENERAL, § 541.
STATUTORY PROVISIONS, § 542.
GROUNDS, § 543.
TIME, § 544.
MAKING AND SUFFICIENCY, § 545.
TRAVERSE OR DENIAL, § 546.
AFFIDAVITS AND OTHER EVIDENCE, § 547.
— PRESUMPTIONS AND BURDEN OF PROOF, § 548.
— WEIGHT AND SUFFICIENCY, § 549.
TRIAL AND DETERMINATION, § 550.

Waiver of right to challenge, see ante, §§ 503–523.

Withdrawal of juror, see "Trial," VI. (A).

§ 541. Nature and right in general.

[a] (Ga. 1859) If the panel be not full, on the impaneling, the prisoner must challenge the array.—Thomas v. State, 27 Ga. 287.

[b] (Ill. 1889) A challenge to the array must be based upon objection to all the jurors composing the panel, and taken in apt time.—Clears v. Stanley, 34 Ill. App. 338.

[c] (Ind. 1884) Objections to the manner of drawing the jury cannot be made by a motion venire de novo.—Doolittle v. State, 93 Ind. 272.

[d] (Iowa, 1855) Whether a challenge to the array of petit jurors will lie in a civil case, quære.—Suttle v. Batie, 1 Iowa (1 Clarke) 141.

[e] (Iowa, 1875) There is no provision in Code, § 4398, providing for challenges to the jury, for a challenge to the "array."—State v. Davis, 41 Iowa, 311.

[f] (Iowa, 1882) Of the 15 jurors drawn for the term only 12 appeared, and one of those was excused by the court, and a bystander was put on the jury by direction of the court. *Held*, that whatever the duty imposed on the court by Code 1873, § 232, to secure the attendance of a sufficient number of drawn jurors by an additional drawing, defendant should have challenged the talesmen as they were called, and not the panel, to take advantage of such conduct.—Buford v. McGetchie, 60 Iowa, 298, 14 N. W. 790.

[g] (Miss. 1851) Under Hutch. Code, p. 888, art. 10, § 1, the circuit courts, except in capital cases, have no authority to entertain a challenge to the array, or to quash a venire facias, for any cause whatsoever.—Baker v. State, 23 Miss. (1 Cushm.) 243.

[h] (N. C. 1864) An action on the case for fraudulently removing a debtor was tried, and a verdict was found for the defendant. In an action against the same defendant by another plaintiff for the same act of removing, the jury which had tried the former action was tendered and challenged by the plaintiff. *Held*, that this was a challenge to the polls, and not to the array.—Baker v. Harris, 60 N. C. 271.

[i] (N. C. 1869) If a prisoner wishes to take advantage of an objection to the manner of summoning a petit jury and special venire, he must do so by challenging the array.—State v. Douglass, 63 N. C. 500.

[j] (Ohio, 1867) Objection to the manner of selecting and constituting a jury cannot be made by plea in abatement. It must be by challenge.—Huling v. State, 17 Ohio St. 583.

[k] (Tex. 1887) There can be no challenge to the array of jurors selected by the jury commissioners.—Williams v. State, 24 Tex. App. 32, 5 S. W. 658.

§ 542. Statutory provisions.

[a] (La. 1884) Acts 1879, No. 44, requiring a challenge to the array to be made on the first day of the term, supersedes all previous acts on the same subject-matter, whether special or general.—State v. Coudier, 36 La. Ann. 291.

§ 543. Grounds.

Specific defects as grounds for challenge to array, see ante, §§ 265–390.

[a] A challenge to the array must be based upon some irregularity affecting the whole panel.—(U. S. 1895) Turner v. United States, 66 Fed. 280, 13 C. C. A. 436, 30 U. S. App. 90;

(W. Va. 1882) State v. Cartright, 20 W. Va. 32;

(Wis. 1857) Conkey v. Northern Bank, 6 Wis. 447.

[b] (Cal. 1874) When the panel is formed from persons whose names are not drawn as jurors, a challenge to the venire is in effect a challenge to the panel; and in such case there is but one ground for challenge, which is that the officer who summoned the jurors was biased.—People v. Welch, 49 Cal. 174.

[c] (Cal. 1894) Under Pen. Code, § 1064, providing that when the panel is formed from persons not named as jurors a challenge may be taken to the panel on account of bias of the officer summoning them, a challenge to a panel summoned by special venire will not lie on the ground, that the panel were nonresidents of the county.—People v. Wallace, 101 Cal. 281, 35 Pac. 862.

[d] (La. 1824) It is not ground of challenge to the array that the panel is larger than is required by law, but the objection should be taken by challenge to the individuals drawn in excess of the legal number.—Ramos v. Bringier, 2 Mart. (N. S.) 193; Debuys v. Mollere, Id. 625.

[e] (La. 1894) In the absence of fraud or wrong committed in the drawing or summoning of the general venire of jurors to the injury of defendant, a motion to quash the venire cannot prevail; that being the provision of Acts 1877, No. 44, § 10.—State v. Saintes, 46 La. Ann. 547, 15 South. 160.

[f] (Miss. 1870) A venire facias can be quashed only for some misconduct of the sheriff, or for some manifest error in selecting, drawing, or summoning the jurors otherwise than as provided by law.—Durrah v. State, 44 Miss. 789.

[g] (N. Y. 1855) Any irregularity in summoning the jury is ground of challenge to the array.—City of New York v. Mason, 1 Abb. Prac. 344.

[h] (N. C. 1886) A challenge to the array can only be taken when there is partiality or misconduct in the sheriff, or some irregularity in making out the list.—State v. Speaks, 94 N. C. 865.

[i] (Tex. 1880) A challenge to the array of petit jurors lies only upon the grounds and in the manner prescribed in Cr. Code, arts. 623–626.—Woodard v. State, 9 Tex. App. 412.

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[j] (Tex. 1884) Under Rev. St. art. 3074, a challenge to the array of jurors can only be entertained upon the ground that the officer who summoned them acted corruptly, and willfully summoned jurors known to be prejudiced against the party challenging or biased in favor of the adverse party.—Galveston, H. & S. A. Ry. Co. v. Jessee, 2 Willson, Civ. Cas. Ct. App. § 406.

§ 544. Time.

Challenge to the polls as waiver of challenge to the array, see ante, § 519.

Objections in general, see ante, § 500.

Order of challenges on different grounds, see ante, § 498.

Statutory provisions, see ante, § 542.

Objections to manner of summoning jury to assess damages for public improvements, see "Municipal Corporations," IX. (D).

[a] A challenge to the array or motion to quash the venire comes too late after the jury has been sworn.
—(Ala. 1886) Williams v. State, 81 Ala. 1, 1 South. 179, 60 Am. Rep. 133;
(Ark. 1852) Brown v. State, 12 Ark. (7 Eng.) 623;
(Ga. 1859) Thomas v. State, 27 Ga. 287; (1879) Mikell v. Same, 62 Ga. 368;
(Ill. 1874) St. Louis & S. E. Ry. Co. v. Casner, 72 Ill. 384;
(Iowa, 1856) Suttle v. Batie, 1 Iowa (1 Clarke) 141;
(Miss. 1878) Jackson v. State, 55 Miss. 530; (1878) Gavigan v. Same, Id. 533;
(N. Y. 1855) City of New York v. Mason, 1 Abb. Prac. 344;
(Pa. 1839) Commonwealth v. Sallager, 4 Pa. Law J. 511.

[b] (U. S. 1876) An objection that persons summoned as "bystanders" were not then present in court should be taken as ground of challenge to the array, before the polls are drawn.—United States v. Loughery, Fed. Cas. No. 15,631 [13 Blatchf. 267].

[c] (Ala. 1840) If a cause be tried by a jury summoned by order of the court from the bystanders, the irregularity, if any, is waived, unless excepted to at the trial.—Crawford v. Creagh, 1 Ala. 592.

[d] (Ala. 1893) A motion to quash the venire before the cause has been submitted to the jury, and before defendant has been called on to announce whether he is ready for trial, is made in proper time.—Peters v. State, 100 Ala. 10, 14 South. 896.

[e] (Cal. 1893) In a criminal case, an objection that the judge ordering the drawing of the panel was disqualified should be raised by challenging the panel, and cannot be raised for the first time after verdict.—People v. Ah Lee Doon, 31 Pac. 933.

[f] (Ga. 1873) In a criminal cause, after a jury has been made up, it is no good ground to quash or set aside the panel that there is upon it one incompetent juryman, or that during the making up of the jury persons were put upon the prisoner as proposed jurymen whose names were not on the legal jury list.—Eberhart v. State, 47 Ga. 598.

[g] (Ga. 1879) An objection that the sheriff, who selected and summoned the tales jurors necessary to complete the panel, was plaintiff in a like case pending against the same defendant and by same complainant, involving the same property, came too late after verdict.—Daniel v. Frost, 62 Ga. 697.

[h] (Ga. 1882) After verdict, a party cannot object that a special jury was stricken from the panel of traverse jurors.—Maddox v. Cunningham, 68 Ga. 431, 45 Am. Rep. 500.

[i] (Ill. 1874) There can be no challenge to the array until there is a full jury in the box.—St. Louis & S. E. Ry. Co. v. Wheelis, 72 Ill. 538.

[j] (Ind. 1860) It appeared that the sheriff asked the persons summoned whether they had any conscientious scruples against finding a verdict of guilty in a capital case. *Held*, that the proceeding was improper, but that, as it did not appear that from the answers given him he rejected any person otherwise competent, or that he acted from corrupt motives, or that the defendant was injured thereby, the objection, first made after verdict, should be overruled.—Joy v. State, 14 Ind. 139.

[k] (Ind. 1894) Where a party does not object to the panel when the jury comes into the jury box to try the case, he cannot afterwards object to the manner of selecting the jury, though he previously moved to reject the jurors selected.—Ohio & M. Ry. Co. v. Stein, 140 Ind. 61, 39 N. E. 246.

[l] (Iowa, 1880) Code 1873, § 4391, provides that "when the indictment is called for trial, and before drawing the jury, either party may require the names of all the jurors in the panel to be called, and an attachment may issue against those who are absent; but the court may, in its discretion, wait or not for the return of the attachment." *Held* that, where some of the petit jurors were absent, and a jury was called from those who appeared, it was too late for defendant to challenge the array on the ground that it was not made up from all who were summoned to appear.—State v. Miller, 53 Iowa, 84, 4 N. W. 838.

[m] (Ky. 1878) Objections to irregularities in summoning petit jurors cannot be raised after verdict.—Kennedy v. Commonwealth, 77 Ky. (14 Bush) 340.

[n] (La. 1822) Objections to the legality of summoning a jury come too late after the verdict is recorded.—Vidal v. Thompson, 11 Mart. (O. S.) 23.

[o] (La. 1889) Acts 1877, No. 44, provides that all objections to the manner of drawing juries, or to any defect or irregularity that can be pleaded against any array or venire, must be urged on the first day of the term. *Held*, that a motion to set aside a venire on the ground that the clerk had not been qualified as a jury commissioner before he assisted in the drawing thereof, not made on the first day of the term, nor made until nearly one year after the finding of the indictment, came too late, no exceptional circumstances being shown.—State v. Ashworth, 41 La. Ann. 683, 6 South. 556.

[p] (La. 1889) Objections to the qualifications of a jury commissioner cannot be taken after verdict, notwithstanding the affidavit of defendant that he did not know of the disqualification of such commissioner until after trial and verdict.—State v. Tisdale, 41 La. Ann. 338, 6 South. 579.

[q] (La.) When the indictment has been presented at a previous term, the objections to the venire must be urged on the first day of the subsequent term, unless it is shown that the facts on which the objections are based were not known by defendant until after the commencement of the term.—(1892) State v. Curtis, 44 La. Ann. 320, 10 South. 784; (1894) Same v. Labauve, 46 La. Ann. 548, 15 South. 172.

[r] (Minn. 1858) In the absence of fraud or collusion in the selection of a jury, where it

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is not shown that the party objecting was prejudiced by the irregularity, an objection to the array, or to a single juror, made after verdict, is too late.—Steele v. Malony, 1 Minn. 347 (Gil. 257).

[s] (Miss. 1851) In civil cases, it is too late, after verdict, to object to the jury that have sat in the trial of a case after they have rendered their verdict, because they have not been regularly summoned on the venire, or as talesmen from the bystanders, or because the venire facias had not been regularly drawn from the box.—Shotwell v. Hamblin, 23 Miss. (1 Cushm.) 156, 55 Am. Dec. 83.

[t] (Mo. 1890) After verdict, it was discovered that the prevailing party was a member of the county court that selected the panel from which the jury in the case was drawn. *Held*, that an objection thereto should have been made by challenge to the array before trial, and came too late after verdict, notwithstanding the objector's want of knowledge of the fact until after verdict, unless substantial injustice be done by such ruling.—Boteler v. Roy, 40 Mo. App. 234.

[tt] (Neb. 1891) Objections to the mode of selecting petit jurors must be made before trial. —Davis v. State, 31 Neb. 247, 47 N. W. 854.

[u] (Neb. 1892) Where the clerk of the court and deputy sheriff are interested in the result of the action, and hence in drawing the jury and talesmen, objection to their acting must be made before the trial is ended.—Leavitt v. Sizer, 35 Neb. 80, 52 N. W. 832.

[uu] (N. J. 1889) Where no objection was made until the case was called for trial, it is not good cause for challenge to the array that one of the jurors struck for the trial was dead, another an exempt fireman, and another not regularly summoned, there being no allegation that there was design or collusion for the purpose of affecting the trial, or that the defendants were prejudiced, since the statute gives ample protection for such defects or omissions by an award of tales to fill the panel.—Smith v. Smith, 52 N. J. Law (23 Vroom) 207, 19 Atl. 255.

[v] (N. Y. 1855) Although a justice of the district court has no power to issue a venire to summon a jury, yet, if a jury so drawn is not challenged on such ground until after it has been impaneled and sworn, the objection is waived.—City of New York v. Mason, 4 E. D. Smith, 142.

[vv] (Pa. 1853) Under Act Feb. 21, 1814, providing that going to trial on the merits shall be a waiver of any errors or defects in the precept or venire, or the drawing, summoning, and returning of jurors, it is too late, after verdict, to object to mistakes in the process as to the names of members of the panel or of the jurors who rendered the verdict.—Jewell v. Commonwealth, 22 Pa. (10 Harris) 94.

[w] (Pa. 1894) Though Act April 10, 1867, regulating the drawing of juries, provides that the oath of the jury commissioners shall be the one required of the sheriff and county commissioners under Act 1834, § 87, the fact that the oath by the commissioners was merely to faithfully fill the jury wheel, in performance of their official duties, is not ground for reversal, where appellant knew of the irregularity at the time of the application for a continuance, but did not file his motion to quash the array until four months later, when the case was called for trial.—Klemmer v. Mt. Penn Gravity R. Co., 163 Pa. 521, 30 Atl. 274, 35 Wkly. Notes Cas. 142.

[ww] (Tenn. 1891) Where the judge, in the absence of defendant, ordered a special venire to be summoned, the error, if any, was waived by defendant's failure to object when the successor of the judge, in defendant's presence, adjourned the trial and directed the members of the special venire to attend on the adjourned day.—Hannum v. State, 90 Tenn. 647, 18 S. W. 269.

[x] (Va. 1885) The omission to direct a new venire facias, as required by Code 1860, c. 208, in a case of felony, when required, is an error apparent on the record, which is not waived by failure of defendant to object thereto before the jury is sworn.—Hall v. Commonwealth, 80 Va. 555.

[xx] (Va. 1890) Under Code, § 3156, which provides that no irregularity in any writ of venire facias shall avail to set aside a verdict unless the objecting party was injured thereby, or unless he objected before the jury was sworn, it is no ground for arresting judgment that the list accompanying a writ of venire contained more than the statutory number of names, or that it purported to be "for trial of felonies" generally, instead of some particular felony, where no objection to the writ was made before the jury was sworn; but the action of the court in ordering an additional number of persons to complete the panel without a second writ is good ground for arresting judgment, though the objection was not raised before, since the statute does not obviate the need of a venire.—Vawter v. Commonwealth, 87 Va. 245, 12 S. E. 339.

[y] (Va. 1891) A venire facias should be quashed for irregularity on its face, though it has been exhausted by the answer of the venire. —Muscoe v. Commonwealth, 87 Va. 460, 12 S. E. 790.

[yy] (Va. 1891) Code, § 3156, provides that in civil cases no irregularity in any writ of venire facias shall be sufficient to set aside a verdict unless the party making the objection was injured thereby, or unless the objection was made before the swearing of the jury. By Act Jan. 18, 1888, this provision is made to apply to felony cases. *Held*, that this does not apply where the record fails to show any venire in a felony case, and the omission of the writ is a fatal error.—Lewis v. Commonwealth, 12 S. E. 1050.

[z] (Va. 1891) The irregularity in a venire facias ordered in vacation, that it commands the summoning of 40 persons for the trial of two persons and others charged with felony, but not jointly indicted with the two, not being prejudicial, cannot, by the provisions of Acts 1887-88, p. 18, for the first time be objected to after verdict.—Lyles v. Commonwealth, 88 Va. 396, 13 S. E. 802.

[zz] (Va. 1894) Code 1887, § 3156, requiring objections to a writ of venire facias in civil cases to be made before the swearing of the jury, and extended to criminal cases by Act Jan. 18, 1888, only cures irregularities in the venire facias, leaving untouched felony cases in which there is no venire at all.—Myers v. Commonwealth, 90 Va. 785, 20 S. E. 152.

§ 545. Making and sufficiency.

Order of parties in making challenges, see ante, § 499.

Withdrawal of challenge, see ante, § 502.

[a] A challenge to the panel or array must be in writing.

—(Iowa, 1855) Suttle v. Batie, 1 Iowa (1 Clarke) 141;

(Mich. 1850) People v. Doe, 1 Mich. (Man.) 451; (1878) Ryder v. People, 38 Mich. 269;

(Nev. 1876) State v. Raymond, 11 Nev. 98;

(Tex. 1896) Perry v. State (Cr. App.) 34 S. W. 618.

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[b] (La. 1891) As the statute provides that no defect or irregularity in the drawing or summoning of the jury shall be sufficient cause to challenge the venire if it shall not appear that some fraud has been practiced, or some great wrong committed, that would work a great or irreparable injury, a motion to quash an indictment on a challenge to the general venire, based on alleged irregularities in the manner of drawing and summoning the jurors, is demurrable if it alleges neither fraud, wrong, nor injury.—State v. Simmons, 43 La. Ann. 991, 10 South. 382.

[c] (Mass. 1824) Where the jury to assess damages caused by laying out a turnpike road was summoned and impaneled by a deputy sheriff, and it was objected verbally on behalf of the turnpike, before the jury was impaneled, and afterwards at the court of sessions, that another deputy of the same sheriff was a member of the corporation, and that therefore, pursuant to St. 1802, c. 135, § 1, the jury should be summoned and impaneled by a coroner, and the sessions nevertheless accepted their verdict, it was *held* that the proceedings in relation to such verdict might be quashed on certiorari.—Barre Turnpike Corp. v. Appleton, 19 Mass. (2 Pick.) 430.

[d] (Nev. 1885) Since, under Comp. Laws, § 1968, the court must decide on an objection to a jury for implied bias, and triors must be appointed if the objection is for actual bias, a challenge, on the ground "that the deputy sheriff who summoned 40 of said jurors was biased against defendant," is insufficient, for failure to state whether actual or implied bias is charged.—State v. Gray, 19 Nev. 212, 8 Pac. 456.

[e] (N. J. 1896) An objection that the jury list was not struck from the jury book of the sheriff, "as required by law," is too general, and will not avail on error.—Fowler v. State, 58 N. J. Law (29 Vroom) 423, 34 Atl. 682.

[f] (Tex. 1877) Where on a trial for murder, defendant's exceptions to two supplementary venires issued in consequence of the exhaustion of the original venire, on the ground that they were not summoned according to law, were overruled, and his bill of exceptions failed to show wherein the law was disregarded, it will be presumed that the court below conformed to the provisions of the law.—Swofford v. State, 3 Tex. App. 76.

[g] (Tex. 1896) That the names of 26 jurors were drawn, instead of 24, as required by statute, cannot be taken advantage of by a general objection to the manner of organizing the jury. The objection should be taken specifically.—Jones v. State, 37 Tex. Cr. R. 433, 35 S. W. 975.

[h] (Wis. 1857) A challenge to the array must be certain and specific.—Conkey v. Northern Bank, 6 Wis. 447.

§ 546. Traverse or denial.

[a] (Idaho, 1887) Under the criminal practice, an exception to the challenge to the panel admits the facts stated therein.—People v. Armstrong, 2 Idaho, 275, 13 Pac. 342.

§ 547. Affidavits and other evidence.

[a] (Cal. 1895) Where a deputy sheriff, who has summoned jurors on a special venire, is challenged for bias under Pen. Code, § 1064, and declares on his examination that he has no bias or prejudice against the defendant, he may be asked by the court whether, if he were sworn as a juror, he could and would give defendant a fair trial.—People v. Ryan, 108 Cal. 581, 41 Pac. 451.

[b] (La. 1889) The testimony of the clerk as to the neglect of the jury commissioner in taking from the venire box the names of disqualified, absent, and dead jurors, does not contradict or vary the venire previously drawn.—State v. Nockum, 41 La. Ann. 689, 6 South. 729; Same v. Riley, 41 La. Ann. 693, 6 South. 730.

[c] (Minn.) On challenge to the panel of petit jurors, testimony of the clerk of the district court that a list of petit jurors was properly drawn, and that the certificate to the contrary is erroneous, is admissible under Gen. St. 1866, c. 116, § 9, allowing officers charged with the drawing of the panel to testify as to its regularity.—(1868) State v. Gut, 13 Minn. 341 (Gil. 315); (1889) Same v. Brecht, 41 Minn. 50, 42 N. W. 602.

[d] (Mo. 1894) On challenge to the array, the court properly refused to admit evidence to contradict its own records in the case.—State v. Clark, 121 Mo. 500, 26 S. W. 562.

[e] (Neb. 1880) Where it appears from the affidavit on motion to quash that one M. W. H. was summoned as a juror at the preceding term, and also a person of the same name at the present term, and there is no allegation that they are the same person, the affidavit is insufficient.—Clark v. Saline County, 9 Neb. 516, 4 N. W. 246.

[f] (Neb. 1892) A motion to quash the panel of jurors because not drawn in proportion to the number of electors of the several precincts of a county, verified by plaintiff's attorney upon mere "belief," was insufficient to justify the court in quashing the panel under the Code.—Weeping Water Electric Light Co. v. Haldeman, 35 Neb. 139, 52 N. W. 892.

[g] (Tex. 1896) A party wishing to challenge the array of jurors must make a motion "in writing, setting forth distinctly the grounds of such challenge," supported by his own affidavit or that of some credible person, as prescribed by Code Cr. Proc. art. 626.—Perry v. State (Cr. App.) 34 S. W. 618.

§ 548. —— Presumptions and burden of proof.

[a] (Fla. 1893) Where the county commissioners selected 248 names, instead of from 290 to 310, as provided by Laws 1891, c. 4015, to constitute a list from which grand and petit jurors were to be drawn, the presumption is, in the absence of any showing that they abused the discretionary powers conferred upon them by the statute, that they performed their duty.—English v. State, 31 Fla. 356, 12 South. 689.

[b] (Ill. 1882) Rev. St. 1874, p. 631, c. 78, § 8, provides in what manner jurors shall be selected and summoned for the term of the circuit court. Id. p. 342, c. 37, § 110, provides that, unless the court shall otherwise order, the jury for the law term of the county court shall be drawn and summoned in the same manner as juries are drawn and summoned for the circuit court, and also provides that, when a jury is not summoned in such manner, the court may, on the first day of each term, call all the cases for trial on the docket to ascertain what cases are to be tried by jury, and, if a jury shall be demanded in any case, the judge shall order a venire for 12 jurors, unless the parties consent to a less number, and the sheriff shall then summon such jurors from the body of the county, and the court may retain such jury to try all jury cases for trial at such term. *Held* that, where a jury in a county court was not drawn as provided by chapter 78, § 8, it would be presumed that it was drawn as provided by chapter 37, § 110, in order to support the judgment.—Barr v. People, 106 Ill. 110.

[c] (Ill. 1887) Where the circuit court orders the clerk to issue a special venire to the sheriff

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for a given number of jurors, it will be presumed, in the absence of proof to the contrary, that the contingency provided by Rev. St. c. 78, § 12, existed, which authorizes the action of the court.—People v. Board of Sup'rs, 23 Ill. App. 386.

[d] (Ill. 1888) Under Rev. St. c. 78, § 12, providing that if, at the opening of a term of court, the panel of petit jurors shall not be full, the clerk shall repair to the office of the county clerk, and draw more jurors, till the panel be filled, and that if, before that time, a jury is needed, the court shall direct the sheriff to summon, etc., where the court orders the clerk to issue a special venire to the sheriff for a given number of jurors, no proof to the contrary being shown, it will be presumed that the clerk repaired to the office of the county clerk, and drew the jurors.—People v. Board of Sup'rs, 125 Ill. 334, 17 N. E. 802.

[e] (Mich. 1887) In the absence of evidence to the contrary, it will be presumed that the officers charged with the drawing and summoning of jurors have faithfully and correctly performed their duty in the premises.—People v. Coughlin, 67 Mich. 466, 35 N. W. 72.

[f] (Minn. 1868) On challenge to the panel of petit jurors it appeared that the list was drawn at a regular meeting of the board of commissioners in January, 1867. *Held*, that it would be presumed that such list was legally drawn at the annual meeting of the board in January, as required by law.—State v. Gut, 13 Minn. 341 (Gil. 315).

[g] (Mo. 1886) Where it does not appear that regular jurors were not engaged in the trial of other causes, an additional panel, ordered for the trial of a particular case, will be presumed to have been properly drawn.—State v. Gleason, 88 Mo. 582.

[h] (N. Y. 1890) It is improper for the justice to instruct the constable that the parties to an action were farmers, and wanted a farmer's jury, and that he was not to summon jurors from the village; but, in the absence of anything to the contrary, it will be assumed that the constable did his duty, and summoned a jury without reference to any particular class of men.—Gibbons v. Van Alstyne, 56 Hun, 639, 9 N. Y. Supp. 156.

[i] (Pa. 1831) It is not necessary that it should appear on the return of the precept directed to the sheriff, commanding him to summon a jury, that the jury have been drawn according to law, but it will be presumed that the sheriff, who returns his writ executed, has proceeded legally, until the contrary is shown.—Commonwealth v. Green, 1 Ashm. 289.

[j] (S. C. 1892) Under Gen. St. § 2257, providing that, in case of an irregularity in drawing a jury, it shall be lawful for the resident circuit judge "to issue his order to the board of jury commissioners * * * to proceed to draw jurors," where the commissioners are served with a copy of such an order, and draw jurors as required therein, they are presumed to have acted under the order, and the drawing is valid, though previous to the drawing they were also served with a writ of venire facias, requiring such drawing to be made.—State v. Toland, 36 S. C. 515, 15 S. E. 599; Same v. Dearing, Id.

[k] (Tex. 1882) Rev. St. art. 3027, provides that the county court shall, at the January and July terms in each year, appoint three jury commissioners. Article 3022 provides that if, from any cause, commissioners should not be selected or should fail to act, or the panels be set aside or the list lost or destroyed, the court shall proceed to supply jurors, and may appoint commissioners for the purpose. *Held* that, where the record showed an appointment of commissioners by the county court at the May term, it would be presumed, in the absence of any showing to the contrary, that ground existed for the exercise of discretionary power conferred by section 3022.—O'Bryan v. State, 12 Tex. App. 118.

[l] (Tex. 1889) Rev. St. art. 3032, requires that the district court shall, at each term, appoint jury commissioners, who shall select jurors to serve during the several weeks of the succeeding term, and that the said commissioners shall certify the several lists of names to be the lists drawn by them for the said several weeks, which lists shall be sealed in separate envelopes, indorsed, "Lists of Petit Jurors for the ——— Week of the ——— Term of the ——— Court of ——— County." Defendant's motion to quash the special venire was based upon the fact that the several lists were headed "Lists of Jurors for the April Term," instead of, properly, the May term. The bill of exceptions did not show, nor did it otherwise appear, that the envelopes inclosing said lists were not properly indorsed. *Held* that, as the statute does not require the "headings of the lists" to be indorsed in like manner as the envelopes, the presumption obtained in favor of the proper return of the lists.—Giebel v. State, 28 Tex. App. 151, 12 S. W. 591.

[m] (Va. 1888) Where a judge certified that he was incompetent, by reason of connection, to try a case, but furnished a list of names and issued a venire facias for a jury, which was quashed by the trial judge, who issued a new venire, using the same names, it will be presumed that he used due discretion in selecting the names.—Waller v. Commonwealth, 84 Va. 492, 5 S. E. 364.

§ 549. —— Weight and sufficiency.

[a] (U. S. 1800) The fact that a partial juror has been returned is no reason for inferring partiality in the sheriff, so as to furnish ground for challenge to the array.—United States v. Callender, Fed. Cas. No. 14,709.

[b] (Ala. 1846) Under the Code a challenge to the array or a plea in abatement to the panel invokes the inquiry only whether the jury has been selected in the mode directed, and on such issue the certificate of the board is conclusive.—State v. Brooks, 9 Ala. 9.

[c] (Ala. 1890) In a murder trial the alleged mistake in the name of one of the special jurors, unsupported by evidence, is not ground to quash the venire.—Walker v. State, 91 Ala. 76, 9 South. 87.

[d] (Ark. 1888) The fact that the sheriff, who held defendant in custody on charge of assault, made the affidavit on which defendant was held for murder on the death of the person assaulted, is not sufficient evidence of the sheriff's bias to sustain a challenge to the array of talesmen summoned by him.—Mabry v. State, 50 Ark. 492, 8 S. W. 823.

[e] (Ill. 1866) The simple fact that a sheriff excused without authority a portion of a regular panel of jurors is not sufficient of itself to warrant the conclusion that he acted corruptly, or that the parties were prejudiced by his action.—Ayers v. Metcalf, 39 Ill. 307.

[f] (Mo. 1895) Where a party to an action makes affidavit that the sheriff is prejudiced against him, and asks for an order that the coroner summon the jury, the trial court is not conclusively bound by such affidavit.—H. T. Simon Gregory Dry Goods Co. v. McMahan, 61 Mo. App. 499, 1 Mo. App. Rep'r, 730.

[g] (Neb. 1880) Though the failure of the county commissioners to select jurors from the several precincts in the county in proportion to

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the number of persons therein competent to serve on grand and petit juries, as required by statute, is good cause for challenge to the array, yet, where the affidavit filed on the motion to quash fails to state the whole number of persons competent to serve on grand and petit juries in the several precincts of the county, it is not sufficient to justify the court in setting aside the panel.—Clark v. Board of Com'rs of Saline County, 9 Neb. 516, 4 N. W. 246.

[h] (Ohio, 1880) That the prosecuting attorney handed the bailiff, a personal enemy, a list of names from which to select talesmen, saying that they were all good business men, and that he was afraid the other side might set up the jury on him, and that when accused's counsel heard of it, and knew that two men on the list had been placed on the jury, he insisted on proceeding to trial, does not show collusion of the prosecuting attorney with accused, justifying discharging the jury, within Rev. St. § 7313, authorizing the court to discharge the jury, without prejudice to the prosecution, for "accident or calamity."—State v. Hoffman, 5 Wkly. Law Bul. 875.

§ 550. Trial and determination.

Harmless error, see "Appeal and Error," vol. 3, cc. 2051–2055, §§ 4124–4126.

[a] (U. S. 1800) Principal challenges to the array, or the whole jury at once, are always for partiality in the sheriff, and not in the jurors, and such challenges are to be determined by the court, whereas challenges for favor, in the particular jurors, are to be determined by triors sworn by the court.—United States v. Callender, Fed. Cas. No. 14,709.

[b] (Ill. 1888) Where the court erroneously sustained an oral demurrer to a challenge to the array, but afterwards allowed the state's attorney to file a nunc pro tunc demurrer and answer thereto, which answer, if true, was sufficient to sustain the overruling of the challenge, and offered to allow defendants to reply to the answer and offer evidence, the error was cured; and it is no objection that defendant had already used a peremptory challenge upon this array, which the court did not offer to restore, since, if the challenge to the array had been sustained, the necessary effect would be to restore the peremptory challenge used.—McDonald v. People, 25 Ill. App. 350, reversed (1888) 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547.

[c] (Iowa, 1880) The court may direct in what form evidence shall be presented upon the trial of a challenge to a panel of jurors.—State v. Linde, 54 Iowa, 139, 6 N. W. 168.

[d] (Kan. 1886) Where 26 persons are summoned as petit jurors, and it is affirmatively shown on the part of the defendant that 2 or 3 of the panel are not eligible, the court can purge the jury without sustaining a challenge to the array.—State v. Whisner, 35 Kan. 271, 10 Pac. 852.

[e] (La. 1879) After the judge has set aside, in one case, a whole venire drawn for that term, he cannot afterwards, during that term, in another case, hold such a venire to be good.—State v. Revells, 31 La. Ann. 387; Same v. Smith, Id. 406.

[f] (Mass. 1878) In the New England states, challenges to the array are usually tried by the court.—Commonwealth v. Walsh, 124 Mass. 32.

[g] (Mass. 1880) If a challenge to the array is made without legal ground, the fact that it is overruled without replication filed affords no ground of exception.—Provident Inst. for Sav. v. Burnham, 128 Mass. 458.

[h] (Mich. 1890) Defendant challenged the array, which challenge the court sustained, and discharged the panel. *Held*, that he is estopped in another suit to allege that the court acted erroneously in discharging all the jurors, as the objection went to all of them.—Robinson v. Mulder, 81 Mich. 75, 45 N. W. 505.

[i] (Minn. 1889) The challenge will be presumed to have been tried and determined on legal and sufficient evidence.—State v. Brecht, 41 Minn. 50, 42 N. W. 602.

[j] (Nev. 1885) Failure of a party challenging a jury panel to ask for triors to settle the issue of bias, and submission of evidence to the court, is a waiver of the examination by triors, and the decision of the court is not reviewable.—State v. Gray, 19 Nev. 212, 8 Pac. 456.

[k] (N. J. 1795) Where the array is challenged, the triors are to be appointed by the court from the panel, unless there are special objections, when persons not on the panel may be appointed.—Lee v. Evaul, 1 N. J. Law (Coxe) 283.

[l] (N. Y. 1891) The record in a criminal case, after stating that defendant challenged the array on the ground that the officer who summoned the jury was disqualified by reason of a certain interest in the proceeding, continued as follows: "People object. No testimony offered to sustain challenge. Challenge overruled." *Held*, that it appeared from such record entry, not that there was an exception to the sufficiency of the facts alleged as a ground of challenge (Code Cr. Proc. § 364), but that such facts were denied, as provided by Code Cr. Proc. § 366, and, no evidence being offered, the challenge was properly overruled.—People v. Wilber, 61 Hun, 620, 15 N. Y. Supp. 435.

[m] (N. C. 1868) A successful challenge to the array of the original panel does not necessarily affect the competency of the special venire.—State v. Owen, 61 N. C. 425.

[n] (S. C. 1891) On the call of a case for murder defendant challenged the array of both petit and grand juries, and his challenges were overruled, and a continuance had. At the next term the case was called before a different circuit judge, and the challenges were again presented. The judge stated that "as the same questions had been presented for the consideration" of his colleague, who "had ruled upon them, he would not disturb the ruling." *Held*, that this was not a ruling that the judge was bound by the previous ruling, but merely that he would not disturb it.—State v. Merriman, 34 S. C. 16, 12 S. E. 619.

[o] (Va. 1887) A motion was made to quash the venire facias, because the jury was composed of colored men. The court, in overruling the motion, assigned as a reason that the prisoner and prosecutrix were colored, and the jury was composed of intelligent men qualified to serve as jurors. *Held*, that the reason assigned by the judge for refusing to quash the writ is not proof that it controlled the judge in ordering them to be summoned, and the motion was properly overruled.—Coleman v. Commonwealth, 84 Va. 1, 3 S. E. 873.

(J) CHALLENGES FOR CAUSE.

1. NATURE AND GROUNDS IN GENERAL, §§ 551-555.
2. TIME FOR CHALLENGES, §§ 556-558.
3. MAKING AND TRAVERSE OF CHALLENGES, §§ 559, 560.
4. EXAMINATION AND EVIDENCE, §§ 561-585.
5. TRIAL AND DETERMINATION, §§ 586-598.

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Rejection on court's own motion, see ante, §§ 524–540.
Requiring jurors to stand aside, see ante, § 501.
To panel or array, see ante, §§ 541–550.
Waiver of right to challenge, see ante, §§ 508–523.

1. NATURE AND GROUNDS IN GENERAL.

IN GENERAL, § 551.
STATUTORY PROVISIONS, § 552.
IN CIVIL ACTIONS, § 553.
CRIMINAL PROSECUTIONS, § 554.
GROUNDS, § 555.

See ante, §§ 400–406.

§ 551. In general.

[a] (Ala. 1835) The right of challenging jurors is the same in jury trials before justices of the peace as in civil cases before the circuit.—Johnson v. Christian, 2 Port. 201.

[b] (Ind. 1860) Though 2 Rev. St. c. 372, § 84, provides that, when the jurors are called, each may be examined on oath by either party as to whether he has formed or expressed an opinion as to the guilt or innocence of the defendant, and upon such examination, and other questions put by leave, the court may determine upon the competency of the juror, and any juror is incompetent who has formed or expressed an opinion of the guilt or innocence of the defendant, it is not a positive declaration of the legislative will as to the competency of jurors, and the parties must avail themselves of the right to challenge jurors for cause under the provisions of the act.—Bradford v. State, 15 Ind. 347.

[c] (Mich. 1865) By Comp. Laws, § 4400, the distinction between challenges for cause and to the favor is practically abolished, all being classed under the head of challenges for cause and tried in the same manner, and, the facts upon which a challenge is based being undisputed, the decision is upon a question of law and is open to exception.—Holt v. People, 13 Mich. 224.

[d] (N. H. 1845) The fact that all challenges are decided by the court does not do away with the distinction between challenges for cause and for favor.—State v. Howard, 17 N. H. 171.

[e] (N. J. 1794) A juror has no right to challenge himself.—Bickham v. Bissant, 1 N. J. Law (Coxe) 220.

[f] (N. C. 1872) Competency of a juror for a capital case who is opposed to capital punishment should be tried by a challenge for favor, not by a challenge for cause.—State v. Mercer, 67 N. C. 266.

[g] (Or. 1880) An objection that a juror is drawn from a particular panel is a challenge to the panel, and not to his qualifications.—State v. Dale, 8 Or. 229.

§ 552. Statutory provisions.

[a] (Ga. 1846) The right to challenge a juror propter affectum is not taken away by St. 1843, prescribing the oath to be administered to jurors in criminal cases, but only prescribes the manner of doing it.—Robinson v. State, 1 Ga. (1 Kelly) 563.

[b] (N. Y. 1876) The challenge of a juror for favor is not affected by Laws 1872, c. 475, providing that a present impression concerning the guilt or innocence of the accused, or the expression of such an opinion, shall not, in the cases therein specified, be a sufficient ground of challenge for principal cause.—Thomas v. People, 67 N. Y. 218.

§ 553. In civil actions.

[a] (Ala. 1844) Clay's Dig. p. 457, § 38, provides that in civil cases the court shall, on motion of either party, examine on oath any person who is called as a juror therein, to ascertain whether the juror stands indifferent in the cause. Section 52 provides that in all cases sounding in damages merely, or where the amount in controversy shall exceed $100, either party at his election shall be furnished with a list of 24 jurors in attendance on such court, from which a jury shall be obtained by the parties alternately striking one from the list until 12 shall be stricken off, the plaintiff commencing, and the jury thus obtained shall not be further challenged for any cause. *Held*, that the 24 jurors mentioned in section 52 must be subject to no good cause of challenge at the time the striking the jury begins, and therefore a party was entitled to challenge members of the panel of 24 for cause before exercising his right to strike the jury.—Davis v. Hunter, 7 Ala. 135.

[b] (Ga. 1885) On the trial of a forcible entry and detainer suit in a justice's court, a party is entitled to purge the jury on their voir dire to show partiality.—Holton v. Hendley, 75 Ga. 847.

[c] (Ill. 1888) A juror who, when called, answers that he has an opinion as to which one of the parties ought to succeed in the case, is not impartial, and either party can challenge him for cause.—Chicago, B. & Q. R. Co. v. Perkins, 125 Ill. 127, 17 N. E. 1.

[d] (Md. 1834) Though Acts 1797, c. 87, § 9, gives to the parties the privilege of striking from a list of 20 jurors 8 of the jurors against whom no cause of challenge could be established, the full panel of 20 jurors must be beyond the reach of challenge, either for principal cause or for favor, and therefore the parties have the right to challenge the jurors for cause before exercising their right of striking the jury.—Lee v. Peter, 6 Gill & J. 447.

§ 554. Criminal prosecutions.

[a] (U. S. 1807) The prosecution may challenge a juror for cause.—United States v. Burr, Fed. Cas. No. 14,693.

[b] (Ala. 1861) Under the statutes the state may challenge for cause a juror who has a fixed opinion against penitentiary punishments, but the prisoner cannot complain if the right is not exercised.—Murphy v. State, 37 Ala. 142.

[c] (Ala. 1885) The right of the state, under Code, § 4883, to challenge for cause a juror in a case punishable by death, or imprisonment in the penitentiary, who states that he believes a conviction should not be had on circumstantial evidence, is not extended to defendant, nor can he complain of its waiver by the state.—Harrison v. State, 79 Ala. 29.

[d] (Ga. 1873) The provisions of Rev. Code, § 4588, providing the mode of proceeding, if a juror is by newly-discovered evidence found to be incompetent, after the jury is made up and before the trial, apply as well to a case where the state objects to a juror as to an objection by a prisoner.—Eberhart v. State, 47 Ga. 598.

[e] (Ga. 1887) On indictment for murder, the court stenographer, whose duty it was to examine the jurors on their voir dire, put a juror upon the defendant, who accepted, before the state's attorney had signified his acceptance. *Held*, that it was no part of the duty of the reporter to accept for the state, and that the juror might be challenged by the state's attorney.—West v. State, 79 Ga. 773, 4 S. E. 325.

[f] (La. 1844) Slaves charged with capital crimes have the same right to challenge jurors

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for cause as free persons.—State v. George, 8 Rob. 535.

[g] (La. 1871) Where a juror does not understand the language in which the proceedings are conducted, the state, as well as the accused, may challenge him for cause.—State v. Push, 23 La. Ann. 14.

[h] (N. Y. 1847) On the preliminary trial of a prisoner's insanity, before the trial of the indictment against him, he may challenge for cause.—Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.

[i] (Pa. 1853) On the trial of indictments for murder, the commonwealth may challenge for cause.—Jewell v. Commonwealth, 22 Pa. (10 Harris) 94.

[j] (Tex. 1885) The state, as well as the defendant, is entitled to jurors who are without bias.—Pierson v. State, 18 Tex. App. 524.

[k] (Va. 1851) Error in the exclusion of a juror on challenge of the state is not a ground of exception by the prisoner.—In re Clore, 8 Grat. 606.

[l] (Va. 1853) The decision of the court, allowing a challenge on the part of the commonwealth or disallowing a challenge on the part of the accused, is matter of exception on the part of the accused, whether it be a principal challenge or a challenge to the favor.—Montague v. Commonwealth, 10 Grat. 767.

§ 555. Grounds.

Bias and prejudice, see ante, §§ 431–437.
Disqualification, see ante, §§ 243–264.
Formation and expression of opinion, see ante, §§ 438–479.
Pecuniary interest, see ante, §§ 407–412.
Personal opinions and conscientious scruples, see ante, §§ 480–496.
Prior service as juror, see ante, §§ 423–430.
Relationship or business connection, see ante, §§ 413–422.

[a] (Ala. 1871) A challenge for cause must embrace some cause enumerated in the Code.—Lyman v. State, 45 Ala. 72.

[b] (Tex. 1877) Act Aug. 1, 1876, § 26, provides that certain disqualifications of jurors "shall be a good cause for challenge." *Held*, that such section does not attempt to define all matters of disqualification, and the parties to an action may urge any other matters which would render a juror unfitted to sit in a case.—Lester v. State, 2 Tex. App. 432.

[c] (Utah, 1886) A challenge for implied bias will be disregarded, unless one or more of the grounds mentioned in Laws Utah 1878, par. 242, are specified.—People v. Hopt, 4 Utah, 247, 9 Pac. 407.

2. TIME FOR CHALLENGES.

IN GENERAL, § 556.
DISCRETION OF COURT, § 557.
AFTER SWEARING OR IMPANELING OF JURORS, § 558.

Challenge for principal cause as bar to challenge for favor, see ante, § 519 [c, d].
Discharge by court pending trial, see ante, §§ 532–538.
Failure to challenge as waiver, see ante, §§ 504–514.
For standing jurors aside, see ante, § 501 [l, m, p].
Objections in general, see ante, § 500.
Order of challenges on different grounds, see ante, § 498.
—— *of parties in making challenges, see* ante, § 499.
Prescribing time as infringement of right to trial by jury, see ante, § 232 [b, c].
Grounds for new trial in civil cases, see "New Trial," II. (D).

§ 556. In general.

[a] (U. S. 1884) By the practice of the federal court each juror is examined, as he is called, touching his statutory qualifications, upon oath, and, if he answers satisfactorily, he is accepted for the term; but the jury is tendered to the parties in each case as it is successively called for trial, and they must then challenge for cause that a juror is disqualified, or the objection will not be entertained after verdict, although the defect was wholly unknown to the parties at the time the jury was sworn.—Brewer v. Jacobs (C. C.) 22 Fed. 217.

[b] (Ala. 1856) If a juror is accepted by the state and afterwards by the prisoner, the state's right of challenge on the ground that the juror has conscientious scruples against capital or penitentiary punishment is lost, and cannot be again revived.—Stalls v. State, 28 Ala. 25.

[c] (Ala. 1877) A peremptory challenge is too late, when interposed after defendant and his counsel have expressed satisfaction with the jury as organized; but a challenge for cause may be interposed, upon its being satisfactorily shown that the cause in fact existed, but was not sooner discovered nor improperly withheld.—Sparks v. State, 59 Ala. 82.

[d] (Cal. 1860) In this state, the common practice is to examine a juror on his voir dire in order to ascertain the grounds for a specific challenge; and this challenge should be made immediately after the preliminary examination is closed, so that the issue on the sufficiency of the juror can be then tried.—People v. Reynolds, 16 Cal. 128.

[e] (Ga. 1859) The objection that a juror is too old may be made after the statutory questions have been put, at least where no injury results to the state therefrom.—Thomas v. State, 27 Ga. 287.

[f] (Ga. 1869) Objections to a juryman, propter defectum, must be made before trial.—Gormley v. Laramore, 40 Ga. 253.

[g] (Idaho, 1885) Under Cr. Prac. Act, §§ 318–353, regulating the impaneling of juries, defendant may be required to exercise his challenges for cause as each juror appears, and before another is called.—People v. Kuok Wah Choi, 2 Idaho, 85, 6 Pac. 112.

[h] (Ill. 1838) Objection to a juror for alienage should be taken at the time of impaneling the jury.—Guykowski v. People, 2 Ill. (1 Scam.) 476.

[i] (Ill. 1887) Under Rev. St. c. 78, § 21, providing "that the jury shall be passed upon and accepted in panels of four by the parties, commencing with the plaintiff," the state, in a trial for murder, is not called upon to tender the defendants a second panel before the defendants tender it back four.—Spies v. People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320.

[j] (Ind. 1859) An objection to the competency of a juror must be made before the trial, if known, or it will be waived.—Lafayette Plank Road Co. v. New Albany & S. R. Co., 13 Ind. 90, 74 Am. Dec. 246.

[k] (La. 1845) An objection to a juror for want of residence should be made when he is

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offered to be sworn.—State v. Kennedy, 8 Rob. 590.

[l] (La. 1894) If, before a trial commences, it is discovered that one of the jurors is incompetent because of relationship to defendant, he may be set aside, and the panel completed, though he had been accepted by both the prosecution and defendant.—State v. Hill, 46 La. Ann. 736, 15 South. 145.

[m] (Me. 1880) When an objection to a juryman is known to the party or his counsel when the jury is being impaneled, it must be taken then, or it will be deemed waived.—State v. Bowden, 71 Me. 89.

[n] (Md. 1849) Either party may challenge a juror for cause, before he is sworn, whether he has or has not exercised his statutory right of striking four names peremptorily from the panel.—Edelen v. Gough, 8 Gill, 87.

[o] (Mass. 1850) Where a jury is completed from the bystanders, if such persons are not qualified and liable to be drawn as jurors, objection must be taken before they are placed upon the panel.—Commonwealth v. Gee, 60 Mass. (6 Cush.) 174.

[p] (Mich. 1878) Challenges for cause can be made by either side until the jury is sworn.—Scripps v. Reilly, 38 Mich. 10.

[q] (Miss. 1838) The qualifications of a juror may be questioned at the trial, but not afterwards in another court.—Cody v. State, 4 Miss. (3 How.) 27.

[r] (Nev. 1895) Where defendant, knowing of the disqualification of a juror, fails to interpose a challenge before the jury is completed, he thereby waives his right to challenge such juror.—State v. Hartley, 22 Nev. 342, 40 Pac. 872, 28 L. R. A. 33.

[s] (N. C. 1859) Where, in the trial of a capital case, the scrolls had not the Christian name written in full, but only the initials, no objection being made when the scrolls were put in the hat, it was *held* that this formed no ground of challenge to the juror.—State v. Simmons, 51 N. C. 309.

[t] (Tex. 1877) Objections to a juror for want of qualifications mentioned in section 1 of the act of August, 1876, should be urged while the jury is being impaneled.—Lester v. State, 2 Tex. App. 432.

[u] (Tex. 1889) An objection to a juror for disqualification, if discovered during the trial, must be then brought to the notice of the court, or it will be waived.—Blanton v. Mayes, 72 Tex. 417, 10 S. W. 452.

[v] (Tex. 1895) An objection to a juror must be made when he is impaneled.—Hannaman v. State (Cr. App.) 33 S. W. 538.

[w] (Vt. 1866) A respondent in a criminal case is not obliged to exhaust his peremptory challenges before challenging for cause.—State v. Fuller, 39 Vt. 74.

§ 557. Discretion of court.

[a] (Ala. 1844) The court may permit a party to challenge a juror for cause at any time before the case is submitted to the jury, although they may have been selected and sworn.—Haynes v. Crutchfield, 7 Ala. 189.

[b] (Ark. 1853) The circuit court have the discretion to determine, as a matter of practice, upon the proper time for a party to raise an objection to the competency of a juror.—Funkhouser v. Pogue, 13 Ark. (8 Eng.) 295.

[c] (N. C. 1872) The court has discretionary power to allow the state in a criminal prosecution to challenge a juror for cause after the jurors are sworn and before they are impaneled.—State v. Adair, 66 N. C. 298.

[d] (Va. 1841) After a juryman has been elected and sworn, the court may, in its discretion, allow the prisoner to challenge him for cause and strike him from the panel.—Tocel v. Commonwealth, 11 Leigh, 714.

§ 558. After swearing or impaneling of jurors.

Discretion of court, see ante, § 557.
Right of state, see ante, § 554 [d].

[a] Objection to a juror must be taken before he is sworn, in order that it may avail the party making it.
—(Ala. 1820) Ripley v. Coolidge, Minor, 11;
(Ga. 1832) Glover v. Woolsey, Dudley, 85; (1847) Williams v. State, 3 Ga. (3 Kelly) 453;
(Mich. 1882) Palmer v. Highway Com'r, 49 Mich. 45, 12 N. W. 903;
(S. C. 1834) State v. Williams, 2 Hill, 381;
(Va. 1851) Thompson v. Commonwealth, 8 Grat. 637.

[b] After the jury are sworn in a criminal case, it is too late to challenge propter defectum.
—(Mo. 1805) Harding v. Brown, 1 Mo. App. Rep'r, 13;
(Tenn. 1839) Ward v. State, 20 Tenn. (1 Humph.) 253.
CONTRA, see
(Ga. 1880) Wesley v. State, 65 Ga. 731.

[c] (U. S. 1813) After a juror has been sworn, no objection can be taken to him on account of his being an inhabitant of another county.—Queen v. Hepburn, 11 U. S. (7 Cranch) 290, 3 L. Ed. 348.

[d] (U. S. 1835) An objection that one of the petit jurors had been summoned and had served on the jury of the next preceding term, made under Acts Md. 1797, c. 87, § 3, which provides "that no person shall be summoned as a juror by any sheriff or coroner of this state to two general or county courts successively," is too late after the jurors are sworn.—United States v. Peaco, Fed. Cas. No. 16,018 [4 Cranch, C. C. 601].

[e] (Ala. 1841) When a juror has once been sworn in chief, he cannot be challenged or set aside from the jury for any cause which existed at the time of his being put on the prisoner.—State v. Morea, 2 Ala. 275.

[f] (Ga. 1855) After a juror has been sworn, an objection that he has not resided in the county for six months is too late, even though the disqualification was unknown to the prisoner or his counsel.—Epps v. State, 19 Ga. 102.

[g] (Ga. 1892) After all the evidence for the state has been heard by the jury on a trial for felony, it is not lawful to change the constitution of the jury by discharging one of its members as incompetent because he was on the grand jury that found the bill, and substituting in his place a fresh juror, and then proceeding with the trial anew, where defendant does not consent to such substitution, but insists that a mistrial be declared, since Code, § 4681, provides that objections to a juror, discovered after he is held competent, may be made "at any time before the prosecuting counsel submits to the jury any of the evidence in the case," and by section 4685 newly-discovered evidence as to incompetency is allowed "at any time before any of the evidence on the main issue is submitted."—Simmons v. State, 88 Ga. 272, 14 S. E. 613.

[h] (Ga. 1893) In trials for misdemeanors, challenges for cause must be made before the

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juror is sworn, unless the cause of the challenge be unknown till afterwards.—Schnell v. State, 92 Ga. 459, 17 S. E. 966.

[i] (Ky. 1895) An objection that one of the jury was incompetent, because not 21 years of age, cannot be taken after the jury is sworn.—Combs v. Commonwealth, 97 Ky. 24, 29 S. W. 734.

[j] (La. 1812) An objection that a juror has already tried a suit by the same plaintiff against another party to the note sued on comes too late after the trial has commenced.—Nugent v. Trepagnier, 2 Mart. (O. S.) 205.

[k] (La. 1859) Where a juror can be challenged for cause, the right must be exercised before the juror is sworn, and a verdict cures the defect.—State v. Bunger, 14 La. Ann. 461.

[l] (Mass. 1830) It is too late to inquire into the impartiality of a juror in a criminal case after the jury is impaneled.—Commonwealth v. Knapp, 27 Mass. (10 Pick.) 477, 20 Am. Dec. 534.

[m] (Mass. 1830) Objections to jurors may be made any time before the jury is impaneled, and even after it is sworn.—Commonwealth v. Twombly, 27 Mass. (10 Pick.) 480, note.

[n] (Mo. 1893) Act April 1, 1891, relating to juries in counties having a city of more than 50,000, in section 8 provides that certain persons shall not be permitted to serve as jurors. *Held*, that such section must be read with Rev. St. 1889, § 6061, forbidding exceptions to a juror on account of his citizenship, etc., "or other legal disabilities," after the jury is sworn.—Pitt v. Bishop, 53 Mo. App. 600.

[o] (Nev. 1881) Under Cr. Prac. Act, § 334, whenever it appears, from the examination of a juror on his voir dire, that he is disqualified, the challenge must be interposed before he is sworn; but the provisions of said section have no application to a case where the disqualification or incompetency of a juror is not, without any fault of the challenging party, discovered until after the jury is completed.—State v. Pritchard, 16 Nev. 101.

[p] (N. Y. 1845) A juror may, after he is sworn, be challenged by the prosecution for a cause arising after the oath has been taken.—People v. Bodine, 1 Edm. Sel. Cas. 36.

[q] (Pa. 1812) If a party learns, before verdict, that one of the jury had declared that he had made up his mind against him before he was impaneled, the party must object at once, without waiting for the verdict.—McCorkle v. Binns, 5 Bin. 340, 6 Am. Dec. 420.

[r] (Pa. 1853) A juror cannot be challenged for cause after the ceremony of administering the oath is begun; but he may at any time previously.—McFadden v. Commonwealth, 23 Pa. (11 Harris) 12, 62 Am. Dec. 308.

[s] (Tenn. 1829) A cause of challenge existing before the juror is sworn is waived, unless taken before then.—McClure v. State, 9 Tenn. (1 Yerg.) 206.

[t] (Tenn. 1835) If the objection to a juror trying the issue in a criminal case, that he was one of the grand jury who found the indictment, is not made before he is sworn, it is waived.—Gillespie v. State, 16 Tenn. (8 Yerg.) 507, 29 Am. Dec. 137.

[u] (Tenn. 1874) An objection to a juror on the ground that he is not a freeholder or a householder in a county where the trial takes place must be made before the jury is sworn, though the prisoner is ignorant of the disqualification.—Draper v. State, 63 Tenn. (4 Baxt.) 246.

[v] (Tex. 1895) After the jury had been sworn in a criminal case, defendant discovered in the box a juror whom he had previously challenged, and thereupon asked the court to stand him aside. *Held*, that defendant showed want of diligence in making the discovery.—Munson v. State, 34 Tex. Cr. R. 498, 31 S. W. 387.

[w] (Va. 1855) Where one of the grand jury which found the indictment is a member of the jury which is to try the prisoner for the felony, the prisoner, if he is guilty of no laches in making the discovery, may object to the juror at any time before the evidence is introduced; and it seems, also, the court may discharge him at any time before the verdict is rendered. The propriety of examining the juror, or taking his statements, on his voir dire, is, to say the least, doubtful.—Dilworth v. Commonwealth, 12 Grat. 689, 65 Am. Dec. 264.

3. MAKING AND TRAVERSE OF CHALLENGES.

FORM AND SUFFICIENCY, § 559.
TRAVERSE OR DENIAL, § 560.

Withdrawal of acceptance or challenge, see ante, § 502.

§ 559. Form and sufficiency.

[a] A challenge to a juror for cause must allege the specific cause of challenge.
—(Iowa, 1883) Bonney v. Cocke, 61 Iowa, 303, 16 N. W. 139; (1895) Davis v. Anchor Mut. Fire Ins. Co., 96 Iowa, 70, 64 N. W. 687;
(Mo. 1896) State v. Taylor, 134 Mo. 109, 35 S. W. 92;
(N. Y. 1847) Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216;
(Wash. 1893) State v. Biles, 6 Wash. 186, 33 Pac. 347.

[b] (U. S. 1892) Under Code Civ. Proc. § 231, providing that the point of exception to a juror must be particularly stated, it is not sufficient to challenge for cause without stating the particular reasons for such challenge.—Southern Pac. Co. v. Rauh, 49 Fed. 696, 1 C. C. A. 416, 7 U. S. App. 84.

[c] (U. S. 1830) On a challenge for favor, without cause assigned, it will not be submitted to triors.—United States v. Wilson, Fed. Cas. No. 16,730 [Baldw. 78].

[d] (Cal. 1859) Under Prac. Act, § 162, the special ground of challenge relied on must be stated in making the challenge.—Paige v. O'Neal, 12 Cal. 483.

[e] (Cal.) A challenge to a juror for implied bias must specify the grounds of the challenge.—(1860) People v. Reynolds, 16 Cal. 128; (1869) Same v. Hardin, 37 Cal. 258; (1874) Same v. Buckley, 49 Cal. 241.

[f] (Cal. 1871) Under Cr. Prac. Act, § 347, the challenge of a juror in a criminal case must specify the particular ground of challenge. If for bias, it must state what kind of bias, and the particular cause from which such bias is to be inferred.—People v. Renfrow, 41 Cal. 37.

[g] (Cal. 1874) A challenge to a juror for implied bias should refer to the particular subdivision of the section of the Penal Code which gives the cause of challenge for implied bias.—People v. Cotta, 49 Cal. 166.

[h] (Iowa, 1889) Under Code 1873, § 4405, requiring a challenge of a juror for cause to distinctly specify the facts constituting such cause, a challenge for cause which does not show with reasonable certainty the ground upon which it

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is based is insufficient.—State v. Munchrath, 78 Iowa, 268, 43 N. W. 211.

[i] (Me. 1857) Challenges of jurors for cause must distinctly state the ground of challenge, and this must be entered on the record.—State v. Knight, 43 Me. 11.

[j] (Md. 1881) A talesman stated on his voir dire that he had not formed an opinion as to the guilt of the accused; that his sympathies were with him, but his prejudices against him; and he did not think himself an impartial juror. Defendant, without asking that the juror be further interrogated, objected to his being sworn; but, the objection being overruled, he peremptorily challenged the juror. The impaneling of the jury then proceeded, and, after defendant had exhausted his 20 peremptory challenges, another talesman was called, who had been drawn in an earlier stage of the proceeding, but who did not appear to be sworn until after defendant had exhausted his challenges. This latter talesman was sworn against defendant's objection. It did not appear that defendant offered to challenge this last juror, or that he would have challenged him if his peremptory challenges had not been exhausted. The objection made was not to the particular juror, but to the panel as made up. *Held* not error to overrule such objection.—Johns v. State, 55 Md. 350.

[k] (Mo. 1895) A general objection to the whole panel of jurors, on the ground of their disqualification, in proceedings to condemn land for street purposes, is insufficient as an objection to a particular juror because of his having been a member of the council when the ordinance for the proposed boulevard was passed. —In re Independence Ave. Boulevard, 128 Mo. 272, 30 S. W. 773; Appeal of Smart, Id.

[l] (Neb. 1877) A record which shows that the prisoner objected to a juror "because he had formed and expressed an opinion," but does not say in terms it was an opinion on the guilt or innocence of the prisoner, is insufficient.—Fillion v. State, 5 Neb. 351.

[m] (Nev. 1870) The grounds of challenge to jurors for cause being pointed out by statute, a party desiring to have such challenge tried must specify the ground or grounds on which he bases it.—Estes v. Richardson, 6 Nev. 128.

[n] (Nev. 1895) Under Gen. St. § 4222, providing that, in a challenge for implied bias, "one or more of the causes stated in section 340 must be alleged," a challenge simply for "implied bias" is insufficient.—State v. Vaughan, 22 Nev. 285, 39 Pac. 733.

[o] (N. J. 1811) A challenge for relationship must state what the relationship is and to whom.—Stevenson v. Stiles, 3 N. J. Law (2 Penning.) 740.

[p] (N. J. 1833) A challenge must be in such terms that the court can see whether it is for principal cause or to the favor, and so determine by what forum it shall be tried, and whether the facts, if true, support the challenge. --Mann v. Glover, 14 N. J. Law (2 J. S. Green) 195.

[q] (N. J. 1890) The challenge of a juror "for cause" is insufficient, unless it be stated whether it is for principal cause or to the favor, and set forth the facts on which it rests.—Drake v. State, 53 N. J. Law (24 Vroom) 23, 20 Atl. 747.

[r] (N. Y. 1818) If the plaintiff has any objections to any of the jurors summoned on a writ of inquiry, he must make them openly; and if he state them privately to the sheriff, who thereupon discharges a juror, the inquisition will be set aside.—Butler v. Kelsey, 15 Johns. 177.

[s] (N. Y. 1851) When a juror is challenged "to the favor," no other cause need be assigned than the words of the challenge import.—Carnal v. People, 1 Parker, Cr. R. 272.

[t] (N. Y. 1858) In all challenges for principal cause and for favor, the matter of fact upon which the challenge is founded must be specified when the challenge is interposed, or the court should disregard it.—People v. Stout, 4 Parker, Cr. R. 71.

[u] (N. Y. 1863) The prosecution challenged a juror for favor, on the ground that he was not indifferent between the people and the prisoner. The prisoner's counsel demurred to the challenge, and assigned for cause that the challenge did not specify any sufficient ground in law, and the district attorney joined in the demurrer. *Held*, that the demurrer was not sustainable, and was properly overruled.—Lowenberg v. People, 5 Parker, Cr. R. 414.

[v] (N. Y. 1893) Code Cr. Proc. § 380, provides that a challenge for actual bias must allege the cause. *Held*, that where a juror had been examined for actual bias by the people, and, when their challenge was withdrawn, defendant cross-examined as though the challenge had been renewed, and at the end of the examination submitted the challenge for cause, the court properly passed on the challenge, though the statute was not strictly complied with.—People v. Larubia, 69 Hun, 197, 23 N. Y. Supp. 579, judgment affirmed (1893) 140 N. Y. 87, 35 N. E. 412.

[w] (N. C. 1872) Where the presiding judge, on a criminal trial, announced that no challenges for cause would be allowed, *held*, that this ruling might be reviewed without an exception showing that the defendant named a particular juror and assigned a special cause of challenge in his case.—State v. Fulton, 66 N. C. 632.

[x] (Tex. 1890) The objection that an incompetent juror was impaneled and sat on the jury after defendant had exhausted his peremptory challenges, is not sufficient to raise the question of the juror's competency, where no reason is stated why the juror is objectionable to defendant, or why he was not fair and impartial.—Rippey v. State, 29 Tex. App. 37, 14 S. W. 448.

[y] (Utah, 1884) A challenge for bias must particularize.—People v. Hopt, 3 Utah, 396, 4 Pac. 250.

[yy] (Utah, 1895) 2 Comp. Laws 1888, § 5022, enumerates different causes for challenge to a juror for implied bias. Section 5024 provides that in challenges for implied bias one or more of the causes must be charged. *Held*, that in challenging for implied bias a challenge that "defendant challenges for cause" is properly denied, as being too general.—People v. Thiede, 11 Utah, 241, 39 Pac. 837.

[z] (Va. 1853) As no challenge of a juror is allowed to the commonwealth, except for cause, when such challenge is made, the cause thereof should be shown to be a good and legal one.—Montague v. Commonwealth, 10 Grat. 767.

[zz] (Wis. 1854) When a challenge for principal cause is interposed, the grounds of challenge should be reduced to writing, that the opposite party may demur; and, the facts being admitted, the issue is to the court.—Schoeffler v. State, 3 Wis. 823.

§ 560. Traverse or denial.

[a] (Cal. 1886) A challenge to a juror on the ground that he is not a resident of the county where the trial of a criminal case is had, is a general challenge for cause, and no exception to the action of the court in disallowing such a challenge is permitted by statute.—People v. Fong Ah Sing, 70 Cal. 8, 11 Pac 323.

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[b] (Cal. 1890) Pen. Code, § 1170, giving defendant, on trial of an indictment, the right to take exception to a decision of the court in disallowing a challenge to a juror for implied bias, or in admitting or rejecting testimony on the trial of a challenge for actual bias, etc., does not authorize an exception to a decision disallowing a challenge for actual bias.—People v. Boling, 83 Cal. 380, 23 Pac. 421.

[c] (N. Y. 1858) A challenge for cause may be traversed presenting a question of fact for decision, or the party may demur, thus admitting the truth of the allegation.—People v. Stout, 4 Parker, Cr. R. 71.

4. EXAMINATION AND EVIDENCE.

RIGHT TO EXAMINE JUROR IN GENERAL, § 561.
DISCRETION OF COURT, § 562.
LAYING FOUNDATION FOR PEREMPTORY CHALLENGES, § 563.
EXTENT OF EXAMINATION, § 564.
— PECUNIARY INTEREST, § 565.
— BIAS AND PREJUDICE, § 566.
— FORMATION AND EXPRESSION OF OPINION, § 567.
— PERSONAL OPINIONS AND CONSCIENTIOUS SCRUPLES, § 568.
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Examination by court or triors as infringement of right, see ante, § 232 [k, p].

Failure to examine as waiver of defects, see ante, § 515.

As to misconduct pending trial in criminal case, see "Criminal Law," vol. 14, cc. 2267, 2268, § 1535.

§ 561. Right to examine juror in general.

Right to trial of challenge, see post, § 586.

To require oath of loyalty, see ante, § 264 [c].

[a] (U. S. 1892) To base error upon the court's ruling that a juror need not answer as to his prejudice against corporations, it must appear that the party making the challenge was thereby prevented from ascertaining whether the juror had such prejudice as would interfere with his conclusions in arriving at a verdict.—Southern Pac. Co. v. Rauh, 49 Fed. 696, 1 C. C. A. 416, 7 U. S. App. 84.

[b] (Del. 1877) Where the defendant in a criminal trial has waived the right to ask one summoned to sit on the jury whether he has formed or expressed any opinion as to the guilt of the defendant, the state has no right to put the question.—State v. Rhodes, 1 Houst. Cr. Cas. 476.

[c] (Minn. 1861) Where a challenge for bias is made and admitted by the other side, it is not error to refuse to allow the challenging party to examine the juror.—Morrison v. Lovejoy, 6 Minn. 319 (Gil. 224).

[d] (Miss. 1856) A person, after having been examined by the court, pronounced competent, and turned over to the representative of the state, may be further examined as to his competency; and, if he be found incompetent upon such examination, the district attorney may challenge him for cause.—Williams v. State, 32 Miss. 389, 66 Am. Dec. 615.

[e] (N. Y. 1819) Where jurors in a justice's court are challenged on the ground that they are not freeholders, the fact may be tried by an examination of the jurors themselves under oath.—Ogden v. Parks, 16 Johns. 180.

[f] (S. C. 1889) It is error for the court to excuse a juror on the ground of prejudice, without first making the examination called for by Gen. St. § 2261, requiring the judge, on motion, to examine the persons called as jurors.—State v. Williams, 31 S. C. 238, 9 S. E. 853.

[g] (Tenn. 1895) It is error to prevent a party from examining a juror, as to his competency, on his voir dire.—Paducah, T. & A. R. R. v. Muzzell, 95 Tenn. 200, 31 S. W. 999.

§ 562. Discretion of court.

Examination before interposition of challenge, see post, § 575 [i].

Limiting time for examination, see post, § 574 [c].

Statutory interrogatories, see post, § 569.

[a] (U. S. 1895) The trial court has a large discretion in conducting the voir dire examination of jurors, and an abuse of discretion is not shown merely because the court states in the bill of exceptions that it would have allowed a certain question if its attention had been called to it at the time, where the court nevertheless refused a new trial.—Connors v. United States, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033.

[b] (Cal. 1893) On the examination of a juror on his voir dire it is in the discretion of the court to ask him leading questions, and allow counsel to do so, which discretion, however, must not be abused.—People v. Ah Lee Doon, 31 Pac. 933.

[c] (Ill. 1891) It is within the discretion of the court to permit counsel to ask the jurors upon their voir dire whether they know a certain lawyer, who, though not appearing as an attorney of record, is believed by the counsel to be interested in the case.—O'Hare v. Chicago, M. & N. R. Co., 139 Ill. 151, 28 N. E. 923.

[d] (Iowa, 1859) The mode of interrogating jurors, in order to test their competency, is within the discretion of the court.—State v. Wilson, 8 Iowa (8 Clarke) 407.

[e] (Minn. 1894) A trial court did not abuse its discretion by refusing to allow questions preliminary to a challenge to be put to a witness called as a juror in a criminal case, though at that time defendant had exhausted all her peremptory challenges.—State v. Smith, 56 Minn. 78, 57 N. W. 325.

[f] (Mo. 1887) A discretion is vested in the trial judge to curtail the examination of jurors as to opinions which have already been sufficiently developed.—State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330.

[g] (Tex. 1893) On a murder trial, one of the veniremen on his voir dire qualified as a juror,

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and was fully interrogated by defendant's counsel. After defendant in person had interrogated the venireman at length, his questions became irrelevant, and the court directed him to confer with his attorney as to other questions. The venireman was peremptorily challenged, but by so doing defendant did not exhaust such challenges. *Held*, that the discretion of the court was not abused, nor defendant's rights infringed, under such circumstances.—Shaw v. State, 32 Tex. Cr. R. 155, 22 S. W. 588.

§ 563. Laying foundation for peremptory challenges.

Effect of examination by court, see post, § 570 [d].

[a] (Ala. 1879) After a party has been declared a competent juror in a criminal case, the defendant cannot ask him, for the purpose of ascertaining a ground of challenge for cause, whether he was born in the United States, or had ever been duly naturalized, or whether he had been a freeholder or householder for the last 12 months, or owned any interest in any lands.—Bales v. State, 63 Ala. 30.

[b] (Ala. 1890) Where a juror has been examined, found competent, and accepted by the state, defendant cannot, as a matter of right, examine him for the purpose of a peremptory challenge, if he thinks best.—Lundy v. State, 91 Ala. 100, 9 South. 189.

[c] (Cal. 1863) In impaneling a jury, each party has a right to ask questions of a juror to show, not only that there exist proper grounds for a challenge for cause, but to elicit facts, to enable the party to decide whether or not he will make a peremptory challenge.—Watson v. Whitney, 23 Cal. 375.

[d] (Cal. 1882) Where a juror is challenged for actual bias, and states that he has formed a qualified opinion, he cannot be asked whether he believes defendant to be guilty or innocent, for the purpose of laying a foundation for a peremptory challenge.—People v. Hamilton, 62 Cal. 377.

[e] (Ill. 1872) A party, in determining the right peremptorily to challenge a juror in a civil case, may ask him, if, upon hearing the testimony, he should find it evenly balanced, which way he would be inclined to decide the case.—Chicago & A. R. Co. v. Buttolf, 66 Ill. 347.

[f] (Ill. 1873) On the trial of one indicted for selling intoxicating liquor to a person in the habit of getting drunk, the court sustained an objection to the following questions, asked the jurors by the defendant: "(1) Are you a member of a temperance society? (2) Are you connected with any society or league organized for the purpose of prosecuting a certain class of people under what is called the new temperance law of the state, or have you ever contributed any funds for such a purpose?" *Held*, that the court erred in refusing the questions, as they were clearly proper to enable the defendant to exercise his right of peremptory challenge.—Lavin v. People, 69 Ill. 303.

[g] (Ill. 1891) It is reversible error to refuse the defendant's counsel permission to examine the jurors on their voir dire for the purpose of deciding upon the advisability of exercising his right of peremptory challenge.—Donovan v. People, 139 Ill. 412, 28 N. E. 964.

[h] (Ill. 1893) On the examination of a jury, a party may inquire if the attorneys for the opposite party are in the employ of any of the jury, for the purpose of enabling him to exercise his peremptory challenges.—City of Vandalia v. Seibert, 47 Ill. App. 477.

[i] (Iowa, 1894) The state may examine a person summoned as a juror on a trial for murder in the first degree, concerning prejudice against the death penalty, for the purpose of a peremptory challenge, though the jury are required to fix the punishment at either death or imprisonment for life, in a verdict of guilty.—State v. Dooley, 89 Iowa, 584, 57 N. W. 414.

[j] (Iowa, 1894) On a trial for murder the county attorney may, for the purpose of peremptory challenge, examine a juror as to his preconceived opinions on capital punishment.—State v. Foster, 91 Iowa, 164, 59 N. W. 8.

[k] (Mich. 1884) To enable a party to decide whom to peremptorily challenge, he may ask a juror on his voir dire examination how he would incline should the evidence be evenly balanced.—Monaghan v. Agricultural Fire Ins. Co., 53 Mich. 238, 18 N. W. 797.

[l] (Mich. 1888) It is permissible to ask a juror which party he would favor, if the testimony were evenly balanced, so as to ascertain his bias for the purpose of peremptory challenges.—Township of Otsego Lake v. Kirsten, 72 Mich. 1, 40 N. W. 26.

[m] (Mich. 1896) Defendant has a right to question jurors on the subject of their prejudices against the defense of limitations, as a means to determine whether or not to exercise the right of peremptory challenge.—Towl v. Bradley, 108 Mich. 409, 66 N. W. 347.

[n] (Mo. 1884) A juror on his voir dire can be asked, not only questions to show his incompetency, but such as will enable counsel to judiciously exercise the right of peremptory challenge.—State v. Mann, 83 Mo. 589.

[o] (Mo. 1887) After a panel of jurors had been qualified and duly cautioned, defendant was, on motion, allowed 48 hours to make his peremptory challenges. On the day of the trial, four days thereafter, defendant's counsel requested a re-examination of the panel to ascertain whether any of them had become disqualified by having in the meantime read certain newspapers prejudicial to defendant. *Held*, that in the absence of evidence that the jury had disregarded the court's admonition, and read the newspapers, the motion was properly denied, especially as it did not appear that said newspapers contained anything prejudicial to defendant.—State v. Rose, 92 Mo. 201, 4 S. W. 733.

[p] (Or. 1896) On the separate trial of a defendant jointly indicted for murder, on the theory that he was an accessory before the fact, his codefendant having been convicted, it is error to refuse to permit him to interrogate jurors as to their opinion of his codefendant's guilt, so as to enable him to intelligently use his peremptory challenges.—State v. Steeves, 29 Or. 85, 43 Pac. 947.

[q] (Vt. 1828) A juror may be asked by the prisoner whether he has formed an opinion, in order to a decision as to a peremptory challenge.—State v. Godfrey, Brayt. 170.

§ 564. Extent of examination.

[a] (Colo. 1895) A party may ask each juror on a voir dire whether he is a man of family.—Union Pac. Ry. Co. v. Jones, 21 Colo. 340, 40 Pac. 891.

[b] (Fla. 1896) On the examination of the jurors on their voir dire, the judge, expressly naming each one of the prisoners' counsel, asked of each juror if said counsel or any one had talked with him about the case, or spoken to, or had any conversation of any kind whatever with him relative to the case. *Held*, that the question tended to prejudice the defendants' case, from the pointedness of its aim at their

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defending counsel.—Hubbard v. State, 37 Fla. 156, 20 South. 235.

[c] (Ill. 1894) On voir dire examination of jurors, counsel have no right to ask them what they would do if instructed in a certain way, or on a certain state of proof.—Fish v. Glass, 54 Ill. App. 655.

[d] (Ind. 1885) It is not legitimate for counsel to put to a proposed juror such questions as, "You would not guess the defendant into the penitentiary, or to hanging her, would you?" or, "What, if anything, have you read of the case?" or, "You would not convict the defendant of the charge against her to please or displease anybody, would you?"—Epps v. State, 102 Ind. 539, 1 N. E. 491.

[e] (Tex. 1895) Parties to a suit may ask jurors on their voir dire whether they are members of certain secret societies.—Burgess v. Singer Mfg. Co. (Civ. App.) 30 S. W. 1110.

§ 565. —— Pecuniary interest.

[a] (Ala. 1895) Under Code, § 4332, providing that the question whether a juror has any interest in the conviction or acquittal of the accused, or had given any assurance that he would acquit or convict, is not required to be proved by the oath of the party summoned as a juror, but by other testimony only, it was not error for the court to fail to examine the juror on his voir dire as to his interest, or whether he had given such assurance.—Bridges v. State, 110 Ala. 15, 20 South. 348.

[b] (Mass. 1887) On trial of a complaint for selling intoxicating liquors, it is incompetent to ask a juryman on his voir dire, under Pub. St. c. 170, § 35, whether he is a member of the Law and Order League, or any association having for its object the enforcement of the laws relating to the sale of intoxicating liquors, or whether he contributes money to any such association; it not being otherwise shown that such association had anything to do with the prosecution of defendant.—Commonwealth v. Burroughs, 145 Mass. 242, 13 N. E. 884.

§ 566. —— Bias and prejudice.

Arising from personal opinions or conscientious scruples, see post, § 568.

Propounding questions suggested by parties, see post, § 571 [c].

Sufficiency of answers, see post, § 582 [d].

[a] A juror may be asked, on examination as to his qualifications, which way he would decide in case the evidence was equally balanced.
—(Ill. 1870) Chicago & A. R. Co. v. Adler, 56 Ill. 344; (1872) Same v. Buttolf, 66 Ill. 347; (1874) Galena & S. W. R. Co. v. Haslam, 73 Ill. 494;
(Mich. 1893) People v. Keefer, 97 Mich. 15, 56 N. W. 105.

CONTRA, see
(Ill. 1892) Chicago & A. R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406, affirming (1890) 38 Ill. App. 33; (1894) Fish v. Glass, 54 Ill. App. 655;
(Mo. 1876) Keegan v. Kavanaugh, 62 Mo. 230.

[b] (U. S. 1895) It was not error to refuse to permit a juror to be asked if he had ever belonged to the Committee of One Hundred, where there was nothing to show any such connection between that committee and the prosecution as would disqualify a member of the committee from sitting as a juror.—Connors v. United States, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033.

[c] (Ala. 1844) After a juror states that he is not sensible of any bias or prejudice in the case, it is not erroneous to refuse a further examination of the juror.—Davis v. Hunter, 7 Ala. 135.

[d] (Cal. 1855) A juror, being challenged for bias, was examined before triors, and the following questions were propounded: "(1) Are you a member of a secret and mysterious order known as and called 'Know-Nothings,' which has imposed on you an oath or obligation, beside which an oath administered to you in a court of justice, if in conflict with that oath or obligation, would be by you disregarded? (2) Are you a member of any secret association, political or otherwise, by your oaths or obligations to which any prejudice exists in your mind against Catholic foreigners? (3) Do you belong to any secret political society, known as, and called by the people at large in the United States, 'Know-Nothings'? and, if so, are you bound by an oath or other obligation not to give a prisoner of foreign birth in a court of justice a fair and impartial trial? (4) Have you at any time taken an oath or other obligation of such a character that it has caused a prejudice in your mind against foreigners? (5) Are you under any obligation not to extend the same rights, privileges, protection, and support to men of foreign birth as to native-born American citizens? (6) Have you any prejudice whatever against foreigners?" *Held*, that the court erred in refusing to allow the questions to be asked.—People v. Reyes, 5 Cal. 347.

[e] (Cal. 1855) Prejudice, being a state of mind more frequently founded in passion than in reason, may exist with or without cause; and to ask a person whether he is prejudiced or not against a party, and, if the answer is affirmative, whether that prejudice is of such a character as would lead him to deny the party a fair trial, is not only the simplest method of ascertaining the state of his mind, but is probably the only sure method of fathoming his thoughts and feelings.—People v. Reyes, 5 Cal. 347.

[f] (Ga. 1853) Upon the challenge of a juror to the favor, the triors may examine the juror on his voir dire as to the leaning of his affections, or whether he had given his opinion beforehand, and ask all other questions which may enable them to test his impartiality, provided they do not interrogate him as to facts which tend to his infamy or disgrace.—Copenhaven v. State, 14 Ga. 22.

[g] (Miss. 1884) Jurors cannot be asked by defendant whether, in a previous case, they had not reluctantly rendered a verdict against the same defendant under the instructions of the court.—Natchez, J. & C. R. Co. v. Bolls, 62 Miss. 50.

[h] (Miss. 1894) Where, on the separate trial of a defendant who had been indicted with another for murder, the jurors were pronounced competent by the court, accepted by the state, and presented to defendant, it was error not to permit defendant to question each juror as to his state of mind regarding defendant's codefendant, and the effect or probable effect of that state of mind upon the verdict.—Hale v. State, 72 Miss. 140, 16 South. 387.

[i] (N. J. 1856) Since the act of April 5, 1855 (Nix. Dig. p. 888, § 4), a juror himself may be examined on the question of his disqualification by reason of malice or ill will against the prisoner; that statute having altered the common-law rule that a juror shall not be examined as to any disqualification tending to his own disgrace.—State v. Fox, 25 N. J. Law (1 Dutch.) 566.

[j] (N. Y. 1887) It is proper to inquire as to the state of mind of a juror in reference to the case or either party, to ascertain whether he has actual bias or not.—People v. O'Neil, 10 N. Y. St. Rep. 1.

[k] (N. C. 1864) Jurors ought not to be asked, either on oath or otherwise, whether their

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minds are in such a state that they can try a case fairly and impartially. Their answers cannot affect the question of their competency, but it is an improper practice to ask them.—Baker v. Harris, 60 N. C. 271.

§ 567. —— Formation and expression of opinion.

As foundation for peremptory challenge, see ante, § 563 [d, o, q].

Discretion of court, see ante, § 562 [f].

Form and sufficiency of answers, see post, § 582 [i, k, l].

—— *of questions, see* post, § 580.

Propounding questions suggested by parties, see post, § 571 [a].

[a] Where a juror is challenged for actual bias, and states that he has formed a qualified or unqualified opinion or impression, he may be asked whether such opinion is for or against the defendant.

—(Cal. 1887) People v. Brown, 72 Cal. 390, 14 Pac. 90; (1887) Same v. Kunz, 73 Cal. 313, 14 Pac. 836.

CONTRA, see

(Cal. 1856) People v. Williams, 6 Cal. 206; (1882) Same v. Hamilton, 62 Cal. 377;

(Iowa, 1859) State v. Shelledy, 8 Iowa (8 Clarke) 477;

(Wash. 1890) White v. Territory, 1 Wash. St. 279, 24 Pac. 447.

[b] A juror, challenged for having formed an opinion, cannot be made to answer whether he has formed such an opinion, since the answer would tend to degrade him.

—(N. J. 1846) State v. Spencer, 21 N. J. Law (1 Zab.) 196;

(N. Y. 1849) People v. Donaldson, 2 Edm. Sel. Cas. 78.

CONTRA, see

(N. Y. 1823) People v. Hettick, 1 Wheeler, Cr. Cas. 399.

[c] (U. S. 1851) The prosecution have no right to ask a juror whether he has so made up his mind on facts that it could not be altered in the course of a trial; there being no obligation on the prisoner to take upon him the burden of changing the juror's mind to the extent that, even if this question were answered negatively, he might have to do it to procure an acquittal.—United States v. Hanway, Fed. Cas. No. 15,299 [2 Wall. Jr. 139].

[d] (Ark. 1857) If a juror, on his examination in a capital case, should state that he had formed an opinion on rumor, he may be asked if such opinion was such as to bias his mind; and, if he should state that he had conversed with persons about the case, he may be asked if such persons professed to have any personal knowledge of the matter.—Meyer v. State, 19 Ark. 156.

[e] (Cal. 1866) The examination of the competency of jurors in a capital case should not be confined to the question whether they could try the case, and render a verdict under the law as declared by the court and upon the evidence adduced, without regard to any previously formed opinions.—People v. Woods, 29 Cal. 635.

[f] (Cal. 1887) Where a proposed juror, who was challenged for actual bias, stated on his examination that he had formed an opinion on the subject of defendant's guilt which it would require evidence to remove, but that he could give the defendant a fair trial, *held*, that the exclusion of questions asked by defendant's counsel, evidently designed to bring out the character and force of the opinion, was error.—People v. Brown, 72 Cal. 390, 14 Pac. 90.

[g] (Ga. 1859) A juror having answered, "Yes," to the question "Have you formed and expressed an opinion?" it is not error for the court to refuse to ask, further, what is the ground of that opinion. The first answer clearly disqualifies him, no matter what the second might be.—Martin v. Mitchell, 28 Ga. 382.

[h] (Ill. 1841) Where a juror has heard rumors as to the questions involved in a cause, a full examination, if deemed necessary, should be allowed to ascertain the state of his mind.—Smith v. Eames, 4 Ill. (3 Scam.) 76, 36 Am. Dec. 515.

[i] (Ind. 1837) A juror may be asked on the voir dire, in a civil as well as a criminal case, whether he has formed or expressed an opinion on the merits of the cause.—Maize v. Sewell, 4 Blackf. 447.

[j] (Ind. 1885) It is not proper for counsel to ask one summoned as a juror, "When you have an opinion on any subject, does it take much evidence to remove it?"—Epps v. State, 102 Ind. 539, 1 N. E. 491.

[k] (La. 1859) On the examination of a juror on his voir dire the question was asked him, "In case the defendant is found guilty of murder, have you made up your mind as to what degree of punishment ought to be inflicted upon him?" *Held*, that the question was not properly put, and that the district judge did not err in refusing to allow it to be answered.—State v. Bennett, 14 La. Ann. 651; Same v. Ward, Id. 673.

[l] (La. 1883) It was not error for the state, after interrogating a juror as to whether he had formed or expressed an opinion, to ask if he had not talked about the case with H., who was not a witness or in any way connected with the case.—State v. Brown, 35 La. Ann. 340.

[m] (La. 1894) Where a juror, on examination by the state, testifies to his unalterable opinion, and is excluded from the jury, refusal to allow defendant to question him is not error.—State v. West, 46 La. Ann. 1009, 15 South. 418.

[n] (Miss. 1860) Where the issue to be tried under an indictment for murder is on the special plea of the accused relying upon a former acquittal, it is not proper, in interrogating a person summoned as a juror as to his competency, to ask him whether he has formed or expressed an opinion as to the guilt or innocence of the accused of the crime charged in the indictment. His examination should extend only to his bias or prejudice in respect to the issue to be submitted to him, and to his personal bias, animosity, and good or ill will to the prisoner.—Josephine v. State, 39 Miss. 613.

[o] (Neb. 1889) The sole object of the preliminary examination of proposed jurors in a criminal prosecution upon their voir dire being to ascertain whether they have formed or expressed an opinion as to the guilt or innocence of the accused, and whether they are prejudiced for or against him, it is not error in the trial court to refuse to permit the counsel to examine a juror as to what certain remarks of his of and concerning the accused tended to show, or whether such juror would believe the testimony of all witnesses equally alike, etc.—Gandy v. State, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108.

[p] (N. Y. 1845) A juror challenged for favor, who is examined before the triors, may be asked whether he ever thought the prisoner

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guilty, or what impressions statements which he had heard or read respecting the evidence had made upon his mind.—People v. Bodine, 1 Denio, 281.

[q] (N. Y. 1848) A juror who stated, on his challenge to the favor, that he had formed no opinion and had no impressions as to the guilt of the prisoner, but that it had been, and still was, his impression that the general character of the prisoner was bad, was asked whether he would disregard what he had seen and read out of court, and render his verdict upon the evidence. On objection, it was *held* that the question, though inartificially put, was a proper one.—Lohman v. People, 1 N. Y. (1 Comst.) 379, 49 Am. Dec. 340, affirmed People v. Lohman (1848) 2 Barb. 216.

[r] (N. Y. 1851) Where a juror was challenged to the favor, and examined to prove a bias from what he had read or heard, he may be asked whether, in his opinion, after what he had read or heard, he could render an impartial verdict.—People v. Knickerbocker, 1 Parker, Cr. R. 302.

[s] (Pa. 1805) Before the jurors are sworn, the court will not ask if they have prejudged the cause, but will admonish them to disclose if they are not indifferent to either party.—Respublica v. Dennie, 4 Yeates, 267, 2 Am. Dec. 402.

[t] (S. C.) 3 Bl. Comm. p. 364, which is fundamental law in this state with respect to the examination and qualification of jurors, provides that "a juror may be examined on oath of voir dire with regard to such causes of challenges as are not to his dishonor or discredit, but not with regard to any crime or anything which tends to his disgrace or disadvantage." *Held*, that to ask a juror whether or not he has formed or expressed an opinion as to the guilt or innocence of the accused in a criminal prosecution is an attempt to elicit information which tends to his dishonor, disgrace, and disrepute, in that it assumes that a man will prejudge a fellow citizen on whose trial he is to sit; and therefore a defendant in a criminal prosecution has no right to examine a juror on his voir dire as to any opinion he may have formed or expressed as to the prisoner's guilt.—(1813) State v. Baldwin, 3 Brev. 309, 1 Const. Rep. 289; (1830) State v. Sims, 2 Bailey, 29; (1831) State v. Crank, Id. 66, 23 Am. Dec. 117.

[u] (Tenn. 1883) No inquiry as to whether a juror, notwithstanding his opinion, will be governed solely by the evidence in the case, is permissible, where his opinion renders him clearly incompetent.—Conatser v. State, 80 Tenn. (12 Lea) 436.

[v] (Tex. 1880) The injunction in Cr. Code, art. 636, that if a juror, on the voir dire, answers that in his opinion his conclusion as to the prisoner's guilt will influence his verdict, he "shall be discharged," is imperative. He cannot be further examined.—Stagner v. State, 9 Tex. App. 440.

[w] (Tex. 1894) When the jurors had qualified by saying that they had no prejudice against the defendant, it was not error to exclude the question, "Have you, from hearsay or otherwise, so prejudged the defendant that you think him such a person as would be likely to commit the offense?"—Messic v. State (Cr. App.) 25 S. W. 626.

[x] (Tex. 1894) Under Willson's Cr. St. § 2281 (Acts 1885, p. 90), providing that if the juror, when asked if the opinion he has formed will influence his verdict, answers in the affirmative, he shall be discharged; if in the negative, he shall be questioned as to how his opinion was formed, and if he swears that he can render an impartial verdict the court may accept him,—it is only where the juror answers in the negative that he can be further questioned.—Shannon v. State, 34 Tex. Cr. R. 5, 28 S. W. 540.

[y] (Tex. 1894) It was error, in a trial for murder, not to allow defendant to ask a juror, before trial, if he believed him guilty and that he ought to be hung, when another juror had answered such questions in the affirmative.—Randle v. State, 34 Tex. Cr. R. 43, 28 S. W. 953.

[z] (Va. 1842) Where a juror, in answer to a question touching his competency, says that he has formed no opinion, nor come to any conclusion, on the case, the prisoner's counsel is not thereby precluded from questioning him still further as to whether he has not conversed much about the case.—Heath v. Commonwealth, 1 Rob. 735.

[zz] (Wis. 1854) When a juror is challenged to the favor, he may be interrogated in order to show the state of his mind, and may be asked whether he has read reports or listened to stories of the matters forming the subject of the issue.—Schoeffler v. State, 3 Wis. 823.

§ 568. —— Personal opinions and conscientious scruples.

As foundation for peremptory challenge, see ante, § 563.

Form and sufficiency of questions, see post, § 581.

Statutory interrogatories, see post, § 569 [m].

[a] (Cal. 1888) Under Pen. Code, § 1074, providing for challenges for implied bias in a trial for murder, when the court is satisfied that a juror entertains conscientious scruples against conviction when the penalty is death, it is the court's duty to excuse him, and it is not error to refuse to allow further examination by defendant.—People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

[b] (Fla. 1893) In testing the qualification of jurors on the voir dire it is not proper to ask a proposed juror as to the comparative credence that he would or could give to persons belonging to different races, who may or may not be witnesses.—Jenkins v. State, 31 Fla. 196, 12 South. 677.

[c] (Ga. 1892) Where a juror on his voir dire answered that he was opposed to capital punishment in cases of extreme youth, and by consent of counsel for accused was put on the court as a trior, and then stated that he was not opposed to capital punishment, the court did not err in allowing counsel for the state to interrogate him further.—Bell v. State, 91 Ga. 15, 16 S. E. 207.

[d] (Ill. 1890) In an action against a carrier of passengers for injuries to a passenger traveling on a pass, counsel for plaintiff may ask a juror whether the fact that plaintiff was traveling on a pass would influence his judgment or verdict, though the declaration alleges that he was traveling on a pass.—Jacksonville S. E. Ry. Co. v. Southworth, 32 Ill. App. 307, affirmed (1890) 135 Ill. 250, 25 N. E. 1093.

[e] (Ind. 1886) Where a juror states that he would not give the testimony of one engaged in sale of intoxicating liquors as much weight or credit as if he were engaged in some other business, the trial court, in the exercise of sound discretion, should permit him to be questioned on that subject.—Stoots v. State, 108 Ind. 415, 9 N. E. 380.

[f] (Iowa, 1896) On the examination of a juror to ascertain whether he was subject to a challenge for cause, it was not error to sus-

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tain an objection to the question, "Would the fact that a man had been indicted raise in your mind any presumption of guilt?"—State v. Cleary, 97 Iowa, 413, 66 N. W. 724.

[g] (Ky. 1892) It was not error for the state to ask jurors if they would inflict the death penalty if the evidence warranted it, after they had stated that they had no conscientious scruples in the matter.—Jones v. Commonwealth, 19 S. W. 844.

[h] (La. 1859) In a capital case, it is competent for the state to show the disqualification of a juror by interrogating the juror himself as to any conscientious scruples he may have against inflicting the punishment of death.—State v. Mullen, 14 La. Ann. 570.

[i] (La. 1892) On the trial of a negro for a criminal offense, questions asked a juror on his voir dire as to his opinion on the race problem, his belief in the superiority of the white race, and whether he thinks that negroes should be tried by white jurors, are irrelevant, and his answers to such questions cannot affect his qualifications as a juror.—State v. Casey, 44 La. Ann. 969, 11 South. 583.

[j] (Mass. 1834) A juror may be asked if he had formed an opinion as to the general guilt or innocence of all concerned in the burglary and arson of a Roman Catholic church, for the purpose of showing his religious prejudices.—Commonwealth v. Buzzell, 33 Mass. (16 Pick.) 163.

[k] (Mass. 1834) A juror, returned to try an indictment, is not to be asked whether he thinks the crime set forth ought not to be punishable by law, or ought to receive a different punishment from that which the law prescribes.—Commonwealth v. Buzzell, 33 Mass. (16 Pick.) 153.

[l] (Mass. 1834) Where a cause depends on the testimony of persons of a particular religious faith, in impaneling a jury, a juror is not to be asked whether he holds the opinion that a witness professing that faith is not to be believed.—Commonwealth v. Buzzell, 33 Mass. (16 Pick.) 153.

[m] (Mass. 1847) After a person called as juror on trial of an indictment has stated, on examination according to the provisions of Rev. St. c. 95, § 27, that he has formed and expressed an opinion that the statute on which the defendant is indicted is in force, and was constitutionally enacted, the court will not allow him to be asked whether he can give due weight to and be fairly influenced by the arguments of the defendant's counsel against the opinion so formed and expressed.—Commonwealth v. Abbott, 54 Mass. (13 Metc.) 120.

[n] (Minn. 1890) On trial for receiving stolen property, a person was called as a juror who knew that the accused was the keeper of a brothel. Juror answered upon his voir dire that his knowledge of defendant's occupation had not prejudiced him against her, and that he was absolutely impartial as to the pending charge. Defendant's counsel then asked whether, if on the trial, her business should be shown, and the evidence in the case was such as to leave in the juror's mind a reasonable doubt as to her guilt, he would be able to give her the benefit of such doubt. *Held*, that the question was properly ruled out.—State v. Frelinghuysen, 43 Minn. 265, 45 N. W. 432.

[o] (Miss. 1877) On a trial for murder, it is error to refuse to comply with the request of the accused further to examine two members of the special venire touching their conscientious scruples, after each had answered that he "would not like for a man to be hung."—Smith v. State, 55 Miss. 410.

[p] (Neb. 1895) It was proper, in impaneling a jury, to ask a juror whether the fact that defendant was accused of murder would have any weight with him, and whether he could give the same credit to the testimony of defendant, should defendant testify, that he could give to the testimony of other witnesses under the same circumstances.—Basye v. State, 45 Neb. 261, 63 N. W. 811.

[q] (N. C. 1870) On the trial of a challenge to the favor, the juror may be questioned as to the existence of any prejudice, bias, partiality, or sentiment tending to prevent him from giving an impartial verdict. It is not improper to ask a white man, drawn as a juror, whether he believes he can do equal justice between the state and a colored man; the defendant being one.—State v. McAfee, 64 N. C. 339.

[r] (S. C. 1893) On a trial for murder, where a juror states on his voir dire that he is opposed to capital punishment, there is no error in excluding him on the challenge of the state without presenting him to defendant.—State v. McIntosh, 39 S. C. 97, 17 S. E. 446.

[s] (Tex. 1877) In the trial of a white man for the murder of a negro, the court below, over the objection of the accused, allowed the state's attorney to ask the petit jurors on their voir dire "if they could, upon the same evidence, return the same verdict against a white man for killing a negro as for killing another white man." *Held*, that the question was a proper one for the purpose of enabling the prosecution to satisfy itself that the jurors were free from a disqualifying bias or prejudice.—Lester v. State, 2 Tex. App. 432.

[t] (Wash. 1896) Since it is the duty of the court to instruct the jury that, in case an accused fails or refuses to testify as a witness in his own behalf, no inference of guilt shall arise against him, it was not error to refuse to permit a juror to be interrogated as to whether the fact of defendant's being charged with larceny would prejudice such juror against defendant's testimony, should he go on the stand in his own behalf.—State v. Everitt, 14 Wash. 574, 45 Pac. 150.

§ 569. Statutory interrogations.

As infringement of right to trial by jury, see ante, § 231.

[a] (Ala. 1893) The court need not allow defendant to examine jurors pronounced competent on the voir dire, to show a cause of challenge not brought to light by the statutory interrogations.—Carr v. State, 104 Ala. 4, 16 South. 150; Id., 104 Ala. 43, 16 South. 155.

[b] (Ga. 1846) The act of 1843, prescribing certain questions to be propounded to jurors to test their competency for the trial of capital offenses, is not applicable to cases which arose previous to its passage.—Reynolds v. State, 1 Ga. (1 Kelly) 222.

[c] (Ga. 1847) The questions to be propounded to jurors in capital cases are prescribed by statute, and it is improper to put any other to a juror in order to test his competency.—Williams v. State, 3 Ga. (3 Kelly) 453.

[d] (Ga. 1850) When a juror is put upon triors, it is not proper for counsel to ask him any other questions than those propounded by the act of 1843.—Bishop v. State, 9 Ga. 121.

[e] (Ga. 1857) The court may vary the statute questions for examination on the voir dire, so as to enable the jury to understand them.—King v. State, 21 Ga. 220.

[f] (Ga.) The only questions to be propounded to the juror on trial as to his competency are those prescribed by the statute of 1856.—(1857)

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Pines v. State, 21 Ga. 227; (1861) Monday v. State, 32 Ga. 672, 79 Am. Dec. 314.

[g] (Ga.) After a proposed juror has answered the statutory questions satisfactorily, and has been pronounced competent, the party objecting to him must produce evidence of the untruthfulness of his answers, and it is not legal or competent to propound questions to the juror himself to show his incompetency; but, after the introduction of such testimony, it is within the province of the court to hear the juror or examine him as to his explanations in the premises.—(1871) Nesbit v. State, 43 Ga. 238; (1876) Carter v. State, 56 Ga. 463.

[h] (Ga. 1888) The court is not confined to the statutory questions provided by Code 1882, § 4682, to be asked a juror put upon his voir dire, but may further question him to test his understanding, and explain to him the meaning of the statutory questions.—Fogarty v. State, 80 Ga. 450, 5 S. E. 782.

[i] (Mass. 1850) The examination of jurors, further than is provided for by Rev. St. c. 95, § 27, with a view to ascertain whether they stand indifferent in the cause, is a matter wholly within the discretion of the judge, both as to putting additional questions and the manner of putting them, whether by the judge or the party.—Commonwealth v. Gee, 59 Mass. (6 Cush.) 174.

[j] (Mass. 1893) Under Pub. St. c. 170, § 35, Gen. St. c. 132, § 29, and Rev. St. c. 95, § 27, the examination of jurors as to interest or bias in the cause, beyond the inquiries expressly provided for, was left to the discretion of the judge, and this is not changed by Acts 1887, c. 149, giving the parties power to make the examination "under the direction of the court"; and in a prosecution for selling intoxicating liquors it is no ground for exception that the court refused to ask a juror if he would have any prejudice or bias against a person accused of such a crime, and against whom some evidence had been offered tending to prove the offense, that would prevent his giving the testimony of the accused the same weight as he would give to any other person accused of an offense, and against whom some evidence had been offered.—Commonwealth v. Poisson, 157 Mass. 510, 32 N. E. 906.

[k] (Mass. 1893) Where, on motion of defendant in a criminal case, the court puts the usual questions to the jurors, a refusal to permit a general examination by counsel is proper, in the absence of any showing why they should have been further questioned.—Commonwealth v. Thompson, 159 Mass. 56, 33 N. E. 1111.

[l] (N. H. 1843) It is the duty of the court to impanel for the trial of each case a competent and impartial jury, and in the execution of this duty the court may propound to the jurors returned other interrogatories than those which they are required to put by the statute.—Pierce v. State, 13 N. H. 536.

[m] (S. C. 1882) Gen. St. 1872, p. 523, provides that "the court shall, on motion of either party in suit, examine on oath any person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection." *Held* that, where a juror had answered the statutory questions in the negative, it was proper for the court to ask him whether he was in the employ of the defendant, though such question was not a statutory one, since the question would properly come within the phrase "any other competent evidence," within the meaning of the statute.—Gunter v. Graniteville Mfg. Co., 18 S. C. 262, 44 Am. Rep. 573.

§ 570. Examination by court.

Re-examination by parties, see post, § 572 [d].

[a] (U. S. 1822) In suits for freedom the court will not question the jurors, as they are called up to be sworn, as to their prejudices or prepossessions in favor of freedom, but leave the parties to their challenges.—Matilda v. Mason, Fed. Cas. No. 9,280 [2 Cranch, C. C. 343], reversed Mason v. Matilda (1827) 25 U. S. (12 Wheat.) 590, 6 L. Ed. 738.

[b] (Fla. 1895) The court may itself assume an exclusive examination of venire men on their voir dire, though the better practice is to allow counsel to do so.—Jones v. State, 35 Fla. 289, 17 South. 284.

[c] (Ga. 1857) After the solicitor general has asked the statute questions in a capital case, the court may repeat them to insure their being understood, although a different answer be elicited.—Mitchell v. State, 22 Ga. 211, 68 Am. Dec. 493.

[d] (Miss. 1891) There is nothing prejudicial to a defendant in the court's examining jurors on their voir dire as to their competency, allowing counsel to suggest questions, but not permitting them directly to interrogate on the subject, turning them over, however, to counsel, after being satisfied as to their competency, to question with a view to peremptory challenge.—Story v. State, 68 Miss. 609, 10 South. 47.

[e] (N. H. 1845) Upon the impaneling of a jury, the court may inquire of the jurors whether they entertain any opinions which will prevent them from discharging their duties in pursuance with the laws.—State v. Howard, 17 N. H. 171.

[f] (N. Y. 1893) A juror, examined as to his qualifications, who, to questions as to his views of circumstantial evidence, says that it must be precise and exact, and such that there would be no doubt whatever in his mind, and states that if the court instructed him in a certain way with respect to the weight and effect, under certain circumstances, to be given to the circumstantial evidence, he would still follow his own views, is incompetent; and, though the method of the court in examining such juror as to his qualifications may be improper, such fact can form no basis for an exception to the ruling of the court in excluding such juror.—People v. Fanshawe, 137 N. Y. 68, 32 N. E. 1102, affirming (1892) 65 Hun, 77, 19 N. Y. Supp. 865.

[g] (Ohio, 1889) Where a juror testifies that he has formed an opinion concerning the case, and a further examination concerning such opinion and as to whether he believes he can render an impartial verdict is conducted by counsel in the presence of the court, such examination constitutes a compliance with Rev. St. § 7278, providing that, if a juror has expressed an opinion as to the guilt of the accused, the court shall examine him on oath as to the grounds of such opinion, and if the juror shall say, and the court believes, that he can render an impartial verdict notwithstanding such opinion, he may be admitted as a juror; and hence the court's refusal to sustain a challenge for cause against such juror will not be ground for reversal.—McGuire v. State, 2 O. C. D. 318.

[h] (S. C. 1884) The examination of a juror on his voir dire should be conducted by the court.—State v. Coleman, 20 S. C. 441.

[i] (Tex. 1877) Act Aug. 1, 1876, § 1, enumerates the qualifications of jurors. Pasch. Dig. art. 3043, provides that it is the duty of the court in every case of felony to cause questions to be asked a juror for the purpose of testing his qualifications. *Held*, that the failure of the court to test the jurors as to their qualifications in a capital case was ground for reversal.—Lester v. State, 2 Tex. App. 432.

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[j] (Wis. 1843) Justices of the peace are not authorized by statute to ascertain the qualifications of jurors, and they are not, therefore, obliged to do so.—Bracken v. Preston, 1 Pin. 365.

§ 571. Propounding interrogatories suggested by parties.

[a] (U. S. 1834) At the request of the prisoner's counsel, the court will ask each juror, as he comes to be sworn, whether he has formed and delivered any opinion as to the guilt of the prisoner upon the indictment.—United States v. Woods, Fed. Cas. No. 16,760 [4 Cranch, C. C. 484].

[b] (Ga. 1884) The judge is not required, at the request of counsel, to ask unusual questions of jurors on their voir dire, nor to address them, after the panel is made up, on the matter of disqualification by reason of bias or having formed an opinion.—Simmons v. State, 73 Ga. 609, 54 Am. Rep. 885.

[c] (Mass. 1858) The refusal of a judge presiding at a criminal trial to ask persons summoned as jurors whether they belong to any association formed for the purpose of enforcing the law under which the defendant is indicted is no ground of exception, if the defendant's counsel disclaims any knowledge or suspicion of any such connection and assigns no ground for making the request.—Commonwealth v. Thrasher, 77 Mass. (11 Gray) 55.

[d] (Mass. 1895) On the voir dire examination of jurors, it is not error to refuse to put to them questions which add nothing material to the questions already put.—Commonwealth v. Surles, 165 Mass. 59, 42 N. E. 502.

[e] (Miss. 1883) It is optional with the court, in the examination of jurors upon their voir dire, to allow counsel to propound questions to proffered jurors, or to propound them itself.—Guice v. State, 60 Miss. 714.

§ 572. Re-examination.

[a] (Ill. 1881) It is within the discretion of the court to give the state leave to further examine a proposed juror after his acceptance by the state and tender to defendant.—Belt v. People, 97 Ill. 461.

[b] (Ill. 1883) After certain jurors had been accepted, but before the panel had been completed, the action of the court, in allowing a re-examination of such jurors, on affidavit of the state's attorney that they were improper persons to sit, whereby it appeared that they were friends or associates of some of defendants and that there had been an exercise of outside influence to get them upon the jury, and in discharging them thereupon, is not subject to exception.—Ochs v. People, 124 Ill. 399, 16 N. E. 662.

[c] (Ky. 1890) Gen. St. c. 62, art. 5, § 5, provides that in selecting jurors in civil cases 18 names shall be drawn from the jury box, and each side shall strike 3 names from the list, and the remaining 12 shall constitute the jury. *Held*, that where the court asks the panel all questions desired by counsel, who announce themselves satisfied, and it appears that the jurors were competent, a refusal by the court to permit counsel to examine each individual juror to ascertain his bias, after the 18 names have been drawn and no challenge for cause is made, is proper.—London & Lancashire Fire Ins. Co. v. Rufer's Adm'r, 89 Ky. 525, 12 S. W. 948.

[d] (Mich. 1878) The judge may examine jurors on the part of the prosecution, if he chooses; but defendant's counsel are entitled to re-examine them.—Stephens v. People, 38 Mich. 739.

[e] (Nev. 1896) Where, in a capital case, a juror is excused by the court against defendant's objection, after evidence has been admitted, it is error to retain the other jurors without giving defendant the privilege asked for of re-examining them as to their then state of mind before being resworn to try the case with the new juror. Belknap, J., concurring on the ground that the jury should have been discharged after the juror had been excused.—State v. Vaughan, 23 Nev. 103, 43 Pac. 193.

[f] (N. Y. 1894) On a trial for larceny, on a general and special plea, it is not error, after the determination of the issue on the special plea, to deny defendant's request to examine each member of the jury before proceeding on the general plea as to bias formed by the evidence under the special plea.—People v. Connor, 142 N. Y. 130, 36 N. E. 807, affirming (1892) 65 Hun, 392, 20 N. Y. Supp. 209.

§ 573. Rights and privileges of jurors.

[a] (U. S. 1878) A person offered as a juror is not compelled to disclose under oath his guilt of a crime which would work his disqualification. If he declines to answer, the objecting party must prove such disqualification by other evidence.—Burt v. Panjaud, 99 U. S. 180, 25 L. Ed. 451.

[b] (Ga. 1854) A juror, challenged for expression of opinion from rumor, will be heard in his own vindication.—Anderson v. State, 14 Ga. 709.

[c] (Ind. 1824) If the cause of challenge to a juror tend to his infamy, he cannot be examined on oath respecting it. The challenge must be supported by extrinsic proof.—Hudson v. State, 1 Blackf. 317.

[d] (Mo. 1884) Jurors are not bound on their voir dire examination to answer questions which are irrelevant or impertinent, or those the answer to which might tend to their disgrace, infamy, or self-accusation of crime.—State v. Mann, 83 Mo. 589.

[e] (N. Y. 1855) A juror may be examined as a witness to sustain a challenge of himself to the favor, and will not be excused from stating whether he has any prejudice against a religious sect, on the ground that the answer would disgrace him.—People v. Christie, 2 Abb. Prac. 256, 2 Parker, Cr. R. 579.

[f] (N. C. 1884) That a juror has stated on his voir dire that he had said it would injure an attorney politically with certain persons to appear for the defense does not require him to name them in response to a question by the prisoner's counsel.—State v. Mills, 91 N. C. 581.

[g] (Tenn. 1845) The prosecuting officer may inquire of a person presented as a juror in the trial of a case for counterfeiting whether he has taken an oath to acquit all persons of counterfeiting; but the person may refuse to answer.—Fletcher v. State, 25 Tenn. (6 Humph.) 249.

[h] (Tex. 1883) While the fact that one is under an indictment for a felony imperatively disqualifies him from serving as a juror, the fact must appear otherwise than from the examination of the proposed juror on his voir dire.—Sewell v. State, 15 Tex. App. 56.

§ 574. Mode of examination.

Number of jurors to be drawn before parties must examine, see ante, § 356.

[a] (Ga. 1863) It is not error for the court to explain to a juror who is on trial for competency the meaning of a phrase which he does not understand.—Henry v. State, 33 Ga. 441.

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[b] (N. Y. 1894) Defendant in a criminal case is not prejudiced by the fact that he was compelled to examine a juror on his voir dire before the state was compelled to exercise its right of challenge, defendant not being compelled to challenge till after the state exhausted its right.—People v. Miles, 143 N. Y. 383, 38 N. E. 456.

[c] (Wis. 1891) Where a special venire is issued, after exhausting the regular panel, the action of the court in giving defendant only 10 minutes in which to examine the list of jurors summoned will not be disturbed, in the absence of any showing that defendant was prejudiced, as it is a matter resting in the discretion of the court to limit the time.—Carthaus v. State, 78 Wis. 560, 47 N. W. 629.

§ 575. —— Preliminary proceedings.

[a] (Ala. 1891) It is not error for a court in a criminal case to refuse to permit defendant to inquire of a juror on his voir dire whether he is willing to accord a negro as fair a trial as a white person, as neither party to the action has a right to interrogate a juror before he is challenged.—Hornsby v. State, 94 Ala. 55, 10 South. 522.

[b] (Ala. 1895) Neither party has the right, before challenge, to interrogate jurors to ascertain whether they are subject to challenge, it being the duty of the presiding judge to conduct their examination.—Kansas City, M. & B. R. Co. v. Whitehead, 109 Ala. 495, 19 South. 705.

[c] (Cal. 1855) The defendant may ask the jurors if they have formed or expressed an opinion, before challenging them for cause.—People v. Backus, 5 Cal. 275.

[d] (Ga. 1877) A panel of 24 jurors being presented for the striking of a jury, the defendant made demand "that said jurors be put upon their voir dire and questioned as to their competency and impartiality as jurors to try such case in accordance with the ruling of the supreme court as contained in Justices of Inferior Court of Pike County v. Griffin & W. P. Plank Road Co., 15 Ga. 39, said case having before that time undergone two investigations in said court, both of defendants being residents of said county, while all of the complainants were nonresidents, and the principal defendant, S. G. H., belonging to said panel of jurors and having been relieved by a substitute when said case was called." *Held*, that it was error to refuse defendant the privilege of examining said jurors before striking the jury, as such demand was a sufficient challenge to the array.—Howell v. Howell, 59 Ga. 145.

[e] (Ga. 1890) Under Code, § 4682, prescribing the questions that may be asked a juror on his voir dire, the judge may first explain the meaning of the words "bias," "prejudice," and "perfectly impartial," used therein; but his failure to do so is not error.—Woolfolk v. State, 85 Ga. 69, 11 S. E. 814.

[f] (Ga. 1893) In trials for misdemeanors there is no right to examine a juror upon his voir dire without first challenging him, and assigning a cause of challenge.—Schnell v. State, 92 Ga. 459, 17 S. E. 966.

[g] (Mass. 1850) When jurors are returned from the bystanders in a criminal case, it is not necessary that the indictment should be read to them before making the inquiries prescribed by Rev. St. c. 95, § 27. It is sufficient to state to them in general terms the offense charged and the party to be tried therefor.—Commonwealth v. Gee, 60 Mass. (6 Cush.) 174.

[h] (Mich. 1860) On the impaneling of a jury, it is irregular for counsel to put questions to the jurors called without interposing any challenge; and no error can be assigned to the action of the court in allowing jurors thus questioned, but not challenged, to be sworn to try the case.—Crippen v. People, 8 Mich. 117.

[i] (Minn. 1876) Whether or not a party shall be allowed to interrogate a juror as to his qualifications, without first interposing a challenge, is discretionary with the court.—State v. Lautenschlager, 22 Minn. 514.

[j] (Miss. 1829) Neither party has a right to interrogate a juror before he is challenged.—State v. Flower, 1 Miss. (Walk.) 318.

[k] (N. M. 1884) Technically, on the trial of a juror for general or absolute disqualification under the statute, the challenge should be first interposed, and the evidence introduced afterwards; but where, on a voir dire, it appears that the juror is not the head of a family, a challenge therefor may be disposed of on the evidence already received.—Territory v. Lopez, 2 Pac. 364.

§ 576. —— Oath.

[a] (U. S. 1806) The court will not ask a juror, before he is sworn, whether he has formed and delivered any opinion as to the case, but leave the party to challenge for favor.—United States v. Johnson, Fed. Cas. No. 15,484 [1 Cranch, C. C. 371].

[b] (Conn. 1880) In showing ground for a challenge for cause in a criminal case, it is not necessary that the juror be sworn on his voir dire.—State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

[c] (Fla. 1889) Jurors, when examined as to their qualifications, should be sworn on their voir dire.—Ellis v. State, 25 Fla. 702, 6 South. 768.

[d] (Ga. 1854) The voir dire oath, after being administered by the court to a juror, need not be readministered to him when sent before triors.—Griffin v. State, 15 Ga. 476.

[e] (Miss. 1859) Where a defendant, before proceeding to trial, moves that the court have each juror sworn to answer questions as to whether he has formed or expressed an opinion in the case, and offers to prove as a ground for this inquiry that the case is one of great notoriety, and that there is great prejudice against himself, a refusal of the court to grant such motion is no ground of error in an appellate court.—Powers v. Presgroves, 38 Miss. 227.

[f] (N. J. 1824) A juror cannot be asked, without being first sworn, whether he has formed an opinion as to the guilt of the prisoner.—State v. Zellers, 7 N. J. Law (2 Halst.) 220.

[g] (N. Y. 1872) The oath to a juror challenged and sworn for examination need not specify the ground of challenge, unless this be required by counsel at the time.—In re Foster, 13 Abb. Prac. (N. S.) 372.

[h] (Okl. 1893) Rev. St. U. S. c. 15, § 800, provides that jurors to serve in the United States courts, "in each state respectively," shall have the same qualifications as jurors in the highest court in such state, and be drawn in the mode practiced therein, and such courts may "conform the designation and impaneling of juries" to the laws and usages relating to jurors in state courts, etc. *Held*, that such statute applied to territories as well as states, and that a judge of a United States court in Oklahoma territory could lawfully administer an oath to a juror on his voir dire, though there was no statute of the United States expressly authorizing him to administer it.—Finch v. United States, 1 Okl. 396, 33 Pac. 638.

[i] (Tex. 1878) In forming a jury from a special venire in a prosecution for murder, there

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is no objection to calling several of the venire together and swearing them simultaneously to answer questions touching their qualifications.—Wasson v. State, 3 Tex. App. 474.

§ 577. —— Propounding questions to jurors individually and collectively.

[a] (U. S. 1847) The jury cannot be asked generally whether their conscientious scruples on the slavery question will prevent them from giving a verdict for the plaintiff, but such a question may be put to the members separately.—Driskell v. Parish, Fed. Cas. No. 4,087.

[b] (Ga. 1878) On a prosecution for a felony, two or more jurors cannot be examined together at the same time on the voir dire, nor put upon the accused after such examination; but each juror called should be disposed of separately, and either accepted or rejected, before another is presented to the accused.—Williams v. State, 60 Ga. 367, 27 Am. Rep. 412.

[c] (Ga. 1884) It is error in a criminal case to cause 12 jurors to be sworn upon their voir dire and examined together touching their competency, to order such as disqualified themselves to stand aside, and put on defendant each of those pronounced competent as his name is called.—Wilkerson v. State, 74 Ga. 398.

[d] (Mo, 1894) A defendant may not examine each juror separately as to whether he has formed or expressed an opinion as to the merits of the case, where the court has asked that question of the entire panel.—State v. Munch, 57 Mo. App. 207.

[e] (Tenn. 1870) Refusal of the court below in a civil suit to allow counsel for defendant, during the impaneling of the jury, to poll each juror, to see whether they had formed and expressed an opinion touching the merits of the case, *held* error.—Williams v. Godfrey, 48 Tenn. (1 Heisk.) 299.

[f] (Tex. 1878) In forming a jury from a special venire in a prosecution for murder, the questions should be put to them separately and not en masse.—Wasson v. State, 3 Tex. App. 474.

§ 578. —— Cross-examination.

[a] (Cal. 1887) Where, on an information charging defendant with an assault with intent to commit murder, the defendant's counsel, in challenging the jury, has put to them hypothetical questions based on his theory of the case against the objection of the district attorney, the district attorney may, in cross-examining them, ask hypothetical questions based on his theory of the case.—People v. Copsey, 71 Cal. 548, 12 Pac. 721.

[b] (Tex. 1878) The accused, if desiring to cross-examine a juror on his qualifications, may be required to do so before the state accepts or rejects the juror.—Hardin v. State, 4 Tex. App. 355; Grissom v. State, 4 Tex. App. 374; Ray v. State, 4 Tex. App. 450.

§ 579. Form and sufficiency of questions propounded.

[a] (Ill. 1881) Counsel have no right to ask jurors to state briefly their ideas of their duties. Jurors are presumed to be of sound judgment and well informed, and such questions would only tend to make unnecessary delay.—Pennsylvania Co. v. Rudel, 100 Ill. 603.

[b] (Ill. 1890) On the examination of a juror who has shown himself in all other respects competent, it is proper to refuse to allow counsel to ask how he would decide the case if the evidence were exactly balanced, unless the explanation is added that in such case the law would require a verdict for defendant.—Chicago & A. R. Co. v. Fisher, 38 Ill. App. 33, affirmed (1892) 141 Ill. 614, 31 N. E. 406.

[c] (Ind. 1887) Counsel asked leave to propound to a juror on his voir dire the following question: "In a case where the plaintiff is a young man, and the defendant a farmer and an old man, upon a note payable in bank, assigned before maturity without notice of any defense, and where the evidence shows that the note was executed by the defendant on the belief that he was only executing an agency agreement, and for which he received no consideration, for whom would you find,—the plaintiff or the defendant?" *Held*, that there was no error in refusing to allow the question to be asked.—Woolen v. Wire, 110 Ind. 251, 11 N. E. 236.

[d] (Wash. 1896) On examination of a juror on his voir dire it was not error to refuse to allow counsel for defendant to ask the juror: "After hearing all the evidence and the testimony and the instructions of the court in this cause, if there yet remains in your mind a reasonable doubt regarding the guilt of the defendant, would you return a verdict of not guilty in his favor?"—such question being hypothetical.—State v. Bokien, 14 Wash. 403, 44 Pac. 889.

§ 580. —— Formation and expression of opinion.

[a] (Ala. 1889) It is proper to refuse to ask a juror on his voir dire whether or not he has previously had a fixed opinion as to defendant's guilt or innocence, since an answer to the question would not indicate that the juror had a present opinion on the subject.—Hawes v. State, 88 Ala. 37, 7 South. 302.

[b] (Iowa, 1864) A party in a criminal case cannot, in ascertaining whether the jury are prejudiced, ask them whether, if the evidence should be the same as in a case they had just decided, their minds were not made up as to the guilt or innocence of the defendant.—State v. Leicht, 17 Iowa, 28.

[c] (La. 1859) When, in a criminal case, the question was asked a juror, examined on his voir dire, "Have you, or not, formed or expressed the opinion, from what you have heard of the case, that the defendant is guilty?" *Held*, that the question was not in legal form, and that the district judge, in refusing to allow it to be answered, did not abuse the discretionary power to overrule interrogatories not in legal form.—State v. Bennett, 14 La. Ann. 651.

[d] (N. C. 1879) On a trial for murder, the judge may properly require the question asked of a juror to be whether he has "formed and expressed an opinion that the prisoner at the bar is guilty," without more, when the judge explains in the presence of the jurors that this question applies to manslaughter as well as to murder.—State v. Matthews, 80 N. C. 417.

[e] (Pa. 1888) It is error to refuse to permit a juror to answer on the voir dire whether he had not heard the merits of the case discussed, and formed an opinion, although there had been no trial of the case before.—Comfort v. Mosser, 121 Pa. 455, 15 Atl. 612.

§ 581. —— Personal opinions and conscientious scruples.

[a] (U. S. 1895) On an indictment, under Rev. St. § 5511, for violation of the election laws, the refusal to permit a juror to be asked on his voir dire whether his political affiliations would bias his judgment was not error, in the absence of any statement tending to show a special reason for asking it.—Connors v. United States, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033.

[b] (Fla. 1894) Under Rev. St. § 2850, providing that "no person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable by

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death shall be allowed to serve as a juror on the trial of any capital case," it is improper to ask a venireman if he would find a man guilty on circumstantial evidence, since the question is insufficient to bring the matter within the statute.—Lambright v. State, 34 Fla. 564, 16 South. 582.

[c] (Mich. 1895) Where, in a prosecution for illegally selling liquor, a juror is asked on his voir dire, "Which way would you desire to give your verdict if the evidence * * * was just even? * * * Which way would you lean,—for the people or for defendant?" it was not reversible error to require the question to be so framed as to merely require him to answer which way he would find.—People v. Caldwell, 107 Mich. 374, 65 N. W. 213.

[d] (Pa. 1888) A juror having on his voir dire declared that he had no conscientious scruples against a defense on the ground of insanity, it was not error to exclude defendant's questions, "Whether, under any circumstances, in his capacity as a juror, he thinks it would be possible to set up such a defense, and if he would consider it a valid defense? Whether he could conceive of any case in which there could be such a defense, which he would entertain as a juror?"—Hall v. Commonwealth, 12 Atl. 163.

[e] (Tex. 1883) In testing the bias of a white man summoned as a juror on a special venire for the trial of a negro, he may not be asked whether he has "the same neighborly regard" for a negro as for a white man.—Cavitt v. State, 15 Tex. App. 190.

§ 582. Form and sufficiency of answers.

Doubt as to effect of opinion, see ante, § 479.

[a] (Colo. 1883) The mere fact that a juror, on the voir dire examination in the trial of one of several persons jointly indicted, testifies that he served on "the other jury," does not render him incompetent when it is not shown what "the other jury" was, or whether the co-defendant was convicted or not.—Mooney v. People, 7 Colo. 218, 3 Pac. 235.

[b] (Ga. 1855) A juror was asked, "Do you reside in the city?" and answered in the affirmative. To the next question, "Have you lived here six months?" he answered in the negative. The state's counsel challenged him for cause, and the challenge was sustained. *Held*, that there is no necessary connection between the above questions, and that the second question and answer must be taken to refer to the county, and not the city in which the trial was held.—Boyd v. State, 17 Ga. 194.

[c] (Ga. 1857) A juror summoned by the sheriff as a tales juror is presumptively a qualified person, and his answer to a question by counsel that he was born out of the limits of the United States does not overcome the presumption that he was naturalized.—Jordan v. State, 22 Ga. 545.

[d] (Ga. 1884) Where a juror, when asked if his mind was impartial, answered that he "could not say it was," but, when told that he must answer "Yes" or "No," said "Yes," *held* no error to rule him competent.—Cato v. State, 72 Ga. 747.

[e] (Ind. 1875) It is not error for the court to overrule an objection to the competency of a juror based entirely upon the mere supposition and presumption by the juror of the existence of facts which might render him incompetent.—Miller v. Wild Cat Gravel Road Co., 52 Ind. 51.

[f] (Ind. 1894) The competency of a juror is not to be determined from one answer alone, but from all that he says on the subject.—Pemberton v. State, 11 Ind. App. 297, 38 N. E. 1096.

[g] (Mo. 1891) A juror on his voir dire stated that plaintiff was second or third cousin to his wife. Defendant's counsel asked, "Would that relationship influence you in coming to a conclusion?" He answered, "Yes, sir." Plaintiff's counsel then asked, "Don't you believe that under your oath you could try the case impartially?" He answered he could if it was his brother. *Held*, that the court erred in overruling defendant's challenge for cause.—Mahaney v. St. Louis & H. R. Co., 108 Mo. 191, 18 S. W. 895.

[h] (Neb. 1893) Where the examination of a juror raises a doubt as to his being an elector of the county where the action is brought, there is no error in sustaining a challenge for cause.—Omaha & R. V. R. Co. v. Cook, 37 Neb. 435, 55 N. W. 943.

[i] (N. Y. 1867) Where the evidence of a juror challenged on a trial for murder is substantially that he had no impression as to the guilt or innocence of the prisoner, and that it would require evidence to enable him to find a verdict, the challenge will be properly overruled. —O'Brien v. People, 48 Barb. 274, affirmed (1867) 36 N. Y. 276, 3 Abb. Prac. (N. S.) 368.

[j] (Pa. 1825) In an action against a banking company, the juror, on being challenged, was asked, on his voir dire, whether he was a drawer or indorser of a note in the bank, and answered that he was an indorser of a note in the bank, but had no interest in the bank. The court not being called upon for the purpose, and expressing no opinion as to the sufficiency of the evidence, the triors found that the juror was not indifferent, and he was set aside. *Held*, that this was no ground of error.—Gratz v. Benner, 13 Serg. & R. 110.

[k] (Pa. 1889) After a juror has stated on his voir dire that he did not think the opinion he had formed as to defendant's guilt would have any influence on his verdict, it is proper for the court to ask him to answer the question "by yes or no," and also whether he would, if sworn, make up his verdict solely from the evidence of the witnesses.—Clark v. Commonwealth, 123 Pa. 555, 16 Atl. 795, 23 Wkly. Notes Cas. 317.

[l] (Tenn. 1857) A juror, on his examination by the court, stated that "shortly after the killing, and while he was looking at the body of the deceased, he inquired of the bystanders how the killing occurred. Being told that it was done without provocation, he said that the prisoner ought to be hung," but also stated, that he had no opinion now. The court held him competent. The prisoner excepted. *Held* that, without some explanation of his change of mind, the juror was incompetent, and a new trial was ordered.—Norfleet v. State, 36 Tenn. (4 Sneed) 340.

[m] (Utah, 1876) On the trial of the defendant, charged with the crime of polygamy, a juror, under examination as to his qualifications to serve, was asked the following question: "Are you living in polygamy?"—which, under the caution of the court, he declined to answer, as the answer would tend to criminate him. *Held*, that the juror virtually admitted the fact, and was properly excluded from the panel. It was not necessary that his disqualification should be shown by extrinsic evidence. —United States v. Reynolds, 1 Utah, 319.

[n] (Va. 1834) One called to serve as a juror in a criminal case, being examined on his voir dire, first said that he was not a freeholder, but, before the panel was completed, returned into court, and said he was mistaken, and that he was a freeholder. *Held*, that he was a good

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and lawful juror.—Hendrick v. Commonwealth, 5 Leigh, 707.

§ 583. Evidence in support of challenges.

[a] (U. S. 1807) Evidence as to the prevailing opinion of individuals of the religious sect to which the juror belongs is inadmissible on trial of a challenge for favor.—Reason v. Bridges, Fed. Cas. No. 11,617 [1 Cranch, C. C. 477].

[b] (U. S. 1808) The challenged juror cannot be examined as a witness to the triors.—Joice v. Alexander, Fed. Cas. No. 7,435 [1 Cranch, C. C. 528].

[c] (Ala. 1861) A freemason is a competent juror in a cause to which his lodge is a party, the court taking judicial notice that such lodge is a charitable or eleemosynary body.—Burdine v. Grand Lodge of Alabama, 37 Ala. 478.

[d] (Ark. 1853) On challenging a juror for principal cause, the party challenging has a right to elect whether the competency of the juror shall be tried by the court or by triors. If by the court, then the trial must be on the testimony of the juror only, on his voir dire; if by triors, then by other evidence, to the exclusion of the oath of the juror challenged.—Stewart v. State, 13 Ark. (8 Eng.) 720.

[e] (Cal. 1855) Where a person offered as a juror is charged with actual bias, the triors are to determine the fact from the testimony; and any testimony which would lead to the conclusion that a bias existed in the juror's mind is competent testimony.—People v. Reyes, 5 Cal. 347.

[f] (Cal. 1855) To ascertain whether a bias exists in the mind of the juror, resort must be had to his declarations to others, or to his sworn statements when interrogated.—People v. Reyes, 5 Cal. 347.

[g] (Ga. 1854) A person called as a juror, and challenged, may be examined as a witness as to the matter of challenge.—Justices of Superior Court Pike County v. Griffin & West Point Plank Road Co., 15 Ga. 39.

[h] (Mass. 1835) In general, if a juror stands indifferent upon his answers on the voir dire, a want of impartiality is not to be shown by other evidence. A cause of challenge, however, which could not be known to the juror, might be thus shown.—Commonwealth v. Wade, 34 Mass. (17 Pick.) 395.

[i] (Mich. 1888) After a juror has denied on his voir dire that he has said he believed respondent to be guilty, it may be shown by other witnesses that the juror had made such statement.—People v. Evans, 72 Mich. 367, 40 N. W. 473.

[j] (Minn. 1889) Defendant, on trial for murder, challenged a juror of the regular panel, on the ground of actual bias, asserting that in a conversation on business matters with defendant's mother the juror had manifested the alleged bias. The mother testified to expressions of ill-will made by the juror, all of which he positively denied. It appeared that the conversation was in the presence of the juror's clerk, whereupon defendant's counsel demanded that the clerk be summoned, that he might be examined as to the juror's competency. *Held*, that the court did not err in refusing to issue a subpœna, suspend proceedings, and secure the attendance of the clerk.—State v. Barrett, 40 Minn. 65, 41 N. W. 459.

[k] (N. H. 1845) A challenge to the juror is founded upon evidence not so strong but that it permits of rebuttal, and leaves the question of partiality to be determined on the evidence adduced by both sides.—State v. Howard, 17 N. H. 171.

[l] (N. J. 1794) If a juror challenged is sworn on his voir dire, and does not disclose any interest, the party challenging may prove the interest by other testimony.—Bickham v. Pissant, 1 N. J. Law (Coxe) 220.

[m] (N. Y. 1823) Where a juror is challenged for having expressed an opinion as to the merits of the case, he may be used as a witness on the trial of his qualifications.—Pringle v. Huse, 1 Cow. 432.

[n] (N. Y. 1823) When triors are appointed for a jury challenged for favor, the juror may be sworn as a witness to state or explain facts not impeaching his character or motives.—People v. Fuller, 2 Parker, Cr. R. 16.

[o] (N. Y. 1845) On a challenge to a juror for favor, any fact or circumstance from which bias or prejudice may justly be inferred, although weak in degree, is admissible evidence before the triors.—People v. Bodine, 1 Denio, 281.

[p] (N. Y. 1845) In the examination before triors of the competency of a juror, it is proper to examine the wife and children, as well as the neighbors and journeymen, of the person on trial.—People v. Boughton, 1 Edm. Sel. Cas. 140.

[q] (N. Y. 1846) On a challenge for favor, evidence as to such impression is admissible.—People v. Honeyman, 3 Denio, 121.

[r] (N. Y. 1847) On the trial of a challenge for favor, an impression or hypothetical opinion adverse to the prisoner, though not conclusive, is admissible evidence in support of the challenge.—Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.

[s] (Pa. 1822) Where a juror swears, on the voir dire, that he "does not know whether he is interested or not," his interest in the suit may be proved aliunde.—Shannon v. Commonwealth, 8 Serg. & R. 444.

§ 584. —— Presumptions and burden of proof.

[a] (Ark. 1857) Where a juror admits that he has formed an opinion, it is incumbent on the state, and not on the prisoner, to show that the opinion was founded on rumor, and was not such as to bias his mind.—Meyer v. State, 19 Ark. 156.

[b] (Iowa, 1859) The burden is on the party challenging, to prove the cause of challenge.—State v. Hartman, 10 Iowa, 589.

[c] (Kan. 1875) In a criminal prosecution for murder, while the jury were being impaneled, one of the jurors, upon an examination as to his competency to serve as a juror, stated that he "had formed the opinion that the deceased was killed, and that the defendant killed him," and nothing further was shown with reference to the competency of said juror; and the defendant then challenged said juror for cause, and the court overruled the challenge. *Held*, that the court erred.—State v. Brown, 15 Kan. 400.

[d] (Mich. 1865) A person called to be a juror is presumed to be qualified and impartial, and the burden of proving the disqualification is on the challenging party, who must make out a prima facie case, and in criminal cases, such a case, at the least, as leaves the juror's impartiality in reasonable doubt.—Holt v. People, 13 Mich. 224.

[e] (N. Y. 1845) A fixed opinion of the guilt or innocence of the prisoner, though it may be necessary to sustain a challenge for principal cause, need not be proved where the challenge

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is for favor. A less decided opinion may be shown and exhibited to the triors, who must determine upon its effect.—People v. Bodine, 1 Denio, 281.

[f] (Tex. 1882) The better practice is to discharge a juror whose impartiality is questionable, though he be not presumably disqualified. —Dreyer v. State, 11 Tex. App. 631.

[g] (Vt. 1888) Proof that a juror took out naturalization papers after he had acted as juror raises a presumption that he was an alien at the time of the trial, especially where it is shown that he was of foreign birth.—Richards v. Moore, 60 Vt. 449, 15 Atl. 119.

[h] (Va. 1853) On trial for arson, where it appears that a juror is the nephew of the deceased wife of the person whose house was burned, and that he was therefore incompetent as a juror, if she left no children, it is for the prosecution to show the fact.—Jaques v. Commonwealth, 10 Grat. 690.

§ 585. —— Weight and sufficiency.

[a] (Ga. 1887) On indictment for murder, an affidavit stating that before the trial affiant heard a juror say that he thought defendant ought to be hung is not sufficient evidence of prejudice to outweigh the juror's own oath, and to disqualify him from serving.—West v. State, 79 Ga. 773, 4 S. E. 325.

[b] (Ill. 1878) When an effort is made to show that a juror has sworn falsely on his voir dire, the evidence must clearly preponderate in establishing the fact.—A mere doubt is not sufficient.—Davison v. People, 90 Ill. 221.

[c] (Kan. 1872) The fact that a juror frequently meets a party to an action is insufficient to show an intimacy disqualifying him to try the case.—Moore v. Cass, 10 Kan. 288.

[d] (Mich. 1865) Wherever, in criminal cases, the examination of the evidence given upon a challenge leaves a reasonable doubt of the impartiality of a juror, the defendant should have the benefit of the doubt, and the juror be excluded.—Holt v. People, 13 Mich. 224.

[e] (Mo. 1884) The trial court is the sole judge of the weight of evidence as to the prejudice of a juror.—State v. Cook, 84 Mo. 40.

[f] (Nev. 1865) The mere statement of a stranger that a person of whom it is known only that his home and residence have been in a foreign country was a citizen of the United States is not sufficient to establish his citizenship here, so as to qualify him as a juror.—State v. Salge, 1 Nev. 465.

[g] (N. Y. 1887) The fact that a large number of men were called before a jury was finally chosen does not show that the jury was either prejudiced or unfavorable towards the accused, or moved by improper motives.—People v. Beckwith, 108 N. Y. 67, 15 N. E. 53.

[h] (Pa. 1872) Proof that some months previous to the trial, one of the jurors had a spell of sickness, which was accompanied with a certain amount of mental disorder, is not sufficient evidence of insanity to disqualify him from sitting on the jury.—Commonwealth v. Morrow, 9 Phila. 583.

[i] (Tenn. 1892) A person of good character, who admits having read the newspaper accounts of a certain murder, and of having talked with a number of persons, but who says he has formed no opinion, and can render an impartial verdict, is competent as a juror, notwithstanding the testimony of one who is shown to be a partisan of defendant, and whose memory is not entirely clear as to the expression of any such opinion by the person mentioned, or of another who has been impeached, and who is unable to swear positively as to the expression of an opinion, but only as to his information and belief.—King v. State, 91 Tenn. 617, 20 S. W. 169.

[j] (Tex. 1893) A verdict will not be set aside for prejudice of a juror summoned on a special venire, and shown to be an honorable man, unacquainted with either defendant or deceased, or with the facts of the case, on evidence that he said to another venireman that he lived so far away that he hoped to be called on some case so as to pay expenses, and that defendant "ought to have his d——d neck broke"; he testifying that he said "they would keep hauling him on the jury until he would get a chance to help break some one's neck."—Mayes v. State (Cr. App.) 24 S. W. 421.

[k] (Wash. 1859) The fact that a resident of this territory, while absent in another state, intending to return, and considering this country his home, voted for president of the United States while absent, cannot be considered as establishing his residence elsewhere, contrary to his oath that it was his fixed intention to return, and that he considered his home here in this territory, made on his voir dire examination as a juror.—Clarke v. Territory, 1 Wash. T. 68.

[l] (Wis. 1858) To disqualify a juror on the ground of alienage, it is insufficient to show that search of the records of the county has been made, and that no record of the naturalization of his father, who was an alien, could be found.—Keenan v. State, 8 Wis. 132.

[m] (Wis. 1891) A juror testified that he was a citizen of the United States. The only evidence to the contrary was that he had stated that he came to this country from England, and had never completed his naturalization. It was not shown that his parents during his minority had not become naturalized. *Held*, that his incompetency was not established.—Schuster v. State, 80 Wis. 107, 49 N. W. 30.

5. TRIAL AND DETERMINATION.

RIGHT TO TRIAL, § 586.
RIGHT TO TRIORS AND PROCEEDINGS TO SECURE, § 587.
WHO MAY BE TRIORS, § 588.
NUMBER OF TRIORS, § 589.
OATH OF TRIORS, § 590.
PROCEEDINGS BEFORE TRIORS, § 591.
—— DISAGREEMENT, § 592.
PROCEEDINGS BEFORE COURT, § 593.
PROVINCE OF COURT AND TRIORS, § 594.
DETERMINATION OF CHALLENGES, § 595.
—— CONCLUSIVENESS AND EFFECT, § 596.
—— RETRIAL OR CORRECTION, § 597.
—— ERRORS AND IRREGULARITIES, § 598.

Discretion of court, see ante, § 405.
Removal of disqualification, see ante, § 406.
Harmless error in rulings, see "Appeal and Error," vol. 3, cc. 2051–2055, §§ 4124–4126.
Review of decision, see "Appeal and Error," vol. 3, c. 1145, § 3328 [d].
—— *of discretion of court, see* "Appeal and Error," vol. 3, cc. 1664–1667, § 3843.

§ 586. Right to trial.

[a] (Minn. 1861) Where a challenge for bias is made by one party, and admitted by the other, no trial of the challenge is necessary.—Morrison v. Lovejoy, 6 Minn. 319 (Gil. 224).

[b] (N. C. 1849) If a juror is challenged for favor by the prisoner, and the cause of challenge is admitted by the prosecution, the prisoner is bound thereby, and cannot insist on the

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juror's being tried by triors or by the court.—State v. Creasman, 82 N. C. 395.

§ 587. Right to triors and proceedings to secure.

On challenge to array, see ante, § 550 [j].

[a] (Cal. 1872) An objection to the appointment of a trior in a criminal case must be made at the time, and the grounds of objection brought to the attention of the court; and, if overruled, an exception must be reserved in the usual mode.—People v. Voll, 43 Cal. 166.

[b] (Fla. 1860) If neither party, in a capital case, asks for triors of the interest of jurors, the court may act as such.—O'Connor v. State, 9 Fla. 215.

[c] (Ga. 1846) Where a prisoner desires the benefit of his right to challenge a juror "propter affectum," he must, under the act of 1843, ask the court for the appointment of triors for that purpose, in the manner provided by common law.—Robinson v. State, 1 Ga. (1 Kelly) 563.

[d] (Ga. 1846) After a juror has answered in the negative the questions propounded by the act of 1843, it is competent for the prisoner to put him upon triors, for the purpose of showing that he is not indifferent.—Boon v. State, 1 Ga. (1 Kelly) 618.

[e] (La. 1893) Since the appointment of triors is not a matter of right, the refusal of a motion to appoint them will not vitiate the verdict.—State v. Porter, 45 La. Ann. 661, 12 South. 832.

[f] (Mich. 1850) The usual mode of trying the impartiality of a juror, challenged for favor, is by triors appointed for that purpose, on the demand of the challenging party, but it is not the only legal mode; and, where a juror is challenged for favor, and the challenging party, when asked by the court how he will have the challenge tried, refuses to indicate the mode of trial, it may be tried by the court by administering an oath to the juror, and propounding questions to him.—People v. Doe, 1 Mich. (Man.) 451.

[g] (N. Y. 1830) The production of evidence to the judge, in case of a challenge, without asking for triors, will be considered as the substitution of him in the place of triors in every respect.—People v. Mather, 4 Wend. 229, 21 Am. Dec. 122.

[h] (N. Y. 1839) Where, on a trial for felony, the prisoner consents to substitute the court for triors, upon challenges to jurors, he cannot revoke his consent, especially after the challenge has been passed upon by the court.—People v. Rathbun, 21 Wend. 509.

[i] (N. Y. 1839) A bill of exceptions lies for refusing triors, or upon any question arising on a challenge to jurors where triors may be demanded.—People v. Rathbun, 21 Wend. 509.

[j] (N. Y. 1867) It is competent for the court to act as trior upon challenge to the favor; and it must be assumed that it so acts by consent of all the parties, in the absence of objection or of request to submit the question to triors.—O'Brien v. People, 36 N. Y. 276.

[k] (Pa. 1831) In a capital case, two jurors declared, upon oath, that they had formed and expressed opinions unfavorable to the prisoner, and were challenged by the commonwealth for that cause. *Held*, that inasmuch as the prisoner made no objection, but acquiesced in the challenges, there was no necessity for appointing triors.—Commonwealth v. Gross, 1 Ashm. 281.

§ 588. Who may be triors.

[a] (U. S. 1807) If, after eight jurors have been sworn in chief, the defendant challenge one for favor, the challenge is to be tried by the jurors already sworn.—Reason v. Bridges, Fed. Cas. No. 11,617 [1 Cranch, C. C. 477].

[b] (U. S.) The two jurors first sworn in a cause are the proper triors of a challenge for favor.—(1808) Joice v. Alexander, Fed. Cas. No. 7,435 [1 Cranch, C. C. 528]; (1810) Queen v. Hepburn, Fed. Cas. No. 11,503 [2 Cranch, C. C. 3], affirmed (1813) 11 U. S. (7 Cranch) 290, 3 L. Ed. 348.

[c] (Ga. 1853) If a challenge be made to the first juror before any one has been sworn, the court will direct two indifferent persons taken from the bystanders to try the question, and if they find the party challenged indifferent he will be sworn and joined with the triors in determining the next challenge; but when two jurors have been found impartial, and have been sworn, then the office of triors will cease, and every subsequent challenge will be referred to the decision of the jurymen.—Copenhaven v. State, 14 Ga. 22.

[d] (Ga. 1853) If the prisoner challenge ten jurors, and the state one, and the twelfth be sworn, one trior shall be chosen by each party and added to the jurymen sworn, and the challenges referred to their decision; but, if several be sworn and the rest challenged, the court may assign any two persons sworn to determine the challenge. To the triors thus chosen no challenge can be admitted.—Copenhaven v. State, 14 Ga. 22.

[e] (Ga. 1855) Any two of the jurors already sworn are sufficient to try the challenges.—McGuffie v. State, 17 Ga. 497.

[f] (Ga. 1855) After one juror has been sworn, it is error in the court to omit to join him with the bystanders who are to try the next challenge.—McGuffie v. State, 17 Ga. 497.

§ 589. Number of triors.

[a] (Ga. 1853) Triors should not exceed two in number, unless by the consent of the prosecutor and defendant, or unless some special cause is alleged by one of them.—Copenhaven v. State, 14 Ga. 22.

[b] (N. J. 1818) A challenge to the favor, tried by three jurors, vitiates a judgment.—McCormick v. Brookfield, 4 N. J. Law (1 Southard) 69.

§ 590. Oath of triors.

[a] (Minn. 1867) Triors are not required to be resworn upon the submission of each challenge in a case.—State v. Brown, 12 Minn. 538 (Gil. 448).

[b] (N. Y. 1847) Where triors of a challenge for favor are sworn to find whether the juror is indifferent "upon the issue joined," the oath is erroneous. They should be sworn to find whether the juror is indifferent as to the issue and impartial between the parties.—Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.

§ 591. Proceedings before triors.

[a] (U. S. 1808) The court will not permit counsel to argue to the triors on a challenge for favor.—Joice v. Alexander, Fed. Cas. No. 7,435 [1 Cranch, C. C. 528].

[b] (Ark. 1853) On the trial, by triors, of the competency of a juror, the party may object to the admission of evidence before the triors, or to the instructions of the court, and make them a part of the record by bill of exceptions.—Stewart v. State, 13 Ark. (8 Eng.) 720.

[c] (Ga. 1852) When a juror has been put upon triors, and they have retired to make up their verdict, it is not proper to move the court to send written instructions to the triors, to pro-

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pound a particular interrogatory to the juror, for the purpose of establishing his disqualification. The triors should be brought into open court, and instructed publicly and in presence of both parties respecting the whole matter.—Whaley v. State, 11 Ga. 123.

[d] (Ga. 1854) The trial of a juror before triors is best conducted when conducted after the manner of the trial of a collateral issue before a full jury.—Baker v. State, 15 Ga. 498.

[e] (Ga. 1855) Where a juror is put upon the triors to ascertain his competency, the trial should be conducted in presence of the court; but it is not error if the triors are allowed to retire with the juror, and question him in private.—Epps v. State, 19 Ga. 102.

[f] (N. Y. 1845) Where, upon a challenge for favor, the court err in admitting or rejecting evidence, or instructing the triors upon matters of law, a bill of exceptions lies.—People v. Bodine, 1 Denio, 281.

[g] (N. Y. 1847) Where a challenge for principal cause is overruled by the court, and the juror is then challenged for favor, it is erroneous to instruct the triors that the latter challenge is in the nature of an appeal from the judgment of the court upon the facts.—Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.

[h] (N. Y. 1863) On a challenge for favor, a juror testified before the triors that he had conscientious scruples in reference to serving as a juror in a case where the punishment on conviction would be death; that he would, if he took an oath to serve as a juror, render a verdict in accordance with the evidence, but that it would violate his conscience to do so; and that he could not, where the punishment was death, conscientiously render a verdict which would take a man's life, even if the evidence clearly showed that the prisoner was guilty. *Held*, that it was proper for the court to refuse to charge the triors that, assuming what the juror had sworn to be true, no cause was shown which would justify the triors in finding the challenge true.—Lowenberg v. People, 5 Parker, Cr. R. 414.

§ 592. —— Disagreement.

[a] (N. Y. 1853) On a trial for murder, a juror was challenged for favor. The first two jurors sworn, having been appointed triors, sworn as such, and having heard the evidence, arguments, and charge, could not agree. *Held*, that the next two (the third and fourth) should be selected to rehear the matter as triors; and they were so sworn.—People v. Dewick, 2 Parker, Cr. R. 230.

[b] (Pa. 1837) Where triors disagree as to the indifference of a juror, one finding that he was indifferent, and the other that he was not, —it was error for the court to declare him competent.—Commonwealth v. Fitzpatrick, 3 Clark, 520, 6 Pa. Law J. 201.

§ 593. Proceedings before court.

[a] (Cal. 1894) Where defendant has no counsel, it is reversible error for the court to fail to comply with Pen. Code, § 1066, which provides that, before a juror is called, defendant must be informed that if he intends to challenge an individual juror he must do so when the juror appears and before he is sworn.—People v. Moore, 103 Cal. 508, 37 Pac. 510.

[b] (Fla. 1890) On an indictment for murder one of the veniremen stated that he had no bias against the accused, whereupon counsel for accused asked for reasonable time to procure witnesses to show the bias of the juror, but without stating how long it would require to procure such witnesses, their residence, or the facts to be proved by them. *Held*, that there was no error in refusing the request.—Hodge v. State, 26 Fla. 11, 7 South. 593.

[c] (N. Y. 1858) The testimony of a juror, on the challenge to him for favor, cannot be considered upon the question whether the challenge for principal cause was properly decided. —Cancemi v. People, 16 N. Y. 501.

[d] (N. Y. 1878) Where the court is the trior of the challenge for principal cause, and also of the challenge for favor, and the latter immediately succeeds the other, the court may, in determining the challenge for favor, take into account what has been said by the proposed juror on the former challenge, and so may an appellate court, with power to review the determination on the challenge for favor.—Greenfield v. People, 74 N. Y. 277, 6 Abb. N. C. 1.

§ 594. Province of court and triors.

On challenge to array, see ante, § 550 [a, f].

[a] (U. S. 1807) It is not a principal cause of challenge that the juror has had conversations with some of the parties; but it is evidence for the consideration of triors upon a challenge for favor.—Young v. Marine Ins. Co., Fed. Cas. No. 18,163 [1 Cranch, C. C. 452].

[b] (Colo. 1873) A preconceived opinion of a juror in a criminal case is a ground of challenge to the favor, and not a ground of principal challenge.—Solander v. People, 2 Colo. 48.

[c] (Ga. 1853) A juror having been challenged to the favor, the trial proceeds before the triors, and the truth of the matter alleged as cause of challenge must be made out to the satisfaction of the triors.—Copenhaven v. State, 14 Ga. 22.

[d] (Ga. 1857) Under Act 1856, the presiding judge in criminal cases is trior of the competency of jurors.—Jordan v. State, 22 Ga. 545.

[e] (Me. 1857) The court has jurisdiction, and it is its duty, to try all challenges of jurors for cause.—State v. Knight, 43 Me. 11.

[f] (Minn. 1886) At the trial of an indictment for murder, on a challenge to jurors for implied bias, the questions put related only to matters of actual bias. *Held*, that they were properly excluded, as, under Gen. St. 1878, c. 116, § 24 et seq., a challenge for implied bias must be tried by the court alone, while, in a capital case, a challenge for actual bias must be tried before triors appointed for that purpose.—State v. Hanley, 34 Minn. 430, 26 N. W. 397.

[g] (N. H. 1845) A principal challenge of a juror is grounded on a charge of such a fact as, being proved true, raises a presumption of partiality too strong to be rebutted.—State v. Howard, 17 N. H. 171.

[h] (N. J. 1833) Principal challenges are to be tried by the court, and challenges to the favor by triors.—Mann v. Glover, 14 N. J. Law (2 J. S. Green) 195.

[i] (N. J. 1846) It is no ground of principal challenge to a juror that he has expressed an opinion on the matter to be tried, if it was not done through ill will or malice.—State v. Spencer, 21 N. J. Law (1 Zab.) 196.

[j] (N. Y. 1812) If the facts alleged in the challenge to the array are admitted, the court decides upon them; if denied, two triors are appointed by the court out of the panel, or perhaps any two other persons named by the court.—Gardner v. Turner, 9 Johns. 260.

[k] (N. Y. 1821) A juror challenged to the favor may be sworn on his voir dire, and asked such questions as do not tend to his infamy or disgrace. The triors are to decide whether

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he stands indifferent between the parties.—Mechanics' & Farmers' Bank v. Smith, 19 Johns. 115.

[l] (N. Y. 1823) Where a juror is challenged by one party, for having expressed an opinion in favor of the other party, the challenge should, regularly, be tried by the court.—Pringle v. Huse, 1 Cow. 432.

[m] (N. Y.) If a juror have expressed an opinion against the party, though from his knowledge of the cause, and not from any ill will or favor, yet this is a principal cause of challenge.—(1826) Ex parte Vermilyea, 6 Cow. 555; (1827) People v. Vermilyea, 7 Cow. 108.

[n] (N. Y. 1839) The mere forming of an opinion by a juror upon the guilt or innocence of a party on trial for felony is a principal cause of challenge.—People v. Rathbun, 21 Wend. 509.

[o] (N. Y. 1845) The question of a challenge for favor is to be submitted as a question of fact upon all the evidence to the conscience and discretion of the triors, whether the juror is indifferent or not.—People v. Bodine, 1 Denio, 281.

[p] (N. Y. 1846) On a challenge for favor, the weight of the evidence adduced is for the triors.—People v. Honeyman, 3 Denio, 121.

[q] (N. Y. 1846) It is not a good ground of challenge to a juror, for principal cause, that he has an impression as to the defendant's guilt or innocence.—People v. Honeyman, 3 Denio, 121.

[r] (N. Y. 1848) Where an opinion in the mind of a juror is fixed and definite, it is ground for principal challenge, and is to be passed upon by the court; but, if it is short of a fixed and definite opinion, it becomes a question of fact for the triors.—People v. Hayes, 1 Edm. Sel. Cas. 582.

[s] (N. Y. 1851) The opinion of a juror, so far formed and fixed as to require evidence to remove it, disqualifies him, and is good ground of challenge for principal cause.—People v. Sullivan, 2 Edm. Sel. Cas. 277.

[t] (N. Y. 1854) A plaintiff brought an action of quare clausum fregit, and one of the defenses set up in the answer was the existence of a certain custom. Some of the jurors were challenged on the ground that they had formed an opinion as to the alleged custom. One of the jurors, on the trial of the challenge, testified that he had formed an opinion against the custom. *Held*, that the triors had two questions to determine: (1) Was the alleged ground of challenge true in fact? (2) If true, was its effect upon the mind of the juror such as to produce bias or favor?—and that therefore what the influence and effect of such an opinion was on the mind of the juror was not a question of law, but was a question to be decided by the triors.—Smith v. Floyd, 18 Barb. 522.

[u] (N. Y. 1855) Triors appointed for a juror challenged for favor are to decide whether the juror is indifferent. The court should not instruct them how they are to find.—People v. McMahon, 2 Parker, Cr. R. 663.

[v] (N. Y. 1858) To sustain a challenge for principal cause, on the ground that the juror has expressed an opinion, it must appear that the opinion was absolute and settled. It is not enough that it was hypothetical and uncertain. If the opinion belong to the latter class, it is a proper subject for a challenge to the favor.—People v. Stout, 4 Parker. Cr. R. 71; Stout v. People, Id. 132.

[w] (N. Y. 1867) In an action for libel brought by an opera manager against an editor, it was *held* that a juror could not be challenged for principal cause on the ground that he had stated that he was "opposed to theatrical representations."—Maretzek v. Cauldwell, 28 N. Y. Super. Ct. (5 Rob.) 660, 2 Abb. Prac. (N. S.) 407.

[x] (N. Y. 1870) If the prisoner upon a criminal trial challenges a juror to the favor, although the facts proved on the trial of the challenge would be ground for challenge for principal cause, yet the determination of the question of competency belongs in such case to the triors, and not to the court; and the court cannot be called upon to rule, as matter of law, that the juror, upon the fact proved, was incompetent.—People v. Allen, 43 N. Y. 28, reversed Allen v. People (1870) 57 Barb. 338.

[y] (N. Y. 1878) Under Laws 1873, c. 427, providing that challenges in criminal cases shall be tried and determined by the court only, a challenge to the favor, as well as a challenge for cause, must be tried by the court instead of by triors, as was the former custom.—Greenfield v. People, 13 Hun, 242, reversed (1878) 74 N. Y. 277.

[yy] (N. C. 1864) A challenge to a jury, in an action for fraudulently removing a debtor, on the ground that it is the same jury which tried a case by a different plaintiff against the same defendant, for the same act, is a principal cause of challenge, involving matter of law.—Baker v. Harris, 60 N. C. 271.

[z] (Vt. 1867) Whether a juror who has conscientious scruples against capital punishment should be excused is to be determined by the court.—State v. Ward, 39 Vt. 225.

[zz] (Wis. 1854) A juror, on his examination, stated that he had an opinion on the question of the defendant's guilt or innocence, if what he had heard was true; that he had heard the story talked about, but had not read the report of the examination before the coroner, or heard the story from witnesses or those who had heard the testimony; and that his opinion would not prevent his hearing testimony impartially. *Held*, that this was cause for a challenge to the favor, but not for principal cause.—Schæffler v. State, 3 Wis. 823.

§ 595. Determination of challenges.

[a] (Mich. 1878) There is no practical difference in criminal cases between a challenge for principal cause and a challenge for favor; and a judge, in ruling upon such a challenge, should make his ruling cover both grounds.—Stephens v. People, 38 Mich. 739.

[b] (N. Y. 1854) The triors of a juror, who is challenged for favor, must find that the juror stands impartial or indifferent, or they must reject him.—Smith v. Floyd, 18 Barb. 522.

[c] (Ohio, 1889) The fact that the court admitted a juror to sit is a sufficient finding that it was satisfied he could render an impartial verdict.—Goins v. State, 46 Ohio St. 457, 21 N. E. 476.

§ 596. —— Conclusiveness and effect.

[a] Where the question of the competency of a juror is submitted to the court, the finding of the court is conclusive.

—(U. S. 1887) Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708, affirming People v. Hopt (1886) 4 Utah, 247, 9 Pac. 407;

(Cal. 1895) People v. Fredericks, 106 Cal. 554, 39 Pac. 944;

(Dak. 1889) Territory v. Pratt, 6 Dak. 483, 43 N. W. 711;

(Ga. 1858) Galloway v. State, 25 Ga. 596;

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(Ind. 1860) Bradford v. State, 15 Ind. 347;
(Minn. 1861) Morrison v. Lovejoy, 6 Minn. 319 (Gil. 224);
(N. Y. 1880) Balbo v. People, 80 N. Y. 484, affirming (1879) 19 Hun, 424;
(S. C. 1891) State v. Merriman, 34 S. C. 16, 12 S. E. 619;
(S. D. 1892) Haugen v. Chicago, M. & St. P. Ry. Co., 3 S. D. 394, 53 N. W. 769.

[b] (U. S. 1869) The decision upon a challenge for favor is not reviewable.—United States v. McHenry, Fed. Cas. No. 15,681 [6 Blatchf. 503].

[c] (Ark. 1866) Where the challenge of jurors is "to the favor," the finding of the judge, sitting in lieu of triors, is conclusive.—Milan v. State, 24 Ark. 346.

[d] (Conn. 1879) A finding and declaration by the court that a juror was disqualified in itself severs his connection with the panel, and a subsequent waiver of the disqualification cannot restore the juror to the panel.—State v. Allen, 46 Conn. 531.

[e] (Minn. 1860) The objection of bias made to a juror being once established, it would seem that no possible combination of circumstances can remove the disqualification.—State v. Dumphey, 4 Minn. 438 (Gil. 340).

[f] (N. Y. 1860) The district attorney and the prisoner's counsel agreed that the court should act as trior. *Held* that, in the absence of exceptions to the admission of evidence, the decision upon the evidence as to the jurors' competency was conclusive.—Sanchez v. People, 22 N. Y. 147, affirming People v. Sanchez (1859) 18 How. Prac. 72, and Sanchez v. People, 4 Parker, Cr. R. 535.

[g] (Pa. 1842) If a juror be set aside on sufficient evidence of interest, it is not error, although it afterwards appear that he had no interest.—Silvis v. Ely, 3 Watts & S. 420.

[h] (Wis. 1854) Jurors were sworn and examined, and after the examination were "challenged for cause." From the answers made it appeared that the challenge could only be for favor, no one having formed such an opinion as would justify a challenge for principal cause. The judge having decided in favor of their competency, it was *held* that the challenges must be regarded as for favor and the judge as having acted in the place of triors, and his decision as therefore conclusive.—Schoeffler v. State, 3 Wis. 823.

§ 597. —— Retrial or correction.

[a] (Cal. 1888) It is not error to deny defendant's motion for a retrial of certain challenges, after the jury has been completed and sworn.—People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

[b] (Conn. 1879) Defendant in a capital case, after having obtained the discharge of a juror pending trial, on the ground that he had declared beforehand an opinion as to the guilt of defendant, cannot demand that he be restored to the panel.—State v. Allen, 46 Conn. 531.

[c] (Ga. 1855) If, from a misapprehension of the answer of a juror, on the voir dire, he has been set aside as incompetent, the court may correct the mistake, whenever discovered, and restore him to the panel.—Epps v. State, 19 Ga. 102.

[d] (La. 1893) The question of a juror's competency cannot be reopened by defendant's counsel after he has been examined on his voir dire and adjudged competent.—State v. Donelon, 45 La. Ann. 744, 12 South. 922.

§ 598. —— Errors and irregularities.

[a] Where an impartial jury is secured, error cannot be predicated on the rejection of persons who may have been qualified.
—(U. S. 1886) Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755, affirming Herbert v. Northern Pac. R. Co. (1882) 3 Dak. 38, 13 N. W. 349;
(Minn. 1893) State v. Kluseman, 53 Minn. 541, 55 N. W. 741;
(Neb. 1893) Omaha & R. V. R. Co. v. Cook, 37 Neb. 435, 55 N. W. 943;
(N. Y. 1873) Armsby v. People, 2 Thomp. & C. 157.

[b] (U. S. 1878) An error committed in overruling an objection to a juror as legally disqualified is cured, where it appears affirmatively that he was not a member of the panel which tried the case, and it does not appear that by his exclusion therefrom the party's right of challenge was abridged.—Burt v. Panjaud, 99 U. S. 180, 25 L. Ed. 451.

[c] (Ala. 1875) Error in disallowing a challenge for cause to a juror, thereon peremptorily challenged by a defendant, whose challenges were not then exhausted, will not be cured by allowing him to exhaust a greater number of peremptory challenges than given by law; it not appearing when the court made known its purpose to allow the extra number of challenges.—Iverson v. State, 52 Ala. 170.

[d] (Colo. 1880) Under Gen. Laws, § 814, everyone charged with murder must be furnished previous to his arraignment with a list of jurors. Under sections 812, 1479, after the regular panel has been exhausted, the court may order a tales. *Held* that, where the court erroneously rules against two of defendant's challenges for cause, the fact that there were two talesmen on the jury entitles defendant to a new trial.—Stratton v. People, 5 Colo. 276.

[e] (Colo. 1883) A prisoner has the right to object to the depletion of the panel of jurors for insufficient reasons, and a challenge for cause sustained for such insufficient reasons is ground for a reversal of the judgment.—Mooney v. People, 7 Colo. 218, 3 Pac. 235.

[f] (D. C. 1893) Error in overruling a challenge for cause by defendant in a criminal case, whereby defendant is forced to challenge peremptorily, is ground for reversal where, when the jury was sworn, defendant had exhausted all his peremptory challenges.—United States v. Schneider, 21 D. C. 381.

[g] (Ind. 1889) Where the examination of a juror shows that he was placed on the jury by the sheriff as one of the regular panel, and the record does not show that it was done by order or direction of the court to fill out a deficient panel, it will be presumed, a challenge having been sustained on the ground that the juror had served during the year preceding, that the juror was not a part of the regular panel, and that the challenge was properly sustained.—City of Goshen v. England, 119 Ind. 368, 21 N. E. 977.

[h] (La. 1883) The fact that the judge excused a juror who was not legally exempt is not ground for reversal, though defendant had exhausted all his peremptory challenges.—State v. Hamilton, 35 La. Ann. 1043.

[i] (La. 1890) The maintenance of a challenge for cause by the state, even if erroneous, affords no ground for relief in absence of suggestion that the state's peremptory challenges were exhausted.—State v. Jackson, 42 La. Ann. 1164, 8 South. 297.

[j] (Mass. 1830) Where, after the twelfth juror in a capital case had been sworn, but before

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the jury was impaneled, the fifth juror said that he had conscientious scruples against punishment by death, except for the crime of murder, and was discharged by the court, no error was committed where the defendant was allowed to waive any of the challenges which he had made to any of the list.—Commonwealth v. Twombly, 27 Mass. (10 Pick.) 480, note.

[k] (N. J. 1856) Where an offer is made to swear a juror, and to ask him a particular question, to test his competency, which is immaterial, it is no error in the court to overrule the offer, although the examination itself is competent.—State v. Fox, 25 N. J. Law (1 Dutch.) 566.

[l] (N. J.) A principal challenge to a juror on the sole ground that from what he had read he had formed an opinion of the guilt or innocence of the accused, without alleging malice or ill will on the part of the juror, should be overruled; but if the court below proceed without objection to try the challenge, and then overrule it, the appellate court must assume that no malice or ill will was in fact found by the court below.—(1891) Moschell v. State, 53 N. J. Law (24 Vroom) 498, 22 Atl. 50; (1892) Id., 54 N. J. Law (25 Vroom) 390, 25 Atl. 964.

[m] (N. Y. 1886) In an action against the city of Troy, the rejection by the court of a citizen as a juror, otherwise competent, is ground for reversal, though the jurors who actually tried the case were competent.—Hildreth v. City of Troy, 101 N. Y. 234, 4 N. E. 559, 54 Am. Rep. 686.

[n] (N. D. 1896) While a jury was being impaneled, the state had exercised five of the six peremptory challenges allowed by law. The state challenged a proposed juror for cause. The examination of the juror disclosed that he was generally disqualified. The court, however, denied the challenge, and thereupon the state challenged the juror peremptorily. Immediately thereafter the court sustained the challenge for cause, and the juror stepped aside. Subsequently the court permitted the state to exercise another peremptory challenge. *Held* no error.—State v. Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

[o] (Or. 1888) Though the statute prescribing the qualifications of jurors does not require his name to be on the assessment roll, yet it is not ground for reversal that the trial court allowed a challenge to a juror by the state, for the reason that his name was not on the assessment roll for the previous year.—State v. Ching Ling, 16 Or. 419, 18 Pac. 844; State v. Harding, 16 Or. 493, 19 Pac. 449.

[p] (Tenn. 1857) An improper discharge of a juror as incompetent is not such an error as would avail a prisoner after verdict, where the court on discharging the juror allowed the prisoner the same number of challenges as if the juror had been discharged for cause.—Norfleet v. State, 36 Tenn. (4 Sneed) 340.

[q] (Tex. 1880) The overruling of a good challenge for cause is not material error, unless it appears that an objectionable juror was thereby forced upon the defendant.—Holt v. State, 9 Tex. App. 571.

[r] (Tex. 1890) Where a challenge to a juror for cause is improperly overruled, and the defendant challenges him peremptorily, the error is cured by allowing the defendant an extra peremptory challenge.—Blackwell v. State, 29 Tex. App. 194, 15 S. W. 597.

[s] (Tex. 1892) Unless objection is shown to jurors who tried a case, the ruling of the trial court upon the competency or incompetency of such jurors will not be inquired into on appeal, even though defendant had exhausted his peremptory challenges.—Holland v. State, 31 Tex. Cr. R. 345, 20 S. W. 750.

[t] (Wis. 1887) In an action against a corporation, one of the jurors, on a challenge for favor, testified that he had had some business difficulty with the president of the company, who was one of its principal stockholders, and did not feel friendly towards him; but he thought he could render an impartial verdict in the case. The court deciding that he was competent, the defendant challenged him peremptorily, and he was set aside. *Held* not error, although the defendant exhausted its peremptory challenges; it not appearing that the jury which tried the cause was not impartial and unobjectionable.—Heucke v. Milwaukee City Ry. Co., 69 Wis. 401, 34 N. W. 243.

[u] (Wis. 1891) Where it is not shown that defendant was prejudiced because he was compelled to challenge peremptorily a disqualified juror, the judgment will not be reversed.—Carthaus v. State, 78 Wis. 560, 47 N. W. 629.

(K) PEREMPTORY CHALLENGES.

1. NATURE AND RIGHT, §§ 599-606.
2. NUMBER, §§ 607-618.
3. TIME, §§ 619-623.
4. MAKING AND EFFECT OF CHALLENGES, §§ 624-630.

Statutory regulation as infringement of right to trial by jury, see ante, § 232.
Waiver, see ante, § 522.
Failure to use peremptory challenge as affecting right to new trial, see "New Trial," II. (D).

1. NATURE AND RIGHT.

IN GENERAL, § 599.
STATUTORY PROVISIONS, § 600.
CIVIL ACTIONS AND PROCEEDINGS, § 601.
CRIMINAL PROSECUTIONS, § 602.
—— RIGHT OF PROSECUTION, § 603.
COPLAINTIFFS OR CODEFENDANTS, § 604.
SPECIAL OR STRUCK JURY, § 605.
JURORS SUBJECT TO CHALLENGE, § 606.

§ 599. In general.

[a] The right of peremptory challenge is not a right to select, but to exclude.
—(N. C. 1842) State v. Smith, 24 N. C. 402; (Tex. 1884) Heskew v. State, 17 Tex. App. 161.

[b] (Ala. 1888) A motion as to the number of defendant's challenges is not properly made during proceedings preliminary to the drawing of names on the venire.—Clarke v. State, 87 Ala. 71, 6 South. 868.

[c] (Iowa, 1853) The right of challenging jurors to the extent provided by the Code is absolute, and without qualification; and a ruling of court, making the defendant's right dependent on a prior exercise of the right by the state, is erroneous.—Smith v. State, 4 G. Greene, 189.

[d] (La. 1844) Slaves charged with capital offenses have no right to challenge jurors peremptorily.—State v. George, 8 Rob. 535.

[e] (Me. 1879) The right of peremptory challenge does not exist when the question of damages is to be determined by a sheriff's jury.—Barrett v. Bangor, 70 Me. 335.

[f] (Nev. 1876) There is a broad distinction between challenges for bias and peremptory challenges. The former challenges exist as a

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matter of right; the latter is by favor of the legislature only. The number of peremptory challenges has always been regulated by statute.—State v. McClear, 11 Nev. 39.

§ 600. Statutory provisions.

[a] (Ala. 1889) An act of February 28, 1887, established a general jury system for the state. That of February 11, 1889, "To expedite the trial of capital cases in Jefferson county," provided a mode for drawing and impaneling special jurors, and prescribed the number of peremptory challenges. By an act of February 28, 1889, four sections of the general act of 1887 were re-enacted in full, as amended,—among them, section 17, containing a repealing clause "of all laws and parts of laws, general and special, in conflict with this act;" but no change was made in that clause. *Held*, that the Jefferson county act is repealed so far, only, as its provisions conflict with the four sections as amended.—Maxwell v. State, 89 Ala. 150, 7 South. 824.

[b] (N. H. 1879) Laws 1860, c. 2350, § 1, giving the state two peremptory challenges in criminal cases omitted from Gen. St. 1878, is not in force, and therefore it is error to sustain a peremptory challenge by the state.—State v. Drake, 59 N. H. 21.

§ 601. Civil actions and proceedings.

[a] (Ala. 1887) There being no statute authorizing peremptory challenges of jurors in condemnation proceedings, no challenges can be made except for cause.—Brown v. Rome & D. R. Co., 86 Ala. 206, 5 South. 195.

[b] (Conn. 1859) Under Rev. St. tit. 1, § 110, which provides that "on the trial of every civil action each party shall have the right to challenge two jurors peremptorily," a party to a proceeding for the reassessment of damages for land taken for a public highway, by a jury of six disinterested electors, under section 25 of the act with regard to highways, has the right of peremptory challenge.—Pettis v. Pomfret, 28 Conn. 566.

[c] (Neb. 1884) Defendant in a bastardy proceeding, under Comp. St. c. 37, is not entitled to peremptory challenges of jurors, as provided by law in criminal cases; such a proceeding being in the nature of a civil action.—Kremling v. Lallman, 16 Neb. 280, 20 N. W. 383.

[d] (N. Y. 1868) Act April 27, 1847, giving the right of peremptory challenge upon the trial of an issue of fact joined in a civil action, does not apply to summary proceedings by the landlord against the tenant to obtain the possession of demised premises.—People v. Hamilton, 39 N. Y. 107.

[e] (Pa. 1842) The statute of 1834, authorizing two peremptory challenges of jurors in civil cases, does not extend to viewers provided for in the same statute.—Schuylkill Nav. Co. v. Farr, 4 Watts & S. 362.

[f] (S. C. 1844) An action of debt brought by the city council of Charleston, to recover a penalty imposed by an ordinance for keeping spirituous liquors in a retail grocery store, without license, is to be regarded as a civil suit, and either party may exercise the right of challenge given by the statute of 1841.—City of Charleston v. Kleinback, 2 Speers, 418.

§ 602. Criminal prosecutions.

In bastardy proceedings, see ante, § 601 [c].

[a] (U. S. 1802) Peremptory challenge allowed only in capital cases, in Alexandria, D. C.—United States v. Carrigo, Fed. Cas. No. 14,735 [1 Cranch, C. C. 49].

[b] (U. S. 1807) In manslaughter, a peremptory challenge is allowed under the Virginia law.—United States v. McLaughlin, Fed. Cas. No. 15,697 [1 Cranch, C. C. 444].

[c] (U. S. 1808) Peremptory challenges are not allowed in cases of larceny, in the District of Columbia.—United States v. McPherson, Fed. Cas. No. 15,703 [1 Cranch, C. C. 517].

[d] (U. S. 1809) A case of horse stealing is simple larceny, and peremptory challenges will not be allowed.—United States v. Toms, Fed. Cas. No. 16,532 [1 Cranch, C. C. 607].

[e] (U. S. 1811) Upon an indictment for manslaughter, the prisoner is allowed the right of peremptory challenge.—United States v. Craig, Fed. Cas. No. 14,882 [2 Cranch, C. C. 36].

[f] (U. S. 1811) Upon the trial of indictment for forgery, under Act Md. 1795, c. 75, the defendant is entitled to no peremptory challenges.—United States v. Smithers, Fed. Cas. No. 16,347 [2 Cranch, C. C. 38].

[g] (U. S. 1814) In Alexandria, D. C., a prisoner indicted under Act April 30, 1790, § 16 (1 Stat. 116), for larceny, has the right of peremptory challenge.—United States v. Peter, Fed. Cas. No. 16,034 [2 Cranch, C. C. 98].

[h] (U. S. 1817) Upon a trial for bigamy in Alexandria, the prisoner is entitled to a peremptory challenge.—United States v. Lambert, Fed. Cas. No. 15,554 [2 Cranch, C. C. 137].

[i] (U. S. 1819) Upon the trial of an offense in the circuit court for the District of Columbia, where the punishment may be death, the court will allow peremptory challenges.—United States v. Black, Fed. Cas. No. 14,601 [2 Cranch, C. C. 195].

[j] (U. S. 1819) Upon an indictment for larceny, in Alexandria, D. C., the prisoner is entitled to a peremptory challenge, under Laws Va. Nov. 13, 1792, p. 103, § 3.—United States v. Gee, Fed. Cas. No. 15,196 [2 Cranch, C. C. 163].

[k] (U. S. 1821) A prisoner indicted for horse stealing, in Washington county, D. C., is not entitled to the right of peremptory challenge.—United States v. Krouse, Fed. Cas. No. 15,544 [2 Cranch, C. C. 252].

[l] (U. S. 1832) On an indictment for forgery, defendant has no right to peremptory challenges.—United States v. Shive, Fed. Cas. No. 16,278 [Baldw. 510].

[m] (U. S. 1833) Peremptory challenge may be allowed, upon an indictment for stealing a slave, in Alexandria, D. C.—United States v. Summers, Fed. Cas. No. 16,416 [4 Cranch, C. C. 334].

[n] (U. S. 1849) Upon a criminal prosecution in the circuit court of the District of Columbia, the prisoner has no right to peremptory challenges where the offense for which the prisoner is on trial is not a capital one.—Drayton v. United States, Fed. Cas. No. 4,074 [1 Hayw. & H. 369].

[o] (U. S. 1852) Peremptory challenges to jurors are not allowed in the courts of the United States in any other than capital cases, even though they are allowed in other cases by the state law.—United States v. Cottingham, Fed. Cas. No. 14,872 [2 Blatchf. 470].

[p] (U. S. 1868) No right to make a peremptory challenge to a juror exists at common law on the part of a person on trial for a misdemeanor.—United States v. Devlin, Fed. Cas. No. 14,953 [6 Blatchf. 71].

[q] (U. S. 1869) Act March 3, 1868, § 2 (13 Stat. 500), regulating peremptory challenges in criminal cases, does not give the right to such challenge except in capital cases, because, when

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the act was passed, such right did not exist by law in any other cases, but was only permitted by rule of court.—United States v. Randall, Fed. Cas. No. 16,118 [Deady, 524].

[r] (Mass. 1830) In a capital trial, the prisoner may challenge a juror peremptorily after he has made such answers on the voir dire as do not authorize a challenge for cause.—Commonwealth v. Knapp, 26 Mass. (9 Pick.) 496, 20 Am. Dec. 491.

[s] (N. Y. 1809) A person indicted for forging an order for the payment of money is not entitled to peremptory challenge, it being an offense under the statute punishable only with imprisonment for a term of years.—People v. Howell, 4 Johns. 296.

[t] (N. Y. 1847) On the preliminary trial of a prisoner's insanity before the trial of an indictment against him, he has not the privilege of peremptory challenges.—Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.

[u] (N. Y. 1847) Where a statute gives the right of peremptory challenges to a prisoner put on trial "for an offense punishable with death or imprisonment in a state prison ten years or any longer time," a person indicted for burglary in the second degree, which is punishable "by imprisonment in a state prison for a term not more than ten years nor less than five years," is entitled to peremptory challenges.—Dull v. People, 4 Denio, 91.

[v] (S. C. 1877) A prisoner indicted for horse stealing is entitled, since the act of 1830, to the right of peremptory challenge, though it should not appear, on the face of the indictment, that it was for the first or second offense.—State v. Allen, 8 Rich. Law, 448.

[w] (Va. 1843) Upon an inquiry, in pursuance of Rev. Code, c. 171, § 16, whether a convict received into the penitentiary be the same person mentioned in the record of a former conviction, the prisoner has no right to challenge peremptorily any person called as juror.—Brooks v. Commonwealth, 2 Rob. 845.

[x] (W. Va. 1891) Since, under Code, c. 116, § 17, "in every case, the plaintiff and defendant may each challenge four jurors peremptorily," the refusal by the court, on the trial of an indictment for a misdemeanor, to allow defendant such challenges, is reversible error.—State v. Pearis, 35 W. Va. 320, 13 S. E. 1006.

§ 603. —— Right of prosecution.

As infringement of right to trial by jury, see ante, § 232.

Standing jurors aside, see ante, § 501.

[a] The people are not allowed any peremptory challenge in a criminal case.

—(N. Y. 1854) People v. Henries, 1 Parker, Cr. R. 579;

(S. C. 1805) State v. Stalmaker, 2 Brev. 1.

[b] (Ky. 1832) On an indictment for permitting unlawful gaming, the commonwealth has no right of peremptory challenge.—Commonwealth v. Bailey, 30 Ky. (7 J. J. Marsh.) 246.

[c] (N. J. 1855) Act Feb. 12, 1852 (P. L. p. 32), provides that the attorney general or prosecutor of the state shall be entitled to challenge peremptorily 3 of the panel of jurors summoned or returned to the sheriff or other officer, provided that the act shall not apply to the cases of struck juries. Rev. St. p. 968, pars. 15, 16, provide that struck juries may be had in all criminal cases, except where the party is entitled to 20 peremptory challenges. *Held*, that it could not be said that the act of 1852 was designed to include not only struck juries, technically so called, but also all juries where defendant is entitled to a service of the list and to 20 peremptory challenges, since the latter statute clearly distinguishes between the two kinds of juries, allowing the one only where the party is not entitled to the other, and therefore the state was entitled to strike 3 names peremptorily from a panel of 48 summoned and returned to try an indictment.—Cook v. State, 24 N. J. Law (4 Zab.) 843.

[d] (N. Y. 1852) 2 Rev. St. p. 734, § 11, providing that the prosecution shall be entitled to the same challenges as are allowed parties in civil causes, and the same proceedings shall be allowed thereon as in civil causes; and Laws 1847, p. 130, c. 134, § 1, providing that on the trial of an issue of fact in a civil action each party shall be entitled to two peremptory challenges,—do not entitle the prosecution to any peremptory challenges.—People v. Aichinson, 7 How. Prac. 241.

[e] (Ohio) The state has no peremptory challenge in a capital case.—(1845) State v. Carver, 1 Ohio Dec. 135. CONTRA, see (1857) Fouts v. State, 8 Ohio St. 98.

[f] (Pa. 1811) The commonwealth may challenge peremptorily in cases of felonies and misdemeanor.—Commonwealth v. Addis, 1 Browne, 285.

[g] (Pa. 1873) At common law the government has no peremptory challenges.—Commonwealth v. Keenan (Quart. Sess.) 30 Leg. Int. 416.

§ 604. Coplaintiffs or codefendants.

Effect of challenges, see post, § 628.

Special or struck jury, see ante, § 376.

[a] Where several defendants are indicted and tried together, one of them cannot complain because jurors not challenged by him were challenged by a codefendant.

—(La. 1853) State v. Cazeau, 8 La. Ann. 109;

(Me. 1888) State v. Cady, 80 Me. 413, 14 Atl. 940;

(N. H. 1877) State v. Doolittle, 58 N. H. 92;

(N. C. 1842) State v. Smith, 24 N. C. 402; (1890) State v. Jacobs, 106 N. C. 695, 10 S. E. 1031.

[b] (Cal. 1857) If one jointly indicted for a capital offense elect a joint trial, he cannot challenge peremptorily or for cause, without the consent of his codefendant. Comp. Laws, § 327.—People v. McCalla, 8 Cal. 301.

[c] (Ga. 1805) If two persons joined in an indictment wish the privilege of each challenging 20 jurors, they must claim the privilege before trial, and cannot object, in arrest of judgment, that they were allowed by 20 peremptory challenges jointly.—State v. Monaquas, T. U. P. Charlt. 16.

[d] (La. 1847) A party cannot deprive his codefendant of the right to challenge peremptorily.—Reynolds v. Rowley, 2 La. Ann. 890.

[e] (La. 1887) Neither the prosecution nor the accused, though he be one of two or more jointly indicted and on trial, can be heard to complain of peremptory challenges tendered by the other.—State v. Durr, 39 La. Ann. 751, 2 South. 546.

§ 605. Special or struck jury.

Manner of striking, see ante, § 376.

Number, see post, § 617.

[a] (U. S. 1849) In the federal circuit court for the Third circuit, no peremptory challenges are allowed to either side, where the jury has been already struck on both sides.—Blanchard v. Brown, Fed. Cas. No. 1,507 [2 Blatchf. 411].

[b] (Ga. 1859) Under our practice, "striking" a jury in petty offense is equivalent to challenging them.—O'Byrne v. State, 29 Ga. 86.

[c] (Ind. 1887) Under Code, § 525, prescribing the mode of selecting a struck jury, and providing that the names "shall be called as they stand upon the panel, and the first 12 of them who shall appear and are not challenged for cause, or set aside by the court, shall be the jury" in the cause, the right of peremptory challenge does not exist.—May v. Hoover, 112 Ind. 455, 14 N. E. 472.

[d] (Minn. 1886) A party has no right of peremptory challenge to any of the 16 names constituting the venire for a struck jury, under Gen. St. c. 71, § 15; and the fact that, by reason of the nonappearance of a part of this number, talesmen have to be called to complete the jury, gives no right of peremptory challenge to those on the struck list who do appear.—Branch v. Dawson, 36 Minn. 193, 30 N. W. 545.

[e] (Minn. 1889) Where a struck jury is summoned under the provisions of Gen. St. 1878, c. 71, § 15, no peremptory challenges will be allowed to any of the jurors composing the panel as finally made up.—Watson v. St. Paul City Ry. Co., 42 Minn. 46, 43 N. W. 904.

[f] (N. J.) Laws 1878, p. 284, § 1, which provides that, "upon the trial of any indictment where 20 peremptory challenges are not allowed, the defendant shall be entitled to challenge peremptorily, at any time before the jury is sworn, 6 of the general panel of jurors summoned and returned by the sheriff or other officer," does not apply when the trial is to be conducted with a jury previously elected or struck. —(1891) Moschell v. State, 53 N. J. Law (24 Vroom) 498, 22 Atl. 50; (1892) Id., 54 N. J. Law (25 Vroom) 390, 25 Atl. 964.

[g] (Ohio, 1832) Where a jury is struck, the right to challenge peremptorily is taken away, semble.—Wouleldorf v. Steignbergen, Wright, 41.

[h] (Ohio, 1857) A struck jury (St. March 12, 1853) is not subject to peremptory challenge; but a jury of seven struck jurors and five talesmen is not such a jury.—Cleveland, P. & A. R. Co. v. Stanley, 7 Ohio St. 155.

[i] (Ohio, 1876) Upon impaneling a struck jury, under the statute (San. & S. Rev. St. p. 407), after 12 jurors have passed into the box unchallenged for cause, the party demanding the struck jury has no right of peremptory challenge.—State v. Moore, 28 Ohio St. 595.

[j] (Pa. 1871) Under Act Assem. March 29, 1860 (P. L. 344), providing that on trial of all civil suits in any court of this commonwealth the plaintiff and defendant shall each have four peremptory challenges, a peremptory challenge may be made to a juror on a struck list. —McDermott v. Hoffman, 70 Pa. (20 P. F. Smith) 31.

§ 606. Jurors subject to challenge.

[a] (U. S. 1830) The United States may challenge a juror in the first instance peremptorily, till the panel is exhausted, after which they can only challenge for cause.—United States v. Wilson, Fed. Cas. No. 16,730 [Baldw. 78].

[b] (U. S. 1883) In the trial of a prosecution for presenting false claims to the government, or making a false affidavit concerning a pension, the district court is governed by section 819 of the Revised Statutes, and under that section each party will be entitled to three peremptory challenges; and when the calling of a new juror is necessitated by the challenge of either party, the other party has a right of challenge as to such juror, although he may have previously passed the list, provided he has not already exhausted his three peremptory challenges.—United States v. Daubner (D. C.) 17 Fed. 793.

[c] (Ky. 1883) Where either the commonwealth or the defendant decline to challenge, the challenges as to jurors thus passed are exhausted.—Munday v. Commonwealth, 81 Ky. 233.

[d] (Ohio, 1877) Code Cr. Proc. § 133, provides that "the prosecuting attorney and every defendant may peremptorily challenge two of the panel." In a criminal case, a special venire was exhausted by the challenge of one of such venire, and thereupon a regular juror was called to fill the panel. *Held*, that defendant had the right then to challenge one of the panel; he having up to that time exercised but one peremptory challenge.—Koch v. State, 32 Ohio St. 352.

[e] (S. C. 1870) After jurors have been challenged, under the act of 1841, and others drawn in their places, neither party can, under the act, challenge the jurors so drawn.—Durant v. Ashmore, 2 Rich. Law, 184.

[f] (S. C. 1878) On trial for conspiracy the state challenged two jurors, whose places were filled by two from the supernumerary list. The defense challenged the latter two before accepting or rejecting any of the other jurors. *Held*, that the challenges of the defense so interposed were properly disallowed.—State v. Cardoza, 11 S. C. 195.

[g] (S. C. 1881) The plaintiff in a civil cause cannot peremptorily challenge a juror drawn to fill the place of a juror removed for cause.—Huff v. Watkins, 15 S. C. 82, 40 Am. Rep. 680; Gunter v. Graniteville Mfg. Co., 15 S. C. 443.

[h] (S. C. 1882) Gen. St. p. 523, allows each party to challenge peremptorily "two of the jury so impaneled, and the place of the jurors so challenged shall be supplied as provided by law." *Held*, that defendant could not challenge talesmen drawn in place of jurors removed by the challenges of plaintiff.—Burckhalter v. Coward, 16 S. C. 435.

[i] (Tex. 1891) Under Rev. St. art. 3084, allowing a party, in trespass to try title, six peremptory challenges, and articles 3088–3090, directing that, if the jurors drawn are less than 12, talesmen shall be summoned to complete the jury, whose names shall be entered on slips just as in the original drawing, a party who has not exhausted his peremptory challenges has a right to exhaust them on the talesmen, and it is error to have the talesmen thus summoned sworn in, without giving the party an opportunity to challenge them.—Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705.

[j] (Wis. 1888) Rev. St. § 2851, entitling each party to three peremptory challenges from a full panel called in the action, applies to a jury filled out by special venire, as well as to the regular panel.—Olson v. Solverson, 71 Wis. 663, 38 N. W. 329.

2. NUMBER.

STATUTORY PROVISIONS, § 607.
CIVIL ACTIONS AND PROCEEDINGS, § 608.
—— COPLAINTIFFS OR CODEFENDANTS, § 609.
CRIMINAL PROSECUTIONS, § 610.
—— NATURE OF OFFENSE AND EXTENT OF PUNISHMENT, § 611.
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DISABLING OF JURORS PENDING TRIAL, § 615.
ALLOWANCE OF ADDITIONAL CHALLENGES, § 616.
SPECIAL OR STRUCK JURY, § 617.
ERRORS AND IRREGULARITIES, § 618.

Effect of discharge of jurors by court, see ante, § 540.
—— *of error in overruling challenges for cause, see* ante, § 598.
Number of peremptory challenges as affecting size of panel, see ante, § 290 [n].
Local legislation respecting challenges, see "Statutes," II.

§ 607. Statutory provisions.

Sufficiency of title of act allowing peremptory challenges, see "Statutes," III.

[a] (U. S. 1840) In offenses made capital by Act April 30, 1790 (1 Stat. 118), the prisoner may challenge 20 jurors peremptorily, and no more. In offenses made capital since that act, he is entitled to 35 peremptory challenges, according to the rules of the common law.—United States v. Dow, Fed. Cas. No. 14,990 [Taney, 34].

[b] (Ala. 1888) Act Gen. Assem. Feb. 28, 1887, § 17, repealed all laws in conflict with it, and provided that "all laws now in force in relation to jurors, their drawing, selecting, or qualification, not in conflict with this act, are hereby continued in full force and effect;" but contained no provisions as to jurors in capital cases. *Held* not a re-enactment of that date of the provisions of the act of 1885 allowing a defendant in a capital case 12 peremptory challenges, so as to affect Code 1886, § 4330, under which such a defendant is entitled to 21 peremptory challenges, under Const. 1875, art. 4, § 2, providing that, in order to re-enact or confer the provisions of an older act, such part as is re-enacted shall be published at length.—Todd v. State, 85 Ala. 339, 5 South. 278.

[c] (Ala. 1889) Section 13 of the general act, as amended, providing that in capital cases the defendant shall have 21, and the state 14, peremptory challenges, conflicts with and repeals section 8 of the Jefferson county act, allowing 10 and 5, respectively. The other sections of the local act remain in force.—Maxwell v. State, 89 Ala. 150, 7 South. 824.

[d] (Conn. 1880) At the time of the commission of a homicide, the state was, by statute, allowed two peremptory challenges. By an act passed afterwards, but before the trial, the state was allowed a greater number. *Held*, that the act related solely to the mode of procedure, and therefore governed the trial of the case.—State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89.

[e] (Fla. 1893) The right to peremptorily challenge jurors does not accrue to an accused until trial; and Laws 1891, c. 4055, § 3, adopting the revision, and providing that "the repeal of any statute by said revision shall not affect any right accrued before such repeal," does not save to one charged with a capital crime alleged to have been committed before the Revised Statutes became operative the right to 20 peremptory challenges given by the previous law.—Mathis v. State, 31 Fla. 291, 12 South. 681.

[f] (Ind. 1847) The right of challenging jurors peremptorily in Decatur county has been, since the act of 1846 on the subject, governed by the general law; and, by the general law on the subject, each of the parties may, under certain circumstances, challenge six jurors peremptorily.—Cable v. State, 8 Blackf. 531.

[g] (Ind. 1866) Section 67 of the justices' act (2 Gav. & H. St. p. 596), which provides that cases appealed from justices of the peace shall be tried under the same rules and regulations as are prescribed for trials before justices, cannot be construed to give four peremptory challenges on appeal, as provided by section 52 of the justices' act, instead of three, as provided by the Code.—Kerschner v. Cullen, 27 Ind. 184.

[h] (Iowa, 1891) Code 1873, §§ 4413, 4414, as amended by Acts 22d Gen. Assem. c. 39, providing that, in impaneling a jury to try a felony punishable by death or imprisonment for life, the state and defendant are each entitled to 10 peremptory challenges, in force at the time of the trial, and not the one in force at the time of the commission of the offense, governs the number of peremptory challenges to be permitted.—State v. Shreves, 81 Iowa, 615, 47 N. W. 899.

[i] (Ky. 1855) That section of the Criminal Code which allows to the commonwealth five peremptory challenges in prosecutions for felony applies as well to prosecutions pending at the time of its passage as to those commenced afterwards.—Walston v. Commonwealth, 55 Ky. (16 B. Mon.) 15.

[j] (Me. 1883) The state is entitled to five peremptory challenges, under Act 1872, c. 78, giving the state that number in capital cases, though the death penalty has been abolished.—State v. Chadbourne, 74 Me. 506.

[k] (Mo. 1857) The "act to regulate and pay grand and petit jurors in Stoddard county," approved February 13, 1855, does not take away the right of the defendant, on a trial for murder, to challenge peremptorily 20 jurors.—State v. Buckner, 25 Mo. 167.

[l] (Pa. 1885) Act 1885, § 140 (P. L. 138), provides that 20 jurors shall be drawn from the box, from which number the plaintiff and defendant shall strike alternately one juror at a time "until each party shall have exercised the four peremptory challenges allowed by law, and the remaining twelve jurors" shall be the jury to try the case, is applicable to cases in which the parties had theretofore the right to 4 peremptory challenges, and not to those cases in which 20 peremptory challenges are allowed.—Commonwealth v. Carling, 1 Pa. Co. Ct. R. 413.

§ 608. Civil actions and proceedings.

[a] (Ala. 1882) As the statutes relating to trials for bastardy do not state the number of peremptory challenges to which defendant is entitled, he cannot complain that he was not allowed six challenges as in criminal cases.—Dorgan v. State, 72 Ala. 173.

[b] (Conn. 1850) A complaint under the statute of forcible entry and detainer is regarded as a civil remedy; and, on the trial of such a complaint, each party has the right of challenging peremptorily two jurors.—Quinebaug Bank v. Tarbox, 20 Conn. 510.

[c] (Conn. 1850) On the trial of a complaint in summary process to obtain possession of leased premises, each party has the right of challenging peremptorily two jurors.—Miner v. Brown, 20 Conn. 519.

[d] (Ind. 1865) Section 67 of the justices' act (2 Gav. & H. St. p. 596), which provides that cases appealed from justices of the peace shall be tried under the same rules and regulations prescribed for trials before justices, cannot be construed to give four peremptory challenges on appeal, as provided by section 52 of the justices' act, instead of three, as provided by the Code.—Vanschoiack v. Farrow, 25 Ind. 310.

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[e] (Wis. 1844) Three peremptory challenges of jurors may be allowed upon an assessment of damages in open court.—Hill v. Bloomer, 1 Pin. 463.

§ 609. —— Coplaintiffs or codefendants.

[a] (U. S. 1892) Where actions by one plaintiff against different defendants, in which the defenses are the same, are consolidated, each of the several defendants in such a consolidated action is entitled to the three peremptory challenges allowed each party by statute, since Rev. St. § 819, in stating that the "parties on each side shall be deemed a single party for the purposes of all challenges," does not refer to consolidated actions.—Mutual Life Ins. Co. of New York v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706; New York Life Ins. Co. v. Same, Id.; Connecticut Mut. Life Ins. Co. v. Same, Id.

[b] (Ala. 1841) The several defendants in a cause constitute but one party, and are entitled to no more peremptory challenges than a single defendant.—Bibb v. Reid, 3 Ala. 88.

[c] (Idaho, 1888) Where in an action there are several parties on either side, each side has four peremptory challenges.—United States v. Alexander, 2 Idaho, 354, 17 Pac. 746.

[d] (Ind. 1860) The expression "each party," as used in 2 Rev. St. 1852, § 313, p. 107, includes, on the one hand, all persons named as plaintiffs, and, on the other, all who are joined as defendants; and "each party," as thus defined, and not each plaintiff or defendant, is entitled to challenge peremptorily three jurors.—Snodgrass v. Hunt, 15 Ind. 274.

[e] (Ky. 1830) In a civil action of trespass for assault and battery, where there has been but one trespass, the defendants, though they plead severally, are entitled to only three peremptory challenges.—Sodousky v. McGee, 27 Ky. (4 J. J. Marsh.) 267.

[f] (Mass. 1866) Under St. 1862, c. 84, giving either party in a civil cause the right to challenge peremptorily two of the jurors, joint plaintiffs or defendants can challenge peremptorily but two jurors in all.—Stone v. Segur, 93 Mass. (11 Allen) 568.

[g] (Mich. 1877) Under Comp. Laws, § 6027, that in all civil cases each party may challenge peremptorily two jurors, when several defendants unite in one plea and defense, and appear by the same counsel, two challenges to all the defendants are all that need be allowed; but where two defendants sever in pleas, and appear by different counsel to litigate antagonistic defenses, each must be deemed a "party," within the enactment, and entitled to two challenges.—Stroh v. Hinchman, 37 Mich. 490.

[h] (Neb. 1885) When an action is brought against two or more defendants jointly, they are entitled to no more peremptory challenges of jurors than where the action is against a single defendant.—McClay v. Worrell, 18 Neb. 44, 24 N. W. 429.

[i] (N. C. 1877) Battle's Revisal, § 229, provides that "the parties, or their counsel for them, may challenge peremptorily four jurors." *Held*, that but four peremptory challenges on each side are allowable, whether there be one or more than one plaintiff or defendant.—Bryan v. Harrison, 76 N. C. 360.

[j] (Ohio, 1889) Under Rev. St. § 5177, providing that in impaneling a jury each party may peremptorily challenge two jurors, "each party" means "side," and however numerous the defendants in a civil case may be they can only exercise two peremptory challenges.—Moores v. Bricklayers' Union, 10 Ohio Dec. 665, 23 Wkly. Law Bul. 48.

[k] (Ohio, 1890) In a civil action against two or more defendants jointly, where the defendants file separate answers making the same defense, and are represented by different counsel, all of the defendants constitute one party to the action, under Rev. St. § 5177, and are entitled to but two peremptory challenges.—Gram v. Sampson, 4 Ohio Cir. Ct. R. 490, 2 O. C. D. 666.

[l] (Tenn. 1867) The "party," in the sense of section 4012 of the Code, entitled to two peremptory challenges, is either party to the action, whether comprising one or more persons.—Blackburn v. Hays, 44 Tenn. (4 Cold.) 227.

[m] (Tex. 1883) In a suit against a building contractor to recover possession of the building, on the ground that plaintiff had paid the full contract price, a person claiming a material man's lien was made a party. *Held*, that the interests of the codefendant were not antagonistic, so as to entitle each to six peremptory challenges.—Jones v. Ford, 60 Tex. 127.

[n] (Tex. 1891) Where there was no antagonism of interests between the defendants in an action for false imprisonment, it was no abuse of discretion to limit the challenges of all of them to six jurors.—Wolf v. Perryman, 82 Tex. 112, 17 S. W. 772.

[o] (Tex. 1891) A firm of druggists and its prescription clerk were joined as defendants in an action brought by a parent to recover damages for the death of his child caused by the mistake of the clerk in putting up a prescription. *Held* not such a case as would entitle the clerk to challenge six jurors in addition to the six challenges by the other defendants, under Rev. St. art. 3084, which provides that "each party to a civil suit in the district court shall be entitled to six peremptory challenges."—Hargrave v. Vaughn, 82 Tex. 347, 18 S. W. 695.

[p] (Tex. 1894) Rev. St. art. 3084, provides that each party to a civil action in the district court shall be entitled to six peremptory challenges. *Held*, that where, in garnishment, plaintiff and intervener were making common cause against the garnishee, intervener cannot, on appeal, complain that he was not allowed to challenge any juror, except in conjunction with plaintiff, and that plaintiff exhausted all his challenges; it not appearing from the bill of exceptions that intervener was forced to accept any juror objectionable to him; and no injury being shown to have been sustained from the action of the court.—Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co., 8 Tex. Civ. App. 227, 28 S. W. 1027.

[q] (Tex. 1895) Under Rev. St. art. 3084, providing that "each party to a civil suit in the district court shall be entitled to six peremptory challenges," several defendants whose interests are identical will be regarded as one party; but if the issues between them and plaintiff are different, or if they claim adversely to each other, each is entitled to six peremptory challenges.—Rogers v. Armstrong Co. (Civ. App.) 30 S. W. 848.

[r] (Tex. 1896) On a trial of right of property between vendee's attaching creditors and the vendor, the creditors should, as constituting a single party, be allowed the challenges to which a single party is entitled.—Raby v. Frank, 12 Tex. Civ. App. 125, 34 S. W. 777.

[s] (Wis. 1875) The word "party," as used in Rev. St. c. 118, § 36, entitling each party to three peremptory challenges, applies to each defendant having a distinct issue to maintain; otherwise, where all have a common defense, even though they answer severally.—Hundhausen v. Atkins, 36 Wis. 518.

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§ 610. Criminal prosecutions.

As infringement of right to trial by jury, see ante, § 232.

Statutory provisions, see ante, § 607.

[a] In criminal cases the state may challenge peremptorily three jurors.
—(Ind. 1837) Wiley v. State, 4 Blackf. 458; (1842) Beauchamp v. Same, 6 Blackf. 299; (Mo. 1840) Mallison v. State, 6 Mo. 399.

[b] (Ga. 1892) Under Code, §§ 298, 299c, on trial in the county court of an indictment transferred from the superior court, the accused has four challenges and the state two.—Grant v. State, 89 Ga. 393, 15 S. E. 488.

[c] (Mo. 1891) Under Rev. St. 1889, § 4200, which allows a defendant charged with an offense punishable by death or imprisonment 20 peremptory challenges, and a defendant charged with an offense punishable by imprisonment alone not more than 12 peremptory challenges, a defendant indicted for murder in the first degree, but only tried for murder in the second degree, is only entitled to 12 challenges, since murder in the second degree is not punishable with death.—State v. Talmage, 107 Mo. 543, 17 S. W. 990.

[d] (N. Y. 1850) By 2 Rev. St. p. 734, § 11, construed in connection with the act of 1847 (Laws 1847, p. 130), the prosecuting officer of the state is entitled to challenge peremptorily the same number of jurors as is allowed to parties in civil actions.—Waterford & Whitehall Turnpike v. People, 9 Barb. 161.

[e] (N. Y. 1855) Under the statutes, the people are entitled to two peremptory challenges, in a criminal prosecution.—People v. Caniff, 2 Parker, Cr. R. 586.

[f] (N. C. 1801) A prisoner may challenge 35 jurors, and no more, without showing cause.—State v. Gayner, Conf. R. 305; Same v. Gainer, 3 N. C. 140.

[g] (Ohio, 1889) Under Rev. St. § 7277, providing that "except as otherwise provided * * * every defendant may peremptorily challenge two of the panel," a defendant in a criminal trial is only entitled to two peremptory challenges unless he is on trial for a capital offense when section 7272 entitles him to sixteen peremptory challenges. The facts that defendant had been indicted for murder in the first degree, that a jury of 36 had been summoned and were in attendance for his trial, that a nolle was then entered as to the charge of murder in the first degree, and that a jury to try him for murder in the second degree was being impaneled from the 36 jurors so in attendance, did not enlarge his right in this respect.—Goins v. State, 46 Ohio St. 457, 21 N. E. 476.

[h] (S. C. 1887) Where the court, the regular panel for the week being exhausted by peremptory challenges, continued the cause to the next week, instead of summoning additional jurors, and then placed defendant on trial before the regular jury for that week, it was error to restrict defendant's peremptory challenges to the number not previously used.—State v. Briggs, 27 S. C. 80, 2 S. E. 854.

[i] (Tenn. 1876) In a trial for a capital crime, the court, in reply to the defendant's counsel, said that he was entitled to 10 peremptory challenges, instead of 24, as given by Code 1865, § 4673a. *Held*, after a verdict of guilty, commuting the punishment to imprisonment, that the judgment should be reversed.—Fowler v. State, 67 Tenn. (8 Baxt.) 573.

[j] (Tex. 1878) Under Pasch. Dig. art. 3037, allowing a defendant in capital cases 20 peremptory challenges and in other cases only 10, a defendant after having been convicted of murder in the second degree, and obtained a reversal on appeal, is only entitled to 10 peremptory challenges at the new trial, as he has been acquitted of murder in the first degree.—Cheek v. State, 4 Tex. App. 444.

§ 611. —— Nature of offense and extent of punishment.

Bastardy proceedings, see ante, § 608 [a].

Statutory provisions, see ante, § 607.

[a] (U. S. 1896) Rev. St. § 5472, imposing penalties for robbing the mails, uses the word "rob" in its common-law sense; and hence the crime specified is a felony, within Rev. St. § 819, giving defendant on a trial for felony the right to 10 peremptory challenges.—Harrison v. United States, 163 U. S. 140, 16 Sup. Ct. 961, 41 L. Ed. 104.

[b] (U. S. 1806) In all cases of felony, by the laws of Virginia, the prisoner is entitled to a peremptory challenge of 20 jurors.—United States v. Browning, Fed. Cas. No. 14,673 [1 Cranch, C. C. 830].

[c] (U. S. 1806) One indicted for murder on the high seas is entitled, by the express provision of the statutes, to only 20 peremptory challenges.—United States v. Russel, Fed. Cas. No. 16,209 [4 U. S. (4 Dall.) 414, note, 1 L. Ed. 889].

[d] (U. S. 1844) On an indictment for murder 20 peremptory challenges of jurors are allowed.—United States v. Hewson, Fed. Cas. No. 15,360 [Brunner, Col. Cas. 532].

[e] (U. S. 1880) Section 819 of the Revised Statutes provides that, "when the offense charged is treason or a capital offense, the defendant shall be entitled to 20 and the United States to 5 peremptory challenges. On the trial of any other felony the defendant shall be entitled to 10 and the United States to 3 peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to 3 peremptory challenges." *Held*, that the offense of uttering and passing counterfeit coin was not a felony within the terms of this section.—United States v. Coppersmith (C. C.) 4 Fed. 198.

[f] (U. S. 1883) The offense of presenting a claim known to be false or fraudulent to any person in the civil service, for payment or approval, punishable by hard work and a fine (Rev. St. § 5438), and of procuring the making or presentation of a false or fraudulent affidavit concerning a pension, punishable by imprisonment and fine or both (section 4746), are not felonies under the federal laws, within section 819, giving a defendant 10 peremptory challenges in such cases.—United States v. Daubner (D. C.) 17 Fed. 793.

[g] (Cal. 1881) It is only in capital cases, or cases in which a life sentence is in terms affixed by the legislature as the punishment for a crime, that defendant is entitled to 20 peremptory challenges. Robbery is not such a crime.—People v. Clough, 59 Cal. 438.

[h] (Cal. 1882) Upon prosecution for robbery, where the information charges that the defendant had been previously convicted of a similar crime, the offense charged is punishable, under Code, § 667, by imprisonment for life in the state prison; and the defendant, therefore, is entitled to 20 peremptory challenges.—People v. Harris, 61 Cal. 136.

[i] (Cal. 1882) One charged with a crime punishable only by imprisonment for life is entitled, under Code, § 1070, to 20, not to 10 only, peremptory challenges.—People v. O'Neil, 61 Cal. 435.

[j] (Cal. 1895) Pen. Code, § 1070, provides that, if the offense charged be punishable with

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death or with imprisonment for life, defendant is entitled to 20 and the state to 10 peremptory challenges. On a trial for any other offense defendant is entitled to 10 and the state to 5 peremptory challenges. *Held*, that on a trial for rape defendant is limited to 10 challenges.—People v. Fultz, 109 Cal. 258, 41 Pac. 1040.

[k] (Conn. 1881) Under Gen. St. 1875, c. 13, § 5, providing that "for any offense punishable by imprisonment for life" there may be a challenge of 10 jurors, and "for any offense the punishment for which may be imprisonment in the state prison for less than life, 4 jurors," *held* that, where the offense was punishable at the discretion of the judge for life or less than life, defendant was entitled to a challenge of 10 jurors.—State v. Neuner, 49 Conn. 232.

[l] (Ind. 1842) On the trial of an indictment for murder, the state is entitled to three peremptory challenges.—Beauchamp v. State, 6 Blackf. 299.

[m] (Ky. 1830) In prosecutions under a penal statute, the prisoner has not the right of 20 peremptory challenges.—Montee v. Commonwealth, 26 Ky. (3 J. J. Marsh.) 132.

[n] (Ky. 1850) In case of an indictment for stabbing without malice, the defendant may challenge 20 jurors peremptorily.—Hayden v. Commonwealth, 49 Ky. (10 B. Mon.) 125.

[o] (Ky. 1853) The keeping of a gaming house being only a misdemeanor, the prosecution and the defendant are each entitled, as in civil cases, to three peremptory challenges and no more.—Buford v. Commonwealth, 53 Ky. (14 B. Mon.) 24.

[p] (Me. 1878) Since the punishment for murder has been reduced from death to imprisonment for life, by Laws 1876, c. 114, a prisoner on trial for murder has the right to challenge only two jurors peremptorily.—State v. Smith, 67 Me. 328.

[q] (Mo. 1873) In an indictment for rape, defendant is not entitled, under Wag. St. pp. 449, 450, § 82, and Id., p. 1102, § 4, to a peremptory challenge of 12 jurors.—State v. Ray, 53 Mo. 345.

[r] (Mo. 1887) Rev. St. § 1261, provides that a person convicted of mayhem shall be confined in the penitentiary not more than 25 years. Section 1900 provides that the defendant on trial for an offense punishable by not less than a certain number of years' imprisonment, but with no limit as to its duration, shall be entitled to 12 peremptory challenges of jurors; for offenses punishable by death or imprisonment for life, 20 challenges; in other cases punishable by imprisonment in the penitentiary, 8 challenges and no more. *Held*, that in an indictment for mayhem defendant was entitled to 8 challenges.—State v. Stevenson, 93 Mo. 91, 5 S. W. 806.

[s] (N. Y. 1891) On a prosecution for manslaughter, which is punishable by imprisonment for not less than 5 nor more than 20 years, defendant is entitled to 20 peremptory challenges, under Code Cr. Proc., allowing 20 challenges if the crime charged be punishable with imprisonment for life or for a term of 10 years or more.—People v. Keating, 61 Hun, 260, 16 N. Y. Supp. 748.

[t] (N. C. 1801) One indicted for horse stealing cannot challenge peremptorily more than 35 jury men.—State v. Gayner, 1 N. C. 479, Conf. R. 305; Same v. Gainer, 3 N. C. (2 Hayw.) 140.

[u] (N. C. 1854) A defendant, on a trial for a clergyable felony, is entitled to challenge peremptorily 35 jurors.—State v. Cadwell, 46 N. C. 289.

[v] (N. C. 1888) Under Code, § 1199, a defendant on trial for a crime not capital has but four peremptory challenges.—State v. Hargrave, 100 N. C. 484, 6 S. E. 185.

[w] (Ohio, 1847) The defendant in a capital case is entitled to only 23 peremptory challenges.—Martin v. State, 16 Ohio, 364.

[ww] (Pa. 1859) A defendant charged with counterfeiting bank notes, though such crime is made a felony by the act of assembly, is entitled to but 4 peremptory challenges. The right to 20 peremptory challenges existing in capital felony only.—Commonwealth v. Handy, 3 Phila. 403.

[x] (Pa. 1861) Forgery was never a felony of death, and a prisoner charged with it is entitled to the same number of challenges which is allowed in cases of misdemeanor.—Shuster v. Commonwealth, 38 Pa. (2 Wright) 206.

[xx] (Pa. 1861) Prisoners are entitled to 20 peremptory challenges, only when charged with crimes that were felonies of death on September 15, 1786.—Shuster v. Commonwealth, 38 Pa. (2 Wright) 206.

[y] (Pa. 1873) In Pennsylvania the right to challenge jurors is regulated by statute. In all cases of treason, murder, manslaughter, concealing the death of a bastard child, rape, robbery, sodomy, malicious maiming, and arson, the accused is entitled to 20, and on the trial of all other indictments to 4, peremptory challenges. In all cases the commonwealth has the right to challenge peremptorily 4 of the panel of jurors.—Commonwealth v. Keenan (Quart. Sess.) 30 Leg. Int. 416.

[yy] (Tenn. 1808) One indicted for horse stealing, under Act 1807, is entitled to a peremptory challenge of 35 jurors, although such privilege is for those on trial for life; and the statute provides corporal punishment for the first offense, and death for the second.—State v. Humphreys, 1 Tenn. (1 Overt.) 306.

[z] (Tenn. 1826) A man charged with perjury is entitled to challenge peremptorily the same number of jurors as in other cases of felony.—Hooper v. State, 13 Tenn. (5 Yerg.) 422.

[zz] (Tenn. 1870) On the trial of all criminal prosecutions above the grade of petit larceny, the state is, under the Code, entitled to 10 peremptory challenges; and the defendant, if charged with a capital felony, is entitled to 35 challenges.—Allen v. State, 47 Tenn. (7 Cold.) 357.

§ 612. —— Codefendants.

[a] Where several defendants are jointly tried, each is entitled to the number of peremptory challenges allowed by law.
—(Ala. 1855) Brister v. State, 26 Ala. 107;
(La. 1853) State v. Cazeau, 8 La. Ann. 109; (1885) Same v. Ford, 37 La. Ann. 443;
(Ohio, 1833) Bixbee v. State, 6 Ohio (6 Ham.) 86;
(Tenn. 1829) Hill v. State, 10 Tenn. (2 Yerg.) 246.

[b] (U. S. 1890) Under Rev. St. § 819, which restricts persons indicted for a capital felony to 20 peremptory challenges, where several persons are jointly indicted for such felony they are to be deemed a single party for the purpose of such challenges, and are only entitled to 20 peremptory challenges in all.—United States v. Hall (C. C.) 44 Fed. 883, 10 L. R. A. 323.

[c] (Ala. 1889) Under Act 1888–89, pp. 77–79, giving a defendant in a capital case 21 peremptory challenges, and providing that when two or more defendants are tried jointly for a capital offense each shall be entitled to "one-half of the peremptory challenges allowed by

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this act," there is no error in giving to one of two defendants 10 and to the other 11 peremptory challenges.—Gibson v. State, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96.

[d] (Ala. 1894) Act Feb. 28, 1887, § 13 (Cr. Code, p. 132), as amended by Act Feb. 28, 1889 (Acts 1888–89, p. 77), provides that on the trial of a capital case the defendant shall have 21 peremptory challenges, and that when two or more defendants are on trial jointly each shall have one-half of the peremptory challenges allowed by the act. *Held*, that a joint defendant, who accepts 11 peremptory challenges, cannot complain that the act is impossible of execution, and that the Code provision giving each defendant 21 peremptory challenges hence applies.—Gregg v. State, 106 Ala. 44, 17 South. 321.

[e] (Ga. 1877) In trials of prisoners jointly, each has the same right to peremptory challenge as if tried severally, unless they stipulate otherwise.—Cruce v. State, 59 Ga. 83.

[f] (Ill. 1854) Under a statute allowing each defendant a certain number of peremptory challenges, the full number of challenges is preserved to each defendant, though they are tried jointly.—Maton v. People, 15 Ill. (5 Peck) 536.

[g] (Kan. 1883) Each of two defendants, joined in one information for a misdemeanor, and put on trial together, is entitled to the same number of peremptory challenges that he would be entitled to if tried separately.—State v. Durein, 29 Kan. 688.

[h] (Ky. 1894) Cr. Code, § 198, providing that, when several defendants are tried together, the challenge of any one shall be deemed the challenge of all, authorizes the court to charge defendant with peremptory challenges made by himself and his codefendant before he demanded a separate trial.—Glass v. Commonwealth, 26 S. W. 811.

[i] (La. 1869) Where two parties are tried together for murder, each one is entitled to 12 peremptory challenges to the jurors.—State v. McLean, 21 La. Ann. 546.

[j] (Me. 1888) Under Rev. St. c. 82, § 74, giving each party in criminal cases not capital two peremptory challenges, several defendants jointly indicted are jointly, and not severally, entitled to such challenges.—State v. Cady, 80 Me. 413, 14 Atl. 940.

[k] (Mich. 1896) While defendants charged together with a misdemeanor must be tried together, unless separate trials are ordered by the court, such trial is, in substance and effect, several; and under How. Ann. St. § 7607, providing that "the defendant may challenge five persons peremptorily," each defendant is entitled to five challenges.—People v. Welmer, 110 Mich. 248, 68 N. W. 141.

[l] (Miss. 1880) Where several persons are jointly tried for felony not capital, each is entitled to four peremptory challenges, by Code 1871, § 2761; and where all are restricted to four, and convicted of a misdemeanor, a new trial will be awarded.—Smith v. State, 57 Miss. 822.

[m] (N. H. 1867) When several persons are tried together for an offense less than capital, each cannot have his two peremptory challenges.—State v. Reed, 47 N. H. 466.

[n] (N. Y. 1825) Where two or more persons are tried together, only 20 peremptory challenges can be allowed to all the persons so tried.—People v. Thayer, 1 Parker, Cr. R. 595.

[o] (Utah, 1881) The provision of U. S. Act July 23, 1874, giving to "each party," whether in civil or criminal cases, three peremptory challenges, does not enable defendants, who have waived separate trials, to sever in their challenges.—People v. O'Loughlin, 3 Utah, 133, 1 Pac. 653.

[p] (Vt. 1879) One indicted with others does not waive his right to the statutory number of peremptory challenges by consenting to be tried with them.—State v. Stoughton, 51 Vt. 362.

[q] (Wis. 1863) Where several persons are jointly indicted and tried, each is entitled to four peremptory challenges, under Rev. St. c. 179, § 3.—Washington v. State, 17 Wis. 147.

§ 613. —— Number allowed state in prosecution of joint defendants.

[a] (Fla. 1882) Where two are jointly indicted and tried for a capital offense, each of them is entitled to 20 peremptory challenges on impaneling a jury, but the state can have but 5.—Savage v. State, 18 Fla. 909.

[b] (Ga. 1893) Under Code, § 4643, allowing a defendant who, if convicted, is subject to death or four years' imprisonment, 20 peremptory challenges, and the state one-half the number of challenges allowed to defendant, where two are tried jointly for a capital offense the state is entitled to 20 challenges.—Butler v. State, 92 Ga. 601, 19 S. E. 51.

[c] (Ill. 1887) Where eight defendants, indicted for murder, aggregate the peremptory challenges to which they are entitled under Rev. St. Ill. c. 38, § 432, thus obtaining 160 peremptory challenges, the state is entitled to the like number.—Spies v. People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320.

[d] (La. 1872) Under Rev. St. 1870, § 998, which declares that "in criminal prosecutions wherein the defendant is allowed peremptory challenges the state shall also be allowed to challenge, without cause, any number not exceeding six," the state is entitled to six challenges in a single prosecution, without any reference to the number of defendants included in the prosecution, or mentioned in the indictment.—State v. Earle, 24 La. Ann. 38, 13 Am. St. Rep. 109.

[e] (La. 1887) Under Acts 1878, No. 30, in all criminal trials the state is entitled to six peremptory challenges for each of the parties who are jointly on trial.—State v. Waggoner, 39 La. Ann. 919, 3 South. 119.

[f] (Ohio, 1840) 29 Ohio Laws, p. 98, "relating to juries," which gives to the prosecuting attorney, on the trial of an indictment, a right to two peremptory challenges, gives only two in the same indictment, however many defendants may be joined in the indictment.—Mahan v. State, 10 Ohio, 233.

[g] (Tenn. 1878) The fact that two defendants are on trial under a joint indictment does not entitle the state to double the number of challenges prescribed.—Wiggins v. State, 09 Tenn. (1 Lea) 738.

[h] (Vt. 1896) Under V. S. § 1914, providing that in criminal prosecutions one-third the number of peremptory challenges to jurors shall be allowed to the state which are by law allowed to respondent, where two or more respondents are tried together the state is entitled to one-third the number of challenges allowed by law to all the respondents.—State v. Fournier, 68 Vt. 262, 35 Atl. 178.

[i] (Wis. 1854) On trial of an indictment for a capital offense, the prosecuting officer is entitled to but six peremptory challenges whatever may be the number of defendants (Rev. St. c. 97, § 37). Act 1854, c. 48, does not enlarge this right, but leaves it as before.—Shoeffler v. State, 3 Wis. 823.

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§ 614. —— Several counts in same indictment.

[a] (Kan. 1885) Where an indictment in separate counts states separate misdemeanors of a kindred character against the same person, the defendant is not entitled to four peremptory challenges upon each separate offense, but is entitled, upon the trial under the indictment or information, to four peremptory challenges only, under section 198, Cr. Code.—State v. Skinner, 34 Kan. 256, 8 Pac. 420; Same v. Gormaly, Id.; Same v. Frew, Id.; Same v. Carnine, Id.; Same v. Teft, Id.

[b] (Mass. 1878) Under St. 1862, c. 84, accused is only entitled to two peremptory challenges, without regard to the number of counts in the indictment.—Commonwealth v. Walsh, 124 Mass. 32.

[c] (Tenn. 1881) On an indictment for forgery, defendant is entitled to but 10 challenges, though there are several distinct counts in the indictment.—Smith v. State, 76 Tenn. (8 Lea) 386.

[d] (Utah, 1886) A person who is tried on an indictment containing two counts is not entitled to three peremptory challenges for each count.—United States v. Groesbeck, 4 Utah, 487, 11 Pac. 542, 622; Same v. Bromley, 4 Utah, 498, 11 Pac. 619.

§ 615. Disabling of jurors pending trial.

[a] (Ala. 1885) Where a juror is discharged on account of sickness, and another substituted, though the trial is commenced anew (Code, §§ 4879, 4906), if defendant has already exhausted his peremptory challenges, he cannot challenge peremptorily the substituted juror.—Jackson v. State, 78 Ala. 471.

[b] (Cal.) Under Pen. Code, § 1123, providing that, if a juror becomes sick and is discharged, a new juror may be sworn and the trial begin anew, when a new juror is sworn defendant is entitled to all the peremptory challenges he had in the first instance.—(1883) People v. Stewart, 28 Pac. 112; (1887) Same v. Brady, 72 Cal. 490, 14 Pac. 202; (1892) Same v. Wong Ark, 96 Cal. 125, 30 Pac. 1115.

[c] (N. D. 1892) Where, during the trial of a criminal case, a juror becomes sick and unable to sit further in the case, the court orders him discharged, and a new juror is sworn to complete the panel, under Comp. Laws, § 7401, providing that in such case the "trial" shall begin anew, the prisoner is not entitled to again exercise all the peremptory challenges given him by statute, or to peremptorily challenge any one of the 11 remaining jurors, but may exercise only such of his peremptory challenges as he has not already exhausted in procuring the other 11 jurors.—State v. Hasledahl, 2 N. D. 521, 52 N. W. 315.

[d] (Tenn. 1833) If, in the trial of a criminal case, a juror becomes sick, and is discharged, upon the summoning of a juror to fill his place, the defendant is entitled to as many challenges of persons not before summoned in that cause as if no juror had been selected.—Garner v. State, 13 Tenn. (5 Yerg.) 160.

§ 616. Allowance of additional challenges.

See post, § 618.

As cure of error in overruling challenge for cause, see ante, § 598 [b, c, j, n, p, r].

Waiver of right to object, see ante, § 522 [r].

Withdrawal of challenges, see post, § 629.

[a] (Idaho, 1892) Where a juror who is incompetent under the statute swears falsely upon examination on his voir dire, and compels plaintiff to exhaust a peremptory challenge to exclude him, and, before the jury is completed, plaintiff discovers that he was incompetent, and offers to make proof thereof, he should be permitted to do so; and, upon satisfactory proof being made, his peremptory challenge should be restored to him.—Burke v. McDonald, 2 Idaho, 1022, 29 Pac. 98.

[b] (N. C. 1886) The fact that a juror summoned on a special venire fails to answer, but his name is put in the hat and drawn therefrom, and he is again called and fails to answer, does not entitle defendant to an additional challenge.—State v. Powell, 94 N. C. 965.

[c] (Pa. 1863) After the peremptory challenges allowed by law have been exhausted, another peremptory challenge cannot be made, and it is error to allow it.—Funk v. Ely, 45 Pa. (9 Wright) 444.

[d] (Tex. 1886) It is not error to refuse to permit a defendant in a criminal case to challenge a juror peremptorily after he has exhausted his 20 peremptory challenges.—Pierson v. State, 21 Tex. App. 14, 17 S. W. 468.

§ 617. Special or struck jury.

Manner of striking, see ante, § 376.

[a] (N. J.) When a jury has been struck for the trial of an indictment against two or more defendants for a crime not within Revision, p. 280, § 71, permitting 20 peremptory challenges, the defendants collectively, and not separately, are entitled to only three peremptory challenges, under Revision, p. 531, § 42 (Jury Act), which provides that, upon the trial of any indictment for which a struck jury shall be summoned and returned, three peremptory challenges shall be allowed.—(1891) Moschell v. State, 53 N. J. Law (24 Vroom) 498, 22 Atl. 50; (1892) Id., 54 N. J. Law (25 Vroom) 390, 25 Atl. 964.

§ 618. Errors and irregularities.

Waiver of challenges or objections, see ante, § 522.

[a] (Ala. 1841) Where a party was allowed more peremptory challenges than he is entitled to by law, the irregularity is not available, if the cause was tried by an impartial jury and the opposite party was not prejudiced thereby.—Bibb v. Reid, 3 Ala. 88.

[b] (Ala. 1891) A trial court, on being informed that a juror had been convicted of a felony and had not been pardoned, declined to exclude him unless he was challenged for that cause. Defendant thereupon challenged him for that cause, and the court sustained the challenge. *Held*, that defendant was not injured by the ruling of the court, as the exclusion of the juror was not charged to defendant as one of his peremptory challenges.—Jackson v. State, 94 Ala. 85, 10 South. 509.

[c] (Miss. 1891) Error of the court in allowing defendant a fifth peremptory challenge is not ground for reversing a judgment for him if plaintiff had an impartial jury, as plaintiff has no vested right to any particular juror, but only to an impartial jury.—State v. Dalton, 69 Miss. 611, 10 South. 578.

[d] (S. C. 1889) On commencing the trial, the court announced that defendants were each entitled to 20 peremptory challenges, but, after each had challenged two jurors, held that they were each entitled to five challenges only, which was correct. *Held* not ground for new trial.—State v. Jacob, 30 S. C. 131, 8 S. E. 698, 14 Am. St. Rep. 897.

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3. TIME.

IN GENERAL, § 619.
DISCRETION OF COURT, § 620.
AFTER ACCEPTANCE OF JUROR, § 621.
AFTER PASSING OR TENDER OF JUROR, § 622.
AFTER SWEARING OF INDIVIDUAL JUROR OR JURY AS A WHOLE, § 623.

Examination of jurors before exercising challenges, see ante, § 568.
Exercise of peremptory challenges before challenging for cause, see ante, § 556 [n].
Exhaustion of peremptory challenges before exercising challenges for cause, see ante, § 556 [w].
Number of jurors to be drawn before peremptory challenges must be made, see ante, § 357.
Right to full panel before exercising challenges, see ante, § 357.

§ 619. In general.

[a] The right of peremptory challenge exists up to the time the juror is sworn.
—(Ala. 1872) Murray v. State, 48 Ala. 675;
(Cal. 1864) People v. Jenks, 24 Cal. 11;
(Ind. 1845) Munly v. State, 7 Blackf. 593; Morris v. State, Id. 607; (1846) Jackson v. Pittsford, 8 Blackf. 194; (1847) Wyatt v. Noble, Id. 507;
(Mich. 1870) Hunter v. Parsons, 22 Mich. 96;
(Va. 1834) Hendrick v. Commonwealth, 5 Leigh, 707.

[b] (U. S. 1877) In challenging petit jurors, the right of peremptory challenge need not be exercised until the opportunity of rejecting for cause is afforded.—United States v. Butler, Fed. Cas. No. 14,700 [1 Hughes, 457].

[c] (Ala. 1878) The right of peremptory challenge is not lost until the juror is sworn or accepted for the trial of the issue; and, when the juror is one of the regular panel for the week, the defendant does not lose his right to challenge until he accepts the juror for his trial.—Spigener v. State, 62 Ala. 383.

[d] (Cal. 1869) Under the various provisions of the practice acts prescribing the method of forming juries, defendant may examine the whole 12 before exercising his right of peremptory challenge to any.—People v. Scoggins, 37 Cal. 676.

[e] (Ind. 1842) Peremptory challenges on trial of an indictment for murder may be made by the state at any time between the appearance and swearing of the jury.—Beauchamp v. State, 6 Blackf. 299.

[f] (Iowa, 1856) A party who has not exhausted his right of peremptory challenge may exercise the right up to the moment the jury is called upon to take the oath, if there is any intermission of the court after his acceptance of the jury and before the swearing them.—Spencer v. De France, 3 G. Greene, 216.

[g] (Ky. 1891) After 12 men have been proven competent on the voir dire examination, and before they have been sworn to try the case, the defense can then exercise its peremptory challenges in a criminal case under the practice.—Shelby v. Commonwealth, 91 Ky. 563, 16 S. W. 461.

[h] (Mass.) The right of a party who is put on trial for a capital offense to a peremptory challenge of jurors must be exercised, if at all, before the jurors are interrogated by the court concerning their bias and opinions.—(1844) Commonwealth v. Rogers, 48 Mass. (7 Metc.) 500, 41 Am. Dec. 458; (1850) Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711.

[i] (Mich. 1870) This right is not lost by not being exercised immediately after the voir dire examination, unless the juror has been sworn.—Hunter v. Parsons, 22 Mich. 96.

[j] (Mo. 1877) Thanksgiving Day, although by statute a public holiday, and, for certain purposes, considered to be the same as Sunday, is properly counted as part of the 48 hours within which the defendant is required to make his challenges, after he is furnished with a list of jurors.—State v. Green, 66 Mo. 631.

[k] (N. Y. 1885) The common-law right to peremptorily challenge jurors in cases of felony until the juror is actually sworn is preserved by the constitution of the state adopting the common law as the law of the state, and by Code Cr. Proc. § 369, providing that before a juror is called, the defendant must be informed that he must challenge him before he is sworn, and section 371, providing that a challenge must be taken when the juror appears and before he is sworn.—People v. Carpenter, 16 Abb. N. C. 128.

[l] (N. Y. 1885) The right of peremptory challenge exists until the juror is sworn, and cannot be abridged by an order of the court that it shall not be exercised after he takes his seat in the jury box.—People v. Carpenter, 36 Hun, 315.

[m] (Pa. 1869) In capital cases where each juror is sworn or affirmed separately, he may be challenged at any time until he is brought to the book or the formula of affirmation is commenced.—Commonwealth v. Marra, 8 Phila. 440.

[n] (Pa. 1880) On indictment for murder, where a juror is accepted by the prisoner and then stood aside by the state, if the facts show no improper motive in standing him aside, the state may afterwards peremptorily challenge him.—Zell v. Commonwealth, 94 Pa. 258.

[o] (S. C. 1844) Under the statute of 1841, either party may claim the right of challenge at any time before the jury is charged, either party challenging first.—City of Charleston v. Kleinback, 2 Speers, 418.

[p] (S. C.) The state may exercise its right of peremptory challenge at any time before the prisoner's acceptance of the juror.
—(1892) State v. Haines, 36 S. C. 504, 15 S. E. 555; (1895) Same v. Corley, 43 S. C. 127, 20 S. E. 989.

§ 620. Discretion of court.

[a] (Iowa, 1859) In the absence of any statutory rule, the order of proceedings in challenging petit jurors peremptorily may be properly left to the discretion of the judge.—State v. Pierce, 8 Iowa (8 Clarke) 231.

[b] (La. 1896) It is within the discretion of the trial judge to allow a peremptory challenge after the juror has been sworn.—State v. Wren, 48 La. Ann. 803, 19 South. 745.

[c] (Mich. 1891) Under How. Ann. St. § 7599, providing that the first 12 persons who shall be approved of as indifferent between the parties shall be sworn, and shall be the jury to try the case, the trial court cannot, in its discretion, after the panel has been sworn in a cause, permit either party to peremptorily challenge a juror, and have another drawn in his place, against the objections of the opposing party.—Ayres v. Hubbard, 88 Mich. 155, 50 N. W. 111.

[d] (Miss. 1876) Where a full jury was presented with which plaintiff declared himself satisfied and defendant peremptorily challenged one of the jurors, and, without exercising other challenges, permitted another talesman to take

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the place of the one rejected, whom both parties accepted, it was not an abuse of discretion for the court to refuse to permit defendant to peremptorily challenge other jurors.—Tatum v. Preston, 53 Miss. 654.

[e] (N. Y. 1873) The court has power to allow a juror to be peremptorily challenged, even after he has been sworn in, at any time before actual commencement of the trial.—In re Tweed, 13 Abb. Prac. (N. S.) 371.

[f] (N. Y. 1885) The court cannot deprive a defendant of his right to peremptorily challenge a juror any time before he is actually sworn by requiring him to exhaust all his challenges to the juror before the juror takes his seat in the box.—People v. Carpenter, 16 Abb. N. C. 128.

[g] (N. Y. 1886) It is within the discretion of the trial court to determine the practice as to when the jurors shall be sworn, and it has the power to lay down the rule that, if the prisoner intends to challenge an individual juror, he must do so when the juror appears, and before he is sworn.—People v. Carpenter, 102 N. Y. 238, 6 N. E. 584, affirming (1886) 38 Hun, 490.

[h] (N. Y. 1892) Under Code Cr. Proc. § 371, providing that "the court may, in its discretion, for good cause set aside a juror at any time before evidence is given in the action," the court may grant leave to interpose a peremptory challenge to a juror already accepted and sworn, if it do not prejudice defendant's rights, upon the oral statement of counsel for the prosecution that matters had come to his knowledge, after the juror was sworn, leading him to believe that he was unsatisfactory.—People v. Hughes, 64 Hun, 638, 19 N. Y. Supp. 550, 8 N. Y. Cr. R. 448.

[i] (N. Y. 1893) Where it is conceded that a court has discretionary power to permit a peremptory challenge of a juror after he is sworn, it is no abuse of discretion to give the permission to the state, on the assurance of the prosecuting officer of undisclosed disqualifying facts, even after defendant had exhausted his peremptory challenges, and before the introduction of evidence.—People v. Hughes, 137 N. Y. 29, 32 N. E. 1105, affirming (1892) 19 N Y. Supp. 550, 8 N. Y. Cr. R. 448.

[j] (Ohio, 1870) It being discretionary with the court as to the means and manner of exercising the right to make peremptory challenges, it was not injurious to defendant indicted for murder for the court to require him to make his peremptory challenges, after first having exhausted his challenges for cause, to each juror as called, and on failure of the party to make any valid challenge, order the juror so called at once to be sworn.—Schufflin v. State, 20 Ohio St. 233.

[k] (S. C. 1896) Under Rev. St. § 2404, allowing each party two peremptory challenges to jurors in civil cases, and providing that the right "shall extend to jurors drawn to fill the places of those challenged," where plaintiff challenged the foreman of the jury, and another was appointed as foreman without objection from defendant, and both parties stated that they were satisfied with the jury, the court, in allowing plaintiff to challenge such substituted foreman, was acting within his discretion.—Curnow v. Phœnix Ins. Co., 46 S. C. 79, 24 S. E. 74.

[l] (Tex. 1878) Under Code Cr. Proc. § 556, providing that in forming the jury the names of the persons shall be called in the order they stand upon the list, and, if present, shall be tried as to their qualification, and, unless challenged, shall be impaneled, after a juror from a special venire has been accepted by both parties, a peremptory challenge to him is not allowable, even by leave of the court.—Baker v. State, 3 Tex. App. 525.

§ 621. After acceptance of juror.

Discretion of court, see ante, § 620 [h, k, l].

[a] (U. S. 1843) Where the statute gives a right to each party to challenge peremptorily two jurors, plaintiff may be allowed to exercise the right after he has once expressed himself as satisfied with the jury, and after defendant has used his challenges.—Jones v. Vanzandt, Fed. Cas. No. 7,502 [2 McLean, 611].

[b] (Ala. 1877) A peremptory challenge is too late when interposed after defendant and his counsel have expressed satisfaction with the jury as organized.—Sparks v. State, 59 Ala. 82.

[c] (Cal. 1854) A prisoner, in a criminal trial, who has not exhausted his peremptory challenges, has the right to challenge peremptorily one of the jurors, after the 12 jurors are accepted, but not sworn.—People v. Kohle, 4 Cal. 198.

[d] (Ill. 1887) Under Rev. St. c. 78, § 21, providing that the jury shall be passed upon and accepted in panels of four, the refusal of the court to allow a peremptory challenge addressed to a juror in a panel of four which both parties have passed upon and accepted, such challenge being made before any of the jurors are sworn, and while the parties are passing upon a subsequent panel, is not error.—Mayers v. Smith, 121 Ill. 442, 13 N. E. 216, affirming (1887) 25 Ill. App. 67.

[e] (La. 1887) The right of peremptory challenge must be exercised before the juror is accepted by the opposite party and commenced to be sworn.—State v. Durr, 39 La. Ann. 751, 2 South. 546.

[f] (Mich. 1881) Though a juror has taken his place in the jury box, and both parties profess to be satisfied with him, yet he may be peremptorily challenged by the prosecution before he is sworn.—People v. Carrier, 46 Mich. 442, 9 N. W. 487.

[g] (Mich. 1883) Either party may peremptorily challenge a juror before the jury is sworn, though he has announced himself as satisfied with the jury.—Appeal of Hamper, 51 Mich. 71, 16 N. W. 236.

[h] (Tex. 1875) In impaneling a jury in a capital case, the names of the persons summoned should be called in the order they stand upon the list, and, when found qualified, they are to be challenged either peremptorily or for cause, or accepted severally, as each one is determined by the court to be a qualified juror, which is to be continued one by one until the jury is fully formed to the number of 12. No law, or established practice under the law, is known which sanctions the peremptory challenge of a juror by either party, in such case, after the juror is accepted and impaneled, whether the jury be full or not, though there may be discretion in the court for excusing or setting aside a juror, after he is thus selected, for good cause shown at the time why he cannot or ought not to serve on the jury.—Horbach v. State, 43 Tex. 242.

[i] (Tex. 1879) When a juror has been duly accepted to try a capital case, neither party can challenge him peremptorily, whether the jury is full or not.—Drake v. State, 5 Tex. App. 649.

[j] (Tex. 1895) A juror in a criminal case was accepted without being questioned by either side as to his qualifications. The state subsequently asked him if he was qualified, and, receiving affirmative answers, again accepted him, and defendant peremptorily challenged. *Held* no error.—Seals v. State, 35 Tex. Cr. R. 138, 32 S. W. 545.

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[k] (Vt. 1887) Under R. L. § 1658, providing that "every person who is arraigned and put on trial in the county court in a criminal prosecution may peremptorily challenge six jurors, and such further number as he can show good cause for challenging," defendant's right to peremptorily challenge a juror continues until the juror is sworn, even though he has previously accepted him.—State v. Spaulding, 60 Vt. 228, 14 Atl. 769.

[l] (Wis. 1850) Where, after the panel of the jury is complete, they are accepted by the state and the accused, though not sworn, it is then too late for the accused to challenge one of the number, though his peremptory challenges are not exhausted.—State v. Cameron, 2 Chand. 172, 2 Pin. 490.

[m] (Wis. 1886) The district attorney being, under Rev. St. § 4690, entitled to 12 peremptory challenges, he may, before the jury is accepted by both parties and sworn, strike from the list the name of a juror, although he had previously, after striking 7 jurors from the list, expressed himself as satisfied with the jury.—Santry v. State, 67 Wis. 65, 30 N. W. 226.

§ 622. After passing or tender of juror.

[a] (Cal. 1874) If the prosecution, in a criminal case, pass the jury to the defendant, who declines to make any challenge, the prosecution may then interpose a peremptory challenge to a juror, before he is sworn.—People v. McCarty, 48 Cal. 557.

[b] (Cal. 1892) Pen. Code, § 1088, provides that, after the challenges of both sides are disallowed, "either party, first the people, and then defendant, may take peremptory challenges, unless the parties' peremptory challenges are exhausted." *Held*, that the prosecution may exercise the right of peremptory challenge after once passing the jury, and the right has been exercised by defendant.—People v. Dolan, 96 Cal. 315, 31 Pac. 107.

[c] (Conn. 1846) B. having been called as a talesman, in the same cause, and examined as to his bias, and no reason to except to him on that account appearing, the counsel for the prisoner were informed by the court that they could then challenge B. peremptorily, if they desired to do so. They declined to exercise the right at that time, as the panel was not then full, and B. was directed to take his seat as one of the jurors. After the panel was full, and but six peremptory challenges had been made, the prisoner's counsel claimed the right to challenge B. peremptorily. *Held*, that in the absence of any reason for a peremptory challenge then which did not exist before, when the exercise of the right was declined, it was too late to challenge B. peremptorily.—State v. Potter, 18 Conn. 166.

[d] (Fla. 1887) A juror tendered and accepted, but not sworn, may be peremptorily challenged by the state, as well as by the defendant.—Mann v. State, 23 Fla. 610, 3 South. 207.

[e] (Miss. 1874) Under Rev. Code 1871, § 2761, a peremptory challenge of a juror cannot be made by the state after he has been presented to the prisoner.—Stewart v. State, 50 Miss. 587.

[f] (Nev. 1880) Upon a trial for murder, A. and 11 other jurors were examined and passed for cause, and were in the box, when, upon the prisoner being asked if he had any peremptory challenges, he then refused to exercise his right, and passed his challenge several times after notice from the court that, in so passing, he would be considered as having accepted all the jurors then in the box. The state interposed several challenges, and as often as a juror was challenged another name was drawn, thus keeping the panel full. When the state ceased challenging, no challenge had been taken by the prisoner, who then challenged A. *Held*, that the court was in error in disallowing this challenge.—State v. Pritchard, 15 Nev. 74.

[g] (N. Y. 1867) The right of a defendant on trial for manslaughter to peremptorily challenge a juror continues until the juror is sworn, notwithstanding that when the juror was declared competent to serve as such, the court asked defendant's counsel if he challenged the juror peremptorily, and he stated "No," and the juror took his seat in the box.—Lindsley v. People, 6 Parker, Cr. R. 233.

[h] (N. C. 1880) A juror may be set aside at any time before he is impaneled. He may be challenged by the state after he has been passed to and accepted by the defendant.—State v. Vestal, 82 N. C. 563; Same v. Vann, Id. 631.

[i] (N. C. 1894) Under Code, § 1200, providing that in capital cases the state may challenge peremptorily four jurors, provided the challenge is made before the juror is tendered to the prisoner, it is error to permit the state to peremptorily challenge a juror after he is tendered to the prisoner.—State v. Fuller, 114 N. C. 885, 19 S. E. 797.

§ 623. After swearing of individual juror or jury as a whole.

Discretion of court, see ante, § 620.

[a] The allowance of a peremptory challenge of a juror, after he has been accepted and sworn, is not a matter of right; and the refusal of the court to allow it does not constitute error.
—(Cal. 1860) People v. Reynolds, 16 Cal. 128; (Nev. 1868) State v. Anderson, 4 Nev. 265.

[b] (Cal. 1858) After 11 of the jury, in a capital case, had been sworn, and the twelfth selected, the defendant offered to interpose a peremptory challenge to one of the 11, without naming him, or stating that any fact had been learned since he was sworn. The offer was refused.—People v. Rodriguez, 10 Cal. 50.

[c] (Cal. 1860) Whether jurors in criminal cases are sworn as they are accepted or after the jury is complete, peremptory challenges must be exercised before the oath is administered.—People v. Reynolds, 16 Cal. 128.

[d] (Cal. 1864) A juror in a criminal action may be peremptorily challenged, even after he is sworn, until the jury is completed.—People v. Jenks, 24 Cal. 11.

[e] (Ill. 1893) Permitting a peremptory challenge after the jury has been sworn and the opening statements made is erroneous.—Peoria, D. & E. Ry. Co. v. Puckett, 52 Ill. App. 222.

[f] (Ind. 1895) In a criminal trial, after the first witness had commenced to testify, a juror told the court that he might have talked about the case, though on his examination he had stated the contrary, and the court granted defendant's motion for his examination over objection. The juror proving competent, defendant, who had not exhausted all his peremptory challenges, without the interposition of any further motion, challenged him peremptorily. *Held*, that the challenge was properly denied; Rev. St. 1894, § 1863 (Rev. St. 1881, § 1794), providing that peremptory challenges shall be made before the jury is sworn, and the proper course being to move to set aside the submission.—Kurtz v. State, 145 Ind. 110, 42 N. E. 1102.

[g] (Mass. 1890) A talesman in a civil case may be challenged peremptorily after he is sworn, and "before anything else is done," under Pub. St. c. 170, § 36, providing that "In all cases, civil and criminal, either party shall, before the trial commences, be entitled to chal-

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lenge peremptorily two of the jurors from the panel called to try the cause."—Sackett v. Ruder, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391.

[h] (Mich. 1883) Where the jury in a criminal case had been impaneled, and, during the temporary absence of the prosecuting attorney from the court room, they had been sworn, it was error to permit him on his return to challenge one of the jurors, and to fill his place with another, against the objection of defendant.—People v. Dolan, 51 Mich. 610, 17 N. W. 78.

[i] (Mich. 1889) A peremptory challenge cannot be allowed after the jury is sworn.—Thorp v. Deming, 78 Mich. 124, 43 N. W. 1097.

[j] (Pa. 1869) Where seven jurors had been sworn, and the clerk directed those who affirmed to rise, *held* too late to challenge after the jurors who affirmed stood upon their feet, and the clerk was in the act of affirming them.—Commonwealth v. Marra, 8 Phila. 440.

4. MAKING AND EFFECT OF CHALLENGES.

DISCRETION OF COURT, § 624.
ORDER OF CHALLENGES, § 625.
EXHAUSTION OF CHALLENGES, § 626.
MODE OF MAKING CHALLENGES, § 627.
OPERATION AND EFFECT OF CHALLENGES, § 628.
—— WITHDRAWAL, § 629.
ERRORS AND IRREGULARITIES, § 630.

Examination of jurors before exercising challenges, see ante, § 563.
Exercise of challenges as waiver of defects, see ante, § 519.
Right to full panel before exercising challenges, see ante, § 357.

§ 624. Discretion of court.

[a] In the absence of any provision of statute on the subject, the order in which peremptory challenges to individual jurors may be taken in a civil action rests in the sound discretion of the court in which the trial takes place.—(Md. 1881) Turpin v. State, 55 Md. 462; (Minn. 1874) St. Anthony Falls Water Power Co. v. Eastman, 20 Minn. 277 (Gil. 249); (Vt. 1888) State v. Flint, 60 Vt. 304, 14 Atl. 178.

§ 625. Order of challenges.

Discretion of court, see ante, § 624.
Of parties in making challenges on different grounds, see ante, § 499.
On different grounds, see ante, § 498.

[a] (U. S. 1847) Peremptory challenges of jurors need not be made at the same time, but the parties may alternate.—Driskell v. Parish, Fed. Cas. No. 4,087.

[b] (Ala. 1878) In all criminal prosecutions the state must be required to pass upon the jurors offered before the defendant can be compelled to announce his acceptance or rejection of them.—Spigener v. State, 62 Ala. 383.

[c] (Idaho, 1896) In the impaneling of a trial jury in a criminal case, where the defendant has double the number of peremptory challenges given the state, the state making the first challenge, the defense is required to make two before the state is again called upon to exercise its next peremptory challenge.—State v. Browne, 44 Pac. 552.

[d] (Ill. 1877) On proceedings to condemn lands for a public sewer, after the first objecting lot owners had passed on the jurors, new jurors were introduced into the panel by challenges from the other objectors and from petitioner. *Held*, that thereupon, the first objectors, who had not exhausted their peremptory challenges, were entitled to again challenge.—Fitzpatrick v. City of Joliet, 87 Ill. 58.

[e] (Iowa, 1858) Where, on the trial of an indictment, the district attorney challenged a juror peremptorily, and then the defendant one; and where, the panel being filled, the defendant insisted that the state should exercise a second peremptory challenge, if any more were to be made, which the court refused, and required the defendant to challenge the second time, before the state exercised the right, holding that, upon his failure to do so, the defendant would waive the privilege as to one juror, it was *held* that the rule adopted by the court was fair and equitable.—State v. Pierce, 8 Iowa (8 Clarke) 231.

[f] (Iowa, 1862) In the formation of a jury, the parties to the suit must alternate in their challenges, the plaintiff beginning. Revision, § 3036.—Davenport Gaslight & Coke Co. v. City of Davenport, 13 Iowa, 229.

[g] (Mo. 1856) In a trial for murder, the prisoner may be required to make his peremptory challenges from the list of jurors, without first knowing what the state may make.—State v. Hays, 23 Mo. 287.

[h] (Mo. 1877) The defendant in a criminal case cannot be required to announce his peremptory challenges of jurors until those of the state have been announced.—State v. Steeley, 65 Mo. 218, 27 Am. Rep. 271.

[i] (Mo. 1894) On the trial of an interplea in an attachment suit, the interpleader is the plaintiff, within the meaning of Rev. St. 1889, § 6081, providing that plaintiff shall in all cases announce his peremptory challenges first.—Cunningham v. Prusansky, 59 Mo. App. 498.

[j] (Mo. 1894) The requirement of Rev. St. 1889, § 6081, that the plaintiff shall in all cases first announce his peremptory challenges of jurors, is mandatory, and a refusal by the trial court to permit the plaintiff to first exercise his right of peremptory challenge is reversible error.—Cunningham v. Prusansky, 59 Mo. App. 498.

[k] (Mo. 1895) Under Rev. St. 1889, § 6081, providing that each party may challenge peremptorily three jurors, and that "plaintiff shall, in all cases, announce his challenge first," in an action to set aside a will plaintiff should be required to announce his challenges first, though defendants have the burden of proof.—Hegney v. Head, 126 Mo. 619, 29 S. W. 587.

[l] (N. Y. 1888) Code Cr. Proc. § 385, as amended in 1882, declaring that "challenges to an individual juror must be taken first by the people, and then by the defendant," is mandatory; and the prosecution must first exhaust its peremptory challenges before defendant can be called on to challenge peremptorily. Violation of the order of challenge is not within section 542, requiring the appellate court to disregard technical errors or defects not affecting a substantial right.—People v. McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273, affirming (1888) 21 Abb. N. C. 417, 6 N. Y. Cr. R. 1.

[m] (Pa. 1871) Cr. Proc. Act, § 38, providing that all challenges in criminal proceedings shall be alternate, the commonwealth making the first challenge, does not preclude a first challenge by the commonwealth, after defendant had exhausted his challenges, where defendant made his challenges as the jurors entered the box, and did not call on the district attorney to make

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any challenges.—Commonwealth v. Reid, 1 Leg. Gaz. R. 182.

[n] (Tex. 1873) The proper mode of selecting a jury in a criminal case is by trial or examination, until 12 qualified jurors are found. Then the party holding the affirmative should be required to pass upon the jury. Should he pass upon it without challenge, the party holding the negative is then called upon to pass upon it. Should either make a peremptory challenge, another juror must be called, when the peremptory challenging may proceed.—Cooley v. State, 38 Tex. 636.

[o] (Tex. 1874) On the trial of a criminal charge, after the state had tendered the defendant a full jury, he was required to pass upon all the jurors tendered, after which the places of those challenged were filled, and defendant required to pass on the new jurors (before the state was required to pass), until he was satisfied with the panel, or had exhausted his challenges. *Held*, that there was no error.—State v. Ezell, 41 Tex. 35.

[p] (Wash. 1894) Code Proc. § 1297, provides that the law relating to the selection of jurors in civil cases shall apply in criminal cases. Section 348 provides that plaintiff may peremptorily challenge one, and then defendant one, and so alternately until the peremptory challenges are exhausted. *Held*, in a criminal case, where defendant has twelve challenges, and the state only six, that defendant must make two challenges to the state's one.—State v. Eddon, 8 Wash. 292, 36 Pac. 139.

[q] (Wis. 1856) Under Rev. St. c. 148, § 5, the defendant is entitled to twenty-four peremptory challenges, and cannot be required to exercise four or waive four at one time—Schumaker v. State, 5 Wis. 324.

[r] (Wis. 1883) In a trial for murder, the state and defendant have the right of alternate challenge of jurors; and, where there are two defendants, the state may challenge one juror and the two defendants four, and the state is not bound to challenge until after such four challenges by defendants.—Rounds v. State 57 Wis. 45, 14 N. W. 865.

§ 626. Exhaustion of challenges.

Allowance to state after exhaustion by defendant, see ante, § 620 [i].

Discharge of jurors by court after exhaustion of challenges, see ante, § 540.

Effect of discharging juror for cause, see ante, § 598 [f, h, i, t, u].

Failure to exhaust challenges as waiver of defects, see ante, § 520.

Jurors subject to challenge, see ante, § 606.

[a] (Kan. 1892) After the regular panel of jurors had been exhausted in a trial for a misdemeanor, and the sheriff had commenced to select the talesmen, defendant objected to the sheriff or his deputies making the selection because of the interest they might have in the result. The court, with the consent of both parties, then named the talesmen, and among those so named was one who had been previously selected by the sheriff. The defendant exhausted his last peremptory challenge upon this talesman. *Held*, that the action of the court was not cause for a new trial.—State v. Plum, 49 Kan. 679, 31 Pac. 308.

[b] (Ky. 1870) Disallowing a challenge for cause, thus necessitating the use of the peremptory challenge, cannot be regarded as a refusal to allow a peremptory challenge, although this action of the court exhausts the number of the latter challenges allowed by law.—Moore v. Commonwealth, 70 Ky. (7 Bush) 191.

[c] (La. 1887) Notwithstanding defendant's challenges have been exhausted at a time when one made by the counsel for the state is sustained, no ground of complaint is afforded the former. His right is that of selection, and not that of rejection by the state.—State v. Carries, 39 La. Ann. 931, 3 South. 56.

[d] (Tex. 1880) The fact that the defendant exhausted his peremptory challenges before the panel was filled does not show that any disqualified juror was forced upon him.—Grissom v. State, 8 Tex. App. 386.

[e] (Tex. 1891) Though the bill of exceptions shows that defendants demanded six challenges for one defendant and six for the other defendants, and that but six were allowed for all, and when these were exhausted two jurors were placed in the panel, yet, where it is not shown that any of defendants desired to challenge those two, no injury is shown, and the ruling becomes immaterial.—Wolf v. Perryman, 82 Tex. 112, 17 S. W. 772.

[f] (Tex. 1893) An objection that defendant was compelled to accept, because all his peremptory challenges were exhausted, a certain person called as a juror, will not be sustained where such person was in all respects qualified to sit as a juror.—McKinney v. State, 31 Tex. Cr. R. 583, 21 S. W. 683.

[g] (Tex. 1896) That defendant in a criminal case was misled by the clerk as to the number of his peremptory challenges, and was thereby compelled to accept an objectionable juror, is not ground for reversal.—Miller v. State, 36 Tex. Cr. R. 47, 35 S. W. 391.

§ 627. Mode of making challenges.

[a] (U. S. 1892) In the trial of a capital case it is the right of the accused to be confronted with the panel of jurors, and to be present during the challenges, and it is therefore reversible error for a federal judge to direct secret challenges to be made from separate jury lists, each side being ignorant of the challenges the other has made.—Lewis v. United States, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011.

[b] (Ky. 1835) Peremptory challenge is a personal privilege that cannot be exercised by a volunteer in the absence of the accused and without his authority.—Steele v. Commonwealth, 33 Ky. (3 Dana) 84.

[c] (Tenn. 1873) Where one having the right to challenge for cause directed the juror to stand aside without asking the judgment of the court, he has peremptorily challenged him.—Crider v. Lifsey, 57 Tenn. (10 Heisk.) 456.

[d] (Tex. 1873) It is not proper to make more than one peremptory challenge at the same time.—Cooley v. State, 38 Tex. 636.

§ 628. Operation and effect of challenges.

Effect of order quashing array, see ante, § 550 [b].

Exercise of challenges as waiver of defects, see ante, § 519.

[a] (Tenn. 1829) Where several defendants are jointly tried, a challenge by one excludes the juror challenged as to all.—Hill v. State, 10 Tenn. (2 Yerg.) 246.

§ 629. —— Withdrawal.

See post, § 630 [a].

[a] (U. S. 1795) On a trial for high treason, where the whole panel has been drawn out of the jury box without furnishing 12 names unchallenged, the counsel for the prisoner may retract the challenge of a juror, who will be

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qualified by order of the court.—United States v. Porter, Fed. Cas. No. 16,073 [2 U. S. (2 Dall.) 345, 1 L. Ed. 409].

[b] (Md. 1887) In a criminal action, after the peremptory challenges allowed a defendant have been exhausted, he will not be permitted to withdraw his challenge to one of the rejected jurors, and have him substituted in the place of a talesman that has been called to complete the jury.—Biddle v. State, 67 Md. 304, 10 Atl. 794.

[c] (Mo. 1884) A party having once made his peremptory challenge of a juror cannot capriciously withdraw it and examine him in order to challenge for cause.—Vojta v. Pelikan, 15 Mo. App. 471.

[d] (N. J. 1850) A peremptory challenge cannot be withdrawn after the juror has been set aside and the next juror called.—Furman v. Applegate, 23 N. J. Law (3 Zab.) 28.

[e] (Or. 1865) It is not error for the court to allow a peremptory challenge of one juror to be withdrawn before another has been called. —Garrison v. City of Portland, 2 Or. 123.

[f] (S. C. 1857) A prisoner on trial for murder made a peremptory challenge of a juror, and then, having ascertained that there was a connection by marriage between the juror and the deceased, proposed to withdraw it in order to challenge him for cause. This the court would not permit him to do.—State v. Price, 10 Rich. Law, 351.

[g] (S. C. 1876) The defendant in a criminal case cannot have a juror whom he has challenged peremptorily recalled in order that he may object to him for cause.—State v. Coleman, 8 S. C. (8 Rich.) 237.

§ 630. Errors and irregularities.

[a] (Ala. 1880) Where the prosecuting attorney challenged a juror who had taken his seat in the jury box, and the challenge was withdrawn on objection by the defendant, and the juror directed to take his seat, *held* that there was no ground for an exception by the defendant.—Leonard v. State, 66 Ala. 461.

[b] (Ind. 1847) When a peremptory challenge has been allowed, it must be presumed, if the contrary does not appear, that the challenge was authorized by the circumstances of the case.—Cable v. State, 8 Blackf. 531.

[c] (Iowa, 1895) Code 1873, § 2763, provides that where there are several defendants, and no separate trial is allowed, they must join in their challenges to jurors. In an action on a note, after judgment for plaintiff, but in favor of one of the defendants as against the other two defendants, a new trial was granted to the two defendants only, and in impaneling the jury for the second trial a peremptory challenge by them was overruled because the other defendant did not join therein. The claim by the latter defendant of former adjudication, which was afterwards sustained, was not raised until after the jury was impaneled. *Held*, that the ruling on the challenge would not be disturbed.—Cleveland v. Atkinson, 94 Iowa, 621, 63 N. W. 465.

VI. IMPANELING FOR TRIAL, AND OATH.

(A) IN GENERAL, §§ 631-639.
(B) OATH, §§ 640-650.

Defects in number as infringement of right, see ante, §§ 221–225.
Drawing jurors for trial of cause, see ante, §§ 349–359.
Mode of impaneling as infringing right to trial by jury, see ante, § 230.
Number composing jury, see ante, §§ 3–7.
Waiver of defects as to number of jurors in civil cases, see ante, § 189.
—— *in criminal prosecutions, see* ante, § 201.
Waiver of objections, see ante, §§ 503–523.
Custody, conduct, and deliberations of jury in criminal prosecutions, see "Criminal Law," vol. 14, cc. 2842–2891, §§ 2027–2078.
Dismissal after jury impaneled, see "Dismissal and Nonsuit," vol. 17, c. 15, § 11.
—— *effect of discharge of jury for inability of one to attend, see* "Dismissal and Nonsuit," vol. 17, c. 152, § 153 [n].
Grounds for arrest of judgment in criminal prosecutions, see "Criminal Law," vol. 15, cc. 248–250, § 2441.
Grounds for new trial in civil cases, see "New Trial," II. (D).
—— *in criminal prosecutions, see* "Criminal Law," vol. 15, c. 28, § 2167; cc. 58–63, §§ 2219–2224; c. 190, § 2364; cc. 210–218, §§ 2392–2395.
Presence of accused, see "Criminal Law," vol. 14, c. 2220, § 1471.
—— *of parties in civil cases, see* "Trial," III.
Review as dependent on aspect of record on appeal in criminal prosecutions, see "Criminal Law," vol. 15, cc. 580, 581, §§ 2814, 2815; cc. 673–676, § 2927.
—— *on presentation of objections in lower court, see* "Criminal Law," vol. 15, cc. 421, 422, § 2637.
Review, harmless error in criminal prosecutions, see "Criminal Law," vol. 15, cc. 903–910, §§ 3115–3118.
—— *harmless error in impaneling and swearing jury, see* "Appeal and Error," vol. 3, cc. 2051–2056, §§ 4124–4127.
—— *of discretion of court, see* "Appeal and Error," vol. 3, cc. 1664–1667, § 3843.
—— *of discretion of court in criminal prosecutions, see* "Criminal Law," vol. 15, cc. 822–828, § 3056.
—— *presumptions as to regularity of impaneling jury, see* "Appeal and Error," vol. 3, cc. 1487, 1488, § 3723.
—— *presumptions in criminal prosecutions, see* "Criminal Law," vol. 15, cc. 772–779, §§ 3023, 3024.
Statutory jury for trial of slaves, see "Slaves."

(A) IN GENERAL.

IMPANELING AND ORGANIZATION IN GENERAL, § 631.
CONSTITUTION OF JURY FOR TRIAL OF CAUSE, § 632.
DESIGNATION AND IDENTITY OF JURORS, § 633.
EFFECT OF PRESENCE OR SERVICE ON JURY OF PERSON NOT DRAWN THEREFOR, § 634.
DISCHARGE OR WITHDRAWAL OF JUROR PENDING TRIAL, § 635.
DISCHARGING ACCEPTED JURORS BEFORE COMPLETION OF JURY, § 636.
DISCHARGE OF JURY PENDING TRIAL, § 637.
APPOINTMENT OF FOREMAN, § 638.
OBJECTIONS AND EXCEPTIONS, § 639.

§ 631. Impaneling and organization in general.

[a] (Ga. 1874) When one juror, on a trial or an indictment for a felony, has been sworn.

and a nolle prosequi is then entered, and a new bill found, it is not error that the array, with the same juror upon it, is put upon the prisoner; and in such a case the right of challenge, both on the part of the state and the prisoner, is the same as if the former proceedings had not been taken.—Reid v. State, 50 Ga. 556.

[b] (Iowa, 1865) The word "impaneled" used with reference to the organizing of a jury, means its final formation by the court. It is the act that precedes the swearing of the jury, and which ascertains who are to be sworn.—State v. Ostrander, 18 Iowa, 435.

[c] (Nev. 1866) The impaneling of a jury is not complete until after the jurors are sworn and charged with the case.—State v. Squaires, 2 Nev. 226.

[d] (N. Y. 1809) Where a jury was sworn and impaneled to try a prisoner on several indictments, and after giving a verdict of not guilty on the first indictment, they separated and went to a tavern, and then returned into court, when the prisoner was tried by the same jury on the other indictments, and found guilty, the supreme court *held* the proceedings on the other indictments irregular, and that the jury ought to have been sworn and impaneled again.—People v. Meany, 4 Johns. 294.

[e] (Va. 1885) The provisions of the statute relative to impaneling juries in capital cases are not directory merely, but imperative, and may not be disregarded.—Hall v. Commonwealth, 80 Va. 555.

§ 632. Constitution of jury for trial of cause.

[a] (U. S. 1826) The jury is to be composed of the first 12 men whose names remain upon the panel after the challenges are exhausted.—United States v. White, Fed. Cas. No. 16,682 [4 Mason, 158], affirmed United States v. Marchant (1827) 25 U. S. (12 Wheat.) 480, 6 L. Ed. 700.

§ 633. Designation and identity of jurors.

[a] (Pa. 1858) Act 1834, § 88, requiring an addition to be given to jurors, is merely directory; and to be a mark of identity, it is necessary that the addition should be written as it is commonly known in the community where he is drawn. Therefore the addition "mill boss" was *held* insufficient ground for quashing the array for want of a suitable addition to the name of one of the jurors.—Clark v. Commonwealth, 29 Pa. (5 Casey) 129.

[b] (Tex. 1852) It is not necessary, in civil cases, that the names of the jurors should be set out in the record of each case.—Clark v. Davis, 7 Tex. 556.

§ 634. Effect of presence or service on jury of person not drawn therefor.

Drawing from jury box name of one not previously drawn for the venire, see ante, § 308 [a].

As ground for new trial, see "New Trial," II. (D).

[a] (Mass. 1885) Under Pub. St. c. 170, § 40, providing that no "irregularity in the * * * impaneling of jurors shall be sufficient to set aside a verdict, unless the party making the objection was injured by the irregularity," the fact that the wrong man, but a qualified juror, by mistake took his seat in the jury box, in answer to a name called by the clerk, is no ground for setting aside the verdict, the mistake not being discovered till after the verdict was rendered.—Commonwealth v. Parsons, 139 Mass. 381, 31 N. E. 767.

[b] (Mo. 1875) If, after the jury are sworn, an unchallenged and unexamined juryman is found in the panel, the proper juror should be substituted and the jury resworn. Wag. St. p. 797, § 3, excluding objections after the jury is sworn, does not apply to such case.—State v. Sternberg, 59 Mo. 410.

[c] (N. Y. 1879) C. was summoned as a juror, but did not attend. A person whose name was not on the panel answered to C.'s name, and served. All parties were ignorant of the substitution. *Held*, that the verdict must be set aside; it was that of 11 men only.—Dayton v. Church, 7 Abb. N. C. 367.

[d] (Pa. 1891) Where the sheriff in good faith summoned a person as a juror, identical in name, occupation, and the street of his residence with a person on the venire, the error was cured, after verdict, by Act March 31, 1860, § 53, which provides that "no verdict in any criminal court shall be set aside * * * for any defect or error in drawing, summoning, or returning any juror," etc.—Commonwealth v. Beucher (Orph. Ct.) 10 Pa. Co. Ct. R. 3.

§ 635. Discharge or withdrawal of juror pending trial.

See ante, § 425 [a].

As infringement of right, see ante, §§ 223, 232 [h].

Effect on number of peremptory challenges, see ante, § 615.

Excusing and discharging members of panel, see ante, § 385.

Filling vacancies in panel caused by excusing jurors, see ante, § 314 [e].

Of juror not drawn, see ante, § 634 [b].

Power of court, see ante, §§ 532–538.

Rejection or discharge on court's own motion, see ante, §§ 524–531.

[a] (U. S. 1852) Where a United States court sitting in New York, in accordance with New York practice, excused a juror for illness during the plaintiff's opening, it was discretionary with the court to impanel a whole new jury, or, as in this case, to fill the vacancy and proceed with the trial.—Silsby v. Foote, 55 U. S. (14 How.) 218, 14 L. Ed. 394, affirming Foote v. Silsby (1849) Fed. Cas. No. 4,916 [1 Blatchf. 445].

[b] (Ala. 1894) The court may fill the place of a juror selected for trial of a criminal case, excused for illness before entering on the trial, by calling another juror from the panel, or, if that is exhausted, by summoning a talesman from the body of the county.—Yarbrough v. State, 105 Ala. 43, 16 South. 758.

[c] (Cal. 1887) Pen. Code, § 1123, provides that, if a juror engaged in a trial becomes sick, the court may discharge him, and either swear a new juror and commence the trial anew, or discharge the whole jury and summon a new one. *Held*, that where during a murder trial one of the jurors became incapable of proceeding, before any evidence was taken, and was discharged, the court properly refused to discharge the other jurors and impanel a new jury, and filled the place of the one discharged.—People v. Brady, 72 Cal. 490, 14 Pac. 202.

[d] (Cal. 1895) In an action against a street railroad company for death by wrongful act, after much evidence was taken, a juror stated to the judge, in the presence of counsel, that he was familiar with the country in which the accident occurred, and did not believe the statements of three of plaintiff's witnesses in regard to its description. *Held*, that it was error to discharge the juror on account thereof.—Mahoney v. San Francisco & S. M. Ry. Co., 110 Cal. 471, 42 Pac. 968.

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[e] (Ga. 1860) After one of the selected jurors on a struck jury has been excused for sickness, the court properly called another juror to complete the panel, and had the jury stricken over again.—Pannell v. State, 29 Ga. 681.

[f] (Ga. 1872) After a jury, in a criminal case, had been stricken, but before the case was given to them, it was discovered that two of the jurors had been on the grand jury which found the indictment. *Held*, that the defendant was entitled to a new jury list, with talesmen substituted for the incompetent jurors.—Cobb v. State, 45 Ga. 11.

[g] (Ill. 1876) Where the court has discharged a juror for illness, after the trial is begun, his place may be filled, and the trial commenced de novo.—City of Shawneetown v. Mason, 82 Ill. 337, 25 Am. Dec. 321.

[h] (Ill. 1889) The fact that a juror sharply cross-examines one of the witnesses as to the accuracy of his memory does not show that the juror has become incompetent, through prejudice, to discharge his duty as a juror, and a motion to exclude him from the panel is properly overruled.—Chicago, M. & St. P. Ry. Co. v. Harper, 128 Ill. 384, 21 N. E. 561.

[i] (Ind. 1837) A jury in a civil case was impaneled, heard part of the evidence in a case, and was dispersed, by consent, over night. The next day one of the jurors failed to appear, whereupon the jury was dismissed, and a new jury impaneled. *Held*, that this was not erroneous.—Harris v. Doe, 4 Blackf. 369.

[j] (Iowa, 1850) Where a juror, in a criminal case, during the adjournment of court for dinner, separated himself from his fellows, and was discharged by the court for that reason, it was improper to substitute another juror in his place and proceed with the trial as though no change had been made.—Grable v. State, 2 G. Greene, 559.

[k] (La.) Where a juror is discharged and another substituted, after the trial has commenced and part of the evidence been introduced, plaintiff is entitled to open his case again and have the trial proceed de novo.—(1835) Follin v. Foucher, 8 La. 563; (1841) Prentice v. Chewning, 1 Rob. 71.

[l] (La. 1841) Where the court excused a juror for sickness, after the trial had commenced, it was error to call another juror from the bystanders, over defendant's objection, and place him on the jury, reading to him the evidence already taken.—Prentice v. Chewning, 1 Rob. 71.

[m] (La. 1887) Where a juror is incapacitated from serving, by illness, immediately after the swearing of the complete jury, his place may be filled from the panel.—State v. Moncla, 39 La. Ann. 868, 2 South. 814.

[n] (La. 1896) The court may call another juror to supply the place of one excused for illness after being accepted and sworn, but before the completion of the trial jury.—State v. Johnson, 48 La. Ann. 437, 19 South. 476.

[o] (Mo. 1872) Judgment reversed, because one of the jurors, after trial, and before verdict rendered, became insane.—Norvell v. Deval, 50 Mo. 272, 11 Am. Rep. 413.

[p] (Nev. 1881) Where, after the jury had been sworn in a capital case, it appeared that one of the jurors had conscientious scruples against convicting defendant on circumstantial evidence, *held* proper to discharge him and impanel a new juror, and that there was no necessity for discharging the other 11 jurors.—State v. Pritchard, 16 Nev. 101.

[q] (Pa. 1850) Act April 14, 1836, § 142, provides that the names of the jurors sworn in any cause shall be kept separate until such jury shall give their verdict, or until the jury shall be discharged. Section 141 provides that juries shall swear to well and truly try the issue and a true verdict give, unless dismissed by the court. *Held*, that where a juror, after being sworn, fails to appear, the court is not entitled to summon another in his place, but must either compel his attendance, or dismiss the whole jury and call another.—Pennell v. Percival, 13 Pa. (1 Harris) 197.

[r] (Pa. 1888) Where a juror, in a criminal case, after being sworn, fails to appear, the course which the court ought to pursue is either to compel his appearance, or dismiss the jury, and impanel another to try the case.—Commonwealth v. Byers (Quart Sess.) 5 Lanc. Law Rev. 270.

[s] (S. C. 1835) Where a juror has been sworn, but has heard no testimony, and the case is adjourned to another day, on which the juror does not attend, the commissioner may call and swear another juror.—Rice v. Sims, 3 Hill, 5.

[t] (S. C. 1839) The foreman of the jury in a slander case, who had used like words of the plaintiff to those on which the action was brought, was excused, against the defendant's consent, from sitting on the trial; and the defendant was not permitted for that reason to continue the cause.—Palmer v. Bogan, 1 Cheves, 52.

[u] (S. C. 1871) Judgment of conviction for assault and battery arrested, because one of the jurymen impaneled to try the cause having absented himself, a member of another jury, who had however heard the evidence and the arguments, was substituted in his place against the defendant's consent.—State v. Scarborough, 2 S. C. (2 Rich.) 439.

[v] (Tenn. 1833) Where some jurors are discharged for sickness and inability to sit in the trial of a criminal case, as provided by Acts 1817, c. 99, the others remain as selected jurors.—Garner v. State, 13 Tenn. (5 Yerg.) 160.

[w] (Tenn.) Where a juror has been discharged during a criminal trial because incapacitated by illness, the court may either supply his place and try the case de novo, or continue the cause.—(1845) State v. Curtis, 24 Tenn. (5 Humph.) 601; (1874) Snowden v. State, 66 Tenn. (7 Baxt.) 482.

[x] (Tenn. 1874) Under Code, § 4028, the court, on finding, in a criminal trial, a juror mentally incapacitated, may, at discretion, substitute another and try the cause de novo, or discharge the jury and continue the case.—Snowden v. State, 66 Tenn. (7 Baxt.) 482.

[y] (Tenn. 1883) A duly qualified juror in a capital case remained with the other jurors for two days, until the panel was completed, and was then discharged, it appearing that he had expressed an opinion which disqualified him. *Held*, that the court was not bound to discharge the entire panel.—Taylor v. State, 79 Tenn. (11 Lea) 708.

[z] (Tex. 1873) If an irregularity in impaneling 13 jurors is discovered before the verdict is rendered, the cause should be withdrawn from the jury, and a lawful jury impaneled and sworn to try it; but if the last juror sworn can be pointed out, he may be dismissed from the panel, and the trial proceed before the legally constituted jury.—Bullard v. State, 38 Tex. 504, 19 Am. Rep. 30.

[zz] (Tex. 1882) After a juror has once been impaneled in a felony case, it is beyond the power of the court to excuse him from serving in the case. If he becomes sick so that he can-

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not proceed, the jury must be discharged and another one impaneled.—Ellison v. State, 12 Tex. App. 557.

§ 636. Discharging accepted jurors before completion of jury.

See ante, § 347 [a].

Excusing and discharging members of panel, see ante, § 385.

[a] (Ala. 1872) On trial of a murder case, a juror duly summoned and in attendance, being sworn and examined by the court, was pronounced competent and accepted by both sides. The juror then requested to be discharged, on the ground that he belonged to a fire company and was exempt, which the court refused. The juror then stated that he would discharge himself and left the room. *Held*, that the action of the court in selecting another juror to fill his place, without discharging him and without the consent of accused, was reversible error.—Powell v. State, 48 Ala. 154.

[b] (Ala. 1894) Where a juror who has been merely examined and found competent, and who is allowed by the court to go while talesmen are being summoned, fails to appear again, the court may complete the jury without reference to him.—Byers v. State, 105 Ala. 81, 16 South. 716.

[c] (Ga. 1874) Where a juror selected for a struck jury failed to answer when his name was called before the jury was sworn, the court properly ordered the panel to be filled and the jury to be struck over again.—Clifton v. State, 53 Ga. 241.

[d] (Ga. 1891) The court may call another juror to supply the place of one excused for illness after he was accepted though not yet sworn.—Osburn v. State, 87 Ga. 173, 13 S. E. 247.

[e] (Pa. 1890) There is no irregularity of which defendant can complain in the substitution of one person as a juror for another by defendant's express consent, when the jury is being impaneled in a criminal prosecution.—Commonwealth v. Fritch (O. & T.) 9 Pa. Co. Ct. R. 164.

[f] (Tenn. 1878) After six jurors had been obtained in a criminal case and placed under charge of an officer, two, after an unexplained separation from the others, were taken back and spent the night with them. *Held*, that the court properly punished the two and ordered a panel de novo; and that the four others, being tendered to the prisoner without objection, might be included therein.—Griffee v. State, 69 Tenn. (1 Lea) 41.

[g] (Tenn. 1892) On a trial for murder, after eight jurors had been accepted, two of the eight were discharged as having expressed opinions as to defendant's guilt. *Held* not a cause for discharging the remaining jurors on the ground that they had become tainted by association with the two so discharged, where the remaining jurymen were again interrogated by the court, and qualified as competent.—Ellis v. State, 92 Tenn. (o Pickle) 85, 20 S. W. 500.

[h] (Tex. 1890) Code Cr. Proc. art. 657, provides that, in all crimes less than capital, the jury shall be sworn in a body. *Held*, upon an indictment for assault with intent to commit murder, that where but seven jurors have been selected the first day, and the oath administered to them as a matter of precaution before giving them in charge of the officer for the night, they were not thereby impaneled, and therefore excusing one did not excuse the others.—Rippey v. State, 29 Tex. App. 37, 14 S. W. 448.

§ 637. Discharge of jury pending trial.

See ante, § 470 [a].

[a] (Colo. 1895) It is reversible error for the court, without any sufficient reason therefor, but merely because a case was to be adjourned, to discharge a jury duly impaneled and sworn, and to call another when the case is again called for trial.—Swink v. Bohn, 6 Colo. App. 517, 41 Pac. 838.

[b] (Conn. 1875) A jury was impaneled to try a prisoner for burglary. After the reading of the information, his counsel, claiming to be taken by surprise by certain new matter in it, moved for a postponement, which the judge granted, but fixed no time and made no order for the trial, and on the same day adjourned the court for three weeks. When the court came in again, a different judge held it, who ordered the trial to proceed before the same jury that had before been impaneled; overruling a motion of the prisoner's counsel for a new jury. *Held*, that the jury could not reasonably have been expected to regard themselves, after the postponement, as having the case under their consideration, with the responsibility with regard to it which that fact would have involved, and that therefore a new jury should have been impaneled.—State v. Williamson, 42 Conn. 261.

[c] (Ill. 1867) A jury after being discharged cannot be again impaneled in a case, without the consent of the parties.—Williams v. People, 44 Ill. 478.

§ 638. Appointment of foreman.

[a] (La.) In criminal proceedings no foreman is appointed to the jury.—(1843) State v. Nolan, 8 Rob. 513; (1843) Same v. Seaborne, Id. 518; (1879) Same v. Daniel, 31 La. Ann. 91.

[b] (Mass. 1822) Where, in a capital case, the foreman of the jury for the trial of civil actions happened to serve as foreman in the criminal cause, no foreman having been regularly appointed for that cause, it was *held* that no exception could be taken to the verdict on that account.—Inhabitants of Amherst v. Inhabitants of Hadley, 18 Mass. (1 Pick.) 38, 43, note.

§ 639. Objections and exceptions.

As to oath, see post, § 650.

Failure to object as waiver, see ante, § 513.

Objections in general, see ante, § 500.

To panel or array, see ante, §§ 541–550.

To polls in general, see ante, §§ 551–598.

[a] (U. S. 1886) In the absence of anything to the contrary, the presumption is that the jury were selected and drawn according to law.—Kie v. United States (C. C.) 27 Fed. 351.

[b] (D. C. 1889) Objection to the manner of impaneling a jury should be made when the panel is made up, before the jury is sworn, and, unless so made, will be deemed to have been waived by the defendant.—United States v. McBride, 7 Mackey, 371.

[c] (Iowa, 1859) Where a juror who had been excused was allowed to substitute another juror in his place on the panel, the objection to such procedure must be taken at the time the vacancy was so filled.—State v. Howard, 10 Iowa, 101.

[d] (N. Y. 1891) An objection for irregularity in drawing a jury must be made before the jury is drawn.—Goodman v. Goetz (Com. Pl.) 13 N. Y. Supp. 267.

[e] (Tex. 1880) An error in impaneling is not necessarily a ground for reversal.—McKinney v. State, 8 Tex. App. 626.

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(B) OATH.

IN GENERAL, § 640.
STATUTORY PROVISIONS, § 641.
WHEN ADMINISTERED, § 642.
RESWEARING JURY, § 643.
FORM AND SUFFICIENCY, § 644.
—— AFFIRMATION, § 645.
—— CIVIL ACTIONS AND PROCEEDINGS, § 646.
—— CRIMINAL PROSECUTIONS, § 647.
RECORD, § 648.
ATTAINT, § 649.
OBJECTIONS AND EXCEPTIONS, § 650.

Necessity of reimpaneling, see ante, § 631 [d].
Omission of oath as infringement of right, see ante, § 230 [l].
On voir dire, see ante, § 576.
Rejection of juror for refusal to take oath, see ante, § 525 [k].
Waiver of defects, see ante, §§ 503, 514.
Harmless error, see "Appeal and Error," vol. 3, cc. 2055, 2056, § 4127.
Presumptions on appeal, see "Appeal and Error," vol. 3, cc. 1488, 1489, § 3724.

§ 640. In general.

[a] (Ark. 1850) Where there are two or more counts in a declaration to which there are pleas and issue, it is error to impanel and swear the jury to try the issue on one count only.—Adams v. State, 11 Ark. (6 Eng.) 466.

[b] (Ill. 1859) A jury in a criminal court should not be sworn for the term, but for the trial of each particular case.—Barney v. People, 22 Ill. (12 Peck) 160.

[c] (Ill. 1860) Where several cases are by agreement submitted together to one jury, they must be sworn separately for each case.—Kitter v. People, 25 Ill. (15 Peck) 42.

[d] (Mass. 1830) A juror who is under impression that he has only been sworn on the voir dire, but has in fact been sworn in chief, should be resworn.—Commonwealth v. Knapp, 26 Mass. (9 Pick.) 496, 20 Am. Dec. 491.

[e] (N. Y. 1887) Under Code Cr. Proc. § 277, where a defendant is indicted under many aliases, it is not error for the court, against the defendant's objection, to permit the clerk, after defendant's true name had been given, to repeat, in giving the oath to jurors, the designation of defendant by many aliases, as it occurred in the indictment.—People v. Everhardt, 104 N. Y. 591, 11 N. E. 62, affirming (1886) 5 N. Y. Cr. R. 91.

[f] (Pa. 1890) There is no statutory provision regulating the manner in which juries shall be sworn; and, if one juryman be sworn separately from the rest, it is no ground of exception.—Commonwealth v. Fritch (O. & T.) 9 Pa. Co. Ct. R. 164.

[g] (W. Va. 1868) Although the records of the court show that a jury had been properly sworn and all the other prerequisites complied with, if it appears that one juror who signed the verdict was another than any of the jurors named as having been sworn, in the absence of any averment that this odd man had been sworn, the judgment and verdict should be set aside.—Younger v. State, 2 W. Va. 579, 98 Am. Dec. 791.

§ 641. Statutory provisions.

[a] (Utah, 1887) On March 2, 1887, a jury having the requisite legal qualifications was selected, accepted, and sworn, according to the existing law, to try a criminal case in a Utah court. On March 3d, congress passed a law requiring all jurors to take an additional oath. *Held*, that the act of congress did not affect the case, as it only applied to such jurors as might be sworn in a case after the law took effect, and that the court properly refused to require the jurors to take the additional oath.—People v. Chalmers, 5 Utah, 201, 14 Pac. 131.

[b] (Wis. 1857) Where a statute is unconstitutional because not requiring the jury assessing the damages of property sought to be taken for public use to be sworn, the fact that the jury was actually sworn does not cure the defect.—Lumsden v. City of Milwaukee, 8 Wis. 485.

§ 642. When administered.

[a] (U. S. 1826) A jury may not be sworn to try the issue till issue be made by replying to good pleas in bar in actions of trespass on the case, such as non assumpsit and payment.—Miles v. Rose, Fed. Cas. No. 7,544a [1 Hemp. 37].

[b] (Cal. 1860) Under the statute, jurors in criminal cases may be sworn in chief as they are accepted, without waiting for the completion of the panel, or may all be sworn together.—People v. Reynolds, 16 Cal. 128.

[c] (Fla. 1860) It is not necessary for a juror, in a capital case, to be sworn in chief immediately after his acceptance by the prisoner, or that the jurors should be sworn one at a time.—O'Connor v. State, 9 Fla. 215.

[d] (Idaho, 1885) A juror, if accepted, must be sworn to try the case as he appears, and before another is called.—People v. Kuok Wah Choi, 2 Idaho, 85, 6 Pac. 112.

[e] (Iowa, 1853) The pleadings should all be in and the issue made up before the jury is sworn.—Cole v. Swan, 4 G. Greene, 82.

[f] (Mich. 1882) Where a jury was impaneled for the trial of joint offenders, but a separate trial was ordered, it was immaterial that they were sworn before the order was entered, if sworn for the trial of one only.—People v. Cummins, 47 Mich. 334, 11 N. W. 184.

[g] (Minn. 1867) Swearing each juror separately, in the trial of a criminal case, and before a full jury is present, is correct practice.—State v. Brown, 12 Minn. 538 (Gil. 448).

[h] (N. Y. 1831) A general oath may be administered to jurors at the opening of a court for the trial of issues; it is not necessary that they should be sworn in each cause in which they are called.—People v. Albany Court of Common Pleas, 6 Wend. 548.

§ 643. Reswearing jury.

[a] (Colo. 1890) Jurors sworn to well and truly try the matters at issue may make any special findings of fact raised under the pleadings, and need not be resworn during the trial, if the pleadings are not changed.—Londoner v. People, 15 Colo. 557, 26 Pac. 135.

[b] (Fla. 1876) If, after the jury is sworn and before testimony is taken, one of the jurors is discharged because of newly-discovered disqualification, and his place filled with a competent person, the entire jury must be sworn anew.—Keech v. State, 15 Fla. 591.

[c] (Ind. 1863) Where the issues are altered after the jury are sworn, they must be resworn before hearing the cause.—Hoot v. Spade, 20 Ind. 326.

[d] (Ind. 1872) It was not error for the court, when it was ascertained that the jury had not been properly sworn, to reswear them and recommence the trial.—Leas v. Patterson, 38 Ind. 465.

[e] (Ind. 1874) Where, by leave of court, an amendment to a pleading is filed after the trial has commenced, the jury need not be resworn,

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unless such amendment changes the issue.—Hackney v. Williams, 46 Ind. 413.

[f] (Ind. 1884) It is not necessary to reswear the jury upon allowing an amendment to a pleading, after the trial has begun, which does not change the issues.—Rogers v. State, 99 Ind. 218.

[g] (Ind. 1891) Where plaintiff has amended his complaint to conform to the proof, it is not error to fail to reswear the jury, as no new cause of action is submitted to them.—Sandford Tool & Fork Co. v. Mullen, 1 Ind. App. 204, 27 N. E. 448.

[h] (Iowa, 1874) The Indiana rule of practice as to the reswearing of the jury in case of certain amendments is not followed in Iowa; upon the filing of a substituted petition, after striking out the name of a party plaintiff, the jury need not be resworn, even though the issue is enlarged.—Hinkle v. Davenport, 38 Iowa, 355.

[i] (La. 1871) Where the indictment is amended at the trial, it is within the discretion of the court to permit the trial to proceed before the same jury, without their being resworn.—State v. Holmes, 23 La. Ann. 604.

[j] (Md. 1875) Where the jury has been sworn and the trial proceeded with, it is not necessary, on the amendment of the original writ and declaration, by changing the form of action from assumpsit to covenant, to reswear the jury.—Clagett v. Easterday, 42 Md. 617.

[k] (Mo. 1882) An amendment not affecting the merits of the case, which consists merely of the joinder of an additional party, does not make it necessary to reswear the jury.—Merrill v. City of St. Louis, 12 Mo. App. 466, affirmed (1884) 83 Mo. 244, 53 Am. Rep. 576.

[l] (Pa. 1868) The reswearing of a jury after a case is in progress is not error.—Widmarer v. Mellert, 6 Phila. 515.

[m] (Pa. 1891) When additional plaintiffs are added at the trial of an action, it is the most regular practice to reswear the jury; but the omission to do so is not error, at least when there is no request to do it.—Vann v. Downing (Com. Pl.) 48 Leg. Int. 264.

[n] (W. Va. 1888) Where the court discharged a juror in the middle of a trial on account of the death of his son, the court properly swore in another juror to fill his place, and commenced the trial de novo, without swearing the other jurors anew.—State v. Davis, 31 W. Va. 390, 7 S. E. 24.

§ 644. Form and sufficiency.

Sufficiency of record, see post, § 648.

In bastardy proceedings, see "Bastards," vol. 6, c. 1964, § 184.

[a] (U. S. 1803) A juror summoned in a case in the District of Columbia may be sworn by holding up of the hand and without kissing the book.—In re McIntire, Fed. Cas. No. 8,824 [1 Cranch, C. C. 157].

[b] (Nev. 1866) Different juries should not be sworn to try issues raised by an equitable defense and those raised by a legal defense all in the same case.—Low v. Crown Point Min. Co., 2 Nev. 75.

§ 645. —— Affirmation.

Sufficiency of record, see post, § 648 [t, u].

[a] (U. S. 1803) Where a juror summoned in a case in the District of Columbia refuses to be sworn, but offers to affirm, he will not be permitted to affirm where it appears that he is not a Quaker and is not attached to any particular religious sect.—In re McIntire, Fed. Cas. No. 8,824 [1 Cranch, C. C. 157].

[b] (U. S. 1804) A juror will not be allowed to make affirmation in lieu of oath, on the ground that he is a Methodist, where it is not contrary to the principles of that religious society to take an oath.—In re Bryan, Fed. Cas. No. 2,063 [1 Cranch, C. C. 151].

[c] (N. J. 1830) Where the award of the venire was in the usual form for a jury to come, etc., "to recognize upon their oaths whether," etc., and it appears that one of the jurors was affirmed, the record is sufficient.—State v. Price, 11 N. J. Law (6 Halst.) 203.

§ 646. —— Civil actions and proceedings.

[a] Where there are two issues, it is not error to swear the jury to try "the issue."

—(Ky. 1829) Bate v. Lewis' Ex'rs, 24 Ky. (1 J. J. Marsh.) 313; (1830) Fowler v. Garret, 26 Ky. (3 J. J. Marsh.) 681;

(Miss. 1835) Montgomery v. Tillotson, 2 Miss. (1 How.) 215;

(Va, 1836) White v. Clay's Ex'rs, 7 Leigh, 68.

[b] Where a common order is taken in a cause, and no plea filed or issue joined, it is error to swear the jury "to try the issue."

—(Ky. 1819) Hopkins v. Preston, 9 Ky. (2 A. K. Marsh.) 64;

(W. Va. 1876) High v. Peerce, 9 W. Va. 291.

[c] (Ala. 1848) Where, on the trial of a suggestion against a sheriff and his sureties for the failure of the sheriff to return an execution, a jury is impaneled and sworn to assess the damages as well for a failure to "execute," as for a failure to return, the execution, and judgment is rendered on the verdict, such judgment is erroneous and cannot be sustained.—Garey v. Edwards, 15 Ala. 105.

[d] (Ark. 1857) It is not necessary, in an action of trover, to swear the jury "to try the issue and the damages to assess;" it is sufficient if they are sworn "to try the issue joined."—Vaden v. Ellis, 18 Ark. 355.

[e] (Ark. 1860) In suits on penal bonds, where breaches have been assigned, swearing the jury to inquire into the truth of the breaches is equivalent to swearing them to try the issues, and not liable to objection.—McCoy v. State, 22 Ark. 308.

[f] (Fla. 1858) The jury were "sworn well and truly to try and the truth to speak upon the issues joined." *Held*, that they were properly sworn.—Burk v. Clark, 8 Fla. 9.

[g] (Ga. 1850) The oath required to be administered to the jury in a justice's court on the trial of the right of property is substantially the same as that required to be administered to special jurors in the superior court; and therefore it is no error to administer to a jury, in the justice's court, such oath.—Carter v. Stanfield, 8 Ga. 49.

[h] (Ga. 1852) The oath which is administered to a special jury on appeals in cases at common law is that which was originally prescribed for the jury in equity causes.—Thornton v. Lane, 11 Ga. 459.

[i] (Ga. 1852) The word "equity" in the oath administered to the special jury on appeals in common law cases is synonymous with "law," meaning a system of jurisprudence governed by established rules, and bound down by fixed precedents. The special jury is sworn to try the cause according to equity and the opinion they entertain of the evidence, and not their opinion of equity as well as the evidence.—Thornton v. Lane, 11 Ga. 459.

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[j] (Ind. 1884) A jury to whom are submitted questions of fact involved in a suit in equity should not be sworn to try the matters in issue between the parties, but to try the questions submitted to them.—Pence v. Garrison, 93 Ind. 345.

[k] (Iowa, 1844) It is sufficient if the form of the oath prescribed to be administered to a petit jury is substantially complied with.—Humphreys v. Humphreys, 1 Morris, 359.

[l] (Miss. 1854) Where a jury was sworn "well and truly to try the issue joined between the parties," it was *held* to be according to the universal practice in civil cases, and sufficient.—Pierce v. Tate, 27 Miss. (5 Cushm.) 283.

[m] (N. J. 1799) Where a justice administered to the jury the form of oath usually administered in courts of justice, it was *held* sufficient, though he had not pursued the precise form prescribed by the statute for juries in justices' courts.—Earle v. Vanburen, 7 N. J. Law (2 Halst.) 344.

[n] (Tex. 1849) Where a summary proceeding, under Act Feb. 5, 1840, brought by a landlord to obtain possession, is carried by an appeal to the district court, the jury should be sworn in the ordinary manner prescribed for the trial of issues of fact in civil cases.—Hendrick v. Cannon, 5 Tex. 248.

[o] (Tex. 1881) An oath administered to a jury to "well and truly try the issue joined between the parties" was a substantial compliance with the statute.—McConnell v. Ryan, 1 White & W. Civ. Cas. Ct. App. § 1020.

[p] (Vt. 1802) Upon trial at the supreme court on appeal from a freehold court, the "petit jurors' oath" in civil causes described by the act establishing the forms of oaths must be administered.—Allen v. Ormsby, 1 Tyler, 345.

[q] (W. Va. 1875) In an action of ejectment, when an issue has been regularly made, an oath administered to the jury to speak the truth of and upon the premises is not objectionable.—Mercer Academy v. Rusk, 8 W. Va. 373.

§ 647. —— Criminal prosecutions.

[a] (Ala. 1843) It is sufficient, in a criminal case, that the jurors are sworn well and truly to try the issue, etc., because to do so they must have regard to the law and the evidence.—State v. Pile, 5 Ala. 72.

[b] (Ala. 1843) Jurors are properly sworn to "render a verdict according to the evidence."—State v. Jones, 5 Ala. 666.

[c] (Ala. 1860) Under the provisions of the statutes for the oath to be administered to a petit jury, it is sufficient if they are sworn in a criminal case "well and truly to try the issue joined."—McGuire v. State, 37 Ala. 161.

[d] (Ala. 1873) The statute (Rev. Code, § 4092) is substantially complied with where the jury in a criminal case are sworn "well and truly to try the issue joined," omitting the words "and true verdict render according to the evidence."—Edwards v. State, 49 Ala. 334.

[e] (Ala. 1873) The statute (Rev. Code, § 4092) is substantially complied with where the jury in a criminal case are sworn "well and truly to try the issue joined between the state of Alabama and the prisoner at the bar, and a true verdict to render according to the law and the evidence."—Walker v. State, 49 Ala. 369.

[f] (Ala. 1874) Where the jury are sworn, in a criminal case, "well and truly to try the issue joined, and true verdict to render according to the evidence" (Rev. Code, § 4092), this is a substantial compliance with the statute.—Hendrix v. State, 50 Ala. 148.

[g] (Ala. 1874) An oath given the jury in a criminal case "to well and truly try and true deliverance make between the people of the state of Alabama and the prisoner at the bar" is insufficient under Rev. Code, § 4092, since the issue is between the state, not the people, and the prisoner.—Lewis v. State, 51 Ala. 1.

[h] (Ala. 1877) Under the requirement of the constitution that all prosecutions shall be conducted in the name of "the state of Alabama," an oath to a petit jury, to well and truly try, etc., "between the people of the state of Alabama and the prisoner at the bar," was a ground for reversal.—Commander v. State, 60 Ala. 1; Perkins v. Same, Id. 7.

[i] (Ala. 1881) An oath to a petit jury, "well and truly the issue joined to try and a true verdict to render," omitting "according to the evidence," will not sustain a conviction; the latter words being required by statute.—Allen v. State, 71 Ala. 5.

[j] (Ala. 1882) On a criminal prosecution, an oath to the jury, which omits the words "and a true verdict render according to the evidence, so help you God," required by Code 1876, § 4299, is insufficient to support a verdict.—Storey v. State, 71 Ala. 329.

[k] (Ala. 1884) Code 1876, § 4765, requires a jury to be sworn "well and truly to try the issues joined, and a true verdict render according to the evidence, so help you God." *Held*, that where the jury are sworn "well and truly to try the issues joined" only, it is insufficient.—Cary v. State, 76 Ala. 78.

[l] (Ark. 1846) The jury in a capital case should, under the laws of this state, be sworn to decide according to the law and the evidence of the case, since they are judges of both; and it is wholly insufficient to swear them merely to "say the truth in the premises."—Patterson v. State, 7 Ark. (2 Eng.) 59, 44 Am. Dec. 530.

[m] (Ark. 1850) In a criminal case it is not sufficient to swear the jury "well and truly to try the issue joined, and a true verdict to render according to the evidence." The jurors in such cases are judges as well of the law as the facts, and consequently should be sworn to try the cause according to both.—Sandford v. State, 11 Ark. (6 Eng.) 328.

[n] (Ark. 1851) In criminal cases the jury should be sworn to try the issue according to law and evidence.—Burrow v. State, 12 Ark. (7 Eng.) 65.

[o] (Fla. 1860) The court may rightly refuse to have the jury in a capital case sworn to find a verdict according to the law and the evidence.—O'Connor v. State, 9 Fla. 215.

[p] (Iowa, 1848) Under the statutes it is erroneous in a criminal case to swear the jury "the truth to speak on the issue joined," etc.—Warren v. State, 1 G. Greene, 106.

[q] (Iowa, 1849) Where jurors in a capital case were sworn "to speak the truth upon the issue joined between the parties," a trial de novo was awarded. The oath prescribed by statute must be followed.—Harriman v. State, 2 G. Greene, 270.

[r] (Iowa, 1854) A jury sworn "the truth to speak," etc., but not "to try the issue joined," is not legally sworn.—Dixon v. State, 4 G. Greene, 381.

[s] (La. 1885) The form of oath for a juror in a criminal case prescribed by the common law is the proper form in Louisiana.—State v.

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Johnson, 37 La. Ann. 421; Same v. Logan, Id. 778.

[t] (Minn. 1859) On trial of capital offenses, the statutory oath provided for petit jurors must be administered.—Maher v. State, 3 Minn. 444 (Gil. 329).

[u] (Nev. 1884) While jurors should, in substance, be sworn according to the form prescribed by statute, a slight and immaterial departure from the prescribed form will not vitiate the proceedings.—State v. Angelo, 18 Nev. 425, 4 Pac. 1080.

[v] (N. H. 1851) Rev. St. c. 176, § 22, prescribes the form of oath to be administered to petit jurors in criminal trials, and imperatively requires its administration, and any other form of oath is insufficient. Accordingly where, in such a case, an oath in the form prescribed in civil trials was administered, upon exception taken by the respondent, the verdict returned was set aside, and a new trial granted.—State v. Rollins, 22 N. H. (2 Fost.) 528.

[w] (N. C. 1875) Upon administering the oath to jurors as to their competency in the regular way, the immediate addition of their oath as jurors, omitting the words "you swear," will not vitiate the verdict.—State v. Owen, 72 N. C. 605.

[x] (N. C. 1883) After an oath administered to a juror in the statutory form, he need not repeat the words "so help me God."—State v. Paylor, 89 N. C. 539.

[xx] (Tenn. 1892) It was sufficient that the jury were sworn "well and truly to try the issues joined," the omission of the words "and true deliverance make" being immaterial.—Lancaster v. State, 91 Tenn. (7 Pickle) 267, 18 S. W. 777, distinguishing State v. Hargrove (1884) 81 Tenn. (13 Lea) 179.

[y] (Tex.) A conviction will be reversed where the record shows that another and different oath was administered to the jury than the one prescribed by law.—(1874) Bawcom v. State, 41 Tex. 189; (1874) Edmondson v. Same, Id. 496; (1874) Sutton v. Same, Id. 513; (1874) Bray v. Same, Id. 560; (1875) Morgan v. Same, 42 Tex. 224; (1877) Leer v. Same, 2 Tex. App. 494; (1877) Tharp v. Same, 3 Tex. App. 90.

[yy] (Tex. 1894) The failure to swear, in a body, the jury in a criminal case, as provided by Code Cr. Proc. art. 657, is fatal to a conviction.—Stephens v. State, 33 Tex. Cr. R. 101, 25 S. W. 286.

[z] (Wash. 1874) There is no error in a superfluous addition to the oath to jurors prescribed by statute only requiring them to comply with an obligation imposed on them by law.—Hartigan v. Territory, 1 Wash. T. 447.

[zz] (Wash. 1885) The oath of a jury, if substantially in the words of the statute, is not bad because there is added, after the words "according to the evidence," the words "as given you on the trial."—Leonard v. Territory, 2 Wash. T. 381, 7 Pac. 872.

§ 648. Record.

[a] The record should show that the proper oath was administered to the jury.

—(Ark. 1888) Carnett v. State, 6 S. W. 513;

(Iowa, 1858) Walters v. Houck, 7 Iowa (7 Clarke) 72;

(Tex. 1887) Biles v. State (App.) 4 S. W. 902.

[b] Statements in the record that there came a jury, "who, being * * * sworn well and truly to try the issue joined herein," the trial proceeded, and that "a jury was impaneled and sworn to well and truly try the issues joined herein," are not attempts to give the form of oath administered, and do not show that the jury were not sworn "to well and truly try the matters submitted to them in the case in hearing, and a true verdict give according to the law and the evidence," as required by Comp. Laws Kan. c. 82, art. 11, § 208, and chapter 80, art. 15, § 274.

—(U. S. 1889) Baldwin v. State of Kansas, 129 U. S. 52, 9 Sup. Ct. 193, 32 L. Ed. 640;

(Kan. 1886) State v. Baldwin, 36 Kan. 1, 12 Pac. 318.

[c] (Ala. 1883) A compliance with Code, § 4765, providing that the clerk shall administer to the petit jury the oath: "You do solemnly swear that you will well and truly try all issues which may be submitted to you, and render true verdicts according to the evidence. So help you God,"—is not shown by a recital in the judgment entry that the jury were "sworn according to law" or that they were "duly sworn."—Peterson v. State, 74 Ala. 34.

[d] (Ala. 1883) A compliance with Code, § 4765, providing that the clerk shall administer to the petit jury the oath, "You do solemnly swear that you will well and truly try all issues that are submitted to you, and render true verdicts according to the evidence," is not shown by a recital in the judgment entry that the jury were sworn to well and truly try the issue joined between the state of Alabama and the defendant.—Johnson v. State, 74 Ala. 537.

[e] (Ark. 1889) Where the record shows that "the following named jurors * * * are called, found qualified, accepted, and sworn," it cannot be objected that it does not appear that the jury were properly sworn.—Pruitt v. State, 11 S. W. 822.

[f] (Fla. 1889) The record of a judgment in a criminal case contained the entry: "Thereupon came a jury, to wit [naming them], 12 good and lawful men, who were duly elected and sworn to well and truly try, and true deliverance make, between the state of Florida and the prisoner at the bar." *Held*, that it was sufficient to show that the jury were properly sworn, in accordance with the statute, to "well and truly try, and true deliverance make," between the state of Florida and the defendant, according to the evidence.—Smith v. State, 25 Fla. 517, 6 South. 482.

[g] (Fla. 1891) A record entry in a criminal case which, after showing that the prisoner was arraigned and pleaded not guilty, states: "Whereupon came the following jurors [naming them], who were duly selected, chosen, impaneled, and sworn to try the issue joined."—cannot properly be construed as purporting to recite the oath as it was in fact administered to the jury, but should be construed as merely intended to show that the jurors were in fact sworn properly, in the form prescribed by the statute.—Garner v. State, 28 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232.

[h] (Fla. 1891) Where the record shows that the jury was sworn to try the issues joined between the parties it is sufficient.—Jacksonville, T. & K. W. Ry. Co. v. Neff, 28 Fla. 373, 9 South. 653.

[i] (Ind. 1833) If the record show that the jury were sworn, the omission of the words "the truth to speak in the premises" is not material.—Judah v. McNamee, 3 Blackf. 269; Mann v. Clifton, Id. 304.

[j] (Iowa, 1845) Where the record shows that an improper oath was administered to the jury, the error will not be disregarded, though probably a mere clerical error.—Roberts v. Smith, 1 Morris, 417.

[k] (Iowa, 1855) It is sufficient if the record shows that the jury were sworn the truth to speak upon the issue joined.—Wrocklege v. State, 1 Iowa (1 Clarke) 167.

[l] (Iowa, 1865) No form of oath to the jury in the trial of indictments being prescribed by

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statute, it was *held*, where the record recited that "the jury were duly impaneled, and sworn well and truly to try the cause and a true verdict give therein, according to the evidence and the best of their ability," that this oath was sufficient, and that in the absence of a record to the contrary the oath must be presumed to have been administered in due form.—State v. Ostrander, 18 Iowa, 435.

[m] (Kan. 1886) It is not the duty of the clerk to place on the record the formulary of words in which the oath administered to a jury is couched; and, where he enters the fact that the jury was duly sworn, the presumption is that the oath was correctly administered.—State v. Baldwin, 36 Kan. 1, 12 Pac. 318.

[n] (Miss. 1854) Where the recital of the oath of the jury in the record is that a jury of good and lawful men came, "who being impaneled, tried, and sworn truly to try the issue joined between the parties," etc., it was *held* to be sufficient.—Windham v. Williams, 27 Miss. (5 (Cushm.) 313.

[o] (Miss. 1856) Where it appeared that the jury were "sworn a true verdict to give according to the evidence," it was *held* sufficient, as it must be presumed that a due and formal oath was administered, for if an insufficient oath was actually administered, it was the duty of the parties to take exception to it at the time.—Welborn v. Spears, 32 Miss. 138.

[p] (Miss. 1857) It is sufficient if the justice's record states that the jury were sworn "according to law;" but if the oath be set out, and does not conform to the statute, it is bad.—Graham v. Busby, 34 Miss. 272.

[q] (Miss. 1857) A recital that the jury were sworn "well and truly to try the matter in controversy between the parties" is bad in an action for forcible entry.—Graham v. Busby, 34 Miss. 272.

[r] (Miss. 1873) Where the record in a capital case shows that the jury were "sworn," it will be presumed that they were sworn properly and according to law.—Edwards v. State, 47 Miss. 581.

[s] (Miss. 1876) If the swearing of the jury constituted a part of the proceedings in each case, it would be necessary for the record to show it; but under the statute, it is no part of the history of the proceedings in the case. The jury are not, as matter of fact, sworn specially to try each particular issue, and it cannot be necessary for the record of the trial to show that which did not take place. The forms of entries usually employed were adopted when it was the practice to swear the jury in each case. The present law provides for the impaneling of petit juries, and requires them to be sworn for the term, and tales jurors for the day.—Waddell v. Magee, 53 Miss. 687.

[t] (N. J. 1812) It need not appear of record that jurors who are affirmed are conscientiously scrupulous of taking an oath.—Anonymous, 3 N. J. Law (2 Penning.) 930.

[u] (N. J. 1836) In a civil action for a penalty, if the record state that jurors were affirmed, it will be presumed that they were conscientiously scrupulous of taking an oath.—Clark v. Collins, 15 N. J. Law (3 J. S. Green) 473.

[v] (Tex. 1852) The statute prescribes that the jury shall be sworn, once for all, for the trial of such civil cases as shall be submitted to them during the term; in a civil case, therefore, the presumption is that the jury were sworn, and it is not necessary that the fact should appear on the record.—Clark v. Davis, 7 Tex. 556.

[w] (Tex. 1852) In civil cases the record need not show that the jury were sworn; it is otherwise, however, in criminal cases.—Drake v. Brander, 8 Tex. 351.

[x] (Tex. 1853) An entry in a criminal case, that the jury were "sworn the cause to try according to law," cannot be regarded as an attempt to spread the form of the oath actually administered upon the record; and, as it states that the jury were "sworn," the court will presume that the proper oath was administered.—Russell v. State, 10 Tex. 288.

[y] (Tex. 1877) A judgment entry reciting that the jurors (naming them) were "duly tried, impaneled, and sworn" was a sufficient recital of the due impaneling of the jury as against any objections made after verdict.—Lester v. State, 2 Tex. App. 432.

[z] (Va. 1890) A recital of the record that the jury "were sworn the truth of and upon the premises to speak," shows that the jury were duly sworn.—Brown v. Commonwealth, 86 Va. 466, 10 S. E. 745.

[zz] (W. Va. 1890) Where it appears by the record in a felony case that the jury were elected, impaneled, tried, and sworn as required by law, it will be presumed that the proper oath was administered to them.—State v. Ice, 34 W. Va. 244, 12 S. E. 695.

§ 649. Attaint.

[a] (N. J. 1806) Where a matter omitted to be inquired of by the principal jury goes to the very point in issue and constitutes the gist of the action, an attaint will lie, and it cannot be supplied by a writ of inquiry; but it is otherwise where the matter omitted does not go to the point in issue and constitute the gist of the action,—as a neglect to assess damages.—Stalcope v. Capner, 2 N. J. Law (1 Penning.) 132.

§ 650. Objections and exceptions.

Failure to object as waiver, see ante, § 514.

[a] (Ga. 1879) A defendant in a criminal proceeding cannot, after the discharge of the jury, raise the objection that the oath administered to them deviated from that prescribed by statute.—Smith v. State, 63 Ga. 168.

[b] (N. Y. 1890) Where some of the jurors in a criminal case are drawn and sworn in the absence of one of the sessions justices, and objection thereto is first made at the close of the trial by motion to dismiss, the irregularity will be deemed to have been waived.—People v. De Camp, 57 Hun, 591, 10 N. Y. Supp. 811.

Jus Accrescendi.

See "Joint Tenancy," vol. 29, cc. 1540–1543, § 4.

Justice.

See "Courts," vol. 13, cc. 1826–3227; "Judges," vol. 29, cc. 1562–1822; "Justices of the Peace," vol. 31, cc. 835–1976.

Department of, see "Attorney General," vol. 5, cc. 2027–2042.

Fleeing from, see "Extradition," vol. 23, cc. 278–344.

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Justices of the Peace.

Scope-Note.

[INCLUDES inferior judicial officers authorized to act as conservators of the peace with subordinate judicial powers within limited districts; appointment, qualification, tenure, and removal of such officers, and ex officio and de facto justices of the peace; their jurisdiction and powers, proceedings before them in general, and review thereof; their rights, duties, and liabilities; and liabilities on their official bonds.

[EXCLUDES justices of the peace as members of courts of record (see "*Courts*"); particular proceedings in exercise of preventive and provisional jurisdiction (see "*Bastards*"; "*Breach of the Peace*"; "*Criminal Law*"; "*Arrest*"; "*Bail*"; "*Searches and Seizures*"; and other specific heads); and administering oaths (see "*Oath*"), taking depositions (see "*Depositions*"), affidavits (see "*Affidavits*"), acknowledgments or proof of deeds, etc. (see "*Acknowledgment*"), solemnizing marriages (see "*Marriage*"), and other ex officio functions (see specific heads).]

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JUSTICES OF THE PEACE.

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§ 1. Nature of office.

[a] Justices' courts are courts of record.—(Ind. 1844) Hooker v. State, 7 Blackf. 272; (1877) Pressler v. Turner, 57 Ind. 56; (Miss. 1852) Brian v. Davidson, 25 Miss. (3 Cushm.) 213.

CONTRA, see (Ga. 1842) Planters' & Mechanics' Bank v. Chipley, Ga. Dec. 50, pt. 1.

[b] (Conn. 1862) The election of justices of the peace by the towns, under the amendment of the constitution made in 1850, does not alter the character of the office.—Neth v. Crofut, 30 Conn. 580.

[c] (Ind. 1886) The office of justice of the peace is a judicial office under the constitution and statutes.—Vogel v. State, 107 Ind. 374, 8 N. E. 164.

[d] (N. Y. 1856) A justice of the peace is a constitutional, and not a town, officer.—People v. Keeler, 25 Barb. 23.

[e] (N. Y. 1859) Whether a justice of the peace is a county, and not a town, officer, quære.—People v. Carter, 29 Barb. 208.

[f] (Tex. 1856) Whether justices' courts are to be deemed for any purpose courts of record has never been determined in this state.—Wahrenberger v. Horan, 18 Tex. 57.

§ 2. Creation.

Delegation of legislative power to fix number of justices, see "Constitutional Law," vol. 10, cc. 1386–1388, § 110 [g, v].

Validity of act relating to justices' districts in counties as local or special law, see "Statutes," II.

[a] (Colo. 1871) Though the charter of the city of Central, authorizing the election of a justice of the peace, to be denominated a "police judge," with certain powers, is void in so far as it gives the justice another name, yet such act is valid so far as it creates the office and describes its jurisdiction.—Deits v. City of Central, 1 Colo. 323.

[b] (Colo. 1880) The office of "police judge," as denominated in Gen. Laws, §§ 2714, 2720, can only be established and fully equipped for service by the legislature. Such officer is not the creature of the municipal authority of a city or town, which cannot invest the office with any powers or functions of its own creation.—People v. Curley, 5 Colo. 412.

[c] (Ill. 1855) Const. art. 5, § 1, providing for the establishment of courts, does not restrict the power of the legislature, as to the number of justices of the peace that may be created, nor require that the jurisdiction of such justices shall be uniform.—In re Welsh, 17 Ill. (7 Peck) 161.

[d] (Ill. 1880) Where the charter of a town provided for the election of a police magistrate, who was to have exclusive jurisdiction of all cases arising under its ordinances, and

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that appeals should be allowed to the circuit court of the county, it was to this extent in conflict with the general laws of the state, which conferred jurisdiction in such cases upon justices of the peace, with the right of appeal to the circuit or county court.—Campbell v. Town of Lewiston, 6 Ill. App. (6 Bradw.) 530.

[e] (Ill. 1881) Laws 1881, p. 103, dividing Cook county into two justices' districts, while leaving the other counties to constitute each a district, violates Const. art. 6, § 21, providing that the jurisdiction of justices of the peace shall be uniform.—People v. Meech, 101 Ill. 200.

[f] (Ind. 1867) The first section of the justices' act (2 Gav. & H. St. p. 576) empowers the board of county commissioners to fix the number of justices of the peace for each township in the county, and confers on the commissioners a discretionary power as to the number, to be exercised by them as the public exigency may require. The latter clause of the section, however, limits that discretion by providing that not more than three shall be elected in each township, and one in addition thereto for each incorporated town therein. In other words, if the township contains no incorporated town within its limits, it cannot have more than three justices of the peace; but, if it contains an incorporated town or towns, then an additional number of justices equal to the number of incorporated towns may be allowed. All, however, are justices of the township, and elected by the voters thereof. The additional justice so provided for, on account of an incorporated town, may by the order of the board of commissioners providing for his election be required to reside within the corporate limits; but he is, nevertheless, a justice of the township, and his jurisdiction is coextensive with the township.—Town of Spencer v. Cline, 28 Ind. 51.

[g] (Iowa, 1855) The charter of Dubuque (Act Feb. 24, 1847), giving to justices authority to punish breaches of city ordinances, does not create a new tribunal, but merely extends to newly-created offenses the power already had by a recognised tribunal over other offenses.—City of Dubuque v. Rebman, 1 Iowa (1 Clarke) 444.

[h] (Minn. 1893) Sp. Laws 1891, c. 125, providing for the election of justices of the peace in the city of Minneapolis, and forbidding justices outside the city to issue process to be served inside the city, is not obnoxious to Const. art. 6, § 8, requiring the legislature to provide for the election of a sufficient number of justices in each county, whose duties shall be prescribed by law.—Smith v. Victorin, 54 Minn. 338, 56 N. W. 47.

[i] (Mo. 1889) In the amendment of Rev. St. § 2803, which fixed the number of justices of the peace in townships, by Laws 1881, p. 154, providing that "towns of 100 inhabitants or more" containing a medical spring, shall be entitled to an additional justice, the word "towns" may include a city of the fourth class, not having been used with reference to the statutory classification of cities, towns, and villages.—State v. Simmons, 35 Mo. App. 374.

[j] (Neb. 1886) Const. art. 6, § 19, which requires that "all laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments, and decrees of such courts severally shall be uniform," is not violated by Laws 1885, p. 249, limiting the number of justices of the peace in cities of the first class to three, to be elected in districts to be created by the board of county commissioners of the counties in which such cities are situated, as such law comes within the rule declaring not objectionable, as wanting uniformity of operation, any law which is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for.—State v. Berka, 20 Neb. 375, 30 N. W. 267.

[k] (Neb. 1890) The provisions of Comp. St. c. 26, § 7, as amended by Act March 21, 1889, apply to cities of the second class in counties that have adopted township organization, and such cities are entitled to elect two justices of the peace for each ward, under the terms of the statute.—State v. Partridge, 28 Neb. 748, 45 N. W. 169.

[l] (Neb. 1895) Laws 1895, c. 28, relating to township organization, and providing that there shall be but one justice of the peace for each township adopting organization, is not repugnant to Const. art. 6, § 19, providing that all laws relating to courts shall be of uniform operation.—Van Horn v. State, 46 Neb. 62, 64 N. W. 365.

[m] (Nev. 1868) Act March 5, 1867, providing for the appointment of additional justices of the peace by county commissioners in certain cases, is in conflict with Const. art. 6, § 8, providing that the legislature shall determine the number of justices of the peace to be elected.—State v. Snodgrass, 4 Nev. 524.

[n] (N. Y. 1860) Local police justices are permitted by the constitution, provided their jurisdiction be local and inferior.—Brandon v. Avery, 22 N. Y. 469.

[o] (N. Y. 1883) Laws 1870, c. 25, incorporating the city of Rome, declares that four justices of the peace shall be elected by the city at large, and defines their term of office, and provides that they shall have and exercise all the powers, authority, and jurisdiction, and discharge all the duties, and be entitled to the fees and compensation, of justices of the peace of the several towns in the state, except as modified by the act. It also confers on the recorder of the city exclusive jurisdiction in the city to issue all criminal process required to be issued by justices of the peace of the several towns of the state, to hear all complaints, and to conduct all examinations in criminal cases, hold courts of special sessions, and perform all the duties of such courts, and conduct and try all matters of a criminal nature that may by law be done or tried by a justice of the peace or two justices of the peace, and declares that in case of sickness, absence from the city, or disability or inability to act of the recorder, his powers and duties shall devolve upon either of the said justices of the peace. *Held*, that the justices of the peace so created are justices of the peace within Const. art. 6, § 15, and hence are eligible to the office of justice of sessions, and as such to sit in courts of oyer and terminer.—Ostrander v. People, 29 Hun, 513.

[p] (N. Y. 1887) The act incorporating the village of Canton (Laws 1845, c. 192, as amended by Laws 1859, c. 70, as further amended by Laws 1870, c. 263), and providing for the election of a justice for that village, is intended to prescribe a limited jurisdiction for said justice coextensive with the boundaries of the village, and is therefore constitutional.—People v. Terry, 108 N. Y. 1, 14 N. E. 815.

[q] (Pa. 1874) Under Act March 20, 1818, incorporating the city of Lancaster, the recorder of the city of Lancaster has no powers except those therein expressly conferred, and he is not judge in the full and true sense of the term, but an adviser, mouthpiece, and organ of the mayor's court.—Locher v. King, 5 Lanc. Bar, No. 49, p. 2.

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[r] (Pa. 1884) Under the provisions of the acts of June 21, 1839, and March 15, 1848, the borough of P. is entitled to one justice of the peace for each ward, to be elected by the citizens of the several wards.—Commonwealth v. Pattison, 1 Lanc. Law Rev. 252.

[s] (Tenn. 1891) Acts 1875, c. 8, providing that every city having a certain population "shall be entitled to and have two justices of the peace for each ward into which such city may be subdivided," does not come within the saving of Const. 1870, art. 6, § 15, providing that "the legislature shall have power to provide for the appointment of an additional number of justices of the peace in incorporated towns," since such an act would involve the power by the municipality to increase the number of justices indefinitely by merely increasing the number of wards.—State v. Adams, 90 Tenn. 722, 18 S. W. 393.

[t] (Va. 1894) Const. art. 7, provides that each county shall be divided into as many magisterial districts as may be deemed necessary, not less than three, and that in each district there shall be elected three justices of the peace and other officers. Section 4 provides that nothing herein shall be considered as prohibiting the general assembly from providing for any additional officers in the city or county. *Held*, that the legislature had power to provide for additional justices of the peace.—Ex parte Bassitt, 90 Va. 679, 19 S. E. 453.

§ 3. Abolition.

Abolition of office as shortening term of office, see post, § 12.

Removal from office by change of territory, see post, § 4.

[a] (Cal. 1890) Code Civ. Proc. § 108, which provides, among other things, that there shall be one justice of the peace in every city having 10,000, and not more than 20,000, inhabitants, does not by implication repeal a provision for two justices in the town of Berkeley, made by its charter, which was granted by special act before the adoption of the present constitution, although said town has a population of less than 10,000.—Ex parte Armstrong, 84 Cal. 655, 24 Pac. 398.

[b] (Colo. 1896) After the determination by a board of county commissioners of such facts as entitle a precinct, under the law, to an additional justice, and they have filled the position by an appointment, they have no power to abolish the office.—Pueblo County Com'rs v. Smith, 22 Colo. 534, 45 Pac. 357.

[c] (Ill. 1872) Const. 1870, art. 6, § 28, prohibiting the election of justices of the peace in Chicago, and providing for their appointment, abolished by implication the office of police magistrate therein.—People v. Palmer, 64 Ill. 41.

[d] (Me. 1880) Sp. Laws 1879, c. 180, entitled "An act to establish the police court of the city of Belfast and to abolish the Belfast municipal court," terminates the commission of one appointed judge of the police court created by Sp. Laws 1850, c. 303, §§ 11–14.—Fahay v. Boardman, 70 Me. 448.

[e] (N. Y. 1857) The office of justice of the peace is as much beyond legislative abolition as that of a justice of the supreme court.—People v. Keeler, 25 Barb. 421.

[f, g] (N. Y. 1896) Laws 1895, c. 601, which abolishes the office of police justice in New York City, does not violate Const. 1895, art. 6, § 22, providing that "local judicial officers" (which designation includes police justices) in office when the article takes effect shall hold their offices until the expiration of their respective terms.—Koch v. City of New York, 39 N. Y. Supp. 164, 5 App. Div. 276, affirmed (1896) 152 N. Y. 72, 46 N. E. 170; In re Quinn (Sup.) 15 Misc. Rep. 509, 36 N. Y. Supp. 894.

[h] (Pa. 1892) When, by an order of court in proceedings under Act May 14, 1874, wards in a borough are subdivided into other wards, such borough is "divided into wards," within the meaning of Act May 10, 1878, which provides that in such case two justices of the peace shall be elected in the borough by the concurrent votes of the several wards, and which, in effect, repeals Act June 21, 1839, providing for the election of two justices in every ward.—Commonwealth v. Pattison (Com. Pl.) 12 Pa. Co. Ct. R. 202, 2 Pa. Dist. R. 128.

[i] (Pa. 1894) Act 1839 (P. L. 376) § 1, providing that each ward in a borough should elect two justices of the peace, was repealed by Act 1878 (P. L. 51) § 1, which provides that, whenever any borough is divided into wards, in every such borough there shall be elected two justices of the peace, who shall be chosen by the concurrent votes of each ward.—Commonwealth v. Pattison (Com. Pl.) 15 Pa. Co. Ct. R. 238; Id., 3 Pa. Dist. R. 599; Id., 7 Kulp, 477.

[j] (Pa. 1894) Act 1878 (P. L. 51) § 1, which provides that, whenever any borough is divided into wards, in every such borough there shall be elected two justices of the peace, who shall be chosen by the concurrent votes of each ward, applies to boroughs divided into wards before such act was passed, as well as to boroughs afterwards divided.—Commonwealth v. Pattison (Com. Pl.) 7 Kulp, 477, 15 Pa. Co. Ct. R. 238, 3 Pa. Dist. R. 599.

§ 4. —— Effect of change of territory.

[a] (Mass. 1889) A person resident in a new town, created by a division of an old town, who had been commissioned a justice of the peace before its incorporation, may thereafter continue to exercise his official functions; a justice of the peace being, under St. 1884, c. 286, an officer for the whole judicial district, with power to issue warrants in criminal cases arising anywhere therein.—Commonwealth v. Brennan, 150 Mass. 63, 22 N. E. 628.

[b] (Mich. 1853) Const. art. 6, § 22, provides that, whenever a judge has removed beyond the limits of the jurisdiction for which he was elected, or a justice of the peace from a township in which he was elected, or by change of the boundaries of said township shall be placed outside the same, they shall be deemed to have vacated their respective offices. *Held*, that section 6 of the act incorporating the city of Adrian, continuing in office justices residing on territory thereby taken from townships, is unconstitutional.—People v. Geddes, 3 Mich. 70.

[c] (N. J. 1864) The constitution provides that "the commission of any justice of the peace shall become vacant upon his ceasing to reside in the township in which he is elected." *Held*, that a justice duly commissioned was not disqualified by an act creating a new township, whose territory included that part of his township in which he resided.—State v. Dilloway, 31 N. J. Law (2 Vroom) 42.

[d] (N. Y. 1827) Where a new county is made out of several towns, the justices of such towns will continue to hold their offices as such justices in the new county.—Garey v. People, 9 Cow. 640.

[e] (Ohio, 1896) Rev. St. § 568, providing that "if a part of any township is attached to any other township the justices of the peace residing in the limits of that part of the township so attached, as aforesaid, shall execute the duties of their office in the township to which

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the same is attached, in the same manner as if they had been elected for such township," is constitutional; and a justice of another township residing in territory which after his election is added to the township of Cincinnati becomes a justice of Cincinnati township, notwithstanding the provision of section 621a, that "hereafter there shall not be more than five justices of the peace" in Cincinnati township, such provision having reference to the election of justices.—Pfeiffer v. Green (Com. Pl.) 8 Ohio N. P. 156.

[f] (Pa. 1807) A justice of the peace, commissioned in a certain district and county, cannot act under his appointment in a division of the county, if he reside in the new county, although the district remains in it entirely.—Respublica v. McClean, 4 Yeates, 399.

[g] (Pa. 1818) The division of a town does not vacate the commission of a justice of the peace for the district in which the town lies.—Commonwealth v. Sheriff and Keeper of Northumberland County Jail, 4 Serg. & R. 275.

§ 5. Appointment.

Validity of appointment of justice of the peace by concurrent act of governor and senate at special session, see "Officers," I. (B).

[a] (Ala. 1855) Under Judiciary Act 1789, § 33 (1 Stat. 91), which empowers justices of the peace to arrest and commit (or bail, as the case may require) persons charged with a violation of the criminal law of the United States, the exercise of the authority as conferred does not make the justices federal officers appointed by congress, and not by the president, in violation of Const. art. 2, § 2, cl. 2.—Ex parte Gist, 26 Ala. 156.

[b] (Ala. 1894) The office of police judge of the city of Birmingham, created by Act 1894, is "a civil office of profit under the state," within Const. art. 4, § 17, prohibiting one from holding any "office of profit under this state," unless elected thereto by the people, created by the legislature when he was member thereof.—Montgomery v. State, 107 Ala. 372, 18 South. 157.

[c] (Cal. 1884) Where the mayor of the city was by the charter constituted ex officio judge of the city court, with power, in case of absence or inability to act, to deputize any justice of the peace to act for him, a general deputation of all the justices to act, on the ground that he could not perform such duties without neglecting other duties, carried with it no authority to act.—Los Angeles County v. City of Los Angeles, 65 Cal. 476, 4 Pac. 453; Same v. Morgan, 4 Pac. 456.

[d] (Conn. 1870) Const. art. 5, §§ 1, 3, provide that the judicial power shall be vested in a supreme court, a superior court, and such inferior courts as the general assembly shall from time to time establish, and that the judges of all these courts shall be appointed by the general assembly in such manner as shall be by law prescribed. The general assembly passed an act establishing a police court in the city of Hartford, and providing for the appointment of a judge of the court by the common council of the city. *Held* that, under the constitution, the judge could be appointed only by the general assembly, and an appointment by the common council was void.—Brown v. O'Connell, 36 Conn. 432, 4 Am. Rep. 89.

[e] (Ill. 1895) Though the governor has power, under Const. art. 6, § 28, to appoint justices of the peace in Chicago, by and with the advice of the senate, and on the recommendation of the circuit, superior, and county court judges, he cannot designate whom such appointees shall succeed; such duty devolving on the county clerk, under Hurd's Rev. St. 1893, c. 79, § 111.—People v. O'Toole, 60 Ill. App. 534; Same v. Moore, Id. 547.

[f] (Ky. 1824) The appointment by the governor of C. as a justice of the peace, who had been recommended by the county court with L., after the latter had been appointed and declined, is unconstitutional; and, where such facts appear on the return of a mandamus nisi for admission to the office, a peremptory mandamus cannot be awarded.—Justices v. Clark, 17 Ky. (1 T. B. Mon.) 82.

[g] (Ky.) The governor cannot commission a person a justice of the peace without a nomination, according to the constitution.—(1824) Justices of Jefferson County v. Clark, 17 Ky. (1 T. B. Mon.) 82; (1827) Commonwealth v. Frazier, 20 Ky. (4 T. B. Mon.) 513.

[h] (Mass. 1826) St. 1821, c. 109, § 6, providing that justices of the police court of Boston shall have original jurisdiction of civil suits formerly determinable by a justice of the peace, is not in violation of the constitutional provision that the governor has the right to appoint all judicial officers.—Wales v. Belcher, 20 Mass. (3 Pick.) 508.

[i] (Mich. 1879) Acts 1879, No. 76, purported to establish the police court of Grand Rapids, and repealed the act under which the police justice was acting, but continued him in office to the end of his term under the title of "police judge." *Held*, that Const. art. 15, § 14, requiring judicial officers of cities and villages to be elected, was not violated, as such act did not confer a new office, but only abstained from legislating the police justice out of office.—In re Coon, 42 Mich. 65, 3 N. W. 258.

[j] (Mont. 1880) The provision of the Butte city charter for the mayor and city council to appoint a police justice does not contravene Rev. St. U. S. 329, § 1856, requiring justices of the peace to be elected by the people in such manner as the respective legislatures may provide.—Ex parte Parks, 3 Mont. 426.

[k] (N. Y. 1827) The appointment of more than four justices of the peace in a town is void.—People v. Garey, 6 Cow. 642.

[l] (N. Y.) Under Const. art. 4, § 7, providing that all judicial officers shall be appointed by the governor and senate, except justices of the peace in several towns, an act authorizing the common council of a city to appoint police justices is unconstitutional.—(1840) People v. Kane, 23 Wend. 414. CONTRA, see (1841) Clark v. People, 26 Wend. 599.

[m] (N. Y. 1874) The office of "police justice of the city of New York" is not embraced under the title of "justices of the peace," as used in Const. 1869, art. 6, § 18, wherein it is provided that "the electors of the several towns shall * * * elect justices of the peace," so that the legislature may provide for the appointment of such police justices without violating the constitution.—People v. Morgan, 5 Daly, 161, affirmed (1874) 58 N. Y. 679.

[n] (Va. 1848) The governor may commission some of the persons recommended as justices at the same time by the county court, and may refuse to commission the others.—Frederick Justices v. Bruce, 4 Grat. 281.

§ 6. Election.

Elections to fill vacancies, see post, § 13.

Contest of election, see "Elections," vol. 18, cc. 428–430, § 253.

Validity of act relating to election of justices of the peace as local or special law, see "Statutes," II.

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[a] (Cal. 1852) The failure of a county judge to call a convention of the justices of the peace to elect associate justices of the court of sessions cannot defeat the election, if the justices had actual notice and there was no fraud or surprise.—People v. Campbell, 2 Cal. 135.

[b] (Cal. 1880) Justices of the peace are judicial officers, within the meaning of Const. art. 22, § 10, and must be elected at the general election.—McGrew v. City of San José, 55 Cal. 611.

[c] (Cal. 1881) The act of 1880, amending Code Civ. Proc. §§ 84, 106, 110, providing for the election of justices of the peace at the general election in 1880, is constitutional.—People v. Ransom, 58 Cal. 558; Bishop v. City of Oakland, Id. 572.

[d] (Cal. 1881) Justices of the peace are judicial officers, within Const. art. 22, § 10, relating to elections, and are officers whose election the constitution requires to be held in 1879, and afterwards in even-numbered years.—People v. Ransom, 58 Cal. 558; Bishop v. City of Oakland, Id. 572.

[e] (Cal. 1881) Though a police judge is a judicial officer, he is also a municipal officer, and as such he is not within the provisions of Const. art. 22, § 10, that "judicial officers * * * shall be elected at the time and in the manner that state officers are elected."—People v. Henry, 62 Cal. 557.

[f] (Iowa, 1883) Under Code 1873, §§ 635, 636, providing that the board of county supervisors shall canvass the returns of elections, and designating "county officers" among those to be listed in the abstract of the votes cast, the board, and not the township trustees, should canvass the votes cast for justices of the peace, who are by section 593 declared to be "county officers," although voted for by the voters of their respective townships.—Lynch v. Vermazen, 61 Iowa, 76, 15 N. W. 663.

[g] (Iowa, 1890) Code 1873, § 590, provides for the election of two justices of the peace in each township, and section 592 provides that one or two additional justices may be elected in each township if the trustees so direct, by posting notices, etc. Section 395 requires an accurate record of the proceedings of such trustees to be kept. *Held*, that this section includes such direction of elections for additional justices, and, where there is no record of such direction, no more than two justices can be elected for that township.—State v. Gaston, 79 Iowa, 457, 44 N. W. 706.

[h] (Kan. 1876) Under Const. art. 3, § 9, the regular term of office for a justice of the peace is two years, and under Gen. St. p. 1083, § 4, all the justices elected for full terms must be elected in the same year; but neither the constitution nor the statutes provide whether the election is to be held in the even or the odd year.—Odell v. Dodge, 16 Kan. 446.

[i] (Kan. 1881) In February, 1880, a city of the second class was organized from W. township. In April, 1880, a city election was held, and C., then a justice of the peace for the township under an election held in November, 1878, was elected a justice of the peace for the city. In April, 1881, at the annual city election, S. was elected to fill the office. *Held* that, under Comp. Laws 1879, April, 1881, was the time fixed by law for holding the election, and that C.'s election was a nullity; he being entitled, as justice for the township, to act until S.'s qualification.—Showalter v. Cox, 26 Kan. 120.

[j] (La. 1846) Section 2, St. June 1, 1846, providing for the election of justices of peace in the parish of Orleans by the qualified voters in each district into which it subdivides the parish, is not a violation of article 81 of the constitution, which declares that justices of the peace "shall be elected by the qualified voters of each parish"; the object of that article being merely to declare that the mode of election should be by the people, instead of by the executive and senate.—Second Municipality v. Schmidt, 1 La. Ann. 387.

[k] (La. 1858) Justices of the peace are not included in the word "judges" in the constitution (article 82), declaring that "it shall be the duty of the legislature to fix the time for holding elections for all judges, at a time which shall be different from that fixed for all other elections."—Andrews v. Saucier, 13 La. Ann. 301.

[l] (Mo. 1884) Rev. St. § 2807, supersedes and repeals all prior statutes authorizing elections of justices of the peace prior to November, 1882.—State v. McCann, 81 Mo. 479.

[m] (N. Y. 1842) A justice of the peace can be elected only at the annual town election.—Ex parte Quackenbush, 2 Hill, 369.

[n] (N. Y. 1868) The provision of the charter of the city of Rochester, creating three justices of the peace in that city, to be elected by the legal voters of the city, and providing that in exercising civil jurisdiction they shall be deemed justices of the peace of the county of Monroe, and that the general laws relating to proceedings before justices of the peace of the several towns in the state shall be applicable to proceedings before them, *held* not to be in conflict with the provisions of section 17, art. 6, of the state constitution, respecting the mode of electing justices of the peace, because the provisions of the constitution relate only to justices of the peace of towns.—Dawson v. Horan, 51 Barb. 459.

[o] (N. Y. 1879) The legislature cannot make an office of justice of the peace elective otherwise than as provided by Const. art. 6, § 18.—Geraty v. Reid, 78 N. Y. 64.

[p] (N. Y. 1884) Const. art. 6, § 18, designates the annual town meeting as the time when justices of the peace are to be elected. *Held*, that Laws 1881, c. 564, providing for their election in a certain class of towns at a general election, is void.—People v. Schiellein, 95 N. Y. 124.

[q] (N. Y. 1886) Const. art. 6, § 18, provides that the electors of the several towns shall elect justices of the peace. Therefore a provision of a village charter authorizing an election of a justice of the peace by the electors of the village is invalid, and a person elected under the charter cannot claim to be even a de facto justice.—People v. Terry, 42 Hun, 278.

[r] (N. Y. 1887) The constitution permits the election in villages of a judicial officer of inferior and local jurisdiction, and it is immaterial that such officer is called "a justice of the peace."—People v. Terry, 108 N. Y. 1, 14 N. E. 815, reversing (1886) 42 Hun, 273.

[s] (Okl. 1895) St. 1890, c. 83, art. 1, §§ 43, 44, providing that cities having more than 1,500 inhabitants shall constitute a township for the purpose of electing justices of the peace, which officers shall be elected at the regular city elections held biennially in April, was repealed by St. 1893, c. 33, § 1, providing that general elections for the purpose of electing all township officers shall be held on the Tuesday succeeding the first Monday in November.—Davis v. Hull, 41 Pac. 144.

[t] (R. I. 1869) A town which has once elected a trial justice to serve in two or more voting districts cannot afterwards change the constitution of the court so created by electing separate trial justices for each district. Such election would be void, and the officer first elected would

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hold till his successor is appointed.—State v. Stiness, 9 R. I. 368.

[u] (Utah, 1876) Election as alderman of the city of Salt Lake does not entitle a person to be a justice of the peace upon simply qualifying as such.—In re Wineman, 1 Utah, 39.

[v] (Wis. 1876) Under Const. art. 7, § 15, providing that cities shall at their charter elections elect justices of the peace "in such manner as the legislature may direct," the legislature after having once provided in a city charter for the election of justices of the peace in the city, has no power by subsequent legislation wholly to deprive the inhabitants of the city of the right to elect a justice.—State v. Goldstucker, 40 Wis. 124.

§ 7. Eligibility.

Eligibility of women to office of justice of the peace, see "Officers," I. (C).

Holding other office as affecting eligibility to the office of justice of the peace, see "Officers," I. (C).

Validity of acts of infant justice of the peace, see "Infants," vol. 27, cc. 974–976, § 8.

[a] A justice of the peace does not "hold the office of justice or judge of any court," within the meaning of a constitutional provision declaring that such shall not hold office after arriving at the age of 70 years.
—(N. H. 1884) Keniston v. State, 63 N. H. 37, 56 Am. Rep. 486;
(N. Y. 1873) Dohring v. People, 2 Thomp. & C. 458; (1885) People v. Mann, 97 N. Y. 530, 49 Am. Rep. 556, reversing (1884) 32 Hun, 440, 66 How. Prac. 337.

[b] (Colo. 1880) Const. art. 6, § 26, authorizes the general assembly to provide for and create police magistrates for cities, who shall have jurisdiction in all cases arising under the ordinances of such cities. Gen. Laws, § 2661, allows all justices of the peace and police magistrates certain jurisdiction, and provides that "the city council may designate one justice of the peace who shall have such jurisdiction exclusively." Section 2720 authorizes the city council in certain cities to elect a police judge. *Held*, that a police magistrate must primarily be a justice of the peace.—People v. Curley, 5 Colo. 412.

[c] (Ky. 1895) One not a qualified elector in the city may be eligible to the office of judge of the police court; St. 1894, § 3511, merely providing that no person can be such a judge unless 24 years of age, and a resident of the city for the 6 months preceding his election.—Boyd v. Land, 97 Ky. 379, 30 S. W. 1019.

[d] (Mo. 1888) By Rev. St. § 2810, no person is eligible to the office of justice who shall not have been an inhabitant of the township for which he is chosen six months before his election. Section 2805 divides the city of St. Louis into districts for the election of justices. By section 2806 a justice elected under section 2805 must hold his court in the district for which he is elected, and, if he removes his office out of the district, his office will be deemed vacated. Section 3065 provides that the powers and jurisdiction given by that chapter to county or township officers are also given to the like officers in any city not within a county, or any district in such city. *Held* that, to be eligible to the office of justice of a district in St. Louis, a person must have been a resident of such district six months before his appointment or election.—Mullery v. McCann, 95 Mo. 579, 8 S. W. 774.

[e] (N. Y. 1873) Where a justice of the peace, who had been chosen after reaching 70 years of age, sits as a justice of sessions at a criminal trial, the conviction cannot be avoided, since Const. art. 6, § 13, limiting the tenure of judicial office to 70 years of age, is not applicable to justices of the peace.—Dohring v. People, 2 Thomp. & C. 458.

[f] (Pa.) There is nothing in the constitution to confine the choice of electors of a district to an elector of that district for the office of alderman or justice of the peace, nor empowering the legislature to make a justice a township officer.—(1867) In re Camphausen, 3 Pittsb. R. 57; (1872) Commonwealth v. Kerr, Id. 348.

§ 8. Qualification.

Disqualification of justice, see post, §§ 199–203.

Failure of justice to qualify as creating vacancy, see post, § 13.

Qualification anew of justice holding over, see post, § 14.

[a] (U. S. 1807) A magistrate, who is found acting as such, must be presumed to have taken the requisite oaths.—Ex parte Bollman, 8 U. S. (4 Cranch) 75, 2 L. Ed. 554.

[b] (Ill. 1877) The notice which the surety on the justice's official bond gives to the county clerk of his unwillingness to continue longer as such is required to be filed, and, when filed, it becomes a part of the files of his office.—Rudesill v. Jefferson County Court, 85 Ill. 446.

[c] (Ill. 1877) When the question arises whether a justice, in filing a new bond in place of one on which the surety has notified the county clerk that he is unwilling longer to continue to be bound, has acted in pursuance of the statute, resort may be had to the notice filed by such surety with the clerk.—Rudesill v. Jefferson County Court, 85 Ill. 446.

[d] (Ill. 1877) Though the statute requires a justice of the peace to file a new bond, upon notice to the county clerk by his surety in the original one that he does not wish longer to be bound thereby, it is not essential that such new bond should recite the circumstances.—Rudesill v. Jefferson County Court, 85 Ill. 446.

[e] (Ind. 1847) Where a surety in the bond of a justice of the peace applies to be discharged from liability, the justice may waive the issuing of a summons in such case and execute an additional bond.—Weaver v. State, 8 Blackf. 563.

[f] (Miss. 1890) Where one elected justice of the peace before his term begins files his bond, but does not take the oath, and there is no other recognition of his official character, and no other official functions performed by him, a writ of replevin issued by him before his term actually begins is void.—Dabney v. Hudson, 68 Miss. 292, 8 South. 545, 24 Am. St. Rep. 276.

[g] (Ohio, 1869) Where a justice of the peace, having refused to pay over moneys received by virtue of his office, and having been notified by the township's trustees that his sureties were unwilling longer to be liable, procured other persons to subscribe their names to his official bond, but with no seals attached, and without their names in the body of the bond, *held*, that he "failed to give other security," within the meaning of the justices' act of 1854.—Stevens v. Allmen, 19 Ohio St. 485.

[h] (Pa. 1884) Every person elected to the office of alderman or justice of the peace must file his acceptance with the prothonotary of the proper county within 30 days after the election; otherwise, he will be held to have declined the office.—In re Justices of the Peace, 4 Pa. Co. Ct. R. 539.

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[i] (S. C. 1820) Const. art. 8, § 3, provides that all commissions shall be in the name and by the authority of the state, be sealed with the seal of state, and signed by the governor; and article 6 provides that all persons chosen or appointed to any office, before entering on the execution thereof, shall take a prescribed oath. *Held*, that a justice of the peace taking such oath is legally qualified to act without a commission.—Billy v. State, 2 Nott & McC. 356.

[j] (S. C. 1820) Act 1778, providing that justices shall at the time of qualification sign a roll, which shall be lodged in the secretary's office, so that all persons may discover who are acting magistrates, is not a condition precedent to a justice going into office.—Billy v. State, 2 Nott & McC. 356.

[k] (S. C. 1820) Act 1819, providing that thereafter all justices then in commission, who had not qualified before the governor, shall within 90 days qualify before the clerks, does not embrace justices who had qualified agreeably to Act 1800.—Billy v. State, 2 Nott & McC. 356.

[l] (S. C. 1824) The act of 1778, providing that justices, before commencing the duties of their office, shall sign a roll to be lodged with the secretary of state, has been impliedly repealed by long disuse and by the passage of subsequent acts rendering the provision inapplicable and unnecessary.—Morrison v. Barksdale, Harp. 101.

[m] (Va. 1848) A person who has been commissioned by the governor as a justice may take the oaths of office before a justice of the peace, if it be done in the court house on a court day.—Frederick County Justices v. Bruce, 4 Grat. 281.

§ 9. De facto justices.

Collateral attack on title of de facto justice, see post, § 18.

[a] (Ala. 1861) Where one elected intendant of a town under the statute assumed to act as a justice of the peace on the authority of his election, although it did not make him a justice virtute officii, *held*, that it constitutes a valid foundation for a bona fide claim to be ex officio justice of the peace, and, upon acting as such, he became a justice de facto.—Williamson v. Woolf, 37 Ala. 298.

[b] (Ga. 1856) Where a justice of the peace removed to another county, but continued to act under his commission, it was *held* that his acts were not void so far as the public and third persons were concerned, nor could they be invalidated in a proceeding to which he was not a party.—Hinton v. Lindsay, 20 Ga. 746.

[c] (Ga. 1871) One holding a commission from the governor as notary public and ex officio justice of the peace, and acting as such, is a de facto officer.—Pool v. Perdue, 44 Ga. 454.

[d] (Ill. 1860) The decisions of a magistrate de facto will be enforced, though he was not regularly elected.—Town of Lewiston v. Proctor, 23 Ill. (13 Peck) 533.

[e] (Ill. 1895) Const. 1870, art. 6, § 32, makes the terms of offices of justices of the peace four years and until their successors shall be qualified; and section 28 provides that all justices in the city of Chicago shall be appointed by the governor. *Held* that, though the justices in the town of Lake still had a right to hold their offices for four years on its annexation to Chicago, other justices, who were appointed for such town before the expiration of such four years' term, became the successors of the elected justices, and the latter were not even justices de facto, after expiration of said four years.—Becker v. People, 156 Ill. 301, 40 N. E. 944; Wilmott v. Same, Id., affirming (1894) 55 Ill. App. 285.

[f] (Kan. 1875) It is enough to sustain the proceedings of a justice of the peace and sheriff, in respect to the arrest, examination, and bail of alleged offenders, so far as the question of their power to act is concerned, that they are officers de facto.—Rheinhart v. State, 14 Kan. 318.

[g] (Ky. 1843) A constable may justify under an execution issued by one illegally commissioned, but who has qualified, as a justice of the peace.—Rodman v. Harcourt, 43 Ky. (4 B. Mon.) 224.

[h] (Ky. 1845) Although a justice of the peace may have vacated his office by a removal from the county, yet, if he continues to exercise the functions of the office, he is a justice de facto, and his acts will be binding on third persons.—Lexington & H. Turnpike Road Co. v. McMurtry, 45 Ky. (6 B. Mon.) 214.

[i] (Me. 1854) An acknowledgment taken before one who had acted as justice of the peace for many years, but whose last commission has in fact expired, he himself being in ignorance of this, continuing to act as justice in perfect good faith, is nevertheless good, as made before an officer de facto.—Brown v. Lunt, 37 Me. 423.

[j] (Me. 1854) One who had been a justice of the peace under successive commissions for 40 years, and constantly and frequently acted as such, but whose last commission had expired, was *held* to be an officer de facto, having since that time habitually exercised the functions of that office, not knowing that its term had expired.—Brown v. Lunt, 37 Me. 423.

[k] (Me. 1884) The disclosure of a poor debtor is valid, although the justice hearing it is only such de facto.—Johnson v. McGinly, 76 Me. 432.

[l] (Mass. 1849) If a justice of the peace, having been legally qualified to act as such, continue to act in the same capacity after accepting an incompatible office, he will be considered as a justice of the peace de facto, so far as third persons are concerned, and his warrant will justify the officer to whom it is directed in making service thereof.—Commonwealth v. Kirby, 56 Mass. (2 Cush.) 577.

[m] (Mich. 1896) Notwithstanding How. Ann. St. § 649, providing that every office shall become vacant on the neglect of the officer to deposit his oath of office or official bond in the manner and within the time prescribed by law, a justice of the peace is a de facto officer, though he does not file his oath of office and bond within the time stipulated by sections 767–769.—People v. Payment, 109 Mich. 553, 67 N. W. 689.

[n] (Miss. 1890) One who is elected justice of the peace for a term beginning at a certain time is not a de facto justice before that time, though both he and his predecessor believe that his term begins on a certain day before, and the latter then delivers to him the docket, and he files his bond, but does not take the oath of office.—Dabney v. Hudson, 68 Miss. 292, 8 South. 545, 24 Am. St. Rep. 276.

[o] (Mo. 1880) Where a justice holds over after the election of his successor, denying the validity of the act ousting him, his judicial acts are valid as far as the public and third persons are concerned.—Fleming v. Mulhall, 9 Mo. App. 71.

[p] (Mo. 1894) There can be an officer de facto only where there is an office de jure. A justice of the peace appointed after abolish-

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ment of his office is not, therefore, a de facto justice.—Ayers v. Lattimer, 57 Mo. App. 78.

[q] (N. Y. 1847) The acts of a person elected to the office of a justice of the peace, and acting as such, will be held to be valid, as regards the public and third persons, although he has neglected to take the oath of office and to give the security required by law.—Greenleaf v. Low, 4 Denio, 168.

[r] (N. Y. 1848) A person having been elected to the office of justice of the peace, and entering upon the discharge of its duties, without having first taken the oath prescribed by law, is nevertheless a justice of the peace de facto; and his acts as such, so far as relates to the public and third persons, are valid, until a forfeiture of his office has been judicially declared in a proceeding against him for that purpose.—Weeks v. Ellis, 2 Barb. 320.

[s] (N. Y. 1848) And a warrant issued by such person justifies the person to whom it issues to the same extent as if it had been issued by a magistrate de jure.—Weeks v. Ellis, 2 Barb. 320.

[t] (N. Y. 1887) Where it did not appear affirmatively that no ballots were cast for a certain person for the office of justice of the peace, and there was evidence to indicate that probably some were so cast, and where many were cast for the person for an office designated in nearly the same way as the office in question, and it further appeared that the person had entered upon the duties of the office, and in pursuance thereof convicted one who was accused of a crime, *held*, that the office was held by an officer de facto, and the prisoner should not be discharged.—People v. Terry, 108 N. Y. 1, 14 N. E. 815.

[u] (Or. 1887) A justice of the peace who, on the expiration of his term, has refused to surrender the office, docket books, and papers to his duly-qualified successor, is a de facto officer, and his acts, as such, cannot be collaterally attacked.—Hamlin v. Kassafer, 15 Or. 456, 15 Pac. 778, 3 Am. St. Rep. 176.

[v] (Pa. 1887) A mortgage is not rendered invalid because the justice taking the acknowledgment held at the same time another office, and the law declared the two offices to be incompatible; it not being declared which should be forfeited.—Adam v. Mengel, 8 Atl. 606.

[w] (Vt. 1842) Though a justice of the peace holds an office incompatible with the office of justice, he is, however, a justice de facto, and all his acts as such before removal are valid between third persons.—McGregor v. Balch, 14 Vt. 428, 39 Am. Dec. 231.

[x] (Va. 1817) Where a justice of the peace forfeits his office by an acceptance of another office, such acceptance does not vacate such of his subsequent acts as may have been done before his disqualification is established by some proper judicial tribunal.—Maddox v. Ewell, 2 Va. Cas. 59.

[y] (Wis. 1871) A justice of the peace, appointed by the trustees of a village, who assumed the right under the charter to fill a vacancy, having in good faith filed his oath and bond and assumed the duties of the office, is a de facto justice, although the appointment was without authority; and process regularly issued by him protects the officer who executed it.—Laver v. McGlachlin, 28 Wis. 364.

§ 10. Justices ex officio.

Officers invested with jurisdiction as justices, see post, § 76.

[a] (Ala. 1826) After the statute of 1819, the chief justice of the county court could not try a case as justice of the peace.—Rhodes v. Sneed, Minor, 403.

[b] (Cal. 1863) The constitution not having defined the jurisdiction of municipal courts, an act of the legislature conferring upon the mayor of a city the office of justice of the peace ex officio is not unconstitutional.—Uridias v. Morrill, 22 Cal. 473.

[c] (Colo. 1880) Under Gen. Laws, § 2661, granting justices of the peace and police magistrates certain jurisdiction, and providing that "the city council may designate one justice of the peace who shall have such jurisdiction exclusively," and section 2720, authorizing the city council in certain cities to elect a police judge, the designation or appointment of a justice of the peace with such exclusive jurisdiction makes him a police magistrate ex officio.—People v. Curley, 5 Colo. 412.

[d] (Ill. 1853) The provisions of Act Feb. 10, 1849, incorporating towns and cities, and authorizing the mayors thereof to be commissioned as justices of the peace, and vesting them with judicial powers, were abrogated by the provisions of article 5, § 27, of the new constitution, declaring that justices of the peace shall be elected and hold office for four years.—People v. Maynard, 14 Ill. (4 Peck) 419.

[e] (Ind. 1859) Article 7, § 16, of the constitution, provides that "no person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state, other than a judicial office." W. was chosen mayor of Indianapolis, a city incorporated under St. 1857, p. 42, and ex officio, until the city should see fit to elect a city judge, he was to hold court and to have exclusive jurisdiction of offenses against the ordinances, and also the general jurisdiction of a justice of the peace. No other judge was elected, and within the two years he resigned, and was chosen sheriff of the county. *Held*, thereupon, that he assumed the judicial duties, not as incidental to his office as mayor, but as separate and independent duties under the statute.—Waldo v. Wallace, 12 Ind. 569.

[f] (Miss. 1892) Under Const. 1869, art. 6, § 23, providing that "a competent number of justices of the peace * * * shall be chosen in each county by the qualified electors thereof, by districts," a provision of a town charter making the mayor ex officio justice of the peace for the whole district of which the town is a part is void as to that part of the district outside of the town.—Heggie v. Stone, 70 Miss. 39, 12 South. 253.

[g] (Mo. 1879) Const. 1865, art. 6, § 25, authorizes the legislature to provide as many justices of the peace as are required, and no requirement is made as to the mode of appointment. Hence a provision in a city charter that the city recorder shall be ex officio a justice of the peace within the city limits is valid.—Dunn v. St. Louis, I. M. & S. Ry. Co., 70 Mo. 663.

[h] (N. J. 1827) The legislature may constitutionally confer the powers of justices of the peace on the mayor, recorder, and aldermen of a city or borough.—Hutchings v. Scott, 9 N. J. Law (4 Halst.) 218.

[i] (N. J. 1854) The charter of the borough of Beverly requires that certain officers be sworn or affirmed before a justice of the peace of the county of Burlington. Section 7 of the said charter declares that the mayor of the borough shall have all the power and authority of a justice of the peace for the state of New Jersey. *Held*, that said section does not constitute said mayor a justice for the county of Burlington, authorized to administer the oaths of the

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said officers.—State v. Perkins, 24 N. J. Law (4 Zab.) 409.

[j] (N. Y. 1887) Under Laws 1873, c. 370, the recorder of the village of Port Jervis is, for purposes of civil trials within the village, a justice of the peace of the town of Benpark.—Village of Port Jervis v. Barrett Bridge Co., 10 N. Y. St. Rep. 339.

[k] (N. C. 1871) The constitution requires that justices of the peace shall be elected by townships. Hence the legislature cannot confer the judicial powers of a justice of the peace upon the mayor of an incorporated town; such mayor being elected, not by the voters of the township, but only by the inhabitants of the town.—Town of Edenton v. Wool, 65 N. C. 379.

[l] (Ohio, 1857) Act May 3, 1852, conferring on mayors of cities of the second class the jurisdiction and powers of a justice of the peace in certain cases, provided the same was passed by a vote of two-thirds of the members elected to each branch of the general assembly (and this vote will be presumed if the record does not show the contrary), is not repugnant to Const. art. 4, reposing the judicial powers of the state in certain courts "and in such other courts * * * in one or more counties" as the legislature shall establish.—The Northern Indiana v. Milliken, 7 Ohio St. 383.

[m] (Or. 1866) The provision in the charter of Portland making the city recorder ex officio a justice of the peace within the corporate limits is an act within the constitutional authority of the legislative assembly.—Ryan v. Harris, 2 Or. 175.

[n] (Pa. 1800) The judges of the supreme court are ex officio justices of the peace and have power to take recognizances for good behavior.—Respublica v. Cobbet, 3 Yeates, 93.

[o] (Pa. 1850) The recorder of the city of Philadelphia was expressly vested with the power of a justice of the peace, by sections 13 and 14 of the act of incorporation of March 11, 1789. It was not an accessory of his jurisdiction of recorder, and was not taken away by the act of March 19, 1838, transferring the jurisdiction of the mayor's court to the court of criminal sessions. His power as a justice of the peace is not judicial.—Rhoads v. Commonwealth, 15 Pa. (3 Harris) 272.

[p] (Wis. 1854) The constitution of this state vests the judicial power in certain courts and officers. Article 7 provides for the election of justices of the peace. *Held*, that Acts 1849, c. 87, § 2, constituting the mayor of Racine a justice of the peace by virtue of his office, is unconstitutional.—Attorney General v. McDonald, 8 Wis. 805.

§ 11. Term of office.

Expiration of term as affecting powers of justice, see post, § 204.

Term of office on election or appointment to fill vacancy, see post, § 13.

Judicial notice of expiration of term, see "Evidence," vol. 20, c. 105, § 58 [h].

[a] (Cal. 1884) The act of 1880, fixing the terms of office of justices of the peace at two years, is constitutional.—Bailey v. San Joaquin County Sup'rs, 66 Cal. 10, 4 Pac. 768.

[b] (Fla. 1875) Under the amendments of the constitution, justices of the peace hold their offices for four years from the date of signing and sealing their commissions.—In re Executive Communication, 15 Fla. 735.

[c] (Ill. 1895) Const. 1870, art. 6, § 32, makes the terms of office of justices of the peace four years, and provides that they shall hold office until their successors shall be qualified; and section 28 provides that all justices in the city of Chicago shall be appointed by the governor, while in the rest of the state they are elected. *Held* that, on the annexation of the town of Lake to the city of Chicago, the justices then in office in the town had a right to hold office until the expiration of their four years.—Becker v. People, 156 Ill. 301, 40 N. E. 944; Wilmott v. Same, Id., affirming (1894) 55 Ill. App. 285.

[d] (Iowa, 1859) The term of office of a justice elected at the April election of 1858 terminated on the first Monday of January following.—State v. Coenzler, 9 Iowa, 433.

[e] (Iowa, 1859) Const. art. 12, § 7, prescribing the times for the election of state and county officers, provided, however, that the time for which any county officer had been elected at the April election of 1858 should not extend beyond the time fixed for holding the election as prescribed, uses the term "county officer" in the sense which was given to it by the laws in existence at the time of the adoption of the constitution; and hence the term of a justice of the peace elected at the April election expired with the election of a successor at the time prescribed by the constitution for the election of county officers.—State v. Coenzler, 9 Iowa, 433.

[f] (Kan. 1876) Under Gen. St. p. 231, § 8, providing that a person elected to a township office at the first election shall continue to hold it until the next annual township meeting, one so elected justice of the peace can hold his office only for one year, and it is not a full term.—Odell v. Dodge, 16 Kan. 446.

[g] (Ky. 1895) Under Const. § 167, and St. § 3510, providing that the terms of police judges elected in November, 1893, shall begin September 1, 1894, one elected to such office in a city of the fourth class at the November election, 1893, begins his term September 1, 1894. St. § 3550, providing that all officers other than members of the common council shall begin their term on the first Monday in January after election, is not applicable.—Tevis v. Rice, 97 Ky. 528, 30 S. W. 1021.

[h] (Md. 1866) By section 16, art. 2, Const. 1864, it was provided that "all civil officers appointed by the governor and senate shall be nominated to the senate within fifty days from the commencement of each regular session of the general assembly; and their term of office, except in cases otherwise provided for in this constitution, shall commence on the first Monday of May next ensuing the appointment, and continue for two years (unless sooner removed from office) and until their successors respectively qualify according to law." By section 6, art. 12, it was provided that "all officers, civil and military, now holding office, whether by election or appointment, under the state, shall continue to hold and exercise their offices according to their present tenure, unless otherwise provided in this constitution, until they shall be superseded according to its provisions, and until their successors be duly qualified." By section 47, art. 6, the term of office of justice of the peace was changed from an election by the people to appointment by the governor by and with the consent of the senate. Under these provisions, *held*, that the justices of the peace who were elected in November, 1863, and in office when the constitution of 1864 was adopted, continued to hold their offices until regular appointments were made by the governor and senate superseding them.—Taylor v. Hebden, 24 Md. 202.

[i] (Mass. 1840) The justices of the several police courts of Boston, Salem, Lowell, Newburyport, and New Bedford hold their offices during good behavior, and not for the term of

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seven years only.—In re Opinion of Justices, 57 Mass. (3 Cush.) 584.

[j] (Mich. 1895) The language of the charter of Battle Creek (section 4) is identical with Const. art. 6, § 17, and provides for the election and duration of office of justice of the peace, but fixes no time for the term to begin or end. How. Ann. St. § 719, provides that the terms of justices of the peace shall commence July 4th, next succeeding their election. *Held*, that the legislature intended the terms of justices of the peace under the charter to be controlled by section 719.—Hulbert v. Henry, 105 Mich. 211, 62 N. W. 1030.

[k] (Mich. 1895) An act providing for a term of four years for justices of the peace does not contravene Const. art. 6, § 17, declaring that they "shall hold their offices for four years and until their successors are elected and qualified."—Messenger v. Teagan, 106 Mich. 654, 64 N. W. 499; Engel v. Donovan, Id.

[l] (N. Y. 1863) Laws 1859, c. 10, relating to the village of Whitesborough, and declaring that the police justice shall have the same jurisdiction and powers as a justice of the peace, and providing for the election of a police judge annually, is unconstitutional, in that he is in contemplation of law a justice of the peace, whose constitutional term of office is four years.—Waters v. Langdon, 40 Barb. 408.

[m] (Pa. 1879) Under Act March 22, 1877, the term of a justice of the peace, who had been re-elected, which would expire after the passage of the act, was extended to the first Monday in May next following the expiration of his commission.—Hess v. Evans, 1 Leg. Rec. Rep. 89. CONTRA, see (1880) Haupt v. Borough, 1 Leg. Rec. Rep. 213, reversing (1879) 1 Leg. Rec. Rep. 176.

§ 12. —— Alteration.

[a] (Cal. 1885) Act April 1, 1880, amending the Code of Civil Procedure, and providing for the terms of office of justices of the peace, applies to those elected before, as well as after, the general election of 1879.—Shearer v. City of Oakland, 67 Cal. 633, 8 Pac. 384.

[b] (Fla. 1875) Since the amendment to the state constitution fixing the term of office of a justice of the peace at four years from the date of the signing and sealing of his commission, a justice at the expiration of this term ceases to be such officer, although he was appointed prior to the amendment, when the tenure of office was during good behavior.—In re Executive Communication, 15 Fla. 735.

[c] (Ill. 1895) Act April 25, 1889, for the annexation of the town of Lake to the city of Chicago, provided that, at the expiration of the terms of office of certain justices of the peace, their dockets and files should be deposited with any justice of the city that the circuit court should designate. *Held*, that the omission of the court to so designate did not extend the terms of office of such justices.—Becker v. People, 156 Ill. 301, 40 N. E. 944; Wilmott v. Same, Id. Affirming (1894) 55 Ill. App. 285.

[d] (Me. 1880) Sp. Laws 1879, c. 180, entitled "An act to establish the police court of the city of Belfast, and to abolish the Belfast municipal court," terminates the commission of one appointed judge of the police court created by Sp. Laws 1850, c. 363, §§ 11-14.—Fahay v. Boardman, 70 Me. 448.

[e] (Mo. 1880) The fact that Rev. St. 1879, § 2807, concerning the election of justices of the peace, etc., results incidentally in extending the terms of some justices, does not render it invalid as inconsistent with the constitutional provision relating to terms of offices; nor is the act otherwise unconstitutional.—State v. Ranson, 73 Mo. 78.

[f] (N. Y. 1827) The legislature has no power to shorten the constitutional term of office of justices of the peace, either directly or indirectly, by the erection or division of counties; but it has power to enlarge or diminish their territorial jurisdiction.—People v. Garey, 6 Cow. 642; Gary v. People, 9 Cow. 640.

[g] (N. Y. 1873) The term of office of police justice in the city of New York is not vested by the constitution, but is subject to legislative control.—Coulter v. Murray, 15 Abb. Prac. (N. S.) 129.

[h] (N. Y. 1888) Laws 1886, c. 335, § 7, providing that justices of a town, duly elected, qualified, and acting, at the time the law extinguishing the town organization takes effect, shall hold their office for the term for which they were elected, does not extend to one who was elected, but had not qualified, before the law became operative.—Gertum v. Kings County Sup'rs, 109 N. Y. 170, 16 N. E. 328. Affirming (1887) 12 N. Y. St. Rep. 659.

[i] (N. Y. 1888) The provision of the constitution making the term of office of justices four years does not prevent the legislature, in the exercise of its duty to organize cities from other forms of civil government, from extinguishing the town organization, and thereby shortening the term of office of the justices thereof.—Gertum v. Kings County Sup'rs, 109 N. Y. 170, 16 N. E. 328. Affirming (1887) 12 N. Y. St. Rep. 659.

[j] (N. Y. 1896) Justices of the peace of the city of Brooklyn are "justices of inferior local courts," within Const. 1895, art. 12, § 3, providing that the terms of city officers holding office on January 1, 1895, which would expire in an even-numbered year, shall be abridged so as to expire with the close of the preceding year, but that such provision shall not apply to any judicial officer "except judges and justices of inferior local courts."—Petterson v. Van Wart, 1 App. Div. 8, 36 N. Y. Supp. 1009; Murphy v. Schnitzpan (Sup.) 15 Misc. Rep. 496, 36 N. Y. Supp. 1013.

[k] (Tenn. 1886) The legislature cannot, by repealing the charter of a town, cut short the term of office of a justice of the peace elected before the repeal of the charter.—Ex parte Cross, 84 Tenn. (16 Lea) 486.

§ 13. Vacancies.

[a] (Ariz. 1894) Under Rev. St. par. 1393, declaring the term of office of a justice of the peace to be two years, and till his successor is elected and qualified, and paragraph 484, providing that all county and precinct officers shall hold office till their successors are elected and qualified, a justice of the peace, who is a precinct officer, in a precinct entitled to two justices, holds over where only one candidate receives more votes, and another the same number as he, and there is no vacancy to which an appointment can be made.—Meyer v. Culver, 35 Pac. 984.

[b] (Cal. 1867) R. was appointed to fill a vacancy in the office of police judge for the unexpired term. *Held*, that he was entitled to hold the office for the same term his predecessor would have had no vacancy occurred, and not merely until his successor was elected and qualified.—People v. Rix, 33 Cal. 503.

[c] (Cal. 1894) Under a charter providing that the mayor shall appoint suitable persons to fill vacancies in office, he is empowered to fill vacancies in the offices of city justices of the peace.—People v. Sands, 35 Pac. 330.

[d] (Cal. 1894) City justices of the peace are not township or county officers, and the board

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of supervisors has no authority to fill vacancies therein.—People v. Sands, 35 Pac. 330.

[e] (Cal. 1894) Acts 1891, p. 304, § 25, authorizing the board of supervisors to fill by appointment all vacancies occurring in any office filled by its appointment, and elective county and township offices, does not repeal Code Civ. Proc. § 111, providing that if any vacancy occurs in the office of a justice the board shall appoint an eligible person to hold the office for the remainder of the term.—People v. Sands, 102 Cal. 12, 36 Pac. 404.

[f] (Cal. 1894) Code Civ. Proc. § 111, providing that, if any vacancy occurs in the office of a justice of the peace, the board of supervisors shall appoint an eligible person for the remainder of the term, applies to all justices, whether in cities or townships; the Oakland city charter, which provides that the mayor may appoint suitable persons to fill vacancies in any office, except as in the charter provided, applying only to vacancies in offices created by the charter itself.—People v. Sands, 102 Cal. 12, 36 Pac. 404.

[g] (Ill. 1846) The statutes require that every justice of the peace shall file a bond in a prescribed form within 20 days after his election; otherwise, the office shall be considered as vacant. A justice filed a bond within 20 days, omitting a part of the prescribed condition, and, after the 20 days had expired, filed another in proper form. It was *held* that neither bond would avail, and that the office was vacant.—People v. Percells, 8 Ill. (3 Gilman) 59.

[h] (Ind. 1832) Under the statute of 1831, county commissioners, doing county business, may order an election of a justice of the peace to supply a vacancy which had previously occurred; but they cannot make such order in anticipation of a vacancy.—Nooe v. Bradley, 3 Blackf. 158.

[i] (Kan. 1874) Where A. is duly elected justice of the peace for the term of two years, and qualifies, and thereafter during the first year of his term resigns his office, and B. is appointed to fill the vacancy more than 30 days prior to the first succeeding regular election, and then at such election elected justice of the peace, this election is also only to fill the vacancy, and his term expires at the expiration of the term of which A. was elected.—Hale v. Evans, 12 Kan. 562.

[j] (Kan. 1886) Const. art. 3, § 11, provides that, "in case of vacancy in any judicial office, it shall be filled by appointment of the governor until the next regular election shall occur more than 30 days after such vacancy shall have happened." *Held* that, since Gen. St. 1868, c. 110, § 48, provides that, in cities having more than 2,000 inhabitants, justices of the peace shall be elected at the regular city election, a person appointed to fill a vacancy in such office held over till the next city election, though this did not take place till after the next general November election.—Ward v. Clark, 35 Kan. 315, 10 Pac. 827.

[k] (Ky. 1895) In April, 1893, M. was elected police judge of a fourth-class city for a term of one year, under provisions in its charter. On November 7, 1893, under St. 1894, § 3510, providing that judges of the police courts in fourth-class cities may be appointed by the board of council, under ordinance passed 60 days previous to any November election, M. was again appointed judge of the police court of the same city, his term of office to begin September 1, 1894. *Held*, that by provision of Const. § 167, providing that the terms of police judges elected in November, 1893, should begin September 1, 1894, and continue until the November election, 1897, the term of office of M. under his election in April, 1893, was extended until September, 1894, and upon his death, August 8, 1894, two vacancies existed, one for the balance of the term ending August 31, 1894, and the other for the full term beginning September 1, 1894, and ending with the November election, 1897.—Boyd v. Land, 97 Ky. 379, 30 S. W. 1019.

[l] (Md. 1859) Under Const. art. 4, § 19, the appointee of the governor to a vacancy in the office of justice of the peace holds till the next regular election of justices of the peace, and the appointment must be made by the governor alone.—Cantwell v. Owens, 14 Md. 215.

[m] (Mich. 1887) Under section 20 of the charter of Grand Rapids, Mich., providing that all officers of the city shall take office on the first Monday in May, and section 23, limiting the term of elective officers appointed to fill vacancies, to "the first Monday of May succeeding," a justice of the peace appointed by the council January 25, 1885, to fill a vacancy in that office caused by death, held only until the first Monday in May following, and a judgment rendered by such justice May 16, 1885, is void.—Edison v. Almy, 66 Mich. 329, 33 N. W. 509.

[n] (Miss. 1892) Const. 1890, § 170, provides for dividing each county into districts. Section 171 provides that justices of the peace shall be chosen in each county in the manner provided by law for each district. The mode of filling vacancies in all offices not specifically provided for by the constitution (which provisions do not include justices of any county office) is left by section 103 to the legislature. The legislature provided for the election in districts of justices of the peace, and also (Code 1892, § 3683) for filling vacancies in any "county" or "county district" office by election. Section 3686 authorizes the governor to fill by appointment any vacancy in a "county, city, town, or village" office, where the local authorities have failed to act, but contains no mention of "county district" offices. *Held* that, although the governor is not authorized by section 3686 to fill a vacancy in the office of a justice, the same not being a county office, he is authorized by section 103 of the constitution, the failure of the local authorities being an emergency not otherwise provided for within said section.—State v. Lovell, 70 Miss. 309, 12 South. 341.

[o] (Mo. 1884) The term of office of a justice of the peace, appointed under Rev. St. § 2809, to fill a vacancy in the office, extends only to the next general election, and the election, commission, and qualification of a successor.—State v. Manning, 84 Mo. 661.

[p] (Mo. 1895) Under Rev. St. 1889, § 6090, providing that at the general election in 1890, and every four years thereafter, there shall be elected a justice of the peace, who "shall hold his office for four years, and until his successor is elected and qualified," and section 6096, providing that a vacancy occurring in the office of justice of the peace shall be filled by the appointment of one "who shall hold his office until the next general election of county officers," the term of one appointed in 1892 to fill a vacancy expires at the general election of county officers in 1894.—State ex rel. Brown v. Spitz, 127 Mo. 248, 29 S. W. 1011.

[q] (N. Y. 1853) Const. 1846, art. 6, § 17, abrogates the provisions of 1 Rev. St. p. 347, relative to supply vacancies in town offices. An appointment of a justice of the peace to fill a vacancy made under those provisions is null and void; and the appointee cannot even be deemed a justice in fact, nor can perjury be assigned of testimony given before him.—People v. Albertson, 8 How. Prac. 363.

[r] (N. Y. 1856) Act Feb. 3, 1849, which provides that, whenever vacancies occur in any

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office for the filling of which there is no existing provision, the governor shall appoint some capable person to execute the duties until the commencement of the political year succeeding the first annual election after the happening of the vacancy at which such officer can be by law elected, applies to the office of the justice of the peace, since there was no provision of law applicable to vacancies therein.—People v. Keeler, 25 Barb. 23.

[s] (N. Y. 1858) Where a justice of the peace was appointed by the governor to fill a vacancy caused by death, the term of such justice was at an end as soon as a person was chosen at the next annual town meeting for the residue of the unexpired term.—People v. Keeler, 17 N. Y. 370, reversing (1857) 25 Barb. 421.

[t] (N. Y. 1859) H., a justice of the peace of the city of B. prior to the consolidation of the cities of B. and W. and the town of B., resigned after the consolidation, and the governor appointed J. in his place. *Held* that the appointment was invalid; the common council of the city having the power to fill vacancies.—People v. Carter, 29 Barb. 208.

[u] (N. Y. 1886) Laws 1875, c. 166, providing that a person appointed to fill the vacancy in the office of a justice of the peace whose term of office would have expired on the 31st day of December next succeeding such appointment shall hold office until said 31st day of December, does not contravene the constitutional provision that, when the legislature directs an election to fill a vacancy occurring before the expiration of a full term, the person elected shall hold for the residue of the unexpired term. Such provision does not require the holding of an election to fill a vacancy occurring before the expiration of a full term.—In re Elliott, 6 N. Y. St. Rep. 8.

[v] (N. Y. 1889) The engagement of the city judge of Yonkers in attending to the removal of his family of 12 persons from their summer resort to his home in Yonkers, is an "inability," within Laws 1881, c. 184, tit. 3, § 8, which makes it the duty of the mayor to designate one of the justices of the peace of the city "who shall, only in case of * * * inability of the city judge to act, exercise, in the place and stead of the city judge, criminal jurisdiction."—People v. Schirmer, 55 Hun, 160, 8 N. Y. Supp. 76.

[w] (N. C. 1887) Const. § 28, art. 4, provides that when the office of justice of the peace becomes vacant, and the voters of the district fail to elect, the clerk of the superior court shall appoint to fill the vacancy. Code, § 819, provides that the justices of the peace shall be elected by the legislature. Acts 1885, c. 288, repealing all conflicting laws, provides that all appointments made by the legislature shall be void unless the appointees qualify in three months, and that the governor shall fill all vacancies so occurring by an appointment for the unexpired term. The legislature appointed a justice, who failed to qualify in the time prescribed, and the governor appointed the plaintiff to fill the vacancy. Plaintiff being duly notified, and with proper credentials, appeared before the clerk of the court, the defendant, to qualify, who refused to qualify him. Code, § 821, provides that a justice shall qualify before the clerk of the superior court, and the clerk shall file the oath. *Held*, that the act of appointment in no way conflicts with article 4, § 28, of the constitution.—Gilmer v. Holton, 98 N. C. 26, 3 S. E. 812.

[x] (Ohio, 1888) Rev. St. § 1802, authorizing the mayor to appoint a person to act as police judge in the temporary absence of the duly-elected judge, does not contravene Const. art. 4, § 10, providing that, on the office of any judge becoming vacant before the expiration of his term, the vacancy shall be filled by the governor, since such temporary absence is not a vacancy.—Moliter v. State, 10 Ohio Dec. 324, 20 Wkly. Law Bul. 323.

[y] (Pa. 1884) Where a ward has been divided into two or more wards, and no justice resides in some of the new wards, there is a vacancy in the office of justice, which is properly filled at the next annual municipal election.—Commonwealth v. Pattison, 1 Lanc. Law Rev. 252.

[yy] (Tenn. 1855) That part of chapter 1, § 15, of the Acts of 1835, which limits the term of a justice elected to fill a vacancy produced by resignation, etc., to the unexpired term of his predecessor, is unconstitutional. By article 6, § 15, of the constitution, the term of office is fixed at six years; the manner of election only being referred to the legislature.—Keys v. Mason, 35 Tenn. (3 Sneed) 6.

[z] (Wash. 1892) Const. art. 11, § 6, which declares that all vacancies in county, township, precinct, and road district offices shall be filled by appointment of the county commissioners, applies to justices of the peace, thus superseding Gen. St. § 308 et seq., which provide for the filling of such a vacancy by election.—State v. Cronin, 5 Wash. 398, 31 Pac. 864.

§ 14. Holding over.

Justice holding over as de facto justice, see ante, § 9.

[a] (Cal. 1886) The character of the office of justice of the peace was not changed by the reduction of the number of justices in pursuance of the constitution of 1879, nor were justices' courts abolished, but, on the contrary, they were expressly continued in force; and the failure of a justice elected under such constitution to qualify would leave a vacancy in the office, which the board of supervisors could fill by appointment; but until the qualification of the person duly elected or appointed, the former incumbent, though holding over by virtue of an election under the old constitution, would be legally entitled to the office, under section 879 of the Political Code.—French v. Santa Clara County, 69 Cal. 519, 11 Pac. 30.

[b] (Kan. 1871) Under the constitution, a justice of the peace is elected for two years and until his successor is qualified, and no vacancy will occur in the office at the expiration of the two years by reason of a failure on the part of the people to elect his successor at the proper time, but he will continue to hold the office until a successor is duly qualified.—Borton v. Buck, 8 Kan. 302.

[c] (Kan. 1875) A justice of the peace holds his office until his successor is qualified; and if a party has once been elected and qualified, and at a subsequent election is re-elected, but fails to qualify, he nevertheless remains a justice de jure, as well as de facto, until a successor is qualified.—Rheinhart v. State, 14 Kan. 318.

[d] (Neb. 1891) Comp. St. c. 10, § 17, provides that "when it is ascertained that the incumbent of an office holds over by reason of the nonelection or nonappointment of a successor, or of the neglect or refusal of the successor to qualify, he shall qualify anew within ten days from the time at which his successor, if elected, should have qualified." *Held*, in an action of quo warranto by an incumbent of the office of justice of the peace holding over, against an appointee, that the incumbent could not continue to exercise the duties of the office without filing a sufficient hold-over bond, and that his remedy was by mandamus to compel the county board to approve his bond, in-

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stead of quo warranto against the appointee.—State v. Lynn, 31 Neb. 770, 48 N. W. 881.

[e] (Wis. 1886) Where, under Const. art. 7, § 15, a justice holds over until his successor is elected and qualified, he does so in a case where the city charter is silent on the subject, and where, but for the constitutional provision, there might be a doubt.—City of Platteville v. Bell, 66 Wis. 326, 28 N. W. 404.

§ 15. Resignation or abandonment of office.

Justice holding incompatible office as justice de facto, see ante, § 9.

Forfeiture of office of justice of the peace by acceptance of incompatible office, see "Officers," I.

[a] (Ga. 1856) Where A. was elected justice of the peace for one county, afterwards boarded and lodged four nights in a week in another county, keeping school there, and returning to the first the remaining three, it was *held* that, under the act of 1838, A. acquired a residence in the latter, and his commission as justice was vacated thereby, notwithstanding his intention to return at the end of six months.—Hinton v. Lindsay, 20 Ga. 746.

[b] (Ky. 1814) A temporary removal of a justice of the peace from his county, with an intent to stay four months and then return, does not vacate his office.—Lyon v. Commonwealth, 6 Ky. (3 Bibb) 430.

[c] (Ky. 1845) That the removal of a justice of the peace from his county may operate to vacate his commission, it must be with the absolute intent to change his place of residence.—Lexington & H. Turnpike Road Co. v. McMurtry, 45 Ky. (6 B. Mon.) 214.

[d] (Pa. 1887) A justice of the peace who has removed from the district for which he was elected cannot administer an oath to road jurors, as by his removal he vacates his office.—In re Clinton Tp. Road, 3 Pa. Co. Ct. R. 170.

[dd] (Tex. 1894) The mere absence of a justice of the peace from his precinct does not create a vacancy, within Sayles' Civ. St. art. 1536, authorizing the commissioners' court to fill any vacancy in the office.—Crawford v. Saunders (Civ. App.) 29 S. W. 102.

[e] (Va. 1820) A mandamus will not issue from the superior court to reinvest a former justice of the peace with his office, who had removed from the county in which he was appointed with his family to another county, where he remained for several years and then returned.—Chew v. Justices of Spottsylvania, 2 Va. Cas. 208.

[f] (Va. 1830) A justice of the peace of the county of A. left the state with intent to reside in another state. He remained in another state nine months, but did not establish his permanent residence there. He then returned, and resumed his former residence in the county of A. *Held*, that he had no right to resume his office of justice of the peace of A.—Poulson v. Justices of Accomack, 2 Leigh, 743.

§ 16. Suspension or removal.

Removal from office of justice of the peace for acceptance of incompatible office, see "Officers," I.

Validity of act relating to removal of justices of the peace as not embraced in title, see "Statutes," III.

[a] (Ala. 1879) A report of the grand jury as to misconduct on the part of a justice of the peace, recommending his removal, under the provisions of Act Jan. 23, 1879, must set forth clearly the nature and description of the misconduct charged, although it need not be described with the same degree of accuracy required in pleading.—State v. Seawell, 64 Ala. 225.

[b] (D. C. 1887) Under Act Cong. June 7, 1878 (20 Stat. 700), authorizing the president to appoint justices of the peace for the District of Columbia for the term of four years, "subject to removal for cause," the president may remove a justice for cause, and the supreme court of the district cannot review his action to determine the sufficiency of the cause, nor can it presume that he acted without cause from the fact that none is specified in the order of removal.—United States v. Oliver, 6 Mackey, 47.

[c] (La. 1876) As the manner of removal from office of justices of the peace is established by the constitution, and requires the vote of two-thirds of the members of both branches of the general assembly, the statute providing that a conviction for extortion shall operate a vacation of the office is unconstitutional.—State ex rel. Koppel v. Thompson, 28 La. Ann. 444.

[d] (Md. 1859) The power of removal of officers for incompetency or misconduct, conferred upon the governor by Const. art. 2, § 15, applies only to such offices as he has power to fill by original appointment for terms of years, and does not embrace justices of the peace.—Cantwell v. Owens, 14 Md. 215.

[e] (Mo. 1886) Police justices of the city of St. Louis, being appointed for a specified term, and removable only for cause, and not at the discretion of the mayor or council of the municipal assembly, a resolution removing a person from the office is void, if the person so removed does not receive a specification of the charges, notice, and an opportunity to be heard.—State ex rel. Denison v. City of St. Louis, 90 Mo. 19, 1 S. W. 757.

[f] (N. Y. 1877) The justices of the peace for the city, appointed under Laws 1861, c. 143, may be removed by the legislature, and others appointed in their stead.—People v. City of Rochester, 11 Hun, 241.

[g] (N. Y. 1888) Under Laws 1847, c. 280, providing for removal of a justice for malfeasance in office, denial of bail on an arrest for a misdemeanor, though unauthorized, is not a ground for removal.—In re Thomas, 48 Hun, 617, 2 N. Y. Supp. 38.

[h] (N. Y. 1889) Where a judge is charged with intoxication, affidavits are relevant, tending to show that he has well and faithfully discharged his judicial duties.—In re Grogan, 52 Hun, 615, 5 N. Y. Supp. 499.

[i] (N. Y. 1889) Where all the affidavits in support of the charges are fully met by affidavits on the part of respondent, and on examination of all the papers the charges appear to be substantially answered, a reference will not be ordered under Laws 1880, c. 354, which gives the power to order a reference in such cases, but does not require one as a matter of course, or in every instance where there are conflicting affidavits.—In re Grogan, 52 Hun, 615, 5 N. Y. Supp. 499.

[j] (N. Y. 1889) Const. art. 6, § 18, provides that justices of the peace and justices and judges of inferior courts not of record, may be removed for cause by such courts as may be prescribed, and Code Cr. Proc. § 132, designates the general term of the supreme court as the court to make such removals. *Held*, that the charter of the city of Buffalo (Laws 1870, c. 519, tit. 2, § 24, as amended by Laws 1886, c. 17), which authorizes the mayor to remove the police justice of that city, does not oust the

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supreme court of jurisdiction.—In re King, 53 Hun, 631, 6 N. Y. Supp. 420.

[k] (N. Y. 1889) In a proceeding for the removal of a police justice, a general charge of misconduct in office during his present term of office will not justify an inquiry into acts committed by such justice before such term began, though such acts are set forth in the specifications accompanying the charge.—In re King, 53 Hun, 631, 6 N. Y. Supp. 420.

[l] (N. Y. 1889) It is not sufficient cause for removal that on account of passion and prejudice the justice illegally continued a bastardy case for two months, and kept the defendant in jail during such time, when it appears that no objection was made to such continuance by the prisoner.—In re King, 53 Hun, 631, 6 N. Y. Supp. 420.

[m] (N. Y. 1889) Nor is it sufficient cause for such removal that he maliciously uttered from the bench slanderous words regarding the mayor of his city and the county judge of his county.—In re King, 53 Hun, 631, 6 N. Y. Supp. 420.

[n] (N. Y. 1889) Nor that he objected because the police commissioners detailed certain policemen for duty in his court, and told one of the policemen to tell the commissioners that he did not want the policemen there.—In re King, 53 Hun, 631, 6 N. Y. Supp. 420.

[o] (N. Y. 1889) Nor that he suspended sentence on a prisoner convicted of assault and battery.—In re King, 53 Hun, 631, 6 N. Y. Supp. 420.

[p] (N. Y. 1889) Nor that in his return on an appeal he maliciously referred to the appellant's attorney as "a penitentiary outcast, and legal pirate, who has made a practice of hanging around the police court and penitentiary seeking whom he might devour, and persuading ignorant persons to appeal when he knows there is no cause for reversal, often causing them unwittingly to commit perjury," when it appears that such statements are substantially true.—In re King, 53 Hun, 631, 6 N. Y. Supp. 420.

[q] (N. Y. 1891) On a motion to remove a justice of the peace it appeared that, while the justice was temporarily acting as a police justice, one C. was brought before him, duly charged with the commission of a criminal offense. The justice required C. to give $1,000 bail. The bondsman offered was not a resident of the city in which the proceeding was had, and the justice adjourned the hearing for five days, to enable C. to procure a city bondsman. The petition for removal stated that on the day to which the hearing was adjourned the justice fixed the bail at $2,000, which averment the justice denied. It was also charged by C., and denied by the justice, that the justice denied C. the right of counsel before he pleaded. No new bail was given, and the case was again adjourned for five days, during which the complaint against C. was transferred to the grand jury by a certificate of a justice of the supreme court. *Held*, that no such evil or oppressive conduct on the part of the justice as would justify his removal from office was shown.—In re Peterson, 60 Hun, 585, 15 N. Y. Supp. 489.

[r] (N. Y. 1892) In a proceeding to remove a police justice from office under Laws 1847, c. 280, § 25, as amended by Laws 1880, c. 354, § 1, which empowers the general term to certify "the reasonable expenses of [the] referee," it has no authority to include in such expenses the counsel fees and disbursements of the parties to the proceeding.—In re King, 130 N. Y. 602, 29 N. E. 1096.

[s] (N. Y. 1893) Evidence that a justice of the peace attended a prize fight, and prevented the arrest of the guilty parties; that he frequently visited gambling houses on Sundays, and made no effort to suppress them, but was apparently intimate with the "coppers," who were appointed to watch those trying to suppress the gambling and inform the gamblers; that he attended a dog fight; that he used his office to punish a constable who was alleged to have shot at the proprietor of the hotel where the prize fight occurred, which allegation the justice knew to be false,—was sufficient to justify his removal from office.—In re Carpenter, 66 Hun, 631, 21 N. Y. Supp. 351.

[t] (N. Y. 1894) Rev. St. (Birdseye's Ed.) p. 1770, §§ 283, 284, authorizing the removal of a justice of the peace by the county judge, having been repealed by Laws 1890, c. 589, § 243, such removal can be made only by the general term of the supreme court as provided by Code Cr. Proc. § 132.—In re Prescott, 77 Hun, 518, 28 N. Y. Supp. 928.

[u] (N. Y. 1895) A police justice is guilty of misconduct for which he should be removed where it appears that during a strike of the employés of a street railway company he discharged strikers who were arrested and brought before him, charged with throwing stones at the cars and assaulting the main operator of the cars, notwithstanding the evidence against them, and stated that the strikers had a perfect right to take men off the cars if they could do so in an orderly way.—In re Quigley (Sup.) 32 N. Y. Supp. 828.

[v] (N. Y. 1895) A police justice will be removed on the ground of misconduct in office where it appears that his judicial acts were intentional violations of the laws governing magistrates, or were in disregard of legal rules.—In re Quigley (Sup.) 32 N. Y. Supp. 828.

[w] (Tenn. 1873) An indictment against a justice of the peace as a private citizen for drunkenness and profanity will not support a verdict of dismissal from his office, under Code, §§ 4817, 4818a.—Carpenter v. State, 65 Tenn. (6 Baxt.) 585.

[ww] (Tex. 1872) Act Aug. 15, 1870, §§ 2, 8, "giving effect to the several provisions of the constitution concerning taxes," which purport to authorize the removal of justices of the peace by district judges by summary proceedings, are repugnant to section 24, art. 5, of the constitution, which provides the manner by which county and district officers shall be removed, when their removal is not otherwise provided for.—Ex parte Hogg, 36 Tex. 14; Laflain v. State, 36 Tex. 696.

[x] (Tex. 1873) Where a rule nisi was entered against all the justices of the peace in a certain county, without naming them, to show cause why they should not be removed from office for a specified cause, a judgment entered by default against one of them, removing him from office for an entirely different cause, was void.—Ex parte Fields, 37 Tex. 575.

[y] (Va. 1808) A justice of the peace may be amerced and removed from office upon an information against him in a superior court of criminal jurisdiction for misbehavior in office. Being intoxicated while in the discharge of his offical duties is a sufficient misbehavior for such proceedings against him. If the jury in such case find the defendant "guilty" generally, it is sufficient to authorize the judgment of amotion from office; and no further testimony is admissible before the court after the discharge of the jury.—Commonwealth v. Alexander, 4 Hen. & M. 522.

[yy] (Va.) Where a justice of the peace had been indicted for drunkenness while in the execution of his official duties, and, tried by a jury, found guilty, it was *held* that he ought to

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be removed from his office.—(1808) Commonwealth v. Alexander, 1 Va. Cas. 156; (1812) Same v. Mann, Id. 308.

[z] (Va. 1818) Where a justice of the peace maliciously issued a warrant commanding a person to appear before him and answer the complaint of another person, and adjudged him to pay costs, when in fact said complaint was never made to him, it was *held* that he was guilty of malfeasance, and he was accordingly removed from office.—Wallace v. Commonwealth, 2 Va. Cas. 130.

[zz] (Va. 1830) A conviction and judgment for felony against a justice of the peace is a forfeiture of his office, and incapacitates him from ever afterwards acting under his commission.—Commonwealth v. Fugate, 2 Leigh, 724.

§ 17. Title to and possession of office.

Certificate as to official character, see "Acknowledgment," vol. 1, cc. 1000–1012, §§ 244–254.

[a] (Cal. 1884) The exercise by a justice of the peace of jurisdiction outside of that conferred by the constitution is not the exercise of an office, from which he may be ousted by quo warranto.—People v. Veuve, 3 Pac. 862.

[b] (Colo. 1874) A writ of attachment and return thereto is sufficient evidence to warrant a finding of the official character of the justice of the peace who issued the attachment.—McCraw v. Welch, 2 Colo. 284.

[c] (Colo. 1880) A person assuming as police judge to exercise judicial functions under no other authority than that conferred by municipal authority is guilty of usurpation.—People v. Curley, 5 Colo. 412.

[d] (Ga. 1879) Where, pending a contest for the office of justice of the peace, a commission is inadvertently issued to one of the claimants, after due notice to the governor of the contest and without the fault of the other claimant, the commission is not conclusive.—Hardin v. Colquitt, 63 Ga. 588.

[e] (Ill. 1857) A justice of the peace is not obliged to pass over money, collected by him while in office, to his successor.—Warren County v. Jeffrey, 18 Ill. (8 Peck) 329.

[f] (Ill. 1884) Under Acts 1847, c. 51, § 17, providing that, before proceedings in a justice court can be used in another county, the county clerk shall certify that the justice was at the time a justice of the peace duly commissioned, the certificate of a justice that certain commissioners appointed to survey and locate a road were fully sworn before him is not, without other proof, admissible in evidence out of the justice's county.—Crossett v. Owens, 110 Ill. 378.

[g] (Ill. 1890) On a petition in quo warranto charging defendant with unlawfully exercising the powers of a police magistrate and justice of the peace in East St. Louis, in St. Clair county, a plea setting up that defendant was a duly elected and qualified police magistrate of the village of New Brighton, in St. Clair county, is good on demurrer, as such officer could exercise certain duties of his office through the entire county.—People v. Wyatt, 34 Ill. App. 454.

[h] (Ind. 1835) In trespass quare clausum fregit, the defendant pleaded in justification a judgment and execution of a justice of the peace. *Held*, that the official character of the justice must be proved.—Hunter v. Harris, 4 Blackf. 126.

[i] (Ind. 1884) Upon the election of A., B., and C. as justices of the peace, A. qualified, B. failed to, and C., who had resigned a similar position, was appointed to fill the vacancy left by B., and qualified and kept the books B. had been using. *Held* that, upon B.'s qualifying, he was entitled to the books retained by C.—Morris v. State, 94 Ind. 565.

[j] (Ky. 1816) The recommendation by the county court of a person, as a member of their body, as a proper person to fill the office of sheriff, is not conclusive that he was a justice at that time, as against persons not parties to such recommendation.—Gilbert v. Huston, 16 Ky. (Litt. Sel. Cas.) 223.

[k] (Me. 1851) Where there are several persons in a town, each holding the office of a justice of the peace, it is not in conflict with any constitutional right that one of them should be selected by the voters of the town to exercise the powers of that office within the town, exclusively of the others, or that the one so selected should be vested with some superadded powers. The person thus selected derives his powers, not from the choice of the town, but from his previous appointment as justice of the peace.—State v. Coombs, 32 Me. 526.

[l, m] (N. J. 1844) Proof that a party acted as, and exercised the office of, a justice of the peace, is sufficient evidence of his being one, without producing his appointment or commission.—Conover v. Solomon, 20 N. J. Law (Spencer) 295.

[n] (Pa. 1851) Under Act April 21, 1846, justices of the peace or aldermen are bound to deliver over their dockets and papers to their successors in office, where the vacation arises from removal out of the district, ward, or township, or from any other cause; and the representatives of a deceased magistrate are also bound to deliver the docket of such deceased alderman to the person elected as his successor.—Regle v. Nugent, 2 Pars. Eq. Cas. 297.

[o] (Pa. 1863) A justice of the peace whose term of office has expired cannot be summarily compelled to deliver over his docket to his successor in office by an order of court, on petition and rule to show cause.—In re Baker, 44 Pa. (8 Wright) 440.

[p] (Pa. 1895) Where an alderman elected for one ward moves his office into another ward, and holds court there, the remedy of the alderman whose ward is thus invaded is by injunction, not by quo warranto or writ of prohibition.—Wright v. Millar (Com. Pl.) 1 Lack. Leg. N. 346.

[q] (Tenn. 1871) A presentment for assuming to be a justice of the peace without being legally qualified must show wherein the want of qualification consists.—Daniel v. State, 50 Tenn. (3 Heisk.) 257.

[r] (Tenn. 1873) The act of 1873 to provide justices of the peace with the statutes, etc., does not intend to replace lost copies thereof.—Perkins v. Gibbs, 60 Tenn. (1 Baxt.) 171.

§ 18. —— Collateral attack.

[a] (Ga. 1871) The official acts of a justice of peace de facto cannot be attacked collaterally by the parties to a suit on the ground that his appointment was not authorized by law.—Pool v. Perdue, 44 Ga. 454.

[b] (Ill. 1845) A suit commenced before a person assuming to act as a justice of the peace, and appealed to the circuit court, will not be dismissed on motion and affidavit showing that he was not duly qualified; and his right to act cannot be collaterally examined in such a case.—Culbertson v. City of Galena, 7 Ill. (2 Gilman) 129.

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[c] (Ind. 1884) The title of a justice of the peace to his office, held by appointment under color of law, cannot be questioned in a suit to enjoin the collection of a judgment rendered by him.—Baker v. Wambaugh, 99 Ind. 312.

[d] (La. 1881) A prisoner cannot, in an application for a writ of habeas corpus, question the legality of the title to office of the magistrate who committed him, where the magistrate is the regular incumbent de facto, and the tribunal one of recognized legal existence and competency.—State v. Pertsdorf, 33 La. Ann. 1411.

[e] (Me. 1861) In a suit on a poor debtor's bond, where the defense was that the debtor had performed one of its alternative conditions by taking the oath required, evidence that the justice who issued the notification to the creditor was at the time he was commissioned a minor, and not eligible to the office, was rightfully excluded.—Hooper v. Goodwin, 48 Me. 79.

[f] (Mass. 1861) The validity of the appointment of one who holds a commission as justice of the peace, and has taken the oaths of office, cannot be inquired into in the superior court, on a motion to dismiss an action which was originally made returnable before him.—Coolidge v. Brigham, 83 Mass. (1 Allen) 333.

[g] (Mich. 1865) The actual legal right of a justice of the peace to his office cannot be collaterally tried in a suit by third parties on a judgment rendered by him.—Facey v. Fuller, 13 Mich. 527.

[h] (Mich. 1877) On habeas corpus, the court cannot inquire into the title of the office of the committing magistrate.—In re Corrigan, 37 Mich. 66.

[i] (Mich. 1891) Under How. Ann. St. § 745, which provides that, in case of the temporary disability of one of the elder justices of the peace to act on the township board, "one of the remaining justices," on being notified by such board, shall act thereon, the board cannot question the election or qualification of two justices who have acted and been recognized as such justices for over two years.—Grondin v. Logan, 88 Mich. 247, 50 N. W. 130.

[j] (Mont. 1880) The title of a de facto officer to his office cannot be inquired into collaterally, as, for instance, a de facto justice of the peace in a habeas corpus proceeding.—Ex parte Parks, 3 Mont. 426.

[k] (Neb. 1884) The jurisdiction of a justice in a criminal case cannot be attacked on the ground that he is not entitled to the office, since his acts are valid as an officer de facto; nor can his title to the office be the subject of collateral attack in habeas corpus proceedings for the release of a person by him convicted.—In re Johnson, 15 Neb. 512, 19 N. W. 594.

[l] (N. J. 1882) Whether a justice of the peace was such officer at the time of the rendition of a judgment purporting to be by him as such justice cannot be collaterally inquired into, for such question can only be raised by making him a party to a suit to determine it.—Frichnicht v. Hulsaidt, 6 N. J. Law J. 57.

[m] (N. Y. 1848) It is not proper, on habeas corpus, to inquire into the question whether the magistrate who issued the warrant for the arrest of the petitioner, acting as a police justice de facto, under color of an election, in pursuance of an act of the legislature, was rightfully in office.—In re Wakker, 3 Barb. 162.

[n] (N. Y. 1860) The right of an acting justice of the peace to act as justice of the session cannot be questioned on the trial of an indictment before such court, but can only be inquired into on a direct proceeding against them by information in the nature of quo warranto.—Nelson v. People, 5 Parker, Cr. R. 39, affirmed (1861) 23 N. Y. 293.

[o] (N. Y. 1867) A judgment rendered by a justice of the peace, while holding over after his term of office had expired, but before that of his successor commenced, cannot be impeached collaterally. The office is continuing in its nature, and, as he was in undisputed possession under apparent authority of law, his title can only be questioned in a proceeding directly involving that issue.—Read v. City of Buffalo, 4 Abb. Dec. 22.

[p] (N. C. 1892) Defendant cannot collaterally impeach the election of the officers of the town in order to question the authority of the mayor, who issued the warrant on which he was arrested, since an acting mayor, whose judicial authority and official character are recognized by the court to which the record is certified, and by the constable and people of the town, is at least a de facto officer, and as such may lawfully take cognizance of any offense which is within his jurisdiction.—State v. Davis, 111 N. C. 729, 16 S. E. 540.

[q] (Ohio, 1881) The authority of a magistrate who was an officer de factor cannot be collaterally attacked.—Caldwell v. High (Dist. Ct.) 6 Wkly Law Bul. 201.

[r] (Ohio, 1892) Questions as to the constitutionality of the appointment of an acting police judge, appointed by the mayor of a city, under Rev. St. § 1802, authorizing such appointment, are collateral issues, which cannot be raised or decided at the trial, nor is the decision thereon a subject of review.—Molitor v. State, 6 Ohio Cir. Ct. R. 263.

[s] (Ohio, 1892) In such a case, the proper manner of trying such issues is by quo warranto.—Molitor v. State, 6 Ohio Cir. Ct. R. 263.

[t] (Vt. 1842) In a suit to which he is not a party, his appointment or eligibility cannot be tried or determined, and it is therefore no ground of a plea in abatement as to the jurisdiction that the magistrate, at the time of issuing the writ and trying the case, was a postmaster.—McGregor v. Balch, 14 Vt. 428, 39 Am. Dec. 231.

[u] (Vt. 1848) Where a person, acting as justice of the peace, holds a commission for that office from the governor under the seal of the state, the court will not go behind that commission to inquire whether he had been duly appointed to that office by the general assembly of the state, or not.—Overseer of the Poor of Town of Norwich v. Yarrington, 20 Vt. 473.

[v] (Vt. 1889) In an action before a justice of the peace, who was appointed by the governor to fill a vacancy, and was regularly commissioned, defendant cannot object that the justice was ineligible to the office as not being a naturalized citizen, as he is a de facto justice.—Fancher v. Stearns, 61 Vt. 616, 18 Atl. 455.

[w] (Wash. 1896) Where a justice of the peace has been appointed by the proper authorities, in prosecutions before him his qualifications for the office cannot be questioned.—State v. Fountain, 14 Wash. 236, 44 Pac. 270.

[x] (Wis. 1842) The qualifications of a justice and his right to office cannot be inquired into upon an appeal from a judgment rendered by him.—Tolle v. Stone, 1 Pin. 230.

[y] (Wis. 1874) Even if the provision of a city charter by which a justice of the peace has been appointed by the mayor and council to act as police justice were invalid, he would be still a de facto police justice, and his right to exercise the office could not be determined

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in a collateral proceeding by habeas corpus at the suit of one convicted of crime in police court.—State v. Bartlett, 35 Wis. 287.

[z] (Wis. 1887) It is no objection to the jurisdiction of the circuit court in a bastardy proceeding that the village justice of the peace, before whom the preliminary examination was had, was elected by the voters both of the village (an independent organization) and of the town in which it was situated. The validity of appointment or election of an officer de facto will not be inquired into collaterally.—Baker v. State, 69 Wis. 32, 33 N. W. 52.

[zz] (Wis. 1894) Prohibition will not issue, on relation of one sued before one appointed by the city council to fill a vacancy as justice of the peace, on the ground that the council had no power to appoint, since, the office existing de jure, the appointee is a de facto officer.—In re Radl, 86 Wis. 645, 57 N. W. 1105, following State v. McMartin (1889) 42 Minn. 30, 43 N. W. 572.

II. RIGHTS, DUTIES, AND LIABILITIES.

(A) PRIVILEGES, DISABILITIES, FUNCTIONS, AND DUTIES, §§ 19-23.
(B) COMPENSATION AND FEES, §§ 24-31.
(C) LIABILITIES FOR JUDICIAL ACTS, §§ 32-40.
(D) LIABILITIES FOR MINISTERIAL ACTS, §§ 41-43.
(E) LIABILITIES FOR NEGLIGENCE AND MISCONDUCT, §§ 44-47.
(F) ACTIONS AGAINST JUSTICES FOR OFFICIAL ACTS, §§ 48-55.
(G) LIABILITIES ON OFFICIAL BONDS, §§ 56-65.
(H) CRIMINAL RESPONSIBILITY AND PROSECUTION, §§ 66-70.

(A) PRIVILEGES, DISABILITIES, FUNCTIONS, AND DUTIES.

PRIVILEGES, § 19.
DISABILITIES, § 20.
DUTIES AS CONSERVATORS OF THE PEACE, § 21.
JUDICIAL FUNCTIONS AND DUTIES IN GENERAL, § 22.
MINISTERIAL FUNCTIONS AND DUTIES, § 23.

Powers after expiration of term, see post, § 204.

—— *of successor over proceedings before former justice, see* post, § 205.

§ 19. Privileges.

[a] (N. Y. 1869) Under Laws 1862, c. 337, § 1, providing that justices of the peace of a city should each nominate, and with consent of the common council appoint, one clerk for each court, the concurrence of the mayor was requisite to a valid appointment.—Cassidy v. City of Brooklyn, 60 Barb. 105.

[b] (N. Y. 1869) Acts 1868, c. 689, § 2, which authorized the election of an additional justice in a city and conferred upon him jurisdiction of all civil and criminal cases which was possessed by the justices then in office, and all laws governing the justices in said city should apply to and be binding upon the justice, but made no provision for a clerk. *Held*, that the power to nominate or appoint a clerk could not be extended to the justice by construction, notwithstanding the other justices had the power to nominate a clerk and appoint him with the consent of the common council.—Cassidy v. City of Brooklyn, 60 Barb. 105, affirmed (1871) 47 N. Y. 659.

[c] (N. Y. 1881) Laws 1873, c. 538, which provides that the police clerks to be appointed under it shall keep records similar to those mentioned in the act of 1867, but omits any provision for the appointment of or specification of duties for a record clerk, takes away from the police justices of the city of New York the authority given under Laws 1867, c. 861, § 2, to appoint a record clerk of the city of New York to take charge of specified records in each police court.—Fitch v. City of New York, 9 Daly, 514, affirmed (1882) 88 N. Y. 500.

§ 20. Disabilities.

[a] (Ind. 1876) The office of city clerk is not an office "under the state," within the meaning of Const. art. 7, § 16; and one who has been elected to the office of justice of the peace, and has qualified and entered upon the duties of that office, is not ineligible to the office of city clerk during the term for which he was elected justice of the peace.—Mohan v. Jackson, 52 Ind. 599.

[b] (Mass.) A bastardy process is not to be dismissed by the court of common pleas because the attorney appearing there for the complainant is the justice before whom the sworn accusation was made.—(1857) Reardon v. Russell, 75 Mass. (9 Gray) 366; (1861) Kenney v. Driscoll, 83 Mass. (1 Allen) 210.

[c] (Neb. 1890) Code Civ. Proc. § 1101, which declares that "it shall not be lawful for any justice of the peace to purchase any judgment on any docket in his possession," prohibits the purchase by a justice of fees earned by a constable in an action, which are taxed as costs therein, and constitute part of the judgment.—Phœnix Ins. Co. v. Bohman, 31 Neb. 131, 47 N. W. 637.

[d] (N. J. 1844) If a judge or justice of the peace is the bona fide assignee of a book account or other chose in action not assignable in law, he may appear in person and prosecute the same before a justice of the peace in the name of his assignor without incurring the penalty given by Elmers' Dig. p. 287.—Conover v. Solomon, 20 N. J. Law (Spencer) 295.

[e] (N. J. 1844) But such an officer cannot appear and prosecute or defend for another person in a court for the trial of small causes by virtue of a power of attorney without incurring the penalty, unless his constituent is absent from and resident out of the state; nor even then, unless the power is to attend to the general concerns of his constituent.—Conover v. Solomon, 20 N. J. Law (Spencer) 295.

[f] (N. Y. 1886) It is no defense, in an action upon a promissory note, that plaintiff, a justice of the peace, bought the same for the purpose of bringing an action thereon in the supreme court.—Hoag v. Weston, 10 Civ. Proc. R. 92.

[g] (N. C. 1887) Code, § 27, forbidding any attorney at law or justice of the peace to practice law in any court of the county wherein he holds the office of county commissioner or justice, applies as well to justices who are not licensed attorneys as to those who are.—State v. Bryan, 98 N. C. 644, 4 S. E. 522.

§ 21. Duties as conservators of the peace.

[a] (U. S. 1829) A justice of the peace in the city of Washington, D. C., has authority, under the charter of May 4, 1812, and section 7 of the by-law of December 16, 1812, to require a common prostitute to give security for her good behavior, and has jurisdiction of a suit upon the bond given therefor; the penalty not

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exceeding $20.—Patten v. Washington, Fed. Cas. No. 10,813 [3 Cranch, C. C. 654].

[b] (Ala. 1854) A justice of the peace has authority in cases of emergency to appoint a special constable (Code, § 712), and he must himself judge of such emergency.—Noles v. State, 24 Ala. 672.

[c] (Ala. 1855) Section 33 of the judiciary act of 1789 (1 Stat. 91), empowering justices of the peace to arrest and commit offenders against the criminal laws of the United States, is not unconstitutional, in that it makes such justices of the peace, in the exercise of the power conferred upon them, officers of the United States within Const. U. S. art. 2, § 2, cl. 2, providing for the appointment of officers of the United States by the president or under authority conferred by congress.—Ex parte Gist, 26 Ala. 156.

[d] (Mich. 1876) A magistrate, as conservator of the peace, has the same power to order into custody an insane man who is committing a breach of the peace in his presence as one who is sane. Though an insane person may not be guilty of crime, he may lawfully be prevented from doing harm.—Lott v. Sweet, 33 Mich. 308.

[e] (Mich. 1889) Loc Act No. 435, Sess. Laws 1887, conferring on the police justice of Bay City exclusive and original jurisdiction to hear and determine all criminal cases within the limits of said city which had theretofore been cognizable by justices of the peace, is void, in so far as it deprives justices of the peace of jurisdiction as conservators of the peace, under Const. 1850, art. 6, § 19, which declares that justices of the peace shall be conservators of the peace within their several jurisdictions.—Averell v. Perrott, 74 Mich. 296, 41 N. W. 929.

[f] (N. Y. 1837) Justices of the peace, presiding at town meetings, may make a parol order for the removal of a disorderly person.—Parsons v. Brainard, 17 Wend. 522.

[g] (N. Y. 1866) A magistrate, before whom property taken under a warrant for grand larceny was brought, had a right to order its delivery to the person from whom it was alleged to have been stolen, if, on examination of the accused, the magistrate adjudged that it was so stolen.—Houghton v. Bachman, 47 Barb. 388.

[h] (S. C. 1834) A justice of the peace may issue a warrant for abusive words in relation to his office and threats of personal injury to himself, and require the party to give security for his good behavior.—Edmondson v. Frean, 2 Hill, Law, 410.

[i] (Vt. 1839) A justice of the peace has authority to issue a warrant to apprehend offenders and commit them for trial.—State Treasurer v. Rice, 11 Vt. 339.

§ 22. Judicial functions and duties in general.

Duty of justice to draw up the bond on appeal from his judgment, see post, § 557.

Duties in trial of forcible entry and detainer, see "Forcible Entry and Detainer," vol. 23, cc. 1383, 1384, § 156.

Mandamus to compel justices of the peace to perform official duties, see "Mandamus."

[a] (Ala.) A justice of the peace, who has collected money in his official capacity, cannot retain it to satisfy a debt due him in his private capacity.—(1831) Prewett v. Marsh, 1 Stew. & P. 17, 21 Am. Dec. 645; (1845) Lowrie v. Stewart, 8 Ala. 163; (1846) Spence v. Mitchell, 9 Ala. 744.

[b] (Cal. 1850) By the Mexican law, alcaldes and justices of the peace in the department of California, as well as some others, were empowered to perform the functions of judges of first instance in those districts in which there were no judges of first instance.—Mena v. Le Roy, 1 Cal. 216.

[c] (Ill. 1825) At common law a justice may authorize any person he pleases to be his officer; and under Act March 22, 1819, a magistrate can appoint a constable in a criminal case, where there is a probability that the criminal will escape.—Flack v. Ankeny, 1 Ill. (Breese) 187.

[d] (Ill. 1878) The duty of a justice of the peace under Rev. St. p. 638, § 5, to pay over all moneys "collected on any judgment or otherwise by virtue of his office," exists regardless of the time when the claims were received by him for collection.—People v. Price, 3 Ill. App. (3 Bradw.) 15.

[e] (Ind. 1853) When a statute confers a new power on a justice of the peace, he must proceed in the mode prescribed by the statute.—Bargis v. State, 4 Ind. 126.

[f] (Ind. 1857) 2 Rev. St. p. 500, § 21, requiring every justice of the peace to pay over to the county treasurer all money he may have received on account of fines for the benefit of the common schools, includes all fines, no matter for what offenses they were assessed.—Alexander v. State, 9 Ind. 337.

[g] (Ind. 1857) 2 Rev. St. p. 500, § 21, requiring justices of the peace to pay over to the county treasurer all moneys received on account of fines, was not repealed by Act March, 1855, amendatory thereof.—Alexander v. State, 9 Ind. 337.

[h] (Me. 1827) Where a statute confers certain powers upon, or requires certain duties to be performed by, any two justices quorum unus, it is only necessary that one should be of the quorum.—Gilbert v. Sweetser, 4 Me. (4 Greenl.) 483.

[i] (Me. 1835) Under St. 1833, c. 85, two justices of the peace and of the quorum have not the power to imprison a person for refusing to give his deposition in perpetuam memoriam.—In re Pierce, 10 Me. (4 Shep.) 255.

[j] (N. C. 1891) Code, § 1159, authorizing two justices of the peace to sit together in criminal proceedings, and giving them the same powers and duties as are given to any justice sitting alone, was authorized by Const. art. 4, § 12, empowering the general assembly to allot and distribute the judicial power and jurisdiction which does not pertain to the supreme court in such manner as they may deem best.—State v. Flowers, 109 N. C. 841, 13 S. E. 718.

[k] (Tex. 1860) A justice, receipting for a note for collection in his official capacity, does not thereby become a collecting agent, and is not bound to cause a suit to be instituted in another precinct.—White v. Goffe, 24 Tex. 658.

§ 23. Ministerial functions and duties.

Acknowledgment before justice, see "Acknowledgment," vol. 1, cc. 857–861, §§ 86–95; cc. 863, 864, § 99.

—— *certificate, see* "Acknowledgment," vol. 1, cc. 892–1012, §§ 151–254.

—— *extraterritorial authority to take acknowledgment, see* "Acknowledgment," vol. 1, cc. 874, 875, § 116.

—— *extraterritorial effect, see* "Acknowledgment," vol. 1, cc. 854–856, § 83; cc. 876, 877, § 120.

Acting as coroner, see "Coroners," vol. 11, cc. 2379, 2380, § 6.

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Administering oath or affirmation to witness, see "Witnesses," III. (A).
As member of town board, see "Towns," II.
Taking oath or affirmation, see "Oaths."

[a] (N. Y. 1850) A justice of the peace cannot delegate any part of his official power or authority to another.—Borrodaile v. Leek, 9 Barb. 611.

[b] (N. Y. 1850) Yet it seems that he may depute another to do a specific act without vesting in him any discretion.—Borrodaile v. Leek, 9 Barb. 611.

[c] (N. Y. 1894) The Kingston city charter (Laws 1872, c. 150) provides that a justice of the peace may be designated by the city council to act as recorder during a vacancy, and (section 46) that a justice thus designated in signing process shall add to his official title the words "Acting as Recorder." *Held*, that where a justice so designated signs the process merely as "Acting Recorder," omitting his official title of "Justice of the Peace," such omission does not invalidate a conviction.—People v. Du Bois (Sess.) 26 N. Y. Supp. 895.

[d] (N. C. 1892) Code, § 906, making it the duty of a justice of the peace to furnish the clerk of the superior court at each term with a list containing the "names and offenses of all parties" tried in criminal proceedings and finally disposed of by him, does not require him to make any return to the clerk where no such proceedings have been had.—State v. Latham, 110 N. C. 490, 14 S. E. 390.

(B) COMPENSATION AND FEES.

IN GENERAL, § 24.
PARTICULAR PROCEEDINGS AND SERVICES, § 25.
—— TRIALS, EXAMINATIONS, AND JUDGMENTS, § 26.
—— CERTIFICATES, TRANSCRIPTS, AND RECOGNIZANCES, § 27.
ACCOUNTING FOR AND DISPOSITION OF FEES, § 28.
RECOVERY OF FEES, § 29.
—— RENDERING ACCOUNT, § 30.
—— ACTIONS FOR FEES, § 31.

Actions against justice for taking illegal fees, see post, §§ 48–55.
Criminal liability of justice for taking illegal fees, see post, §§ 66–70
Liability of justice for taxation of illegal fees or overcharge, see post, § 47.
Constitutional provision for compensation, see "Constitutional Law," vol. 10, c. 1274, §§ 33 [zz]; c. 1276, § 34 [s].
Filing of transcript of judgment, fees of clerk, see "Clerks of Courts," vol. 10, c. 101, § 43 [c].
—— *on preliminary examination as costs in criminal cases, see* "Costs," vol. 13, c. 1081, § 1174.
Validity of contract with justice as to amount of fees, see "Contracts," vol. 11, c. 599, § 620.

§ 24. In general.

[a] (Cal. 1892) Pen. Code, § 770, provides that from a judgment of removal from office "an appeal may be taken to the supreme court in the same manner as from a judgment in a civil action; but, until such judgment is reversed, defendant is suspended from his office. Pending the appeal, the office must be filled as in case of a vacancy." *Held* that, where a judgment removing a justice of the peace from office for willful misconduct therein is reversed on appeal, the justice is entitled to his salary during the period of removal, though another has filled the vacancy and been compensated therefor.—Ward v. Marshall, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198.

[b] (Iowa, 1887) Under Code 1873, § 3806, which requires fees of justices in criminal cases where the prosecution fails to be certified by the justice and verified by affidavit, a police judge or justice of the peace cannot certify and collect from the county fees earned by his predecessor, but not certified to by such predecessor.—Labour v. Polk County, 70 Iowa, 568, 31 N. W. 873.

[c] (Ky. 1895) In an action against a city to recover salary as police judge it appeared that before appointment to such office an ordinance was passed reducing the salary from $900 to $600; that then, and for four months afterwards, plaintiff was mayor of such city, and had actual knowledge of such ordinance; that it was his duty to see that the ordinances were executed; that he was appointed judge at the end of his term as mayor; and that such ordinance was not published until after such appointment. *Held*, that plaintiff was not entitled to the higher salary on the ground that the constitution forbids a change in salary during the term, and that such ordinance was not in force when he was appointed, because not published; since it was his duty as mayor to see that it was published.—City of Paris v. Webb, 33 S. W. 87.

[d] (Nev. 1881) Under section 17 of the salary act, the right of every justice of the peace, elected or appointed after the act took effect, to salary or fees, should be determined by reference to the number of legal votes cast at the last general election preceding the time when the claim for his salary is preferred.—State v. Storey County Com'rs, 16 Nev. 92.

[e] (N. H. 1855) The police justice of the city of Manchester furnished a room for keeping the files and transacting a portion of the business of the police court. *Held*, that he could recover rent for the same. He also furnished a seal for the police court. *Held*, that he was entitled to pay therefor.—City of Manchester v. Potter, 30 N. H. (10 Fost.) 409.

[f] (N. H. 1877) Under a statute authorizing the establishment of a police court in any town which by vote provides "a suitable compensation, not less than $100 per annum, for the justice," a vote of a town directing "that the compensation of such justice shall be the fees established by law" is to be construed as adopting the statutory minimum of compensation.—State v. Varrell, 58 N. H. 148.

[g] (N. H. 1886) Gen. St. c. 196, § 1, provides that "any town may by vote provide suitable compensation, not less than $100 per annum, for the justice of the police court therein," and section 14, subsequently enacted, provides that "any town may rescind their vote establishing an annual salary for a police justice, in which case the justice and special justice of said court may receive and hold all fees accruing to them, to their own use." *Held*, that where such vote has been rescinded the justice is only entitled to the fees, though they amount to less than $100 per annum.—Hill v. Town of Pittsfield, 64 N. H. 78, 5 Atl. 910.

[h] (N. Y. 1843) A justice of the peace was impeached, tried, and acquitted, and then claimed an allowance against the county for the expenses of his defense. The board of supervisors allowed the claim. *Held*, that mandamus did not lie to compel the treasurer to pay the claim, inasmuch as the supervisors exceeded their jurisdiction.—People v. Lawrence, 6 Hill, 244.

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[i] (N. Y. 1854) By Act 1851 the supervisors were authorized to increase the salaries of the police justices of New York county, which was to be in full for all extra services, and the salaries thus fixed were not to be increased during the term of office of said justices. In 1852 the supervisors fixed the salaries for regular and extra services. In 1853 the supervisors ordered a further compensation to be made the justices for extra services. *Held*, that the last resolution and order was void.—People v. Edmonds, 19 Barb. 468.

[j] (N. Y. 1857) Laws 1857, c. 344, relating to the district courts of the city of New York and providing for an increase of the salary of the justices of such courts, renders the corporation of the city of New York liable to an action for an increase of salary given by the act, where the legislature, under the act executing it, gave the corporation authority to raise money for the payment of the increase.—Green v. City of New York, 5 Abb. Prac. 503.

[k] (N. Y. 1874) Laws 1860, c. 508, § 26, provided that for certain additional duties imposed on the police justices of a city the common council or board of supervisors in such city or county might increase the compensation of such officers, which they did. Under 2 Laws 1869, c. 876, § 11, the common council was prohibited from increasing the salaries of persons then in office, except as provided by acts passed by their predecessors. *Held*, that a resolution of the common council in December of that year, increasing the salaries of the police justices, was invalid.—Smith v. City of New York, 8 Thomp. & C. 160.

[l] (N. Y. 1886) The salaries of police justices of the city of New York were increased contrary to law, and a justice who entered upon the duties of his office after such increase had been made received payment at the increased rate in good faith, without any mistake of fact, and believing that the increase had been lawfully made. *Held* that, the payments having been made to him voluntarily, they could not be recovered back on the ground that the increase was illegal.—Cox v. City of New York, 103 N. Y. 519, 9 N. E. 48.

[m] (N. Y. 1893) Laws 1875, c. 283, authorizing the town auditors of Middletown, Richmond county, to audit claims of justices of the peace up to $300 which had accrued subsequent to the abolition of the office of police justice, did not reinstate the section so repealed.—People v. Marsh, 69 Hun, 123, 23 N. Y. Supp. 728.

[n] (N. Y. 1893) Laws 1866, c. 59, § 2, limiting the compensation of a justice of the peace in Richmond county to $300 a year, was repealed by Laws 1866, c. 692, fixing the fees of the justices of the peace for the state, and providing (section 11) that all inconsistent laws were repealed, except those locally applicable to villages and cities.—People v. Marsh, 69 Hun, 123, 23 N. Y. Supp. 728.

[o] (N. Y. 1894) On an application for mandamus to compel the recognition of relator as police justice of a village, the court has no power to fix his compensation where his fees are by statute made a charge on the village, to be audited and allowed as other village charges.—People v. Village of Wappinger's Falls, 83 Hun, 130, 31 N. Y. Supp. 758, affirming judgment (1894) 9 Misc. Rep. 246, 30 N. Y. Supp. 265, and affirmed (1895) 144 N. Y. 616, 39 N. E. 641.

[p] (Or. 1874) Section 160 of the special act incorporating Portland, providing that the police judge shall receive no other compensation for his services than a salary fixed by the common council, does not preclude him from receiving fees as a justice of the peace, when acting as such under the authority of sections 155 and 156.—City of Portland v. Denny, 5 Or. 160.

[q] (Pa. 1893) Justices of the peace and constables are public officers, within Const. art. 3, § 13, providing that no law shall increase or diminish the salary or emoluments of an officer after his election or appointment.—Rupert v. Chester County (Com. Pl.) 13 Pa. Co. Ct. R. 342, 2 Pa. Dist. R. 688.

[r] (Pa. 1895) Act May 23, 1893 (P. L. 117), reciting the absence of uniformity in the fees of justices of the peace throughout the commonwealth, and specifying the fees to be thereafter allowed, and excepting certain counties (not including Luzerne county) from the operation of the act, repealed so much of Act April 2, 1868 (P. L. 3), as relates to fees of justices of the peace in Luzerne county subsequent to the passage of the later act.—Fenner v. Luzerne County, 167 Pa. 632, 31 Atl. 862.

[s] (Tenn. 1881) A justice of the peace does not forfeit his claim for costs by neglecting upon the preliminary hearing of a felony to take down the testimony in writing as required by law.—Winters v. State, 75 Tenn. (7 Lea) 254.

[t] (Tex. 1890) A justice of the peace is not a "county officer" within the meaning of Rev. St. art. 705, providing that the county commissioners shall provide and maintain offices for the county officers, and he cannot maintain an action to recover from the county moneys expended for office rent and furnishings.—Reynolds v. Tarrant County, 78 Tex. 289, 14 S. W. 580.

[u] (Wash. 1891) The charter of the city of S. provided that the city might designate one of the justices of the peace residing therein to act as police magistrate, and might regulate the compensation of its officers, "except when otherwise provided." *Held*, that the phrase, "except when otherwise provided," referred to the general statutes, and not to the ordinances of the city which fixed the compensation of the police magistrate, and that he was entitled only to the fees allowed by statute to other justices of the peace.—Furth v. McIntosh, 2 Wash. St. 108, 26 Pac. 79.

[v] (Wash. 1892) Const. art. 2, § 3, requires the legislature to provide for the taking of a state census in 1895, and every 10 years thereafter. Code 1881, § 2754, requires assessors to take biennial censuses, commencing in 1883, of all the inhabitants in their respective districts. Act Feb. 7, 1891, provides for the salaries of justices of the peace according to the population of their respective cities and towns, "as shown by the last state or federal census." *Held*, that a census taken under Code 1881, § 2754, was not a state census, within the meaning of Act Feb. 7, 1891.—Rohde v. Seavey, 4 Wash. St. 91, 29 Pac. 768.

[w] (Wash. 1892) Const. art. 4, § 10, providing that "in incorporated cities or towns having more than 5,000 inhabitants justices of the peace shall receive such salary as may be provided by law, and shall receive no fees for their own use," does not apply to cities which had less than 5,000 by the last federal census, but which had more than 5,000 by a census taken under Code 1881, § 2754.—Rohde v. Seavey, 4 Wash. 91, 29 Pac. 768.

[x] (Wyo. 1894) Sess. Laws 1890–91, c. 55, provides fees for justices of the peace in precincts having less than 1,500 population, and salaries in precincts having a larger population. *Held*, where it is determined, after the election of a justice, that the population of the precinct at the time of his election was 1,500, and it is voted that he have a salary from a certain time during his term, which amounts to more than the fees which he would have re-

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ceived, his emoluments are not increased after election, in violation of Const. art. 3, § 32, as the population at the time of his election entitled him to the salary.—Davis v. Sweetwater County Com'rs, 4 Wyo. 477, 35 Pac. 467.

[y] (Wyo. 1894) Sess. Laws 1890–91, c. 55, providing fees for justices of the peace in precincts having less than 1,500 population, and salaries in precincts having a larger population, declares that the population shall be ascertained from the last census, and that where this cannot be done the presumption shall be, till overcome by evidence satisfactory to the county commissioners, that the population is less than 1,500. *Held*, that the determination of commissioners, from the last census and the registration of voters, that a precinct contained 1,500 population, would not be disturbed, in the absence of proof that it erred.—Davis v. Sweetwater County Com'rs, 4 Wyo. 477, 35 Pac. 467.

§ 25. Particular proceedings and services.

[a] (Iowa, 1878) Code 1873, § 3804, regulating justices' charges, refers to fees. There can be no costs for the collection of a debt, unless there is a suit.—Pennington v. Beedy, 50 Iowa, 85.

[b] (Ky. 1845) Though a justice of the peace is not bound to go to distant parts of his county at the request of individuals to take acknowledgments of deeds, without being paid for his time and trouble, yet, if he does go without stipulating for compensation for his trouble as an individual, he cannot afterwards charge for it as official dues.—Bristow v. Sullivan, 45 Ky. (6 B. Mon.) 143.

[c] (Mich. 1845) Sess. Laws 1840, p. 186, § 14, allowing to "clerks" and certain other officers therein named one dollar per day "for attending on subpœna with bills, records, or other written evidence," does not apply to a justice of the peace in attendance with his docket.—Prentiss v. Webster, 2 Doug. 5.

[d] (Nev. 1895) Under Act March 12, 1885 (consolidating certain county offices, and fixing the salaries thereof), § 11, providing that the salaries named "shall be in full for all services and all ex-officio services required of the officers herein named," a justice of the peace in Storey county, who is ex officio registry agent thereof, is not entitled to the compensation provided for in Act March 5, 1869, § 12, to be paid registry agents, in addition to the justice's salary provided for in the act of 1885.—Lobenstein v. Storey County, 22 Nev. 376, 40 Pac. 1016.

[e] (N. J. 1881) Justices' fees are not recoverable from the county on an illegal and void commitment to imprisonment in the county jail.—Fairbanks v. Sheridan, 43 N. J. Law (14 Vroom) 484.

[f] (N. Y. 1849) A special justice of the city of New York, receiving an annual salary, is not entitled to extra compensation for services performed on Sunday.—Palmer v. City of New York, 4 N. Y. Super. Ct. (2 Sandf.) 318.

[g] (Pa. 1827) A magistrate, in binding over a defendant in a criminal action, has no right to take from him any fees beyond those for the recognizance, the commitment, and the supersedeas, and then only if such services be actually performed.—Clark v. Alderman, 3 Clark, 414.

[h] (Pa. 1831) By the fee bill of February 22, 1821, the justice is only entitled to the fee of 12½ cents for entering a discontinuance in a case of assault and battery; and where, on a settlement by the parties, he receives 25 cents, the penalty may be recovered.—Wallace v. Coates, 1 Ashm. 110.

[i] (Pa. 1895) Where several persons are charged with a criminal offense, the justice may, in his discretion, issue separate warrants for each, and where no abuse of discretion appears he will be entitled to a fee for each warrant.—Commonwealth v. Ruski (Quart. Sess.) 1 Lack. Leg. N. 396, 17 Pa. Co. Ct. R. 92.

[j] (Tenn. 1877) Code, § 5062, entitled "Proceedings before Committing Magistrates," provides that evidence taken shall be reduced to writing. Section 4550 fails to fix the magistrate's fees for taking such testimony, but provides, "for any other services required by law in criminal cases, the same fees allowed by law in similar services in civil cases." *Held*, that for taking down the testimony the magistrate should be allowed the same fees allowed for taking depositions in civil cases.—State v. Anthony, 68 Tenn. (9 Baxt.) 227.

[k] (Wis. 1891) A justice of the peace is a local officer, and the matter of his compensation for services which he performs for the county is within the power of county boards to determine.—Ryan v. Outagamie County, 80 Wis. 336, 50 N. W. 340.

§ 26. —— Trials, examinations, and judgments.

[a] (Ark. 1890) Under Mansf. Dig. § 4068, providing that in cases before a justice of the peace, where plaintiff's claim is not founded on a written instrument, signed by defendant, and the latter fails to appear, the justice shall hear the allegations and proof of the plaintiff, and render judgment for the amount to which plaintiff is entitled, the proceeding in such a case is a trial within the meaning of section 3259, allowing justices a certain fee "for each trial in a civil case."—Reigler v. Quinn, 54 Ark. 37, 14 S. W. 1103.

[b] (Cal. 1864) Revenue Act 1861, § 46, providing that justices of the peace shall be paid no fees for trying actions before them for the collection of delinquent taxes, "unless the same be collected from the defendants," is not unconstitutional.—Miner v. Solano County, 26 Cal. 115.

[c] (Cal. 1867) Where the plaintiff, after summons had been served on the return day without other proceedings, directed a justice of the peace to enter judgment on discontinuance, it was *held* that no such trial was begun or entered upon as, under Act Feb. 6, 1855, regulating the fees of justices of the peace in San Francisco, would entitle him to a fee for "a trial and proceedings subsequent thereto."—Anderson v. Pennie, 32 Cal. 265.

[d] (Ill. 1869) Under provisions of Laws 1867, p. 113, fixing the fees of justices of the peace, a police magistrate is not authorized to charge a fee of two dollars per day for the trial of a cause in garnishment proceedings against a bank.—Town of Carlyle v. Sharp, 51 Ill. 71.

[e] (Iowa, 1872) Under Laws 1860, c. 1, § 5, amending Revision 1860, § 4152, a justice of the peace is entitled, both in civil and criminal cases, to a fee for continuances or adjournments, and in criminal cases he is also entitled to the cost of stationery used.—Evans v. Story County, 35 Iowa, 126.

[f] (Iowa, 1881) Under Code 1873, § 3804, giving to justices of the peace "for entering judgment by default 50 cents, * * * for trial of all causes $1," in case of judgment by default the justice is entitled to charge both a trial fee and a fee for entering judgment.—Shaw v. Kendig, 57 Iowa, 390, 10 N. W. 771.

[g] (Iowa, 1890) Code 1873, § 3804, provides that the fees of justices of the peace for the trial of criminal causes shall be one dollar for

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each six hours or fraction thereof; section 2739 defines a trial to be the judicial examination of the issues, whether of law or of fact, in the cause; and sections 4348, 4349, declare that in a criminal case an issue of law arises upon a demurrer to the indictment, an issue of fact on a plea of not guilty, or of former conviction or acquittal. *Held*, that where a justice pronounces judgment on a plea of guilty, there being no objection to the information, and no evidence introduced, there is no trial, and he is not entitled to such fee.—Mathews v. Clayton County, 79 Iowa, 510, 44 N. W. 722.

[h] (Ky.) Since the compensation of recorder of the city of Lexington is by law the same as that of a justice of the peace, under Gen. St. p. 467, fixing the compensation of justices of the peace at two dollars per day "for presiding at examining courts in felony cases," the recorder is not entitled to two dollars for each of such cases, when there is more than one examining trial held by him on the same day.—(1883) Auditor v. Kinkead, 80 Ky. 596, 4 Ky. Law Rep. 544. CONTRA, see (1868) Johnson v. Auditor, 67 Ky. (4 Bush) 321.

[i] (Ky. 1889) Gen. St. p. 277, § 7, which enacts that a justice of the peace or other officer, except the county judge, acting as an examining court, shall receive for the first day, as fee for his services, two dollars, and for each day thereafter one dollar, providing that his fees in one case shall not exceed four dollars, allows such an officer fees at the prescribed rate for each case, though more than one examining trial is held on one day.—Hewitt v. Walton, 88 Ky. 633, 11 S. W. 722.

[j] (Me. 1887) The fee of 80 cents to which a trial justice is entitled, under Rev. St. c. 116, § 2, for "the trial of an issue," applies to civil, and not criminal, proceedings.—Knowlton v. Waldo County Com'rs, 79 Me. 164, 8 Atl. 683.

[k] (Mich. 1879) Under a statute allowing the police justice a fee of one dollar for each case, such charge may be made without any reference to the time occupied in the trial; but it cannot be charged in cases dismissed or where a nolle prosequi is entered.—People v. Kent County Sup'rs, 40 Mich. 481.

[l] (Mich. 1882) Under Acts 1881, which give to a justice specific fees for various services in criminal cases, and among others a definite sum for the trial of a case, he is not entitled to such fee where the accused pleads guilty.—Potts v. Jackson County Sup'rs, 47 Mich. 635, 11 N. W. 413.

[m] (Mo. 1890) Although a justice of the peace be recorder of a town, whose ordinances authorize prosecutions for vagrancy before him in that capacity, he is still entitled to fees in prosecutions before him as justice of the peace for vagrancy, under the statute laws of the state.—State v. Heege, 40 Mo. App. 650.

[n] (Neb. 1893) A justice of the peace is not entitled to a fee for entering a default, in addition to that allowed by statute for rendering judgment.—Van Etten v. Selden, 36 Neb. 209, 54 N. W. 261.

[o] (N. H. 1855) Section 16 of the act of 1846 incorporating the city of Manchester provides, among other things, that "all fines and forfeitures, and all costs in criminal prosecutions, which shall be received by or paid into the hands of the justice of said court [the police court], shall be by him accounted for and paid over to the city of Manchester, in the same manner and under the same penalties for neglect as are by law prescribed in the case of justices of the peace; and all costs in such prosecutions, not thus received, shall be made up, taxed, certified, and allowed, and shall be paid and satisfied in like manner as provided by law in cases of justices of the peace"; and the section also fixes a salary for the police justice. *Held*, that the police justice, under this section, was entitled, in addition to his salary, to his legal costs in those criminal prosecutions in which the costs were not paid by the respondents, but not to costs in cases tried by a special justice of the police court.—City of Manchester v. Potter, 30 N. H. (10 Fost.) 409.

[p] (N. Y.) Laws 1845, c. 180, § 26, as amended by Laws 1847, c. 455, providing that a warrant issued by a magistrate outside of the town where an offense is committed shall authorize the offender to be taken for trial before a magistrate of the town, and that the magistrate issuing the warrant shall be entitled to no compensation other than for issuing the warrant, is repealed by Code Cr. Proc. §§ 150, 151, 158, 161, 164, providing that the offender be taken before the magistrate issuing the warrant, and such magistrate may recover from the town fees for trial of the offender.—(1888) People v. Board of Auditors (Sup.) 2 N. Y. Supp. 609; (1893) Same v. Board of Auditors of Hamden, 71 Hun, 461, 24 N. Y. Supp. 974.

[q] (Pa. 1860) The county is not liable to a justice of the peace for his fees on convictions for vagrancy, unless the defendants be sentenced to hard labor and the commitments follow the sentences as recorded.—Cumberland County v. Holcomb, 36 Pa. (12 Casey) 349.

[r] (Pa. 1881) Under Act March 29, 1869, the mayor or other officer receiving a salary from the city of Lancaster shall receive only half a fee from the county of Lancaster for commitments of vagrancy, drunkenness, and disorderly conduct, and no fee for dismissed cases.—City of Lancaster v. Lancaster County, 12 Lanc. Bar, 169.

[s] (Vt. 1890) Acts 1888, No. 37, § 2, entitling the justice or municipal court before whom a prosecution for intoxication is pending to $1.50 for taking the disclosure of the respondent, does not apply to the city court of Burlington; and the judge of that court is entitled to $3 for such service, under the charter of said city, which provides that "in all causes * * * before the city court the city judge shall be entitled to tax and receive double the costs allowed by law to justices of the peace," etc.—Peck v. Powell, 62 Vt. 296, 19 Atl. 227.

[t] (Wis. 1891) Laws 1887, c. 470, § 6a, providing for the arrest and imprisonment of tramps, empowers the county boards to fix a fee to be allowed magistrates in cases of arrest and conviction. *Held*, that a resolution that no sum exceeding two dollars, in case of arrest and conviction or acquittal, will be allowed, is an effectual exercise of the authority conferred upon the county board.—Ryan v. Outagamie County, 80 Wis. 336, 50 N. W. 340.

§ 27. —— Certificates, transcripts, and recognizances.

[a] (Iowa, 1879) Under Code 1873, § 3804, allowing a justice of the peace a fee of 50 cents for "drawing and approving bond when required in any case," a justice is not entitled to a fee for the approval and filing of an appeal bond prepared by the appellant's attorney.—McKay v. Maloy, 53 Iowa, 33, 3 N. W. 808.

[b] (Iowa, 1889) Code 1873, § 3804, provides that a justice of the peace is entitled to fees "for each official certificate, * * * 25 cents; * * * for making and certifying transcripts, 50 cents." Section 3806 provides that fees "in criminal cases shall be audited and paid out of the county treasury in any case where the prosecution fails, or where such fees cannot be made from the person liable to pay the same; the facts being certified by the justice, and veri-

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fied by affidavit." A justice made a copy of the entries in his docket in criminal cases in which the prosecution failed or defendants were insolvent, showing who were entitled to fees and the amounts. Plaintiff called these copies "transcripts," and filed them with the county auditor. To each copy was attached a certificate "that the foregoing is a true transcript of costs from my docket, that the items charged are legal, and that the costs enumerated have not been paid." *Held*, that such copies were not transcripts, within the meaning of section 3804, for which the justice was entitled to a fee of 50 cents each.—Hinesley v. Mahaska County, 78 Iowa, 312, 43 N. W. 198.

[c] (Iowa, 1889) Neither section 3806, nor section 3843, Code 1873, requiring the statement filed with the auditor to contain a particular account of the fees or other compensation demanded, made it a part of the official duty of a justice to file the statement referred to.—Hinesley v. Mahaska County, 78 Iowa, 312, 43 N. W. 198.

[d] (Iowa, 1889) Under Code 1873, § 3804, entitling a justice to fees "for each official certificate," the justice was not entitled to fees for the certificates attached to the copies, as they failed to comply with section 3806, which required that the certificate should show that the fees claimed were taxed in criminal cases when the prosecution failed, or that the fees could not be made from the persons liable to pay them.—Hinesley v. Mahaska County, 78 Iowa, 312, 43 N. W. 198.

[e] (Iowa, 1889) Even if the certificates had complied with the provisions of the statute, the justice would not be entitled to recover against the county, where he failed to show that they were furnished at the request of the county; the presumption being that they were prepared and filed for the justice's own benefit, to enable him to collect fees to which he was entitled.—Hinesley v. Mahaska County, 78 Iowa, 312, 43 N. W. 198.

[f] (N. H. 1851) The certificates of attestation on the various copies of a case on appeal are not to be regarded as parts of the copies for which the magistrate is entitled to compensation on the basis of the number of pages composing the entire copy of the case allowed by Rev. St. c. 229, § 8.—Fowler v. Tuttle, 24 N. H. (4 Fost.) 9.

[g] (N. H. 1851) Under Rev. St. c. 229, § 8, providing that the certifying officer shall be allowed a certain fee for every certificate on a copy of a whole case, the magistrate is entitled to the fee only for one certificate on a copy of the whole case, though he appends certificates to the various copies composing the case; a single attestation being sufficient.—Fowler v. Tuttle, 24 N. H. (4 Fost.) 9.

[h] (N. J. 1827) The court's fee on the return of the appeal is 37 cents.—Carpenter v. Titus, 9 N. J. Law (4 Halst.) 90.

[i] (Pa. 1828) On binding over a defendant in a criminal case, a justice is only entitled to demand the fees for the recognizance, commitment, and supersedeas, and then only if such services be actually performed.—Clark v. Alderman, 1 Haz. Reg. 373.

[j] (Pa. 1831) Where the hearing of the parties before a justice in a criminal case, and the binding over of the defendant, take place at the same time, the justice is entitled to but two fees for recognizance,—one for the recognizance in which he binds over the commonwealth's witnesses, and the other for that in which he binds over the party and his bail.—Wallace v. Coates, 1 Ashm. 110.

[k] (Pa. 1892) A magistrate who takes a recognizance before hearing, fixed for a future day, at which defendant is discharged, is not entitled to a fee under Act 1868, § 10, entitling him to a fee for taking a recognizance, "and returning the same to court," and "same fee for services not herein specifically provided for as for similar services."—Young v. Northampton County (Com. Pl.) 11 Pa. Co. Ct. R. 508.

[l] (Wis. 1891) Where a county board has fixed the fees of magistrates in all cases of the arrest and conviction or acquittal of tramps, they are not entitled to additional fees for filing a certificate of conviction, and for making report to the county board, since such services are performed under the law giving to magistrates jurisdiction for the trial of the offense.—Ryan v. Outagamie County, 80 Wis. 336, 50 N. W. 340.

§ 28. Accounting for and disposition of fees.

[a] (Mo. 1895) Though Acts 1891, p. 175, while providing for the salary of justices, makes no direct provision for the disposition of fees of justices collected by a constable, such fees are to be paid to the city treasurer, and not to the justice.—Spaulding v. Brady, 128 Mo. 653, 31 S. W. 103.

[b] (Pa. 1859) Act May 13, 1856, requiring a magistrate to pay over his receipts to the state treasurer before obtaining a warrant for his salary, is not inconsistent with the ordinance of November 21, 1855, limiting compensation of the justices of the peace or magistrates to the receipts of their respective offices; and hence police magistrates are entitled only to the amount of fees received by them not exceeding $500.—Gibson v. City of Philadelphia, 3 Phila. 411.

§ 29. Recovery of fees.

[a] (Ala. 1884) Code, § 5088, provides that in prosecutions before a justice, where the case is not taken to the circuit or city court, the fees for such services as may be rendered in the case must be taxed by him and collected by execution as in cases tried in the county court; and in all other cases the fees must be certified by him to the court to which the proceedings are removed, and there taxed and collected as other costs. *Held*, that such statute does not make the fees of justices of the peace arising from criminal cases removed to the circuit court claims against the fine and forfeiture fund, under section 4461, which makes the fees only of officers of court payable in certain cases out of the fund arising from fines and forfeitures.—McPherson v. Boykin, 76 Ala. 602.

[b] (Cal. 1864) Under Revenue Act 1861, § 46, providing that justices of the peace shall be paid no fees for trying actions before them for the collection of delinquent taxes, "unless the same be collected from the defendants," the justice cannot collect the fees from the state, where he does not from the defendants, on the ground that he may do so in order to balance his interest in the case, because of his implied interest in favor of the defendants under the act.—Miner v. Solano County, 26 Cal. 115.

[c] (Ill. 1861) Where a justice of the peace, who is not a police magistrate, tries causes within the jurisdiction of the police court at the request of the city authorities, he may recover his fees for such services from the city.—De Wolf v. City of Chicago, 26 Ill. (16 Peck) 443.

[d] (Kan. 1882) Laws 1881, c. 108, repeals St. 1868, c. 39, § 19, and by implication chapter 83, § 27, so that now fees in misdemeanor cases cognizable by a justice of the peace are payable by the county, when they cannot be collected from the defendant or prosecuting witness, as the case may be.—Labette County Com'rs v. Kiersey, 28 Kan. 40.

[e] (N. H. 1860) An officer who has made an arrest for debt on a writ on which is indorsed

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the affidavit required by statute, and has at the debtor's request carried him before two justices of the peace to enable him to apply to them for a discharge, is not liable to the justices for their fees.—Stevens v. Merrill, 41 N. H. 309.

[f] (N. H. 1875) Prior to the amendments of 1851, 1855, and 1867, the charter of the city of Manchester provided that all costs in criminal proceedings, not paid to the judge of the police court by the respondents, should be "made up, taxed, certified, and allowed, and paid and satisfied in like manner as provided by law in cases of justices of the peace," thus in effect requiring such costs to be paid by the city to the police judge in addition to his annual salary, unless the prosecution had been directed by the counsel for the state or allowed by the court of common pleas. The amendments named fixed the salary of the police judge at a certain sum, which is declared to be "in full compensation for all services performed by him in behalf of the city * * * and for all fees in actions for which the city would otherwise be responsible." *Held*, that he is not entitled to recover from the city fees in cases prosecuted by the city in which city officers were complainants, and in which no costs were paid by the respondents.—Upton v. City of Manchester, 56 N. H. 54.

[g] (N. Y. 1823) The services of a justice of the peace in examining and removing paupers from one town to another are not a county, but a town, charge.—Ex parte Bennet, 1 Cow. 204.

[h] (N. Y. 1882) Code, §§ 2993, 3328, do not authorize a justice or constable to require prepayment of fees for services probably, but not necessarily, to be required in the further conduct of the cause.—Powens v. Jones, 10 Abb. N. C. 458.

[i] (N. C. 1890) Code, § 739, which provides for the payment of justice's fees by the county where defendant is acquitted or unable to pay costs on conviction, applies only to such cases wherein the justice acts as examining magistrate, and not to those over which he has final jurisdiction.—Merrimon v. Henderson County Com'rs, 106 N. C. 369, 11 S. E. 267.

[j] (N. D. 1894) By Comp. Laws, § 1420, fixing the fees that justices are "entitled to charge and receive," and section 6184 et seq., requiring justices to report under oath, to the county board, an itemized account of fees in all criminal cases, showing what, if anything, has been paid thereon, the legislature intended that the county should be liable for such unpaid fees.—Barrett v. Stutsman County, 4 N. D. 175, 59 N. W. 964.

[k] (Ohio, 1889) The county commissioners, in the absence of statutory authority for the payment of compensation to justices of the peace for services rendered by them in making abstracts of election returns, have no power to make payment for such services out of the common funds.—State v. Hamilton County Com'rs, 10 Ohio Dec. 467, 21 Wkly. Law Bul. 228.

[l] (Wis. 1885) Rev. St. § 1561, by providing that any person found intoxicated in a public place shall be punished by fine or imprisonment, or both, makes drunkenness a misdemeanor; but it allows cities and villages to provide a different mode of punishment for such offenses. An ordinance of the village of Waukesha of March 19, 1878, provides that all persons found in public places intoxicated, or "guilty of disorderly conduct calculated to disturb the peace," shall be fined by the justice, and in default of payment the offender may be imprisoned. *Held*, that the offenses named in the ordinance are not misdemeanors, and a prosecution for a violation of the ordinance is merely a civil action, and therefore Rev. St. § 679, which, in effect, makes a county liable to justices of the peace for fees incurred in criminal proceedings, does not apply to cases prosecuted under such ordinance.—Chafin v. Waukesha County, 62 Wis. 463, 22 N. W. 732.

[m] (Wis. 1885) Rev. St. § 679, requires justices of the peace, on or before a certain date, to forward to the county clerk correct statements of all proceedings had before them, during the preceding year, "in which the county shall have become liable for costs," and provides that no officer failing to return such statements shall receive any compensation "from the county" for any service rendered by him in any criminal proceeding during said year. *Held* that, by implication, a county is liable to one of the justices of the peace for fees accruing to him on prosecutions for drunkenness in violation of section 1561, where he has returned said statements.—Chafin v. Waukesha County, 62 Wis. 463, 22 N. W. 732.

§ 30. —— Rendering account.

[a] (Ky. 1837) A statement of the charge for a copy of his record, made by a justice of the peace at the foot of it, and signed by him, is a fee bill, within the meaning of the act of 1798.—Means v. Frame, 35 Ky. (5 Dana) 535.

[b] (Mich. 1880) Under the statute specifying in detail the fees to which a justice of the peace shall be entitled in any case, the supervisors of a county are entitled to a detailed statement of the fees claimed by a justice, so that they can ascertain if the charges are correct, and their decision on the facts is not reviewable on mandamus from this court.—McDonald v. Muskegon County Sup'rs, 42 Mich. 545, 4 N. W. 266.

[c] (N. Y. 1887) A police magistrate, who fails to make a complete report to the board of county commissioners of money received and disbursed as costs in a particular case, is not entitled to mandamus to compel the board to allow him his fees in such case.—People v. Greene County Sup'rs, 10 N. Y. St. Rep. 633.

[d] (Wis. 1885) An account of a justice of the peace for fees and costs in criminal cases, filed with the county clerk for allowance, which is sufficient in form and substance to be allowed in part by the county board, is equally sufficient to be allowed altogether, if the whole amount claimed constitutes a legal charge against the county, and this, either before the board, or in the circuit court on appeal. Such an account is not required to stand the test of a formal complaint for the recovery of money against the county.—Grimm v. Jefferson County, 62 Wis. 572, 22 N. W. 857.

§ 31. —— Actions for fees.

[a] (Mass. 1861) A magistrate may maintain an action against a judgment creditor to recover fees for services rendered in taking a recognizance and attending the examination of a judgment debtor on his application to take the poor debtor's oath, if the same are not paid in advance.—Townsend v. Way, 85 Mass. (3 Allen) 245.

[b] (Mass. 1861) In an action by a magistrate to recover fees in taking a recognizance of a judgment debtor on his application to take the poor debtor's oath, it cannot be shown in defense that the recognizance was invalid, if the poor debtor appeared in obedience thereto and submitted to an examination.—Townsend v. Way, 85 Mass. (3 Allen) 245.

[c] (Neb. 1893) Under Comp. St. c. 28, § 32, a justice of the peace, before bringing suit for his fees, must, when requested so to do, make and furnish the person to whom the services

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were rendered an itemized bill of his costs, but such statement may be waived by the person entitled thereto.—Van Etten v. Selden, 36 Neb. 209, 54 N. W. 261.

[d] (N. Y. 1891) The intent of the legislature in passing Act May 26, 1888 (Laws 1888, c. 412), which provides that all payments made by the mayor, etc., of New York City, from January 1, 1870, to September 1, 1871, to persons then police justices, at the rate of salary fixed by the resolution of the common council of December 31, 1869, "are hereby declared to have been lawfully paid, and said resolution is hereby legalized, ratified, and confirmed," was to protect the city officials by legalizing the payments which had been made in mistakenly supposing such resolution to be valid. The act does not confer a right of action upon such police justices to recover for the increased salary given by the resolution.—Bixby v. City of New York, 61 Hun, 490, 16 N. Y. Supp. 364.

[e] (Ohio, 1891) Under Act May 15, 1886, entitled "An act supplementary to section 621 of the Revised Statutes of Ohio," and providing (Rev. St. § 621a) that in all cities of the second grade of the first class each justice of the peace shall receive a certain salary in lieu of all fees, payable out of the city treasury, and (section 621b) that it shall be the duty of each justice in such cities to collect the fees as provided in sections 615 and 621, and pay the same into the city treasury, such justice may during his term of office maintain a civil action to collect the fees, and is not limited to the usual mode of collecting them by execution.—Hart v. Murray, 48 Ohio St. 605, 29 N. E. 576.

[f] (Pa. 1849) The fees of a justice of the peace, appearing by his docket, may be recovered in assumpsit for work and labor, and are earned when judgment is recovered.—Harris v. Christian, 10 Pa. (10 Barr) 233.

[g] (Pa. 1849) In assumpsit by a justice of the peace for his fees, his docket is evidence against the defendant of the suits brought for him and the amount of fees earned.—Harris v. Christian, 10 Pa. (10 Barr) 233.

(C) LIABILITIES FOR JUDICIAL ACTS.

WHAT ACTS ARE JUDICIAL, § 32.
LIABILITIES IN GENERAL, § 33.
—— ACTS IN CIVIL PROCEEDINGS, § 34.
—— ACTS IN CRIMINAL PROCEEDINGS, § 35.
ACTS WITHOUT JURISDICTION, § 36.
—— IN CIVIL PROCEEDINGS, § 37.
—— IN ATTACHMENT, GARNISHMENT, OR REPLEVIN PROCEEDINGS, § 38.
—— IN CRIMINAL PROCEEDINGS, § 39.
—— ACTS IN GOOD FAITH, § 40.

Liabilities on official bonds for acts in official capacity, see post, § 57.

§ 32. What acts are judicial.

[a] (U. S. 1848) A justice of the peace in the District of Columbia is not liable in damages for judicial acts, and for ministerial acts only in case of intentional or gross negligence; and the justice is not liable for taking a supersedeas on Sunday and from a minor.—Gannon v. Donn, Fed. Cas. No. 5,211 [1 Hayw. & H. 346], 7 D. C. 264.

[b] (Iowa, 1863) Where a justice of the peace approved a replevin bond, one of the sureties in which was a married woman, it was *held* that this was an error while acting in a judicial capacity, and he was not liable therefor upon his official bond, unless it could be shown that he acted corruptly.—Howe v. Mason, 14 Iowa, 510.

[c] (Mich. 1878) Where an unauthorized party appeared for a defendant in a suit, and the justice entered on his docket that defendant appeared, defendant could not maintain an action against said justice, as what he had done was done by him in his judicial capacity.—Morton v. Crane, 39 Mich. 526.

[d] (Mo. 1860) All the proceedings which a justice is required to perform, from the commencement to the close of a suit, are, it seems, to be held to be of a judicial, rather than of a ministerial, character, so far as to exempt him from any greater responsibility for his acts than that which attaches to other judicial officers.—Wertheimer v. Howard, 30 Mo. 420, 77 Am. Dec. 623.

[e] (N. H. 1870) A justice of the peace is not liable to an action for erroneously refusing to grant an appeal. The granting of an appeal is a judicial act.—Jordan v. Hanson, 49 N. H. 199, 6 Am. Rep. 508.

[f] (N. Y. 1850) A justice, in liquidating the amount of the costs of an inquiry into an alleged encroachment upon a highway upon the application of highway commissioners, acts judicially, and is not liable in a civil suit for taxing illegal costs.—Voorhees v. Martin, 12 Barb. 508.

[g] (N. Y. 1858) Proceedings of a justice on hearing an excuse of a person summoned as a juror for failing to appear in compliance with such summons, and the imposing of a fine, are judicial, and cannot be overhauled in an action against him, but can be reviewed only by further proceedings in the same matter.—Robbins v. Gorham, 26 Barb. 586.

[h] (N. Y. 1889) The justice before whom a person charged with violating a village ordinance is brought, under Laws 1885, c. 385, providing that such magistrate must proceed to hear the charge, and on conviction the accused must be fined according to the ordinance, and be imprisoned until the fine is paid, having acquired jurisdiction, his subsequent acts are judicial, and he is not answerable in damages therefor.—Roderick v. Whitson, 51 Hun, 620, 643, 4 N. Y. Supp. 112.

[i] (N. Y. 1889) Though under Code Civ. Proc. §§ 3126, 3207, it is the duty of a justice, on the service of a summons and verified complaint on a defendant, to render judgment without proof on the return day for want of an answer, yet the adjournment of the action over plaintiff's objection is a judicial error, and plaintiff cannot recover damages of the justice, sustained by reason of other creditors securing liens on defendant's property pending the adjournment, whereby plaintiff loses his debt.—Merwin v. Rogers, 6 N. Y. Supp. 882, 15 Daly, 334.

[j] (N. Y. 1891) Where a justice of the peace, holding a court of special sessions, imposes a fine in excess of the amount authorized by law, and orders that defendant stand committed until the fine is paid, and defendant pays the fine to avoid imprisonment, and then demands its return before it is paid into the county treasury, he cannot maintain an action against the justice for the amount so paid, since the justice, as such court of special sessions, acted judicially in imposing the fine.—Burns v. Norton, 59 Hun, 616, 15 N. Y. Supp. 75.

[k] (S. C. 1882) A trial justice entered judgment and issued execution before the five days within which defendant was entitled to move for a new trial, and the property in controversy was delivered accordingly by the constable to the plaintiff. *Held*, in a suit against the

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justice, that, if his action was contrary to law, it was in his judicial capacity, and, he not being charged with acting willfully or corruptly, he could not be made to respond in damages.—Abrams v. Carlisle, 18 S. C. 242.

[l] (Tex. 1878) Justices of the peace, who are also members of the county court, and authorized by virtue of their office to approve sheriff's bonds, are not personally liable for refusing to approve such a bond, even if the refusal is willful and malicious; their action in such a case being judicial.—Rains v. Simpson, 50 Tex. 495, 32 Am. Rep. 609.

§ 33. Liabilities in general.

[a] When a justice of the peace has jurisdiction, but errs in exercising it, he is not personally liable to the person injured.
—(Conn. 1790) Ambler v. Church, 1 Root, 211;
(Del. 1854) Bailey v. Wiggins, 5 Har. 462, 60 Am. Dec. 650;
(Ky. 1827) Jarrett v. Higbee, 21 Ky. (5 T. B. Mon.) 546;
(N. J. 1818) Little v. Moore, 4 N. J. Law (1 Southard) 74, 7 Am. Dec. 574;
(N. Y. 1824) Adkins v. Brewer, 3 Cow. 206, 15 Am. Dec. 264;
(S. C. 1819) Reid v. Hood, 2 Nott & McC. 168, 10 Am. Dec. 582.

[b] (Conn. 1836) Where a justice of the peace, on application duly made by the committee of an ecclesiastical society, with a rate bill, regular and valid on the face of it, grants a warrant for the collection of the tax, he is not liable in trespass, although the tax was not legally imposed.—Prince v. Thomas, 11 Conn. 472.

[bb] (D. C. 1848) A justice of the peace is not liable in damages for judicial acts, and is only liable for ministerial acts in case of intentional violation or gross negligence.—Gannon v. Donn, 7 D. C. 264.

[c] (D. C. 1876) Where a justice of the peace has no jurisdiction whatever, and undertakes to act, his acts are coram non judice and void, equally as if he were not a justice. If he has jurisdiction, but errs in exercising it, then his acts are not void, but voidable only. In the former case he is personally liable; in the latter he is not.—Holtzman v. Robinson, 2 MacArthur, 520.

[d] (Iowa, 1856) A justice acting officially with jurisdiction and in good faith, is not answerable in trespass for his acts, though erroneous.—Hetfield v. Towsley, 3 G. Greene, 584.

[e] (Iowa, 1863) A justice of the peace is liable for errors committed by him in a ministerial capacity, but not when acting judicially, unless it be proven that he has acted corruptly.—Howe v. Mason, 14 Iowa, 510.

[f] (Iowa, 1870) The rule of exemption from liability for erroneous judicial acts applies to inferior as well as superior tribunals.—Londegan v. Hammer, 30 Iowa, 508.

[g] (La.) A justice is not answerable civiliter for an error of judgment, if acting within his jurisdiction; otherwise, if acting beyond it.—(1824) Dressen v. Cox, 2 Mart. (N. S.) 631; (1827) Bore v. Bush, 6 Mart. (N. S.) 1; (1830) Buquet v. Watkins, 1 La. 131.

[h] (Me. 1859) No action will lie against a justice for an error of judgment committed while acting honestly within the scope of his jurisdiction.—Downing v. Herrick, 47 Me. 462.

[i] (N. H. 1856) A witness was summoned to appear before a justice of the peace, in a case pending in a court of Maine, and neglected to attend. He was brought before the justice by attachment, and fined, and was imprisoned on the justice's warrant until he paid the fine and costs. *Held*, that the justice had jurisdiction to take a deposition to be used in another state, and to impose a fine for neglect to appear and give a deposition, upon a witness duly summoned and neglecting to attend, and that a summons to testify was sufficient, and, though the proceedings were irregular, the justice was not liable until they were set aside.—Burnham v. Stevens, 33 N. H. 247.

[ii] (N. J. 1881) No action will lie against a justice, acting in a judicial capacity, for any errors which he may commit in a matter within his jurisdiction.—Loftus v. Fraz, 43 N. J. Law (14 Vroom) 667.

[j] (N. Y. 1810) A justice of the peace is not liable to be sued by witnesses for their fees. They must look to the party who subpœnaed them.—Andrews v. Bates, 5 Johns. 351.

[k] (N. Y. 1831) A justice of the peace acting without jurisdiction is a trespasser, but where he has jurisdiction an error of judgment does not subject him to an action, as he is entitled to the protection afforded to a judge of a court of record.—Horton v. Auchmoody, 7 Wend. 200.

[l] (N. C. 1828) Under the act of 1790, justices of the peace are liable to an action of debt only when they take no bond from the sheriff, and not when they commit an honest mistake in the form of it.—Governor v. McAffee, 13 N. C. 15.

[m] (N. C. 1839) No action can be supported against a justice of the peace, acting judicially and within the sphere of his jurisdiction, however erroneous his decision or malicious the motive imputed to him; and, if he does not so act, he is still not liable, if he acted bona fide and according to his best information.—Cunningham v. Dillard, 20 N. C. 485.

[n, o] (Ohio) A justice is not liable for judicial acts done within his jurisdiction.—(1817) Carothers v. Scott, Tapp. 227; (1818) Masters v. Johnson, Id. 238.

[p] (Pa. 1884) The chief burgess of a borough is a judicial officer, and where he has jurisdiction of the subject-matter, and acts within the limits of his jurisdiction, action will not lie against him, though he act through an erroneous or mistaken judgment.—Reid v. Wood, 2 Chest. Co. Rep. 513.

[q] (S. C. 1796) A justice of the peace is not liable in a special action on the case for what he does in his judicial capacity, though he may be prosecuted criminally for oppressive acts.—Lining v. Bentham, 2 Bay, 1.

[r] (S. C. 1802) A magistrate is not liable for what he does in his judicial capacity, unless he acts corruptly or oppressively.—State v. Johnson, 2 Bay, 385.

§ 34. —— Acts in civil proceedings.

[a] A justice of the peace, while acting within the limits of his jurisdiction, is not liable for a mere error of judgment, without any malicious or improper design.
—(Ky. 1815) Gregory v. Brown, 7 Ky. (4 Bibb) 28, 7 Am. Dec. 731; (1855) Bullitt v. Clement, 55 Ky. (16 B. Mon.) 193;
(S. C. 1825) Peake v. Cantey, 3 McCord, 107.

[b] (Conn. 1790) In the absence of a charge of partiality or corruption, a justice of the peace is not liable for refusing to call an action for trial at the time fixed by the writ.—Ambler v. Church, 1 Root, 211.

[c, d] (Conn. 1831) A justice of the peace is not answerable, in a civil suit, for an erroneous judgment rendered by him in his judicial capac-

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ity, provided he had jurisdiction.—Holcomb v. Cornish, 8 Conn. 375.

[e] (Ga. 1880) Only in case of malfeasance, and not of mere error of judgment, is a magistrate liable for dismissing an action on a note left with him for collection merely for nonappearance of the plaintiff.—Hitch v. Lambright, 66 Ga. 228.

[f] (Ind. 1892) A justice of the peace is not liable to one of two joint makers of a note for failure to enter up a judgment showing that such maker signed the note only as surety, where neither the note itself nor the pleadings in the action thereon show the fact of such suretyship, and the alleged surety failed to file a complaint against his comaker to try and determine the question of suretyship, as provided by Rev. St. 1881, § 1212.—State v. Wanee, 4 Ind. App. 1, 30 N. E. 161.

[g] (Ky. 1815) If a justice of the peace acts within his jurisdiction, he is not responsible for an erroneous judgment, and such judgment is a justification to the officer in carrying the judgment into execution.—Walker v. Floyd, 7 Ky. (4 Bibb) 237.

[h, i] (Md. 1855) Where a justice of the peace having jurisdiction of a suit renders a wrong judgment, resulting from an erroneous conclusion as to the law governing the case, neither he nor the plaintiff in the action can be held liable for trespass in enforcing the judgment, which has remained unreversed and unpaid.—Deal v. Harris, 8 Md. 40, 63 Am. Dec. 686.

[j, k] (Mass. 1885) A justice who, in violation of Pub. St. c. 183, § 88, declaring that in trustee process plaintiff shall not recover costs if he recovers no more than $10, renders judgment for costs when the recovery is $10 only, and issues execution for such costs, is not liable to a civil action for damages.—White v. Morse, 139 Mass. 162, 29 N. E. 539.

[l, m] (N. J. 1818) Where, in an action against two defendants before a justice, one appears and confesses judgment, and the justice erroneously enters judgment, and issues execution against both defendants, he is not liable to an action by the judgment defendant not served.—Little v. Moore, 4 N. J. Law (1 Southard) 74, 7 Am. Dec. 574.

[n] (N. J. 1838) Trespass will not lie against a justice for the taking of property under execution issued by him on a judgment fraudulently rendered by him against the plaintiff.—Taylor v. Doremus, 16 N. J. Law (1 Har.) 473.

[o] (N. Y. 1805) An action will not lie before one justice to recover back the amount of a fine imposed on a witness by another, for a contempt in a suit before him.—Moor v. Ames, 3 Caines, 170.

[p] (N. Y. 1814) The proof that a defendant is an absent debtor, in order to authorize a justice of the peace to issue writs of attachment against his property, must be such as would be received in the ordinary course of legal proceedings; otherwise, the justice will be a trespasser. A mere return to an execution that the defendant could not be found, is not the satisfactory proof required. — Vosburgh v. Welch, 11 Johns. 175.

[q] (N. Y. 1819) Where a justice has no jurisdiction and undertakes to act, his acts are coram non judice, and void. If he has jurisdiction, and errs in the exercise of it, his acts are voidable only,—as where a justice, in a cause of which he had cognizance, gave more costs than the statute allowed him to give, it was *held* that the judgment and execution thereon were voidable only, and that the justice was not liable at the suit of the defendant, who had been imprisoned under the execution.—Butler v. Potter, 17 Johns. 145.

[r] (N. Y. 1831) Where a justice of the peace grants an adjournment to a plaintiff who is not entitled to it, and subsequently renders judgment and issues execution thereon, and the property of defendant is sold, he cannot be sued as a trespasser.—Horton v. Auchmoody, 7 Wend. 200.

[s] (N. Y. 1889) A decision that a justice of the district court is not liable in damages to plaintiff for adjourning a case when no verified answer is interposed is not in conflict with a decision that such unauthorized adjournment is reversible error.—Merwin v. Rogers (Com. Pl.) 7 N. Y. Supp. 633.

[t] (Wis. 1851) A justice of the peace is not liable for erroneously refusing to set off one judgment against another rendered before him, and for issuing execution on the latter judgment, on which plaintiff's property was seized and sold.—Keeler v. Woodward, 4 Chand. 34, 3 Pin. 306.

§ 35. —— Acts in criminal proceedings.

Liability of justices of the peace for false imprisonment, see "False Imprisonment," vol. 23, cc. 522–534, §§ 17–28.

[a] (Ill. 1857) No error committed by a magistrate in a criminal prosecution in which he has jurisdiction both of the offense and the defendant can make him a trespasser.—Lancaster v. Lane, 19 Ill. (9 Peck) 242.

[b] (Iowa, 1880) Where a justice of the peace has jurisdiction of a prosecution for violating a city ordinance, he is not liable to a civil action for his proceeding therein by reason of the fact that the ordinance was void for want of authority to pass it.—Henke v. McCord, 55 Iowa, 378, 7 N. W. 623.

[c] (Kan. 1870) Where a justice of the peace has jurisdiction of the defendant in a criminal case, and of the offense intended to be charged, and the information states facts sufficient to show what offense is intended to be charged, and facts sufficient to require the exercise of judgment to decide whether any offense has been charged or not, and where the justice judicially determines that such information does state facts sufficient to constitute an offense, and proceeds in an action to a trial, conviction, and sentence under such information, he does not thereby render himself liable to an action, although he may have erred in his decision, and although the information does not state facts sufficient to constitute any offense.—Clark v. Spicer, 6 Kan. 440.

[d] (Ky. 1848) Where a justice of the peace, upon his own view, issues a warrant for the apprehension of an individual, to require surety for the peace, returnable to another justice, and the latter justice, without further evidence, requires the surety to be given, it is a judicial act for which he is not liable in a suit, without evidence of a malicious purpose.—Robinson v. Ramey, 47 Ky. (8 B. Mon.) 214.

[e] (Ky. 1894) A justice of the peace is not liable in an action for malicious prosecution for an erroneous judgment in binding over for trial on insufficient evidence one examined before him on the charge of forgery, where there are no facts showing that the judgment was malicious or corrupt.—Hagerman v. Sutherland, 27 S. W. 982.

[f] (Me. 1867) Where a person has been convicted of an offense punishable by law by fine and imprisonment, and has been sentenced to pay the statute fine only, he cannot, after payment thereof, recover the same from the mag-

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istrate who imposed the sentence and to whom he paid it.—Bragdon v. Somerby, 55 Me. 92.

[g] (Mass. 1848) In an action on the case, it was alleged in the declaration that the defendant, who was a justice of the peace, willfully and maliciously received a false and groundless complaint against the plaintiff, for a criminal trespass, and thereupon willfully and maliciously issued his warrant, upon which the plaintiff was arrested and carried before the defendant for trial, and was by him willfully and maliciously tried and convicted, without being allowed an opportunity to obtain witnesses and counsel; that, upon such conviction, the defendant maliciously sentenced the plaintiff to pay a fine of two dollars and costs; and that, upon his refusing to pay the same, the plaintiff was committed by the order and warrant of the defendant to the common jail, where he remained imprisoned for one day, until, to obtain his discharge therefrom, he was obliged to and did comply with the defendant's order to pay the fine and costs imposed upon him by the sentence. It was *held*, on general demurrer, that the action could not be maintained.—Pratt v. Gardner, 56 Mass. (2 Cush.) 63, 48 Am. Dec. 652.

[h] (Mass. 1854) The record of a conviction by an inferior court must show, in order to protect the justice from liability to a person imprisoned pursuant to such conviction, that the case was within the limits of his jurisdiction.—Piper v. Pearson, 68 Mass. (2 Gray) 120, 61 Am. Dec. 438.

[i] (Mass. 1865) It seems that an action of tort cannot be maintained against a magistrate, when acting judicially and within his jurisdiction in a criminal case, on the charge that he has fraudulently altered the complaint and warrant after service and return. He is answerable to the government only, and not to individuals whose cases he is obliged to try.—Kelley v. Dresser, 93 Mass. (11 Allen) 31.

[j] (Mich. 1896) Where a justice issuing a warrant for the arrest of a person for a criminal offense has jurisdiction of the subject-matter, an action against him will not lie by one claiming to have been injuriously affected by his judicial action, either on the ground that he acted maliciously or that his judgment was erroneous.—Curnow v. Kessler, 110 Mich. 10, 67 N. W. 982.

[k] (Neb. 1895) A police justice, acting within his jurisdiction, is not liable in a civil action for false imprisonment because the proceedings under which the person was imprisoned were void for irregularities.—Atwood v. Atwater, 43 Neb. 147, 61 N. W. 574.

[l] (N. H. 1819) A justice of the peace is not liable, in a civil action, for requiring excessive bail from one whom he has bound over on a criminal charge.—Evans v. Foster, 1 N. H. 374.

[m] (N. H. 1856) A magistrate is not liable to the penalty, who has rendered judgment in a criminal proceeding for costs, including an attorney fee; the same being taxed and claimed by the attorney who conducted the prosecution, as compensation for his services, although the costs were paid upon the order of the magistrate to hold the respondent in custody till they were paid, and the magistrate receipted to the respondent for the costs upon their being so paid.—Fox v. Whitney, 33 N. H. 516.

[n] (N. J. 1868) A justice of the peace, having cognizance of a criminal complaint, is not liable to the party implicated, for any act done by him within his jurisdiction.—Mangold v. Thorpe, 33 N. J. Law (4 Vroom) 134.

[o] (N. J. 1881) Where an order for a warrant made by a justice of the peace fails to state the amount for which the warrant is to be issued, and the contemporaneous order for bail indorsed by the justice on the warrant supplied the omission, the two together will be a substantial compliance with the provision of the statute, and hence the justice was not liable.—Loftus v. Fraz, 43 N. J. Law (14 Vroom) 667.

[p] (N. Y. 1839) Where a magistrate issued a warrant, on which a person was arrested and fined, for a violation of the statute for the observance of Sunday, it was held that he was not guilty of a trespass, though the facts alleged may not have been an offense within the statute.—Stewart v. Hawley, 21 Wend. 552.

[q] (N. Y. 1870) No action will lie to recover back from a justice of the peace the amount of a fine imposed by him in his judicial capacity in excess of the amount which he is authorized by law to inflict, after it has been actually paid, until the judgment is avoided by reversal, notwithstanding it may have been paid in order to escape imprisonment.—Clark v. Holdridge, 58 Barb. 61, 40 How. Prac. 320.

[r] (N. Y. 1891) The mayor of a city, having by virtue of his office judicial authority to conduct examinations on criminal charges, refused to proceed with such an examination when the accused was brought before him, and adjourned the hearing to the following day, and held the accused to bail for his appearance on that day. He also refused to accept bail tendered by the accused, or to accept any bail until after 24 hours, and directed that he be locked up until the following day. *Held*, that the mayor was not liable in damages to the accused for such conduct, having acted in a judicial capacity, with jurisdiction of the person and the subject-matter.—Hommert v. Gleason, 60 Hun, 579, 14 N. Y. Supp. 568, 20 Civ. Proc. R. 349.

[s] (Ohio, 1817) Where it appears in an action against a justice for false imprisonment that the defendant acted as a judicial officer in imprisoning plaintiffs, it will be sufficient justification for the acts done if they are within his jurisdiction.—Carothers v. Scott, Tapp. 227.

[t] (Pa. 1870) A justice of the peace, having jurisdiction of assault and battery with intent to kill, is not answerable in trespass for an error in holding the prisoner and committing him in default of bail, for malicious or wanton injury case is the remedy.—Kennedy v. Barnett, 64 Pa. (14 P. F. Smith) 141.

[u] (R. I. 1855) Justices of the peace, where the forms of law are substantially complied with, though the precision proper to be observed in indictments may be wanting in complaints before them, ought not to be held liable in damages for acts done in the performance of their official duties.—Alexander v. Card, 3 R. I. 145.

[v] (Tex. 1858) Where a justice of the peace convicted a party for assault and battery, when the facts would have warranted a conviction for an offense beyond his jurisdiction, the justice was *held* not liable to the party convicted for this mistake of judgment.—Bumpus v. Fisher, 21 Tex. 561.

[w] (Vt. 1881) A justice of the peace and town grand juror are not liable for their judicial acts, done in good faith, when they have jurisdiction of the subject-matter, the process, and the person of the party dealt with.—Kibling v. Clark, 53 Vt. 379.

[x] (Vt. 1891) A justice of the peace, before whom one is being tried for assault and battery, has a right to interrogate witnesses offered by the accused, or to exclude them, and reject their evidence, if being within his judi-

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cial discretion, and he is not answerable in a civil action for such acts.—Banister v. Wakeman, 64 Vt. 203, 23 Atl. 585, 15 L. R. A. 201.

§ 36. Acts without jurisdiction.

[a] (Ky. 1820) A justice of the peace is liable to an action for exercising authority where he has none, though such act is a judicial act.—Ely v. Thompson, 10 Ky. (3 A. K. Marsh.) 70.

[b] (Me. 1851) A. was selected by the principal in a debtor's relief bond to act as a magistrate in an adjudication upon the debtor's disclosure, and, upon such disclosure, united with B., the other magistrate, in giving a discharge certificate to the debtor, when in fact A. had no authority to act as such magistrate, and thereby the surety in the relief bond was compelled to pay the same. *Held*, that the surety could not sustain an action against A. for wrongfully assuming to act as submagistrate in the case.—Brookings v. Cunningham, 33 Me. 103.

[c] (Me. 1876) A justice of the peace, disqualified by reason of his relation to one of the parties to the cause, is liable in trespass for committing a witness for refusing to testify in such cause.—Call v. Pike, 66 Me. 350.

[d] (Mass. 1854) A justice of the peace, who acts in a case of which he has no jurisdiction, or who exceeds his jurisdiction, knowing the facts which constitute the defect of jurisdiction, is liable in damages to any party injured.—Piper v. Pearson, 68 Mass. (2 Gray) 120, 61 Am. Dec. 438; Clarke v. May, 68 Mass. (2 Gray) 410, 61 Am. Dec. 470.

[e] (Mass. 1854) Thus, a justice of the peace, who, in the course of the trial of a case of which a police court has exclusive jurisdiction, commits a witness to prison for contempt, is liable to an action by the witness.—Piper v. Pearson, 68 Mass. (2 Gray) 120, 61 Am. Dec. 438.

[f] (Mass. 1854) A justice of the peace, who, after finally disposing of a cause tried before him, commits a witness to prison for contempt at the trial, is liable to an action by the witness.—Clarke v. May, 68 Mass. (2 Gray) 410, 61 Am. Dec. 470.

[ff] (Ohio, 1818) A justice of the peace who exceeds his jurisdiction is a trespaser.—Masters v. Johnson, Tapp. 238.

[g] (Wis. 1851) Where a justice of the peace rendered judgment in an attachment suit, in which the return had not been returned, and in which the defendant did not appear, and defendant's property was taken and sold by virtue of an execution thereunder, the justice was liable for the value thereof.—Selby v. Platts, 3 Chand. 183, 3 Pin. 170.

§ 37. —— In civil proceedings.

[a] (Ind. 1852) The judgment of the justice being absolutely void, he and the judgment plaintiff are liable in trespass de bonis asportatis to the party whose goods were sold under the execution.—Dawson v. Wells, 3 Ind. 398.

[b] (La. 1885) A justice is liable in damages for an erroneous judgment rendered without his jurisdiction.—Estopinal v. Peyroux, 37 La. Ann. 477.

[c] (Mich. 1844) A. and B. were duly summoned to answer to C., before a justice of the peace, at his residence. They appeared there on the return day, but neither the justice, who was absent from home, nor C., appeared, and no proceedings were had in the case. Three days afterwards, B., in the presence of C. and a witness, but in the absence of the justice, indorsed on a joint and several note of A. and B., found in the office of the justice, his individual confession of judgment thereon, upon which the justice, on the same day, without any continuance of the cause from the return day of the summons, or any declaration filed, rendered judgment for C. against A. and B. for the amount of the note, and execution was issued thereon, upon which the property of A. was seized and sold. A. thereupon brought trespass against the justice. *Held*, that the justice had no jurisdiction over the person of A. at the time the judgment was rendered, the summons having spent its force on the return day, the parties being out of court, and the cause discontinued, and that he was liable to A. in the action.—Clark v. Holmes, 1 Doug. 390.

[cc] (Minn. 1894) A justice is not liable for damages because of the rendition of a judgment after the time allowed by law, when no further proceedings on his part are shown.—Murray v. Mills, 56 Minn. 75, 57 N. W. 324.

[d] (Mo. 1881) For excess of jurisdiction a justice of the peace is liable as a wrongdoer, nor is it a defense that he had jurisdiction over the subject-matter of the complaint for a different purpose.—Patzack v. Von Gerichten, 10 Mo. App. 424.

[e] (N. H. 1843) A judgment rendered by a justice of the peace in Vermont, in a cause in which he is interested, is void, and no justification in trespass brought against him.—Russell v. Perry, 14 N. H. 152.

[f] (N. H. 1843) If a justice of the peace in Vermont render judgment in a cause over which he has no jurisdiction, the judgment will be void, and be no justification in an action of trespass brought against him.—Russell v. Perry, 14 N. H. 152.

[g] (N. Y. 1818) A justice tried an action of assault and battery, and gave judgment for the plaintiff for $15, and issued execution thereon, under which the constable levied on and sold property of the defendant. In an action of trespass against the justice and constable, by the defendant in the former action, he recovered a verdict for $270. A new trial was refused, although there was reason to believe that the justice had acted under a mistake as to the extent of his jurisdiction, and there were strong circumstances to show that the party himself had, through his agent, purchased the goods sold under the execution at a price about equal to the amount of the judgment against him, so that he could have sustained no greater injury than the amount of the judgment; the case admitting of doubt, and the question being fairly submitted to the jury.—Woodward v. Paine, 15 Johns. 493.

[h] (N. Y. 1824) Trespass will lie against a justice of the peace who acts without jurisdiction, and, in so doing, injures a party in his property or person.—Adkins v. Brewer, 3 Cow. 206, 15 Am. Dec. 264.

[i] (N. Y. 1895) In an action before a justice of the peace, the constable neglected to serve the venire for a jury, issued on defendant's demand; and on the day before the venire was returnable the justice, at plaintiff's request, issued another venire, returnable several days later, and the trial was adjourned to that day. Defendant did not appear on the return day of the second venire, and the jury rendered a verdict for plaintiff, and the justice issued execution thereon. *Held*, under Code Civ. Proc. § 3013, providing that, if plaintiff in a justice's court fails to appear within one hour after the time to which the trial has been adjourned, judgment of nonsuit must be rendered against him, that the action was, ipso facto, discontinued by the failure of plaintiff to appear on the return day of the first venire, and the subsequent acts of the justice were without jurisdiction, and he was liable to defendant for dam-

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ages sustained by the issuance of the execution.—Handshaw v. Arthur, 89 Hun, 179, 34 N. Y. Supp. 1034.

[j] (N. C. 1844) Where a magistrate gives a judgment against a defendant for a sum beyond his jurisdiction, the defendant may have an action for any acts done under it.—Morgan v. Allen, 27 N. C. 156.

[k] (Ohio, 1834) If the return of the officer show that the court has no jurisdiction, the plaintiff and the justice proceed at their peril.—Harmon v. Gould, Wright, 709.

[l] (Tex. 1895) A justice of the peace is liable in damages for injuries inflicted under color of a judgment rendered by him with knowledge that he was so related to one of the parties as to render the judgment void.—McVea v. Walker, 11 Tex. Civ. App. 46, 31 S. W. 839.

§ 38. —— In attachment, garnishment, or replevin proceedings.

[a] (Ga. 1878) Where a justice of the peace erroneously entertains jurisdiction of a garnishment suit, based on a judgment rendered in a superior court, and receives the amount of such judgment from the judgment debtor, and pays it out to the plaintiff in garnishment, he is personally liable therefor to such judgment defendant.—Durden v. Belt, 61 Ga. 545.

[b] (Ind. 1838) A justice of the peace who issues a writ of domestic attachment, by which the goods of an absconding debtor are attached, without requiring a bond to be previously filed according to the statute, and the party who procures such writ to be issued without first filing the bond, are trespassers, and as such liable to the party injured.—Barkeloo v. Randall, 4 Blackf. 476, 32 Am. Dec. 46.

[c] (Kan. 1878) Under Gen. St. p. 791, § 70, a justice is liable in damages to a party injured by issuance of a replevin writ, without the filing of the prescribed undertaking; and this, although the plaintiff, after the seizure, deposits with the justice a sufficient amount of money to secure the defendant, and thereupon executes and files what would have been a sufficient undertaking, if seasonable.—Hannum v. Norris, 21 Kan. 114.

[d] (Neb. 1885) Where the cause of action against a nonresident is a claim for damages arising through the delay of the vendor in delivering goods sold, the claim is founded on tort, and the writ of attachment cannot issue, under Code Civ. Proc. § 198, providing that an attachment shall not be granted, on the ground that defendant is a nonresident of the state, for any claim other than "a debt or demand arising upon contract, judgment, or decree," and the justice issuing the attachment is liable to the defendant.—Wright v. Rouss, 18 Neb. 284, 25 N. W. 80.

[e] (R. I. 1880) Where an attachment suit has lapsed through failure to return the writ in time, but the justice has nevertheless ordered a sale of the goods attached, the defendant is entitled to a verdict against the justice, who so acted without jurisdiction, and against the party and his counsel, who procured him so to do, but not against the party appointed to keep the goods until the sale, nor against the officer selling the same, where the order under which he sold them was regular on its face.—Brown v. Carroll, 16 R. I. 604, 18 Atl. 283.

§ 39. —— In criminal proceedings.

Liability of justices of the peace for acts without jurisdiction, see "False Imprisonment," vol. 23, cc. 524–527, § 18.

[a] (Conn. 1821) Where a justice of the peace, before whom an offender against the riot act, arrested on view, is brought to be further proceeded against, makes an order without a previous complaint or information in writing, requiring such offender to be recognized for trial, and, on his refusal to comply with such order, commits him to prison, he is liable in trespass for false imprisonment.—Tracy v. Williams, 4 Conn. 107, 10 Am. Dec. 102.

[b] (Kan. 1896) After a complaining witness, against whom judgment was rendered for costs of a proceeding on a complaint before a justice charging defendant therein with malicious trespass, executed a bond under Gen. St. 1889, c. 83, § 18, the justice was liable for committing him until the costs were paid.—Smith v. Casner, 2 Kan. App. 591, 44 Pac. 752.

[bb] (La. 1827) A justice of the peace, having no power to try free persons of color for alleged disrespect towards whites, cannot be protected in an action for false imprisonment, by a plea that he acted in his official capacity.—Bore v. Bush, 6 Mart. (N. S.) 1.

[c] (Mass. 1861) A justice of the peace has authority to entertain a complaint, under St. 1846, c. 244, concerning hawkers and peddlers, and, after examination of the defendant, to require him to recognize with sureties to appear at the higher court, but not to require him to recognize with sureties to keep the peace and be of good behavior in the meantime; and for an excess of jurisdiction in the latter respect he is liable in damages.—Knowles v. Davis, 84 Mass. (2 Allen) 61.

[d] (N. Y. 1821) Where a statute requires a justice of the peace "to cause the party to be brought before him," and he proceeds to commit the party in his absence, and enforce the sentence against him, he will be liable as a trespasser; and the party affected by the conviction may, in an action of trespass against the justice, when the conviction is set up as a defense, show that the magistrate had no jurisdiction of the person convicted.—Bigelow v. Stearns, 19 Johns. 39, 10 Am. Dec. 189.

[e] (N. Y. 1871) An overseer of the poor commenced bastardy proceedings before a justice of the peace, who was his son-in-law, and whose wife was living. The justice associated another with himself, and after the usual proceedings the justices made an order of affiliation, and committed the party charged to jail for neglect to comply with the order. *Held*, that the overseer was a party to the proceedings in such sense that the proceedings were void and the justices liable to an action for false imprisonment.—Rivenburgh v. Henness, 4 Lans. 208.

§ 40. —— Acts in good faith.

[a] (Iowa, 1895) A justice of the peace is not civilly liable for entering in good faith a judgment void for want of jurisdiction.—Thompson v. Jackson, 93 Iowa, 376, 61 N. W. 1004.

[b] (Kan. 1884) A justice of the peace is not liable in damages for having issued an attachment in a suit on a note not yet due. The plaintiff, however, who in his affidavit stated that the note was due, is liable.—Connelly v. Woods (Kan.) 2 Pac. 773.

[c] (Me. 1893) A justice of the peace who erroneously, but in good faith, excludes persons from attendance at a criminal trial as spectators, is not liable therefor.—Williamson v. Lacy, 86 Me. 80, 29 Atl. 943.

[d] (N. J. 1882) A magistrate is not liable to an action in consequence of a decision made by him in a matter which was colorably, though not really, within his jurisdiction.—Grove v. Van Duyn, 44 N. J. Law (15 Vroom) 654, 43 Am. Rep. 412.

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[e] (Tex. 1896) A justice of the peace is not liable for rendering a judgment and issuing an order of sale thereunder, in an action in which he has no jurisdiction, unless he knowingly acts outside of his jurisdiction.—Anderson v. Roberts (Civ. App.) 35 S. W. 416.

(D) LIABILITIES FOR MINISTERIAL ACTS.

IN CIVIL PROCEEDINGS, § 41.
—— ISSUANCE OF EXECUTION OR PROCESS, § 42.
IN CRIMINAL PROCEEDINGS, § 43.

Liabilities on official bonds for ministerial acts, see post, § 58.
Authority to call meeting of members and stockholders of corporation, see "Corporations," vol. 12, cc. 855, 856, § 736.
Liability of justices of the peace for wrongful issuance of warrant, see "False Imprisonment," vol. 23, cc. 528–531, §§ 20–23.

§ 41. In civil proceedings.

[a] (Ala. 1847) A justice of the peace who takes insufficient surety upon an appeal bond is not individually responsible, unless it be shown that he acted from corrupt or impure motives.—Lester v. Governor, 12 Ala. 624.

[b] (Del. 1888) The refusal of a justice of the peace to approve an appeal bond is a ministerial act, for which an action will lie against him if he acted corruptly or maliciously.—Legates v. Lingo (Super.) 8 Houst. 154, 32 Atl. 80.

[c] (Ind. 1828) If satisfaction of a judgment be entered by a justice of the peace on his docket, he and his sureties are liable for the amount to the judgment creditor, no matter for what consideration the satisfaction was entered, unless the creditor was a party to the arrangement.—Modisett v. Governor, 2 Blackf. 135.

[d] (Ind. 1881) The failure of a justice to attest the entry of replevin bail, not relieving the bail from liability, is not such a breach of his official bond as to authorize the recovery of substantial damages.—State v. Trout, 75 Ind. 563.

[e] (Me. 1854) A justice is not liable, in a civil suit, for any act done by him in his judicial capacity; but when acting ministerially and in the use of his discretion,—e. g., in refusing an appeal and issuing execution,—he is amenable to the party injured, if he act corruptly.—Tyler v. Alford, 38 Me. 530.

[ee] (Mass. 1849) An action on the case will not lie against a justice of the peace for an error of judgment in taking a recognizance to prosecute an appeal in a form not authorized by law, and therefore invalid.—Chickering v. Robinson, 57 Mass. (3 Cush.) 543.

[f] (Mass. 1853) A justice of the peace is not liable to an action for not sending up the recognizance of an appellant from his decision in a civil case, if the same is not demanded of him and his fees tendered therefor.—Jones v. Werden, 66 Mass. (12 Cush.) 133.

[ff] (Mass. 1862) No action lies against a magistrate to recover damages sustained by reason of his taking an invalid recognizance.—Way v. Townsend, 86 Mass. (4 Allen) 114.

[g] (Mich. 1847) A justice of the peace, who receives uncurrent or depreciated bank bills of an officer, and receipts the amount on the back of an execution held by the officer, is liable, after demand and refusal, for the nominal amount to the judgment creditor in an action for money had and received; the remedy at common law not being restricted by the statutory action on the justice's bond.—Welch v. Frost, 1 Mich. (Man.) 30, 48 Am. Dec. 692.

[h] (Mich. 1879) In order to make a justice of the peace liable to a judgment creditor on a judgment which the justice had marked "Judgment discharged," it must be shown that money had been paid the justice on the judgment, and that the justice had refused to pay it over.—Dane v. Holmes, 41 Mich. 661, 3 N. W. 169.

[i] (Mich. 1879) Where money is paid into justice's court, to be applied upon a certain judgment, the justice's docket entry that the money is in satisfaction of a different judgment cannot make him liable to the holder of the latter judgment—McDonald v Lewis, 42 Mich. 135, 3 N. W. 300.

[j] (N. Y. 1832) Case lies against a justice of the peace who corruptly refuses to take the security required to be given on the prosecution of an appeal, such proceeding being of a ministerial and not a judicial character.—Tompkins v. Sands, 8 Wend. 462, 24 Am. Dec. 46.

[k] (N. Y. 1845) A justice of the peace, in making a return to the court of common pleas upon an appeal, acts ministerially, and is responsible to the party injured for an error in such return.—Houghton v. Swarthout, 1 Denio, 589.

[l] (N. Y. 1864) A justice of the peace, in making a return on appeal, acts ministerially, and is liable in damages for a false return.—McDowell v. Buffum, 31 How. Prac. 154.

[m] (N. Y. 1869) The entry of a judgment by a justice of the peace, in his docket, is a ministerial and not a judicial act; and an action may be maintained against a justice who, having rendered judgment for the plaintiff, through mistake, enters up judgment for the defendant, which the former is obliged to satisfy.—Christopher v. Van Liew, 57 Barb. 17.

§ 42. —— Issuance of execution or process.

[a] (Ala. 1890) Where the issuance of a writ of restitution within three days from the rendition of the judgment in forcible detainer, notwithstanding defendant's notice of intention to appeal, was premature, it was merely error, and did not render the writ void; and an action for damages will not lie against the justice for wrongfully issuing the writ.—Olmstead v. Brewer, 91 Ala. 124, 8 South. 345.

[b] (Cal. 1861) Judgment was rendered by a justice against two codefendants, over one of whom he had acquired no jurisdiction. Execution issued thereon, in its terms leviable on the individual property of either defendant. *Held*, that the justice was liable in damages for a levy upon the property of the defendant who was not bound by the judgment.—Inos v. Winspear, 18 Cal. 397.

[c] (Conn. 1874) Where a complaint and summons, in a summary process for obtaining possession of leased premises, were dated one day before the right of action accrued, but were in fact issued and served on the day following, and the defendant did not object thereto, *held*, that the judgment was a protection to the justice issuing the execution thereunder.—Taylor v. Judd, 41 Conn. 483.

[d] (Ind. 1844) A constable, appointed by a justice of the peace to levy an execution on the goods of A., levied the same on goods of B. A trial of the right of property was claimed by B., who gave bond, etc., but the constable refused to deliver the goods to B. *Held* that,

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for this misconduct of the constable, the justice was, under the statute, liable to B., in an action on the case.—Dugan v. Melogue, 7 Blackf. 144.

[e] (La. 1868) Where a justice of the peace caused executions to issue in several suits against a person not a party to the suits, and, at the sale thereunder, purchased the property seized, both the justice and the constable levying the writs were liable to the owner, for the restoration of the property or its value.—Terrail v. Tinney, 20 La. Ann. 444.

[f] (Me. 1840) A justice of the peace is liable in trespass for an arrest under an execution issued by him in a case after his jurisdiction has ceased.—Spencer v. Perry, 17 Me. (5 Shep.) 413.

[g] (Mass. 1813) Where a justice of the peace issues execution three hours after judgment, the law providing for its issuance 24 hours after judgment, he is liable in trespass to defendant imprisoned thereon.—Briggs v. Wardwell, 10 Mass. 356.

[h] (Mass. 1814) Trespass will lie against a magistrate issuing void process, although not maliciously.—Hayden v. Shed, 11 Mass. 500.

[i, j] (Mass. 1854) A justice of the peace, who issues an execution, commanding an arrest of the body of the debtor, in a case in which he knows that the law prohibits such arrest or the issuing of such an execution, is liable in damages to the debtor arrested on such execution.—Sullivan v. Jones, 68 Mass. (2 Gray) 570.

[k] (Mich. 1848) A judgment in a justice's court was stayed six months, instead of three, as the statute required. At the expiration of the six months, the justice issued execution against both defendant and the stayer, on which the property of the stayer was taken and sold. *Held*, that the execution was illegally issued, and that the justice was liable in trespass to the stayer for the property sold.—Shadbolt v. Bronson, 1 Mich. (Man.) 85.

[l] (Mo. 1860) Where a justice issued an execution, but, by a mistake, made it returnable in 60 instead of 90 days, as required by law, whereby the plaintiff lost his debt, it was *held* that the act was one for which the justice was not responsible, in an action to the plaintiff.—Wertheimer v. Howard, 30 Mo. 420, 77 Am. Dec. 623.

[m] (N. J. 1881) A justice of the peace having jurisdiction is not liable to an action for error in issuing a warrant for the arrest of a debtor, for when an application is presented to him, and he is satisfied, it is his duty to issue the warrant.—Loftus v. Prior, 5 N. J. Law J. 24.

[n] (N. Y. 1831) A justice of the peace, who issues a second execution after the first is satisfied, is a trespasser; and it is no excuse that such second execution issued through the false representation of the plaintiff that the first was lost. A constable, acting under such second execution, is not liable as a trespasser.—Lewis v. Palmer, 6 Wend. 367.

[o] (N. Y. 1848) A magistrate who issues a void process is only liable for the injury inflicted upon the party against whom it issued, where it is executed according to its mandate, and where such process was directed to "any constable of the county," but the party who sued it out placed it in the hands of a deputy sheriff, with directions to execute it, which he accordingly did, it was held in trespass by the party against whom it issued that the justice was not liable.—Merritt v. Read, 5 Denio, 352.

[p] (N. C. 1855) The warrant of a justice of the peace, who had no jurisdiction of the matter, is void; and the magistrate is liable for damages.—Cohoon v. Speed, 47 N. C. 133.

[q] (S. C. 1823) A justice of the peace, acting without jurisdiction in issuing an execution for costs, under which the plaintiff's horse was sold, was *held* liable to an action of trespass.—Rembert v. Kelly, Harp. 65.

[r] (Wis. 1851) A justice of the peace is not liable in an action for damages sustained by reason of his issuing an execution upon a judgment before the proper time.—Keeler v. Woodward, 4 Chand. 34, 3 Pin. 306.

§ 43. In criminal proceedings.

[a] (Conn. 1836) Where process issues on the complaint of a grand juror for an offense of which he is not cognizant, the magistrate who issues the warrant is liable in trespass.—Allen v. Gray, 11 Conn. 95.

[b] (Ill. 1826) If a justice of the peace officiously, and without any complaint on oath or of his own knowledge, issues his warrant to apprehend a person, he will be liable in an action of trespass.—Flack v. Harrington, 1 Ill. (Breese) 213, 12 Am. Dec. 170.

[c] (S. C. 1808) A justice of the peace, from a mistaken notion of duty, wrote his name on the back of a warrant issued by a justice of the peace, in Georgia, against a person complained of as a felon; and an arrest was made in South Carolina, under the pretended warrant of the indorsing magistrate. *Held*, that the indorsing magistrate was to be considered in the light of a principal trespasser, though he might be acting legally.—Perrin v. Calhoun, 2 Brev. 248.

[d] (Vt. 1891) The issuing of a mittimus by a justice of the peace in a criminal case is a ministerial act, for which he may be liable in damages if done without right and with a malicious intent.—Banister v. Wakeman, 64 Vt. 208, 23 Atl. 585, 15 L. R. A. 201.

(E) LIABILITIES FOR NEGLIGENCE AND MISCONDUCT.

NEGLIGENCE, § 44.
MISCONDUCT, § 45.
— WRONGFUL ISSUANCE OF WRITS OR WARRANTS, § 46.
— TAXATION OF ILLEGAL FEES, § 47.

Liabilities on official bonds for negligence and misconduct, see post, § 59.
Refusal to accept recognizance for appeal as affecting liability for false imprisonment, see "False Imprisonment," vol. 23, c. 581, § 71.

§ 44. Negligence.

[a] (Ga. 1886) Under Code 1882, § 3961, providing that a justice of the peace may be ruled by the superior court for refusal or neglect "to collect or to pay over any money," a justice may be ruled for his failure to collect, though the enactment, as worded by the legislature in Act Feb. 25, 1876, incorporated in section 3961 by the compilers, omitted the disjunctive "or," so that the section as enacted provided that a justice might be ruled for his refusal or neglect "to collect to pay over any money."—Barrett v. Pulliam, 77 Ga. 552.

[b] (Ill. 1863) If the justice neglects to make the entry on his docket, of the inventory required by law, where he has taken an acknowledgment of a personal mortgage, he is, it seems, liable to any one who is thereby injured, for the damage occasioned by such neglect.—Harlow v. Birger, 30 Ill. (20 Peck) 425.

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[c] (Ind. 1837) Where, after a justice has rendered judgment for plaintiff, plaintiff directed him not to issue execution until the time for taking an appeal from the judgment had expired, the justice was not liable for failure to issue the execution on the expiration of such time, nor until he was requested to do so.—Tingle v. Pullium, 4 Blackf. 442.

[d] (Ind. 1844) A justice of the peace is not authorized, in the absence of special instructions, to receive anything except gold and silver coin of the United States, in satisfaction of a judgment rendered before him; and if he receive bank bills current as money at the time, from a constable who has collected the same on the execution, and entered satisfaction on the judgment, he will be liable to the judgment creditor for the amount, even though he afterwards tender him the bills received, and they become depreciated or worthless.—Hooker v. State, 7 Blackf. 272.

[e] (Mass. 1817) Where a justice of the peace had neglected to return a recognizance taken by him until the second day of the term at which it was returnable, the court ordered that he pay a fine for his neglect.—Ex parte Neal, 14 Mass. 205.

[f] (Mass. 1863) If, upon an application by a debtor, who has been arrested on execution, to take the oath for the relief of poor debtors, the magistrate issues a notice to the creditor by a wrong name, whereby the discharge of the debtor is invalidated, the surety in his recognizance, who has subsequently been compelled to pay the amount of the execution, cannot maintain an action against the magistrate to recover damages for the mistake.—Van Kuran v. May, 89 Mass. (7 Allen) 466.

[g] (Minn. 1861) The statute (Comp. St. c. 63, § 33), imposing a penalty on a justice for neglecting to post up a fee bill in his office, is limited in its operation to officers in office, and to come into office within six months after its passage.—Kennedy v. Raught, 6 Minn. 235 (Gil. 155).

[h] (N. Y. 1834) A justice of the peace was held not to be liable for negligence and carelessness in giving erroneous information, as to the amount of a judgment rendered by him, to a party about to prosecute an appeal, by means whereof the appeal is lost.—Wickware v. Bryan, 11 Wend. 545.

[i] (N. Y. 1844) After execution returned by a constable, judgment was recovered against him for neglect, the justice not having entered the return in his docket and the constable being unable to prove it aliunde. *Held*, that the neglect of the justice did not render him liable to the constable.—James v. Hartney, 6 Hill, 487.

[j] (N. Y. 1886) A justice of the peace is not liable for failure to enter a judgment, unless it is first shown that he rendered such a judgment.—Evarts v. Kiehl, 102 N. Y. 296, 6 N. E. 592.

[k] (N. C. 1855) A record showing that "A. was appointed a guardian to B., upon entering into bond with C. and D. as sureties," and that A. only executed the bond, on the strength of which he took charge of the ward's estate, is a sufficient "committing of an orphan's estate to the charge or guardianship" of a person to render the magistrate making such entry liable for not taking good and sufficient security for the default of A. The said entry does not mean that A. was to be guardian, if he gave C. and D. as sureties, but that he was appointed guardian, and was to give the persons named as sureties.—Davis v. Lanier, 47 N. C. 307.

[l] (Ohio, 1831) A justice of the peace is liable for negligently entering a recognizance so as to be ineffectual.—Kerns v. Schoonmaker, 4 Ohio (4 Ham.) 331, 22 Am. Dec. 757.

[m] (Ohio, 1833) Where money has been paid to a justice, on a judgment in his docket, and he places it for safe-keeping in the same place with his own money, and it is stolen, without his default, he is not liable unless guilty of gross neglect.—Monteith v. Bissell, Wright, 411.

[n] (Ohio, 1856) The neglect of a justice of the peace to affix a proper date to a recognizance for appeal, or an act of postdating or antedating it, thereby preventing an appeal, are not matters in his discretion; and he is liable for damages to a person injured thereby.—Cohen v. Marchant, 1 Disn. 113.

[o] (Ohio, 1877) A justice of the peace is liable to a judgment creditor for money received officially in satisfaction of a judgment, if he deposits the same in bank to his own private account, and the bank fails before the deposit is withdrawn.—Shaw v. Bauman, 34 Ohio St. 25.

[p] (Ohio, 1880) Under Rev. St. § 6619, providing that a constable shall be responsible if he take an insufficient bond for the return of property taken by him under a writ of replevin, a justice of the peace is liable for the value of property returned by a special constable appointed by him to execute a writ of replevin, where the constable did not take a sufficient bond.—Dummick v. Howitt, 8 Ohio Dec. 196.

[q] (Pa. 1884) The chief burgess of a borough, acting in his judicial capacity, is not liable for acts done through ignorance, negligence, or misconduct, unless he acted maliciously, and without reasonable or probable cause.—Reid v. Wood, 2 Chest. Co. Rep. 513.

[r] (Pa. 1884) Where a magistrate allows his clerk to receive money paid in on judgments, he cannot avoid liability for money paid to the clerk in satisfaction of a judgment, on the ground that the clerk failed to account to him therefor.—Commonwealth v. Ziegler (Com. Pl.) 4 Pa. Dist. R. 772.

[s] (S. C. 1808) Trespass on the case lies against a justice of the peace for neglecting to pursue the plain directions of the act of assembly respecting estrays, in which he acts rather as a ministerial than a judicial officer, although he may err from mere ignorance.—Armstrong v. Campbell, 2 Brev. 259.

[t] (S. C. 1815) A woman of color was convicted before a magistrate and two freeholders for slandering and insulting a white woman, and sentenced to pay a fine of $10 and costs of prosecution, which fine was received by the magistrate, but not paid over by him within the time prescribed by the act of 1787. *Held* that, as there was no evidence that the magistrate intended to keep the fine fraudulently, its nonpayment within the time limited could only be imputed to negligence.—State v. Porter, 3 Brev. 175.

§ 45. Misconduct.

Liability for false certificate, see "Acknowledgment," vol. 1, c. 999, § 243 [f].

—— *of justices of the peace for false imprisonment, see* "False Imprisonment," vol. 23, cc. 522–534, §§ 17–28.

Wrongfully assuming jurisdiction, right of action for, see "Action," vol. 1, c. 1106, § 10 [k].

[a] (Ala. 1876) For corrupt official misconduct on the trial of a cause within his jurisdiction, a justice of the peace is not liable to a civil action, but can only be punished criminally.—Irion v. Lewis, 56 Ala. 190.

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[b] (Ill. 1859) If a justice acts corruptly, he can be made to answer both criminally and civilly.—Garfield v. Douglass, 22 Ill. (12 Peck) 100, 74 Am. Dec. 137.

[c] (Ind. 1845) If, after the issuing of a fi. fa. by a justice of the peace, and before its execution, the plaintiff die, and the justice afterwards prevent its execution, he may, for any loss thereby caused to the estate of the deceased, be sued in case by the administrator of such estate.—Murray v. Buchanan, 7 Blackf. 549.

[d] (Ind. 1878) The rule that judicial officers cannot be held responsible to parties injured by their corrupt acts applied to a suit against a justice of the peace, alleging fraudulent entry of a judgment for too small an amount.—Kress v. State, 65 Ind. 106.

[e] (N. J. 1837) Case lies against a justice of the peace, for that, after taking time to consider a case, he rendered judgment against the plaintiff, and deceitfully concealed the fact from him until it was too late to appeal.—Neighbour v. Trimmer, 16 N. J. Law (1 Har.) 58.

[f] (N. Y. 1800) If a justice of the peace proceeds to judgment after a certiorari has been delivered to him, an action of trespass lies.—Case v. Shepherd, 2 Johns. Cas. 27.

[g] (N. Y. 1817) An action will lie against a justice of the peace for a false return to a certiorari, though the party bringing such action suffered judgment by default in the court to which the certiorari was returned.—Kidzie v. Sackrider, 14 Johns. 195.

[h] (N. Y. 1828) In an action for a false return to a certiorari, the officer making it is not liable in damages, though the return be untrue on its face, if the facts of the case truly stated would have produced the same results to the party complaining as the return made.—Ford v. Smith, 1 Wend. 48.

[i] (N. Y. 1832) A justice rendered a verdict near midnight of the 19th day of the month, and entered judgment the next day as of the 20th. The party against whom judgment was rendered appealed, reciting in his appeal bond the judgment as rendered on the 20th. The justice subsequently, in his return to the common pleas, stated that the judgment was rendered on the 19th, in consequence of which the appeal was quashed. *Held* that, there being no evidence of a fraudulent intent, an action against the justice for a false return, or for fraudulently misleading the party, would not lie.—Millard v. Jenkins, 9 Wend. 298.

[j] (N. C. 1803) Justices are liable to an action on the case for refusing to grant an appeal.—Hardison v. Jordan, Conf. R. 454.

[k] (S. C. 1815) A magistrate, on the advice of another magistrate as to the construction of a statute, refused to admit to bail one charged with bastardy, unless he would give bond for the support of the child. He appeared willing to avoid committing accused, but thought it was his duty. He afterwards offered to accept bail, if a note for $50 for benefit of mother and child were given by accused, which was refused. *Held*, that malice was not shown, making him liable for his erroneous decision.—Young v. Herbert, 2 Nott & McC. 172, note.

[l] (Vt. 1876) Where receipts and the leaf of an open account book are used in evidence before a justice of the peace, on a question of payment, the justice is liable in trover for not delivering them on demand, made after the rendition of final judgment in the cause.—Yates v. Pelton, 48 Vt. 314.

§ 46. —— Wrongful issuance of writs or warrants.

Liability of justice for issuing execution after prohibition from court, see "Prohibition," II.

[a] (U. S. 1833) If a justice of the peace issues an order or warrant of arrest contrary to the provisions of the constitution of the state, or for a matter over which he has no jurisdiction, and the party is arrested, the justice is liable in trespass; nor is any notice requisite, before such suit, by any act of that state.—Johnson v. Tompkins, Fed. Cas. No. 7,416 (1 Baldw. 571].

[b] (Ky. 1808) If a justice of the peace, under color of his office, issues an illegal warrant, an action of trespass will lie against him.—Kennedy v. Terrill, 3 Ky. (Hardin) 490.

[c, d] (La. 1858) As the mayor of the town of Jackson is, by law, ex officio justice of the peace, and has the power to issue warrants for the arrest of criminals, he is not liable in damages for an alleged illegal arrest, where he acted in good faith.—Maguire v. Hughes, 13 La. Ann. 281.

[e] (Mass. 1853) An action will not lie against a justice of the peace for issuing a writ, in favor of a third person, upon a false claim against the plaintiff, and secreting and destroying the writ after service thereof, and refusing to enter it, or to allow the defendant his costs.—Raymond v. Bolles, 65 Mass. (11 Cush.) 315.

[f] (Mass. 1854) A justice of the peace, who issues an execution containing a command to arrest the body of the judgment debtor, in a case in which he knows that the law prohibits such arrest or the issuing of such an execution, is liable to the debtor in trespass.—Sullivan v. Jones, 68 Mass. (2 Gray) 570.

[g] (N. Y. 1817) An attachment was issued, under Twenty-Five Dollar Act, § 23, on the oath of a party to the attachment, by which the constable was directed to attach the goods and chattels of the defendant, his arms and accoutrements excepted. In trespass against the justice by the defendant for issuing the attachment, he cannot recover damages for the constable's taking his arms and accoutrements.—Collins v. Ferris, 14 Johns. 246.

[h] (N. Y. 1852) Where a justice of the peace issues an attachment, under the act to abolish imprisonment for debt, without the proof required by the statute, and without a bond, his acts are void, and he is answerable as a wrongdoer.—Davis v. Marshall, 14 Barb. 96.

[i] (Ohio, 1833) If a magistrate proceed unlawfully in issuing process, he, and not the executive officer, is liable, but the law does not invoke the aid of courts to punish the officers of justice for trifling errors in drawing up legal process.—Taylor v. Alexander, 6 Ohio (6 Ham.) 144.

[j] (Pa. 1855) An action for maliciously issuing a warrant, and holding defendant to bail, without probable cause, will lie against a magistrate.—Gault v. Mitchell, 12 Leg. Int. 238.

§ 47. —— Taxation of illegal fees.

Criminal responsibility for demanding illegal fees, see post, § 66.

Effect of custom as to charging exorbitant fees, see "Customs and Usages," vol. 15, c. 1296, § 37 [i].

Taxation of illegal fees as extortion, see "Extortion," vol. 23, cc. 266–267, § 10.

[a] (Ky. 1845) A justice of the peace is liable only for a single penalty, for one fee bill in which are several items of illegal charge.—Briston v. Sullivan, 45 Ky. (6 B. Mon.) 143.

[b] (Pa.) Where a magistrate charges more fees than allowed by the fee bill, he is liable for the penalty.—(1827) Clark v. Alderman, 3

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Clark, 414; (1859) Simmons v. Kelly, 33 Pa. (9 Casey) 190.

[c] (Pa. 1827) A justice incurs the penalty of the act of March 28, 1814, for taking fees, though he do it by mistake.—Coates v. Wallace, 17 Serg. & R. 75.

[d] (Pa. 1831) A justice cannot escape the statutory penalty for taxing more than legal fees, by showing that they were taxed on a compromise, since an agreement to pay costs can only mean legal costs; and, if the justice demands and receives on such a compromise more fees than are allowed by law, he is as responsible as if they were collected never so adversely.—Wallace v. Coates, 1 Ashm. 110.

[e] (Pa. 1832) Where a justice charges an illegal fee, which is indorsed on the execution and collected by the constable, the justice is liable for the penalty prescribed by Act March 28, 1814, although they were not actually paid over to him.—Jackson v. Purdue, 3 Pen. & W. 519.

[f] (Pa. 1836) In an action against a justice for taking illegal fees, an overcharge for one item of service will not be compensated by omission to charge as much as he was entitled to for another item.—Curry v. Carrol, 5 Watts, 477.

[g] (Pa. 1838) A tender of $50 by a justice who has taken illegal fees is the only amend.—McConahy v. Courtney, 7 Watts, 491.

[h] (Pa. 1879) Taxation of legal fees by a justice, in an action over which he had no jurisdiction, is not an overcharge, within Act March 28, 1814, imposing on justices a penalty for overcharge of fees.—Watrous v. Davis, 26 Pittsb. Leg. J. (O. S.) 161.

[i] (Pa. 1879) Act March 28, 1814, imposing upon justices a penalty for an overcharge of fees, was repealed by Act May 22, 1893, regulating the fees of justices.—Watrous v. Davis, 26 Pittsb. Leg. J. (O. S.) 161

[j] (Pa. 1896) Where a justice of the peace in Allegheny county, elected before the passage of Act May 23, 1893 (P. L. 117), relating to the taking of fees by justices of the peace, and therefore subject to the prior act of Feb. 3, 1865 (P. L. 92), makes an illegal charge for unperformed services, the fee will be considered as having been received under the act of 1865, and the justice will be subject to the penalty provided in Act March 28, 1814, of which the act of 1865 is a part.—Lyons v. Means, 1 Pa. Super. Ct. 608, judgment affirmed (Com. Pl. 1896) 17 Pa. Co. Ct. R. 382, 26 Pittsb. Leg. J. (N. S.) 291.

[k] (Pa. 1896) The penalty provided by Act March 28, 1814, against justices of the peace, for charging illegal fees, is limited to illegal fees taken under or referable to the statute itself, and cannot be inserted into the subsequent act of May 23, 1893 (P. L. 117), forbidding generally the taking of illegal fees, and providing no penalty, but providing for punishment through indictment.—Lyons v. Means, 1 Pa. Super. Ct. 608, judgment affirmed (Com. Pl. 1896) 17 Pa. Co. Ct. R. 382, 26 Pittsb. Leg. (N. S.) 291.

(F) ACTIONS AGAINST JUSTICES FOR OFFICIAL ACTS.

IN GENERAL, § 48.
DEFENSES, § 49.
LIMITATIONS, § 50.
NOTICE OR DEMAND, § 51.
PLEADING, § 52.
EVIDENCE, § 53.
INSTRUCTIONS, § 54.
DAMAGES, § 55.

Actions on official bonds of justices of the peace, see post, §§ 60–65.

Jurisdiction of justice in action against other justice, see post, §§ 126 [i, j], 137 [a, c].

Necessity for showing notice in record, see post, § 214 [qq].

Actions against justices of the peace for false imprisonment, see "False Imprisonment," vol. 23, cc. 589–643, §§ 80–121.

Liability, remedy by action on the case, see "Action on the Case," vol. 1, c. 1522, § 25 [e].

§ 48. In general.

[a] (Del. 1852) It seems that the superior court has power to attach a justice of the peace for flagrant official misconduct affecting private rights.—King v. Reading, 5 Har. 399.

[b] (Del. 1852) On a rule for an attachment against a justice of the peace for official misconduct, if he deny the alleged facts on oath, the superior court will dismiss the attachment and remit the parties to an action at law or an indictment.—King v. Reading, 5 Har. 399.

[c] (N. H. 1851) An action for the recovery of a penalty for taking unlawful fees, founded on Rev. St. c. 229, § 25, cannot be maintained in the names of two persons suing as copartners.—Fowler v. Tuttle, 24 N. H. (4 Fost.) 9.

[d] (N. Y. 1832) To entitle plaintiff, in an action against a justice for a false return on an appeal from a judgment rendered by him, by reason of which the appeal is quashed, to sustain his action, he must show that had such appeal not been quashed, he would have gotten rid of the judgment against him.—Millard v. Jenkins, 9 Wend. 298.

[e] (N. Y. 1832) An action against a justice, for making a false return on an appeal from a judgment rendered by him, cannot be maintained, unless an actual damage is shown, since otherwise it would be injuria sine damno.—Millard v. Jenkins, 9 Wend. 298.

[f] (N. C. 1855) One of the several justices of the peace, who are on the bench when an appointment is made of a guardian, without taking security, may be sued alone, under the act of assembly (Rev. St. c. 54, § 2).—Davis v. Lanier, 47 N. C. 307.

[g] (Ohio, 1876) A constable levied execution on property worth $600, which was replevied before a justice of the peace, and it was appraised at over $300. The justice did not certify the case to the common pleas, as he was required by law to do, nor did he make any record of his proceedings, and the constable sued him and his bondsmen for the amount of the appraisement. *Held*, that such constable, being the real party in interest, was the proper party to maintain such action.—Deuble v. Kolbe, 7 Ohio Dec. 177, 1 Wkly. Law Bul. 234.

[h] (Pa. 1851) An employer voluntarily paid to an alderman illegal fees charged by him in a criminal proceeding against persons who were in his employ, and committed the act in obedience to his instructions, in the course of his business. *Held*, that he was the party injured, and entitled to recover the penalty for taking such fees; the presumption being, in the absence of rebutting testimony, that he paid the fees out of his own money.—Evans v. Harney, 17 Pa. (5 Harris) 460.

[i] (Pa. 1856) Where the court erred in committing for contempt, in an action of trespass against the justice, but admitted evidence of

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the circumstances of the alleged contempt, the error was cured.—Albright v. Lapp, 26 Pa. (2 Casey) 99, 67 Am. Dec. 402.

[j] (Va. 1817) Trespass, and not case, is the proper form of action against a justice of the peace, "for maliciously and corruptly, with intent to injure and oppress the plaintiff, and without probable cause," issuing a search warrant, by virtue of which one N. S., a constable, "did forcibly enter the close of the plaintiff and take and carry away certain negro slaves."—Muse v. Vidal, 6 Munf. 27.

§ 49. Defenses.

[a] (Ill. 1857) A conviction, by a magistrate having jurisdiction, valid on its face until set aside, is a complete bar to any action against him for any act of his in the prosecution in which the conviction was had.—Lancaster v. Lane, 19 Ill. (9 Peck) 242.

[b] (N. Y. 1811) The record of a conviction, under Acts 11th Sess. c. 6, § 1, to prevent forcible entries and detainers, if it show that the justice had jurisdiction and proceeded regularly, is a bar to any suit against the justice.—Mather v. Hood, 8 Johns. 44.

[c] (Ohio, 1876) A constable levied an execution on property worth $600, which was replevied before a justice of the peace, and it was appraised at over $300. The justice did not certify the case to the common pleas, as he was required by law to do, nor did he make any record of his proceedings, and the constable sued him and his bondsmen for the amount of the appraisement. *Held*, that it was no defense to such action that, without any fault of the justice, the papers were stolen, so that he could not make any record of the case or certify the pleadings to the common pleas.—Deuble v. Kolbe, 7 Ohio Dec. 177, 1 Wkly. Law Bul. 234.

[d] (Pa. 1859) It is no defense, to an action by the father for the penalty given by the act of 1729 against a justice for marrying his minor child without his consent, that the father by reason of moral degradation was unfit to take care of such child.—Robinson v. English, 34 Pa. (10 Casey) 324.

[e] (S. C. 1845) In an action against a magistrate, issuing a warrant for the arrest of a person for an offense committed without his jurisdiction, the plaintiff need only show that the defendant knew such fact when he issued the warrant. Want of malice or corrupt motive, and error of judgment as to the defendant's jurisdiction, though they may be used in mitigation of damages, will not justify him.—Miller v. Grice, 2 Rich. Law, 27, 44 Am. Dec. 271.

[f] (Vt. 1861) A justice of the peace, in an action against him for an arrest under a warrant issued by him, cannot justify, if he had not, before such arrest, taken the oath of office prescribed by the constitution of the state.—Courser v. Powers, 34 Vt. 517.

§ 50. Limitations.

[a] (Pa. 1822) Act March 21, 1772, § 7, limiting suits against justices of the peace to six months, may be taken advantage of by the justice, though not specially pleaded.—Prather v. Connelly, 9 Serg. & R. 14.

[b] (Pa. 1851) Under Act March 21, 1772, § 7, an action will not lie against an alderman for maliciously entering judgment against plaintiff in a suit, in which he had no jurisdiction, unless such action be commenced within six months after the defendant was cognizant of the entry of such judgment.—Killion v. Davis, 8 Leg. Int. 124.

§ 51. Notice or demand.

[a] (U. S. 1833) Notice of action against a justice of the peace for trespass for issuing order of arrest contrary to the constitution of the state, or without jurisdiction, is not necessary.—Johnson v. Tompkins, Fed. Cas. No. 7,416 [1 Baldw. 571].

[b] (Ga. 1881) The statute of 24 Geo. II., c. 44, § 1, requiring one month's written notice to be given to a justice before bringing suit against him for any act done by him virtute officii, is in force; and a declaration failing to show such notice is demurrable.—Collins v. Granniss, 67 Ga. 716.

[c] (Ind. 1841) The statute requiring a demand at the office or residence of a justice of the peace, to support an action against him, does not apply to suits against him to recover money collected by him.—State v. Harding, 5 Blackf. 504.

[d] (Md. 1853) St. 24 Geo. II., c. 44, § 1, which requires notice to be given to a justice of the peace before suit brought against him for his official acts, is not in force.—Day v. Day, 4 Md. 262.

[e] (Pa. 1813) Under the act of March 21, 1772, it is not necessary that a notice to a justice of the peace should state what kind of writ will be issued.—Litle v. Toland, 6 Bin. 83.

[f] (Pa. 1824) The notice required to be given to a justice of the peace prior to commencing an action against him for the penalty for marrying a minor without the consent of parent or guardian, under Act Feb. 14, 1729, need not state that there was no publication of banns; Act March 21, 1772, directing that such notice shall clearly and explicitly set forth merely the cause of action against such justice.—Miller v. Smith, 12 Serg. & R. 145.

[g] (Pa. 1825) Under Act March 21, 1772 (1 Smith's Laws, p. 364) § 1, providing that no writ shall be sued out against a justice of the peace for anything done by him in the execution of his office until notice in writing of such suit shall have been delivered to him, or left at the usual place of his abode, by the party, his attorney or agent, at least 30 days before the issuing of the same, a notice to the justice of the peace of the intention to bring suit, signed by an agent or attorney, need not be served by such agent or attorney personally, but may be served by any person.—Bates v. Shaw, 13 Serg. & R. 420.

[h] (Pa. 1838) The notice of suit to a justice, required by the act of March 21, 1772, before he can be sued, must state the cause of action with reasonable precision.—Hansel v. Spoul, 7 Watts, 297.

[i] (Pa. 1838) A notice of action against a justice should state substantially the cause of action.—McConahy v. Courtney, 7 Watts, 491.

[j] (Pa. 1844) A notice to a justice of the peace that he may tender amends before suit brought must specify the nature and circumstances of the injury to be redressed; and if it undertakes to set out the title of a statute which has been violated, although unnecessary, a variance will be fatal.—Stansbury v. Bertron, 7 Watts & S. 362.

[k] (Pa. 1848) A notice of action against a justice, delivered to him by the plaintiff in person, who is known to the justice, is not sufficient, unless signed by the plaintiff.—Grimes v. Percival, 9 Pa. (9 Barr) 135.

[l] (Pa. 1859) The notice required by Act March 21, 1772, to be given to a justice of the peace of an intended action against him, need not possess the technical formality of a declaration, provided it be explicit enough to indicate the injury complained of and sought to be redressed.—Robinson v. English, 34 Pa. (10 Casey) 324.

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[m] (Pa. 1879) Under the act of March 21, 1772, providing that no suit shall be brought against a justice for anything done in the execution of his office until notice in writing has been given to him at least 30 days before bringing the suit, the notice must contain a sufficient reference to the case, where the illegal fees were taken, and show the cause of action, so that the defendant may tender amends, if he desires.—Bechtel v. Hause, 1 Chest. Co. Rep. 239.

[n] (Pa. 1879) Where a notice to a justice of the peace, to make amends for taking illegal fees, gives the location of the office of plaintiff's attorney, but fails to state the attorney's abode, it is insufficient to entitle plaintiff to maintain an action for the penalty for taking illegal fees, under Act March 28, 1814.—Watrous v. Davis, 26 Pittsb. Leg. J. (O. S.) 161.

[o] (Pa. 1880) Where the notice to a justice of the peace that an action will be brought against him states that it is an action for false imprisonment, and the action is for trespass and false imprisonment, the notice is fatally defective.—Kennedy v. Shoemaker, 1 Browne, 61.

[p] (Pa. 1880) Under Act March, 1772, requiring a notice of action to be brought against a justice of the peace to state the place of abode of the party sending it, a notice signed "J. L., Attorney for T. K., No. 79 So. Fifth Street," is insufficient.—Kennedy v. Shoemaker, 1 Browne, 61.

[q] (Pa. 1884) Where a justice of the peace is sued for an act done in the execution of his office, and not for a penalty, the notice required by Act 1772 is not required to be given to him previous to suit being brought.—Bair v. Harple, 1 Lanc. Law Rev. 265.

§ 52. Pleading.

[a] (Del. 1854) Where the evidence of the plaintiff, in an action against a justice of the peace for trespass and false imprisonment, shows that the only trespass complained of was the act of defendant in issuing process on a complaint and holding plaintiff to bail, the defendant may, under the general issue, introduce evidence that he acted in his official character.—Bailey v. Wiggins, 5 Har. 462, 60 Am. Dec. 650.

[b] (Ga. 1886) Where, in a rule against a justice of the peace under Code, § 3961, providing that he may be ruled for his refusal or neglect to collect or to pay over money, there is no allegation of loss to plaintiff on account of such neglect or refusal, plaintiff cannot recover.—Barrett v. Pulliam, 77 Ga. 552.

[c] (Ind. 1836) In an action against a justice of the peace for neglect to transmit the papers in a case in which he had rendered a judgment against the defendant, from which there was an appeal to the appellate court, it is necessary for the plaintiff to allege that he had a good defense to the original action.—Crews v. Sheets, 4 Blackf. 275.

[d] (Ind. 1838) A defendant, against whom a justice of the peace had rendered judgment, and who had appealed, sued the justice for not filing the papers in the appeal in time. The declaration averred that the plaintiff before the justice had no just cause of action against the now plaintiff. *Held*, that it was no objection to the averment that the subject-matter of the demand or defense in the first suit was not set out.—Peters v. Land, 5 Blackf. 12.

[e] (Ind. 1841) In an action against a justice of the peace, for failing to issue an execution in time, an allegation that judgment was rendered on the 1st of April, and that execution issued the 16th of May was returned unsatisfied, is equivalent to an averment that, up to the time of the return, the judgment was not paid nor replevied.—State v. Brown, 5 Blackf. 494.

[f] (Ind. 1889) In an action against a justice of the peace, plaintiff alleged that he had been summoned as garnishee, and that judgment had been rendered against him on a note, the property of defendant therein, which he paid, but that the justice failed to enter judgment against him, and he was compelled to pay the note twice, and that the justice had promised to reimburse him. *Held*, that the allegations of the complaint that the justice informed plaintiff that he had rendered a judgment against him, and that plaintiff could not read, but relied on the statement of the justice, do not show facts amounting to a fraud on plaintiff, excusing his negligence, and, the payment being voluntary, plaintiff must bear the loss.—Emery v. Royal, 117 Ind. 299, 20 N. E. 150.

[g] (Iowa, 1893) A petition stated that on presentation of an appeal bond by plaintiff to defendant, a justice of the peace, defendant approved same, and agreed to send up proper transcript, expressly waiving any right to payment of fees in advance; that in making up the docket defendant omitted any mention of the appeal, wrote plaintiff he must pay, or the transcript would not be sent, and afterwards entered in the docket that plaintiff was to pay before the appeal was taken, and, not having done so, the appeal was not taken; which entry, it was alleged, was false, and made with intent to injure plaintiff, and prevent his appeal. *Held*, in an action for damages on account of such acts, to show not merely a mistake in judgment, but that the acts were malicious and corrupt; and a demurrer, therefore, should have been overruled.—Horne v. Pudil, 88 Iowa, 533, 55 N. W. 485.

[h] (Md. 1879) A plea, in justification to a complaint alleging that defendant "unlawfully, wickedly, and maliciously" seized plaintiff's boat, merely alleging that defendant held the boat as a justice of the peace, it having been delivered to him by an officer who seized it for violation of the oyster laws, is insufficient, for failure to deny that defendant unlawfully, etc., took the boat.—Willing v. Bozman, 52 Md. 44.

[i] (Mass. 1821) In action against justice of the peace for the penalty of St. 1795, c. 41, for receiving greater fees for copies than are allowed, the declaration must allege that the money was received from him on whom the extortion is practiced, and evidence that it was paid by another person for him, from whom it is alleged to have been received, if it were paid without his request or knowledge, does not support the declaration.—Lincoln v. Shaw, 17 Mass. 410.

[j] (N. Y. 1814) In an action against a justice of the peace for a false return to a certiorari, the declaration, after stating the falsity of the return, averred that "by pretext whereof the plaintiff was not only prevented from obtaining any redress or reversal of the judgment and proceedings aforesaid, but was also compelled to suffer imprisonment and endure great pain, both of body and mind, and to pay and expend divers large sums of money," etc. *Held*, that this was a sufficient averment, after verdict, of the affirmance of the judgment, and the loss or damage consequent thereon.—Pangburn v. Ramsay, 11 Johns. 141.

[k] (N. Y. 1845) In case brought against a justice, for a false return to an appeal, corrupt motives need not be charged.—Houghton v. Swarthout, 1 Denio, 589.

[l] (Pa. 1849) In a suit against a justice of the peace, for the penalty for taking illegal fees, the previous notice to the defendant, pre-

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scribed by law, stated the penalty to have been incurred under "the twenty-sixth section of the act of 1814, which said section is reenacted by the act of 1821"; but the declaration was upon the act of 1814. *Held*, that there was a fatal variance.—Apple v. Rambo, 13 Pa. (1 Harris) 9.

[m] (Tex. 1896) In an action against a justice, on the ground that he had exceeded his jurisdiction, the petition must show that the question of jurisdiction was not before the justice for determination and passed on by him.—Anderson v. Roberts (Civ. App.) 35 S. W. 416.

§ 53. Evidence.

[a] (Ill. 1857) In an action against a justice of the peace for trespass which he sought to justify, as being an official act, his docket is admissible in his favor.—Lancaster v. Lane, 19 Ill. (9 Peck) 242.

[b] (Iowa, 1858) Where the docket, in a prosecution by information before a justice, was put in evidence by the defendant, in an action brought by him against the justice for wrongfully issuing execution for the fine imposed in favor of the informed, when the judgment imposed it in favor of the state, the burden of proof was thereby thrown on the defendant (the justice) to show another suit, if any there was, in which the execution might have been lawfully issued.—Dupont v. Downing, 6 Iowa (6 Clarke) 172.

[c] (Md. 1878) In an action for damages against a justice of the peace, for malicious, fraudulent, and corrupt conduct in office, it was shown that defendant, in a case before him, had rendered judgment against plaintiff, and had subsequently refused an appeal bond of $200, tendered by plaintiff, demanding one for $800. There was evidence that in a prior conversation between plaintiff and defendant, relative to another bond which plaintiff refused to sign, defendant said to him, "I will get even with you, and you know I can." Neither the character of the bond nor the case in which it was to be given was shown. Plaintiff testified that he had not dealt with defendant since the occurrence, and that an unfriendly feeling had since existed between them. *Held* insufficient to warrant a finding that the justice had been guilty of official misconduct as charged.—Knell v. Briscoe, 49 Md. 414.

[d] (N. Y. 1830) The minutes of a justice are not competent evidence in justification of his acts. He must show affirmatively facts giving him jurisdiction.—Evertson v. Sutton, 5 Wend. 281, 21 Am. Dec. 217.

[e] (N. Y. 1874) In an action against a justice, to recover damages for the alleged wrongful issue of an execution against plaintiff after the latter had taken an appeal from the judgment, one of the issues being whether the proper fees had been paid to the justice within the time prescribed by law, the justice testified that the judgment was rendered on May 30th, for $52.98 damages and $4.50 costs. There was evidence on the part of plaintiff that on June 2d he paid the justice $2 for "appeal papers" and $2 for costs, and that the justice said that was all he claimed. *Held*, that it was proper to inquire of the justice, upon cross-examination, how the $4.50 was made up, as it might have been made to appear that the legitimate costs were not more than the amount paid by plaintiff.—Whitman v. Seaman, 61 N. Y. 633.

[f] (Pa. 1822) In a suit against a justice for not certifying a recognizance entered into by plaintiff, in consequence of which plaintiff's appeal from the judgment of the justice was dismissed, evidence is admissible that plaintiff tendered bail to the justice more than six months before the suit against the justice, because, though this was before the six months had expired within which, under the act of March 21, 1772, suit can be brought against the justice, the neglect to certify the recognizance may have been within that period.—Prather v. Connelly, 9 Serg. & R. 14.

[g] (Pa. 1845) In an action by a father against a justice for marrying his minor daughter without his consent, where a witness testifies that he heard plaintiff read a notice of action against the justice in the latter's presence, but cannot say when it was or that a paper offered in evidence was the notice read, proof of notice within the required period fails.—Minor v. Neal, 1 Pa. (1 Barr) 403.

[h] (Pa. 1855) Malice in a magistrate issuing a warrant and holding defendant to bail may be inferred from want of probable cause.—Gault v. Mitchell, 12 Leg. Int. 238.

[i] (S. C. 1819) A justice of the peace issued an attachment for an amount in excess of his jurisdiction, and, on being told that defendants would sue him, he said he thought he might be doing wrong, but he was safe, as he had taken a bond from plaintiff to indemnify himself. *Held* not sufficient to show willful wrong.—Reid v. Hood, 2 Nott & McC. 168, 10 Am. Dec. 582.

[j] (Tex. 1891) In an action against a justice of the peace for illegally issuing a writ of restitution, the evidence showed that defendant issued the writ of restitution in good faith, believing that, because of the defect in the appeal bond, the jurisdiction of the county court had not attached, and that the case was still in his court. *Held*, that a verdict for exemplary damages was error.—Smith v. Holland (App.) 16 S. W. 424.

[k] (Vt. 1840) In an action against a justice of the peace for nonfeasance in being absent at the time set for a certain trial, so that the plaintiff who was one of the trial parties was compelled to pay witness fees and extra costs, the records of such trial, though made by the justice himself, were properly admitted in evidence in his own favor.—Barnard v. Flanders, 12 Vt. 657.

[l] (Vt. 1861) In an action against a justice for an arrest under a warrant issued before he had taken his official oath, it can be shown that, though the oath was taken the same day, it was after the warrant was issued.—Courser v. Powers, 34 Vt. 517.

§ 54. Instructions.

[a] (Neb. 1883) An instruction, in an action against a justice of the peace for wrongfully issuing an attachment, that "there is no evidence introduced tending to show that defendant acted negligently, wantonly, and corruptly in issuing said order of attachment," should not have been given, where the attachment was issued against a nonresident on a claim for unliquidated damages, and not for a debt arising upon contract, judgment, or decree, as provided by Code Civ. Proc. § 198.—Rouss v. Wright, 14 Neb. 457, 16 N. W. 765.

[b] (Neb. 1889) In an action to recover the penalty from a justice of the peace, under Comp. St. c. 28, § 34, for taking illegal fees for making out and certifying to certain transcripts of judgments, the testimony showed that eight of the transcripts were demanded at one time, and were received together, and paid for in one sum, although separately itemized in the bill. *Held*, that an instruction which, in effect, directed the jury to find that there were eight separate causes of action was properly refused.—Phœnix Ins. Co. v. Bohman, 28 Neb. 251, 44 N. W. 111.

[c] (Tex. 1891) In an action against a justice of the peace for illegally issuing a writ of res-

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titution, whereby certain cattle which plaintiff had replevied were taken from his possession, and for exemplary damages, it appeared that plaintiff had leased the cattle, and had consented to a transfer by his lessee to a third person; that, without authority, he took them from such third person, who sued and recovered judgment for the possession of such cattle, both in the justice's court and in the county court; and that plaintiff had appealed from the judgment of the justice, who afterwards, becoming convinced that the appeal bond was insufficient, and that the jurisuction of the county court had not attached, issued the writ of restitution complained of. *Held*, that it was error to refuse to charge the jury that, if they found the right of possession of the cattle was not in the plaintiff, they would not find for him the value of the cattle during the time he was deprived of them.—Smith v. Holland (App.) 16 S. W. 424.

[d] (Tex. 1891) There was evidence that plaintiff had sold the cattle to his son before the writ of restitution was levied. *Held*, that refusal to instruct that, if plaintiff did not own the cattle at the time the writ of restitution was levied, the jury should find a verdict for defendant, was error.—Smith v. Holland (App.) 16 S. W. 424.

§ 55. Damages.

[a] (Mass. 1861) A magistrate who has rendered judgment for the plaintiff in an action pending before him, and, on request for an execution, has issued one which is invalid on its face, is liable for such damages as are the natural, necessary, and proximate consequences of his wrongful act.—Noxon v. Hill, 84 Mass. (2 Allen) 215.

[aa] (Mass. 1861) A magistrate who has rendered judgment for the plaintiff in an action pending before him, and, on request for an execution, has issued one which is invalid on its face, is liable for such damages as are the natural, necessary, and proximate consequences of his wrongful act, but not for the costs of levying the execution, or losses to which the plaintiff has been subjected by reason of attempting to enforce it.—Noxon v. Hill, 84 Mass. (2 Allen) 215.

[b] (Mass. 1861) In an action against a magistrate to recover damages for his wrongful act in issuing an execution which was invalid on its face, he may show in mitigation that the condition and circumstances of the judgment debtor was such that nothing could have been collected upon a valid execution.—Noxon v. Hill, 84 Mass. (2 Allen) 215.

[c] (Mo. 1881) Where a justice of the peace has usurped power, good faith may be shown in mitigation of damages.—Patzack v. Von Gerichten, 10 Mo. App. 424.

[d] (N. Y. 1881) In an action against a justice for making a false return, whereby appellant's appeal was heard on the law, and not on the facts, as desired by him, and the justice's judgment affirmed, plaintiff's measure of damage is the costs paid by him in the county court and expense of applying for a new trial.—Brooks v. St. John, 25 Hun, 540.

[e] (Ohio, 1856) In an action against a justice of the peace, by the plaintiff taking the appeal, for the erroneous dating of a recognizance, the jury may consider the amount plaintiff was compelled to pay, the loss of time he was compelled to employ in attending to it, and reasonable counsel fees, in determining the amount of damages.—Cohen v. Marchant, 1 Disn. 113.

[f] (Ohio, 1861) The rule of damages, in an action by an indorsee and owner of a promissory note against a justice for negligence, whereby the collection of the note intrusted to the justice for collection was lost, is the actual loss occasioned by such neglect.—Dehn v. Heckman, 12 Ohio St. 181.

[g] (Pa. 1831) Where a suit was instituted against a justice to recover the excess of fees taken by him, in the execution of his office, beyond what the act of assembly allows, judgment may be rendered for the excess and costs, including the fee of 20 shillings to the plaintiff's attorney, for preparing and serving the notice, under the act of March 21, 1772.—Collins v. Hunter, 1 Ashm. 60.

(G) LIABILITIES ON OFFICIAL BONDS.

IN GENERAL, § 56.
ACTS IN OFFICIAL CAPACITY IN GENERAL, § 57.
MINISTERIAL ACTS, § 58.
NEGLECT OR MISCONDUCT, § 59.
ACTIONS ON BONDS, § 60.
—— DEFENSES, § 61.
—— LIMITATIONS, § 62.
—— PLEADING, § 63.
—— EVIDENCE, § 64.
—— DAMAGES, § 65.

§ 56. In general.

[a] (Ala. 1861) Where the intendant of an incorporated town executed a bond with sureties, conditioned for the faithful discharge of his duties as justice of the peace, by virtue of his election as intendant (although no bond is required of the intendant under the statutes), and it appeared that he performed the duties of a justice de facto, and received business and patronage as such, on the credit of the bond, *held*, that the bond was valid, as a common-law obligation, and founded on a sufficient consideration.—Williamson v. Woolf, 37 Ala. 298.

[b] (Ala. 1876) The requisition of an official bond from a justice of the peace, conditioned for the faithful performance of his duties (Rev. Code, §§ 840, 157), does not increase his liability to civil suits, nor make any official derelict actionable which was not already actionable. It only renders him and his sureties liable for acts for which, without a bond, he alone was liable.—Irion v. Lewis, 56 Ala. 190.

[c] (Ill. 1855) The official bond of a justice is binding upon the principal and his sureties from the time of the delivery of the bond to the county clerk, although not formally approved by him.—Green v. Wardwell, 17 Ill. (7 Peck) 278, 63 Am. Dec. 366.

[d] (Ill. 1855) The official bond of a justice of the peace de facto is binding on the sureties.—Green v. Wardwell, 17 Ill. 278, 63 Am. Dec. 366.

[e] (Ind. 1835) One commissioned as a justice of the peace executed a bond with surety to the governor, conditioned for the faithful discharge of his duties. At the time the bond was executed there was no statute in force authorizing the execution of such a bond by a justice of the peace. *Held* that, as the bond was not warranted by law, no action could be sustained thereon.—Silver v. Governor, 4 Blackf. 15.

[f] (Ind. 1881) The failure of the principal and sureties on the official bond of a justice of the peace to acknowledge the same, as required by Act Dec. 21, 1865, does not impair its validity, if it be accepted and approved without such acknowledgment.—Brown v. State, 76 Ind. 214.

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[g] (Iowa, 1866) A justice of the peace and his sureties are liable upon his bond for notes left with him for collection, but the sureties are not liable for any default occurring before they became sureties, unless the bond was specially drawn with that view.—Bessinger v. Dickerson, 20 Iowa, 260.

[h] (Ohio, 1861) Where the bond of a justice was approved by a majority of the trustees, though not at a special or regular meeting of the board, and the officer entered upon the discharge of his official duties, and enjoyed the benefits and emoluments of his office during his official term, his sureties are concluded from claiming their discharge from liability, for the reason that the bond was not formally approved.—Buell v. Parke, 2 Ohio Dec. 524.

§ 57. Acts in official capacity in general.

Liabilities for official acts, see ante, §§ 32–40.

[a] (Ill. 1878) Under Rev. St. §§ 108, 109, providing that the docket, statutes, and all papers relating to the business transactions before an outgoing justice of the peace shall be turned over to his successor, and that the functions of the outgoing justice shall entirely cease, and those of the new one commence, and page 638, § 5, providing that said outgoing justice shall pay over all moneys collected on any judgment or otherwise by virtue of his office, the responsibility is the same, whether the incumbent succeeds himself or another, and his official bond to pay over all moneys that might come into his hands under any judgment or otherwise, by virtue of his office, covers moneys whether received before or after the beginning of his term.—People v. Price, 3 Ill. App. (3 Bradw.) 15.

[b] (Ill. 1879) An action cannot be maintained against the sureties on the official bond of a justice of the peace merely because he died without paying over money collected by him. There must have been a demand and refusal to pay, or some omission of official duty.—Price v. Farrar, 5 Ill. App. 536.

[c] (Ind. 1837) The death of a justice of the peace does not relieve his sureties from liability for breach of the condition of his official bond.—State v. Houston, 4 Blackf. 201.

[d] (Ind. 1860) Suit against a justice of the peace and his sureties on his official bond, for failure to pay over money collected. The bond was conditioned for the payment to the person entitled thereto of all moneys which should come into his hands, as such justice, during his continuance in office. *Held* that, in order to a recovery, it was incumbent on the relators to prove that the money sued for had been collected by the justice during his continuance in office.—King v. State, 15 Ind. 64.

[e] (Ind. 1871) A constable having executions in his hands, the return day of which had passed, and money having been collected upon some of them, was required, by the justice of the peace who had issued them, to return them, but, declining to do so, immediately he was committed to the county jail by the justice, for contempt, though the trial of no cause was in progress. *Held*, that the justice had no jurisdiction or power to cause the arrest and imprisonment of the constable, and therefore, as the surety was only bound that he should faithfully discharge his duties as justice of the peace, and as this was not a duty which he did or could legally do as justice, the surety was not responsible for the commitment of the constable.—Doepfner v. State, 36 Ind. 111.

[f] (Ind. 1879) No action can be maintained on the official bond of a justice of the peace for his refusal to tax the regular fee in favor of a prosecuting attorney.—State v. Jackson, 68 Ind. 58.

[g] (Iowa, 1881) Where, in proceedings for contempt, a justice rendered a judgment against the offender, and subsequently, without authority, upon his failure to pay the sum, committed him to prison, he was liable therefor in an action on his bond.—Lanpher v. Dennell, 56 Iowa, 153, 9 N. W. 101.

[h] (Minn. 1862) A justice of the peace has no authority to receive a deposit of money in lieu of a recognizance for the appearance of a prisoner held for examination before him, and his refusal to return such deposit is not a breach of his official duty, for which his sureties are liable, though he is liable to an action to recover the same.—Cressey v. Gierman, 7 Minn. 398 (Gil. 316).

[i] (Minn. 1896) The words "judicial duties," in a bond given by a justice of the peace for the faithful performance of his duty, mean "official duties."—Larson v. Kelly, 64 Minn. 51, 66 N. W. 130.

[j] (Neb. 1880) Plaintiffs, nonresidents, by their agent, placed in the hands of a justice of the peace a lot of notes for collection, almost half of which were in amounts in excess of his jurisdiction. Gen. St. p. 705, § 1100, provides that the note, bond, etc., sued on before a justice of the peace shall be filed with him. *Held*, in the circumstances, it would not be considered that the notes were left with the justice in his official capacity, and the sureties on his official bond were not liable for moneys collected by him on such notes without suit, and not paid over.—McCormick v. Thompson, 10 Neb. 484, 6 N. W. 597.

[k] (Ohio, 1834) Money paid to a justice on a demand in his hands, before due, is not paid to him in his official capacity, and he is not liable on his official bond.—Stevens v. Breatheven, Wright, 733.

[l] (Ohio, 1891) Rev. St. §§ 6513–6522, provides that an attachment by a justice of the peace may be discharged by the giving of a proper undertaking with sureties, or by motion based on proper grounds and supported, if necessary, by evidence. *Held* that, where the bond of a justice of the peace recited the obligation of the sureties to be that the justice should pay over according to law all moneys received by him by virtue of his office, and a justice of the peace before whom an attachment suit was pending informed defendants that the only means of discharging the attachment was by the deposit of $50, which defendant deposited, the sureties on the justice's bond were not liable for such amount on the failure of the justice to repay the same to defendants, since such sum was not received by virtue of his office, since such method of discharging an attachment was not authorized by law.—Fritch v. Douglass, 5 O. C. D. 695.

[m] (Pa. 1846) A surety of a justice is liable for all claims received by him on suits, or claims to be put in suit, or on execution, or received from a constable on execution, but not for anything received on claims to be collected as an agent, and without suit.—Commonwealth v. Kendig, 2 Pa. (2 Barr) 448.

[n] (Pa. 1848) Where proceedings were commenced before a justice to recover a debt less than $100, and the defendant confessed judgment for a sum exceeding $100, and consequently beyond the justice's jurisdiction, and the amount was paid to the justice without execution issued, it was *held* that the sureties of the justice were responsible for it to the plaintiff.—Hale v. Commonwealth, 8 Pa. (8 Barr) 415.

[o] (Pa. 1864) A surety on an official bond of a justice of the peace is liable for money collected by him in his official capacity, though

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without suit.—Ditmars v. Commonwealth, 47 Pa. (11 Wright) 335.

[p] (Wis. 1878) Where a justice's bond binds him and his sureties to pay to persons entitled all sums of money which may come into his hands "by virtue of his office," the sureties will not be liable, in an action by the injured party, for money paid to the justice upon an execution sale under a void judgment.—Barnes v. Whitaker, 45 Wis. 204.

§ 58. Ministerial acts.

Liabilities for ministerial acts, see ante, §§ 41–43.

[a] (Ala. 1847) Whether the sureties of a justice of the peace upon his official bond are bound for the official malversation of their principal, and whether the bond was not intended as a security for the performance of his ministerial duties only, quære.—Lester v. Governor, 12 Ala. 624.

[b] (Ala. 1851) The sureties of a justice of the peace on his official bond are only bound for the faithful performance of his ministerial duties, and not for errors, mistakes, and omissions of a judicial character.—McGrew v. Governor, 19 Ala. 89.

[c] (Ill. 1892) An action will not lie on the bond of a justice of the peace for the loss of a debt by his attempt to acknowledge and certify a mortgage given by himself to one of his creditors.—People v. Scott, 45 Ill. App. 182.

[d] (Ind. 1880) Where a justice of the peace appoints a special constable in a case, he and the sureties on his bond become, under 2 Rev. St. 1876, p. 638, § 111, liable for said constable.—Hood v. Sennett, 70 Ind. 329.

[e] (Md. 1889) Where judgment has been rendered by a justice of the peace in an action of replevin, requiring the return of the chattel to defendant, the writ of retorno habendo is the proper form of execution, and its issuance by the justice, where no appeal has been taken, is a ministerial act, for refusal to perform which a liability accrues on his official bond.—State v. Carrick, 70 Md. 586, 17 Atl. 559, 14 Am. St. Rep. 387.

[f] (Minn. 1896) Where a justice of the peace neglects to enter a judgment in his docket within three days after the action is submitted to him for decision, and damages thereby result to the prevailing party to the action, the justice and the sureties on his bond are liable therefor.—Larson v. Kelly, 64 Minn. 51, 66 N. W. 130.

[g] (Ohio, 1869) Neglect of a justice to render judgment on a verdict within the time required by law is merely an omission of judicial duty, and not a breach of his official bond, conditioned that he will "well and truly perform every ministerial act enjoined upon him by law and by virtue of said office."—Stallcup v. Baker, 18 Ohio St. 544.

[h] (Ohio, 1872) The issuance of an order of arrest in a civil action, without the plaintiff's undertaking of indemnity required by Swan & C. St. p. 774, is such a neglect well and truly to perform a ministerial act as constitutes a breach of the justice's official bond, wherefor the person wrongfully arrested may maintain an action.—Place v. Taylor, 22 Ohio St. 317.

[i] (Ohio, 1876) Where a justice has entered upon his docket a memorandum, showing that he has considered and determined upon the judgment to be rendered, the subsequent duties of entering the judgment in full and in suing an execution are ministerial duties, for the nonperformance of which an action on his official bond will lie.—Fairchild v. Keith, 29 Ohio St. 156, affirmed Keith v. Fairchild (1876) 1 Wkly. Law Bul. 227, 7 Ohio Dec. 176.

[j] (Ohio, 1876) In an action on the official bond of a justice of the peace, the petition stated that, in an action pending before the justice, the plaintiff recovered a judgment against the defendant for $90, and that, on the rendition of the judgment, the plaintiff requested the justice to issue execution thereon immediately, and the breaches assigned were that the justice had neglected to make any entry on his docket, except the words, "Judgment $90," and had also neglected to issue execution. *Held*, that the entry, "Judgment $90," was sufficient to complete the judicial action of the justice.—Fairchild v. Keith, 29 Ohio St. 156.

§ 59. Neglect or misconduct.

Liabilities for misconduct, see ante, §§ 45–47. —— *for negligence, see* ante, § 44.

[a] (Ala. 1882) A notary public acting as justice of the peace, under pretense that he had rendered judgment against a garnishee, condemning its indebtedness to the payment of the judgment against the principal defendant, received the money, and gave the garnishee a discharge. *Held*, that he and his sureties were liable on his official bond.—Mason v. Crabtree, 71 Ala. 479.

[b] (Ind. 1832) If a justice of the peace, in the discharge of any of his ministerial or judicial duties, act corruptly to the injury of a party, his conduct is a breach of the condition of his official bond.—State v. Flinn, 3 Blackf. 72, 23 Am. Dec. 380.

[c] (Ind. 1835) The sureties on a justice's bond are liable for his willful and corrupt breaches of duty, but not for errors of judgment or unintentional mistakes.—State v. Littlefield, 4 Blackf. 129.

[d] (Ind. 1873) Where a justice of the peace receives a note for collection, in his official capacity, and collects the same, and appropriates the proceeds to his own use, the sureties on his official bond are liable therefor to the party injured.—Widener v. State, 45 Ind. 244.

[e] (Iowa, 1861) A justice of the peace is not liable on his official bond for errors of judgment committed by him while acting in a judicial capacity; but where he acts through favor, fraud, or partiality, or knowingly commits a wrong by virtue of his office, he will be liable.—Gowing v. Gowgill, 12 Iowa, 495.

[f] (Iowa, 1864) The sureties on the bond of a justice of the peace are liable for a conversion by him of notes placed in his hands for collection.—Latham v. Brown, 16 Iowa, 118.

[g] (Kan. 1873) The sureties on the official bond of a justice of the peace, as well as the justice himself, are liable to the owner of a judgment rendered by such justice and entered upon his docket, for money paid to and collected by said justice in satisfaction of said judgment, where the justice afterward fails and refuses to pay over said money to said owner of the judgment.—Brockett v. Martin, 11 Kan. 378.

[h] (Ohio, 1854) The sureties on a bond of a justice, conditioned that he would well and truly pay over, according to law, all moneys which might come into his hands by virtue of his commission, are liable thereon, on failure of his personal representative, after his death, to pay over, on demand, money which came into his hands officially during his term of office.—Peabody v. State, 4 Ohio St. 387.

[i] (Ohio, 1884) A demand made on the administrator of a justice of the peace for payment of funds received by the justice in his

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official capacity for the benefit of another, and the administrator's refusal to pay, constitute a breach of the justice's bond, since the administrator is liable, in the management of the estate, to distribute trust funds in the hands of the justice at the time of his death.—Lindeman v. Ziegler, 9 Ohio Dec. 401, 12 Wkly. Law Bul. 319.

[j] (Pa. 1895) Where a clerk of a justice of the peace receives money from a defendant in execution, with the knowledge and acquiescence of the justice, the justice and the sureties are liable on the official bond for failure to deliver over said moneys to the creditor.—Walter v. Ziegler (Com. Pl.) 8 Kulp, 25.

[k] (Pa. 1895) Act June 21, 1839 (P. L. 378) § 6, provides that a justice shall give bond, with sureties, conditioned, inter alia, "for the faithful application of all moneys that come into his hands." *Held*, that where a justice receives money on a judgment rendered by him, and fails to pay it over to the judgment plaintiff, the proper remedy is on his official bond.—Fery v. Schutter (Com. Pl.) 8 Kulp, 64.

§ 60. Actions on bonds.

[a] (Ala. 1847) The act which gives a summary remedy against justices of the peace for failure to pay over on demand money received or collected by virtue of office does not extend to their sureties, so as to authorize a judgment to be rendered against them, with their principals, on motion. Consequently, a motion for judgment in such case against a justice and his sureties is unauthorized, and may be denied in toto.—Ledbetter v. Castles, 11 Ala. 149.

[b] (Ill. 1857) When a justice of the peace has absconded, no demand for money collected by him need be made, in order to maintain a suit upon his official bond.—Warren County v. Jeffrey, 18 Ill. 329.

[c] (Ind. 1844) A judgment of a justice of the peace may be assigned, by statute, so as to authorize the assignee to be the relator, in a suit on the justice's bond for the money collected by the justice on the judgment.—Hooker v. State, 7 Blackf. 272.

[d] (Ind. 1846) The demand required to be made on a justice of the peace, before a suit for money collected by him can be sustained on his bond, may be made at any time before the commencement of the suit.—Parker v. State, 8 Blackf. 292.

[e] (Iowa, 1861) The right to sue a justice upon his bond, for improper conduct in the discharge of the duties of his office, is not waived by an appeal from his decision, but only the right to raise any question upon the erroneous rulings in that case.—Gowing v. Gowgill, 12 Iowa, 495.

[f] (Miss. 1875) Where suit is brought upon an official bond of a justice of the peace, for damages for a breach of the conditions thereof, the amount of the damages claimed, and not the penalty of the bond, is the criterion of jurisdiction.—State v. Luckey, 51 Miss. 528.

[g] (Ohio, 1873) Act March 11, 1853, § 11 (Swan & C. St. p. 746), provides that the liability on the bond of a justice shall be enforced in the same manner as on bonds given by sheriffs. Code Civ. Proc. § 566, provides that when an officer, by misconduct, forfeits his bond or renders his sureties liable, any person injured thereby may bring an action against the officer and his sureties. *Held*, that the action on a justice's bond against the principal and his sureties must be joint.—Aucker v. Adams, 23 Ohio St. 543.

[h] (Ohio, 1876) A constable levied executions on property worth about $600, and it was replevied from him, and appraised before a justice at over $300, but he did not certify the case up to the common pleas, nor make any record of his proceedings, as required by law. *Held*, that the constable was entitled, as the real party in interest, to sue on the justice's bond for the sum total of the executions in his hands.—Deuble v. Kolbe, 1 Wkly. Law Bul. 234.

[i] (Pa. 1871) The law of 1772, requiring 30 days' notice of suits against justices, construed not to apply to suits on their official bond.—Commonwealth v. Frailey, 69 Pa. (19 P. F. Smith) 260, distinguishing Wise v. Wills (1828) 2 Rawle, 208.

§ 61. —— Defenses.

[a] (Ohio, 1876) A constable levied executions on property worth about $600, and it was replevied from him, and appraised before a justice at over $300, but he did not certify the case up to the common pleas, nor make any record of his proceedings, as required by law. *Held*, that the fact that, without the justice's fault, the papers in the replevin case were stolen, so that he could not make any record of the case or certify it up, was no defense to an action by the constable on his bond, for the sum total of the executions in his hands.—Deuble v. Kolbe, 1 Wkly. Law Bul. 234.

[b] (Ohio, 1876) A constable levied executions on property worth about $600, and it was replevied from him, and appraised before a justice at over $300, but he did not certify the case up to the common pleas, nor make any record of his proceedings, as required by law. *Held*, that where, without the justice's fault, the papers in the replevin case were stolen, so that he could not make out any record or certify it up, it was no defense to an action by the constable on his bond, for the sum total of the executions in his hands, that the plaintiff in the replevin case is and was willing to consent to the substitution of such papers as would give jurisdiction to the common pleas.—Deuble v. Kolbe, 1 Wkly. Law Bul. 234.

§ 62. —— Limitations.

[a] (Ill. 1876) Rev. St. c. 59, § 138, making bonds of justices of the peace void after five years, while in the nature of a statute of limitations, is not such a statute as must be specially pleaded.—People v. Herr, 81 Ill. 125

[b] (Ohio, 1850) An action on the bond of a justice of the peace, for failure of the justice to pay over money received in his official capacity, is not barred in one year.—State v. Chenoweth, 1 Ohio Dec. 369.

§ 63. —— Pleading

[a] (D. C. 1876) In an action against the sureties on the official bond of a justice of the peace, on the alleged ground that the justice issued a writ without authority of law, by virtue of which certain goods were seized and taken away by the constable, it is necessary to aver that the justice knowingly, willfully, or wrongfully omitted to do what ought to have been done, or that, in doing what he did by way of issuing process, he knowingly, willfully, or corruptly instituted the proceedings to the injury of the plaintiff.—Holtzman v. Robinson, 2 MacArthur, 520.

[b] (Ill. 1857) Where a declaration upon the official bond of a justice of the peace recites that he was twice elected, but alleges a breach for nonpayment of money collected during his first term of office, it will be sufficient to maintain the action upon the bond first given. It will not be presumed that the justice held the money by virtue of his second office.—Warren County v. Jeffrey, 18 Ill. 329.

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[c] (Ind. 1835) In an action on a justice's bond by the state, on the relation of a private citizen, the complaint must show a breach of some duty embraced in the covenants of the bond for which relator has a cause to complain; hence an averment that the justice did not faithfully perform his duty as required by law is insufficient.—State v. Littlefield, 4 Blackf. 129.

[d] (Ind. 1841) In an action in the name of the state on the official bond of a justice of the peace, it is not necessary that it should appear from the declaration that the relator is beneficially interested in the suit.—State v. Harding, 5 Blackf. 504.

[e] (Ind. 1842) A declaration in debt on a justice's bond set out the condition, and assigned as a breach that the justice had failed to discharge his duty, by failing to issue an execution on a certain judgment. The plea was that the justice had not failed to discharge his duty, as alleged in the declaration. *Held*, on general demurrer, that the plea was good, but that it might have been specially demurred to, as argumentative.—State v. Scott, 6 Blackf. 263.

[f] (Ind. 1843) In a suit by the state, on the relation, etc., on a justice's bond, the breach assigned was that the justice had rendered judgment in an action of debt in favor of the relator against one R., for $95.87 and costs; that the justice had improperly taken replevin bail, etc., and neglected to issue execution, etc. *Held*, that the declaration sufficiently showed that the justice had jurisdiction of the suit against R.; it appearing that the action was debt, and the amount recovered less than $100. —State v. Hook, 6 Blackf. 515.

[g] (Ind. 1843) In a suit on a justice's bond for neglecting to issue an execution, a plea that at the time of the judgment, and ever since, the execution defendant was insolvent, is insufficient; but such insolvency may be proved in mitigation of damages.—Noel v. State, 6 Blackf. 523.

[h] (Ind. 1843) In debt by the state, on the relation, etc., on a justice's bond, against him and his surety, the plea was general performance; and the replication assigned as a breach the justice's failure to pay over money collected. The rejoinder was that the relator had recovered a judgment against the justice for the same money. *Held*, that the rejoinder was a departure.—Bell v. State, 7 Blackf. 33.

[i] (Ind. 1843) In an action on a justice's bond for failure to pay over money collected, though the bond was conditioned for payment on demand of such money, a general averment in the replication of nonpayment, though often demanded, was sufficient on general demurrer. —Bell v. State, 7 Blackf. 33.

[j] (Ind. 1846) A declaration in a suit on a justice's bond, where the breach assigned was the justice's failure to pay over money collected on a judgment, which states that the justice, by virtue of his office, had collected and received the money, substantially avers that the money was received by the justice while he was in office.—Parker v. State, 8 Blackf. 202.

[k] (Ind. 1847) Where suit is brought to recover damages for the nonperformance of a duty of a justice of the peace, and there are exceptions contained in the enacting clause of the statute which prescribes the duty, the declaration must negative the exceptions.—Weaver v. State, 8 Blackf. 563.

[l] (Ind. 1847) The declaration should have expressly averred, or have stated facts amounting to an averment, that the judgment had not been replevied, and that the judgment creditor had not directed that an execution should not issue.—Weaver v. State, 8 Blackf. 563.

[m] (Ind. 1847) In debt on a justice's bond for his failure to issue an execution, the relator's statement that the justice might, could, and should have issued an execution is only a conclusion of law.—Weaver v. State, 8 Blackf. 563.

[n] (Ind. 1847) In debt on the bond of a justice of the peace, the breach assigned was that on June 21, 1841, the relator recovered a judgment before the justice, for $51.25, against one A.; that the justice failed to issue execution on the judgment during his term of office, though he might, could, and should have issued it; that no execution issued on the judgment until December 6, 1841, when one was issued by the successor of the justice, and when A. had no property subject to execution; and that the judgment had not been paid. *Held*, that the assignment of the breach was insufficient.—Weaver v. State, 8 Blackf. 563.

[o] (Ind. 1871) A justice of the peace received money from a garnishee in an attachment proceeding against whom there was an order made to pay the money. Afterwards, in a suit against the justice and the sureties on his official bond, on the relation of said garnishee, the complaint alleged that the money was paid to the justice, "to be held by him as such justice of the peace, until the final determination and adjudication of the rights of the respective parties connected with said cause, for the person entitled to said money and authorized to receive the same," and that the relator appealed from the judgment within 30 days, and the judgment was reversed, and the relator demanded the money from the justice, who refused to pay. *Held*, that the complaint did not show a cause of action against the justice and his sureties. It should have been alleged that the justice had not paid over the money, and that it remained in his hands at the date of the appeal from his judgment, after which he could not legally pay over the money on the judgment.—State v. Woodman, 36 Ind. 511.

[p] (Ind. 1873) A complaint on the official bond of a justice of the peace, alleging that the relator was plaintiff in an action before the justice, and, on the trial, the justice found for the plaintiff in the sum of $166, but, without the fault or knowledge of the relator, the justice entered his finding and judgment for only the sum of $66, and that the relator did not know of such entry for more than 60 days thereafter, by reason of which the relator lost the sum of $100, is bad.—Larr v. State, 45 Ind. 364.

[q] (Ind. 1882) Where, in a suit upon the official bond of a justice of the peace, the breach assigned being a failure to pay over money, the complaint failed to allege that the money was received during the time covered by the bond. *held*, that the complaint was defective, and that the defect was not cured by a verdict. —Naugle v. State, 85 Ind. 469.

[r] (Iowa, 1881) In an action upon a justice's bond for damages for illegal commitment after conviction, the petition alleged that, when the justice gave the plaintiff notice of his privilege of appeal, the plaintiff "offered security and bond for appeal," which the justice refused to allow, and willfully and maliciously committed him to jail. *Held*, that the petition was insufficient, as it failed to show proper steps taken to stay the judgment by putting in bail in the amount and form required by Code 1873, § 4698.—Anderson v. Park, 57 Iowa, 69, 10 N. W. 310.

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[s] (Ohio, 1859) In an action upon a justice's bond, a petition which avers that two of the township trustees, as such, approved it, without averring that it was done at a meeting of the trustees, is insufficient.—Slicer v. Elder, 2 Ohio Dec. 218.

§ 64. —— Evidence.

[a] (Ind. 1848) In debt on the bond of a justice of the peace to recover money collected by him on a judgment, it was *held* that evidence of the acknowledgment by the justice that the judgment had been paid, and that he receipted for the money, was proper for the consideration of the jury, in determining whether the justice received the money.—State v. Daily, Smith, 153.

[b] (Ind. 1854) In a suit on the official bond of a justice of the peace, for his refusal to account for the proceeds of a note collected by him, for which note he has receipted as justice of the peace, it will be presumed that he had power to give the receipt as such, and that the act was legal, until the contrary is shown. —State v. Carter, 6 Ind. 37.

[c] (Ohio, 1882) In an action against a justice and his sureties to recover damages on account of his failure to issue execution, where it is shown that the execution debtor had certain property which might have been levied on, if the debtor did not claim it as exempt, the presumption is that he would not have claimed it as exempt.—Carpenter v. Warner, 38 Ohio St. 416.

§ 65. —— Damages.

[a] (Ill. 1878) In an action on a justice's bond for his failure to deliver up, in compliance with Rev. St. p. 653, § 110, securities left with him for collection, the measure of damages is the owner's loss; if, when he received a note, and ever since, the maker was wholly insolvent, they are merely nominal.—Hays v. People, 8 Ill. App. (3 Bradw.) 57.

[b] (Ohio, 1861) Where a justice has neglected to put to judgment and execution notes left with him for collection, the rule of damages, in a suit against the sureties of the justice, is the actual loss sustained.—Dehn v. Heckman, 12 Ohio St. 181.

[c] (Ohio, 1872) In an action by a judgment creditor on the official bond of a justice of the peace for failure to issue an execution, the damages may include the loss incurred by the neglect, though exceeding the amount of the execution.—Gaylor v. Hunt, 23 Ohio St. 255.

[d] (Ohio, 1882) In a suit against a justice and his sureties to recover damages on account of his failure to issue an execution, the measure of damages is, prima facie, the amount of the execution; but this amount may be reduced by showing that a part only of the execution could have been collected.—Carpenter v. Warner, 38 Ohio St. 416.

(H) CRIMINAL RESPONSIBILITY AND PROSECUTION.

OFFENSES, § 66.
INDICTMENT AND INFORMATION, § 67.
EVIDENCE, § 68.
INSTRUCTIONS, § 69.
PUNISHMENT, § 70.

Commission of crime as ground for removal from office, see ante, § 16.
Applicability of bribery statute to justice, see "Bribery," vol. 8, c. 993, § 3 [g].
Conspiracy to subject to penalty, see "Conspiracy," vol. 10, cc. 1099, 1100, § 6 [f].
Right to appear and be heard before grand jury when indicted for false imprisonment, see "False Imprisonment," vol. 23, c. 645, § 124.

§ 66. Offenses.

Duties of justices as conservators of the peace, see ante, § 21.

[a] (U. S. 1808) A justice of the peace is not liable criminally for discharging on bail a prisoner committed for a felony, unless the justice acted contemptuously, and willfully, and with evil intent.—United States v. Faw, Fed. Cas. No. 15,078 [1 Cranch, C. C. 486].

[b] (U. S. 1836) Where the indictment does not describe an indictable offense, the magistrate has a discretion as to the amount of bail, and is not criminally liable for taking insufficient bail.—United States v. Smith, Fed. Cas. No. 16,330 [4 Cranch, C. C. 727].

[c] (U. S. 1844) It is an indictable offense for a justice of the peace in the District of Columbia knowingly to demand, by color of his office, in any case, civil or criminal, payment of any other fees than those established by law.—Mattingly v. United States, Fed. Cas. No. 9,295 [1 Hayw. & H. 195].

[d] (U. S. 1880) The willful and corrupt violation of an act of congress by a justice of the peace, in the exercise of his office, will render him liable to indictment in a federal court.—United States v. Kindred (C. C.) 5 Fed. 43.

[e] (Ala. 1859) On the trial of an indictment of a justice of the peace, under Code, § 3225, for receiving illegal fees, *held*, that service and summons of a garnishment on a person indebted to defendant in attachment is a levy of the attachment, within the meaning of the act (Sess. Acts 1845–46, p. 103), regulating the fees of constables in Mobile.—Cleaveland v. State, 34 Ala. 254.

[f] (Ark. 1881) Under Act Feb. 11, 1875, providing that any justice of the peace guilty of certain breaches of duty shall be deemed guilty of a misdemeanor, and fined a certain sum, "to be recovered in a suit before a justice of the peace," a justice violating its provisions must be prosecuted criminally.—McClure v. State, 37 Ark. 426.

[g] (Ark. 1881) It is a violation of Act Feb. 11, 1875, relative to the duties of justices of the peace, if the justice's abstract of misdemeanors, required of him thereby, omits any item of information which the act requires; and he is liable to the penalty and to removal from office, although he might have honestly thought that the imperfect abstract filed by him was sufficient.—McClure v. State, 37 Ark. 426.

[h] (Ark. 1890) Under Mansf. Dig. § 5925, the justice has a choice between paying the penalty and accepting the appointment, under section 5922, to apportion the persons in the township liable to work the roads, and no absolute duty to accept is imposed.—State v. Lewis, 53 Ark. 340, 13 S. W. 925.

[i] (Ark. 1890) Under Mansf. Dig. §§ 1755, 1757, imposing a penalty on any justice of the peace who fails to file an abstract, giving the style of each criminal case, whether the defendant was acquitted or convicted, and, if convicted, the amount of the fine imposed, this penalty is incurred if cases are omitted from the abstract, though from no improper motive, but because the fines were not collected, and under the belief that they were not to be reported.—Bishop v. State, 14 S. W. 88.

[j] (Ark. 1890) A justice of the peace is not indictable for failure to file an abstract of the

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misdemeanors tried before him with the clerk of the county court, as required by Mansf. Dig. § 1755, if he has tried no such cases.—State v. Smith, 53 Ark. 325, 14 S. W. 95.

[k] (Ill. 1834) Acts of official misconduct by justices of the peace, done with corrupt motives, are indictable offenses.—Wickersham v. People, 2 Ill. (1 Scam.) 128.

[l] (Ky. 1859) A justice of the peace of Ohio solemnized a marriage upon a ferry boat, midway on the Ohio river, between Newport and Cincinnati, illegally, according to the laws of the state of Kentucky. It did not appear that Ohio had ever, by its legislation, assumed, or claimed, or asserted jurisdiction, exclusive or concurrent, over the place where the marriage was solemnized. *Held*, that the justice was guilty of an offense against and punishable under the laws of Kentucky.—McFall v. Commonwealth, 59 Ky. (2 Metc.) 394.

[m] (Md. 1866) Where a justice of the peace received bank notes during the trial of a cause before him, and afterwards refused to deliver up such notes to the person legally entitled to them, it was *held* that the justice of the peace was guilty of a misdemeanor, for which he was indictable and punishable at common law.—Hiss v. State, 24 Md. 556.

[n] (Minn. 1869) It is not the official duty of a justice of the peace to advise parties in regard to selling their judgments, and misbehavior in office cannot be predicated upon corrupt advice in such matters.—State v. Coon, 14 Minn. 456 (Gil. 340).

[o] (Minn. 1869) A justice of the peace is not liable criminally for failing to pay over money collected, or withholding information in regard to a judgment recovered before him, until after demand for such money, and request for such information.—State v. Coon, 14 Minn. 456 (Gil. 340).

[oo] (N. Y. 1829) A justice of the peace is liable to indictment for a misdemeanor, if he denies an adjournment, because a defendant refuses to pay his fees for drawing a bond, on the defendant's demanding an adjournment.—People v. Calhoun, 3 Wend. 420.

[p] (N. Y. 1836) A justice of the peace is indictable for discharging an offender, without requiring sufficient securities for his reappearance, corruptly, and with intent to pervert the course of justice.—People v. Coon, 15 Wend. 277.

[pp] (N. Y. 1845) A justice of the peace before whom a cause is pending is bound, on the defendant's request, to swear him to an affidavit, prepared for the purpose of procuring the cause to be discontinued, on the ground of the justice being a material witness for the defendant; and his refusal to do so is a misdemeanor, whether the affidavit, as drawn, is sufficient for the purpose or not.—People v. Brooks, 1 Denio, 457, 43 Am. Dec. 704.

[q] (N. Y. 1856) A police justice was indicted for having willfully taken bail of and discharged a person committed by another magistrate, on charge of larceny, without notice to the district attorney, as provided by session laws of 1846. *Held*, that these facts constituted a misdemeanor.—People v. Bogart, 3 Parker, Cr. R. 143.

[qq] (N. Y. 1856) A police justice in the city of New York, who intentionally and willfully takes bail and discharges from custody a person committed on a criminal charge by another magistrate, without notice to the district attorney, as required by Laws 1846, p. 408, cannot defend a prosecution for a misdemeanor, under 2 Rev. St. p. 696, § 39, on the ground that his acts were judicial.—People v. Bogart, 3 Parker, Cr. R. 143.

[r] (N. C. 1853) It is a misdemeanor in office for a justice of the peace to sell or transfer a judgment rendered by himself or by any other justice, if in his possession virtute officio; the law making it his duty to keep and preserve such judgments.—State v. Zachary, 44 N. C. 432.

[rr] (N. C. 1872) Where a forcible trespass—such as turning a defendant out of his house—is committed in the execution of process issued by a justice, an indictment therefor cannot be sustained against the justice, unless he acted without jurisdiction, or corruptly, or at least maliciously, and without probable cause.—State v. Ferguson, 67 N. C. 219.

[s] (Pa. 1794) Criminal information lies against a justice of the peace for taking very insufficient bail.—Respublica v. Burns, 1 Yeates, 370.

[ss] (Pa. 1795) A justice of the peace is indictable for not attempting to suppress a riot.—Respublica v. Montgomery, 1 Yeates, 419.

[t] (Pa. 1823) Under Act March 20, 1810, § 23, providing that the justice, on demand of either party, must make out a copy of his proceedings, and that a refusal shall constitute a misdemeanor in office, a refusal by a justice to deliver a copy of his proceedings to either party on demand is a violation of the act.—Wilson v. Commonwealth, 10 Serg. & R. 373.

[tt] (Pa. 1844) A magistrate who, when either present on the occasion of an unlawful assembly or when called on such an occasion, neglects or refuses to do his utmost for the suppression of such unlawful assemblies, subjects himself to an indictment and conviction for a criminal misdemeanor.—King's Charge to Grand Jury, 4 Pa. Law J. 36.

[u] (Pa. 1872) In acting as local magistrate, an alderman taking other or greater fees than are allowed by the fee bill is guilty of an indictable offense.—Commonwealth v. Hagan, 9 Phila. 574.

[uu] (Pa. 1885) Since the passage of Act April 2, 1868, the only remedy against a justice of the peace for taking illegal fees is by indictment under Act March 31, 1860, § 11.—Derrick v. Litsch, 2 Chest. Co. Rep. 494.

[v] (Pa. 1896) Act May 23, 1893 (P. L. 117), relating generally to punishment of justices of the peace for taking illegal fees, repeals all other local and general acts on the subject of fees legally chargeable by justices of the peace, except in so far as they are, in whole or in part, kept temporarily in force by Const. art. 3, § 13, which provides that "no law shall extend the term of any public officer or increase or diminish his salary or emoluments, after his election or appointment."—Lyons v. Means, 1 Pa. Super. Ct. 608, judgment affirmed (Com. Pl. 1896) 17 Pa. Co. Ct. R. 382, 26 Pittsb. Leg. J. (N. S.) 291.

[vv] (S. C. 1802) A justice is not indictable for oppression in office, although he mistake the law, unless it appear that he acted from corrupt motives, and was influenced by malice, ill will, or resentment, and not by a sense of duty.—State v. Johnson, 1 Brev. 155.

[w] (S. C. 1815) A justice is not answerable criminally for error of judgment, but is answerable for corruption.—State v. Porter, 3 Brev. 175, 2 Tread. Const. 694.

[ww] (S. C. 1838) Where two justices, under the habeas corpus act, had admitted a person to bail who was charged with murder in the warrant, they were guilty of an escape, and might very properly be indicted.—State v. Arthur, 1 McMul. 456.

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[x] (Tex. 1873) The failure of a justice of the peace to attend the sittings of the county court will not render the justice liable to indictment.—State v. Baldwin, 39 Tex. 75.

[xx] (Tex. 1873) Failure of a justice of the peace to report to the district court the number of causes which he has tried and determined, together with the disposition made of them, as required by Pasch. Dig. art. 3772, will render the justice liable to an indictment for a misdemeanor.—State v. Baldwin, 39 Tex. 155.

[y] (Vt. 1802) An indictment does not lie against a justice of the peace for maladministration. The proceeding is by impeachment.—State v. Campbell, 2 Tyler, 177.

[yy] (Va. 1808) A justice of the peace may be amerced and removed from office upon an information against him in a superior court of criminal jurisdiction, for misbehavior in office.—Commonwealth v. Alexander, 4 Hen. & M. 522.

[z] (Va. 1818) Where a justice of the peace maliciously issued a warrant commanding a person to appear before him and answer the complaint of another person, and adjudged him to pay costs, when in fact said complaint was never made to him, he was guilty of malfeasance, and was indicted and fined.—Wallace v. Commonwealth, 2 Va. Cas. 130.

[zz] (Va. 1825) A corrupt agreement between two justices of the peace, A. and B., to the effect that A. will vote for C. as commissioner of the revenue, in consideration that B. will vote for D. as clerk, and the actual voting in pursuance thereof is a misdemeanor at common law, for which an information or indictment will lie.—Commonwealth v. Callaghan, 2 Va. Cas. 460.

§ 67. Indictment and information.

[a] (U. S. 1835) In an indictment against a justice of the peace for taking insufficient bail in a criminal case, it is not necessary to state in what respects the bail was insufficient, nor to set out the security taken, nor to aver that the defendant ordered the offender to be discharged from the arrest.—United States v. Clark, Fed. Cas. No. 14,803 [4 Cranch, C. C. 506].

[aa] (Ark. 1882) An indictment against a justice for failing to proceed against one for carrying a pistol should allege that the justice had information of the offense from the oath of some person, or that he had personal knowledge of it.—State v. Graham, 38 Ark. 519.

[b] (Ark. 1890) Mansf. Dig. § 5922, provides that the county court shall appoint a justice of the peace, who shall apportion the persons in the township liable to work the roads; and section 5925, that any justice who shall refuse to accept and discharge the duties of such appointment shall be fined in the county court. *Held*, that an indictment at common law for nonfeasance in office, in failing to make the apportionment, charging that the accused was the apportioning justice, having been appointed and duly notified, is fatally defective unless it also show an acceptance of the appointment.—State v. Lewis, 53 Ark. 340, 13 S. W. 925.

[c] (Cal. 1890) An indictment which avers that a justice of the peace took jurisdiction of a prosecution for the sole purpose of making the acquittal of accused a bar to another pending prosecution for the same offense, but does not aver that he intended to acquit accused, or that he acted from corrupt or partial motives, is not sufficient, under Pen. Code, § 758, punishing "district, county, township, or municipal officers" for willful or corrupt "misconduct in office."—People v. Ward, 85 Cal. 585, 24 Pac. 785.

[d] (Fla. 1879) An indictment, under Thomp. Dig. p. 497, c. 5, § 18, charging a justice of the peace with malpractice in office, which does not allege that the malpractice was committed by the defendant "in the administration and under color of his office," is so defective as to cause an arrest of judgment.—Snowden v. State, 17 Fla. 386.

[e] (Ga. 1875) A justice of the peace cannot be arraigned on a presentment for malpractice in office. An indictment as prescribed by Code, § 4504, is the proper method of charging him with such offense.—Hawkins v. State, 54 Ga. 653.

[f] (Ga. 1875) A presentment is demurrable which charges a justice of the peace with "malpractice," without the addition of the words "in office," or which charges him with malpractice, and does not show, by the entry of the solicitor general or the sheriff, that a copy thereof had been served on him before it was laid before the grand jury, and that he had been notified to appear with his witnesses, or which simply charges him with being drunk while presiding in his court. In the latter case it should set forth the wrong done by some official act or omission to act, resulting from such drunkenness.—Hawkins v. State, 54 Ga. 653.

[g] (Ga. 1876) An indictment against a justice of the peace, for malpractice in office, alleged that, upon the trial before the justice of a possessory warrant, possession of the property was awarded to the plaintiff, and an execution issued against the defendant therein for costs, but that the justice had refused to deliver the property to the plaintiff upon demand, and had an entry of nulla bona entered on the execution and a levy made upon the property in dispute, although the plaintiff offered to point out property belonging to the defendant. *Held*, that the indictment was sufficient.—Russell v. State, 57 Ga. 420.

[h] (Ill. 1834) An indictment, charging that the defendant, a justice of the peace, took up certain estray animals, specifying the number and kind, and corruptly caused the same to be appraised before himself as such justice, is substantially good.—Wickersham v. People, 2 Ill. (1 Scam.) 128.

[i] (Ill. 1840) An indictment against a justice of the peace, for malfeasance in office, in refusing to issue subpœnas, should charge that he "willfully and corruptly refused to issue the subpœnas."—Jones v. People, 3 Ill. (2 Scam.) 477.

[j] (Ind. 1844) An indictment against a justice, under Act 1842, p. 131, for failure to pay over, on the first Monday in August, moneys which have come into his hands at any time prior to the preceding first Monday in August, alleging that the fees were not paid over, must allege that they were received prior to the first Monday in August of the year preceding the first Monday in August on which he failed to pay over.—State v. Boyles, 7 Blackf. 90.

[k] (Ind. 1847) An indictment alleged that the defendant, being a justice of the peace, as such justice, charged A. with committing an assault and battery on B., upon the justice's view, without complaint or affirmation having been made; that the justice verbally required A. to appear before him to answer the offense; that A. appeared, without consenting to do so; that the justice thereupon, without a plea of guilty, and without proof, fined him, A., $3, and collected the fine; that the justice, in the administration and under the color of his office, unlawfully and oppressively took cognizance of said offense, and unlawfully and oppressively rendered said judgment, and collected the money, contrary to the form of the statute, etc.

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Held, that the indictment was insufficient.—State v. Odell, 8 Blackf. 396.

[l] (Ind. 1850) It is not necessary to state the names of the persons against whom the fines had been assessed, in an indictment against a justice for failing to make out and file in the clerk's office a list of all the fines, etc., assessed by him.—State v. McCormack, 2 Ind. (2 Cart.) 305.

[m] (Ind. 1853) An indictment against a justice of the peace, under Rev. St. 1843, c. 53, § 83, charging the corrupt rendering of an unlawful judgment, unless it allege that he knew his decision to be contrary to law, is bad.—State v. Ross, 4 Ind. 541.

[n] (Ind. 1857) In an information against a justice of the peace, under 2 Rev. St. p. 442, § 63, for a violation of 2 Rev. St. p. 500, § 21, requiring them to pay over all moneys received on account of fines for the use of common schools, it is not necessary to state from whom the moneys were received.—Alexander v. State, 9 Ind. 337.

[o] (Mo. 1895) Rev. St. 1889, § 4370 et seq., requires a justice of the peace before whom parties may be adjudged guilty of misdemeanors and fined, to report to the clerk of the county court the amount of the fine, and the name of the "constable" charged with the collection thereof, and makes the failure of the justice to perform this duty a misdemeanor. *Held*, that an indictment thereunder, merely stating that the "execution was delivered to the proper officer," is defective for failure to allege that such officer was a constable.—State v. Latshaw, 63 Mo. App. 496, 620; Id., 2 Mo. App. Rep'r, 861.

[p] (N. Y. 1836) Where a justice of the peace is indicted for discharging an offender without requiring sufficient securities for his reappearance, corruptly and with intent to pervert the course of justice, the indictment should be full and specific.—People v. Coon, 15 Wend. 277.

[q] (N. C. 1838) An indictment against a justice of the peace, for refusing to issue his warrant for the arrest of a felon, must charge either that the felony was committed in his presence, or the tender to him of an affidavit of its commission. It should also charge that the felon was in the magistrate's county when the refusal took place.—State v. Leigh, 20 N. C. (3 & 4 Dev. & B.) 126.

[r] (N. C. 1887) Code, § 906, provides "that it shall be the duty of each justice of the peace to furnish the clerk of the superior, criminal, or inferior court of his county with a list of the names and offenses of all parties tried and finally disposed of by such justice, together with the papers in each case, in all criminal actions since the last term of the superior, criminal, or inferior court." An indictment against a justice alleged that he did on certain days try and finally dispose of certain criminal actions, and did willfully and unlawfully fail to furnish the clerk of the superior court of the county with a list containing the names of all parties tried in such actions. *Held*, that such indictment sufficiently advised accused of the particulars of the criminal neglect imputed, so as to protect him against any further prosecution for the same offense, and should not be quashed because it omitted to state the names of the persons tried, or that their names were unknown.—State v. Foy, 98 N. C. 744, 3 S. E. 524.

[s] (Pa.) An indictment against a justice of the peace for refusing a copy of his proceedings, as required by Act March 20, 1810, § 23, should allege a tender of his fee for that service.—(1824) Wilson v. Commonwealth, 10 Serg. & R. 373; (1846) Commonwealth v. Beerbrower, 3 Clark, 404, 5 Pa. Law J. 426.

[t] (Pa. 1846) An indictment, under Act March 20, 1810, § 23, against a justice of the peace, for refusing on demand to make out and deliver to a party in an action pending before him a certified copy of his proceedings, must aver the tender or payment of the fee to which the justice is entitled for such service, and an averment that the demandant pay the justice the full amount of the money which the justice required, is insufficient; and proof that the sum paid was the precise sum fixed by the fee bill will not cure the defect.—Commonwealth v. Beerbrower, 3 Clark, 404, 5 Pa. Law J. 426.

[u] (Tenn. 1849) An indictment of a justice of the peace, under Act 1835, c. 17, for failing to deliver over to his successor the books and papers of his office, which shows that a period of time elapsed between the expiration of his term and the qualification of his successor, must negative the idea that defendant delivered the books and papers in the interval to the nearest justice, as he would have been authorized to do in such case, under the statute.—State v. Jones, 29 Tenn. (10 Humph.) 41.

[v] (Tenn. 1849) An indictment of a justice of the peace, under Act 1835, c. 17, for failing to deliver over to his successor the books and papers of his office, should aver that the successor demanded the books and papers of defendant.—State v. Jones, 29 Tenn. (10 Humph.) 41.

[w] (Va. 1795) In an information against a justice of the peace for bribery in the election of a clerk, it must appear that an election was held, and that a vote was given at that election.—Newell v. Commonwealth, 2 Wash. 88.

[x] (Va. 1830) In an indictment against a justice of the peace for misbehavior in office, it is necessary that the act imputed as misbehavior should be distinctly and substantially charged to have been done corruptly, etc., and should also charge a scienter.—Jacobs v. Commonwealth, 2 Leigh, 709.

§ 68. Evidence.

[a, b] (Ga. 1876) On trial of an indictment charging a justice of the peace with malpractice in office in a particular proceeding, it is competent to require the defendant to produce his docket and such official papers as may be relevant to the issue.—Russell v. State, 57 Ga. 420.

[c] (N. Y. 1856) On trial of a city police justice for willfully discharging from custody, on bail, a person committed for larceny by another magistrate, without notifying the district attorney, as required by Laws 1846, p. 408, it is not necessary to prove that the act was done corruptly.—People v. Bogart, 3 Parker, Cr. R. 143.

[d] (N. Y. 1856) On trial of a city police justice for discharging on bail a person committed on a criminal charge by another magistrate, without notifying the district attorney, as required by Laws 1846, p. 408, the state may show that, after bail had been taken, search was made for the surety in the recognizance at the place stated as his residence, and at other places, and that he could not be found.—People v. Bogart, 3 Parker, Cr. R. 143.

[e] (N. C. 1887) Evidence that a justice appeared as agent for a plaintiff in an action, and managed his case at the trial before another justice of his county as an attorney would do, nothing appearing to show that he practiced as an attorney at any other time, or that he received or asked compensation for his services, is not sufficient to convict under Code, §

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27, forbidding his practicing as an attorney.—State v. Bryan, 98 N. C. 644, 4 S. E. 522.

[f] (S. C. 1886) Proof of an illegal act committed with evil intent is necessary to sustain a charge of official misconduct.—State v. Tarrant, 24 S. C. 593.

§ 69. Instructions.

[a] (Cal. 1890) Pen. Code, § 1385, provides that "the court may, either of its own motion or on the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed." Section 1386 provides that "neither the attorney general nor the district attorney can discontinue a prosecution except as provided in the last section." *Held*, that on an indictment of a justice for taking jurisdiction of a criminal proceeding after it has been dismissed before another justice of the same township by order of the prosecuting attorney, and brought before a justice of another township, it is error to instruct that the district attorney has authority to dismiss a criminal prosecution before a justice of the peace.—People v. Ward, 85 Cal. 585, 24 Pac. 785.

[b] (Kan. 1875) In a trial upon an information, under section 207 of the crimes act, against a justice of the peace, charging willful and malicious oppression, partiality, misconduct, and abuse of authority, "in requiring an excessive bond on an appeal from a judgment rendered by him, and in refusing to approve a surety on such bond, who was in fact sufficient," *held* error to instruct the jury that "gross ignorance of law in a case like this amounts to criminal intent."—State v. Reeves, 15 Kan. 396.

[c] (N. C. 1881) On a prosecution against a justice for unlawfully and maliciously issuing a warrant for the arrest of four persons, where it is shown that after they had been tried before two justices, under a warrant issued by defendant on a certain affidavit, and two bills had been found by the grand jury, defendant, upon the same affidavit, issued another warrant against the same parties for the same offense, it is not error to refuse an instruction that as the affiant in such affidavit swore to four distinct offenses, and the indictment covered only two of them, defendant's act in issuing the second warrant was lawful.—State v. Sneed, 84 N. C. 816.

§ 70. Punishment.

[a] (Ill. 1895) A fine of $1,000 is not an excessive punishment for assuming the powers of a justice of the peace, without having even color of title to the office.—Becker v. People, 156 Ill. 301, 40 N. E. 944; Wilmott v. Same, Id.

III. CIVIL JURISDICTION AND AUTHORITY.

(A) IN GENERAL, §§ 71-76.
(B) NATURE OF SUBJECT-MATTER, §§ 77-134.
(C) CHARACTER OF PARTIES, §§ 135-142.
(D) DOMICILE OR RESIDENCE OF PARTIES AND TERRITORIAL EXTENT OF JURISDICTION, §§ 143-147.
(E) AMOUNT OR VALUE IN CONTROVERSY, §§ 148-172.
(F) SET-OFFS AND COUNTERCLAIMS, §§ 173-175.
(G) NATURE OF REMEDY OR RELIEF, §§ 176-188.
(H) ANCILLARY AND INCIDENTAL JURISDICTION, § 189.
(I) LOSS AND DIVESTITURE OF JURISDICTION, §§ 190-198.
(J) DISQUALIFICATION TO ACT, §§ 199-203.
(K) POWERS AFTER EXPIRATION OF TERM AND OVER PROCEEDINGS BEFORE OTHER JUSTICES, §§ 204-206.
(L) JURISDICTION TO BE SHOWN BY RECORD AND PRESUMPTIONS, §§ 207-216.
(M) CONSENT OF PARTIES TO JURISDICTION, AND WAIVER AND CURE OF OBJECTIONS, §§ 217-221.
(N) DETERMINATION OF QUESTIONS OF JURISDICTION, §§ 222, 223.
(O) ACTS AND PROCEEDINGS WITHOUT JURISDICTION, § 224.

Jurisdiction of court of record in cause certified from justice, see post, §§ 243–245.
Authority to take acknowledgments, see "Acknowledgment," vol. 1, cc. 854–856, § 83; cc. 863, 864, § 99; cc. 874–877, §§ 116, 120.
—— *affidavits, see* "Affidavits," vol. 2, cc. 17–20, §§ 22, 27 [b, d].
—— *depositions, see* "Depositions," vol. 16, cc. 1014–1018, §§ 72, 75.
Compelling making of affidavits, see "Affidavits," vol. 2, c. 13, § 17 [b–d].
Contempt of justice as indictable offense, see "Contempt," vol. 10, c. 2379, § 4 [u]; c. 2381, § 6 [n].
Criminal jurisdiction, see "Criminal Law," vol. 14, cc. 734–754, §§ 30–136.
—— *bastardy proceedings, see* "Bastards," vol. 6, cc. 1882–1884, § 84.
—— *complaint for solemnizing marriage without license, see* "Marriage."
—— *obstruction of highway, see* "Highways," vol. 25, cc. 1903, 1904, § 447 [c, e–g].
—— *violations of militia laws, see* "Militia."
Forcible detainer in general, see "Forcible Entry and Detainer," vol. 23, cc. 1326, 1327, § 82; cc. 1383, 1384, § 156.
Judicial notice of official character and authority, see "Evidence," vol. 20, cc. 104, 105, § 58.
Selection as associate justices of court of sessions, see "Judges," vol. 29, c. 1572, § 9.
Solemnizing marriages, see "Marriages."

(A) IN GENERAL.

NATURE AND SCOPE OF JURISDICTION IN GENERAL, § 71.
CONSTITUTIONAL PROVISIONS, § 72.
STATUTORY PROVISIONS, § 73.
EXCLUSIVE OR CONCURRENT JURISDICTION, § 74.
ELECTION OF REMEDY AS AFFECTING JURISDICTION, § 75.
OFFICERS INVESTED WITH JURISDICTION, § 76.

§ 71. Nature and scope of jurisdiction in general.

[a] Justices of the peace have only a statutory jurisdiction.
—(Ark. 1886) Dunnagan v. Shaffer, 48 Ark. 476, 3 S. W. 522;
(Colo. 1894) Corthell v. Mead, 19 Colo. 386, 35 Pac. 741;
(Me. 1840) Martin v. Fales, 18 Me. (6 Shep.) 23, 36 Am. Dec. 693;
(Mass. 1804) Commonwealth v. Leach, 1 Mass. 59;
(Mo. 1858) Williams v. Bower, 26 Mo. 601;
(N. Y. 1860) Miner v. Burling, 32 Barb. 540;
(Tenn. 1849) Vanbibber v. Vanbibber, 29 Tenn. (10 Humph.) 53.

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[b] A justice's court is a court of record.
—(Ohio, 1833) Adair v. Rogers, Wright, 428;
(Vt. 1824) Stone v. Proctor, 2 D. Chip. 108.
CONTRA, see
(U. S. 1823) Searcy v. Hogan, Fed. Cas. No. 12,584a [Hemp. 20].

[c] Courts of justices of the peace being courts of special and limited jurisdiction, they can exercise no jurisdiction except where it is distinctly and expressly conferred.
—(Dak. 1889) Murry v. Burris, 6 Dak. 170, 42 N. W. 25;
(N. Y. 1857) Worden v. Brown, 14 How. Prac. 327;
(S. D. 1890) Pyle v. Hand County, 1 S. D. 385, 47 N. W. 401.

[d] The powers of justices of the peace are wholly statutory, and must be strictly pursued.
—(Ill. 1840) Evans v. Pierce, 3 Ill. (2 Scam.) 468;
(Ind. 1856) Matlock v. Strange, 8 Ind. 57;
(Tenn. 1834) Gibbs v. Bourland, 14 Tenn. (6 Yerg.) 481.

[e] (Ala. 1854) By the common law, a justice of the peace had no civil jurisdiction, and his court was not a court of record.—Ellis v. White, 25 Ala. 540.

[f] (Ala. 1890) The civil jurisdiction of a justice of the peace did not exist by the common law, but depends upon constitutional warrant or statutory enactment.—Horton v. Elliott, 90 Ala. 480, 8 South. 103.

[g] (Ark. 1886) A justice of the peace, being an inferior court, takes nothing by implication except what is necessary to make effective his express powers.—Dunnagan v. Shaffer, 48 Ark. 476, 3 S. W. 522.

[h] (Ga. 1881) Since the adoption of Const. 1877, which fixes the times and places for holding justices' courts, such courts are regular legal tribunals, at which parties summoned may appear and plead.—Stansell v. Hays, 67 Ga. 487.

[i] (Ill. 1861) A justice of the peace who is not a police justice may, at the request of the city authorities, try causes within the jurisdiction of the police court.—De Wolf v. City of Chicago, 26 Ill. (16 Peck) 443.

[j] (Ind. 1857) At common law, a justice was only a conservator of the peace, and civil jurisdiction is conferred on him by statute.—Willey v. Strickland, 8 Ind. 453.

[k] (Ind. 1861) The court of a justice of the peace is one of limited jurisdiction, acting by virtue of statutory power, and whose act to be valid must be authorized by statute.—Ohio & M. R. Co. v. Hanna, 16 Ind. 391.

[l] (Ky. 1847) Justices of the peace of a city or parish have the same power as justices of the peace of counties.—Winston v. Gwathmey's Heirs, 47 Ky. (8 B. Mon.) 19.

[m] (N. Y. 1840) The justice's court of the city of Albany, in its jurisdiction between party and party, is not a court of record, though for some purposes it is so.—Wheaton v. Fellows, 23 Wend. 375.

[n] (N. Y. 1854) A justice of the peace holding special sessions sits as a court, and one of inferior jurisdiction.—Lattimore v. People, 10 How. Prac. 336.

[o] (Ohio, 1861) A justice court is one of limited, though not inferior, jurisdiction.—Howell v. Jenkins, 2 Ohio Dec. 552.

[p] (Tenn. 1832) Statutes giving jurisdiction to justices of the peace must be strictly construed.—Walker v. Wynne, 11 Tenn. (3 Yerg.) 62.

§ 72. Constitutional provisions.

Power of legislature to authorize issuance by justice of attachment returnable to circuit court, see "Constitutional Law," vol. 10, c. 1405, § 124 [h].

[a] (Ala. 1868) A constitutional provision (Const. 1865, art. 6, § 9) that the jurisdiction of justices of the peace in civil cases "shall be limited to causes in which the amount in controversy shall not exceed $100" does not vest in justices jurisdiction to that extent, but leaves it with the legislature to determine to what extent this jurisdiction shall be exercised in the class of cases named.—Pearce v. Pope, 42 Ala. 319.

[b] (Ala. 1875) Const. art. 6, § 13, giving justices of the peace jurisdiction of all civil cases wherein the amount in controversy does not exceed $100, is not an express grant of civil jurisdiction to justices of the peace, but was intended to limit their jurisdiction to controversies involving a sum not exceeding $100, leaving it to the general assembly to determine the class of cases in which it shall be extended to or reduced below that point.—Taylor v. Woods, 52 Ala. 474.

[c] (Ala. 1880) That part of Act 1874–75, § 47, establishing a new charter for the city of Selma, which authorizes a purchaser of lands sold for unpaid city taxes to maintain an action of unlawful detainer, before a justice of the peace, against a person who refuses to surrender the possession on demand, "for the recovery of the possession of the premises, and damages for the detention thereof," is unconstitutional, as attempting to confer on justices the jurisdiction to try and determine the value of real estate regardless of its value.—Webb v. Carlisle, 65 Ala. 313.

[d] (Ala. 1881) The statute conferring on justices of the peace jurisdiction in proceedings of unlawful detainer is not unconstitutional.—Beck v. Glenn, 69 Ala. 121.

[e] (Ala. 1888) As Code 1886, § 839, limits the jurisdiction of justices of the peace in actions sounding in tort to $50, section 1149, extending the jurisdiction in suits against a railroad company for killing stock to $100, is unconstitutional, as an unjust discrimination.—Brown v. Alabama G. S. R. Co., 87 Ala. 370, 6 South. 295.

[f] (Ark. 1841) All writs returnable to a court of record must, under the constitution, be issued by the clerk of that court, signed by him, and be sealed with the seal of the court. A statute, therefore, authorizing a justice of the peace to issue writs of attachment returnable to the circuit court is unconstitutional and void.—Toby v. Bowen, 3 Ark. (3 Pike) 352.

[g] (Ark. 1842) As the constitution expressly takes from justices of the peace all jurisdiction in matters which are not matters of contract, an act giving justices of the peace jurisdiction in actions of forcible entry and detainer is unconstitutional; such actions not being matters of contract.—McLain v. Taylor, 4 Ark. (4 Pike) 147.

[h] (Ark. 1843) If a justice of the peace has jurisdiction of a case by the constitution, he cannot be prevented from exercising it because the legislature has neglected to prescribe any method by which it can be exercised and suits commenced.—More v. Woodruff, 5 Ark. (5 Pike) 214.

[i] (Ark. 1846) By the constitution, justices of the peace have jurisdiction only of actions

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on contracts. *Held*, that it is incompetent for the legislature to give them jurisdiction of actions for the invasion of the privileges of licensed ferries.—Gibson v. Emerson, 7 Ark. (2 Eng.) 172.

[ii] (Ark. 1882) Act Jan. 23, 1875, providing that "when a constable to whom an attachment is directed by a justice of the peace can find no personal property * * * he shall levy the writ on any lands," is not repugnant to Const. 1874, art. 7, § 40, providing that "a justice of the peace shall not have jurisdiction where a lien on land or title or possession thereto is involved."—Bush v. Visant, 40 Ark. 124.

[j] (Cal.) Const. art. 6, § 6, providing that the district court shall have original jurisdiction in all cases of law and equity, where the amount in dispute exceeds $200, gives the legislature power only to provide for the disposition of cases where the amount does not exceed $200; and the law vesting in justices of the peace jurisdiction of cases where the amount exceeds $200 is void.—(1855) Zander v. Coe, 5 Cal. 230; (1856) Small v. Gwinn, 6 Cal. 447.

[jj] (Cal. 1856) Though by the constitution the legislature cannot confer jurisdiction on justices over cases where the amount in dispute exceeds in value the sum of $200, it can confer jurisdiction on them in forcible entry and detainer cases, because of the quasi criminal nature of those cases, whereby they fall under the head of special cases in the constitution, of which the legislature has a right to dispose of the jurisdiction.—Small v. Gwinn, 6 Cal. 447.

[k] (Cal. 1867) The act of April 14, 1863, conferring on justices of the peace exclusive jurisdiction over actions to recover forfeitures imposed on railroad companies, for charging a passenger an excess of fare, *held* not unconstitutional.—Reed v. Omnibus R. Co., 33 Cal. 212.

[kk] (Cal. 1877) Act 1874, p. 50, giving a landowner an action in rem against trespassing animals, "any overplus of the proceeds of such sale, after satisfying the judgment and costs," to be paid by the justice to the owner of the property, upon demand, if demanded within six months from the date of sale, and, "if not so demanded," to "be paid into the county treasury for the benefit of the county school fund," is unconstitutional in attempting to give a justice of the peace jurisdiction of a proceeding in equity to enforce a lien, make distribution, etc.—Young v. Wright, 52 Cal. 407.

[l] (Ga. 1842) Parties cannot, with a view of giving justices' courts jurisdiction of a debt exceeding $30, in Georgia, divide it into smaller sums, though payable on different days. The act of 1811, which authorizes it, is in violation of the constitution of 1798, under which it was passed, and is void.—Planters' & Mechanics' Bank v. Chipley, Ga. Dec. pt. 1, p. 50.

[ll] (Ga. 1882) Code of Augusta, pp. 252, 259, under Acts 1834 and 1839, allowed justices to hold their courts in any part of the city, and gave them jurisdiction over the entire city. Const. 1877, art. 6, § 7, par. 2, provides that justices shall sit monthly at fixed times and places. Section 9, par. 1, provides that the jurisdiction, powers, proceedings, and practice of all courts of the same grade or class, so far as regulated by law, shall be uniform, and that such uniformity should be established by the general assembly. *Held*, that the local laws of Augusta in regard to justices remained in force until the passage of Act July 21, 1879, making uniform the jurisdiction of justices.—Harbig v. Freund, 69 Ga. 180.

[m] (Ga. 1882) The constitution of 1877, depriving a justice of jurisdiction to try an action involving damages to realty, did not affect an action wherein an appeal was pending when the constitution was adopted.—City of Cartersville v. Lyon, 69 Ga. 577.

[mm] (Ga. 1890) Const. 1877, art. 6, § 7, par. 2, gives justices' courts jurisdiction in "civil cases arising ex contractu, and cases of injuries or damages to personal property." *Held*, that Act 1887, conferring on justices' courts jurisdiction over actions to recover a penalty imposed on telegraph companies for undue delay in the transmission and delivery of messages, is unconstitutional.—Western Union Tel. Co. v. Taylor, 84 Ga. 408, 11 S. E. 396.

[n] (Ill. 1872) The special charter jurisdiction of police magistrate of city of Centralia was abrogated by constitution of 1870.—Phillips v. Quick, 63 Ill. 445.

[o] (Ill. 1873) Const. 1870, art. 6, § 21, declaring that the jurisdiction of justices of the peace and police magistrates shall be uniform, reduced the jurisdiction of all justices of the peace and police magistrates to the uniform jurisdiction conferred on such officers by the general law of the state, and thus rendered their jurisdiction uniform, and abrogated the special jurisdiction conferred by the local and special laws.—Markham v. Heffner, 67 Ill. 101.

[oo] (Iowa, 1857) Const. art. 1, § 11, does not limit the jurisdiction of justices of the peace to cases cognizable before that officer, at the time of its adoption, but has a prospective sense, and embraces such causes as may be made so cognizable.—Bryan v. State, 4 Iowa (4 Clarke) 349.

[p] (Ky. 1818) It is within the constitutional power of the legislature to enlarge the jurisdiction of justices of the peace by giving them exclusive jurisdiction of all debts not exceeding a specified amount.—Head v. Hughes, 8 Ky. (1 A. K. Marsh.) 372, 10 Am. Dec. 742.

[pp] (Ky. 1896) Const. § 142, providing that jurisdiction of justices of the peace shall be equal and uniform throughout the state, supplemented by Act June 10, 1893 (St. § 1093), for carrying such provision into effect, and defining the jurisdiction of justices, operates as a repeal of the provisions of special laws, in force at the time of the adoption of the present constitution, conferring special jurisdiction in different localities.—McTigue v. Commonwealth, 35 S. W. 121.

[q] (La. 1880) Acts 1878, No. 10, giving justices of the peace in Orleans parish exclusive jurisdiction over the territory of their respective districts within the limits of the jurisdiction conferred on them by law, is not unconstitutional.—State ex rel. Sinnott v. Falls, 32 La. Ann. 553.

[qq] (Mass. 1826) St. 1821, c. 109, § 6, providing that justices of police courts of Boston shall have exclusive jurisdiction of civil suits which might before have been heard by any justice of the peace of that county, is not unconstitutional as abridging the powers of justices of the peace, since there is no color for the objection that the legislature cannot abridge or annul the power of courts and magistrates.—Wales v. Belcher, 20 Mass. (3 Pick.) 508.

[r] (Minn. 1872) Gen. St. 1866, c. 65, § 5, providing that a justice shall have jurisdiction in actions for the recovery of money only, if "the sum claimed" does not exceed $100, is not in contravention of the constitutional provision that no justice shall have jurisdiction in any civil action in which "the amount in controversy" exceeds $100. The words "the sum claimed" and "the amount in controversy" are synonymous.—Barber v. Kennedy, 18 Minn. 216 (Gil. 196).

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[rr] (Miss. 1875) The provision of Const. art. 6, § 23, limiting the jurisdiction of justices of the peace to causes in which the principal of the amount in controversy does not exceed $150, is not a limitation to actions ex contractu; and it is competent for the legislature to confer jurisdiction in all cases where the subject of controversy is susceptible of pecuniary measurement within the constitutional limitation. Code 1871, § 1302, therefore, giving jurisdiction to a justice of the peace of actions for the recovery of personal property or damages, etc., is not unconstitutional.—Bell v. City of West Point, 51 Miss. 262.

[s] (Miss. 1884) Code 1880, § 1585, extending to justices' courts jurisdiction over issues made under Code 1880, § 1767, which provides that where execution is returned unsatisfied, and plaintiff shall suggest that defendant has conveyed his property to defraud creditors and avoid the execution, the person into whose hands such property has passed shall be summoned, and an issue made up and tried by a jury, and that, "if the jury shall find the conveyance fraudulent or without a valuable consideration, the property thus fraudulently conveyed shall be subject to the execution," is not unconstitutional on the ground that the title to real estate exceeding in amount the constitutional limit of a justice's jurisdiction might be involved, since the issue to be tried is the issue of fraud, and any issue of title is merely collateral.—Smith v. Newlon, 62 Miss. 230.

[ss] (Miss. 1892) Under Const. 1869, art. 6, § 23, providing that "a competent number of justices of the peace * * * shall be chosen in each county by the qualified electors thereof, by districts," a provision of the town charter making the mayor ex officio justice of the peace for the whole district of which the town is a part is void as to that part of the district outside of the town.—Heggie v. Stone, 70 Miss. 39, 12 South. 253.

[t] (Mo. 1884) Rev. St. 1879, § 2835, giving to justices jurisdiction of actions against railroad companies for injury to animals without regard to their value, is constitutional.—Steele v. Missouri Pac. Ry. Co., 84 Mo. 57.

[tt] (Nev. 1865) The constitution does not give justices' courts jurisdiction of causes founded on money claims not exceeding $300, by the provision that such court shall not have jurisdiction when the claim exceeds said sum, nor by implication from the fact that it confers upon no court jurisdiction of claims over $100, and not exceeding $300.—Paul v. Beegan, 1 Nev. 327.

[u] (N. Y. 1823) The statute of April 11, 1823, created the county of Wayne out of certain towns in the counties of Ontario and Seneca, with a proviso that justices of the peace who had been appointed for those towns, while they belonged to Ontario or Seneca, pursuant to Const. art. 4, § 7, should, by virtue of the statute, be and remain justices of the new county, etc. *Held*, that this provision was constitutional; the legislature having power to enlarge or contract the territorial jurisdiction of justices as an incident to their power to create new counties.—Ex parte McCollum, 1 Cow. 550.

[uu] (N. Y. 1860) A statute chartering a village, and giving to a police justice, to be chosen by the inhabitants thereof, the jurisdiction of a justice of the peace of the town, within the village limits, is constitutional.—Brandon v. Avery, 22 N. Y. 469.

[v] (N. Y. 1861) The constitution provides that justices of the peace, to be designated by the legislature, shall assist in the court of sessions. A statute provided that no justice should so sit unless he had certain qualifications. A subsequent statute provided that R., who in fact was not qualified, should sit in the court of O. in the current year. *Held*, that the designation of R. was good.—Nelson v. People, 23 N. Y. 293.

[vv] (N. C. 1871) Where the constitution confers on a particular court exclusive original jurisdiction of all civil actions in which the title to real estate may be called in question, a statute which gives to justices of the peace jurisdiction of a summary proceeding in ejectment by a purchaser at sheriff's sale against the defendant in execution to obtain possession of the land, is unconstitutional, because, in such an action, the title to the land is necessarily involved.—Credle v. Gibbs, 65 N. C. 192.

[w] (N. C. 1871) Those sections of Acts 1868-69, c. 156, which give summary proceedings before justices of the peace in favor of landlords to recover possession of lands from their tenants who hold over after the expiration of their leases, are not unconstitutional, because, in consequence of the doctrine of estoppel, the title to the real estate cannot come in question.—Credle v. Gibbs, 65 N. C. 192.

[ww] (Or. 1863) Act Oct. 11, 1862, increasing the jurisdiction of justices' courts in civil actions from $100 to $250, is constitutional. Article 7, § 1, of the constitution, providing that the jurisdiction shall be "limited in accordance with the constitution," does not inhibit any change in the original restriction.—Noland v. Costello, 2 Or. 57.

[x] (Pa. 1836) Act March 23, 1877 (P. L. 25; Purd. Dig. p. 385), giving justices jurisdiction of actions for official fees due from persons living out of the county in which such actions are brought, extends the jurisdiction of justices in violation of Const. art. 3, § 7.—Stine v. Foltz, 3 Lanc. Law Rev. 130.

[xx] (Pa.) Act July 7, 1879, enlarging the jurisdiction of justices of the peace to sums not exceeding $300, except in cases involving the title to land, is constitutional.—(1880) Wissler v. Becker, 2 Pa. Co. Ct. R. 103; (1886) Johnson v. Beacham, Id. 108.

[y] (Tex. 1894) Rev. St. art. 2049, which declares that executors and administrators who fail to make payments ordered by the county judge shall be liable on their official bonds for the amount of such payments, together with damages thereon at the rate of 5 per cent. per month, to be recovered "before any court having jurisdiction of the amount claimed exclusive of interest and such damages," is unconstitutional in so far as it attempts to give justices of the peace jurisdiction of controversies which involve, including damages, more than the constitutional limit of $200.—Russell v. Woessner, 7 Tex. Civ. App. 281, 26 S. W. 1112.

[yy] (Wash. 1891) The article of the constitution relating to superior courts gives them original jurisdiction in all civil cases where the value of the property in controversy amounts to $100; and it further declares that part of the judicial power of the state shall be vested in justices of the peace, whose jurisdiction shall be fixed by the legislature, but shall not trench on that of the superior courts. Prior to the adoption of the constitution, justices had jurisdiction of civil cases to the amount of $300. *Held* that, under the constitution, justices have no jurisdiction in excess of $100.—Moore v. Perrot, 2 Wash. St. 1, 25 Pac. 906.

[z] (Wis. 1847) The legislative assembly of Wisconsin territory had authority under the organic act to regulate and limit the jurisdiction of justices' courts within the restrictions it contains, and to provide, where, in an action

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for the recovery of less than $50 for trespass upon lands, if the defendant justified by a plea of title, that the case and all proceedings therein should be certified and returned to the district court, which will thereupon entertain jurisdiction of the case and proceed with the same to final judgment.—Lybrand v. Carson, 2 Pin. 33.

[zz] (Wis. 1859) Under the constitutional provision that justices "shall have such civil and criminal jurisdiction as shall be prescribed by law," it is competent for the legislature to give justices jurisdiction in forcible entry cases, though the title to land may be brought in question.—Savage v. Carney, 8 Wis. 162.

§ 73. Statutory provisions.

Jurisdiction of justice as statutory, see ante, § 71.

Local or special laws conferring jurisdiction, see "Statutes," II.

[a] (Ga. 1846) Act 1843, giving parties injured the right to sue in justices' courts for damages done their stock by railroad companies, does not apply to causes arising previous to its passage.—Girtman v. Central R. & Banking Co., 1 Ga. (1 Kelly) 173.

[b] (Ga. 1846) St. 24 Geo. II. c. 44, § 1, relative to suits against justices of the peace, is in force in Georgia.—Warthen v. May, 1 Ga. (1 Kelly) 602.

[c] (Ill. 1860) The act extending the jurisdiction of justices of the peace of Peoria county should have such a reasonable construction as will advance the object designed by its enactment.—The Delta v. Walker, 24 Ill. (14 Peck) 233.

[d] (Ind. 1859) Act 1859, extending the application of Act 1853 relating to actions brought in justices' courts against railroad companies for failure to fence their tracks to all courts, does not apply to a case commenced before it went into operation.—Evansville & C. R. Co. v. Ross, 12 Ind. 446.

[e] (Mass. 1804) St. Edw. III., respecting the jurisdiction and powers of justices of the peace, adopted and practiced on in Massachusetts, is to be considered as a part of its common law. —Commonwealth v. Leach, 1 Mass. 59.

[f] (Mass. 1805) The office of justice of the peace, in all practices then applicable or which have since become applicable to its jurisdiction, may be considered as possessing in Massachusetts the general character and functions allowed to it in England by virtue of the statutes which had there created and regulated it. —Commonwealth v. Foster, 1 Mass. 488.

[g] (Minn. 1875) Sp. Laws 1875, c. 2, § 25, establishing a municipal court in the city of St. Paul, and providing that after its passage justices of the peace in the city should not take cognizance of any cause, but that the jurisdiction of such municipal court should be exclusive, is controlled by section 26 of such chapter, enacting that the term of each existing justice in the city shall cease at the end of the two years for which he was elected, and is not applicable to justices of the peace in said city in office at the time of its passage.—Marsh v. Smith, 22 Minn. 46.

[h] (N. J. 1880) The third proviso of P. L. 1879, p. 115, § 1, to increase the jurisdiction of justices of the peace, merely prevents the justices mentioned in the proviso from acquiring the increase of jurisdiction which the enactment confers on justices generally.—Sloat v. McComb, 42 N. J. Law (13 Vroom) 484.

[i] (N. Y. 1845) The title of the Revised Statutes relating to justices' courts, and the subsequent acts amending the same, do not affect the special provisions contained in the several acts respecting the justices' courts in the cities of Albany, Hudson, and Troy (e. g., the provisions defining their jurisdiction).—Bryan v. Cain, 1 Denio, 507.

[j] (N. Y. 1857) Code, § 53, specifying distinctly the causes of action and particular cases of which justices of the peace shall have jurisdiction, has no general words or terms, like trespass, assumpsit, or trespass on the case, within which other causes of action may be embraced.—Worden v. Brown, 14 How. Prac. 327.

[k] (Ohio, 1859) Act May 1, 1854, § 1, amending Act March 14, 1853, in regard to the jurisdiction of justices of the peace in civil cases, and providing that "under the restrictions and limitations herein provided" justices of the peace shall have concurrent jurisdiction with the court of common pleas in any sum over $100 and not exceeding $300, the words "under the restrictions and limitations herein provided" referred to the restrictions and limitations in the original act as amended.—McKibben v. Lester, 9 Ohio St. 627.

[l] (Ohio, 1859) St. May 1, 1854, § 2, does not restrict, but enlarges, the class of cases in which enlarged jurisdiction is previously conferred.—McKibben v. Lester, 9 Ohio St. 627.

§ 74. Exclusive or concurrent jurisdiction.

See post, § 79 [d]; "Courts," vol. 13, cc. 3007–3011, § 1208.

Constitutionality of law conferring exclusive jurisdiction, see ante, § 72 [q].

Election of remedy as giving concurrent jurisdiction, see post, § 75.

Jurisdiction of circuit court of cause originally commenced before justice, see "Courts," vol. 13, c. 3024, § 1229 [h].

[a] (Kan. 1878) Acts 1876, c. 133, and Acts 1872, c. 195, are simply part of the act of 1867 for the protection of live stock from disease; and under section 2 of the latter, giving justices of the peace exclusive jurisdiction of causes arising thereunder, the district court has no jurisdiction.—Evans v. Adams, 21 Kan. 119.

[b] (Ky. 1822) Justices of the peace have exclusive jurisdiction in all attachments, not exceeding $50, founded on any specialty, bill, or note in writing, or on account.—Owens v. Starr, 12 Ky. (2 Litt.) 230.

[c] (Ky. 1831) Under the statute of 1828, justices have exclusive jurisdiction in those cases over which they had such jurisdiction prior to the act.—Tudder v. Warren's Adm'r, 29 Ky. (6 J. J. Marsh.) 93.

[d] (Ky. 1841) Under the statute of 1835, justices of the peace alone have jurisdiction in actions to recover penalties against constables for failing to return executions.—Partlow v. Lawson, 41 Ky. (2 B. Mon.) 46.

[e] (Mich. 1854) The Revised Statutes give no exclusive jurisdiction in suits of less than $100 to justices.—Webb v. Mann, 3 Mich. 139.

[f] (Mich. 1878) Breach of promise must be sued in assumpsit before a justice of the peace, if the damages are below $100.—People v. Ingham County Circuit Judge, 38 Mich. 243.

[g] (Mich. 1889) How. Ann. St. §§ 6814, 6815, providing that, where the damages do not exceed $100, "justices of the peace may have jurisdiction in actions for damages resulting from obstructions to highways," do not confer an exclusive jurisdiction on justices of the

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peace.—Knorr v. Macomb Circuit Judge, 78 Mich. 168, 43 N. W. 1099.

[h] (N. Y. 1834) 2 Rev. St. p. 225, § 3, authorizing an action on a bond for less than $50 in a justice's court does not preclude the obligee from bringing such an action in a court of record.—Lewis v. Spencer, 12 Wend. 139.

[i] (N. C. 1874) Plaintiff purchased an outstanding incumbrance for $30, to perfect his title to land purchased of defendant, and sued defendant for breach of contract in not delivering a perfect deed, as promised. *Held* that, the sum demanded for the breach being under $200, exclusive jurisdiction was in a justice of the peace.—Templeton v. Summers, 71 N. C. 269.

[j] (N. C. 1887) Under the act of 1876 (Code, § 887), providing that "justices of the peace shall have concurrent jurisdiction of civil actions, not founded on contract, wherein the value of the property in controversy does not exceed fifty dollars," justices of the peace have concurrent jurisdiction with the superior court in actions of tort wherein the damages claimed do not exceed $50.—Harry v. Hambright, 98 N. C. 446, 4 S. E. 187.

[k] (Ohio, 1862) Justices of the peace have jurisdiction, concurrent with the courts of common pleas, in suits for injuries to personal property, where damages claimed exceed $100 and do not exceed $300.—Job v. Harlan, 13 Ohio St. 485.

[l] (Pa. 1874) The jurisdiction of the common pleas in trover and trespass is not taken away by the act of 1814, which gives to justices jurisdiction of such actions.—Devers v. Gething, 21 Pittsb. Leg. J. (O. S.) 115.

[m] (S. C. 1839) Under Acts 1824, p. 25, the justice of the peace has exclusive jurisdiction in contracts for £20 and less.—Allen v. Singleton, 1 Rice, 289.

§ 75. Election of remedy as affecting jurisdiction.

[a] (Ark. 1846) Justices of the peace have jurisdiction where the amount in controversy does not exceed $100, except actions of covenant; but, though debt and covenant will both lie on a bond for the payment of money, yet, if the amount of it be less than $100, a party must bring debt thereon before a justice, and cannot elect to bring covenant, and thereby oust the justice of his jurisdiction.—Crabtree v. Moore, 7 Ark. (2 Eng.) 74.

[b] (Kan. 1890) Where defendant occupies plaintiff's property without his consent, and so is a trespasser, plaintiff may waive the trespass, and sue before a justice of the peace to recover for the use and occupation of the land any sum less than $300; the limit fixed by Comp. Laws, c. 81, § 2, to justice's jurisdiction in actions for the recovery of money, though the limit to his jurisdiction in cases of trespass on land is fixed, by section 6, at $100.—Missouri Pac. Ry. Co. v. Atchison, 43 Kan. 529, 23 Pac. 610.

[c] (Mo. 1848) A party injured has his election of remedies within the statutes; and, where he brings an action on the official bond of the officer by whose neglect he has been injured, the circuit court and justices of the peace have concurrent jurisdiction where the amount claimed does not exceed the limit of the latter's jurisdiction.—Pollock v. Hudgens, 12 Mo. 67.

[d] (Mo. 1860) Plaintiff, in an action for injuries to personal property, where the damages claimed exceed the jurisdiction of justices of the peace, cannot confer jurisdiction by waiving the tort and suing in assumpsit.—Webb v. Tweedie, 30 Mo. 488.

[e] (N. C. 1835) On a covenant to pay $60 annually for two years for the hire of a slave, and also to furnish him with food and drink, plaintiff may elect either to bring covenant in a court of record or debt before a justice for $60.—Hamilton v. McCarty, 18 N. C. 226.

[f] (N. C. 1888) Under Code, § 887, giving justices jurisdiction of civil actions not founded on contracts wherein the value of the property in controversy does not exceed $50, a person, having trespassed on the lands of another by cutting timber and selling it, has committed a tort; and, in an action therefor, the jurisdiction of the justice is confined to $50; and, where the amount sued for is above that sum, the jurisdiction cannot be supported on the ground that the trespass was waived, the agency of the trespasser in selling the timber ratified, and that the claim is therefore for money due on a contract.—Edwards v. Cowper, 99 N. C. 421, 6 S. E. 792.

[g] (N. C. 1891) By Code, § 834, justices of the peace have jurisdiction of all actions founded on contract where the sum demanded does not exceed $200, and where title to land is not in controversy; and by Code, § 887, they have jurisdiction of actions not founded on contract where the value of the property in controversy does not exceed $50. *Held*, in an action where it is alleged that plaintiff's property to the value of $200 was tortiously converted by defendant, that plaintiff may waive the tort, and sue in a justice's court to recover the value of the property.—Scottish Carolina Timber & Land Co. v. Brooks, 109 N. C. 698, 14 S. E. 315.

§ 76. Officers invested with jurisdiction.

Validity of act creating police magistrate and giving him a justice's jurisdiction, see ante, § 2.

[a] (U. S. 1806) The mayor of Georgetown, D. C., may in that town do any act which justices of the peace of a county can do.—Hodgson v. Mountz, Fed. Cas. No. 6,569 [1 Cranch, C. C. 366.]

[b] (Ind. 1859) A mayor has the jurisdiction of a justice of the peace.—Cluggish v. Rogers, 13 Ind. 538.

[c] (Iowa, 1887) Under Code 1873, § 506, providing that "the mayor of each city or incorporated town shall be a magistrate and conservator of the peace, and, within the same, have the jurisdiction of a justice of the peace in all matters civil and criminal, * * * but the criminal jurisdiction shall be coextensive with the county in which such city or town is situated," *held*, that the mayor is given the same jurisdiction in civil cases as a justice of the peace, and therefore his jurisdiction extends to a case brought before him by a resident of his incorporated town, against a resident of the county, but not of the corporation nor of the township in which it is situated, by a notice served on the defendant within his township, but outside the limits of the corporation, and of the township wherein it is situated.—Weber v. Hamilton, 72 Iowa, 577, 34 N. W. 424.

[d] (Miss. 1896) The mayor of a town, who is ex officio justice of the peace within its limits, is a "justice of the county," within the meaning of Code 1892, §§ 4461–4469, and authorized to sit as one of the trial justices in an action for unlawful entry and detainer.—Nickles v. Kendricks, 73 Miss. 711, 19 South. 582.

[e] (Mo. 1888) The charter of the city of Kansas (Acts 1875, p. 252, art. 8, § 4) provided that suits on tax bills, not exceeding $300, might be brought before the city recorder, "or any justice of the peace in said city, as in other civil cases." The city of Kansas had been, and

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was at the time of the suit on the tax bill in question, a part of Kaw township, and had no justices of the peace, except the justices elected for the township, who had their offices in the city. *Held*, that such justices were the justices contemplated by the charter.—Harris v. Hunt, 97 Mo. 571, 11 S. W. 236.

[f] (Or. 1871) Laws 1870, pp. 130, 131, give the police judge of the city of Portland the jurisdiction of a justice of the peace for the county in which Portland is situated, but limits his jurisdiction to criminal cases. *Held* that, the provision attempting to limit his jurisdiction to criminal cases being unconstitutional, the police judge possesses the authority of a justice of the peace in both criminal and civil cases.—State v. Wiley, 4 Or. 184.

[g] (Pa. 1874) The design of the eighth section of the act of March 20, 1818 (incorporating the city of Lancaster), providing for the appointment by the governor of one recorder and two aldermen, who should severally have the jurisdictions of justices of the peace and of oyer and terminer, was to give a distinct appropriation of jurisdiction to each,—to the recorder and to the aldermen, taliter qualiter, viz., the aldermen to have the jurisdiction of justices of the peace, and the recorder, with the aldermen, all the jurisdiction of the justices of oyer and terminer and jail delivery.—Locher v. King, 5 Lanc. Bar, No. 49, p. 2.

[h] (Pa. 1892) A city recorder and aldermen are justices of the peace, within Act March 21, 1772, which provides for the trial before such officers of certain actions between a landlord and tenant.—Wilmington S. S. Co. v. Haas, 151 Pa. 113, 25 Atl. 85, 31 Wkly. Notes Cas. 79.

[i] (S. C. 1846) The recorder of the town of Camden is a magistrate ex officio, and invested with all the power of magistrates, except for the trial of small and mean causes.—State v. Harrison, 1 Strob. 153.

[j] (Tex. 1874) A mayor of a city has no jurisdiction to try civil causes, unless conferred upon him by the act of incorporation of the city.—Smith v. Deweese, 41 Tex. 594.

(B) NATURE OF SUBJECT-MATTER.

1. IN GENERAL, §§ 77-82.
2. ACTIONS INVOLVING TITLE TO REAL PROPERTY, §§ 83-97.
3. ACTIONS ON CONTRACTS, §§ 98-115.
4. ACTIONS FOR TORTS, §§ 116-134.

Actions on judgments, see post, § 418 [l, m].
Amount or value as determining jurisdiction, see post, §§ 148-172.
Consent as conferring jurisdiction, see post, § 217 [p, q, t].
Constitutionality of statute conferring jurisdiction of subject-matter, see ante, § 72 [j-l, rr, x, xx].
Waiver of objections to jurisdiction, see post, § 218 [b, k].
—— *of subject-matter, see* post, § 219.
Authority to administer oath to complainant in criminal prosecution, see "Criminal Law," vol. 14, c. 1074, § 418 [b, c].
—— *to subpœna witness to compel attendance in court of record, see* "Witnesses," I.
—— *to take affidavits, see* "Affidavits," vol. 2, cc. 17-20, §§ 22, 27 [b, d]; "Attachment," vol. 5, cc. 441, 442, § 227.
—— *to take depositions, see* "Depositions," vol. 16, cc. 1014-1018, §§ 72, 75.
Compelling making of affidavit, see "Affidavits," vol. 2, c. 13, § 17 [b-d].
Solemnizing marriages, see "Marriage."

1. IN GENERAL.

NATURE OF SUBJECT-MATTER IN GENERAL, § 77.
ACTIONS FOR PENALTIES, FINES, FORFEITURES, AND EXEMPLARY DAMAGES, § 78.
ACTIONS FOR TAXES, ASSESSMENTS, AND LICENSE TAXES, § 79.
ENFORCEMENT OF AWARDS, § 80.
ABATEMENT OF NUISANCES, § 81.
ACTIONS FOR MESNE PROFITS, § 82.

§ 77. Nature of subject-matter in general.

[a] (Ala. 1844) The jurisdiction of justices of the peace in libels by material men against coasting steamboats under the statutes of 1824 and 1841 is not taken away when such steamboats carry the United States mail.—Monroe v. Brady, 7 Ala. 59.

[b] (Ala. 1844) Under the statutes of 1824 and 1841, a justice of the peace has jurisdiction, in libel suits by material men, against a coasting steamboat to the amount of $50.—Monroe v. Brady, 7 Ala. 59.

[c] (Ala. 1852) A justice of the peace has no jurisdiction of a suit against the commissioners of the sixteenth section for a refusal on their part to pay over to a legal voter of the township his proportionate share of the school fund.—Jeffries v. Harbin, 20 Ala. 387.

[d] (Ala. 1852) Justices of the peace had no admiralty jurisdiction previous to the act of 1836, and, doubts having arisen whether that act gave them any such jurisdiction, the act of 1841 was passed, conferring on them the same jurisdiction, on claims less than $50, which had been granted to the circuit courts, where the demands arise from "furnishing materials, labor, or stores for the use of any steamboat or other water craft."—The Louisiana v. Fettyplace, 21 Ala. 286.

[e] (Cal. 1886) Under Const. art. 6, § 5, where the legality of a toll is in issue, in an action brought to recover a penalty for collecting an alleged excessive toll, a justice's court is without jurisdiction.—Culbertson v. Kinevan, 68 Cal. 490, 9 Pac. 455.

[f] (Ga. 1831) St. 1799, entitled "An act to regulate the pilotage of vessels to and from the several ports of this state," by section 5, which vests the commissioners of pilotage with power to decide, adjust, and regulate any damage, dispute, complaint, or difference arising against or between master or pilot for pilotage, or any other matter relating to the business of a pilot, does not deprive the justice's court of jurisdiction over a demand for pilotage where the same does not exceed $30.—Taylor v. Thomas, Dud. 59.

[g] (Kan. 1884) Justice's Code, § 185, providing that the provisions of the Civil Code, "which are in their nature applicable to the jurisdiction and proceeding before justices and in respect to which no special provision is made by statute, are applicable to proceedings before justices of the peace," does not make Civ. Code, §§ 230, 231, authorizing a creditor who suspects his debtor of fraudulently conveying property to bring suit before his claim is due, applicable to justices' courts.—Lyons v. Insley, 32 Kan. 174, 4 Pac. 150.

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[h] (Ky. 1815) A justice of the peace has jurisdiction to hear and determine a complaint for stopping a highway.—Walker v. Floyd, 7 Ky. (4 Bibb) 237.

[i] (Miss. 1872) A justice of the peace may determine a proceeding to contest the election of a county officer.—Sublett v. Bedwell, 47 Miss. 266, 12 Am. Rep. 338.

[j] (N. J. 1809) Under Act 1774, giving an action of debt for a legacy in the supreme court or any other court of record if the legacy amounts to £15, and in any court where the same may be cognizable if under that sum, the courts of justices of the peace (declared courts of record by an act of assembly) have jurisdiction to recover a legacy for $100.—Woodruff v. Woodruff, 3 N. J. Law (2 Penning.) 552.

[k] (Pa. 1823) A justice of the peace has no jurisdiction in an action of account rendered.—Wright v. Guy, 10 Serg. & R. 227.

[l] (Pa. 1843) Under Act March 16, 1816, declaring that the mayor and aldermen of Pittsburg shall have the same jurisdiction in all civil cases as justices of the peace of the county, etc., aldermen of the city of Pittsburg have jurisdiction to hear and determine the rights and liabilities of the townships of Alleghany county respecting the support of paupers.—Overseers of Poor of St. Clair Tp. v. Overseers of Poor of Moon Tp., 6 Watts & S. 522.

[m] (Pa. 1873) Magistrates have no jurisdiction in an action brought by a witness for his fees in a criminal case.—Zink v. County, 1 Leg. Chron. 191.

[n] (Tex. 1896) The failure to prove a claim against a county for a bounty on wolf scalps before the commissioners' court, as required by statute, does not affect the jurisdiction of a justice of the peace to entertain an action thereon.—Dimmit County v. Salmon (Civ. App.) 35 S. W. 752.

§ 78. Actions for penalties, fines, forfeitures, and exemplary damages.

Amount or value as determining jurisdiction, see post, §§ 150 [d, i, s, t], 158 [g].

Constitutionality of statute conferring jurisdiction, see ante, § 72 [k, mm].

Exclusive or concurrent jurisdiction, see ante, § 74 [d].

Involving title to land, see post, §§ 84 [m], 92 [b, c, g–i].

—— *to realty, see* ante, § 92 [b, c, g–i].

Involving legality of a toll, see ante, § 77 [e].

[a] A justice of the peace has jurisdiction of an action of debt for the escape of a prisoner against the sheriff.

—(N. Y. 1812) Jansen v. Stoutenbergh, 9 Johns. 369;

(Pa. 1806) Mulliken v. Rolph, 1 Browne, 30.

CONTRA, see

(Pa. 1825) Schaffer v. McNamee, 13 Serg. & R. 44.

[b] (U. S. 1833) A justice of the peace for the county of Washington, D. C., has jurisdiction of suits for penalties under the by-laws of the corporation of Washington, though the amount of the penalty be discretionary within certain limits.—Washington v. Eaton, Fed. Cas. No. 17,228 [4 Cranch, C. C. 352].

[c] (U. S. 1835) Fines, penalties, and forfeitures, under by-laws of the corporation of Washington, not exceeding $50, are recoverable before a justice of the peace.—Ex parte Reed, Fed. Cas. No. 11,634 [4 Cranch, C. C. 582].

[d] (U. S. 1836) A justice of the peace in Washington, D. C., has jurisdiction of penalties under by-laws, not exceeding $50.—Hall v. Washington, Fed. Cas. No. 5,953 [4 Cranch, C. C. 722].

[e] (Ala. 1830) A justice of the peace may give judgment in debt for penalty of $20, under the act of 1811, for marking the hogs of another without his consent; and it is no objection to his jurisdiction that his court is not provided with a jury, the offense being merely penal, and not criminal.—Reagh v. Spann, 3 Stew. 100.

[f] (Ark. 1886) Under Const. 1874, art. 7, § 40, which restricts the civil jurisdiction of justices to actions arising on contract, actions of replevin, and actions for injuries to personal property, a justice has no jurisdiction over an action for the recovery of a statutory penalty.—Baltimore & O. Tel. Co. v. Lovejoy, 48 Ark. 301, 3 S. W. 183.

[g] (Ark. 1894) Act March 25, 1889, § 1, which provides that if the wages of a discharged employé be not paid to him on the day of his discharge, "then, as a penalty for nonpayment," the wages of the employé shall continue at the same rate until paid, was intended to compensate the employé for the delay, and to punish his employer for failure to pay; and hence, though expressly termed a penalty, the additional compensation is exemplary damages, within the decisions that a justice of the peace has jurisdiction of actions for exemplary damages, but not for statutory penalties.—Leep v. St. Louis, I. M. & S. Ry. Co., 58 Ark. 407, 25 S. W. 75, 41 Am. St. Rep. 109, 23 L. R. A. 264.

[h] (Cal. 1889) A penalty imposed by statute for transacting an insurance business without obtaining a certificate of authority to do so from the insurance commissioner is recoverable before a justice, under Code Civ. Proc. § 112, giving justices jurisdiction of actions for penalties less than $300, given by statute or by municipal ordinance, where no issue is made as to the legality of a "municipal fine," tax, assessment, or toll, as such a penalty does not come within the exception mentioned; and the jurisdiction thus given is authorized by Const. art. 6, § 11, limiting powers of justices to cases not within the jurisdiction of courts of record.—In re Thomas, 80 Cal. 40, 22 Pac. 80.

[hh] (Ill. 1847) A supervisor may institute proceedings to recover the penalties for obstructing roads, given by the road law of 1841, before a justice of the peace.—Ferris v. Ward, 9 Ill. (4 Gilman) 499.

[i] (Ill. 1857) Act June 22, 1852, authorizes a qui tam action before a justice of the peace to recover the penalty for the obstruction of a public road imposed by Rev. St. c. 93, § 16, which imposes one penalty for the obstruction of a public road and a separate one for continuing the obstruction. *Held*, that a qui tam action will not lie before a justice of the peace to recover the penalty imposed for continuing an obstruction.—Crosby v. Gipps, 19 Ill. (9 Peck) 309.

[j] (Ill. 1859) A justice of the peace has not jurisdiction of an action to recover a penalty for continuing an obstruction to a highway.—Bickerdike v. Dean, 21 Ill. (11 Peck) 199.

[k] (Ill. 1865) The ordinance of the city of Chicago of August 24, 1863, imposing a penalty of $5 per barrel for selling flour without an inspection thereof, being repugnant to the charter of the city, so far as it operates to impose a penalty beyond $100, a justice of the peace has jurisdiction under the ordinance of an action to collect such penalty, as it can never exceed said sum.—City of Chicago v. Quimby, 38 Ill. 274.

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[l] (Ill. 1870) An action to recover a penalty of $200 imposed upon railroad companies for not stopping their trains before crossing another railroad upon the same level, under Rev. St. 1874, c. 114, §§ 50, 51, may be brought before a justice of the peace.—Indianapolis & St. L. R. Co. v. People, 91 Ill. 452.

[m] (Ind. 1883) Under Rev. St. 1881, § 1433, limiting the jurisdiction of a justice in civil actions to cases where the amount of recovery does not exceed $200, a justice has jurisdiction of an action to recover a penalty of $100 for violating a town ordinance, since such action is a civil one.—Clevenger v. Town of Rushville, 90 Ind. 258.

[n] (Miss. 1892) The jurisdiction which a justice of the peace has, under Code 1871, § 1302, of suits for the recovery of "debts or damages or personal property" embraces every subject of recovery other than realty, including suits "founded on any penal statute," though the express mention made of such suits in the Code of 1857 is omitted.—Western Union Tel. Co. v. Sullivan, 70 Miss. 447, 12 South. 460.

[o] (Mo. 1841) A justice of the peace has jurisdiction of a suit to recover a fine for the violation of a by-law of a private corporation.—O'Brien v. Union Fire Co., 7 Mo. 38.

[p] (N. Y. 1842) Under the charter of Utica, providing that "penalties imposed by the common council may be recovered in an action of debt in any court having cognizance," the suit may be brought in a justice's court.—Walker v. Cruikshank, 2 Hill, 296.

[q] (N. Y. 1885) The jurisdiction of a justice, defined as extending to an action for a penalty, embraces an action for several penalties, if the amount claimed in the aggregate does not exceed the jurisdictional amount.—Prussia v. Guenther, 16 Abb. N. C. 230.

[r] (N. C. 1881) An action to recover the penalty imposed on a railroad company for failure to forward freight by Laws 1874–75, c. 240, is an action ex contractu; and when the sum demanded does not exceed $200 a justice of the peace has jurisdiction.—Katzenstein v. Raleigh & G. R. Co., 84 N. C. 688.

[s] (Pa. 1825) A justice of the peace has no jurisdiction of an action for the penalty imposed by the act of April 13, 1791 (Laws 7th Sess. p. 32), for not entering satisfaction of a judgment.—Zeigler v. Gram, 13 Serg. & R. 102.

[t] (Pa. 1833) A justice of the peace of the Northern Liberties has jurisdiction of an action, instituted under an ordinance of said district, to recover a penalty imposed on any person who should place or cause to be placed on the foot pavement any package, etc., and should suffer it to remain for a longer time than two hours.—Ellmore v. Hoffman, 2 Ashm. 159.

[u] (Pa. 1833) Act May 4, 1832, did not devest a justice of the Northern Liberties of jurisdiction of an action instituted under the act of 1819 to recover a penalty imposed by an ordinance.—Ellmore v. Hoffman, 2 Ashm. 159.

[v] (Pa. 1838) A justice has jurisdiction in an action to recover the penalty for taking illegal fees.—McConahy v. Courtney, 7 Watts, 491.

[vv] (Pa. 1844) A justice has jurisdiction of a suit for the penalty for exposing to sale foreign goods.—Commonwealth v. Winchester, 4 Pa. Law J. 371.

[w] (Pa. 1881) Under Gen. Act June 26, 1849, § 19, a justice has jurisdiction of an action of debt for statutory penalty against a person who drives through the gate of a turnpike company without paying the toll demanded.—Turnpike Co. v. Singer, 13 Lanc. Bar, 107.

[x] (S. C. 1822) The penalty imposed by Act 1740 on a free negro who harbors a slave cannot be recovered before a justice of the peace and two freeholders, since the act of 1791, which confines their jurisdiction to cases of debt and contract.—State v. Marshall, 2 McCord, 63.

[y] (S. C. 1833) Where a debt is created by a penal statute, and no mode of recovery is prescribed, the proceeding must be in the superior courts of law, and not in the justices' courts.—Anderson v. Fowler, 1 Hill, Law, 226.

[yy] (Tenn. 1857) A justice of the peace has no jurisdiction of a suit to recover the penalty given by Acts 1782, c. 29, § 1, for unlawfully firing wood, since jurisdiction is not conferred on them by the act.—Duncan v. Maxey, 37 Tenn. (5 Sneed) 114.

[z] (Tenn. 1881) A justice of the peace has no jurisdiction of a suit for the recovery of the forfeiture imposed by Act March 23, 1875, on one guilty of turbulent conduct within or about a public house or theater. Such suit should be brought in the circuit court.—Stover v. Lasater, 76 Tenn. (8 Lea) 631.

[zz] (Va. 1889) Code, § 3799, provides that "if a person on a Sabbath day be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except household or other work of necessity or charity, he shall forfeit two dollars for each offense." Section 2939 provides that any claim to a fine not exceeding $20, which would be recoverable by an action at law, shall be cognizable by a justice; the proceeding to be by civil warrant, as in the case of other small claims therein enumerated. Section 717 provides that, "when any fine is imposed by a justice, he may commit the defendant to jail until the fine and costs are paid, or until the costs are paid, where there is no fine, but he shall not issue any execution therefor." *Held*, that the fine prescribed for violation of the Sabbath is recoverable before a justice, and by a civil warrant.—Ex parte Marx, 86 Va. 40, 9 S. E. 475.

§ 79. Actions for taxes, assessments, and license taxes.

[a] (Cal. 1864) When the illegality of a tax is set up in the answer to an action to recover it, brought before a justice of the peace, his jurisdiction is ousted.—People v. Mier, 24 Cal. 61.

[b] (Cal. 1886) A justice of the peace has jurisdiction of an action to recover a sum of money less in amount than $300, due on an assessment for street work in a municipality, unless the legality of the assessment is questioned, when the superior court acquires judicial jurisdiction.—Williams v. Mecartney, 69 Cal. 556, 11 Pac. 186.

[c] (Cal. 1888) Under Code Civ. Proc. § 838, providing that in actions in justice's court, if it appears from defendant's answer, verified by his oath, that the determination of the action will necessarily involve the legality of any tax, the justice must suspend all further proceedings, and certify the pleadings to the clerk of the superior court, the justice, in an action to recover a license tax, properly certified the proceedings, where the answer alleged that there was no law authorizing the ordinance imposing the tax; that such ordinance had been repealed; that the county had no power to assess the tax; and that the tax was unauthorized by law, and contrary to the federal constitution.—Monterey County v. Abbott, 77 Cal. 541, 18 Pac. 113, 20 Pac. 73.

[d] (Mo. 1882) Act 1877, § 5, as amended by Act 1879, § 4, giving justices of the peace jurisdiction of suits to enforce payment of delinquent taxes, repealed the charter of the city of Hannibal so far as such charter conferred ex-

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clusive jurisdiction of such suits upon the city recorder.—State v. Van Every, 75 Mo. 530.

[e] (Mo. 1885) Justices of the peace have no jurisdiction of suits to enforce the state's lien for back taxes.—State v. Hopkins, 87 Mo. 519.

[f] (Mo. 1894) Kansas City Charter 1889, art. 9, § 18, providing that, "when the amount due on any tax bill shall not exceed $250, suit may be brought thereon * * * before any justice of the peace of the city," does not confine the jurisdiction of such justice to special tax bills issued by the board of public works, but includes any special tax bill issued under either the old or the new charter.—Kansas City v. Summerwell, 58 Mo. App. 246.

[g] (Mo. 1894) A justice of the peace has no statutory jurisdiction in an action to enforce a tax bill lien for the expense of constructing a sewer.—Kansas City v. Summerwell, 58 Mo. App. 246.

[h] (Mo. 1894) The jurisdiction expressly conferred on justices of the peace by Kansas City Charter 1889, art. 9, § 18, over the subject-matter of tax bills, where the amount does not exceed $250 for expenses of a sewer, may be exercised in an action commenced since the adoption of such charter.—Kansas City v. Summerwell, 58 Mo. App. 246.

[i] (Mo. 1894) Under the Kansas City charter of 1889, a justice of the peace has jurisdiction of cases founded on a special tax bill for street and sewer improvements issued prior to the adoption of such charter.—Kansas City ex rel. Pryor v. Winner, 58 Mo. App. 299.

[j] (Pa. 1864) A justice of the peace has jurisdiction of an action brought in the name of the county to recover from a purchaser of unseated lands at a treasurer's sale for taxes the amount of the bid, or such part as is necessary to pay taxes and costs; Act March 13, 1815, expressly providing for a suit in the name of the county "in such courts as debts of equal amount are by law recoverable."—Fulton County v. Tate, 47 Pa. (11 Wright) 532.

[k] (Pa. 1882) A justice of the peace has no jurisdiction of actions for the recovery of claims against property owners arising out of paving by borough authorities.—Dougherty v. Borough, 1 Lehigh Val. Law Rep. 11.

[l] (Pa. 1887) A justice of the peace has no jurisdiction of an action for the recovery of a claim against a property owner arising out of paving by municipal authority, though the general ordinance directs that such suits be brought before magistrates.—Borough v. Johns, 4 Pa. Co. Ct. R. 522.

[m] (Tex. 1846) Under Acts 1846, p. 298, §§ 13, 28, giving justices jurisdiction of actions on written instruments, and replevin under $100, and for torts and trespasses under $100, a justice has no jurisdiction for the recovery of sums due for license tax.—Aulanier v. Governor, 1 Tex. 653.

§ 80. Enforcement of awards.

Jurisdiction by consent, see post, § 217 [e].

Reduction to writing by justice of agreement to refer matters in controversy to third persons as common-law submission, see "Arbitration and Award," vol. 4, c. 10, § 2 [y].

Submission of matters in controversy to justice as arbitration, see "Arbitration and Award," vol. 4, c. 10, § 2 [r].

[a] A justice of the peace has no authority to enter judgment and issue execution on an award.
—(Mass. 1808) Worthen v. Stevens, 4 Mass. 448; (1812) Kingsley v. Bill, 9 Mass. 198; (Ohio, 1832) Hubbel v. Baldwin, Wright, 86.

[b] (Ill. 1855) A justice of the peace can render judgment on an award only in cases pending before him, on a reference by the parties.—Weinz v. Dopler, 17 Ill. (7 Peck) 111.

[c] (Ind. 1872) A justice of the peace has no jurisdiction to render judgment on an award.—Richards v. Reed, 39 Ind. 330.

[d] (Pa. 1791) Justices of the peace have jurisdiction when damages occasioned by the biting of a dog have been ascertained by reference to arbitrators, and may enforce the award.—Weidimor v. Drissel, 1 Yeates, 77.

[e] (Pa. 1847) An action on award may be brought before a justice of the peace.—Scott v. Barnes, 7 Pa. (7 Barr) 134.

[f] (Pa. 1890) Where arbitrators annulled a lease, and directed the vacation and surrender of certain premises, and the payment of a sum of money by one of the parties to the other, a justice of the peace has no jurisdiction to enforce the money part of the award, being without jurisdiction to enforce the other provisions thereof.—Yates v. Demmer (Com. Pl.) 9 Pa. Co. Ct. R. 80.

§ 81. Abatement of nuisances.

Actions to abate liquor nuisance, see "Intoxicating Liquors," vol. 29, c. 1316, § 406 [b].

[a] (Ga. 1869) Justices of the peace for the county have no jurisdiction to abate a nuisance in a town or city which is under the government of a mayor, etc. The power to abate such nuisance is in the city government alone.—South Carolina R. Co. v. Ells, 40 Ga. 87.

[b] (Ga. 1873) Justices of the peace have not jurisdiction, under the provisions of section 4023, Code, to abate as a nuisance a bridge constructed by a railroad company over a navigable stream.—Macon & B. R. Co. v. State, 50 Ga. 156.

[c] (Ga. 1878) The jurisdiction of justices of the peace, under Code, § 4094, to abate nuisances, extends to all such as are detrimental to the citizens in general, other than as specially excepted, and includes the case of a dam, causing overflow and destruction of rice crops.—Wetter v. Campbell, 60 Ga. 266.

[d] (Ga. 1878) Justices of the peace have jurisdiction to abate the stopping of a way, claimed as an easement, by piling up dirt and building fences.—Hart v. Taylor, 61 Ga. 156.

§ 82. Actions for mesne profits.

[a] (N. J. 1816) A justice cannot try trespass for mesne profits after a recovery in ejectment.—Pickle v. Covenhoven, 4 N. J. Law (1 Southard) 319.

2. ACTIONS INVOLVING TITLE TO REAL PROPERTY.

IN GENERAL, § 83.
PARTICULAR ACTIONS AND PROCEEDINGS, § 84.
—— ACTIONS FOR TRESPASS, § 85.
—— ACTIONS FOR CUTTING OR CARRYING AWAY FIXTURES OR PERSONAL PROPERTY FROM LAND, § 86.
—— ACTIONS FOR FLOWAGE, § 87.
—— ACTIONS FOR PURCHASE PRICE OF LAND OR EASEMENTS, § 88.
—— ACTIONS AND PROCEEDINGS TO RECOVER RENT OR FOR USE AND OCCUPATION, § 89.
—— ACTIONS AND PROCEEDINGS TO RECOVER POSSESSION OF LAND OR BUILDINGS IN GENERAL, § 90.
—— FORCIBLE DETAINER AND RECOVERY OF POSSESSION BY LANDLORD, § 91.

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— ACTIONS FOR OBSTRUCTING HIGHWAYS, WATER COURSES, AND EASEMENTS, § 92.
— ACTIONS FOR BREACH OF LAND CONTRACTS AND COVENANTS IN DEEDS, § 93.
— ACTIONS FOR DECEIT IN SALE OF LAND, § 94.
— ACTIONS BY VENDEE TO RECOVER PURCHASE PRICE OF LAND OR GROWING TIMBER, § 95.
— ACTIONS RESPECTING BOUNDARIES AND DIVISION FENCES, § 96.
TITLE ADMITTED OR NOT NECESSARILY INVOLVED, § 97.

Attachments on land in general, see post, § 177 [l, xx, zz].
Consent as conferring jurisdiction, see post, § 217 [p].
Constitutionality of law conferring jurisdiction notwithstanding title is involved, see ante, § 72 [vv, zz].
— *depriving justice of jurisdiction where title is involved, see* ante, § 72 [z].
Determination of question of jurisdiction, see post, §§ 222, 223.
Enforcement of liens on land in general, see post, § 185.
Real contracts in general, see post, § 99.
Removal of cause involving title to court of record, see post, §§ 243–245.
Waiver of objection that title is involved, see post, § 219.

§ 83. In general.

[a] A justice of the peace has no jurisdiction of a cause where the title to land is in dispute.
—(Mich. 1845) Stout v. Keyes, 2 Doug. 184, 43 Am. Dec. 465;
(N. J. 1793) Smith v. Layton, 1 N. J. Law (Coxe) 177; (1794) Harvey v. Drummond, Id. 217;
(N. Y. 1858) Fredonia & S. Plank Road Co. v. Wait, 27 Barb. 214;
(Pa. 1856) Rhoades v. Patrick, 27 Pa. (3 Casey) 323; (1872) Stevens v. Sarver, 29 Leg. Int. 46.

[b] A question as to a right of way involves title to real property, which a justice of the peace has no jurisdiction to try.
—(N. H. 1860) Bartlett v. Prescott, 41 N. H. 493;
(N. J. 1857) Osborne v. Butcher, 26 N. J. Law (2 Dutch.) 308;
(N. Y. 1864) Little v. Denn, 34 How. Prac. 68; (1867) Alleman v. Dey, 49 Barb. 641;
(Vt. 1847) Whitman v. Pownal, 19 Vt. 223;
(Wis. 1883) Lowitz v. Leverentz, 57 Wis. 596, 15 N. W. 842.

[c] (U. S. 1880) Where, in a civil suit before a justice of the peace of the territory of Idaho, it appears by defendant's answer, verified by his affidavit, that the question of title to real estate is necessarily involved, the justice should certify the case to the district court for trial.—Langford v. Monteith, 102 U. S. 145, 26 L. Ed. 53.

[d] (Ark. 1890) The question being whether a certain contract affecting lands is one of sale or lease, the status of the parties, not the title, is involved, and a justice has jurisdiction.—Quetermous v. Hatfield, 54 Ark. 16, 14 S. W. 1096.

[e] (Cal. 1869) Under that clause of the constitution which confers jurisdiction on justices of the peace in certain cases involving the "title or possession of real property," it is not enough to give jurisdiction that the possession is a fact in controversy or incidentally in question, but the right of possession must be involved in the action.—Pollock v. Cummings, 38 Cal. 683.

[f] (Conn. 1793) A justice of the peace cannot try a question of title to a highway.—Bundy v. Sabin, 2 Root, 54.

[g] (Conn. 1796) A justice of the peace has no more authority to judge of the plea of a title on demurrer than on the merits.—French v. Potter, 2 Root, 359.

[h] (Ga. 1891) An issue as to whether land is exempt from levy and sale under an execution as a homestead does not bring the title of the land in question.—Moore v. O'Barr, 87 Ga. 205, 13 S. E. 464.

[i] (Ind. 1834) Whenever, in a suit commenced before a justice of the peace, it appears, from the pleadings, or evidence, or agreement of the parties, that the title to real estate will come in question, the suit must be dismissed for want of jurisdiction.—Parker v. Bussell, 3 Blackf. 411; Smith v. Harris, Id. 416.

[j] (Kan. 1860) Under section 27 of the organic act of the territory of Kansas, providing that justices of the peace shall not have jurisdiction of any matter in controversy, when the title or boundaries of land may be in dispute, so soon as the title or bonndaries to lands come in dispute in any case before a justice of the peace, either on the pleadings or in the evidence, his jurisdiction ceases, and he should dismiss the case.—Burt v. Reyburn, McCahon, 97.

[k] (Mo. 1893) Where it appears that the question decisive of the case is whether or not plaintiff has title to real estate, the justice has no jurisdiction, notwithstanding the plea and affidavit setting up that title to real estate is involved is informal, and fails to comply with the statute.—State ex rel. Huston v. Ganzhorn, 52 Mo. App. 220.

[l] (Mo. 1894) In an action in justice's court, where defendant's statement shows that the title to real estate is involved, it is the duty of the justice to certify the case to the circuit court.—State ex rel. Huston v. Ganzhorn, 56 Mo. App. 519.

[m] (N. J. 1837) A right of way is a hereditament, and a justice of the peace has not jurisdiction of an action involving such right.—Randolph v. Montfort, 16 N. J. Law (1 Har.) 226.

[n] (N. Y. 1813) An agreement to remove a fence, and open a road to its original width, has no reference to the title to land, so as to take it out of the jurisdiction of a justice of the peace.—Storms v. Snyder, 10 Johns. 109.

[o] (N. Y. 1829) A plea of title may be put in, in a justice's court, under St. 1824, c. 283, in any action wherein the title to land in any wise comes in question.—People v. Onondaga Common Pleas, 2 Wend. 263.

[p] (N. Y.) A justice may try a question of actual possession of land.—(1844) Ehle v. Quackenboss, 6 Hill, 537; (1858) Fredonia & S. Plank Road Co. v. Wait, 27 Barb. 214.

[q] (N. Y. 1857) Where it becomes necessary to establish title in order to recover before a justice of the peace, the objection that the title to land comes in question may be taken by defendant, and it is the duty of the justice, in whatever stage of the trial this shall appear, to dismiss the action.—Main v. Cooper, 26 Barb. 468, affirmed (1862) 25 N. Y. 180.

[r] (N. Y. 1864) A justice of the peace has jurisdiction of a cause, though the plaintiff introduces in evidence a deed of real estate to show the performance by him of a condition precedent to the defendant's liability.—Nichols v. Bain, 42 Barb. 353, 27 How. Prac. 286.

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[s] (N. Y. 1866) The question where a stream ought to run does not necessarily involve title. —Bowyer v. Schofield, 1 Abb. Dec. 177.

[t] (N. C. 1880) The question of title, which arrests further proceedings before the justice, must be one between the original parties to the action; and jurisdiction once acquired cannot be devested by the intervention of a stranger to the suit, asserting a paramount title in himself.—Davis v. Davis, 83 N. C. 71.

[u] (Ohio, 1844) Under Swan's St. p. 525, where the plaintiff, in order to sustain his case, is compelled in the first instance to prove certain facts or to disprove them, and those facts, or either of them, is title to lands or tenements, the jurisdiction of a justice of the peace is excluded, except in trespass; but, where it is unnecessary for the plaintiff to introduce such proof, the defendant cannot, by its introduction, take away the jurisdiction.—Bridgmans v. Wells, 13 Ohio, 43.

[v] (Or. 1884) Where it appears by defense or plea in a justice's court that the title to real estate is involved, the jurisdiction of that court is ousted.—Sweek v. Galbreath, 11 Or. 516, 6 Pac. 220.

[vv] (Pa. 1832) Justices of the peace have no jurisdiction of contracts that concern the realty, where title to land may come in question.—Sechrist v. Connellee, 3 Pen. & W. 388.

[w] (Pa. 1850) An agreement to purchase a judgment which was a lien on real estate is not within Act March 20, 1810, § 1, excluding from the jurisdiction of justices of the peace "cases of real contract, where the title to lands or tenements may come in question."—Helfenstein v. Hurst, 15 Pa. (3 Harris) 358.

[ww] (Pa. 1882) The fact that the title to real estate appears on the hearing to be involved in an action before a justice of the peace is not sufficient to oust the jurisdiction of the justice.—Quay v. Hartman, 1 Chest. Co. Rep. 543.

[x] (Vt. 1848) If a plaintiff, in order to sustain his action, is obliged to rely on and prove a possessory title, even, to premises described in his declaration, a justice of the peace has no jurisdiction of the suit.—Haven v. Needham, 20 Vt. 183.

[xx] (Vt. 1868) A justice of the peace has no jurisdiction, if, on a traverse of all the material facts alleged in the declaration, the title of land would be involved in the issue.—Flannery v. Hinkson, 40 Vt. 485.

[y] (Vt. 1884) Where the declaration is of such a character that under the general issue, or any other plea that puts plaintiff to the necessity of proving his declaration, he is bound either to prove or to disprove title to land, the justice has no jurisdiction.—French v. Holt, 57 Vt. 187.

[yy] (Wis. 1859) The provisions of chapter 88, Rev. St., restricting the jurisdiction of justices of the peace where the title to lands comes in question, do not apply to the cases provided for in chapter 117.—Savage v. Carney, 8 Wis. 162.

[z] (Wis. 1860) A plea of pre-emption right under the swamp act ousts a justice of his jurisdiction, if the defendant also files the bond required by the statute.—Manny v. Smith, 10 Wis. 509.

[zz] (Wis.) The question of user of the locus in quo as a highway is a question involving an issue of title to land, over which a justice has no jurisdiction.—(1868) Barteau v. City of Appleton, 23 Wis. 414; (1869) Ashbough v. Walter, 24 Wis. 466.

§ 84. Particular actions and proceedings.

Enforcement of liens on land in general, see post, § 185.

—— *attachments on land in general, see* post, § 177 [l, xx, zz].

[a] (Ala. 1831) Where an execution issued by a justice of the peace is levied on real estate claimed by a third person, the justice cannot award a venire to try title; the circuit court having exclusive jurisdiction in such case.—McDaniel v. Moody, 3 Stew. 314.

[b] (Ark. 1883) A justice of the peace has no jurisdiction to try the title to land, and therefore should refuse an interplea for land on which an attachment from his court has been levied.—Cunningham v. Holland, 40 Ark. 556.

[c] (Cal. 1885) Though a justice of the peace has no jurisdiction over a suit involving a question of title to land, he has jurisdiction of a suit to recover a deposit made by a vendor under a contract to purchase, if the title was good, the question of title being incidental to the right to recover back the deposit.—Schroeder v. Wittram, 66 Cal. 636, 6 Pac. 737.

[d] (Cal. 1894) An action to recover money paid to defendant under a contract to locate plaintiff on vacant government land, in which the issue is whether the land on which plaintiff was located was in fact vacant, is an action involving the possession of real estate, of which, by Code Civ. Proc. § 838, a justice of the peace has no jurisdiction.—Hart v. Carnall-Hopkins Co., 101 Cal. 160, 35 Pac. 638.

[e] (Ga. 1852) It is not competent for a justice's court to reopen a fi. fa., which has been entered satisfied by the sale of land, on the ground that the entry was a nullity; title to the property not having passed to the purchaser, and adjudication on questions of title to real estate being restricted exclusively by the constitution of the state to the superior courts.—Dougherty v. Marsh, 11 Ga. 277.

[f] (Ind. 1866) A proceeding before a justice of the peace for an assessment of damages, under the act authorizing the construction of plank, macadamized, and gravel roads, does not involve the title to real estate.—Norristown, H. & St. L. Turnpike Co. v. Burket, 26 Ind. 53.

[g] (Ohio, 1871) Justices of the peace have no jurisdiction over actions against an owner or lessee for permitting sale of intoxicants thereon, against 67 Ohio Laws, p. 102. The title to real estate is there drawn in question. —Bowers v. Pomeroy, 21 Ohio St. 184.

[h] (Pa. 1864) A justice of the peace being expressly granted jurisdiction of an action brought under Act March 13, 1815, in the name of the county, to recover from the purchaser of unseated lands at a treasurer's sale for taxes the amount of the bid, or such part as is necessary to pay taxes and costs, it matters not whether the title to the land sold can come in question or not.—Fulton County v. Tate, 47 Pa. (11 Wright) 532.

[i] (Tex. 1889) A suit to ascertain the amount justly due, for which there is a lien on land, and to reform the contract as to the amount secured by the lien, does not involve title, and a justice has jurisdiction.—Crawford v. Sandridge, 75 Tex. 383, 12 S. W. 853.

[j] (Vt. 1847) A justice of the peace has jurisdiction of case against a town to recover for injuries sustained by reason of the insufficiency of a highway which the town was bound to maintain, unless defendants interpose such a plea as directly puts in issue the right of way;

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title to realty not being necessarily involved.—Whitman v. Pownal, 19 Vt. 223.

[k] (Vt. 1854) In an action of account between tenants in common of land, a justice of the peace has no jurisdiction, as the defendant may plead in bar that he was never bailiff and receiver of the plaintiff, and this puts the plaintiff on the proof of his whole declaration, which would bring in question the title to land.—Thayer v. Montgomery, 26 Vt. 491.

[l] (Vt. 1868) A justice of the peace has jurisdiction of an action for breach of covenant, though the declaration alleges that the giving of a quitclaim deed by plaintiff was the consideration. It does not import "title to land" in either party.—Judevine v. Holton, 41 Vt. 351.

[m] (Vt. 1879) In an action brought under Gen. St. c. 24, § 7, to recover a penalty for tearing down gates and bars on a pent road, the necessity which the plaintiff is under of proving that he is interested in the lands so far involves the title to the land as to take the case beyond the jurisdiction of a justice of the peace.—French v. Holt, 51 Vt. 544.

[n] (Wis. 1863) Rev. St. c. 15, § 3, which confers on towns the authority to make by-laws to restrain animals from running at large, provides the means for their enforcement by the imposition of penalties on the owners. In an action to recover possession of a hog, the answer alleged that the animal was found running at large in the highway, contrary to the by-laws of the town, and had been taken up and sold under such by-laws, and the defendant became the purchaser. *Held*, that as the alleged sale was void, because unauthorized, the answer set up no defense, and the question of title to the land alleged to be a highway was not in issue.—Miles v. Chamberlain, 17 Wis. 446.

§ 85. —— Actions for trespass.

See post, § 128.

[a] Where the plaintiff can maintain his right to sue in trespass by proof of actual possession, the action is cognizable in a justice's court; but if the possession is merely constructive, and can be shown only by proof of title, a justice has no jurisdiction.

—(N. J. 1829) Gregory v. Kanouse, 11 N. J. Law (6 Halst.) 62; (1837) Hill v. Carter, 16 N. J. Law (1 Har.) 87; (1847) Campfield v. Johnson, 21 N. J. Law (1 Zab.) 83; (1857) Osborne v. Butcher, 26 N. J. Law (2 Dutch.) 308; (1869) Dickerson v. Wadsworth, 33 N. J. Law (4 Vroom) 357; (1879) Messler v. Fleming, 41 N. J. Law (12 Vroom) 108; (1879) Jeffrey v. Owen, 41 N. J. Law (12 Vroom) 260; (1887) Bloom v. Stenner, 50 N. J. Law (21 Vroom) 59, 11 Atl. 131; (1889) Ely v. Schanck, 52 N. J. Law (23 Vroom) 119, 18 Atl. 692; (1890) Schanck v. Ely (Err. & App.) 21 Atl. 783;

(Or. 1885) Sweek v. Galbreath, 5 Pac. 749.

[b] In trespass before a justice of the peace, he may be ousted of jurisdiction by a plea of title.

—(Mass. 1835) Kelley v. Taylor, 34 Mass. (17 Pick.) 218;

(N. J. 1808) Ming v. Compton, 2 N. J. Law (1 Penning.) 345.

[c] (Colo. 1895) Where one of two adjoining tenants, each, respectively, in possession of land and buildings thereon up to a dividing fence, removes the fence onto the land of the other, an action by the other for damages for the taking of the lands and buildings thereon is not an action in which title or boundaries of lands are in dispute, of which a justice could not have jurisdiction, there being no dispute as to where the fence was, and it makes no difference that plaintiff introduced evidence to show that the true line was where the fence had stood.—Smith v. Schlink, 6 Colo. App. 228, 40 Pac. 478.

[d] (Conn. 1811) In trespass for disturbing the plaintiff in the use of his fisheries, the defendants justified under plea of title, wherein they stated that the locus in quo was a portion of the river used from time immemorial as a common fishing place, and by the defendants, in common with others, for more than 15 years, and that the acts complained of were done in the exercise of such common right. *Held*, that a title paramount to that of the plaintiff, within the meaning of the statute (title 165, c. 1, § 18), was alleged, and that the cause was properly removed to the county court.—Lay v. King, 5 Day, 72.

[e] (Del. 1865) An action against an adjacent lot owner for bricking into a party wall previously erected by the plaintiff *held* to pertain to the realty, and not to be within the jurisdiction of a justice of the peace.—Hawkins v. Mendenhall, 3 Houst. 216.

[f] (Ill. 1892) A justice of the peace may try a case for injury to real property, though the defense set up is that plaintiff has no interest therein.—Pitts v. Looby, 46 Ill. App. 54, affirmed Pitts v. Looby (1892) 32 N. E. 519.

[g] (Ind. 1860) The fact that, in a suit for trespass to land, defendant under a general denial gave evidence to show title in a third person, but did not show that he claimed under such person, does not bring in issue the title to real estate.—Beach v. Livergood, 15 Ind. 496.

[h] (Ind. 1881) In an action for trespass to real estate, a sworn answer that defendant is holding under a lease does not put in issue the question of title, so as to oust the jurisdiction of a justice of the peace.—Melloh v. Demott, 79 Ind. 502.

[i] (Kan. 1874) A bill of particulars stated that the defendant set fire to prairie grass, and that the fire continued to burn and spread until it reached and burned the hay, posts, and rails, and growing peach trees of the defendant, and that such burning occasioned great damage to the defendant, to wit, the amount of $161.40, the value thereof. *Held*, that the justice of the peace erred in dismissing the action on the ground that the cause of action stated in the bill of particulars was one for trespass on real estate, and beyond his jurisdiction.—Loring v. Rockwood, 13 Kan. 178.

[j] (Me. 1825) In trespass quare clausum fregit before a justice of the peace, defendant's plea of title to the soil and freehold, without any replication from the plaintiff, puts an end to the magistrate's jurisdiction over the cause.—Low v. Ross, 3 Me. (3 Greenl.) 256.

[k] (Mass. 1806) Where, in trespass quare clausum before a justice of the peace, defendant pleads in bar that he entered his own close adjoining the locus in quo, and there committed the act complained of, but does not plead a title to the locus in quo in himself, the justice may proceed to try the action.—Wood v. Prescott, 2 Mass. 174.

[l] (Mass.) Where, in trespass qu. cl., defendant pleads that the locus in quo is a public highway, a justice cannot proceed to try the cause, but must order the defendant to recognize to enter the action at the next court of common pleas, because an easement for the public in the plaintiff's land is a real franchise holden by the commonwealth, which greatly affects the plaintiff's interest in the close.—

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(1809) Spear v. Bicknell, 5 Mass. 125; (1811) Strout v. Berry, 7 Mass. 385.

[m] (Mich. 1888) In an action for trespass to land, when plaintiff's evidence shows that the locus in quo is a public highway, and that he was not in actual possession, and he testifies that he owns the adjoining land, and his title to the locus in quo is not admitted, the case is within How. St. § 6895, providing that "if it appears on the trial, from the plaintiff's own showing, that the title to lands is in question, which title shall not be admitted by the defendant, the justice shall, without further proceeding, certify the cause to the circuit court."—Ostrom v. Potter, 71 Mich. 44, 38 N. W. 670.

[n] (Mich. 1894) An action of trespass for disturbing the peaceable possession of land does not involve a question of title.—Dolahanty v. Lucey, 101 Mich. 113, 59 N. W. 415.

[o] (Mich. 1895) Where the declaration in trespass q. c. f. before a justice states that defendant entered "the lands and premises of the said plaintiff, situated," etc., and plaintiff, not having been in actual possession, seeks to prove title in himself, the issue of title is involved, and the justice cannot refuse to certify the case to the circuit court.—Orris v. Kempton, 105 Mich. 229, 63 N. W. 68.

[p] (Nev. 1875) Justices of the peace have jurisdiction of actions for malicious injury to real estate, where the defendant claims an adverse title to the property.—State v. Rising, 10 Nev. 97.

[q] (N. H. 1834) Act July 2, 1831, to abolish special pleading, was not intended to enlarge the jurisdiction of justices of the peace, so as to authorize them to try actions of trespass quare clausum fregit, where the defendant sets up title in opposition to the title of the plaintiff. —Flagg v. Gotham, 7 N. H. 266.

[r] (N. J. 1794) In an action of trespass, a plea of liberum tenementum puts an end to the power of the justice.—Bispham v. Inskeep, 1 N. J. Law (Coxe) 231.

[s] (N. J. 1808) In an action of trespass for pulling down a house, a plea of title ousts the justice of jurisdiction.—Vanmater v. Real, 3 N. J. Law (2 Penning.) 64.

[ss] (N. J. 1818) A justice of the peace cannot try an action of trespass for a permanent injury to the freehold, since the title is involved.—Blackwell v. Leslie, 4 N. J. Law (1 Southard) 112.

[t] (N. J. 1860) In trespass, a plea of public highway does not raise a question of title, so as to deprive the justice of jurisdiction.—Chambers v. Wambough, 28 N. J. Law (4 Dutch.) 530.

[tt] (N. J. 1862) In trespass before a justice of the peace, a plea that there was a road across the locus in quo, to which the defendant had a title in common with all other citizens of the state, is not a plea of title, so that, on defendant's giving a title bond, the plaintiff can maintain an action in a court of record.—Yawger v. Manning, 30 N. J. Law (1 Vroom) 182.

[u] (N. J. 1880) In trespass, proof of the dedication of the locus in quo as a highway, by means of a transfer of title, from which the inference of dedication is sought to be drawn, involves a question of title to lands, etc., not capable of being tried in the court for the trial of small causes.—Vanatta v. Jones, 42 N. J. Law (13 Vroom) 561.

[uu] (N. J. 1885) In trespass cases in justices' courts, if the defendant offers not to prove title in himself, but to prove lack of title in plaintiff, the action, under section 25 of the small cause act, should be dismissed.—Edgar v. Anness, 47 N. J. Law (18 Vroom) 465, 2 Atl. 246.

[v] (N. J. 1885) In an action of trespass quare clausum fregit, brought in a justice's court, the evidence, from which constructive possession of lands was inferable, was such as ousted the court of jurisdiction, and a judgment of nonsuit was not erroneous.—Urian v. Dunn, 47 N. J. Law (18 Vroom) 565, 4 Atl. 650.

[vv] (N. J. 1886) In trespass quare clausum, before a justice, there was no evidence that plaintiff was in actual possession of the locus in quo, and the only evidence of possession was derived from a deed conveying the land to plaintiff, which she put in evidence. *Held*, that the title was involved, and the justice should have dismissed the suit for want of jurisdiction.—Hillman v. Stanger, 49 N. J. Law (20 Vroom) 191, 6 Atl. 434.

[w] (N. Y. 1831) In trespass in a justice's court, a plea of a right of way puts in question the title to lands, and deprives a justice of jurisdiction.—Striker v. Mott, 6 Wend. 465.

[ww] (N. Y.) A justice has no jurisdiction in an action of trespass quare clausum, where the defendant justifies on the ground that the locus in quo is a highway.—(1838) Whiting v. Dudley, 19 Wend. 373; (1844) Randall v. Crandall, 6 Hill, 342.

[x] (N. Y. 1838) Where an action of trespass quare clausum is prosecuted in a justice's court, all proceedings must be suspended when the title to the land is in question.—Willoughby v. Jenks, 20 Wend. 96.

[xx] (N. Y. 1838) Where a street is dedicated to the public, but the same has not been accepted or recognized by the officers as a public street, the question whether the owner of a lot bounding thereon may be considered as having title usque filum viæ, so as to entitle him to an action against another for digging in the street opposite to his lot and removing the earth therefrom, or whether he has merely a right of way in the street, presents a question of title to land, which cannot be tried by a justice court.—Willoughby v. Jenks, 20 Wend. 96.

[y] (N. Y. 1849) An executory contract for the purchase of land, with leave to the purchaser to enter and possess until default in the payment of the purchase money, without any fixed period or compensation, is a license, and not a lease, and does not draw the title into question, so as to exclude a justice from having jurisdiction of an action of trespass brought by the licensee against the licensor for entering and taking possession.—Dolittle v. Eddy, 7 Barb. 74.

[yy] (Or. 1885) In an action before a justice for trespass to real property, the court should exclude all testimony on the question of title, and try only the question of damages; a justice having no jurisdiction where title is concerned.—Sweek v. Galbreath, 5 Pac. 749.

[z] (W. Va. 1871) Under Code, c. 50, § 11, a justice of the peace has no jurisdiction to try actions for trespass involving the title to real estate.—Belcher v. Gaston, 4 W. Va. 639.

[zz] (Wis. 1869) In trespass to real property, brought by a married woman, in order to rebut the presumption, arising from the husband's occupancy, that the possession was in him, parol evidence was admissible to explain the nature of her possession, though the justice would have no jurisdiction to try the question of title.—Boos v. Gomber, 24 Wis. 490.

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§ 86. —— Actions for cutting or carrying away fixtures or personal property from land.

[a] (Ill. 1892) Under Rev. St. 1891, c. 79, § 13, which gives justices of the peace jurisdiction "in actions for damages to real property," where the amount claimed does not exceed $200, they have jurisdiction of an action for damages for cutting down and carrying away growing trees, where the only controversy is whether the land on which the trees stood was in the possession of the plaintiff or of the defendant.—Pitts v. Looby, 142 Ill. 534, 32 N. E. 519.

[b] (Ind. 1877) An action by a guardian of minor owners of land to recover possession of timber cut and carried away from the land, chiefly litigated on the question whether the plaintiff has been appointed guardian as alleged, does not, of necessity, involve title to real property.—Deacon v. Powers, 57 Ind. 489.

[c] (Md. 1874) Code, art. 51, § 14, providing that no justice of the peace shall have jurisdiction in actions where the title to land is involved, has no application to an action of replevin to recover logs cut on land, since sections 13 and 16 expressly confer jurisdiction on justices in actions of replevin, where the amount involved is under $50.—Deitrich v. Swartz, 41 Md. 196.

[d] (Mass. 1826) St. 1783, c. 42, providing that an action of trespass brought before a justice of the peace may be removed into the court of common pleas by plea of title to real estate, comprehends all actions of trespass, as de bonis asportatis for cutting and carrying away timber, and not merely quare clausum fregit.—Blood v. Kemp, 21 Mass. (4 Pick.) 169.

[e] (Mich. 1882) In an action of trover before a justice of the peace for hoops, a party may, for the purpose of proving his title to personal property, show that it was taken off certain lands, and that he was the owner thereof, for this does not bring the matter of title to lands in question.—Hart v. Hart, 48 Mich. 175, 12 N. W. 33.

[f] (N. H. 1851) In debt by plaintiff to recover the penalty for cutting trees on his land, defendant pleaded that he was then in possession by lease from plaintiff. Plaintiff replied that the lease had been canceled. *Held*, that the plea raised a question of title and that the justice had no authority to proceed further.—Morse v. Davis, 24 N. H. (4 Fost.) 159.

[g] (N. J. 1829) Where plaintiff is in the actual possession of land, a justice of the peace may take jurisdiction of his action for trespass qu. cl. fr. for cutting down trees and growing grass, and digging up and removing the soil, since the title is not involved.—Gregory v. Kanouse, 11 N. J. Law (6 Halst.) 62.

[h] (N. J. 1887) Where, in trespass for cutting or destroying growing trees, defendant produces evidence that the plaintiff is entitled only to the temporary possession, and that the fee is in another, the question of title is presented in the case, and therefore the justice must dismiss the suit, because he has no jurisdiction to try it.—Bloom v. Stenner, 50 N. J. Law (21 Vroom) 59, 11 Atl. 131.

[i] (Vt. 1870) An action of trover for the removal from the plaintiff's farm of manure, which, previous to the conveyance of the farm to the plaintiff, had been sold by his grantor, and removed from the barnyard, and piled up for the purchaser, but had not been removed by him at the date of the conveyance, does not involve the title to land, so as to deprive a justice of the peace of jurisdiction.—French v. Freeman, 43 Vt. 93.

[j] (Wis. 1857) In an action for conversion of grain, a plea that the grain converted was on the defendant's land does not show that the title must necessarily be brought in question.—Verbeck v. Verbeck, 6 Wis. 159.

[k] (Wis. 1888) The title to land is in issue, so as to take the case out of the jurisdiction of the justice's court, where plaintiff, in an action for conversion of timber, alleges in his complaint title to the land on which the timber was cut in another, who gave him a license to cut the timber, and where defendant denies the allegations of the complaint, and asserts title in himself.—Huddleston v. Johnson, 71 Wis. 336, 37 N. W. 407.

§ 87. —— Actions for flowage.

[a] (N. J. 1819) A justice of the peace has not jurisdiction of an action on the case for overflowing land to the permanent injury of the freehold; the title of land necessarily coming in question.—Vantyl v. Marsh, 5 N. J. Law (2 South.) 507.

[b] (N. J. 1840) In an action for damages by overflowing the plaintiff's land, the plaintiff must necessarily show title to the land, and therefore a justice of the peace has not jurisdiction of the action.—Dixon v. Scott, 18 N. J. Law (3 Har.) 430.

[c] (N. Y. 1877) In an action brought in justice court to recover damages occasioned by the negligent act of defendant in discharging waste water on plaintiff's lot, a motion by defendant to dismiss the proceedings because the evidence showed that plaintiff was not in possession of the premises did not bring in question plaintiff's title to the premises, so as to deprive the justice of jurisdiction.—Ryan v. Harrigan, 9 Hun, 520.

[d] (Ohio, 1886) A justice of the peace has no jurisdiction of an action brought to recover damages for injury to personal property, caused by the flow of water from the defendant's premises resulting from bursting of water pipes on said premises, since plaintiff in such action must prove that defendant had some title to the premises from which the water flowed.—Coles v. Reiger, 2 Ohio Cir. Ct. R. 50, 1 O. C. D. 355.

[e] (Vt. 1848) A justice of the peace has no jurisdiction of an action brought to recover damages for obstructing a water course, whereby the plaintiff suffered injury by the overflowing of his land; the title to land being involved.—Haven v. Needham, 20 Vt. 183.

[f] (Vt. 1885) Where, in an action on the case, the declaration alleges "that the plaintiff was damaged both in his cellar and tenement, and in his drugs and medicines in his cellar," by reason of a wrongful diversion of water into such cellar, *held*, that the title to land was concerned, so as to exclude the jurisdiction of a justice.—Burlington & L. R. Co. v. Brush, 57 Vt. 472.

§ 88. —— Actions for purchase price of land or easements.

[a] (Ind. 1844) To a suit on a promissory note, commenced before a justice of the peace, a plea that the note was given in consideration that the payee would convey certain land to the defendant, that the payee had no title to the land, and that he had failed to make the deed, does not oust the justice of jurisdiction.—Rogers v. Perdue, 7 Blackf. 302.

[b] (Md. 1877) Where suit is brought to recover the purchase money of land, and the contract of sale has not been performed by the execution and delivery of the deed, plaintiff must allege and prove that he has good title to the land, and consequently a justice has no jurisdiction.—Cole v. Hynes, 46 Md. 181.

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[c] (Md. 1877) Where the cause of action before a justice of the peace is a balance of the purchase money for land, in order to oust him of jurisdiction, it must appear affirmatively on the face of the proceedings that the defendant has not accepted a deed of the property, but that the contract is still executory.—Cole v. Hynes, 46 Md. 181.

[d] (N. C. 1889) Under Const. art. 4, § 27, giving justices of the peace original jurisdiction of actions on contracts where the sum demanded does not exceed $200, and "wherein the title to real estate shall not be in controversy," justices of the peace have jurisdiction of suits on notes given for the price of land, where the amount does not exceed $200, and in which an issue of fact may be raised as to whether the notes were given for the price of the land; such an issue not involving any controversy as to the title to the land.—Durham v. Wilson, 104 N. C. 595, 10 S. E. 683.

[e] (Ohio, 1880) A justice of the peace may have jurisdiction of a suit to recover the consideration due on a conveyance of real estate, where the contract to convey has been executed, since it does not involve the title to land.—Green v. Sewell (Dist. Ct.) 8 Ohio Dec. 69, 5 Wkly. Law Bul. 440.

[f] (Pa.) An action by the indorsee of a promissory note given in part payment for land may be brought before a justice of the peace, since the title cannot come in question.—(1836) Camp v. Walker, 5 Watts, 482; (1892) Packer v. Taylor (Com. Pl.) 12 Pa. Co. Ct. R. 521, 2 Pa. Dist. R. 443.

[g] (Pa.) A justice of the peace has no jurisdiction of an action by the payee on a note given as part consideration for the purchase of land, since the title to land may be involved.—(1836) Camp v. Walker, 5 Watts, 482; (1893) Hunsicker v. Miller (Com. Pa.) 14 Pa. Co. Ct. R. 261, 5 Pa. Dist. R. 107.

[h] (Pa. 1837) A justice has no jurisdiction of a suit on a promissory note, given in consideration of a right to dig a mill race and conduct water across plaintiff's land, as the title to real estate is liable to come in question.—Goddard v. McKean, 6 Watts, 337.

[i] (Pa. 1852) A justice of the peace has not jurisdiction to enforce the payment of the purchase money of land, either in the hands of the vendor or of his assignee.—Doud v. Truby, 2 Grant, Cas. 37.

[j] (Pa. 1856) A contract for coal or stone is not a real contract, involving title, and an action for the price of such articles is within the justice's jurisdiction.—Rhoades v. Patrick, 27 Pa. (3 Casey) 323.

[k] (Pa. 1872) Under Act March 20, 1810, § 1, providing that a justice of the peace shall have no jurisdiction of "cases of real contracts when the title of land may come in question," a justice has no jurisdiction of an action to recover a balance due on a conveyance of land.—Gruber v. Sheetz, 2 Woodw. Dec. 63.

[l] (Pa. 1892) A justice of the peace has no jurisdiction of an action to recover purchase money of real estate, since the title to land may come in question.—Packer v. Taylor (Com. Pl.) 12 Pa. Co. Ct. R. 521, 2 Pa. Dist. R. 443.

§ 89. —— Actions and proceedings to recover rent or for use and occupation.

[a] (Ark. 1847) By the constitution "exclusive original jurisdiction in all matters of contract, where the sum in controversy is of one hundred dollars and under," is given to justices of the peace. By Rev. St. c. 87, § 4, it is expressly enacted that justices of the peace shall not have jurisdiction in any case where the title to land comes in question. *Held*, that a justice of the peace has not jurisdiction of an action for use and occupation, where the title to lands comes in controversy; and, on its appearing that such question must arise in a case, the justice should dismiss the suit and refuse to take further cognizance of it.—Fitzgerald v. Beebe, 7 Ark. (2 Eng.) 305, 46 Am. Dec. 285.

[b] (Ark. 1847) Justices of the peace possess no jurisdiction in actions for use and occupation, where the title to the land comes in controversy.—Thruston v. Hinds, 8 Ark. (3 Eng.) 118.

[c] (Ark. 1876) In an action before a justice of the peace on an alleged contract for rent, the defendant cannot defeat the jurisdiction by controverting the plaintiff's title to the land.—Matthews v. Morris, 31 Ark. 222.

[d] (Ark. 1880) In a suit for rent, the jurisdiction of a justice of the peace is not defeated by affidavits of defendant denying plaintiff's title.—Nolen v. Royston, 36 Ark. 561.

[e] (Ark. 1881) In suit for rent, the justice should not dismiss for want of jurisdiction merely on defendant's answer denying plaintiff's title to the land.—Jordan v. Henderson, 37 Ark. 120.

[f] (Cal. 1880) The title or possession of real estate is not put in issue, in an action to recover rent alleged to be due on a written lease, by an answer denying the plaintiff's title and right of possession, and alleging the title and right of possession to be in some one else, under whom defendant entered and held possession.—Ghiradelli v. Greene, 56 Cal. 629.

[g] (Md. 1875) An action before a justice of the peace on an alleged contract for rent does not involve the title to lands, within Code, art. 57, § 14, providing that such justices shall have no jurisdiction where title to lands is involved.—Randle v. Sutton, 43 Md. 64.

[h] (N. Y. 1862) An action by an assignee of the lessor against the assignee of the lessee for arrears of a perpetual rent reserved by a lease in fee brings in question the title to real estate; and when, on the trial, the plaintiff's claim is disputed, a justice of the peace is ousted of jurisdiction.—Main v. Cooper, 25 N. Y. 180, affirming (1857) 26 Barb. 468.

[i] (N. Y. 1893) In an action before a justice for rent, by one claiming title as heir of the lessor, where defendants dispute that the lessor was the owner of the premises at the time of his death, the title to the premises is in question, on plaintiff's own showing, within Code Civ. Proc. § 2956, and the complaint is properly dismissed for want of jurisdiction.—Lane v. Young, 66 Hun, 563, 21 N. Y. Supp. 838.

[j] (N. Y. 1893) Under Code Civ. Proc. § 2951, providing that in a justice's court the defendant may set forth in his answer facts showing that the title to real property will come in question, and section 2954, providing that, on the defendant delivering to the justice an undertaking relative to a new action in the proper court, the action before the justice is discontinued, where, in an action for rent, defendant pleaded that he was the owner in fee of the premises, and tendered a proper bond, it was error for the justice to refuse to dismiss the case.—Van Etten v. Van Etten, 69 Hun, 499, 23 N. Y. Supp. 711.

[k] (N. C. 1883) In an action to recover one-third of the crops due as rent under an alleged contract of lease, which the jury found to exist, a justice of the peace had jurisdiction, as the title to land was not involved.—Durant v. Taylor, 89 N. C. 351.

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[l] (Pa. 1845) Where, under Act March 22, 1814, § 2, an action for rent is brought before a justice of the peace or alderman, and the defendant, before the trial is commenced, makes oath or affirmation that the title to land will come in question, it is the duty of the magistrate to dismiss the proceeding and remit the plaintiff to the court of common pleas.—Williams v. Smith, 3 Clark, 22.

[m] (Pa. 1852) A claim to rent, where the title to the real estate from which it issued comes in question, is not within the jurisdiction of a justice of the peace.—Jacobs v. Haney, 18 Pa. (6 Harris) 240.

[n] (Pa. 1853) In an action for rent, requiring proof that the relation has been changed by proper assignments is but requiring proof of the necessary allegations of the declaration, and such dispute does not oust the justice's jurisdiction, on the ground that it involves title.—Louer v. Hummel, 21 Pa. (9 Harris) 450.

[o] (Pa. 1886) The magistrate's court has no jurisdiction over an action by a landlord against a tenant for rent, where the defense pleaded is title to the land in the tenant.—Mohan v. Butler, 112 Pa. 590, 4 Atl. 47.

[p] (Tex. 1881) The law precluding a justice from trying title to land does not preclude a plaintiff, suing for rent, from proving that he was the purchaser of the demised premises from the person whom defendant claims is his landlord.—Johnson v. Doss, 1 White & W. Civ. Cas. Ct. App. § 1075.

[q] (Vt. 1869) A declaration on a promise to pay money for use and occupation of land does not involve title to land, so as to defeat the jurisdiction of a justice. The permission and occupancy constitute a consideration for the defendant's promise, irrespective of the question of title.—Clough v. Horton, 42 Vt. 10.

§ 90. —— Actions and proceedings to recover possession of land or buildings in general.

[a] (Mo. 1870) An action of replevin brought before a justice of the peace for the recovery of a "frame building" does not disclose a want of jurisdiction on its face, since it may be a mere personal chattel.—Elliott v. Black, 45 Mo. 372.

[b] (N. Y. 1883) The provisions of Code Civ. Proc. §§ 2951, 2952, relating to removal of causes from a justice's court where an answer is interposed which raises a question of title to real property, do not apply to summary proceedings for the removal of squatters under section 2232, subd. 4; in such proceedings the question being, not as to title, but as to the right to the possession of the property.—In re White, 12 Abb. N. C. 348.

[c] (N. C. 1881) Where, in a summary proceeding in ejectment before a justice of the peace, the testimony shows that title to the land is in controversy, the proceedings should be dismissed for want of jurisdiction.—Parker v. Allen, 84 N. C. 466.

[d] (N. C. 1891) Under Code, § 834, which provides that justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contracts, except where the demand exceeds $200, or the title to real estate is in controversy, a justice has no jurisdiction in ejectment, where the issue is whether a contract to purchase the land was abandoned by defendant, and a suit for specific performance of the contract, instituted by defendant, is pending in the superior court.—Boone v. Drake, 109 N. C. 79, 13 S. E. 724.

[e] (N. C. 1895) Where a will devises all testator's land to his wife, remainder to plaintiff in fee, except 50 acres in some suitable place, on certain conditions, to defendant, and defendant, who was a tenant of the wife, during her life, of 50 acres, claims title to the same as being in a suitable place, and on conditions performed, an action by plaintiff for possession involves the title to land, and a justice of the peace has no jurisdiction.—Wright v. Harris, 116 N. C. 460, 21 S. E. 693.

[f] (Or. 1893) As the rights of one locating lands as a mining claim under Rev. St. U. S. § 2319 et seq., are merely possessory, so long as the conditions entitling him to a patent are only partially performed, and do not constitute title, an action before a justice, under Hill's Code, §§ 2175–2183, to recover possession of a mining claim, based on such partial performance, does not involve an issue as to title to real estate.—Duffey v. Mix, 24 Or. 265, 33 Pac. 807.

[g] (Pa. 1880) Where, in a proceeding before the justice under Act June 13, 1836, to obtain possession of real estate purchased at sheriff's sale, the person in possession makes oath that he holds the premises in his own right, the justice should certify the record into court, where the proceedings will be continued as an ejectment.—Worman v. McCloskey, 1 Chest. Co. Rep. 32, 12 Lanc. Bar, 42.

[h] (Pa. 1887) A purchaser of land at a sheriff's sale instituted a proceeding against the execution defendant, who was in possession, to recover the premises. The latter appeared and made affidavit that he did "not hold possession of the premises under the defendant in execution, under which they were sold, but under E." E. also appeared and made the same claim. *Held* that, on the entering of a proper recognizance, the justice had no power to render judgment.—O'Neil v. Soles, 8 Pa. Co. Ct. R. 173.

§ 91. —— Forcible detainer and recovery of possession by landlord.

Forcible detainer in general, see "Forcible Entry and Detainer," vol. 23, cc. 1326, 1327, § 82.

Recovery of possession by landlord in general, see "Landlord and Tenant," vol. 32, §§ 1167–1348.

[a] (Ala. 1894) Title is not involved in an action of unlawful detainer before a justice of the peace, brought by a purchaser of lands at an administrator's sale for the payment of debts, to recover the possession thereof from decedent's heirs.—Cobb v. Garner, 105 Ala. 467, 17 South. 47, 53 Am. St. Rep. 136.

[b] (Colo. 1893) Where, in forcible detainer, the complaint alleges that plaintiff was peaceably in possession by virtue of certain deeds, an answer setting up that defendants were peaceably in possession by virtue of conveyances to them does not raise any issue as to title so as to deprive the justice of jurisdiction.—Kelley v. Andrew, 3 Colo. App. 122, 32 Pac. 175.

[c] (Colo. 1896) In a proceeding before a justice under Mills' Ann. St. § 1973, subd. 6, which declares that a person is guilty of unlawful detention who, after due demand, holds against the purchaser of real estate sold under mortgage or trust deed executed by such person, etc., a plea setting up that plaintiff, for whose security the trust deed was given, and who had purchased thereunder, had agreed to extend the time for payment of his debt beyond the date of the sale, and that foreclosure, when had, was to have been in a court of equity; and that, therefore, the property had not been duly sold, or plaintiff's title perfected,—does not involve a direct trial of title so as to oust the jurisdiction of the justice.

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but merely raises the issue of right of possession.—Hamill v. Clear Creek County Bank, 22 Colo. 384, 45 Pac. 411.

[d] (Dak. 1889) Where, in forcible entry and unlawful detainer, defendant pleads ownership, and offers evidence to prove that fact, the justice is bound to cease all proceedings and certify the case to the district court.—Murry v. Burris, 6 Dak. 170, 42 N. W. 25.

[e] (Ind. 1844) Plaintiff filed a complaint against B. and C., as tenants of certain premises, for holding over, etc. The premises had been conveyed in fee simple by B. to plaintiff, and by a sealed instrument of the same date with the conveyance leased to B. and C. Plaintiff agreed to pay B. $100 at the end of the term, on condition that B. and C. should surrender the premises, and also that, should B., on or before that time, pay him a certain debt, he would permit B. to remain in possession, and would release to him all his interest in the premises. Defendants agreed that they would use the premises in a husbandlike manner, would commit no waste, and would, at the end of the term, deliver possession, if B. failed to pay said debt. *Held*, that the title to real estate was not involved, so as to deprive the justices of jurisdiction.—Dougherty v. Thompson, 7 Blackf. 277.

[f] (Ind. 1879) In an action before a justice of the peace to recover possession of land from a tenant, where defendant does not file a written answer, but a third party is admitted as a defendant and files an answer, verified by affidavit, alleging that he is the owner of the land and entitled to possession thereof, etc., if such third party is properly admitted and plaintiff makes no objection thereto, the title to the land is "put in issue by plea supported by affidavit," and the justice should certify the cause and papers to the circuit court.—Bibbler v. Walker, 69 Ind. 362.

[g] (Ind. 1893) Rev. St. 1881, § 1434, providing that if in an action before a justice of the peace the title to land shall be put in issue, the cause shall be certified to the circuit court, does not apply to an action begun before a justice under Rev. St. 1881, § 5237, for forcible entry and detainer, as such an action relates only to possession, and not to title.—Bridges v. Branam, 133 Ind. 488, 33 N. E. 271.

[h] (Iowa, 1879) In an action of forcible entry and detainer, brought in justice's court, the petition alleged absolute ownership in plaintiff by virtue of a deed from defendant, and also of a sheriff's deed on foreclosure; that defendant had been a tenant at will; and that plaintiff had terminated said tenancy by giving the proper notice. *Held*, that the petition did not show that the title to land was involved, so as to deprive the justice of jurisdiction, since plaintiff did not seek to recover on the ground that he held the title, but on the ground that defendant continued in possession after the termination of a tenancy at will.—Jordan v. Walker, 52 Iowa, 647, 3 N. W. 679.

[i] (Iowa, 1881) Where the petition in an action of forcible entry and detainer before a justice of the peace does not aver title in the plaintiff, an averment in the answer that the title is in the defendant, not being responsive, raises no issue as to title, and does not require the removal of the action to the circuit court.—Jordan v. Walker, 56 Iowa, 686, 10 N. W. 232.

[j] (Miss. 1876) Though justices of the peace cannot adjudicate the title to real property, yet they may take jurisdiction of cases of forcible entry and detainer, where the right to possession is established only by evidence of title.—Ragan v. Harrell, 52 Miss. 818.

[k] (Mo. 1886) In accordance with the express directions of section 2931, Rev. St. 1879, in an action against a tenant for possession, commenced before a justice of the peace, a motion made on affidavit by defendant, setting forth plea of title in and payment of rent to a third party as landlord, to transfer the case to the circuit court, should be granted.—Meier v. Thieman, 90 Mo. 433, 2 S. W. 435.

[l] (Mo. 1887) Where defendant in a landlord's summons files an affidavit denying that plaintiff had any title to the premises, or that he was defendant's landlord, or was entitled to collect any rent from him, but avers that the title was in one W., who was defendant's landlord, and recites that defendant put in issue the title to the premises, and requests that the papers be transmitted to the circuit, it is sufficient to bring the case within Rev. St. 1879, § 2931, providing that where an affidavit is filed in an action before a justice of the peace showing that title to real estate is in issue, the justice shall certify the cause, and transmit all the papers to the circuit court.—Bennett v. McCaffery, 28 Mo. App. 220.

[m] (Mont. 1889) Neither the title nor right of possession can be made an issue in an action under the forcible detainer act (Comp. St. § 723), and hence a justice of the peace properly refused to certify such action to the district court without trial, and that court, on appeal, properly refused to allow any question of title to be raised.—Sheehy v. Flaherty, 8 Mont. 365, 20 Pac. 687.

[n] (N. Y. 1854) An action of waste under Code, § 450, where forfeiture is alleged and recovery of possession sought from a tenant, involves the question of title to land, precluding a justice's court from exercising jurisdiction.—Snyder v. Beyer, 3 E. D. Smith, 235.

[o] (N. C.) The rule which estops a tenant to deny his landlord's title precludes all controversy as to the title in summary proceedings by the landlord, and thus gives a justice of the peace jurisdiction.—(1871) Credle v. Gibbs, 65 N. C. 192; (1880) Davis v. Davis, 83 N. C. 71.

[p] (N. C. 1874) A justice of the peace has no jurisdiction of an action in the form of forcible detainer, under Rev. Code, c. 49, by certain alleged directors of a railroad company against other contesting directors, for forcibly entering on and seizing the lands and other property belonging to the company, since the question of title is involved in such action.—Atlantic, T. & O. R. Co. v. Johnston, 70 N. C. 348.

[q] (N. C. 1874) A justice of the peace has no jurisdiction of an action of forcible entry and detainer under Rev. Code, c. 49, where the title to the property is involved, or is in any manner raised by the defendants, in which case the justice can only dismiss the suit.—Atlantic, T. & O. R. Co. v. Sharpe, 70 N. C. 509.

[r] (N. C. 1876) Where an equitable defense, set up by the tenant in summary proceedings against him before a justice under the landlord and tenant act, involves the title to real property, the justice cannot take jurisdiction, but should dismiss the proceedings.—Forsythe v. Bullock, 74 N. C. 135.

[rr] (N. C. 1882) In a proceeding under the landlord and tenant act, the question of jurisdiction is not to be determined by matter set up in the answer, but the court should hear the evidence as to the issue of tenancy, and, if the same be found for the landlord, an estoppel operates upon the tenant, and the title to the land is not drawn in controversy. The equitable title which serves to defeat the estoppel is only that which arises out of some peculiar relation between the parties as would

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make it inequitable on the part of the landlord to oust the tenant.—Hahn v. Guilford, 87 N. C. 172.

[s] (N. D. 1893) While plaintiff was living on the land, the sheriff, aided by defendant, and assuming to act under a writ out of a justice's court, entered on the land, and ousted plaintiff, and put defendant in possession. The writ was issued on a judgment by default in an action for unlawful detainer by defendant herein against plaintiff. The record in said action was excluded on the ground that the justice had no jurisdiction. The complaint showed on its face that both parties claimed the fee. *Held*, that the ruling was correct.—Heger v. De Groat, 3 N. D. 354, 56 N. W. 150.

[ss] (Ohio, 1862) A justice of the peace has no jurisdiction in forcible entry and detainer of a case which involves the title to realty.—Bridwell v. Barcroft, 2 Ohio Dec. 697.

[t] (Ohio, 1862) As a mortgagee who has never been in possession, but who seeks by reason of a breach of the conditions of the mortgage to evict a lessee of the mortgagor, is compelled to prove title to the real estate, a justice of the peace has no jurisdiction of his action of forcible detainer.—Bridwell v. Barcroft, 2 Ohio Dec. 697.

[tt] (Ohio, 1874) It is no objection to the jurisdiction of a justice of the peace, in an action of forcible detainer, that plaintiff, in order to show his right to possession, had to prove his title as devisee by a certified copy of the will.—Brown v. Burdick, 25 Ohio St. 260.

[u] (Pa. 1861) In a proceeding by a landlord to recover possession of the demised premises, an affidavit by a third person that he claims a reversion cannot oust the justice of jurisdiction. As between the landlord and a party holding under him, no other title can come into question in the proceeding; but a person claiming title against the landlord must bring a direct proceeding against him to determine his rights.—Daly v. Barrett, 4 Phila. 350.

[uu] (Pa. 1879) Where, in proceedings under Act Dec. 14, 1863, for the recovery of leased premises, the tenant files an affidavit that the title of land will come in question, but it does not show that he acquired title by a conveyance, or such an equitable right to one as would sustain a decree for specific performance, the jurisdiction of the magistrate is not ousted.—Strohm v. Carrol, 11 Lanc. Bar, 62.

[v] (S. C. 1878) A petition by a landlord to eject his tenant is not an action, within Code, § 81 et seq., which excludes the justice from jurisdiction of civil actions involving title to land, and provides for the removal of proceedings from the jurisdiction of the justice.—State v. Fickling, 10 S. C. (10 Rich.) 301.

[vv] (S. C. 1886) In a forcible entry proceeding to dispossess a tenant, if the tenant sets up title in himself, this does not devest the jurisdiction of the trial justice. It does not make the proceeding an action involving the title to land.—State v. Marshall, 24 S. C. 507.

[w] (S. C. 1890) Under Gen. St. § 1819, providing for the institution of proceedings before justices of the peace for the ejection of tenants who either hold over after the expiration of their lease or fail to pay rent, the jurisdiction of the justice is not ousted by raising the question of title.—Swygert v. Goodwin, 32 S. C. 146, 10 S. E. 933.

[ww] (Tex. 1858) The action of forcible entry and detainer in a justice's court is brought to recover the inchoate possession, and is dependent on the right of possession, and not on the ultimate superiority of title; and it is therefore no objection to the jurisdiction of the justice's court that the defendant claims to be owner of the land.—Smith v. Ryan, 20 Tex. 661.

[x] (W. Va. 1883) Where, in a forcible entry and detainer suit, the relation of landlord and tenant does not exist, but the title to the land is shown to be in controversy, a justice has no jurisdiction and must dismiss the suit.—Hughes v. Mount, 23 W. Va. 130.

[xx] (Wis. 1853) Rev. St. c. 88, § 10, deny to a justice of the peace jurisdiction of any action in which the title to real estate shall come in question. A justice may, nevertheless, have jurisdiction of the process of forcible entry and detainer; that process not being resorted to for the determination of title to the premises detained.—Gates v. Winslow, 1 Wis. 650.

[y] (Wis. 1869) Where the defendant in forcible detainer before a justice is a lessee, the question whether the plaintiff has succeeded to the rights of the original lessor is not properly a question involving the title to land.—Winterfield v. Stauss, 24 Wis. 394.

[yy] (Wis. 1886) As fast as material is incorporated into a building, it becomes a part of the realty, and a contractor who is erecting a building, and has violated the terms of the contract, cannot resist an action for unlawful detainer, instituted by the owner of the property on which the building is being erected, in a justice's court, on the ground that the title to the property is in question.—City of Platteville v. Bell, 66 Wis. 326, 28 N. W. 404.

[z] (Wis. 1890) In an action under Rev. St. c. 145, for an alleged unlawful holding over after the expiration of a lease, brought before a justice of the peace, the complaint alleged a lease by plaintiff to defendant. The answer alleged that defendant entered into possession under a contract of purchase with third persons, and had paid the purchase money; that plaintiff had acquired title, subject to such contract, and that defendant was entitled to a deed; and continued "that, except as hereinbefore admitted or explained, the defendant denies each and every allegation" in the complaint. *Held*, that the answer raised the question whether the relation of landlord and tenant existed between the parties, and not the question of title to the land, and that the justice had jurisdiction.—Menomonee River Lumber Co. v. Philbrook, 78 Wis. 142, 47 N. W. 188.

[zz] (Wyo. 1892) An action of forcible detainer cannot bring in question the title to land, within Rev. St. § 3435, providing that, if it shall appear on the trial of any case before a justice that the title to land is brought in question, the cause shall be certified to the district court.—Jenkins v. Jeffrey, 3 Wyo. 669, 29 Pac. 186.

§ 92. —— Actions for obstructing highways, water courses, and easements.

See post, § 128 [j, k].

Jurisdiction of prosecutions for obstruction of highways, see "Highways," vol. 25, cc. 1903, 1904, § 447 [c, e–g].

[a] (N. Y. 1850) Where, in an action on the case in a justice's court for obstructing a river, the plaintiff claims that such river was a public highway at common law, and has been declared such by statute, without making any other proof of his right, and no fact is shown by the defendant to controvert the right thus declared by law, but he pleads the general issue, and introduces in evidence a grant from the legislature authorizing him to erect and maintain a dam across the river of such construction as not to interfere with the public

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right of passage, the title to land does not come in question, so as to oust the justice of his jurisdiction to try the cause.—Browne v. Scofield, 8 Barb. 239.

[b] (N. Y. 1865) A justice of the peace has jurisdiction of an action for penalty for obstructing a highway, as the plaintiff cannot be said to raise a question of title by proving the record of a road.—Chapman v. Swan, 65 Barb. 210.

[c] (Ohio, 1876) In an action before a justice of the peace to recover the statutory penalty for obstructing a public highway, the jurisdiction of the justice conferred by the statute is not affected by the fact that the right of the party to use the highway may involve to some extent the title of the land at the place of such obstruction.—Trustees of Burton Tp. v. Tuttle, 30 Ohio St. 62.

[d] (Pa. 1869) An action brought to recover damages for an obstruction to a right of way is not a case on real contract, within Act March 20, 1810, excepting from the jurisdiction of justices all cases of real contract where the title to land comes in question.—Leary v. Harter, 1 Leg. Gaz. R. 20.

[e] (Vt. 1870) An action for obstructing a public pent road, alleged to have been laid through the defendant's land, does not so involve title as to oust the jurisdiction of a justice of the peace thereof.—Bell v. Prouty, 43 Vt. 279.

[f] (Va. 1860) In a proceeding before a mayor or other justice against a party for obstructing a street, if a claim to the freehold is set up bona fide, the jurisdiction of the mayor or justice is ousted.—Warwick v. Mayo, 15 Grat. 528.

[g] (Wis. 1861) To a suit in a justice's court to recover a penalty for obstructing a highway, the defendant answered, denying the existence of the highway, alleging that the premises in question were his own close, land, and freehold, in his possession, and that no highway was open or running across the same or any part. *Held*, that the pleadings showed that the title to the land would be at issue sufficiently to allow the justice to certify the case up to the circuit court.—State v. Doane, 14 Wis. 483.

[h] (Wis. 1871) In an action under Rev. St. c. 19, § 103, to recover a penalty for an alleged encroachment on a highway, the question whether the highway had been laid out does not necessarily involve the question of title to land, and oust a justice of jurisdiction.—State v. Huck, 29 Wis. 202.

[i] (Wis. 1871) In an action under Rev. St. c. 19, § 103, to recover a penalty for an alleged encroachment on a highway, an oral answer alleging that the locus in quo was not a highway, but was the property of defendant, cannot be regarded as sufficient to raise an issue of title to lands, so as to oust the jurisdiction of the justice.—State v. Huck, 29 Wis. 202.

§ 93. —— Actions for breach of land contracts and covenants in deeds.

[a] (Mass. 1807) An action of covenant broken on a deed to convey land, in which a breach is assigned that the defendant was not seised, or had no right to convey the land, brings the title to real estate directly in question, and is therefore not within the jurisdiction of a justice of the peace.—Bickford v. Page, 2 Mass. 455, 462, note.

[b] (Mo. 1876) A justice of the peace has no jurisdiction of an action on a covenant of warranty contained in a conveyance of land.—Birks v. Russell, 1 Mo. App. 335.

[c] (Mo. 1882) A justice of the peace has no jurisdiction over an action for breach of warranty of title to real estate under Rev. St. § 2837, providing that he shall not have jurisdiction "of any action where the title to any lands or tenements shall come in question."—Bredwell v. Loan & Investment Co., 76 Mo. 321.

[d] (Mo. 1886) Under Rev. St. § 2837, providing that "no justice of the peace shall have jurisdiction to hear or try any action where the title to any lands or tenements shall come in question or be in issue," a justice of the peace has no jurisdiction of an action for a breach of covenant in a warranty deed.—Hillhouse v. Houts, 1 S. W. 752, reaffirming Bredwell v. Loan & Investment Co. (1882) 76 Mo. 321, and Patterson v. Yancy (1884) 81 Mo. 379.

[e] (Mo. 1891) In an action for breach of a contract to pay a certain sum for the right to enter upon plaintiff's land, and cut and remove tie timber therefrom, partly performed by defendant, title to the realty is not drawn in question, and a justice has jurisdiction.—Woodson v. Hubbard, 45 Mo. App. 359.

[f] (Neb. 1895) A justice of the peace has jurisdiction of an action by a grantee against a grantor to recover the amount of taxes paid on the land to prevent the same from being sold, for which the grantor was liable under his covenant against incumbrances; such an action not drawing the title to real estate into question.—Campbell v. McClure, 45 Neb. 608, 63 N. W. 920.

[g] (Ohio, 1892) A covenant against incumbrances in a conveyance of real estate runs with the land, and an action founded on a breach thereof, under Rev. St. § 591, cl. 6, is not within the jurisdiction of a justice of the peace, for it necessarily draws in question the title of the real estate to which the covenant is attached.—Van Dyke v. Rule, 49 Ohio St. 530, 31 N. E. 882.

[h] (Vt. 1868) In an action for breach of covenants in a deed, brought before a justice of the peace, the declaration, after specifically alleging one breach, alleged that "defendant has broken all of said covenants, and has refused to perform his covenants aforesaid, and the plaintiff in consequence thereof has been obliged to pay large sums of money to prevent being ejected from said land, which it was the duty of the defendant to pay." *Held*, that this was but a conclusion of law on facts previously stated, and not an allegation of fact, and did not involve title.—Flannery v. Hinkson, 40 Vt. 485.

[i] (Vt. 1868) In an action for breach of covenant in a deed, the fact that the deed which the declaration describes, and which plaintiff would be bound to prove if the execution were denied, contains, among other covenants, a covenant of seisin and warranty of title, is no objection to the jurisdiction of a justice of the peace, unless the allegation of the breach tenders an issue as to title.—Flannery v. Hinkson, 40 Vt. 485.

§ 94. —— Actions for deceit in sale of land.

[a] (Mich. 1848) In an action in a justice's court against defendant for falsely representing himself to have title to a piece of land, which plaintiff was induced to purchase of him, title to the land must necessarily be drawn in question, and the justice, therefore, has no jurisdiction.—Brooks v. Delrymple, 1 Mich. (Man.) 145.

[b] (Vt. 1891) Where, in an action for deceit in the sale of land, plaintiffs allege that defendant, to induce them to buy, falsely repre-

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sented that the acreage was greater than it was, and ask damages for the fraud, the issue does not involve the title to land, to take the action out of the jurisdiction of the justice of the peace.—Dano v. Sessions, 63 Vt. 405, 21 Atl. 922.

§ 95. —— Actions by vendee to recover purchase price of land or growing timber.

[a] (Ark. 1886) An action to recover money paid on a parol contract to purchase land, which defendant concedes has been rescinded, does not involve title to or right to possession of the land.—Benton v. Marshall, 47 Ark. 241, 1 S. W. 201.

[b] (Minn. 1892) Where one has orally sold growing timber, and, after receiving the purchase price, has made it impossible to allow the purchaser to cut and remove it by selling the land, an action by the purchaser to recover the price, where the real issue is as to what time was agreed on for the removal of the timber, involves no issue as to the title to real estate, so as to withdraw the action from the jurisdiction of a justice of the peace.—Herrick v. Newell, 49 Minn. 198, 51 N. W. 819.

[c] (Pa. 1833) Where a justice has jurisdiction in all cases where the sum demanded is not over $100, except in cases of real contract, where the title to land may come into question, a justice has no jurisdiction to recover back money paid on a contract for the sale of land afterwards rescinded because of a defect of title in the party who covenanted to convey.—Campbell v. Gallagher, 2 Watts, 135.

§ 96. —— Actions respecting boundaries and division fences.

[a] (Mich. 1883) In a proceeding by a highway commissioner before a justice of the peace to remove encroachments from a highway, the justice has no jurisdiction to determine disputes concerning private boundaries.—Gregory v. Knight, 50 Mich. 61, 14 N. W. 700.

[b] (Minn. 1887) In an action to recover damages for unlawful entry and detention of certain land, there was some dispute about boundary lines, and plaintiff introduced evidence of his ownership of the land in question. *Held* that, title to real estate being in controversy, the justice before whom the action was brought lost jurisdiction.—Tordsen v. Gimmer, 37 Minn. 211, 34 N. W. 20.

[c] (Mont. 1888) In an action before a justice to recover ore, plaintiff's evidence tended to prove that defendants took the ore from within the limits of plaintiff's mining claim. Defendants' evidence tended to show that the apex of the vein from which the ore was taken lay outside said claim, and within the limits of another claim. *Held*, that the justice had jurisdiction, the question being one of boundary, and not of title.—Driscoll v. Dunwoody, 7 Mont. 394, 16 Pac. 726.

[d] (N. Y. 1866) In an action in a justice's court to recover expenses of making a line or division fence on the boundary between the lands of the parties, an answer alleging that the fence in question was not built on the true line, but on the defendant's land, sufficiently involves the question of title to oust the jurisdiction of the justice.—Hinds v. Page, 6 Abb. Prac. (N. S.) 58.

[e] (Pa. 1855) The jurisdiction of a justice of the peace, under the fence law, to enforce contribution, is not ousted by raising a question of title to land, since the duty of contribution to maintain the fence nevertheless exists, and a dispute as to the line does not excuse it.—Stephens v. Shriver, 25 Pa. (1 Casey) 78.

[f] (Tex. 1849) Justices of the peace still have jurisdiction with six jurors to determine the location of the field notes of a survey, where the same is disputed.—Cannon v. Hendrick, 5 Tex. 339.

[g] (Tex. 1849) Land Law 1837, § 17, provides that conflicting claims to land, in case there be more occupants than one, shall be tried by the nearest justice of the peace and six jurors, and on their decision the surveyor shall grant to the successful party the field notes of the tract of land. *Held*, that the jurisdiction of the justice of the peace is confined to cases of conflict before the field notes have been delivered to either party.—Prewitt v. Farris, 5 Tex. 370.

[h] (Vt. 1850) A justice of the peace has no jurisdiction of an action on the case by a landowner against the owner of adjoining land to recover the expense of building that part of the division fence between them which the fence viewers have assigned to the defendant as his proportion thereof; proof of ownership of the adjoining land being essential.—Shaw v. Gilfillan, 22 Vt. 565.

[i] (Vt. 1800) An action to recover the defendant's share of the expenses of building a division fence between his own land and that of the plaintiff necessarily involves the title of land, and is not within the jurisdiction of justices of the peace.—Foster v. Bennett, 33 Vt. 66.

[j] (Vt. 1872) A justice of the peace has jurisdiction of an action by a landowner against an adjoining proprietor to recover damages for neglecting to build or maintain a proportion of the division fence, to the amount of $200, irrespective of the question whether the title to land may be involved or not.—Hall v. Niles, 44 Vt. 439.

[k] (Wis. 1869) A fence is part of the realty, and if, in an action before a justice, there is a dispute between adjoining lot owners as to the title to a division fence, it is a question as to the title of land, within Rev. St. c. 120, § 51, which deprives the justice of jurisdiction.—Murray v. Van Derlyn, 24 Wis. 67.

§ 97. Title admitted or not necessarily involved.

[a] (Ark. 1894) Plaintiff sued defendant before a justice for rent of land, and attached the crops raised on it to enforce his landlord's lien. Appellant filed an interplea, setting up a mortgage on the crops, and alleging that plaintiff was not defendant's landlord, and did not own the land. *Held*, that such interplea, though alleging plaintiff's want of title to land, did not itself oust the jurisdiction of the justice, without evidence on the trial tending to bring the title in question.—Jansen v. Strayhorn, 59 Ark. 330, 27 S. W. 230.

[b] (Iowa, 1893) Where a railroad engine scatters fire, thereby injuring timber land, and the owner brings suit for damages before a justice, his petition alleging ownership of the land, the point that the justice has no jurisdiction because the question of title to the land may arise is not raised by demurrer, since the demurrer admits that plaintiff owns the land, and tenders no issue on that question.—Delzell v. Burlington, C. R. & N. Ry. Co., 89 Iowa, 208, 56 N. W. 433.

[c] (Mich. 1845) Where the title to the land is admitted, as by demurrer to a declaration alleging it, the justice has jurisdiction.—Stout v. Keyes, 2 Doug. 184, 43 Am. Dec. 465.

[d] (Minn. 1863) The fact that a question of title to real estate is involved in the pleadings in a suit before a justice is not of itself alone sufficient to deprive the court of jurisdiction,

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and to authorize the certification of the case up to the district court. Such title must be disputed on the evidence, to warrant its removal.—Goenen v. Schroeder, 8 Minn. 387 (Gil. 344).

[e] (Minn.) To oust a justice of the peace of jurisdiction, and make a case for certification to the district court, under Gen. St. 1878, c. 65, § 37, on the ground that title to real estate is involved in proceedings before him, a controversy as to title must appear from the evidence.—(1863) Goenen v. Schroeder, 8 Minn. 387 (Gil. 344); (1886) Radley v. O'Leary, 36 Minn. 173, 30 N. W. 467.

[f] (Neb.) In an action of forcible entry and detainer, a denial by the defendant of the plaintiff's title, or a claim of title or interest in himself, does not necessarily raise the question of title, so as to oust a justice of the peace of jurisdiction; and he may proceed with the trial until it is clear from the evidence that the question of title is involved.—(1882) Pettit v. Black, 13 Neb. 142, 12 N. W. 841; (1885) Smith v. Kaiser, 17 Neb. 184, 22 N. W. 368; (1888) Lipp v. Hunt, 25 Neb. 91, 41 N. W. 143.

[g] (N. J. 1892) Since Revision, p. 573, § 14, provides that in a proceeding before a justice to oust a tenant the facts authorizing his removal shall be shown if required by him, and section 15 provides that the action shall be dismissed if on the trial it shall be necessary to prove title to the land, there was no trial, and consequently no question involving title to the land, where on the return day the tenant did not appear and demand proof of such jurisdictional facts.—Watson v. Idler, 54 N. J. Law (25 Vroom) 467, 24 Atl. 554.

[h] (N. Y. 1852) In an action for disturbing a right of way, the defendant having established the title of the plaintiff by his own evidence, and having answered by a general denial, the title to real estate cannot be said to come in question, so as to oust a justice's court from jurisdiction.—Hastings v. Glenn, 1 E. D. Smith, 402.

[i] (N. Y. 1853) Where title to real estate is not pleaded before the justice, he is not ousted of his jurisdiction because it may be necessary to prove title, unless such title shall be disputed by the defendant.—Bellows v. Sackett, 15 Barb. 96.

[j] (N. Y. 1857) Plaintiffs and defendants owned adjoining lots, and plaintiffs by mistake paid the tax due on defendants' lots. Defendants, on being informed of the fact, promised to pay the money. *Held*, in an action for its recovery, the title to the land not being in dispute, a justice of the peace was not deprived of jurisdiction.—Nixon v. Jenkins, 1 Hilt. 318.

[k] (N. Y. 1866) In an action in a justice's court for injuries to real property, if the title of neither party is disputed, evidence given concerning title does not oust the justice of jurisdiction.—Bowyer v. Schofield, 1 Abb. Dec. 177.

[l] (Pa. 1868) To oust the jurisdiction of a justice under the justices' act of 1810, it is not enough merely to allege a claim of title to land. It must appear that such claim may be a defense.—Heritage v. Wilfong, 58 Pa. (8 P. F. Smith) 137.

[m] (Pa. 1895) Where defendant in an action before an alderman makes affidavit, before hearing, that the title to real estate "may" come in question, the magistrate has no jurisdiction to hear the case.—Shober v. Henry (Com. Pl.) 4 Pa. Dist. R. 505.

[n] (Vt. 1847) A justice of the peace is not excluded from taking jurisdiction of an action, merely because, under the plea of the general issue or a plea in bar, the title of land may be drawn into controversy, but only when the action necessarily involves such an inquiry, as ejectment and other real actions, or when, by the course of pleading, the title to land is actually contested.—Whitman v. Town of Pownal, 19 Vt. 223.

[o] (Vt. 1865) Where the declaration in an action is such as not to require the proof of title to land to sustain it, and such question of title only comes into the case by reason of some special line of defense, a justice of the peace is not ousted of his jurisdiction to try the action.—Jakeway v. Barrett, 38 Vt. 316.

[p] (Wis. 1863) In an action in a justice's court to recover damages for breaking and entering the close of the plaintiff, it is sufficient for the plaintiff to aver that he was in possession, and to show under that averment that he was rightfully in possession as against the defendant; and if, in alleging his possession, he unnecessarily sets out the character or extent of his title, a general denial of the allegations of the complaint does not put the title to real estate in question, so as to oust the jurisdiction of the justice.—Watry v. Hiltgen, 16 Wis. 516.

[q] (Wis. 1867) Though a right of way, contested or denied, raises a question of title to lands, over which a justice of the peace has no jurisdiction, an allegation of a right of way, demurred to by the defendant, does not raise such question.—Stoppenbach v. Zohrlaut, 21 Wis. 385.

[r] (Wis. 1874) The mere fact that the plaintiff's title to land was asserted in the complaint, *held* not to deprive the justice of jurisdiction, the same not being put in issue by the answer.—Coffee v. City of Chippewa Falls, 36 Wis. 121.

[s] (Wis. 1878) Under Rev. St. 1858, c. 120, § 51, enabling a defendant in a justice's court to oust the justice's jurisdiction by pleading facts showing that title to land will come in question, and by having the case thereupon certified to the circuit court, it is not sufficient, in replevin for grain, for defendant to allege in his answer that plaintiff claimed title to the land on which the grain was raised, and that therefore the title might come in question, but it must appear that the question of title is necessarily involved.—Ohse v. Bruss, 45 Wis. 442.

3. ACTIONS ON CONTRACTS.

IN GENERAL, § 98.
LAND CONTRACTS AND LEASES, § 99.
BUILDING CONTRACTS, § 100.
BILLS AND NOTES, § 101.
OBLIGATIONS PAYABLE OTHERWISE THAN IN MONEY, § 102.
BONDS AND RECOGNIZANCES, § 103.
—— OFFICIAL BONDS, § 104.
—— FIDUCIARY BONDS, § 105.
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CONTRACT OR TORT, § 115.

Action for penalty as action ex contractu, see ante, § 78 [r].
Amount or value as determining jurisdiction, see post, §§ 150–156, 158–161.
Involving title to land, see ante, §§ 83–97.

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§ 98. In general.

[a] (Ala. 1839) A justice of the peace has no jurisdiction of an action upon a contract which does not itself point out the measure of damages.—Cavender v. Funderburg, 9 Port. 460.

[b] (Ark. 1892) An action for unliquidated damages for breach of a contract is a matter of contract, within Const. 1874, art. 7, § 40, giving justices of the peace jurisdiction in "matters of contract," where the amount involved does not exceed $300.—Koch v. Kimberling, 55 Ark. 547, 18 S. W. 1040.

[c] (Ill. 1881) A justice of the peace has jurisdiction of an action on contracts of one deceased, after the expiration of a year from the decease, where no administration has been taken out.—Dodds v. Walker, 9 Ill. App. (9 Bradw.) 37.

[d] (Ky. 1830) A justice of the peace has no jurisdiction over an action for breach of contract, where the damages are indeterminate.—Huling v. Rife, 26 Ky. (3 J. J. Marsh.) 587.

[e] (Ky. 1847) Under the act of 1828 (2 St. Law, p. 902), justices of the peace have jurisdiction of cases for breach of contract, where the damages are laid at $50 or under.—Howke v. Buford, 47 Ky. (8 B. Mon.) 38.

[f] (N. C. 1825) The jurisdiction of a justice of the peace extends only to cases of debts and demands where there is a balance due ascertainable by legal computation, and not where the claim lies in general damages for nonperformance of an assumpsit.—State v. Alexander, 11 N. C. 182.

[g] (N. C. 1828) Justices of the peace have no jurisdiction in actions on executory contracts.—Tyer v. Harper, 12 N. C. 387.

[h] (Pa. 1851) An alderman has jurisdiction in an action for damages for breach of contract.—Shannon v. Madden, 8 Leg. Int. 162, 1 Phila. 254.

[i] (S. C. 1814) A justice of the peace has jurisdiction in all cases ex contractu for any sum not exceeding £20.—Debruhl v. Parker, 3 Brev. 406, Tread. Const. 475.

§ 99. Land contracts and leases.

[a] (Kan. 1890) Where there has been a sale of real estate, and everything connected with the sale and conveyance has been completed, an action against the grantee for the costs of an abstract of title and of recording the deed, which he agreed to pay, but which were paid by the grantor, who now seeks to recover them, is not an "action on a contract for real estate" of which a justice has no jurisdiction under Gen. St. 1889, par. 4854, subd. 4.—Duff v. Morrison, 44 Kan. 562, 24 Pac. 1105.

[b] (N. C. 1884) As an action by a landlord against a tenant for the recovery of rent, the sum demanded not exceeding $200, is an action on the contract of lease, it is cognizable by a justice of the peace.—Deloatch v. Coman, 90 N. C. 186.

[c] (Ohio, 1844) Contracts to clear lands, to repair tenements, to build a house, to leave land in good tenantable repair, to pay rent, and the like, are not real contracts within the meaning of the statute, so as to oust the jurisdiction of a justice of the peace.—Bridgmans v. Wells, 13 Ohio, 43.

[d] (Ohio, 1880) Under the statute providing that no suit shall be brought in the "magistrate's court on a contract for the conveyance of real estate," an action for damages for breach of a contract to sell real estate is not within the justice's jurisdiction.—Blackburn v. Sewell, 6 Ohio Dec. 962.

[e] (Ohio, 1894) Actions for the purchase price of land are actions "on contracts for real estate," within Rev. St. § 591, and not within the jurisdiction of justices of the peace.—Crafts v. Prior, 51 Ohio, 21, 36 N. E. 1070.

[f] (Ohio, 1896) An action to recover money paid on a verbal land contract, which has been repudiated by the vendor, is not an action on a contract for the sale of land, but for money had and received, and may be brought before a justice of the peace.—English v. Brooks, 4 Ohio Dec. 120, 1 Cleve. Law Rep. 43.

[g] (Ohio, 1896) A justice of the peace has no jurisdiction in an action in which it is sought to recover a payment due on a land contract.—McNickle v. Hickox, 4 Ohio Dec. 240, 1 Cleve. Law Rep. 149.

[h] (Pa. 1883) Under Act July 7, 1879, a justice of the peace has jurisdiction of actions for rent up to $300.—Reckless v. Charnley, 2 Chest. Co. Rep. 207.

[i] (Tenn. 1850) A justice of the peace may have jurisdiction of an action of debt for the price of land due plaintiff on his performance of the conditions of a bond for title.—McFadgen v. Eisensmidt, 29 Tenn. (10 Humph.) 567.

§ 100. Building contracts.

[a] (Pa. 1895) An action for breach of a building contract is within Act March 20, 1810, as amended by Act July 7, 1879, giving justices jurisdiction of causes arising on contract where the sum demanded is not above $300.—Kuhn v. Eggers (Com. Pl.) 17 Pa. Co. Ct. R. 155, 5 Pa. Dist. R. 156.

§ 101. Bills and notes.

See post, § 102.

Actions on lost notes, see post, § 184 [d, r].

Amount or value as determining jurisdiction, see post, §§ 150, 152.

[a] (Conn.) An arbitration note for £10, and vouched by two witnesses, is not cognizable by a justice of the peace.—(1785) Mills v. Borroughs, 1 Root, 99; (1789) Desborough v. Desborough, Id. 126.

[b] (Mo. 1860) A justice has jurisdiction of a suit on a note: "Due B. one hundred and fifty dollars. [Signed] A."—Brady v. Chandler, 31 Mo. 28.

[c] (Mo. 1877) An action by indorsee against indorser is on a contract which the law implies, and not on the note, within the meaning of the statute defining a justice's jurisdiction.—Meis v. Geyer, 4 Mo. App. 404.

[d] (N. C. 1847) A contract not under seal, whereby A. bound himself to pay B. $75, if B. could prove that A. had certain notes left with him for collection, is not a "note," within the act giving justices jurisdiction of debts due on notes, etc.—Spencer v. Hunsucker, 30 N. C. 9.

[e] (N. C. 1887) An action on a draft against the drawees is founded on contract, and not in tort, and is within the jurisdiction of a justice of the peace.—Nimocks v. Woody, 97 N. C. 1, 2 S. E. 249, 2 Am. St. Rep. 268.

[f] (Tenn. 1838) Acts 1837, c. 22, § 1, does not confer on a justice of the peace jurisdiction in any case where the writing which evidences the contract creates a liability which is indirect and collateral, as the liability of an indorser.—Mitchell v. Miller, 19 Tenn. (Meigs) 510.

[g] (Tenn. 1872) An unconditional acceptance is a note of hand, within the meaning of Code, § 4123, prescribing the jurisdiction of justices of the peace.—Powers v. Nahm, 54 Tenn. (7 Heisk.) 583.

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§ 102. Obligations payable otherwise than in money.

[a] (Ky. 1823) The statute giving justices of the peace jurisdiction of all sums not exceeding $50 gives no jurisdiction over a contract payable in other property than money.—Farrow v. Summers, 13 Ky. (3 Litt.) 460.

[b] (N. C. 1837) Under Battle's Revisal, cc. 414, 627, giving justices of the peace jurisdiction of demands "for specific articles" to the value of £30, a single justice has jurisdiction of a valid obligation "to pay the sum of 100 bushels of corn."—Hamilton v. Jervis, 19 N. C. 227.

[c] (N. C. 1849) A note payable in current bank notes, though it be not negotiable, yet comes within the jurisdiction of a single justice, under the statutes.—Dowdle v. Corpening, 32 N. C. 58.

[d] (Tenn. 1843) A justice of the peace has jurisdiction, to the extent given by the legislature over money demands, in all cases where by the terms of the contract specific articles are to be delivered or services performed, if such contract ascertain the money value of such services or articles.—Marrigan v. Page, 23 Tenn. (4 Humph.) 247.

§ 103. Bonds and recognizances.

Amount or value as determining jurisdiction, see post, § 161.

[a] (Ky. 1820) A justice of the peace, having jurisdiction where the claim does not exceed $50, has jurisdiction of the money part of a bond for less than that sum, though the bond contains other collateral covenants, not necessarily connected with the payment of the money.—Thomas v. Thomas' Adm'r, 9 Ky. (2 A. K. Marsh.) 430.

[b] (Mo. 1841) Justices of the peace have no jurisdiction of actions on penal bonds, except constables' bonds, where the demand does not exceed $90.—Wimer v. Brotherton, 7 Mo. 264.

[c] (Mo. 1847) Justices of the peace have jurisdiction of actions on recognizances for appeals.—Cockrill v. Owen, 10 Mo. 287.

[d] (Mo. 1869) The special act of March 23, 1863, gives justices in Buchanan county concurrent jurisdiction with the circuit court upon bonds under $250 for the payment of money, and this act has never been repealed.—Howard v. Clark, 43 Mo. 344.

[e] (N. Y. 1860) A justice of the peace has jurisdiction of an action to recover on an undertaking of bail.—Shackelton v. Hart, 20 How. Prac. 39, 12 Abb. Prac. 325.

[f] (Pa. 1884) An alderman has jurisdiction of an action for breach of a bond to take the benefit of the insolvent law.—Hunter v. Keller, 3 Lanc. Law Rev. 249, 1 Pa. Co. Ct. R. 617.

[g] (Tenn. 1844) A penal bond for $100 being dischargeable under Acts 1801, c. 6, § 66, by the payment of damages, to be assessed by a jury, and cost of suit, is not embraced by Acts 1835, c. 17, giving a justice of the peace jurisdiction to the extent of $100 over all debts and demands evidenced by specialty, note, agreement, or account, signed by the party to be discharged, etc.—Collins v. Oliver, 23 Tenn. (4 Humph.) 439.

§ 104. —— Official bonds.

[a] (Ill. 1849) Probate justices of the peace have jurisdiction of suits on official bonds of constables.—Robertson v. Marshall County Com'rs, 10 Ill. (5 Gilman) 559.

[b] (Ill. 1853) A justice of the peace has jurisdiction of an action against the constable and his sureties for the recovery of single damages for the former's malfeasance in taking property not subject to levy.—Vaughan v. Thompson, 15 Ill. (5 Peck) 39.

[c] (Kan. 1883) Under Comp. Laws 1879, c. 81, cl. 7, § 2, giving a justice jurisdiction to proceed against constables failing to make true return, or to pay over money collected on execution issued by such justice, he has jurisdiction of an action on constable's bond, for moneys collected on an execution issued by such justice, and not paid over on demand to the person entitled thereto.—Dodge v. Kincaid Bros., 30 Kan. 346, 1 Pac. 107.

[d] (Md. 1874) Code, art. 51, § 13, giving to justices of the peace jurisdiction in suits on bonds with penalty, does not embrace a sheriff's bond; or bonds with collateral condition for the discharge of official duty. It only includes such bonds as are conditioned for the payment of money.—State v. Tabler, 41 Md. 236.

[e] (Mo. 1857) A suit on a constable's bond for neglect to pay over money collected on execution is cognizable by a justice of the peace.—State v. Muir, 24 Mo. 263.

[f] (N. Y. 1890) Under Code Civ. Proc. § 2865, providing that "an action cognizable by a justice of the peace may be brought * * * by or against a town or county officer in his official character," a justice has jurisdiction of an action on the official bond of a constable to recover damages for an insufficient levy of an attachment.—Sutherland v. McKinney (Co. Ct.) 10 N. Y. Supp. 876, 18 Civ. Proc. R. 216.

[g] (Ohio, 1859) A justice has no jurisdiction of an action on an official bond of a sheriff to recover money collected by such sheriff which he has refused to pay over to the party entitled thereto.—Hall v. Strong, 2 Ohio Dec. 168.

[h] (Ohio, 1859) A justice of the peace has no jurisdiction of an action against a surety on a constable's bond, where the breach assigned is misconduct in office, though judgment has been recovered against the constable for the same misconduct in the common pleas.—Burrows v. Bliss, 2 Ohio Dec. 228.

[i] (Ohio, 1859) A justice of the peace has no jurisdiction of an action against a surety on a constable's bond, where the breach assigned is misconduct in office of the constable.—Burrows v. Bliss, 2 Ohio Dec. 228.

[j] (Ohio, 1881) A justice of the peace has no jurisdiction, under 1 Swan & C. St. p. 770, of an action on a constable's bond.—Hornbuckle v. State, 37 Ohio St. 361.

[k] (Pa. 1828) Under Act March 20, 1810, providing that justices of the peace shall have jurisdiction "in all causes of action arising from contract, either express or implied, where the sum demanded is not above $100, except on real contracts, where the title to land may come in question, or action on promise of marriage," a justice of the peace has no jurisdiction of a suit on a sheriff's bond, either against the principal or the sureties, since the nature of the demand and the mode of investigation provided therefor by statute and the whole system of jurisprudence of the state equally forbid the exercise of such power by a justice.—Commonwealth v. Reynolds, 17 Serg. & R. 367.

[l] (Va. 1846) A justice of the peace has jurisdiction to give judgment against a constable and his sureties for the failure by the constable to pay over money collected on execution.—Hendricks v. Shoemaker, 3 Grat. 197.

§ 105. —— Fiduciary bonds.

[a] (Del. 1876) A justice of the peace has no jurisdiction of an action on a guardian's bond.—Green v. Clawson, 5 Houst. 159.

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[b] (N. Y. 1852) The justice court has jurisdiction over an action against an administrator on his bond, as it is a personal action, and has no reference to the administrator in his official capacity.—O'Neil v. Martin, 1 E. D. Smith, 404.

[c] (Ohio, 1877) Under section 185 of the act to provide for the settlement of the estate of deceased persons (Swan & C. St. p. 601), providing that an action on an executor's or administrator's bond shall be brought in the court in which the bond is filed, and section 10 of the justice's act (Swan & C. St. p. 772), providing that justices shall not have cognizance of actions against officers for misconduct in office, except in cases provided for in the act, an action on the bond of an administrator cannot be brought before a justice of the peace.—Hackworth v. Robinson, 31 Ohio St. 655.

§ 106. Covenant and warranty.

[a] (Del. 1834) An action of covenant may be brought before a justice of the peace in some cases.—Colesberry v. Stoops, 1 Har. 448.

[b] (Ill. 1859) A justice of the peace has no jurisdiction to render judgment for a breach of covenant.—Kennedy v. Pennick, 21 Ill. (11 Peck) 597.

[c] (Ill. 1885) Where a deed contained such covenants as to make it the duty of the grantor to pay certain taxes, which the grantee paid, the latter can recover the amount, if within his jurisdiction before a justice of the peace.—Martin v. Murphy, 16 Ill. App. (16 Bradw.) 283.

[d] (Ky. 1830) Justices of the peace have jurisdiction of actions for breach of covenant, where the damages claimed do not exceed $50. —Fortune v. Howard, 27 Ky. (4 J. J. Marsh.) 171.

[e] (Mo. 1884) A justice of the peace has no jurisdiction of a suit on a warranty for the recovery of taxes paid by the grantee in the deed.—Patterson v. Yancy, 81 Mo. 379.

[f] (Ohio, 1859) Under Act March 14, 1853, § 4, as amended by Act May 1, 1854, § 1, justices have jurisdiction to give damages for breaches of warranties in the sale of horses, where the damages claimed do not exceed $300. —McKibben v. Lester, 9 Ohio St. 627.

[g] (Pa. 1873) An action of covenant for breach of conditions in the lease is within the jurisdiction of the justice of the peace.—Sharpless v. Hibberd, 2 Lanc. Law Rev. 68.

[h] (S. C. 1822) Damages arising ex contractu, as for a breach of warranty, may be recovered before a magistrate, if the amount be within his jurisdiction.—Cohen v. Saddler, 2 McCord, 239.

[i] (S. C. 1836) A justice of the peace has exclusive jurisdiction of an action on a contract for the breach of a warranty of soundness on the sale of a horse, where the proof is that he is entitled to less than $20.—Caldwell v. Garmany, 3 Hill, Law, 202.

[j] (Tenn. 1834) A justice of the peace has jurisdiction to try an action of covenant arising out of a mortgage, which recites that defendant was indebted to the plaintiff in the sum of $89.22, which should have been paid at a prior date.—Couger v. Lancaster, 14 Tenn. (6 Yerg.) 477.

§ 107. Guaranty and indemnity.

[a] (N. C.) A justice of the peace has no jurisdiction of a suit on a guaranty.—(1827) Dwyer v. Cutler, 12 N. C. 312; (1846) Wall v. Nelson, 28 N. C. 300; (1864) Johnson v. Olive, 60 N. C. 218.

[b] (N. C. 1850) A. was surety for B., and B. gave him a lien on certain swine for indemnity. B. sold the swine to C., and A. and C. agreed, if A. would deliver the swine to C., he would pay the debt for which A. was surety. *Held*, that a single justice had no jurisdiction of the contract.—Cogle v. Hamilton, 33 N. C. 231.

[c] (Wis. 1876) Laws 1872, c. 119, § 10, as amended by Laws 1873, c. 246, § 1, relative to the liability of a railroad company to persons employed by its contractor to perform work in the construction of the road, makes such companies guarantors, on conditions specified, of the payment for such work by the contractor; and therefore the employé's action against the company, as one "growing out of contract," may be brought in justice's court for an amount not exceeding the justice's jurisdiction. —Redmond v. Galena & S. W. Ry. Co., 39 Wis. 426.

§ 108. Hiring services.

[a] (Kan. 1877) A justice may take jurisdiction of an action for damages for breach of a contract to render services, if the sum claimed does not exceed $300.—Hanson v. Lawson, 19 Kan. 201.

[b] (N. Y. 1857) St. March 26, 1819, forbidding justices to entertain suits for seamen's wages, does not apply to actions on a written promise by a shipping agent to pay a specified advance, provided the sailor goes to sea according to the shipping articles, especially where the defendant is neither master nor owner.—Loftus v. Clark, 1 Hilt. 310.

§ 109. Bailment.

[a] (Ala. 1830) Under the act giving to justices of the peace jurisdiction of all debts not exceeding $50, or for money lent, or for specific articles, or for any sum or balance due either by written or verbal contract or assumpsit, in any case not sounding in damages merely, a justice has jurisdiction of an action for the value of articles bailed and not redelivered according to the contract of bailment, as such action is in form ex contractu.—Spann v. Boyd, 2 Stew. 480.

[b] (Ill. 1841) Under the act providing that justices of the peace shall have jurisdiction to hear and determine civil suits for any debts or demands due on a verbal contract or promise, not exceeding $100, a justice's court has jurisdiction of an action brought to recover the value of an article, not exceeding $100, lost by one who had possession thereof, pursuant to an oral contract to transport and deliver the same to plaintiff.—Dowling v. Stewart, 4 Ill. (3 Scam.) 193.

[c] (Pa. 1838) A justice of the peace has jurisdiction in a contract arising out of bailment. —McCahan v. Hirst, 7 Watts, 175; Todd v. Figley, Id. 542.

§ 110. Shipping contract.

[a] (Mo. 1872) Justices of the peace have jurisdiction over contracts of affreightment made by railroad companies to the extent of $90.— Williams v. North Missouri R. Co., 50 Mo. 433.

§ 111. Sales.

[a] (Del. 1848) Justices of the peace have jurisdiction in an action against a vendee for not accepting goods bought.—Barr v. Logan, 5 Har. 52.

[b] (Ind. 1884) A constable may sue in a justice's court, by notice and motion, for the price of goods sold by him on execution, with 10 per cent. damages, if the demand do not exceed $100.—Steepleton v. McNeely, 6 Blackf. 76.

[c] (Pa. 1883) A justice has jurisdiction in an action for the price of goods sold and deliv-

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ered, even though he states on the record that it is an action for damages.—Knapp v. Short, 2 Leg. Rec. Rep. 224.

§ 112. Accounts.

[a] A justice of the peace has jurisdiction of the action of account.

—(Conn. 1790) Bulkly v. Lewis, 1 Root, 217;
(Vt. 1837) Chadwick v. Divol, 12 Vt. 499.

CONTRA, see
(Ill. 1869) Crow v. Mark, 52 Ill. 332;
(N. Y. 1820) Rickey v. Bowne, 18 Johns. 131.

[b] (Mo. 1824) A justice of the peace has jurisdiction of an action "on an account," for by that is understood book account.—Floyd v. Wiley, 1 Mo. 430.

[c] (N. C. 1847) A contract not under seal, whereby A. bound himself to pay $75 to B., if B. could prove that A. had certain notes left with him for collection, is not a liquidated account within the act giving justices jurisdiction of liquidated accounts.—Spencer v. Hunsucker, 30 N. C. 9.

[d] (Pa. 1840) A justice of the peace has not jurisdiction of an action of account rendered.—Steffen v. Hartzell, 5 Whart. 448.

[e] (Tenn. 1867) Under the Code, a justice of the peace has jurisdiction over an action on an account where the amount does not exceed $250.—Ayres v. Moulton, 45 Tenn. (5 Cold.) 154.

[f] (Vt. 1864) In an action of account brought before a justice of the peace, an allegation in the declaration that A. and B. were receivers of the moneys of the plaintiff, for the common use, benefit, and profit of the plaintiff and A. and B., does not show that the accounting is necessarily between more than two parties (as A. and B. may have been copartners), so as to exclude the jurisdiction of the justice, and therefore the action will not be dismissed for want of jurisdiction.—La Point v. Scott, 36 Vt. 633.

[g] (Vt. 1864) A justice of the peace has no jurisdiction in actions of account, where the accounting is between more than two parties.—La Point v. Scott, 36 Vt. 633.

§ 113. Enforcement of stockholder's liability.

[a] (Cal. 1891) The personal liability of a stockholder of a corporation, for his proportion of the indebtedness of the corporation, is an obligation arising on contract, within Code Civ. Proc. § 112, giving original jurisdiction to justices' courts in actions on contract for the recovery of money when the amount claimed is less than $300.—Dennis v. Superior Court of Los Angeles County, 91 Cal. 548, 27 Pac. 1031.

§ 114. Implied contracts.

See ante, § 101 [c].

[a] (Ark. 1847) A justice of the peace has jurisdiction in an action for the use and occupation of land, where the title to the land does not come in controversy, though there may have been no express agreement or contract for rent.—Thruston v. Hinds, 8 Ark. (3 Eng.) 118.

[b] (Del. 1865) A justice of the peace has jurisdiction of assumpsit on a landlord's demand for rent, not exceeding $100, against a constable, payable out of the proceeds of a sale of the goods of a tenant in the hands of the constable, which had been levied on the demised premises and sold under execution at the suit of another against the tenant.—Dougherty v. Thompson, 3 Houst. 128.

[c] (N. C. 1829) Under the act of 1794, a single justice of the peace has jurisdiction of implied contracts.—Ferrell v. Underwood, 13 N. C. 111.

[d] (N. C. 1848) Plaintiff executed a note to a third person, with defendant as his surety. The sum for which the note was given was paid by A., and the third person thereupon gave up the note to defendant, who held it for nine years and then sent it to plaintiff, stating that he had been compelled to pay the note, whereupon plaintiff paid it, and, on discovering that A. had paid the amount of the note, sued defendant before a justice of the peace to recover back the money. *Held* that, the money being paid under a mistake of fact, the justice of the peace had jurisdiction of the implied contract to recover the same.—Mitchell v. Walker, 30 N. C. 243.

[e] (Pa. 1854) Where one undertakes to perform work for another, the law implies a contract to do it with care and skill, and an action of assumpsit for a breach of such contract, claiming damages under $100, is within the jurisdiction of a justice of the peace.—Conn v. Stumm, 31 Pa. (7 Casey) 14.

§ 115. Contract or tort.

See post, § 119.

[a] (Ark. 1887) An action by the vendee of a farm to recover damages, based on the fact that the farm was smaller than represented, may be regarded as on an implied promise to pay the sums wrongfully received, and not in tort for the deceit, and therefore is within a justice's jurisdiction.—Harris v. Simpson, 50 Ark. 422, 8 S. W. 177.

[b] (Ga. 1869) An action against an innkeeper to recover the value of personal property left in his charge by a guest, and subsequently stolen, is founded on contract, and not on tort, and a justice's court has jurisdiction.—Rockwell v. Proctor, 39 Ga. 105.

[c] (S. C. 1832) A justice of the peace has jurisdiction of a special action on the case by a sheriff to recover the jail fees of a defendant in execution from the plaintiff; the form of the action not necessarily rendering it tortious, and hence not within his jurisdiction.—Hyams v. Michel, 3 Rich. Law, 303.

4. ACTIONS FOR TORTS.

IN GENERAL, § 116.
TRESPASS IN GENERAL, § 117.
TROVER AND CONVERSION, § 118.
ACTIONS FOR TORTS GROWING OUT OF CONTRACTS, § 119.
ACTIONS FOR CONSEQUENTIAL DAMAGES, § 120.
ACTIONS FOR ASSAULTS, § 121.
ACTIONS FOR PERSONAL INJURIES DUE TO NEGLIGENCE, § 122.
ACTIONS FOR SLANDER AND LIBEL, § 123.
ACTION FOR ENTICING AWAY WIFE, § 124.
ACTIONS FOR MALICIOUS PROSECUTION AND WRONGFUL ATTACHMENT, GARNISHMENT, OR DISTRESS, § 125.
ACTIONS AGAINST OFFICERS FOR NEGLIGENCE OR MISCONDUCT, § 126.
ACTION AGAINST PUBLIC CORPORATION FOR NONPERFORMANCE OF STATUTORY DUTY, § 127.
ACTIONS FOR INJURIES TO REAL ESTATE, EASEMENTS, AND RIGHTS OF WAY, § 128.
ACTIONS FOR NUISANCES, § 129.
ACTIONS FOR INJURIES TO PERSONAL PROPERTY IN GENERAL, § 130.
ACTIONS FOR INJURY TO STOCK, § 131.
ACTIONS FOR DETENTION OF STEAMBOAT BY DEFECTIVE BRIDGE, § 132.
ACTION AGAINST JOINT OWNER OF CHOSE IN ACTION FOR REFUSING TO PROSECUTE CLAIM, § 133.
ACTION AGAINST WITNESS FOR NONATTENDANCE, § 134.

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Amount or value as determining jurisdiction, see post, §§ 151, 158.

Exclusive or concurrent jurisdiction, see ante, § 74 [g, j, k, l].

Involving title to land, see ante, §§ 84 [j], 92, 94 [a, b].

§ 116. In general.

[a] (N. C.) A justice of the peace has no jurisdiction of an action founded on tort.—(1876) Heptinstall v. Rue, 75 N. C. 78; (1877) Nance v. Carolina Cent. Ry. Co., 76 N. C. 9.

[b] (Pa. 1893) Where a justice has issued a warrant for the arrest of one charged with crime, the justice cannot convert the case into an action for damages, and enter judgment for plaintiff, as in an ordinary action of trespass.—Clader v. Shepowich (Com. Pl.) 3 Lack. Jur. 124; 13 Pa. Co. Ct. R. 459, 2 Pa. Dist. R. 824.

§ 117. Trespass in general.

[a] (Ky. 1850) Previous to Act Feb. 12, 1840, justices of the peace had no jurisdiction of cases of trespass and trespass on the case.—Waggener v. Highbaugh, 49 Ky. (10 B. Mon.) 196.

[b] (Pa. 1790) A trespass which might be made the foundation of an action of trover is not within the jurisdiction of a justice of the peace.—Lawrence v. Doublebower, 2 Dall. 73, 1 L. Ed. 294.

[c] (Pa. 1844) A justice of the peace has no jurisdiction of an action of trespass, where the action sounds in damages merely, but only where the trespass has occasioned a loss to the plaintiff, capable of ascertainment and compensation.—Brown v. Quinton, 2 Clark, 169, 3 Pa. Law J. 425.

[d] (S. C. 1881) Damages, indefinite in amount, given by statute for a trespass, cannot be sued for in a trial justice's court.—State v. Weeks, 14 S. C. 400.

§ 118. Trover and conversion.

[a] A justice of the peace has cognizance of trover.

—(Ga. 1879) James v. Smith, 62 Ga. 345;
(N. J. 1812) Anonymous, 3 N. J. Law (2 Penning.) 930.

[b] (Ala. 1840) Justices of the peace have not jurisdiction of actions of trover, though the property converted may be of less value than $50.—Williams v. Hinton, 1 Ala. 297.

[c] (Ark. 1885) Const. 1874, art. 7, § 40, provides that justices of the peace shall have jurisdiction in matters of damage of personal property where the amount in controversy does not exceed $100. *Held*, that a justice had jurisdiction of an action against a railroad company for $66, the value of wood which plaintiff had delivered on defendant's right of way, under a contract of sale made with a third person, and which defendant used by burning it in its engines.—St. Louis, I. M. & S. Ry. Co. v. Briggs, 47 Ark. 59, 14 S. W. 464.

[d] (Ark. 1886) Const. art. 7, § 40, conferring on justices of the peace jurisdiction in all matters of damage to personal property, where the amount in controversy does not exceed $100, includes all injuries which one may sustain in respect to his ownership of personal property, and therefore embraces damages for trover and conversion.—Parkes v. Webb, 48 Ark. 293, 3 S. W. 521.

[e] (Mo. 1848) Under Rev. Code 1845, p. 635, § 3, subd. 3, giving justices of the peace jurisdiction of trespass or case for injury to person or to personal or real property, wherein the damages claimed shall exceed $20 and shall not exceed $50, a justice has jurisdiction of an action in trover, where the amount claimed is not more than $50.—Smith v. Grove, 12 Mo. 51.

[f] (Mo. 1874) Under Wag. St. p. 807, §§ 2, 3, giving justices jurisdiction of actions for injuries to persons or property, where the damage does not exceed $50, a justice has jurisdiction of an action to recover damages for the taking and detention of personal property, where no claim is made for the recovery thereof.—Alley v. Gamelick, 55 Mo. 518.

§ 119. Actions for torts growing out of contracts.

[a] (N. C. 1829) Where defendant promised to pay a debt as soon as he had collected certain notes, a special action on the case was the only remedy for neglect in the collection, and a single magistrate had no jurisdiction, without proof of the receipt by defendant of the money due on the notes.—Fentress v. Worth, 13 N. C. 229.

[b] (N. C. 1874) The provision of Const. art. 4, § 33, that justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract, wherein the sum demanded, with certain limitations, does not include an action ex delicto, though the cause thereof grew out of a contract.—Bullinger v. Marshall, 70 N. C. 520.

[c] (Pa. 1835) A justice of the peace has no jurisdiction of an action to recover damages for a failure to execute a work, employment, trust, or duty, under a contract, in a proper and workmanlike manner; it being substantially an action for a tort, though a tort deducible from the existence of a contract.—Henion v. Morton, 2 Ashm. 150.

§ 120. Actions for consequential damages.

[a] (Del. 1879) In an action for damages in cutting the belt of a wheat thresher and for loss of the use of the machine, the principal claim was evidently for consequential damages, and therefore a justice of the peace had no jurisdiction.—Guenford v. Loose, 5 Houst. 596.

[b] (Del. 1887) An action for the destruction of fruit in baskets, by being run over and crushed by the wheels of defendant's wagon, does not involve consequential damages, and may be tried as an action of trespass before a justice of the peace.—Conner v. Reardon (Super.) 8 Houst. 19, 31 Atl. 878.

[c] (Ill. 1885) "Injury to real property" over which justices have jurisdiction embraces all injuries, whether direct or consequential.—Chicago & A. R. Co. v. Calkins, 17 Ill. App. (17 Bradw.) 55.

[d] (Ill. 1892) A justice of the peace has jurisdiction of an action for damages for an injury to personal property, though such injury happened in consequence of a trespass on real property.—Kellar v. Shippee, 45 Ill. App. 377.

[e] (Pa. 1813) Act March 1, 1799, which extends the power of justices to suits brought for the recovery of damages for any trespass, wrong, or injury done or committed against the real or personal estate of the plaintiff, etc., only comprehends cases where the damages arise by an actual or immediate injury operating on the body of the property, and does not include such a thing as cheating in a bargain concerning a house.—Masteller v. Trimbly, 6 Bin. 33.

[f] (Pa. 1818) A justice of the peace has no jurisdiction of an action on the case for consequential damages for the value of property destroyed by fire from a railroad locomotive.—Hasbrouck v. New York, L. E. & W. R. Co., 1 C. P. Rep. 156.

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[g] (Pa. 1856) A justice of the peace has no jurisdiction of an action for consequential damages for loss of services.—Heineke v. Kohler, 2 Phila. 44.

[h] (Pa. 1873) Where an action is brought for consequential damages, sounding in tort, a justice of the peace has no jurisdiction.—Dormer v. Handwick, 1 Leg. Chron. 293.

[i] (Pa. 1886) A justice of the peace has no jurisdiction of an action of trespass on the case for consequential damages, based on Act 1875, § 7, for furnishing intoxicating liquors to the husband of plaintiff.—Irvine v. Henry, 2 Pa. Co. Ct. R. 336.

[j] (Pa. 1887) A justice of the peace has no jurisdiction in actions for trespass on the case for consequential damages arising from the obstruction of a right of way.—Coulson v. Chronister, 4 Pa. Co. Ct. R. 521.

[k] (Pa. 1892) A justice of the peace has no jurisdiction of an action to recover damages for injuries to plaintiff's property caused by the negligence of defendant in allowing a bull to go on the public highway unattended.—Sisco v. Miller (Com. Pl.) 2 Lack. Leg. N. 143.

[l] (Pa. 1894) Act March 22, 1814, conferred no jurisdiction on justices of the peace of actions of trespass on the case for consequential damages due to negligence.—Thilow v. Philadelphia Traction Co. (Com. Pl.) 4 Pa. Dist. R. 83.

[m] (Pa. 1895) A justice of the peace has no jurisdiction of a claim in trespass to recover the value of a colt killed by "negligence" of defendant, since actions for consequential damages can only originate in the common pleas court.—Ripple v. Keast (Com. Pl.) 8 Kulp, 109, 16 Pa. Co. Ct. R. 548, 5 Pa. Dist. R. 31, 26 Pittsb. Leg. J. (N. S.) 205.

[n] (Pa. 1896) Act March 22, 1814, giving justices jurisdiction of actions of trespass for injuries to real or personal property, does not extend to an action against the township for injuries to a horse, due to a defective culvert; the damages in such action being consequential, and recoverable in an action on the case.—Freedom Tp. v. Snowden (Com. Pl.) 5 Pa. Dist. R. 73.

§ 121. Actions for assaults.

[a] (Del. 1838) A justice of the peace has no jurisdiction in an action of trespass for an assault and battery.—Hollis v. Williamson, 2 Har. 391.

[b] (Ill. 1883) Where an action is in substance one of trespass, brought by a father whose child was beaten by defendant, there is no element of an action of contract, and consequently a justice of the peace has no jurisdiction.—Horne v. Mandelbaum, 13 Ill. App. (13 Bradw.) 607.

[c] (N. J. 1806) Justices of the peace have jurisdiction of actions on the case for special damage by a master for an assault and battery on his servant.—Carman v. Smock, 2 N. J. Law (1 Penning.) 111.

[d] (N. Y. 1847) Trespass cannot be maintained in a justice's court for tearing and injuring plaintiff's clothes, if it appear that the assault was done in connection with an assault on his person, a justice having no jurisdiction of the latter.—Rich v. Hogeboom, 4 Denio, 453.

[e] (Pa. 1804) 6 St. Laws, p. 3, excepts actions for damages for assault and battery from the jurisdiction of justices.—Donaldson v. Maginnis, 4 Yeates, 127.

§ 122. Actions for personal injuries due to negligence.

[a] (Ohio, 1884) Under Rev. St. § 585, giving justices of the peace, "under the restrictions and limitations herein provided," original jurisdiction of any sum not exceeding $100, and concurrent with the court of common pleas of any sum over $100 and not exceeding $300, *held*, that notwithstanding section 591, providing that "justices shall not have cognizance of any action to recover damages for an assault or an assault and battery," a justice had jurisdiction over an action for negligent injury in running over a person.—Schmulbach Brewing Co. v. Archer, 42 Ohio St. 213.

§ 123. Actions for slander and libel.

[a] (N. J. 1811) A justice of the peace has no jurisdiction of an action for slander.—Sparks v. Holston, 3 N. J. Law (2 Penning.) 844.

[b] (Tex. 1863) Old. & W. Dig. § 1100, does not include actions of slander and libel within the jurisdiction of justices of the peace.—Engelking v. Von Wamel, 26 Tex. 469.

§ 124. Action for enticing away wife.

[a] (N. Y. 1811) A justice of the peace has cognizance of an action of trespass on the case for enticing away the wife of the plaintiff.—Chase v. Hale, 8 Johns. 461.

§ 125. Actions for malicious prosecution and wrongful attachment, garnishment, or distress.

[a] An action for malicious prosecution is within the jurisdiction of a justice of the peace.

—(N. J. 1820) Mathews v. Ferguson, 5 N. J. Law (2 Southard) 822.

CONTRA, see

(Wis. 1854) Baldwin v. Hamilton, 3 Wis. 747.

[b] (Ga. 1886) Under Const. art. 6, § 7, and Code, § 4130, providing that justices of the peace shall have jurisdiction in all civil cases arising ex contractu, and in cases of injuries or damages to personal property, where the principal sum does not exceed $100, a justice has no jurisdiction of an action for suing out a garnishment maliciously and without probable cause.—Williams v. Sulter, 76 Ga. 355.

[c] (Neb. 1892) An action for falsely and maliciously suing out an attachment under which plaintiff's property was seized is one for malicious prosecution, and therefore, under Code, § 907, a justice of the peace has no jurisdiction.—Rice v. Day, 34 Neb. 100, 51 N. W. 464.

[d] (N. Y. 1815) Since justices of the peace have no jurisdiction of actions for malicious prosecution, the act conferring on the assistant justices in the city of New York the power possessed by justices of the peace gives them no jurisdiction of actions for malicious prosecution.—Edwards v. Elbert, 12 Johns. 466.

[e] (Pa. 1831) A justice of the peace has jurisdiction of an action under the third section of the act of 1772 for the recovery of double the value of goods taken on a distress for rent in arrear, when no rent is in arrear.—Shetsline v. Keemle, 1 Ashm. 29.

§ 126. Actions against officers for negligence or misconduct.

Actions on official bonds, see ante, § 104.

[a] (Ark. 1892) Under Const. art. 7, § 40, limiting the jurisdiction of justices of the peace to certain matters of contract only, a justice has no jurisdiction in an action against a constable, where he has made a false return on an execution in his hands, and has neglected to sell property of defendant on which he had levied, and which was of sufficient value to have satisfied plaintiffs' debt, for the reason that such an action arises ex delicto.—Merfield v. Burkett, 56 Ark. 592, 20 S. W. 523.

[b] (Ill. 1852) A justice of the peace has jurisdiction of an action against a constable for nonfeasance, where the sum demanded is not over $100.—Briley v. Copeland, 14 Ill. (4 Peck) 88.

[c] (Ill. 1853) A justice of the peace has jurisdiction in an action against a constable for taking property not subject to levy.—Vaughan v. Thompson, 15 Ill. (5 Peck) 39.

[d] (Ill. 1886) Under Rev. St. 1872, c. 79, § 13, giving justices of the peace jurisdiction in actions for damages for injury to realty or personalty, a justice has jurisdiction of an action to recover for an injury to personalty caused by the negligent performance of their duties by highway commissioners.—Skinner v. Morgan, 21 Ill. App. 209.

[e] (Mo. 1822) Under Act Dec. 23, 1818, giving justices jurisdiction of trespass and other actions to recover damages for injury to person or property, a justice of the peace has jurisdiction against an officer for an escape.—Lockhart v. Hays, 1 Mo. 271.

[f] (Neb. 1880) R. brought an action against a sheriff and an attachment creditor in the district court to recover the sum of $300, the value of certain property levied upon by the sheriff under an order of attachment against her husband, and recovered judgment for the sum of $52.58. *Held* not an action against an officer for misconduct in office, and that a justice of the peace had jurisdiction, the amount recovered being less than $100.—Miller v. Roby, 9 Neb. 471, 4 N. W. 65.

[g] (Neb.) Code Civ. Proc. § 907, prohibiting actions against a sheriff and his sureties before justices of the peace, does not deprive a justice of jurisdiction in an action of trover and conversion against a sheriff in his individual capacity, for taking chattels of a value within the justice's jurisdictional limit of $200, though it appear that defendant took such goods in his official capacity.—(1881) Neihardt v. Kilmer, 12 Neb. 35, 10 N. W. 531; (1886) Spielman v. Flynn, 19 Neb. 342, 27 N. W. 224.

[h] (Neb. 1896) After plaintiff had paid his taxes, the county treasurer caused a distress warrant to issue for collection of the same; and, in order to prevent a sale thereunder, plaintiff was obliged to repay the taxes, together with costs. Thereafter the treasurer repaid plaintiff the amount of the taxes, and subsequently plaintiff sued him for the amount of the costs. *Held*, that the action was based on defendant's misconduct as a public officer, and hence a justice of the peace was without jurisdiction.—Warren v. Sadilek, 47 Neb. 53, 66 N. W. 15.

[i] (N. Y. 1849) A justice of the peace has jurisdiction to try an action of trespass on the case for willfully neglecting or refusing to issue an execution on a judgment recovered before the defendant as a justice of the peace.—Van Vleck v. Burroughs, 6 Barb. 341.

[j] (N. Y. 1857) Code, § 53, conferring and defining the jurisdiction of justices of the peace, confers no authority on a justice to try an action for a false return of a justice of the peace.—Worden v. Brown, 14 How. Prac. 327.

[k] (Pa. 1849) Justices of the peace have no jurisdiction in an action of tort against a constable for not paying rent in arrear out of the proceeds of an execution levied on goods upon the premises.—Seitzinger v. Steinberger, 12 Pa. (2 Jones) 379.

[l] (Pa. 1853) A justice of the peace has jurisdiction of a cause of action by a defendant against a constable for selling property which he had claimed to hold under the $300 exemption law.—Stamer v. Nass, 3 Grant, Cas. 240.

[m] (Pa. 1884) A justice of the peace has jurisdiction of an action of trespass brought against a constable for wrongfully retaining exempt goods under an execution.—McDevitt v. Frame, 2 Chest. Co. Rep. 378.

[n] (Pa. 1891) An alderman has jurisdiction of an action in trespass against a constable to recover damages for the wrongful seizure and sale of property.—Pressel v. Bice, 142 Pa. 263, 21 Atl. 813.

[o] (S. C. 1830) A justice of the peace cannot take cognizance of a suit against a constable for neglect in collecting executions delivered to him. His jurisdiction is limited to cases arising out of contract.—Davenport v. Corley, 1 Bailey, 594.

[p] (S. C. 1884) Gen. St. § 1824, provides that no goods on any leased lands, etc., shall be taken on execution, unless the execution plaintiff, before removal of the goods, pays to the landlord such sum or sums as are or shall be due for rent at the time of such taking, provided the rent does not exceed the amount due for one year. *Held* that, where a constable levies on and sells the goods of a tenant in violation of such statute, an action against him by the landlord is an action for damages for injury to rights pertaining to personal property, within the meaning of Code, § 71, par. 2, relating to the jurisdiction of justices of the peace.—Sullivan v. Ellison, 20 S. C. 481.

§ 127. Action against public corporation for nonperformance of statutory duty.

[a] (S. D. 1890) Comp. Laws, § 6042, not having conferred on a justice of the peace authority to try an action for the nonperformance of an official or statutory duty, a justice of the peace has no jurisdiction of an action by a county attorney against the county to recover office expenses; such an action sounding in tort.—Pyle v. Hand County, 1 S. D. 385, 47 N. W. 401.

§ 128. Actions for injuries to real estate, easements, and rights of way.

Involving consequential injuries, see ante, § 120 [c].

—— *title, see* ante, § 85.

Prosecution for obstruction of highways, see "Highways," vol. 25, cc. 1903, 1904, § 447 [c, e, f, g].

[a] (Ark. 1890) If the order under which the overseer acted in opening a road is void, the entry constitutes a trespass on realty, of which a justice has no jurisdiction.—Cockrum v. Williamson, 53 Ark. 131, 13 S. W. 592.

[b] (Ark. 1890) A justice of the peace has no jurisdiction to try a suit for trespass on real estate.—Halpern v. Burgess, 13 S. W. 763.

[c] (Cal. 1855) A justice of the peace has no power conferred upon him to try a cause, where there is an alleged injury arising out of a diversion of water from the natural or artificial channel in which it is conducted; such a right partaking of the realty.—Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140.

[d] (Cal. 1856) Justices of the peace have no jurisdiction in actions to recover damages for an injury to a mining claim.—Van Etten v. Jilson, 6 Cal. 19.

[e] (Del. 1840) A justice of the peace has no jurisdiction of trespass to real estate by horses, cattle, sheep, or hogs, without the intervention of fence viewers.—Draper v. Draper, 3 Har. 65.

[f] (Ill. 1852) A justice of the peace has jurisdiction of an action of trespass for injury

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to growing corn; jurisdiction being disputed on the ground that the corn belonged to the realty.—Reed v. Johnson, 14 Ill. (4 Peck) 257.

[g] (Ill. 1866) Justices of the peace have jurisdiction of actions brought to recover damages to real estate by cattle illegally at large. —Ames v. Carlton, 41 Ill. 261.

[h] (Ill. 1878) A justice of the peace has jurisdiction of an action for damages to real estate by a lessee.—Taylor v. Koshets, 88 Ill. 479.

[i] (Ill. 1888) Justices of the peace have jurisdiction in all cases of injury to real property, whether the damages arising from such injury are actual or merely nominal.—Bischmann v. Boehl, 30 Ill. App. 455.

[j] (Ill. 1889) Under Rev. St. c. 79, § 13, cl. 2, giving justices of the peace jurisdiction of "actions for damages for injury to real property," a justice has jurisdiction of a suit for damages for obstructing a private way, to which plaintiff has title by prescription.—Keyser v. Mann, 36 Ill. App. 596.

[k] (Mich. 1883) Trespass quare clausum fregit consisting in allowing logs to accumulate upon the premises of another, in consequence of the choking up of a stream upon which they were floating, is not an action for the obstruction of a public easement, within the meaning of Comp. Laws 1871, § 5250, and is cognizable by a justice of the peace.—Williamson v. Haskell, 50 Mich. 364, 15 N. W. 512.

[l] (Mo. 1891) The fact that an action for an injury to land affects the inheritance does not deprive a justice of the peace of jurisdiction. His jurisdiction, within the prescribed pecuniary limits, extends to all actions founded on torts, the only exception being actions in which the title to land is in issue.—Polhans v. Atchison, T. & S. F. R. Co., 45 Mo. App. 153.

[m] (N. J. 1808) Justices of the peace have jurisdiction of trespass to land, except in cases where the defendant ousts them of jurisdiction by a plea of title.—Ming v. Compton, 2 N. J. Law (1 Penning.) 345.

[n] (N. Y. 1878) A justice of the peace has jurisdiction of an action of trespass quare clausum fregit, if the damages claimed do not exceed $200.—Brady v. Smith, 1 City Ct. R. 175.

[o] (Pa.) Under Act March 22, 1814, conferring jurisdiction on justices in all actions of trover and conversion and trespass for injury done to real or personal property, where the value of the property claimed or the damage alleged to have been sustained shall not exceed $100, a justice has jurisdiction in all cases where there is an immediate injury done to the body of the property; and every entry into the close of another without his permission, unless justified and authorized by law, is a trespass for which suit may be brought before a justice for any sum not exceeding that named.—(1826) Hobbs v. Geiss, 13 Serg. & R. 417; (1855) Atkinson v. Russman, 13 Leg. Int. 29.

[p] (Pa. 1859) An alderman has jurisdiction of an action of trespass vi et armis for $100 for forcible trespass and keeping possession of plaintiff's home for 18 months.—Curry v. Gilroy, 3 Phila. 424.

[q] (Pa. 1892) A justice of the peace has jurisdiction of an action of trespass qu. cl. fr. to recover damages for injuries done by cattle. —House v. Ziegler (Com. Pl.) 11 Pa. Co. Ct. R. 159.

[r] (Wis. 1881) A complaint by a landlord against a tenant charged that the tenant maliciously threw on the walls and windows of the dwelling house greasy and offensive matter, and maliciously destroyed a waste pipe, allowing offensive matter to accumulate under a sink, from which emanated an offensive ordor, rendering the premises unfit for occupancy, and injuring them. *Held*, that the action was one for malicious and willful injury to real property, different from waste, and was maintainable in a justice's court, under Rev. St. § 3572, subd. 7.—Bandlow v. Thieme, 53 Wis. 57, 9 N. W. 920.

§ 129. Actions for nuisances.

[a] A justice of the peace has no jurisdiction of an action on the case for a nuisance.
—(Ohio, 1829) Nichol v. Patterson, 4 Ohio (4 Ham.) 200;
(Pa. 1831) Herrigas v. McGill, 1 Ashm. 152; (1895) Heisey v. Witmer, 4 Pa. Dist. R. 290.

[b, c] A justice of the peace has no jurisdiction of an action in case for a nuisance affecting the real estate of the plaintiff.
—(Ohio, 1846) Harrington v. Heath, 15 Ohio, 483; Caldwell v. Dunshee, Id. 488;
(Vt. 1839) Whitney v. Bowen, 11 Vt. 250.
CONTRA, see
(Ohio, 1836) Maeller v. Flowers, 7 Ohio (7 Ham.) 230, pt. 2.

§ 130. Actions for injuries to personal property in general.

[a] Justices of the peace have jurisdiction of actions for injuries to personal property.
—(Ill. 1890) Gallery v. Davis, 35 Ill. App. 619.
CONTRA, see
(Pa. 1854) Douglass v. Davidson, 1 Phila. 516.

[b] (Ark. 1876) Under the existing constitution a justice of the peace has jurisdiction of an action for damage to personal property by negligence in the keeping of a ferry, when the amount is $100 or less.—Wells v. Steele, 31 Ark. 219.

[c] (Ga. 1879) Under Const. 1877, justice courts have jurisdiction in actions for torts to personal property, where the damage is less than $100.—James v. Smith, 62 Ga. 345.

[d] (Pa. 1872) Justices of the peace have jurisdiction of actions for trespass for damages to personal property, where the damages sustained do not exceed $100.—Brenner v. Dombach, 3 Lanc. Bar, No. 40, p. 2.

[e] (Pa. 1891) In actions for damages to personal property, the justices of the peace and aldermen of the city of Philadelphia have jurisdiction to the amount of $100.—Porter v. Butchers' Ice & Coal Co. (Com. Pl.) 11 Pa. Co. Ct. R. 256.

§ 131. Actions for injury to stock.

[a] (Ga. 1877) Under the Code, justices have jurisdiction of actions for damages against a railroad company for killing stock, the value of which does not exceed $100.—Western & A. R. Co. v. Brown, 58 Ga. 534.

[b] (Ill. 1891) Under Rev. St. c. 79, § 13, conferring jurisdiction on justices of actions "for taking, detaining, or injuring personal property," a justice has jurisdiction of an action for the loss of hogs by cholera caused by defendant turning out his infected hogs, with knowledge of their condition.—Northrup v. Smothers, 39 Ill. App. 588.

§ 132. Actions for detention of steamboat by defective bridge.

[a] (Ga. 1888) Code, § 5152, giving justices jurisdiction in cases of injuries or damages to personalty, where the amount does not exceed

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$100, does not give jurisdiction of an action for damages for the detention of a steamboat by reason of a defective bridge.—White Star Line Steamboat Co. v. Gordon County, 81 Ga. 47, 7 S. E. 231.

§ 133. Action against joint owner of chose in action for refusing to prosecute claim.

[a] (Pa. 1839) A justice has no jurisdiction in a suit brought by one joint owner of a chose in action against the other for damages for refusing to prosecute the claim on it, by reason of which it was lost.—Mann v. Bower, 8 Watts, 179.

§ 134. Action against witness for non-attendance.

[a] (N. Y. 1813) An action on the case lies in a justice's court against a person regularly subpœnaed as a witness in such court, and who neglects or refuses to attend.—Hasbrouck v. Baker, 10 Johns. 248.

(C) CHARACTER OF PARTIES.

PRIVATE CORPORATIONS, § 135.
PUBLIC CORPORATIONS, § 136.
PUBLIC OFFICERS, § 137.
EXECUTORS AND ADMINISTRATORS, § 138.
HEIRS OR DEVISEES, § 139.
WOMEN—IN GENERAL, § 140.
—— MARRIED WOMEN, § 141.
PARTNERS, § 142.

Action on guardian's bond, see ante, § 105 [a].
Waiver of objections to jurisdiction, see post, § 218 [p].
Jurisdiction over infants, see "Infants," vol. 27, c. 986, § 18 [c].
—— *commitment to reform school, see* "Reformatories."
—— *insane persons, see* "Insane Persons," vol. 27, cc. 2553, 2554, § 75.
—— *principal, surety, and creditors, see* "Principal and Surety," IV., V.
—— *runaway slaves, see* "Slaves."

§ 135. Private corporations.

Appearance as conferring jurisdiction over foreign corporation, see post, § 267 [s].

[a] A justice of the peace has jurisdiction of an action against a corporation.
—(Ark. 1844) Woodruff v. Griffith, 5 Ark. (5 Pike) 354;
(Miss. 1840) Loomis v. Commercial Bank, 5 Miss. (4 How.) 660;
(Ohio, 1827) Harding v. Trustees of New Haven Tp., 3 Ohio (3 Ham.) 227.
CONTRA, see
(N. J. 1817) State Bank v. Van Horn, 4 N. J. Law (1 Southard) 382;
(N. Y. 1810) Coxsackie Dutch Church v. Adams, 5 Johns. 347.

[b] (Mich. 1859) Since the justice's act of 1855, justices of the peace have no jurisdiction to issue attachments against foreign corporations.—Brigham v. Eglinton, 7 Mich. 291.

[c] (Mich. 1874) Justices of the peace have no jurisdiction over foreign insurance companies, especially since the enactment of Laws 1873, p. 206, authorizing a service of process in all cases against such companies by delivery to the state commissioner of insurance, who is required to send duplicates to the company or its agents within the state. Such a provision could not be designed to apply to any court proceeding under summary process, as it could allow no time to prepare for defense, or even to appear.—Hartford Fire Ins. Co. v. Owen, 30 Mich. 441.

[d] (Mich. 1880) A justice of the peace has jurisdiction of an action for wages against a corporation and stockholders jointly, under Acts 1877, No. 113, § 35.—Milroy v. Spurr Mountain Iron Min. Co., 43 Mich. 231, 5 N. W. 287.

[e] (Mich. 1885) Under How. Ann. St. § 6861, giving justices of the peace jurisdiction of actions against corporations in like manner as if against individuals, and section 3723, providing that foreign express corporations shall be deemed residents of the county in which they do business, for the purposes of actions and service of process, foreign express companies may be sued before a justice of the peace.—Gallagher v. American Exp. Co., 56 Mich. 13, 22 N. W. 96.

[f] (Mo. 1859) A justice of the peace has no jurisdiction under the charter of the St. Louis & Iron Mountain Railroad Company of an action against the company to recover damages for injuries sustained by reason of the construction of a culvert.—Fatchell v. St. Louis & I. M. R. Co., 28 Mo. 178.

[g] (Mo. 1859) Justices of the peace have jurisdiction of actions against railroad corporations brought under section 12 of the general railroad act.—Mooney v. Hannibal & St. J. R. Co., 28 Mo. 570.

[h] (Mo. 1860) An action by a laborer against a railroad under section 12 of the general railroad act (Rev. Code 1855, p. 414), is within the jurisdiction of a justice.—Grannahan v. Hannibal & St. J. R. Co., 30 Mo. 546.

[i] (N. J. 1891) The provision of the justice's court act (Revision, p. 539, § 7) that "any body politic or corporate in this state may sue or be sued in any court for the trial of small causes," etc., applies to domestic corporations only, and a justice's court has no jurisdiction of a suit against a foreign corporation.—Wheeler & Wilson Mfg. Co. v. Carty, 53 N. J. Law (24 Vroom) 336, 21 Atl. 851.

[j] (N. Y. 1811) A corporation may bring an action before a justice of the peace.—Hotchkiss v. Trustees of First Religious Soc., 7 Johns. 356.

[k] (Ohio, 1861) The term "foreign corporation," as used in section 28, Act March 14, 1853, entitled "An act of the jurisdiction and procedure before justices of the peace," etc., does not include a corporation created by the laws of this state, and located therein.—Boley v. Ohio Life Ins. & Trust Co., 12 Ohio St. 139.

[l] (Tenn. 1838) Though a justice of the peace cannot issue a distringas, and so cannot enforce the appearance of a corporation, he may render judgment against the corporation for default of appearance to his summons.—Union Bank v. Lowe, 19 Tenn. (1 Meigs) 225.

§ 136. Public corporations.

Jurisdiction as dependent on nature of remedy, see post, §§ 176–188.

[a] Municipal corporations cannot be sued before a justice.
—(Mich. 1855) Root v. Mayor, 3 Mich. 433; (1863) Gurney v. City of St. Clair, 11 Mich. 202;
(N. J. 1861) Inhabitants of Princeton v. Mount, 29 N. J. Law (5 Dutch.) 299.

[b] (Ark. 1850) The United States may sue before a justice of the peace.—McNamee v. United States, 11 Ark. (6 Eng.) 148.

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[c] (La. 1889) A justice of the peace, whose jurisdiction is limited to part of a parish which is subject to the jurisdiction of a police jury, has jurisdiction in a suit against the police jury for an amount not exceeding $100.—State ex rel. Police Jury v. Judge of First Justice's Court, 41 La. Ann. 403, 6 South. 653.

[d] (Mich. 1863) The clause in the act incorporating the city of St. Clair, that it may sue and be sued in all courts of law and equity, intends all courts of law and equity having jurisdiction in the case, and does not confer on justices jurisdiction of actions against the city.—Gurney v. City of St. Clair, 11 Mich. 202.

[e] (Mich. 1881) A justice can hear a suit brought by a municipal corporation.—Hart v. Port Huron Tp., 46 Mich. 428, 9 N. W. 481.

[f] (Mich. 1886) Under How. Ann. St. § 6814, giving justices of the peace original jurisdiction of all civil actions where the amount involved does not exceed $100, an action by a municipal corporation against a pound master for fees which he has collected, is cognizable by a justice of the peace, though, under Id. § 6861, a justice has no jurisdiction of actions against municipal corporations.—City of Eaton Rapids v. Houpt, 63 Mich. 371, 29 N. W. 860.

[g] (Mich. 1889) How. Ann. St. c. 283, authorizes commissioners of highways to sue in their name of office, and in providing for the prosecution and defense, abatement and discontinuance, of such suits, treats the officers as a corporation. Section 6861 provides that all actions against corporations, except municipal corporations, shall be cognizable before a justice of the peace. *Held*, that a justice of the peace has no jurisdiction of an action against a commissioner of highways.—Commissioner of Highways v. Commissioner of Highways, 77 Mich. 228, 43 N. W. 870.

[h] (Mich. 1896) Under How. Ann. St. § 6861, which provides that all actions against corporations, except municipal corporations, shall be cognizable before a justice of the peace, an action against a city for trespass in laying a sewer through plaintiff's land must be brought in the circuit court.—Mason v. City of Muskegon, 109 Mich. 456, 67 N. W. 692.

[i] (N. J. 1875) Though a municipal corporation is subject to garnishment under the New Jersey attachment act, yet in such case a scire facias cannot issue out of a justice's court.—City of Jersey City v. Horton, 38 N. J. Law (9 Vroom) 88.

[j] (N. J. 1880) The trustees of a school district, in their corporate capacity, are not liable to suit in a justice's court.—Trustees of School Dist. No. 28 v. Stocker, 42 N. J. Law (13 Vroom) 115.

[k] (Ohio, 1827) An individual can sustain a suit against a township, as well before a justice of the peace as in other courts.—Harding v. Trustees of New Haven Tp., 3 Ohio (3 Ham.) 227.

[l] (Pa.) A justice of the peace has no jurisdiction in an action against the county to recover fees for which the county has become liable in criminal prosecution, tried in the court of quarter sessions.—(1855) Walton v. Lerch, 2 Lanc. Law Rev. 374; (1885) Id., 1 Lehigh Val. Law Rep. 117.

[m] (Pa. 1880) A magistrate has jurisdiction of a suit against the city of Philadelphia to recover the compensation allowed by law to an overseer of the election.—Wentz v. City of Philadelphia, 14 Phila. 194.

§ 137. Public officers.

Action on official bonds, see ante, § 104.

Commissioner of highways as public corporation, see ante, § 136 [g].

[a] (Kan. 1873) One justice of the peace has no power to hear and determine the question whether another justice of the peace has collected money in his official capacity and refused on demand to pay it over to the person entitled to the same.—Neal v. Keller, 12 Kan. 247.

[b] (Ohio, 1860) Justices' Act March 14, 1853, precluding justices from exercising jurisdiction in actions for misconduct in office, does not preclude them from exercising jurisdiction in replevin against a constable who had levied on property not belonging to the judgment debtor.—Dempsey v. Hill, 3 Ohio Dec. 260.

[c] (Pa. 1861) A justice has jurisdiction of an action against another justice for demanding and receiving illegal fees.—Bartolett v. Achey, 38 Pa. (2 Wright) 273.

§ 138. Executors and administrators.

Actions on bonds, see ante, § 105 [b, c].

Amount in controversy as determining jurisdiction, see post, § 149 [d, e].

Chancery jurisdiction in actions to enforce judgments against executors and administrators, see post, § 184 [i].

Confessing judgment in favor of executor, see post, § 378 [b].

[a] (U. S.) A justice of the peace in the District of Columbia has jurisdiction against executors and administrators.—(1838) Ennis v. Holmead, Fed. Cas. No. 4,492 [5 Cranch, C. C. 509]. CONTRA, see (1821) Ritchie v. Stone, Fed. Cas. No. 11,864 [2 Cranch, C. C. 258]; (1823) Adams v. Kincaid, Fed. Cas. No. 58 [2 Cranch, C. C. 422]; (1837) Foy v. Talburt, Fed. Cas. No. 5,020 [5 Cranch, C. C. 124].

[b] (Del. 1841) A justice of the peace cannot issue a sci. fa. on a judgment against an administrator to try the question of assets subsequently acquired.—Robinson v. Prince, 3 Har. 389.

[c] (D. C. 1888) Act Cong. March 1, 1823, provides that justices of the peace in the District of Columbia shall have jurisdiction, "where the real debt and damages do not exceed the sum of $50, * * * to try, hear, and determine the matter in controversy, between the creditor and debtor, their executors and administrators, * * * in the same manner, and under the same rules and regulations, to all intents and purposes, as such justices of the peace are now authorized and empowered to do when the debt and damages do not exceed the sum of $20." At the time the statute was enacted justices' jurisdiction was confined to matters in which the amount involved did not exceed $20, and did not extend to actions against executors and administrators. *Held*, that the act of March 1, 1823, extended the jurisdiction only in respect to the amount in controversy.—Newmeyer v. Cowling, 6 Mackey, 504.

[d] (Ill. 1836) A justice of the peace has no jurisdiction of an action to recover a sum exceeding $20, in which an administrator is a party, except for debts due for property purchased at the administrator's sale.—Leigh v. Mason, 2 Ill. (1 Scam.) 249.

[e] (Ill. 1865) Justices of the peace have jurisdiction, under clause 10, § 17, of the act in regard to justices of the peace, in suits brought by administrators against a person not an executor or administrator, where the amount claimed does not exceed $100.—Miller v. McCray, 37 Ill. 428.

[f] (Ill. 1895) Under 2 Starr & C. Ann. St. c. 79, § 13, which gives justices of the peace jurisdiction "in all cases where the action of debt or assumpsit will lie if the damages claimed do not exceed $200," justices have jurisdiction of actions against administrators on debts due from

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their intestates.—Bradwell v. Wilson, 158 Ill. 346, 42 N. E. 145, reversing (1894) 57 Ill. App. 162.

[g] (Ind. 1831) The jurisdiction of justices of the peace does not extend to cases in which an executor or administrator is either plaintiff or defendant.—Simonds v. Colvert, 2 Blackf. 413.

[h] (Ind. 1845) Act 1843, giving justices of the peace jurisdiction in actions by and against executors and administrators, applies to causes of action which existed at the time of its passage, as well as to those that might afterwards accrue.—Thompson v. Harbison, 7 Blackf. 495.

[i] (Ind. 1847) A justice of the peace had no authority, previous to the Revised Statutes of 1843, to issue a summons against an executor as garnishee in attachment.—Harmon v. Birchard, 8 Blackf. 418.

[j] (Ind. 1859) Executors may sue in a justice's court.—Arnold v. Fleming, 14 Ind. 10.

[k] (Ky. 1840) The statute of 1838, conferring equitable jurisdiction on justices of the peace to subject choses in action to the satisfaction of judgments, applies as well to a judgment against an administrator or executor as any other person.—Sherwood v. Campbell's Adm'r, 40 Ky. (1 B. Mon.) 54.

[l] (Mich. 1884) Under How. Ann. St. § 6815, providing that a justice of the peace shall not have cognizance of actions against executors or administrators as such, except in cases especially provided by law, and section 5902, excepting from actions that cannot be brought against executors or administrators actions of replevin, a justice has jurisdiction of an action of replevin against a special administrator.—Singer Mfg. Co. v. Benjamin, 55 Mich. 330, 21 N. W. 358.

[m] (N. Y. 1803) A justice of the peace has no jurisdiction in a suit by an administrator.—Way v. Carey, 1 Caines, 191.

[n] (Pa. 1881) A justice of the peace has no jurisdiction of an action brought by a distributee in the orphans' court to recover from an executor his distributive share.—Montgomery v. Heilman, 96 Pa. 44.

[o] (S. C. 1828) The jurisdiction of justices of the peace may extend to charge a defendant as executor de son tort.—Leach v. House, 1 Bailey, 42.

§ 139. Heirs or devisees.

See post, § 184 [x].

[a] (Ill. 1881) Under Rev. St. 1874, p. 542, c. 59, providing that, if no person administers on the estate of a decedent within one year, a suit may be maintained against his heirs or devisees, a justice of the peace has jurisdiction of such an action under Rev. St. c. 79, § 13, giving them jurisdiction in all cases where the action of debt or assumpsit will lie, if the damages do not exceed $200.—Dodds v. Walker, 9 Ill. App. (9 Bradw.) 37.

§ 140. Women—In general.

[a] (U. S. 1838) Justices of the peace in the District of Columbia have jurisdiction in cases against women.—Johnson v. Washington, Fed. Cas. No. 7,420 [5 Cranch, C. C. 434].

§ 141. —— Married women.

In cases involving equitable relief, see post, § 188.

Judgments against husband for wife's antenuptial debts, see post, § 389 [e].

—— *married women, see* post, §§ 373 [j], 374 [m], 414 [m].

Showing jurisdiction on record, see post, § 209.

[a] (N. C. 1886) A feme covert may be sued in the court of a justice of the peace for a debt due by her, or on a contract made by her before marriage, or for a debt contracted by her as a free trader.—Neville v. Pope, 95 N. C. 346.

[b] (N. C. 1890) Under Code, § 1823, providing that the liability of a feme sole shall not be altered or impaired by her marriage, a justice of the peace has jurisdiction of an action against a feme covert for a debt contracted before her marriage.—Hodges v. Hill, 105 N. C. 130, 10 S. E. 916.

[c] (N. C. 1890) Where a feme sole employs a servant for a definite period, and marries before the expiration of such period, compensation for the whole time can be recovered in a justice's jurisdiction, if under $200.—Beville v. Cox, 107 N. C. 175, 12 S. E. 52, 11 L. R. A. 274.

[d] (N. C. 1891) Where suit is brought against a firm before a justice of the peace, and after appeal to the superior court it appears that the defendants are husband and wife, the action cannot be maintained, since the justice could have no jurisdiction of a feme covert.—Patterson v. Gooch, 108 N. C. 503, 13 S. E. 186.

[e] (Pa. 1862) It seems that a justice has no jurisdiction in a case arising on the contract of a married woman, unless the contract shall appear to be within the provisions of Act April 11, 1848.—Hunter v. Weidner, 1 Woodw. Dec. 6.

§ 142. Partners.

See post, § 187.

[a] (Kan. 1887) Where an action at law will lie by a partner against his copartner, all their partnership affairs being settled except an accounting, it can be maintained before a justice of the peace, the amount claimed not exceeding $300, and there being only a limited number of transactions, involving no complications, to be inquired into.—Clarke v. Mills, 36 Kan. 393, 13 Pac. 569.

(D) DOMICILE OR RESIDENCE OF PARTIES AND TERRITORIAL EXTENT OF JURISDICTION.

DOMICILE OR RESIDENCE OF PARTIES, § 143.
—— ADJOINING COUNTIES AND TOWNS, § 144.
—— NONRESIDENTS FOUND WITHIN JURISDICTION, § 145.
TERRITORIAL EXTENT OF JURISDICTION, § 146.
—— EXERCISE OF JURISDICTION BEYOND TERRITORIAL LIMITS, § 147.

Appearance as conferring jurisdiction over nonresident, see post, § 271.

Attachment against nonresident, see post, § 177.

Consent as conferring jurisdiction over nonresident, see post, § 217 [a].

Garnishment against nonresidents, see post, § 178 [e].

Waiver of objections to jurisdiction over nonresident, see post, § 220.

§ 143. Domicile or residence of parties.

[a] (Ala. 1827) St. 1807, § 12, providing that no freeholder shall be sued out of the county of his permanent residence, extends to suits before justices of the peace.—Read v. Coker, 1 Stew. 22.

[b] (Colo. 1873) In an action before a justice of the peace, a defendant may, under Rev. St. p. 418, § 103, plead in bar before the justice, and on appeal in the district court, that he is

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a nonresident of the county, and that the action did not accrue in the county where the suit is pending.—Melvin v. Latshaw, 2 Colo. 81.

[c] (Ga. 1895) Under Code, § 3406, as amended by Act Dec. 20, 1892, providing that railroad companies shall be sued for torts to personal property in the county wherein the tort was committed if the company has an agent therein, the county becomes the residence of the company for the purpose of the suit, and if the action is within the jurisdiction of a justice of the peace, it may be brought in the justice court of any militia district in which the company's road is located.—Southern Ry. Co. v. Johnson, 96 Ga. 655, 23 S. E. 836.

[d] (Ind. 1863) Actions of replevin may be instituted before any justice of the peace in the county, without reference to the fact that the defendant may reside in a different township from that in which the justice resides.—Test v. Small, 21 Ind. 127.

[e] (Ind. 1881) An action on contract against a resident of Indiana, before a justice, unless commenced by capias, must be brought in the township of defendant's residence, if there is a competent justice in such township.—Wilkinson v. Moore, 79 Ind. 397.

[f] (Iowa, 1882) Under Code 1873, § 3507, providing that the jurisdiction of justices of the peace shall not "embrace suits for the recovery of money against actual residents of any other county," a justice has no jurisdiction to render judgment against a nonresident partner served with notice in another county, in an action against the members of a firm as individuals, though, by section 2553, he has jurisdiction of a partnership existing in his own county, and can render judgment against the firm as such.—Ebersole v. Ware, 59 Iowa, 663 13 N. W. 844.

[g] (Iowa, 1884) Where one rents and keeps a house with his family in one county, designing to remain until he has completed a certain job, he becomes an "actual resident" there for the purposes of the jurisdiction of a justice of the peace, though he has a domicile in another county, whither he intends to return on the completion of the job.—Fitzgerald v. Arel, 63 Iowa, 104, 16 N. W. 712, 18 N. W. 713, 50 Am. Rep. 733; Bleedner v. Same, 63 Iowa, 727, 17 N. W. 183, distinguishing Bradley v. Fraser (1880) 54 Iowa, 289, 6 N. W. 293.

[h] (Iowa, 1884) Code 1873, § 2585, which provides that "where a corporation, company, or individual has an office or agency in any county for the transaction of business, any suits growing out of or connected with the business of such agency" may be brought in that county, applies to justices of the peace as well as to the superior courts.—Fitzgerald v. Gimmell, 64 Iowa, 261, 20 N. W. 179.

[i] (Iowa, 1895) Code 1873, § 3507, makes the jurisdiction of a justice of the peace coextensive with the county, unless specially restricted. Sections 3509, 3510, provide that suits may be brought in the township where plaintiff or defendant resides, or in any other township of the same county, if actual service on the defendant is made in such township. *Held*, that a justice of the peace has no jurisdiction to enter judgment in an action by a nonresident of the county against a defendant who was not served with original notice in the township where the action was brought.—Thompson v. Jackson, 93 Iowa, 376, 61 N. W. 1004.

[j] (La. 1887) The provision of article 165, No. 9, Code Prac., making corporations committing trespass or doing damage "liable to be sued in the parish where such damage is done or trespass committed," does not confer jurisdiction of such action on justices of the peace away from the corporate domicile. The article (165) is found under a particular title of the Code of Practice, the first article of which restricts the application of the provisions under said title to district courts, and declares that "special rules are hereafter established for justices of the peace." Such special rules are found in the following title 4 of said Code, articles 1069 and 1070 of which expressly forbid them from exercising jurisdiction over defendants domiciled in the state, outside of their territorial limits.—State ex rel. New Orleans & N. E. R. Co. v. Huft, 39 La. Ann. 990, 3 South. 180.

[k] (Me. 1851) A judgment rendered on a default by a justice of the peace of one county when the defendant's residence is an another county may be reversed on error.—Jewell v. Brown, 33 Me. 250.

[l] (Mich. 1885) A justice of the peace has jurisdiction only in those cases in which the plaintiffs, or some one of them, or the defendants, or some one of them, are resident in the county where the suit is brought.—Hall v. Shank, 57 Mich. 36, 23 N. W. 478.

[m] (Mich. 1893) Acts 1887, No. 229, §§ 5, 9, providing that loggers' liens may be enforced by attachment in justices' courts of the county in which such products may be situated, and justices of the peace, within their respective counties, shall have jurisdiction of all such cases where the amount claimed does not exceed $300, does not enlarge the jurisdiction of justices given by How. Ann. St. § 6818, as amended by Acts 1885, No. 118, providing that every action commenced in such court shall be brought before some justice of the peace of the township where the parties, or any of them, reside, or before some justice of another township in the same county, next adjoining the residence of one of the parties, so that such action may be brought before a justice in a township in which neither of the parties reside, and which does not adjoin their places of residence.—Burlingame v. Marble, 95 Mich. 5, 54 N. W. 695.

[n] (Mich. 1896) How. Ann. St. § 6819, relating to actions in justices' courts, provides that if plaintiffs be all nonresidents of the county, or if the defendant be a nonresident of the county, then such action may be brought before any justice of the township or city where such plaintiffs or defendants, or either of them, may be. *Held*, that where a nonresident brings an action before a justice in the county, but not in the township, in which defendant resides, plaintiff need not be present in the township when the summons is taken out.—Weaver v. Rix, 109 Mich. 697, 67 N. W. 970.

[o] (Mo. 1883) Under Rev. St. § 2839, prescribing the territorial jurisdiction of justices of the peace, such justices have no jurisdiction of causes in which both plaintiff and defendant are nonresidents of the county in which the suit is brought.—Smith v. Simpson, 80 Mo. 634.

[p] (N. Y. 1831) A suit in a justices' court must be brought in the town or next adjoining town wherein either the plaintiff or the defendant to the record resides; the fact that the instrument declared on belongs to an assignee, a nonresident of the county, but not a party to the record, does not justify a departure from this requirement.—Hardy v. Rowe, 7 Wend. 452.

[q] (N. Y. 1833) 2 Rev. St. p. 226, §§ 8, 9, limiting suits before justices to particular towns in regard to the residence of parties, do not extend to nonresident plaintiffs, and where a warrant issues in favor of a nonresident plaintiff, the action may be brought before any justice of the county, and need not be brought be-

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fore a justice of the town where defendant resides, or of the next adjoining town.—Hunter v. Burtis, 10 Wend. 358.

[r] (N. Y. 1857) A justice does not have jurisdiction by long summons over all persons residing in his county, but only over those who, residing in the county, also reside in his own town or in a town adjoining, or where the plaintiff resides in the same town with the justice or in an adjoining one.—Cooper v. Ball, 14 How. Prac. 295.

[s] (N. Y. 1882) Under Code, §§ 2869, 2876, an action by a nonresident plaintiff in a justice's court may be brought anywhere in the county of the defendant's residence.—Bird v. Crane, 26 Hun, 531.

[t] (N. Y. 1888) Code Civ. Proc. § 2869, provides that "an action must be brought before a justice of a town or city wherein one of the parties resides, or a justice of an adjoining town or city in the same county, except, * * * where the defendant is a nonresident of the county, it may be brought before a justice of the town or city in which he is at the time of the commencement of the action." *Held*, that the latter provision is not exclusive, and that a justice of the town where plaintiff resides has jurisdiction, though defendant is a nonresident, and was in another town in the same county when the action was commenced.—Bennett v. Weaver, 50 Hun, 111, 3 N. Y. Supp. 776.

[u] (N. Y. 1890) Under Code Civ. Proc. § 2861, providing that a justice of the peace has only the civil jurisdiction given him by statute, a justice has no jurisdiction of the person of defendant in an action brought in violation of Code Civ. Proc. § 2869, providing that an action must be brought before a justice of the town or city wherein one of the parties resides, or of an adjoining town or city in the same county.—Larocque v. Harvey, 57 Hun, 366, 10 N. Y. Supp. 576, 19 Civ. Proc. R. 109.

[v] (N. Y. 1894) Code Civ. Proc. § 2869, provides, that "an action must be brought before a justice of the town or city wherein one of the parties resides, or a justice of an adjoining town or city in the same county, except, * * * where the defendant is a nonresident of the county, it may be brought before a justice of the town or city in which he is at the time of the commencement of the action." *Held*, that an action may be brought against a nonresident defendant in a town adjoining the city in which plaintiff resides, though defendant was not in such town when the action was commenced.—Slavin v. Mansfield, 77 Hun, 535, 28 N. Y. Supp. 921.

[w] (N. C. 1878) Acts 1876–77, c. 287, ousting the jurisdiction of justices of the peace in civil actions where none of the defendants reside in the justice's county, applies only to actions commenced after the passage of the act.—Lilly v. Purcell, 78 N. C. 82.

[x] (Ohio, 1861) Under Act Jan. 17, 1840, § 15, regulating inclosures, an action of trespass before a justice of the peace must be brought in the township in which the defendant resides.—Place v. Welch, 2 Ohio Dec. 542.

[y] (Tex. 1890) Rev. St. art. 1198, subd. 3, provides that where defendants reside without the state, or their residence is unknown, actions may be brought against them in the county where plaintiff resides. Subdivision 4 provides that several defendants, resident in different counties, may be sued in any county wherein one of them resides. Article 1556, subd. 8, provides that suits before a justice of the peace against nonresidents of the state, or persons whose residence is unknown, may be brought in the county and precinct where plaintiff resides. *Held*, that under these provisions a justice of the peace does not acquire jurisdiction of the person of a defendant, resident in another county, by virtue of service by publication on a codefendant whose residence is unknown, but such defendant can only be sued in the county of his residence.—Claiborne v. Pickens (App.) 16 S. W. 867.

[z] (Utah, 1890) Comp. Laws 1888, § 3021, provides that justices of the peace shall have jurisdiction in their respective precincts or cities; and therefore it is no objection to a justice's jurisdiction that the person served with summons as defendant's agent resided in a different precinct from that in which the justice held his court.—Saunders v. Sioux City Nursery & Seed Co., 6 Utah, 431, 24 Pac. 532.

[zz] (Vt. 1845) In trespass on the freehold, before a justice of the peace, the writ must be made returnable in the town where one of the parties resides, if both parties are citizens of this state.—June v. Conant, 17 Vt. 656.

§ 144. —— Adjoining counties and towns.

[a] (Conn. 1811) A justice of the peace has no jurisdiction in a qui tam action upon the statute for selling spirituous liquors without a license, where both parties reside in an adjoining town.—Humphreville v. Perkins, 5 Day, 117.

[b] (Conn. 1841) Where there is no justice of the peace in either of the towns wherein the plaintiff or defendant dwells, the plaintiff may bring his action before a justice residing in one of the towns next adjoining the place of his abode, though in a different county, especially if it be in the county wherein the defendant dwells.—Town of Lyme v. Town of East Haddam, 14 Conn. 394.

[c] (Mich. 1887) Plaintiff owned 40 acres of land in Climax township, Kalamazoo county, Michigan, through which a railroad company had a right of way, which it neglected to keep properly fenced, and plaintiff's animals got upon the track and were killed. Plaintiff sued the railroad company, which was a resident of Pavilion township, through which its road ran, and which cornered on Kalamazoo township, bringing the suit before a justice of the peace in Kalamazoo city, which was entirely within the limits of Kalamazoo township. Climax township, where plaintiff resided, did not adjoin either the city or township of Kalamazoo. *Held* that, under How. Ann. St. § 6818, providing that suit may be brought "before some justice of a city formed from a township or townships next adjoining the residence of the plaintiff or defendant, or one of the plaintiffs or defendants," and act No. 118, Laws 1885, which further provides that the action may be brought before a justice of a city lying in a township which adjoins the township where the plaintiff or the defendant or either of them reside, the justice had jurisdiction.—Jebb v. Chicago & G. T. Ry. Co., 67 Mich. 160, 34 N. W. 538.

[d] (Minn. 1872) Under Laws 1870, c. 79, providing that in actions arising on contract the summons issued by a justice of the peace may be served in any county adjoining the county in which the justice resides, it is not necessary, to authorize a justice to issue a summons to an adjoining county, that either party should be a resident of the county wherein such summons was issued.—Tyrrell v. Jones, 18 Minn. 312 (Gil. 281).

[e] (N. Y. 1865) Two towns contiguous at either of their corners are "adjoining," within the statute which gives jurisdiction to justices of the peace in actions, the parties to which reside in towns adjoining that of the justice's

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residence.—Holmes v. Carley, 31 N. Y. 289, affirming (1860) 32 Barb. 440.

[f] (N. Y. 1894) Code Civ. Proc. § 2869, provides that "an action must be brought before a justice of a town or city wherein one of the parties reside, or a justice of an adjoining town or city in the same county, except in one of the following cases." Subdivisions 1–4 of said section enumerate four exceptions enlarging the jurisdiction of the justice. Subdivision 5 provides that no justice of a town adjoining an incorporated city "shall have jurisdiction of any action brought by or against a resident of such adjoining city unless at least one of the parties to the action is a resident of such town." *Held*, that subdivision 5 was an exception to the main clause of the section, and not to the other subdivisions, and did not affect the right given by subdivision 3 to a resident of a city to sue a nonresident of the county in a town adjoining the city.—Head's Iron Foundry v. Sanders, 77 Hun, 432, 28 N. Y. Supp. 808.

§ 145. —— Nonresidents found within jurisdiction.

See ante, § 143 [g].
Attachment, see post, § 177 [r].

[a] (Ind. 1856) A debtor going from the county of his residence into another county may be there sued before a justice of the latter county.—Maxwell v. Collins, 8 Ind. 38.

[b] (Ind.) The jurisdiction of a justice of the peace in a suit commenced by capias ad resp. extends over all persons found in his county, whether residents thereof or not.—(1863) Harris v. Knapp, 21 Ind. 198; (1868) Graham v. Klyla, 29 Ind. 432.

[c] (Iowa, 1877) A justice of the peace cannot acquire jurisdiction in an action for the recovery of money against a resident of another county, even though the party may have been served with notice in the township where the action is commenced.—Hamilton v. Millhouse, 46 Iowa, 74.

[d] (Iowa, 1880) Under Code 1873, § 3507, which provides that the jurisdiction of justices of the peace shall not "embrace suits for the recovery of money against actual residents of any other county," a justice has no jurisdiction of such an action against a person who removed with his family into such justice's county for a temporary purpose, with the intention of returning when that purpose should be accomplished.—Bradley v. Fraser, 54 Iowa, 289, 6 N. W. 293.

[e] (N. Y. 1833) Under 2 Rev. St. p. 226, § 9, providing that if the plaintiffs be all nonresidents of the county, or if the defendant be a nonresident of the county, then such action may be brought before any justice of the town in which such plaintiff or defendant may be, a suit against a nonresident defendant must be brought before a justice of the town in which defendant may be at the time of the commencement of the suit, but a nonresident plaintiff need not be personally in county at the time of the application for process.—Hunter v. Burtis, 10 Wend. 358.

[f] (N. Y. 1888) A justice of the peace has jurisdiction of a suit where defendant is served within the county in which the justice has jurisdiction, though in the complaint neither the residence of plaintiff nor defendant is alleged.—Hoffman v. Barton, 47 Hun, 409.

[g] (Or. 1884) Under Civ. Code, § 883, as amended, if either party to an action before a justice resides in the precinct where the action is commenced, and personal service is had on the defendant in any precinct of that county, the court acquires jurisdiction.—Taylor v. Jenkins, 11 Or. 274, 8 Pac. 681.

§ 146. Territorial extent of jurisdiction.

Constitutionality of law affecting territorial jurisdiction, see ante, § 72 [u].
Place for taking proceedings or holding court, see post, § 233.

[a] A justice of the peace has jurisdiction throughout his county in a case of forcible entry and detainer.
—(Iowa, 1849) Wright v. Phillips, 2 G. Greene, 191;
(Mo. 1844) Keim v. Daugherty, 8 Mo. 498.

[b] (Colo. 1887) Gen. St. § 1495, being section 9 of the forcible entry and detainer act, which provides that "the district courts in their respective districts, and county courts and justices of the peace in their respective counties, shall have jurisdiction of cases arising under this chapter," gives jurisdiction to justices of the peace, in actions of forcible entry and detainer, coextensive with the boundaries of their respective counties, and is not restricted in its operation in that respect by section 1932, which, in general terms, limits the jurisdiction of justices of the peace to the townships in which they reside.—Reynolds v. Larkins, 10 Colo. 126, 14 Pac. 114.

[c] (Conn. 1789) In civil actions the jurisdiction of a justice of the peace is limited to the town in which he resides.—Palmer v. Palmer, 1 Root, 202.

[d] (Ga. 1883) Act July 21, 1879, limiting the jurisdiction of justices of the peace, does not repeal Act Dec. 22, 1834, giving to certain justices in Richmond county civil jurisdiction over the whole corporate limits of the city of Augusta.—Thomas v. Lawton, 71 Ga. 244.

[e] (Iowa, 1862) Under Revision 1860, the jurisdiction of a justice in suits begun by attachment is coextensive with his county.—Leversee v. Reynolds, 13 Iowa, 310.

[f] (Iowa, 1863) The jurisdiction of a justice of the peace is coextensive with his county, in actions of replevin and suits commenced by attachment.—Biddle v. Allender, 14 Iowa, 410.

[g] (Iowa, 1877) The jurisdiction of a justice of the peace, in actions of attachment and replevin, is not limited to the township in which either of the parties reside or the property is found, but is coextensive with the county.—Knowles v. Picket, 46 Iowa, 503.

[h] (Iowa, 1894) Code 1873, § 3507, provides that the jurisdiction of justices of the peace, when not especially restricted, shall be coextensive with their respective counties. *Held*, that Acts 20th Gen Assem. c. 198, which establishes a circuit court for the east half of Pottawattamie county, with the jurisdiction and powers of circuit courts of the state, does not limit the jurisdiction of a justice of the peace in such county.—Coffman v. Trimble, 90 Iowa, 737, 57 N. W. 603.

[i] (Mass. 1855) St. 1852, c. 94, § 22, which provides that the police court of Springfield "shall have original jurisdiction of all suits and actions which may now, or at any time hereafter, be heard, tried, and determined before any justice of the peace in the county of Hampden, and exclusive jurisdiction whenever all the parties reside in Springfield, and service of the writ is had on the defendant in said county, and no writ, in any such action or suit, shall be made returnable before any justice within said city of Springfield, but to said police court only," takes away the jurisdiction of justices of the peace to try any civil action whatever with-

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in the limits of Springfield.—Elder v. Dwight Mfg. Co., 70 Mass. (4 Gray) 201.

[j] (Minn. 1880) Gen. St. 1878, c. 84, provides that any justice of the peace may, within his county, entertain proceedings in forcible entry and detainer. Chapter 64, § 104, provides that the municipal court shall have exclusive jurisdiction of such proceedings within the city of St. Paul. *Held*, that a justice of the peace in a town in Ramsey county, outside the city of St. Paul, may entertain proceedings in his town in unlawful detainer, though the parties reside, and the property is situate, within such city.—Hoffman v. Parsons, 27 Minn. 236, 6 N. W. 797.

[k] (Minn. 1886) Under Sp. Laws 1885, c. 74, giving the municipal court of Minneapolis exclusive jurisdiction of all civil actions and proceedings previously cognizable before a justice of the peace, the defendant or garnishee in which resides within the city of Minneapolis, and providing that no justice of the peace shall have jurisdiction to issue any summons or process in any civil action excepting executions to be served within said city, no jurisdiction is acquired by a justice of the peace by the service of a summons upon a defendant within the city of Minneapolis.—Higgins v. Beveridge, 35 Minn. 285, 28 N. W. 506.

[l] (Mo. 1886) A justice's jurisdiction in the city of St. Louis, in all civil cases except landlord's summons cases, is coextensive with the boundaries of the city.—Clarkson v. Guernsey Furniture Co., 22 Mo. App. 109.

[m] (Neb. 1883) A justice of the peace has jurisdiction coextensive with his county.—Jones v. Church of the Holy Trinity, 15 Neb. 81, 17 N. W. 362.

[n] (Nev. 1865) The jurisdiction of justices of the peace in Utah extends to the limits of their respective counties only.—Mallett v. Uncle Sam Gold & Silver Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

[o] (N. H. 1852) Justices of the peace throughout the state have civil jurisdiction in any county in the state.—Young v. Bride, 25 N. H. (5 Fost.) 482.

[p] (N. Y.) The legislature has power to enlarge or contract the territorial jurisdiction of a justice of the peace.—(1823) Ex parte McCollum, 1 Cow. 550; (1827) People v. Garey, 6 Cow. 642.

[q] (N. Y. 1832) A justice of the peace, except in the trial of civil actions, is not limited to the town in which he is chosen, if he be authorized to perform the act.—Gurnsey v. Lovell, 9 Wend. 319.

[r] (N. Y. 1833) A justice of the peace may issue process and make it returnable at any place in the county in which he is a justice; his jurisdiction being coextensive with the county.—Schroepel v. Taylor, 10 Wend. 196.

[s] (N. Y. 1878) Under Acts 1849, c. 125, § 35, conferring the same jurisdiction on justices of the peace in Brooklyn, "in said city," as the justices of towns have by law, "in respect to the towns," restricts the territorial jurisdiction of justices in Brooklyn to the city itself.—Geraty v. Reid, 13 Hun, 313, affirmed (1879) 78 N. Y. 64.

[t] (Or. 1868) Under the charter of the city of Salem, declaring that the recorder shall be ex officio a justice of the peace, his jurisdiction extends only within the city limits.—Craig v. Mosier, 2 Or. 323.

[u] (S. C. 1838) There is no difference between justices of the quorum and of the peace as to the territorial extent of their jurisdiction.—State v. Ferguson, Dud. Eq. 152.

§ 147. —— Exercise of jurisdiction beyond territorial limits.

Issuance of warrant on complaint for offense committed in another county, see "Criminal Law," vol. 14, cc. 1092, 1093, § 440.

Solemnizing marriage out of county, see "Marriage."

[a] (U. S. 1836) A justice of the peace cannot issue process beyond the confines of his township, except in two certain cases; when he does, the act is absolutely void.—Leadbetter v. Kendall, Fed. Cas. No. 8,157a [1 Hemp. 302].

[b] (U. S. 1843) Process issued by a justice of the peace, under laws, giving the inhabitants of a town the exclusive right to oyster fishing in certain waters, cannot be executed beyond the limits of the county.—The Martha Anne, Fed. Cas. No. 9,146 [Olcott, 18].

[c] (Ala.) A justice of the peace of one county is not authorized to issue an attachment returnable into another.—(1843) Caldwell v. Meador, 4 Ala. 755; (1846) Dew v. Bank of State, 9 Ala. 323.

[d] (Ga. 1880) In Code, § 4077, the words "any justice of the peace" import that a justice in one county may administer the oath and issue the warrant to dispossess a tenant holding over in another county.—Du Bignon v. Tufts, 66 Ga. 59.

[e] (Iowa, 1887) Defendant executed to K. a nonnegotiable promissory note. An action was brought against K., in Cerro Gordo county, and a judgment rendered against him by a justice of the peace. An execution was issued on such judgment, and a constable of Cerro Gordo county went therewith into another county where defendant resided, and summoned him as garnishee to appear before the justice in Cerro Gordo county, and answer as to his indebtedness to K. Defendant appeared, and admitted his indebtedness to the amount of the note. Before defendant appeared, the note had been assigned to plaintiff. Judgment was rendered against defendant as garnishee. *Held* that, as the constable had no right to levy on the indebtedness evidenced by the note out of his own county, the justice acquired no jurisdiction of the subject-matter of the action, and the judgment was void.—Gage v. Maschmeyer, 72 Iowa, 696, 34 N. W. 482.

[f] (Kan. 1886) The jurisdiction of a justice of the peace is limited, in civil actions, to the county in which he resides, and for which he has been elected, and where an action is brought before him, and service obtained upon one defendant, he has no authority to issue a summons in such action to an officer of another county, there to be served upon another defendant.—State v. Brayman, 35 Kan. 714, 12 Pac. 111.

[g] (Kan. 1886) The provisions of the Civil Code authorizing the issuance of a summons to a county other than the one in which the action is brought are not applicable to proceedings before a justice of the peace.—State v. Brayman, 35 Kan. 714, 12 Pac. 111.

[h] (Ky. 1877) The action of two justices of the peace of one of several counties through which a turnpike road passes, in determining that the whole road is out of repair, is extrajudicial; their jurisdiction being confined to their own county.—Russell v. Muldraugh's Hill, C. & C. Turnpike Road Co., 76 Ky. (13 Bush) 307.

[i] (Mich. 1874) Under our justice's act, process from a justice's court in civil cases is not authorized to run into another county, or to

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be served beyond the bailiwick.—Hartford Fire Ins. Co. v. Owen, 30 Mich. 441.

[j] (Mich. 1876) Comp. Laws, § 6463, making foreign corporations other than municipal corporations subject to be garnished in justices' courts, and directing on whom service may be made, does not authorize service beyond the limits of the county.—Hebel v. Amazon Ins. Co., 33 Mich. 400.

[k] (Miss. 1881) An attachment issued by a mayor who was ex officio a justice of the peace in the First district of a certain county returnable to the circuit court for the Second district of that county, is not void on the ground that a justice of the First district has no power to issue a writ to the Second district.—Baldwin v. Flash, 58 Miss. 593.

[l] (Mo. 1891) A justice of the peace cannot issue summons to be served in a county other than the one for which he was elected or appointed.—United States Mut. Acc. Ins. Co. v. Reisinger, 43 Mo. App. 571.

[m] (N. Y. 1880) Laws 1879, c. 101, merely enlarged the jurisdiction of justices of the peace in summary proceedings to remove a tenant, without abrogating Laws 1877, c. 187, § 1, prohibiting such justice from exercising such jurisdiction unless the premises are situated in his judicial district.—People v. Campbell, 22 Hun, 574.

[n] (N. Y. 1883) The jurisdiction of the justice's court of the city of Albany depends on the construction of Code, § 3223, which by implication, repeals former laws. The term "within the city" restricts the jurisdiction to the city limits, and no jurisdiction can be acquired by the service of a summons outside of the city.—Conor v. Hilton, 66 How. Prac. 144.

[o] (N. C. 1875) Under Battle's Revisal, c. 63, § 50, a justice of the peace has authority to issue a summons to any county in the state and bring the defendant before his court for trial.—Sossamer v. Hinson, 72 N. C. 578.

[p] (N. C. 1880) Under Acts 1874, c. 33, a justice of the peace, not being a court of record, has no power to amerce the sheriff of a county other than that in which he holds his court, for failure to make due return to process issued by such justice.—Boggs v. Davis, 82 N. C. 27.

[q] (Pa. 1872) A Maryland justice of the peace has no jurisdiction in attachment against a resident of Pennsylvania for a debt contracted in Pennsylvania; the debtor not being personally present in Maryland, nor having property there.—Neville v. Morgan, 10 Phila. 522.

[r] (Vt. 1827) One who is ex officio a justice of the peace for the whole state may sign a county court writ to be served out of the county where it issues and is returnable.—Sinclair v. Gadcomb, 1 Vt. 32.

(E) AMOUNT OR VALUE IN CONTROVERSY.

1. IN GENERAL, § 148.
2. REQUISITE AMOUNT OR VALUE, §§ 149-156.
3. DETERMINATION OF AMOUNT OR VALUE, §§ 157-172.

Amount for which judgment may be confessed, see post, § 378 [a, c, f, g].
—— *of set-off or counterclaim, see* post, §§ 174, 175.
Appearance as conferring jurisdiction over amount involved, see post, § 269.
Consent or waiver as conferring jurisdiction over amount involved, see post, §§ 217, 218.
Constitutionality of statutes conferring jurisdiction regardless of amount or value, see ante, § 72 [d, jj, s, t, y].
—— *fixing limit of jurisdiction, see* ante, § 72 [j, r].
—— *increasing limit of jurisdiction, see* ante, § 72 [e, j, ww, xx].
Constitutional provision limiting amount of jurisdiction as conferring jurisdiction to such amount, see ante, § 72 [b, tt].
Exclusive or concurrent jurisdiction, see ante, § 74 [b, e, h, i, m].

1. IN GENERAL.

§ 148. Amount or value in general.

[a] (Ala. 1890) Code 1886, § 3391, provides that double the annual rent accruing to the landlord on the unlawful holding over of his tenant, and also such other special damages as he thereby sustains, may be recovered in an action for unlawful detainer or by an action at law for damages. *Held* that, though section 3378 gives justices of the peace exclusive original jurisdiction of actions for unlawful detainer, yet where double the annual rent and the special damages claimed exceed the sum fixed as the limit of his jurisdiction by Const. art. 6, § 26, they cannot be recovered in an action for unlawful detainer before the justice, but must be sued for in an action at law for damages, and in a court having jurisdiction of the amount in controversy.—Lykes v. Schwarz, 91 Ala. 461, 8 South. 71.

[b] (La. 1889) The fact that a sum claimed exceeds the lower limit of the jurisdiction of the district court does not devest the justice of the peace of jurisdiction and render him incompetent to decide the case before him.—State ex rel. Police Jury v. Judge of First Justice's Court, 41 La. Ann. 403, 6 South. 653.

[c] (N. C. 1882) Jurisdiction of a county claim cannot be entertained by a justice of the peace where it exceeds the amount of his jurisdiction.—Meneely v. Craven, 86 N. C. 364.

[cc] (Tenn. 1879) Where a constable collects a note on which the amount due exceeds that for which a justice of the peace has jurisdiction, said constable and his sureties cannot be made liable for failure to pay over the proceeds of the note to the owner, by motion before a justice of the peace, as provided in Code, §§ 3600, 4167, though he gave his receipt as constable for the note.—Kiggin v. Sharkey, 71 Tenn. (3 Lea) 707.

[d] (Wis. 1849) A justice cannot take jurisdiction of an action when the plaintiff, in his declaration, demands more than the sum over which the law gives the justice jurisdiction.—Elderkin v. Spurbeck, 1 Chand. 69, 2 Pin. 129, 52 Am. Dec. 148.

2. REQUISITE AMOUNT OR VALUE.

IN GENERAL, § 149.
PARTICULAR ACTIONS AND PROCEEDINGS, § 150.
—— ACTIONS FOR TORTS, § 151.
—— ACTIONS ON BILLS AND NOTES, § 152.
—— ACTIONS TO RECOVER PERSONAL PROPERTY, § 153.
—— ACTIONS AND PROCEEDINGS TO RECOVER POSSESSION OF REALTY, § 154.
—— PROCEEDINGS TO RECOVER RENT, § 155.
—— ATTACHMENT AND GARNISHMENT, § 156.

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§ 149. In general.

[a] A suit before a justice of the peace cannot be sustained if the amount claimed exceeds $100.
—(Ind. 1843) Chandler v. Davidson, 6 Blackf. 367;
(Pa. 1858) Butler v. Urch, 2 Grant, Cas. 247.

[b] (Cal. 1850) The jurisdiction of a second alcalde is limited by law to causes in which the amount claimed is $100 or under.—Horrell v. Gray, 1 Cal. 133.

[c] (Cal. 1857) The jurisdiction of justices of the peace is limited by the constitution to cases in which the value of the thing in controversy does not exceed the sum of $200, except in forcible detainer.—Freeman v. Powers, 7 Cal. 104.

[d] (D. C. 1888) Under Rev. St. § 1006, giving justices of the peace jurisdiction of actions between creditors and debtors, "their executors and administrators," in all cases within their jurisdiction, that court has no jurisdiction of suits against administrators and executors for the recovery of demands of less than $100.—Newmeyer v. Cowling, 6 Mackey, 504.

[e] (Ill. 1850) Justices of the peace, in actions by or against executors or administrators, have jurisdiction to the amount of $20 only.—Williams v. Blankenship, 12 Ill. (2 Peck) 122.

[f] (Miss. 1870) The jurisdiction of a justice of the peace is limited to actions where the amount in controversy does not exceed $150.—Randall v. Kline, 44 Miss. 313.

[g] (N. Y. 1845) The jurisdiction of "the justice's court in the city of Hudson," prior to the act of May 13, 1845, was limited in amount to $50.—Bryan v. Cain, 1 Denio, 507.

[h] (N. Y. 1852) A justice of the peace has no jurisdiction where the damages claimed are $200, and a judgment where that sum was claimed was reversed.—Bellinger v. Ford, 14 Barb. 250.

[i] (N. C. 1880) A justice of the peace has no jurisdiction of an action where the "principal sum demanded" exceeds $200, unless the plaintiff remits the excess, and the same is entered of record.—Dalton v. Webster, 82 N. C. 279.

[j] (Ohio, 1834) A justice has no jurisdiction above $100 without the consent of both parties.—Deming v. Austin, Wright, 717.

[k] (Ohio, 1876) Under Act 1853, § 5, giving justices jurisdiction in certain actions where the balance claimed was less than $300, they had jurisdiction where the balance claimed equaled, but did not exceed, that sum.—Butcher v. Smith, 29 Ohio St. 604.

[l] (Pa. 1862) A justice of the peace has no jurisdiction of claims exceeding $100, unless, in the absence of any process, the debtor voluntarily appears before him.—Borland v. Ealy, 43 Pa. (7 Wright) 111.

[m] (Pa. 1894) An alderman has no authority to enter judgment on a claim exceeding $300, unless the debtor voluntarily appears without process, and confesses judgment.—McDonnell v. Hodgins (Com. Pl.) 3 Lack. Jur. 285.

[n] (S. C. 1806) The jurisdiction of justices of the peace extends to $20, but not beyond that sum.—Collier v. Rogers, 2 Brev. 41.

[o] (Tenn.) A justice of the peace has no jurisdiction to render judgment for an amount over $100.—(1827) Morrow v. Calloway, 8 Tenn. (Mart. & Y.) 240; (1836) Dixon v. Caruthers, 17 Tenn. (9 Yerg.) 30.

[p] (Tex. 1895) A justice has jurisdiction where the amount in controversy is $200, or less, exclusive of interest, where exclusive original jurisdiction is not given to the district or county courts.—Loyd v. Capps (Civ. App.) 29 S. W. 505.

§ 150. Particular actions and proceedings.

Actions on judgments, see post, § 418 [f, n, p]. *Determination of amount or value, see* post, §§ 158–165.

[a] (Ala. 1868) Acts 1865–66, p. 60, conferred on justices of the peace jurisdiction "of all acts founded on any contract where the sum claimed does not exceed $100," but did not change its extent in the other classes of civil suits as fixed by the Code.—Pearce v. Pope, 42 Ala. 319.

[b, c] (Ga. 1855) Under the act of 1852, to enlarge the jurisdiction of the justices' courts in Macon, said courts have jurisdiction of $50 cases against joint promisors, some of whom reside in Macon, and some in districts outside of Macon.—Freeman v. Carhart, 17 Ga. 348.

[d] (Ill. 1852) A justice of the peace has no jurisdiction of an action brought for the penalty for the seizure of property taken on execution, where treble the value of the property taken is over $100.—Casey v. Harvey, 14 Ill. (4 Peck) 45.

[e] (Ky. 1838) A justice of the peace had no jurisdiction, prior to the act of 1835, of a motion against a constable for failing to return execution when the amount collectible exceeded five pounds.—Howard v. Jones, 41 Ky. (2 B. Mon.) 526.

[f] (Ky. 1859) A justice of the peace of the city of Louisville has no jurisdiction of an action for the recovery of $100 for unliquidated damages claimed for a breach of a contract of partnership, to be assessed either by a court of equity upon a settlement of the partnership accounts, or by a jury upon issues of fact formed by the parties.—Fleming v. Limebaugh, 59 Ky. (2 Metc.) 265.

[g] (Mass. 1867) A petition under Gen. St. c. 151, § 21, to enforce a lien for work done and money expended in the manufacture of certain machinery, is within the jurisdiction of a justice of the peace, even though the claim exceed $100.—Busfield v. Wheeler, 96 Mass. (14 Allen) 139.

[h] (Miss. 1889) The question of the liability of property to the satisfaction of an execution on a judgment rendered by a justice of the peace is triable before the justice, however great may be the value of the property levied on.—Bernheimer v. Martin, 66 Miss. 486, 6 South. 326.

[i] (Mo. 1829) The fine of $100, imposed by an ordinance of the corporation of St. Louis on persons keeping tippling houses, and retailing wines, etc., without licenses, has, by a subsequent ordinance, been reduced to $90, and justices of the peace have jurisdiction of an action to recover it.—City of St. Louis v. Smith, 2 Mo. 113.

[j] (Mo. 1894) A justice has no jurisdiction of an action to enforce a mechanic's lien when the amount claimed exceeds $250.—Mitchell Planing Mill Co. v. Short, 58 Mo. App. 320.

[k] (N. Y. 1871) Under Code Civ. Proc. § 54, a justice of the peace has no jurisdiction in matters of account where the sum of the accounts of both parties exceed $400.—Lund v. Broadhead, 41 How. Prac. 146.

[l] (Ohio, 1857) The jurisdiction of a justice of the peace under the water craft law extends only to $100.—The Housatonic v. Kanawha Salt Co., 7 Ohio St. 261.

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[m] (Tenn. 1823) Acts 1809, c. 54, § 1, raised the former jurisdiction of a justice from $50 to $100 where a balance is due on any note or agreement, in addition to the jurisdiction heretofore granted, and said nothing of "specific articles," as was done in former acts. *Held*, that the justice had no jurisdiction over a property contract exceeding $50.—Arnold v. Embree, 7 Tenn. (1 Peck) 134.

[n, o] (Tenn. 1844) Under Acts 1835, c. 17, conferring on justices of the peace jurisdiction over all debts and demands due on any specialty, note, or agreement signed by the party to be charged therewith, on which the judgment will not sound in damages, and over all settled accounts signed by the parties, when the amount claimed to be due on such specialty, note, agreement, or account does not exceed $100, and over all sums not exceeding $50, due by open account, or by contract in writing signed by the party to be charged therewith, on which the judgment would sound in damages, a justice of the peace has no jurisdiction of an action on an award exceeding $50.—Collins v. Oliver, 23 Tenn. (4 Humph.) 439.

[p] (Tex. 1881) A justice of the peace has no jurisdiction in case of a trial of a right of property worth more than $200.—Marx v. Carlisle, 1 White & W. Civ. Cas. Ct. App. § 93.

[q] (Tex. 1894) A justice's court has no jurisdiction to foreclose a mortgage on personal property where the value of the property exceeds $200.—Cox v. Wright (Civ. App.) 27 S. W. 294.

[r] (Tex. 1895) In suit to foreclose liens on property, if the value of the property is more than $200, the justice of the peace has no jurisdiction.—Schwartz v. Frees (Civ. App.) 31 S. W. 214.

[s] (Vt. 1853) Under the license law of 1850 (Comp. St. p. 507, § 12), justices of the peace have concurrent jurisdiction with the county court, whatever the amount of penalty sued for.—Ex parte Tracy, 25 Vt. 93.

[t] (Va. 1891) Under Code, § 2939, providing, among other things, that a justice of the peace shall have jurisdiction of any claim to any fine if the amount thereof does not exceed $20, and of other claims where the amount does not exceed $100, a justice has no jurisdiction of an action for the $100 penalty imposed by section 1292 upon telegraph companies for failure to deliver a dispatch, since such penalty is a fine within the meaning of the statute.—Western Union Tel. Co. v. Pettyjohn, 88 Va. 296, 13 S. E. 431.

[u] (Wis. 1873) Rev. St. c. 120, § 9, provides that a justice shall have jurisdiction of actions on an account when the amount proved to the satisfaction of the justice does not exceed $250, and when the sum shall be reduced to not exceeding $100 by credits given, or by the set-off or demand of the opposite party. Laws 1870, c. 30, amending Rev. St. c. 120, § 5, declaring that justices of the peace shall have jurisdiction of actions arising on contracts expressed or implied where the debt or balance due shall not exceed $200, made provision also for the jurisdiction of justices of other classes of actions, but no specific reference was made to actions on accounts. *Held*, that the act of 1870 did not affect Rev. St. c. 120, § 9, limiting the jurisdiction of justices in actions on account when the balance claimed did not exceed $100.—Nimmick v. Mathiesson, 32 Wis. 324.

[v] (Wis. 1876) A justice of the peace cannot take jurisdiction of an action on an express contract to pay a certain price for a certain amount of labor and materials exceeding, by computation, $600, and averred to be wholly unpaid.—Power v. Rockwell, 39 Wis. 585.

[w] (Wis. 1882) Under Rev. St. § 3672, subd. 4, a justice of the peace has no jurisdiction of an action on an account amounting to $503.66, on which, after deducting all payments, etc., a balance of $287.66 is claimed.—Storm v. Adams, 56 Wis. 137, 14 N. W. 69.

§ 151. —— Actions for torts.

Determination of amount or value, see post, § 159.

[a] (Ill. 1861) In Peoria county, by special statute, justices have jurisdiction to the amount of $300, and suits brought for the recovery of three times the value of property wrongfully levied on by an officer are within the operation of this statute. In other counties the jurisdiction is limited to $100 in amount.—Campbell v. Conover, 26 Ill. (16 Peck) 64.

[b] (Ind. 1838) An action against a constable for an escape sounds in tort, though brought as debt, and hence, where the damages claimed exceed $50, a justice has no jurisdiction, under St. 1834, p. 156, limiting the jurisdiction of justices in cases of tort to $50.—Forsha v. Watkins, 4 Blackf. 520.

[c] (Ind. 1848) A justice of the peace has no jurisdiction of an action for damages to the amount of more than $100, for a false and malicious attachment of a canal boat, and subsequent maltreatment of such boat.—White Water Val. Canal Co. v. Dow, 1 Ind. (1 Cart.) 141.

[d] (Ind. 1854) Where the damages claimed amounted to $100, justices of the peace, by Rev. St. 1843, had no jurisdiction of an action of tort.—Falkner v. Iams, 5 Ind. 200.

[e] (Ind. 1861) Under Act March 11, 1861, declaring that justices of the peace shall have jurisdiction to try suits founded on contract or tort where the debt or damage claimed does not exceed $100, and concurrent jurisdiction to the amount of $200, a justice has jurisdiction of an action for injury to property in which the damages claimed are $200.—Leathers v. Hogan, 17 Ind. 242.

[f] (Md. 1874) Code, art. 51, § 13, prescribes that the civil jurisdiction of justices of the peace shall embrace all cases to obtain redress for wrongs "where the debt or damages claimed shall not exceed $100." In a suit before a justice for wrongful conversion of horses, plaintiff filed a claim for $100, and with such claim his attorney also filed a statement of the cause of action in which he claimed $99 as damages. There was judgment for defendant, and on appeal by plaintiff to the Baltimore city court there was a verdict in his favor for $100, and the judgment of the justice was reversed and judgment entered on the verdict. *Held*, that such verdict was not in excess of the justice's jurisdiction.—Herzberg v. Adams, 39 Md. 309.

[g] (Mich. 1856) Under Laws 1851, p. 204, providing that justices of the peace shall have original and exclusive jurisdiction of all civil actions wherein the debt or damage does not exceed $100, and conferring jurisdiction in all civil actions founded on contract where the debt or damages does not exceed $300, justices have no jurisdiction in actions founded on tort where the damages exceed $100.—Wells v. Scott, 4 Mich. 347.

[h] (Miss. 1888) Plaintiff filed with a justice three claims against defendant railroad company for damages for injuries to his stock on three different occasions. The justice docketed three actions, but issued only one writ. Defendant appeared to one action only, and moved to consolidate all the actions, which was denied, and after trial judgment was rendered for plaintiff for $35. Defendant refused to appear to the other actions. A single judgment by default was rendered against it for $135 in the other two cases.

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Held that, if there was but one action, the amount in controversy exceeded the justice's jurisdiction.—Louisville & N. R. Co. v. McCollister, 66 Miss. 106, 5 South. 695.

[i] (Mo. 1860) Justices have no jurisdiction of actions for injuries to personal property where the damages claimed amount to more than $50.—Ahern v. Carroll, 30 Mo. 200; Webb v. Tweedie, Id. 488.

[j] (Mo. 1873) Justices of the peace have jurisdiction of actions against railroads for killing and injuring live stock in their respective townships, irrespective of the value of the cattle or the amount of damages claimed.—Hudson v. St. Louis, K. C. & N. Ry. Co., 53 Mo. 525.

[k] (Mo. 1887) A justice of the peace has jurisdiction in actions brought under Rev. St. 1879, § 809, giving double damages against a railroad corporation for stock killed by defendant's cars, though the damages claimed exceed $150.—Holloman v. St. Louis, I. M. & S. Ry. Co., 92 Mo. 284, 5 S. W. 1.

[l] (N. Y. 1823) Section 13 of the act of April 5, 1813, for the recovery of debts of the value of $25, giving an action against a constable who neglects to return an execution, applies to all cases arising under the act of April 10, 1818, extending the jurisdiction of justices of the peace.—Gardner v. Jones, 20 Johns. 356.

[m] (N. C. 1880) An action for damages for converting a crop of greater value than $50 is not founded on an implied contract, but in tort, and hence is not within the cognizance of a justice's court.—Womble v. Leach, 83 N. C. 84.

[n] (Or. 1895) Laws 1892, p. 141, making counties liable for injuries sustained through defective county roads and bridges, and providing that compensatory damages for such injuries shall be recovered in the circuit court "or in a justice's court, if the amount of damages sued for be less than $1,000," does not limit the amount of damages recoverable for such injury to $1,000, but merely enlarges the jurisdiction of justices' courts in such cases to any sum less than $1,000.—McFerren v. Umatilla County, 27 Or. 311, 40 Pac. 1013.

[o] (Pa. 1809) Justices have not jurisdiction in trespass over $20.—Dunn v. French, 2 Bin. 173.

[p] (Pa. 1826) Under Act March 20, 1810, § 14, providing that justices of the peace shall take cognizance of controversies for any sum exceeding $100, if the parties voluntarily appear before him for that purpose, by entering judgment, and that such judgment shall be prosecuted to recovery as other judgments, where a justice of the peace has rendered judgment for the plaintiff for a sum exceeding $100, he has jurisdiction in an action against the constable for a false return to an execution issued in such suit, although the amount exceeds $100.—Delaney v. Brindle, 15 Serg. & R. 75.

[q] (Pa. 1885) Under Act June 6, 1879, a justice of the peace has no jurisdiction in an action on the case for damages, where the sum claimed exceeds $100.—Continental Brewing Co. v. Frame, 2 Chest. Co. Rep. 379.

[r] (Vt. 1837) A justice has no jurisdiction of an action for "breaking and entering a close, and taking and carrying away a horse," where the ad damnum is laid at $100, an amount exceeding his statutory jurisdiction.—Prindle v. Cogswell, 9 Vt. 183.

[s] (Vt. 1874) In trespass qu. cl. before a justice of the peace, his jurisdiction is limited to $20.—Ohadwick v. Batchelder, 46 Vt. 724.

§ 152. —— Actions on bills and notes.

Determination of amount or value, see post, § 160.

[a] (Ky.) Justices of the peace have no jurisdiction of suits on notes where the principal due exceeds $50.—(1842) Hoskins v. Roberts, 41 Ky. (2 B. Mon.) 263; (1844) Florrance v. Goodin, 44 Ky. (5 B. Mon.) 111.

[b] (Neb.) Code Civ. Proc. § 1103, provides that "justices of the peace shall have jurisdiction in all cases where the sum in question does not exceed $200, except in cases limited in this title." *Held*, that the jurisdiction of justices in suits on promissory notes exceeding $100 in amount was not limited by section 1100, providing that the justice must indorse the judgment rendered by him on a bond or bill or note, etc., "provided the same shall in no wise exceed $100," since the later statute (section 1103) might be construed as enlarging the jurisdiction of the justice in such case to $200.—(1884) Bullock v. Jordan, 15 Neb. 665, 19 N. W. 508; (1884) Burton v. Manning, 15 Neb. 669, 19 N. W. 509; (1884) Bunker v. State Nat. Bank, 16 Neb. 234, 20 N. W. 256; (1885) Strang v. Krickbaum, 18 Neb. 365, 25 N. W. 364.

[c] (Tenn. 1829) Under Acts 1809, c. 54, restricting the jurisdiction of a justice of the peace in cases of contracts for specified articles to $50, a justice has no jurisdiction of a suit on a note for more than $50, payable in current bank notes.—Bedford v. Hickman, 9 Tenn. (1 Yerg.) 165.

[d] (Tenn. 1832) A magistrate has no jurisdiction in a suit by the indorsee against the indorser of a bill single, where the amount due on the bill is more than $50.—Smith v. Wallace, 12 Tenn. (4 Yerg.) 572.

[e] (Tenn. 1835) Acts 1831, c. 59, gives jurisdiction to justices of the peace to render judgments on notes to the amount of $100, whether payable in money or property.—Hay v. Lea, 16 Tenn. (8 Yerg.) 89.

[f] (Tenn. 1841) A justice of the peace has no jurisdiction of an action against an indorser for any sum exceeding $50.—Crocket v. Wright, 21 Tenn. (2 Humph.) 322.

[g] (Tenn. 1858) A justice of the peace has no jurisdiction to render judgment in favor of the indorsee against the indorser of a promissory note above the sum of $50, unless demand and notice are expressly waived in the indorsement.—Mason v. Westmoreland, 38 Tenn. (1 Head) 555.

[h] (Tenn. 1868) By section 4123 of the Code, the jurisdiction of a justice of the peace extends to $500 in all cases of notes of hand, and in all other cases to $250.—White v. Buchanan, 46 Tenn. (6 Cold.) 32.

[i] (Tenn. 1879) Code, § 4123, gives to justices of the peace jurisdiction to $500 "upon all notes of hand indiscriminately, * * * and upon indorsements of negotiable notes when demand and notice are expressly waived in the indorsement"; and of "all unsettled accounts, obligations, contracts, or other evidences of debt, not embraced in the preceding section, when the amount claimed does not exceed $250." *Held*, that a justice has jurisdiction of an action on a note against an indorser, when demand and notice are not waived, to the extent of $250.—Redd v. Brown, 71 Tenn. (3 Lea) 615.

[j] (Tex. 1849) A note given for more than $100 cannot be sued before a justice, unless, by payments indorsed, the interest shall be discharged and enough of the principal paid to

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reduce the note to $100, or below.—Hampton v. Dean, 4 Tex. 455.

[k] (Wis. 1849) Where a suit is brought in a justice's court on a note exceeding $50, the justice has not jurisdiction under the statute.—McCormick v. Robinson, 1 Chand. 254, 2 Pin. 276.

§ 153. —— Actions to recover personal property.

See post, § 163.

Determination of amount or value, see post, § 163.

[a] (Ala. 1875) A justice of the peace has no jurisdiction of an action for the recovery of chattels in specie, where the value claimed exceeds $50.—Taylor v. Woods, 52 Ala. 474.

[b] (Ill. 1890) Where, on the trial of replevin before a justice of the peace, it for the first time appears that the property in question is worth more than $200, the limit of jurisdiction in actions of replevin, he has no power to award a writ of retorno.—Vogel v. People, 37 Ill. App. 388.

[c] (Ind. 1865) Under Act March 11, 1861, declaring that justices of the peace shall have jurisdiction to try suits founded on contract or tort when the debt or damage claimed, or the value of the property sought to be recovered, does not exceed $100, and concurrent jurisdiction to the amount of $200, justices have jurisdiction in actions of replevin when the value of the property sought to be recovered, or the damages claimed, did not exceed $200.—Harrell v. Hammond's Adm'r, 25 Ind. 104.

[d] (Ind. 1872) Under section 10 of the act defining the powers and jurisdiction of justices of the peace, a justice has no jurisdiction over an action to recover possession of personal property, the value of which exceeds $200.—Caffrey v. Dudgeon, 38 Ind. 512, 10 Am. Rep. 126.

[e] (Ind. 1881) Under Act 1852, as amended in 1859, justices of the peace have jurisdiction in replevin suits where the property does not exceed in value $200.—Grubaugh v. Jones, 78 Ind. 350.

[f] (Ind. 1883) Under Rev. St. 1881, § 1433, in force since 1861, justices of the peace have jurisdiction in actions of replevin when the value of the property, or the damages claimed, does not exceed $200; and the jurisdiction is not governed by the provisions of Rev. St. § 1547, which are an earlier expression of the legislative will.—Fawkner v. Baden, 89 Ind. 587.

[g] (Kan. 1865) A justice of the peace, under Justices Act, § 131, has jurisdiction to try an action in replevin only when the property is of less value than $100.—Garrett v. Wood, 3 Kan. 231.

[h] (Kan. 1868) Under Comp. Laws, p. 640, § 137, giving justices jurisdiction of replevin where the value of the property is less than $100, and requiring them to certify such action to the district court where it exceeds $100, a justice has no jurisdiction where the property is worth $100.—Leslie v. Reber, 4 Kan. 315.

[i] (Minn. 1871) In an action of replevin in a justice's court the defendant may, if the facts warrant, plead in bar to the jurisdiction of the court that the property is of more than $100 in value.—Hecklin v. Ess, 16 Minn. 51 (Gil. 38).

[j] (Miss. 1873) A justice of the peace has jurisdiction only where the amount in controversy does not exceed $150. Therefore, where A. brought suit in the justice's court to recover a mule from B., and the justice gave judgment for the plaintiff for $150, and defendant appealed to the circuit court, and, on the trial there, the proof showed that the mule was worth $200, the circuit court dismissed the case for want of jurisdiction in the justice's court. *Held*, that the circuit court ruled correctly.—Askew v. Askew, 49 Miss. 301.

[k] (Miss. 1893) Under Const. 1890, § 171, providing that the jurisdiction of justices of the peace shall extend to causes in which the principal amount in controversy shall not exceed $200, a justice has jurisdiction in replevin where the property claimed is valued at $175 independently of any statute on the subject.—Illinois Cent. R. Co. v. Brookhaven Mach. Co., 71 Miss. 663, 16 South. 252.

[l] (Mo. 1860) Justices have jurisdiction over actions for the recovery of specific personal property where its value does not exceed $50.—Butler v. Ivie, 30 Mo. 478.

[m] (Mo. 1889) Under Rev. St. § 2895, providing that in replevin "the value of the property, as set forth in the statement and affidavit, shall fix the jurisdiction of the justice so far as the value is concerned," when the value of the property and damages for its detention, as fixed by the statement and affidavit, is $245, the justice has jurisdiction, under Rev. St. § 2881, which provides that the justice shall have jurisdiction when the value of the property and damages for detention do not exceed in the aggregate $250.—Gottschalk v. Klinger, 33 Mo. App. 410.

[n] (Mo. 1895) Under Wag. St. p. 808, § 8, giving justices jurisdiction of actions for recovery of specific personal property not exceeding in value $100 alleged to be wrongfully retained, and damages for injuries thereto, or for taking and detention thereof, not exceeding $25, a justice has no jurisdiction of a suit to recover a horse alleged to be worth $75, and for $50 for damages for detention.—Godman v. Gordon, 61 Mo. App. 685.

[o] (N. C. 1886) Code, § 887, denies to justices jurisdiction of civil actions not founded on contract where the value of the property in controversy does not exceed $50. *Held*, that there is no jurisdiction of a claim and delivery case where the property exceeds $50 in value.—Noville v. Dew, 94 N. C. 43.

[p] (Ohio, 1895) Where, in replevin before a justice of the peace, the property is assessed at over $100, the justice has no jurisdiction to try the case.—Burlinson v. Roe, 4 Ohio Dec. 47, 1 Cleve. Law Rec. 61.

[q] (R. I. 1876) Where goods replevied exceeded $50 in value, justice courts had no jurisdiction in replevin prior to Gen. St. c. 224, § 12.—Howe Mach. Co. v. York, 11 R. I. 388.

[r] (Wis. 1875) Rev. St. c. 120, § 5, having given justice's courts jurisdiction of various classes of actions therein enumerated and defined, including actions to recover personal property wherein the value of the property claimed should not exceed $100, and section 132 having provided for an action in such courts to recover possession of personal property not exceeding $100 in value, with damages for its unjust caption or detention, and the practice in such actions being regulated by the sections immediately following, a subsequent act amending section 5 by substituting "$200" for the sum previously named extends by necessary implication to section 132, and confers jurisdiction of the action therein described, where the value of the property involved does not exceed $200.—Zitske v. Goldberg, 38 Wis. 216.

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§ 154. —— Actions and proceedings to recover possession of realty.

Determination of amount or value, see post, § 158 [a].

[a] (Cal. 1856) The limitation of jurisdiction of justices in civil cases to actions where amount in dispute does not exceed $200 does not apply to actions in forcible entry.—Hart v. Moon, 6 Cal. 161.

[b] (Cal. 1862) In forcible detainer before a justice of the peace, under Forcible Entry and Detainer Act, § 13, providing that the justice shall proceed to hear, try, and determine, and section 12, providing that damages shall be for rents, profits, waste, and injury during the detainer, the amount recoverable does not affect the jurisdiction of the justice.—Howard v. Valentine, 20 Cal. 282.

[c] (Ill. 1892) In an action of forcible entry and detainer by a landlord against his tenant, a justice has jurisdiction, without regard to the amount of rent reserved in the lease; the right to possession being alone in question.—Hannigan v. Mossler, 44 Ill. App. 117.

[d] (Ind. 1844) The jurisdiction of justices of the peace, under the act of 1838, concerning tenants holding over, is not limited as to the amount of damages.—Ricketts v. Ash, 7 Blackf. 274.

[e] (Ind. 1864) In actions for forcible entry and detainer, the jurisdiction of justices of the peace is special, and unlimited as to amount.—Sturgeon v. Hitchens, 22 Ind. 107.

[f] (La. 1830) A justice has jurisdiction forcibly to remove a tenant remaining in a house, after due notice, whatever the value of the property or the improvements claimed by him.—Walker v. Vanwinkle, 8 Mart. (N. S.) 560.

[g] (La. 1842) Article 2683, Civ. Code, authorizes justices out of the city of New Orleans to expel tenants, whatever the value of the lease.—Kennedy v. Downey, 2 Rob. 284.

[h] (Mo. 1875) In actions of forcible entry and detainer, the jurisdiction of a justice of the peace is not limited, in the matter of damages, to $300.—Silvey v. Summer, 61 Mo. 253.

[i] (Mo. 1876) The jurisdiction of a justice of the peace to dispossess a tenant covers all cases of rent in arrear without reference to the amount claimed, though the additional power to render judgment for the sum due from the tenant is limited by the general law regulating the justice's jurisdiction in suits for the recovery of money.—January v. Stephenson, 2 Mo. App. 266.

[j] (Pa. 1879) The act of 1810, restricting the jurisdiction of justices to demands of $100, etc., does not apply to the summary process for obtaining possession of leased property under the landlord and tenant acts.—Graver v. Fehr, 89 Pa. 460.

[k] (Tex. 1858) The action of forcible entry and detainer being for the possession of land, and depending on the right of possession, and not on the ultimate superiority of title, the fact that the value of the land is greater than $100 cannot oust the justice's court of its jurisdiction to try the case.—Smith v. Ryan, 20 Tex. 661.

[l] (Vt. 1855) In a suit under the ejectment act (Comp. St. p. 307, § 26), the jurisdiction of the justice is not affected, although the ad damnum exceeds $30.—Weston v. Haley, 27 Vt. (1 Williams) 283.

§ 155. —— Proceedings to recover rent.

Determination of amount or value, see post, § 164.

[a] (Ga. 1854) By the act to point out the mode for the collection of rents, a justice of the peace has power to issue a distress warrant for a sum exceeding $30.—Holland v. Brown, 15 Ga. 113.

[b] (Ind. 1843) The jurisdiction of a justice of the peace, under the act regulating distress for rent, is not limited to any amount.—Ezra v. Manlove, 6 Blackf. 454.

[c] (Pa. 1883) Under the act of 1879, extending the jurisdiction of justices of the peace to claims not exceeding $300, a justice has jurisdiction of an action for rent to that amount.—Reckless v. Charnley, 2 Montg. Co. Law Rep'r, 10.

[d] (Pa. 1888) The act of July 7, 1879, enlarging the jurisdiction of justices of the peace to $300, does not give a justice jurisdiction of an action for rent exceeding $100.—Fielbach v. Fielbach, 4 Pa. Co. Ct. R. 517.

[e] (Pa. 1891) Act March 22, 1814, confers jurisdiction in case of rent upon justices of the peace to the extent of $100, which is enlarged to $300 by Act May 29, 1879.—Beatty v. Knoxville Land Imp. Co., 139 Pa. 358, 21 Atl. 74.

§ 156. —— Attachment and garnishment.

See post, § 165.

Action on forthcoming bond as incidental to attachment suit, see post, § 189 [c].

Interplea by third persons, see post, § 189 [d, e, k, l].

[a] (Ark. 1867) By the constitution justices have jurisdiction, concurrently with the circuit courts, of proceedings by attachment, where the sum demanded exceeds $100 and does not exceed $200.—Rogers v. Glascock, 25 Ark. 24.

[b] (Ga. 1842) A justice of the peace has no jurisdiction of a case in which the plaintiff in attachment swears to a debt due by the defendant exceeding $30.—Mahone v. McDonald, Ga. Dec. 154, pt. 1.

[c] (Ga. 1858) Act March 5, 1856, enlarging the jurisdiction of justices' courts to demands not exceeding $50, includes demands sued for by attachment as much as demands sued for by ordinary process.—Barrett v. Black, 25 Ga. 151.

[d] (N. J. 1881) Act March 12, 1879, entitled "An act to increase the jurisdiction of justices of the peace," which gives them jurisdiction in suits where the debt, balance, or other matter in dispute does not exceed, exclusive of costs, the sum or value of $200, applies only to their jurisdiction under the act constituting courts for the trial of small causes (Revision, p. 538). Their jurisdiction to issue attachments is conferred by section 62 of the attachment act (Revision, p. 53), and is limited by that section to actions in which the debt does not exceed $100.—Wright v. Moran, 43 N. J. Law (14 Vroom) 49.

[e] (N. Y. 1835) In a proceeding by attachment, under the act to abolish imprisonment, etc., a justice cannot render judgment for a demand exceeding $50.—Comfort v. Gillespie, 13 Wend. 404.

[f] (N. Y. 1844) An attachment issued by a justice of the peace for any sum over $100 is void.—Mattison v. Bancus, Hill & D. Supp. 321.

[g] (Pa. 1878) Act May 8, 1874 (P. L. 123), provides that a justice of the peace may issue an attachment for a claim against a nonresident not exceeding $100. Act July 7, 1879 (P. L. 194, § 1), provides that justices shall have concurrent jurisdiction with the courts of

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common pleas in all actions arising on contract, where the sum demanded does not exceed $300. *Held*, that a justice may issue an attachment against nonresidents where the claim does not exceed $300.—Bumgardner v. Morris, 25 Pittsb. Leg. J. (N. S.) 355.

[h] (Pa. 1884) Act May 29, 1879, enlarging the jurisdiction of justices of the peace to include cases where the sum demanded does not exceed $300, embraces attachment proceedings under the act of 1842, concerning fraudulent debtors as well as ordinary actions begun by summons. Such proceedings are not excepted expressly or by implication.—Jacoby v. Shafer, 105 Pa. 610.

[i] (Pa. 1886) A justice of the peace has jurisdiction to the extent of $300 in cases of attachment execution.—Kuhn v. Warren Sav. Bank, 11 Atl. 440.

[j] (Pa. 1890) Act July 7, 1879 (Purd. Dig. p. 979), which confers on justices of the peace "concurrent jurisdiction with the courts of common pleas of all actions arising from contract, * * * where the sum demanded does not exceed $300," does not enlarge the jurisdiction which justices have under Act May 8, 1874 (Purd. Dig. p. 991), to issue an attachment against a nonresident debtor on a claim not exceeding $100.—Fair v. Hamlin (Com. Pl.) 0 Pa. Co. Ct. R. 8.

[k] (Pa. 1894) A justice of the peace, under Act July 7, 1879, has jurisdiction to issue attachments against nonresidents in claims amounting to $300 or less.—Enfield v. Squires Hardware Co. (Com. Pl.) 14 Pa. Co. Ct. R. 498, 3 Pa. Dist. R. 349, 24 Pittsb. Leg. J. (N. S.) 368.

[l] (S. C. 1821) In cases of domestic attachment, a magistrate's jurisdiction extends to $20.—Roberts v. Brown, 1 McCord, 498.

[m] (Tenn. 1853) By Acts 1852, c. 157, § 2, jurisdiction by attachment to the extent of $500 is expressly given to justices of the peace.—Apperson v. Looney, 32 Tenn. (2 Swan) 664.

[n] (Tenn. 1866) The jurisdiction of justices of the peace, in cases of attachment returnable before themselves in all actions arising out of tort, is limited to $100. *Held*, that section 4 of the schedule to the amended constitution does not extend their jurisdiction in attachment cases.—Stewart v. Vaughn, 43 Tenn. (3 Cold.) 22.

3. DETERMINATION OF AMOUNT OR VALUE.

IN GENERAL, § 157.
PARTICULAR ACTIONS AND PROCEEDINGS, § 158.
—— ACTIONS FOR TORTS, § 159.
—— ACTIONS ON BILLS AND NOTES, § 160.
—— ACTIONS ON BONDS, § 161.
—— ACTIONS ON ACCOUNTS, § 162.
—— PROCEEDINGS TO RECOVER PERSONAL PROPERTY, § 163.
—— PROCEEDINGS TO RECOVER RENT, § 164.
—— ATTACHMENT AND GARNISHMENT, § 165.
INTEREST, COSTS, AND ATTORNEY'S FEES, § 166.
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SEVERAL OR SPLIT CLAIMS EXCEEDING IN AGGREGATE LIMIT OF JURISDICTION, § 168.
—— SEVERAL BILLS OR NOTES, § 169.
REMISSION OR ABANDONMENT OF PART OF CLAIM, § 170.
—— REMISSION OF INTEREST, § 171.
ORIGINAL AMOUNT AS AFFECTED BY PARTIAL PAYMENTS OR REDUCTION FROM OTHER CAUSES, § 172.

§ 157. In general.

[a] In suits before justices of the peace, the amount claimed, and not the amount recovered, is the test by which the jurisdiction is determined.

—(Ala. 1853) Crabtree v. Cliatt, 22 Ala. 181;
(Ark. 1884) Little Rock, M. R. & T. Ry. v. Manees, 44 Ark. 100;
(Iowa, 1855) Stone v. Murphy, 2 Iowa (2 Clarke) 35;
(Md. 1843) O'Reilly v. Murdoch, 1 Gill, 32;
(Mich. 1868) Inkster v. Carver, 16 Mich. 484;
(Minn. 1863) Turner v. Holleran, 8 Minn. 451 (Gil. 401);
(Pa. 1876) Peter v. Schlosser, 81 Pa. (31 P. F. Smith) 439;
(Wash. 1859) Ebey v. Engle, 1 Wash. T. 72.

CONTRA, see
(Ala. 1841) Cothran v. Weir, 3 Ala. 24; (1849) Hart v. Turk, 15 Ala. 675; (1850) Rose v. Thompson, 17 Ala. 628;
(N. Y. 1878) Brady v. Smith, 1 City Ct. R. 175.

[b] (Ill. 1841) In an action before a justice of the peace, the statement of claim by the plaintiff indorsed on the warrant, and entered in the docket, concludes him as to the amount.—Dowling v. Stewart, 4 Ill. (3 Scam.) 193.

[c] (Ill. 1845) Where the statute gave jurisdiction to a justice in cases not exceeding $20, and provided that, on appeal, the appellate court should give judgment according to the rights of the parties, "unless it shall appear from the evidence that the justice had no jurisdiction," etc., and an action was brought before a justice in which the declaration concluded "to the damage of the plaintiff not exceeding $100," but on the evidence the juries returned verdicts for less than $20, it was *held* that the justice had jurisdiction, and that the judgment should not be arrested.—Rogers v. Blanchard, 7 Ill. (2 Gilman) 335.

[d] (Ill. 1853) The jurisdiction of a justice does not depend on the amount of the claim filed. The real amount due is the true test, and that is to be ascertained from the evidence.—Clark v. Whitbeck, 14 Ill. (4 Peck) 393.

[e] (Ind. 1881) Though a complaint prays for an amount beyond the jurisdiction of the justice, if it clearly appears from the bill of particulars that only an amount within his jurisdiction can be recovered, he may take jurisdiction of the suit.—Second Nat. Bank v. Hutton, 81 Ind. 101.

[f] (Ind. 1894) The amount claimed in the complaint, and not the amount appearing by the bill of particulars to be due, controls the question of the justice's jurisdiction.—Elgin v. Mathis, 9 Ind. App. 277, 36 N. E. 650; Decker v. Graves, 10 Ind. App. 25, 37 N. E. 550.

[g] (Iowa, 1874) The test of the jurisdiction of a justice of the peace is the amount claimed.—Galley v. Tama County, 40 Iowa, 49.

[h] (Iowa, 1878) A petition, in an action before a justice, claiming $100, confers jurisdiction; and the fact that the notice states that unless defendants appear judgment will be rendered for the whole amount of the claim is immaterial.—Moran v. Murphy, 49 Iowa, 68.

[i, j] (Iowa, 1884) Where, by stipulation, a justice had jurisdiction in a suit to the extent of $300, and the judgment claimed by plaintiffs did not exceed that sum, jurisdiction attached, and could not be ousted by an error of the justice in taxing the fees so as to make the aggregate exceed $300.—Reed v. Shum, 63 Iowa, 378, 19 N. W. 254.

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[k] (Iowa, 1894) Where the amount in controversy is shown by the pleadings to be only $100, the fact that judgment for a larger sum is inadvertently asked will not deprive a justice of jurisdiction.—Redfield v. Stocker, 91 Iowa, 383, 59 N. W. 270.

[l] (Ky. 1860) The new Code of Practice has left unchanged the old rule which fixed the amount in controversy, in actions before justices of the peace, at the sum demanded in the warrant; and if plaintiff, in his statement of facts filed with the justice, states any other sum, the statement will be disregarded as surplusage.—Burbage v. Squires, 60 Ky. (3 Metc.) 77.

[m] (Me. 1857) Whether an action should have been brought before a justice of the peace may ordinarily be determined by the amount of the judgment rendered by the justice.—Lawrence v. Ford, 44 Me. 427.

[n] (Miss. 1883) A plaintiff's honest mistake as to the value of the property in controversy will not exclude the suit from a justice's jurisdiction.—Ross v. Natchez, J. & C. R. Co., 61 Miss. 12.

[o] (Mo. 1880) Where two causes of action are originally united in one complaint, or where, under the statute, two suits against the same defendant are consolidated by the justice, if jurisdiction as to one of the causes of action is conferred without regard to the amount involved, and the amount claimed in the other does not exceed the jurisdiction of the justice in actions of that class, the amount involved in the cause of action of which the justice has jurisdiction, without regard to value and by reason of the nature of the injury, cannot be added to the amount claimed in the cause of action wherein the jurisdiction depends upon the amount involved, in order to oust the jurisdiction of the justice.—Fenton v. St. Louis, K. C. & N. Ry. Co., 72 Mo. 259.

[p] (Mo. 1888) Where the statement in an action in a justice's court contains two counts, each stating the same cause of action in somewhat different phraseology, and each concluding with a prayer for $100 damages, an objection that the damages sought to be recovered are $200, and thus the suit was one beyond the justice's jurisdiction, is without merit.—Colvin v. Sutherland, 32 Mo. App. 77.

[q] (N. J. 1790) Where the sum in dispute does not exceed £12, the justice has jurisdiction, whatever may be the amount of the accounts.—South v. Hall, 1 N. J. Law (Coxe) 29.

[r] (N. J. 1808) An affidavit that the plaintiff owes the defendant a sum beyond jurisdiction of the justice is not a ground to stay proceedings, since it would make the jurisdiction of the justice depend on the defendant's pleasure.—Montgomery v. Snowhill, 2 N. J. Law (1 Penning.) 361.

[s] (N. Y. 1812) If the plaintiff in proceedings before a justice of the peace states his demand at an amount above the sum within the jurisdiction of the justice, but claims damages in such sum, the justice has jurisdiction.—Bowditch v. Salisbury, 9 Johns. 866.

[t, u] (N. Y. 1849) The plaintiff in an action in a justice's court claimed in his declaration "$100 and over," but took judgment for less than that sum. *Held*, that there was no error; the words "and over" being void for uncertainty.—Rockwell v. Perine, 5 Barb. 573.

[v] (Vt. 1838) Where there are several counts in a declaration before a justice which may be for the same subject-matter, the aggregate of all which exceeds $100, if the ad damnum is but $100, the justice has jurisdiction.—Bell v. Mason, 10 Vt. 509.

[w] (Vt. 1864) The jurisdiction of a justice of the peace is determined by the amount of the claim due at the time of the commencement of the action, and not by the amount due when judgment is rendered.—McDaniels v. Johnson, 36 Vt. 687.

[x] (Vt. 1874) Where, in a suit before a justice, the ad damnum was within the limit of his jurisdiction as to one count in the declaration, but in excess of his jurisdiction as to another count, he could take no jurisdiction of the cause.—Chadwick v. Batchelder, 46 Vt. 724.

[y] (Wis. 1856) A justice has jurisdiction where the "damages claimed do not exceed $100," though the sums given in the declaration are more.—Keegan v. Singleton, 5 Wis. 115.

§ 158. Particular actions and proceedings.

Actions on judgments, see post, § 418 [u, v].
Requisite amount or value, see ante, §§ 150–156.

[a] (Cal. 1891) Under Const. art. 6, § 11, which provides that justices' courts shall have concurrent jurisdiction with the superior courts, in actions of forcible entry and detainer, where the rental value of the property detained does not exceed $25 per month, and the whole amount of damages claimed does not exceed $200, the allegation of a complaint that the rental value does not exceed $25 is not conclusive of the justice's jurisdiction, but the same must be determined by the evidence.—Ballerino v. Bigelow, 90 Cal. 500, 27 Pac. 372.

[b] (Ga. 1894) An action against an express company on a contract for the carriage of $1,100 in money, the breach alleged being a failure to deliver $100 of that sum, and the amount sued for being $100, with interest thereon, is a civil action, arising ex contractu, and within the jurisdiction of a justice's court.—Southern Exp. Co. v. Hilton, 94 Ga. 450, 20 S. E. 126.

[c] (Ind. 1857) In an action in a justice's court, the complaint set out a note for $93, a claim for goods sold amounting to $100, and a claim for work and labor amounting to $100. The damages demanded in conclusion were $100. *Held*, that the sum thus laid in the conclusion constituted the claim, and determined the jurisdiction.—Inhabitants of Congressional Tp. No. 11 v. Weir, 9 Ind. 224.

[d] (La. 1874) Under Act March 21, 1874, § 12, declaring that the mayor of the town of Homer shall receive a salary of $500 a year with no other fees or emoluments of office, and also authorizing said mayor to act as justice of the peace, a suit under the act relating to intrusion into office cannot be brought within the jurisdiction of the district court by alleging that, as justice of the peace, the mayor is entitled to fees, and thus showing that the amount in dispute, i. e., his salary and fees as justice, would exceed $500, and be without a justice's jurisdiction.—State ex rel. Cormick v. Richardson, 26 La. Ann. 631.

[e] (La. 1886) The jurisdiction of a justice of the peace, limited by Const. art. 125, to suits where the matter in dispute exceeds $100, does not embrace a suit against a town where the damages claimed for alleged illegal charges are laid at $90, although the petition also alleges that the town authorities "will daily enforce the illegal ordinance," etc., and prays an injunction.—Clerc v. Boudreaux, 38 La. Ann. 732.

[f] (Md.) In actions on contract, the sum recovered, and not the amount demanded, is the test of the jurisdiction of a justice of the peace.—(1843) O'Reilly v. Murdock, 1 Gill, 32; (1843)

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Beall v. Black, Id. 203; (1854) Ott v. Dill, 7 Md. 251; (1867) Bushey v. Culler, 26 Md. 534.

[g] (Mass. 1812) In an action brought to recover the penalty provided by the act of incorporation of a turnpike company, declaring that any person who shall forcibly pass or attempt to pass the turnpike gates without having paid the legal toll shall forfeit and pay a fine not exceeding $50, nor less than $2, to be recovered by the treasurer of the corporation, the plaintiff may, by alleging his damages at $20, bring his action before a justice.—Carroll v. Richardson, 9 Mass. 329.

[h] (Mo. 1847) A justice of the peace has jurisdiction of an action of covenant where the damages claimed do not exceed $90, though from the covenant itself it appears that more might be claimed.—Joyce v. Moore, 10 Mo. 271.

[i] (N. J. 1808) In an action of debt, though the state of demand is a half cent over $100, the justice is not thereby ousted of jurisdiction where the plaintiff demands but $100.—Darnel v. Sheldon, 3 N. J. Law (2 Penning.) 113.

[j] (Tex. 1892) Where, in a statutory proceeding to try the right of property, the affidavit of claim alleged its value to be $169, and the body of the bond approved by the constable making the levy gave the same valuation, the statement of value in the affidavit, being within the jurisdictional amount of a justice, was sufficient to show that the justice had jurisdiction; and it was immaterial that the constable failed to indorse on the bond the value of the goods, as required by Rev. St. art. 4826.—Leman v. Borden, 83 Tex. 620, 19 S. W. 160.

[k] (Tex. 1894) Where, in a suit before a justice, one count of the complaint seeks partition of property worth $2,000, plaintiff's share being $145, and a second count alleges conversion of property worth $45, a special exception to the first count, as being beyond the jurisdiction of the justice ($200), is properly sustained.—Schulz v. Schulz (Civ. App.) 26 S. W. 107.

[l] (Vt. 1834) Where a contract for services for a period of one year at $180 is broken at the end of six months, and an action is instituted for $100 for services and damages, the amount as claimed by plaintiff determines the jurisdiction of the justice court, and not the total amount under the contract.—Hair v. Bell, 6 Vt. 35.

[m] (Vt. 1856) In assumpsit the sum demanded determines the jurisdiction.—Bank of Rutland v. Cramton, 28 Vt. (2 Williams) 330.

§ 159. —— Actions for torts.

Requisite amount or value, see ante, § 151.

[a] In trespass before justice of the peace, the amount claimed determines the jurisdiction.
—(Ind. 1855) Short v. Scott, 6 Ind. 430;
(Ohio, 1859) Van Buskirk v. Dunlap, 2 Ohio Dec. 233;
(Vt. 1887) Smith v. Fitzgerald, 59 Vt. 451, 9 Atl. 604;
(W. Va. 1889) Stewart v. Baltimore & O. R. Co., 33 W. Va. 88, 10 S. E. 26.

[b] (Cal. 1882) Plaintiff sought by his complaint to recover damages for the conversion of personal property of the value of $250, and also alleged $50 further damage. He prayed judgment for $299. *Held*, that the action was within the jurisdiction of the justice's court; that court having jurisdiction of controversies in which the amount claimed was less than $300.—Sanborn v. Contra Costa County Superior Court, 60 Cal. 425.

[c] (N. Y. 1882) An action for conversion of property whose value exceeds the limit of the justice's jurisdiction is within his jurisdiction, if the damages are laid at a sum within it.—De Camp v. Miller, 44 N. J. Law (15 Vroom) 617.

[d] (Pa. 1874) In an action ex delicto founded on negligence, the sum laid in the declaration is the criterion of the justice's jurisdiction.—McKinney v. Allen, 31 Leg. Int. 373.

§ 160. —— Actions on bills and notes.

Requisite amount or value, see ante, § 152.

[a] (Ind. 1857) Though in a suit by the assignee against the assignor of a promissory note the amount of the note is prima facie the price paid for the assignment, the assignor may show as the measure of damage the actual value which he received from his immediate assignee, and therefore, though the amount of the note in a suit before a justice of the peace exceeds the limit of his jurisdiction, if the ad damnum is within his jurisdiction, the action will not be dismissed, since the court cannot know until after the close of the evidence whether the claim is cognizable by him.—Bozell v. Hauser, 9 Ind. 522.

[b] (Md. 1878) In an action on a note, the jurisdiction of a justice depends on the amount proven to be due, and not the amount appearing on the face of the instrument.—Orme v. Williams, 47 Md. 552.

[c] (Mo. 1855) An action by the assignee on a note against the assignor, on failure to obtain payment from the maker, will not be regarded as an action on the note for the purpose of giving jurisdiction to a justice, when the amount sought to be recovered exceeds his jurisdiction in other actions of assumpsit.—Stone v. Corbett, 20 Mo. 350.

[d] (Vt. 1853) The final jurisdiction of a justice is determined by the amount of a note, without reference to the amount due.—Washington County Mut. Ins. Co. v. Miller, 26 Vt. 77.

[e] (Vt. 1863) A justice of the peace has no jurisdiction in an action brought by an insurance company to recover assessments on a premium note whose face is for over $100, even though the assessments sued for are less than that sum.—Windham County Mut. Fire Ins. Co. v. Pierce, 36 Vt. 16.

[f] (Wis. 1865) A justice of the peace, under our statute, cannot render judgment for $100 or less on a note for a larger amount, unless it has been "reduced by credits or payments indorsed thereon to an amount not exceeding $100."—Rev. St. c. 120, § 6.—Felt v. Felt, 19 Wis. 193.

[g] (Wis. 1874) A justice of the peace has no jurisdiction of an action on a note purporting to be for more than $100, notwithstanding a defense that the note was "not given for the sum of $100," nor for any other sum, but was a forgery.—Butler v. Wagner, 35 Wis. 54.

§ 161. —— Actions on bonds.

Action on forthcoming bond as incidental to attachment suit, see post, § 189 [c].

[a] In a suit on a bond before a justice of the peace, the amount claimed, and not the penalty of the bond, determines the jurisdiction.
—(Ga. 1888) Bowden v. Taylor, 81 Ga. 190, 6 S. E. 277;
(Ind. 1829) Washburn v. Payne, 2 Blackf. 216; (1845) Anderson v. Farns, 7 Blackf. 343;
(Iowa, 1845) Culbertson v. Tomlinson, 1 Morris, 404;

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(Mich. 1895) Montgomery v. Martin, 104 Mich. 390, 62 N. W. 578;

(Miss. 1874) Shattuck v. Miller, 50 Miss. 386; (1875) State v. Luckey, 51 Miss. 528;

(N. Y. 1833) Boomer v. Laine, 10 Wend. 525;

(Pa. 1882) Ginter v. Gresley, 1 Del. Co. Ct. R. 354;

(S. C. 1888) Cavender v. Ward, 28 S. C. 470, 6 S. E. 302;

(Tenn. 1871) Fowler v. McDaniel, 53 Tenn. (6 Heisk.) 529;

(W. Va. 1884) State v. Lambert, 24 W. Va. 399.

CONTRA, see

(Mo. 1880) Pitman v. Dwyer, 8 Mo. App. 570; (1882) State, to Use of Ryan, v. Emmerling, 12 Mo. App. 98;

(N. C. 1873) Fell v. Porter, 69 N. C. 140; (1874) Bryan v. Rousseau, 71 N. C. 194; (1882) Coggins v. Harrell, 86 N. C. 317.

[b] (Ill. 1862) On other than official bonds a justice of the peace has not jurisdiction, where the penalty exceeds $100.—Snowhook v. Dodge, 28 Ill. (18 Peck) 63.

[c] (Ind. 1843) In debt before a justice of the peace, a delivery bond in the penalty of $208 was filed as the cause of action, the value of the property to be delivered not being stated, and there being no statement limiting the demand to $100 or less. *Held*, that the justice had not jurisdiction.—Beard v. Kinney, 6 Blackf. 425.

[d] (Mich. 1880) In an action in a justice's court on a bond in the penal sum of $2,000, given to secure such indebtedness as might grow due from the principal to the obligee, the breaches assigned were failure to pay two judgments amounting to $300, the declaration being in form debt on bond. *Held* not assumpsit for the amount of the two judgments, $300, but debt on the bond, and being for an amount in excess of a justice's jurisdiction could not be sued in that court.—Bishop v. Freeman, 42 Mich. 533, 4 N. W. 290.

[e] (Mich. 1884) Since, under How. Ann. St. § 6003, the judgment for the penalty in an administrator's bond stands as security for further breaches, no action lies in the justice's court on a bond the penalty of which is greater than the jurisdictional limit therein.—Probate Judge v. Dean, 52 Mich. 387, 18 N. W. 118.

[f] (Mich. 1884) How. Ann. St. § 6820, conferring on justices jurisdiction of suits on bonds, however large the penalty, if the amount involved by the breach does not exceed $150, applies though the bond is not a money bond.—Gray v. Stafford, 52 Mich. 497, 18 N. W. 235.

[g] (N. J. 1889) Revision, p. 537, confers jurisdiction upon justices of the peace in certain cases when the matter in dispute does not exceed, exclusive of costs, $100, and further provides that whenever the amount really due on any bond shall not exceed, exclusive of costs, the sum of $100, at the time of the institution of suit, then such sum shall be recoverable without regard to the penalty expressed in the contract. *Held* that, under act approved March 12, 1879, increasing the amount in dispute cognizable before a justice to $200, an action is maintainable before a justice on a bond whereon the amount due is less than $200, though the penalty named exceeds $200.—Anderson v. Rose, 51 N. J. Law (22 Vroom) 471, 17 Atl. 956.

[h] (N. C. 1881) Two parties having agreed upon an interchange of lands executed a bond in $400 for title and possession and providing that in default of performance the disappointed party might sue the other and recover $200 and all damages. *Held*, that the instrument must be construed as a bond for the penal sum of $400, to be void upon certain conditions, and securing $200 and damages in case of nonperformance, and that as the holder had no option but to take judgment for the full penalty to be discharged upon the payment of $200 and damages, the sum demanded was beyond the jurisdiction of a justice of the peace.—Morris v. Saunders, 85 N. C. 138.

[i] (Pa. 1835) Under Act March 29, 1824, § 8, providing that constable bonds shall be in a penalty of not less than $500 and not exceeding $3,000, and that they may be proceeded on as other official bonds, justices of the peace have no jurisdiction of actions on such bonds, as the penalty exceeds their jurisdiction.—Blue v. Commonwealth, 4 Watts, 215.

[j] (Wis. 1886) Where the jurisdiction of a justice of the peace is limited to causes involving no more than $200, action may be had before a justice of the peace for installments, amounting to less than $200, on a bond, though the penalty of the bond is more than $200, and it is secured by a mortgage on real estate.—Buechel v. Buechel, 65 Wis. 532, 27 N. W. 318.

§ 162. —— Actions on accounts.

[a] (Mo. 1870) In an action before a justice of the peace, the account sued on and the specific items claimed, and not the amount named in the prayer for judgment, must be taken as showing the "debt or balance" sued for.—Stephenson v. Porter, 45 Mo. 358.

[b] (N. Y. 1857) Under Code, § 54, to oust a justice of his jurisdiction of a case pending before him, the excess of the sum of both accounts over $400 must be proved to his satisfaction by legal evidence.—Parker v. Eaton, 25 Barb. 122.

[c] (N. Y. 1868) Code, § 54, takes from a justice of the peace jurisdiction of causes where the total amount of the accounts of both parties exceeds $400. Subdivison 4 of the section invests the justice with power of adjudicating the question of jurisdiction, and fixes the time when he may decide it as "when the facts shall be proved to his satisfaction." *Held*, that until the trial has commenced, and the proof has been entered upon, the justice has jurisdiction to act.—Glackin v. Zeller, 52 Barb. 147.

[d] (N. Y. 1883) Under Code, § 2863, providing that a justice has no jurisdiction in a matter of account where the sum total of accounts of both parties exceeds $400, to oust a justice of jurisdiction the items of account must have arisen in a course of mutual dealing, and in themselves constitute an affirmative claim in the defendant's favor, and which have not been specifically appropriated as payments in reduction of plaintiff's claim.—Steele v. MacDonald, 4 Civ. Proc. R. 227.

[e] (N. Y. 1894) Under Code Civ. Proc. § 2863, providing that a justice cannot take cognizance of civil actions where, in a matter of mutual accounts, the sum total of the accounts of both parties "proved to the satisfaction of the justice" exceeds $400, the justice is not ousted of jurisdiction because the amount claimed in the pleadings exceeds that sum, but it must be made to appear to him by the proofs that the amount exceeds his jurisdiction.—Bartlett v. Mudgett, 75 Hun, 292, 27 N. Y. Supp. 56, 31 Abb. N. C. 259, 23 Civ. Proc. R. 288.

[f] (Vt.) A charge on plaintiff's book which makes the debit side exceed the amount of a justice's jurisdiction, but which was made by mistake and which is corrected, does not deprive the justice of jurisdiction.—(1832) Catlin v. Al-

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ken, 5 Vt. 177; (1845) Sheldon v. Flynn, 17 Vt. 238.

[g] (Vt. 1837) In an action of book account, where the "debit side of the plaintiff's book" is made to exceed $100 by the entry of items which the party has no right to charge on book, and which he did not insist on as a ground of recovery, the jurisdiction of the justice is not affected by such entry.—Scott v. Sampson, 9 Vt. 339.

[h] (Vt. 1853) In an action on book account the debit side of the plaintiff's book affords the only rule by which the jurisdiction of the justice is to be determined, and it is not affected by the defendant's book, nor by any entries therein.—Beach v. Boynton, 26 Vt. 105.

[i] (Vt. 1860) If, in an action of book account appealed from the judgment of a justice, the debit side of the plaintiff's book and of his account as presented before the auditor is less than $100, the jurisdiction of the court is not defeated by such a mode of stating the account by the auditor as swells the debit side of the plaintiff's account to more than that sum.—Mason v. Hutchins, 32 Vt. 780.

§ 163. —— Proceedings to recover personal property.

Requisite amount or value, see ante, § 153.

[a] (Ala. 1873) Where the complaint in replevin before a justice does not allege the value of the property, the jurisdiction of the justice on appeal from the judgment is not determined by the amount of recovery before him.—House v. Lassiter, 49 Ala. 307.

[b] (Ala. 1879) By Code, § 757, a justice of the peace has jurisdiction of "actions brought to recover specific property where the value does not exceed $50;" and where the value of the property exceeds $50, the plaintiff cannot, by averring in his complaint that the value is less than that sum, confer on the justice jurisdiction of the action.—Carter v. Alford, 64 Ala. 236.

[c] (Cal. 1880) Under Code, § 114, subd. 5, giving justices of the peace jurisdiction where the value of the property is less than $300, a justice has jurisdiction of a suit to recover specific personal property in which the value of the property is $299, and $50 is claimed as damages for the detention; the value being the test of jurisdiction.—Astell v. Phillippi, 55 Cal. 265.

[d] (Cal. 1886) The jurisdiction of justices' courts being limited to actions in which the sum sought to be recovered is not over $300, such a court cannot take jurisdiction of an action in which specific personal property is sought to be recovered, the value of which is fixed at $319; the judgment prayed being for the possession thereof, or for the sum of $299, in case possession cannot be had.—Shealor v. Amador County Superior Court, 70 Cal. 564, 11 Pac. 653.

[e] (Ind.) Rev. St. 1838, c. 364, § 18, provides that nothing contained therein shall be so construed as to give to a justice jurisdiction in any action for the recovery of damages for any trespass done against the property of a person, nor in any case founded on tort, where the damages demanded shall exceed $20; nor in any action of replevin where the value of the property claimed shall exceed $50. *Held*, that justices of the peace have jurisdiction in replevin where the value of the property sued for does not exceed $50, though the damages claimed for the detention exceeds $20.—(1837) Perkins v. Smith, 4 Blackf. 299; (1843) Middleton v. Harris, 6 Blackf. 397.

[f] (Ind. 1852) In replevin in a justice's court, the value of the property claimed by the declaration, and not by the affidavit, decides as to the jurisdiction of the court.—Markin v. Jornigan, 3 Ind. 548.

[g] (Kan. 1865) Under Justices Act, § 131, giving a justice jurisdiction in replevin only when the property is of less value than $100, the justice has jurisdiction to render a judgment in the alternative that the defendant have a return of the property and the damages found for its detention, if return can be had, though the aggregate value of the property and the damages for detention amount to more than $100, if each is less.—Garrett v. Wood, 3 Kan. 231.

[h] (Kan. 1868) A justice's jurisdiction in replevin is determined by the actual, not the appraised, value of the property.—Leslie v. Reber, 4 Kan. 315.

[i] (Mass. 1864) The jurisdiction of a justice of the peace in replevin depends on the actual value of the goods at the time of suing out the writ, and it is erroneous to dismiss such action for the reason that the goods replevined have been appraised at over $20.—Davenport v. Burke, 91 Mass. (9 Allen) 116.

[j] (Mich. 1873) Where the affidavit, writ, and declaration in replevin set forth the value of the property as less than $100, and the defendant has pleaded the general issue, the fact that the plaintiff's own testimony shows the value to be more than $100 does not oust the justice of jurisdiction; the question of jurisdiction, as depending on the value, if not closed by the affidavit for the writ, was not open under the general issue.—Henderson v. Desborough, 28 Mich 170.

[k] (Mich. 1881) A justice of the peace may render a judgment in replevin for more than $100, where the writ was sworn out for less.—Humphrey v. Bayn, 45 Mich. 565, 8 N. W. 556.

[l] (Mich. 1886) Where the affidavit in replevin before a justice makes out a case within his jurisdiction, the justice cannot dismiss the suit when it appears that the value of the property is $500, but may enter judgment for that amount.—Chilson v. Wayne Circuit Judge, 60 Mich. 235, 26 N. W. 859.

[m] (Mich. 1889) In replevin before a justice, a plea which prays judgment of the writ for want of jurisdiction, "for that the value of the property described in said writ exceeds in value $100," is properly stricken out. The jurisdiction does not depend on value in fact as it may ultimately appear, but the value alleged.—Addison v. Burt, 74 Mich. 730, 42 N. W. 278.

[n] (Minn. 1877) Where, in replevin, the complaint shows that the value of the property and the damages claimed, taken together, exceed the sum of $100, the limit prescribed by Const. art. 6, § 8, a justice of the peace has no jurisdiction.—Stevens v. Gunz, 23 Minn. 520.

[o] (Miss. 1877) The statute precluding a justice of the peace from exercising jurisdiction in replevin of property, the value of which exceeds $150, does not preclude a justice from exercising jurisdiction where the value of the property is less than $150, though its value when added to the damages assessed for the wrongful taking aggregate more than $150.—Higgins v. Deloach, 54 Miss. 498.

[p] (Mo. 1860) A justice of the peace has no jurisdiction of an action to recover specific personal property worth more than $50, though it is alleged in the plaintiff's writ not to be worth more than that amount.—Butler v. Ivie, 30 Mo. 478.

[q] (Mo. 1867) The law conferring jurisdiction on justices of the peace for the recovery of specific personal property limits the value of the

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property to an amount not exceeding $50, and when it is manifest that the value exceeds that amount, the justice is ousted of his jurisdiction, and the suit should be dismissed; but if the value of the property at the time of suit brought does not exceed $50, its enhancement in value at the time of the trial of the appeal is no cause for a dismissal of the suit.—Scott v. Russell, 39 Mo. 407.

[r] (Mo. 1890) Rev. St. § 6182, provides, with respect to the action of replevin, that "the value of the property, as set forth in the statement and affidavit, shall fix the jurisdiction of the justice, so far as the value is concerned." *Held*, that the testimony of the plaintiff at the trial, showing the value of the property to be greater than the jurisdictional amount, cannot affect the jurisdiction of the justice, which is absolutely fixed by the plaintiff's statement.—Malone v. Hopkins, 40 Mo. App. 331.

[s] (Neb. 1882) Code Civ. Proc. § 1069 (as in force July, 1881), provided that a justice of the peace should not have jurisdiction in replevin wherever the appraised value of the property (for the purposes of a bond) should exceed $200. Replevin bond was executed in the penalty of $110, but verdict was rendered in the action of replevin for $107, the value of the possession. The property had been returned to plaintiff, and the justice rendered judgment for costs only. *Held*, that the justice had jurisdiction; the appraised value of the property being $55, one-half of the penalty of the undertaking as required by section 1037 of the Code.—Lawrence v. Curtis, 13 Neb. 515, 14 N. W. 483.

[t] (Ohio, 1860) Under the statute precluding a justice from exercising jurisdiction "where the sum or matter in dispute exceeds" $100, it requires an addition of the value of replevied property to the damages claimed, in determining a justice's jurisdiction in replevin.—Dempsey v. Hill, 3 Ohio Dec. 260.

[u] (Tenn. 1858) In replevin, the plaintiff may fix whatever value he pleases on the property, and so bring it within the jurisdiction of a justice of the peace, but he will be bound by his own valuation.—Gray v. Jones, 38 Tenn. (1 Head) 542.

[v] (Wis. 1851) Gen. St. p. 335, § 5, relating to actions of replevin in justice courts, requires the officer to ascertain the value of the property by the oath of disinterested witnesses, and provides that if on the return of any writ it should appear that the value of the goods had been assessed by the jury to be of a greater value than the amount over which the justice had jurisdiction, then the justice should certify the case to the district court. *Held*, that the value which was to determine whether the justice has jurisdiction was that certified and returned by the officer, and not the value found by a jury on a trial before the justice.—Williams v. McDonal, 4 Chand. 65, 3 Pin. 331.

[w] (Wis. 1877) In an action of replevin, the judgment of the justice must always determine the value of the chattels.—Darling v. Conklin, 42 Wis. 478.

[x] (Wis. 1877) Where the affidavit on which a writ of replevin issues from a justice's court fails to state the value of the property, or states it over $200, the justice takes no jurisdiction, whatever the value may be in fact.—Darling v. Conklin, 42 Wis. 478.

[y] (Wis. 1877) Where the affidavit on which a writ of replevin issues from the justice's court states the value of the property under $200, the justice has jurisdiction to issue the writ and try the action, since his jurisdiction rests on the affidavit independently of the value of the chattels in fact until his judgment determines their value.—Darling v. Conklin, 42 Wis. 478.

§ 164. —— Proceedings to recover rent.

Requisite amount or value, see ante, § 155.

[a] (Tex. 1895) Under Sayles' Civ. St. tit. 58, which provides that when the oath and bond required therein are filed a justice of the peace shall issue a distress warrant on behalf of a landlord, and the officer shall seize the property of defendant, or so much thereof as shall satisfy the demand, and, if the amount in a controversy exceeds a certain amount, make return to the county court, the jurisdiction depends upon the amount of the demand, and not the value of the property levied on.—Yelser v. Taylor (Civ. App.) 31 S. W. 84.

[b] (Tex. 1895) In an action to enforce a landlord's lien given by statute generally on the crops of the tenant, the amount claimed determines the jurisdiction of the justice court, and not the value of the crops attached.—Lawson v. Lynch, 9 Tex. Civ. App. 582, 29 S. W. 1128.

§ 165. —— Attachment and garnishment.

Interplea by third person, see post, § 189 [d, e, k, l].

Requisite amount or value, see ante, § 156.

[a] The jurisdiction of a justice in garnishee proceedings is governed by the amount of the creditor's claim, and not by the amount in the hands of the garnishee.

—(Ill. 1887) Home Ins. Co. v. Kirk, 23 Ill. App. 19; (1895) Surine v. Ft. Dearborn Nat. Bank, 59 Ill. App. 329;

(Mich. 1853) Wetherwax v. Paine, 2 Mich. 555;

(Mo. 1853) Doggett v. St. Louis Marine & Fire Ins. Co., 19 Mo. 201;

(Vt. 1846) Briggs v. Beach, 18 Vt. 115.

CONTRA, see

(Ark. 1843) More v. Woodruff, 5 Ark. (5 Pike) 214; (1895) Traylor v. Allen, 61 Ark. 13, 31 S. W. 570;

(Ill. 1894) Rand, McNally & Co. v. Pomeroy, 54 Ill. App. 522.

[b] The amount in controversy, and not the value of the property attached, determines the justice's jurisdiction.

(Ark. 1896) Fly v. Grieb's Adm'r, 62 Ark. 209, 35 S. W. 214;

(Iowa, 1874) Hoppe v. Byers, 39 Iowa, 573;

(Tex. 1895) Landa v. Mercantile & Banking Co., 10 Tex. Civ. App. 582, 31 S. W. 55.

[c] (Ala. 1831) A proceeding by garnishment is a suit, and a justice cannot render judgment against the garnishee for a sum beyond his jurisdiction, though it may be founded on several judgments against the original defendant.—Witherspoon v. Barber, 3 Stew. 335.

[d] (Ga. 1842) Where a garnishee answers, in a justice's court, that he is indebted to the defendant in a sum exceeding $30, the court cannot take jurisdiction of the case.—Mahone v. McDonald, Ga. Dec. 154, pt. 1.

[e] (Ga. 1857) An attachment in a justice's court against a garnishee may be levied on a debt exceeding $30.—Welch v. Alligood, 22 Ga. 618.

[f] (Ill. 1895) Under Rev. St. 1893, c. 11, par. 42, § 1, which declares that writs of attachment may be granted against the personal estate of the debtor by justices of the peace in all civil actions cognizable before them where the demand does not exceed their jurisdiction, and

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paragraph 47, § 6, which directs the constable to "summon as garnishees" all persons whom plaintiff may direct, a justice of the peace has jurisdiction to enter judgment against a garnishee whose indebtedness to the principal debtor exceeds the $200 limit of justices' jurisdiction.—Pomeroy v. Rand, McNally & Co., 157 Ill. 176, 41 N. E. 636, reversing Rand v. Pomeroy (1894) 54 Ill. App. 522.

[g] (Kan. 1880) A justice of the peace has jurisdiction in the trial of the truth of a garnishee's answer, without regard to the amount of the supposed liability of the garnishee.—Fitch v. Manhattan Fire Ins. Co., 23 Kan. 366.

[h] (Vt. 1844) Under Rev. St. p. 190, § 2, enacting that no trustee "process shall be commenced before a justice when the matter in demand shall exceed the sum of $40," and page 170, § 8, providing that "the amount in demand in actions on book account shall be considered as the debit side of the plaintiff's book," a justice has no jurisdiction of an action of book account commenced by trustee process, where the debit side of plaintiff's book exceeds $40.—Kimball v. Hopkins, 16 Vt. 618.

§ 166. Interest, costs, and attorney's fees.

[a] In determining the amount in controversy, in actions before justices of the peace, the interest must be computed.

—(U. S. 1826) Milburn v. Burton, Fed. Cas. No. 9,541 [2 Cranch, C. C. 639];
(Ala. 1830) Hogan v. Odam, 3 Stew. 58;
(Ind. 1856) Gregg v. Wooden, 7 Ind. 499;
(Ky. 1859) Fidler v. Hall, 59 Ky. (2 Metc.) 461.

CONTRA, see
(Ark. 1874) Sherrill v. Wilson, 29 Ark. 384;
(Miss. 1842) Planters' Bank v. Coulson, 7 Miss. (6 How.) 395.

[b] The amount in controversy, exclusive of interest and costs, determines the jurisdiction of a justice.

—(Cal. 1863) Bradley v. Kent, 22 Cal. 169;
(W. Va. 1896) Moore v. Harper, 42 W. Va. 39, 24 S. E. 633.

[c] (Ala. 1853) When suit is instituted before a justice of the peace on a promissory note, the amount of which, with the legal interest thereon accruing up to the rendition of the judgment, exceeds $50, the justice has no jurisdiction to render judgment for $50 or less, unless the plaintiff enters a credit for the excess, or otherwise releases it before, or at the time of, the rendition of judgment.—Crabtree v. Cliatt, 22 Ala. 181.

[d] (Ala. 1895) Code, § 1778, requires holders of nonnegotiable paper, in order to charge the indorsers or assignor, to sue the maker in the first court to which suit can be brought after the transfer. If the amount does not exceed $100, suit must be brought within 30 days after it can be properly brought. *Held* that, where a note for $97 provided for an attorney's fee of 10 per cent. if suit was brought for its collection, the assignee could not have rightfully demanded more than $97 before the suit, and the amount in dispute was less than $100, and within the jurisdiction of a justice.—Davis v. Jones, 109 Ala. 418, 19 South. 841.

[e] (Ark. 1852) The principal and interest of a covenant for the payment of money constitute the "amount claimed" within the amendment to the constitution, giving justices of the peace jurisdiction of covenants, and the act passed in pursuance therewith (Dig. c. 95, § 3), and if the principal and interest amount to more than $100, the covenant is not within the jurisdiction of the justice.—Howell v. Milligan, 13 Ark. (8 Eng.) 40.

[f] (Ark. 1860) A justice of the peace has jurisdiction, where the sum in controversy is $100 or less, excluding interest, whether fixed by law or by agreement.—Chatten v. Heffley, 21 Ark. 313.

[g] (Colo. 1882) Accrued interest on the principal must be included in determining whether the amount due exceeds the jurisdiction of a justice of the peace.—Cramer v. McDowell, 6 Colo. 369.

[h] (Ga. 1882) A statute giving a justice jurisdiction "when the principal sum does not exceed $100," does not apply to an action on a note promising to pay $100, with interest at 7 per cent., and 5 per cent. for attorney's fees.—Baxter v. Bates, 69 Ga. 587; Johnson v. Stephens, Id. 756.

[i] (Ga. 1884) Where a suit was brought in a justice's court on a note by which it was agreed to pay a specified amount as principal, with interest thereon, and expenses incurred in collecting the same, and the amount named as principal together with the expenses of collection exceeded $100, exclusive of interest, the justice had no jurisdiction.—Hill v. Haas, 73 Ga. 122.

[j] (Ga. 1884) Where suits were brought in a justice's court, and the notes attached to the summons were each for $100, with interest, the costs of collection and 10 per cent. attorney's fees, the justice has no jurisdiction.—Bell v. Rich, 73 Ga. 240.

[k] (Ga. 1891) Where the face of a note, with the attorney's fee provided therein, is in excess of the amount of the jurisdiction of a justice of the peace, he is without jurisdiction, and a judgment rendered therein by him is void.—Beach v. Atkinson, 87 Ga. 288, 13 S. E. 591.

[l] (Ga. 1894) A justice has no jurisdiction of an action on a note for $90, providing for attorney's fees and interest, where it appears that the principal, with attorney's fees and interest, amounted to more than $100, before the action was brought.—Almand v. Almand, 95 Ga. 204, 22 S. E. 213.

[m] (Ga. 1895) A justice of the peace has no jurisdiction of an action on a note for the principal thereof and attorney's fees therein agreed to be paid, where the aggregate amount of the principal and fees exceeds $100.—Ashworth v. Harper, 95 Ga. 660, 22 S. E. 670.

[n] (Ga. 1895) A justice of the peace has jurisdiction of an attachment for the recovery of only the principal of a note amounting to $100 or less, though the note provide for the payment of attorney's fees in the event of collection by suit, and though the aggregate amount of principal and attorney's fees would exceed $100.—Pickett v. Smith, 95 Ga. 757, 22 S. E. 669.

[o] (Ill. 1886) A justice of the peace issuing garnishee process at the instance of a judgment creditor has jurisdiction to render judgment in favor of the garnishing creditor against the garnishee, for more than $200, when the original judgment was for that amount, but, by reason of interest and costs, exceeds it.—Nesbitt v. Dickover, 22 Ill. App. 140.

[p] (Ind. 1884) September 13th judgment was confessed on a note purporting to be executed September 10th, payable one day after date, for $300, at 8 per cent. interest, but in reality executed on the day judgment was recovered. *Held*, that the amount demanded must be considered as $300, and that therefore the justice had jurisdiction.—Calloway v. Byram, 95 Ind. 423.

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[pp] (Iowa, 1874) A justice of the peace has no authority to render judgment for $100, with accrued interest thereon and costs.—Galley v. Tama County, 40 Iowa, 49.

[q] (Iowa, 1875) A notice issued by a justice of the peace stated that plaintiff claimed $300 on a promissory note, "with 10 per cent. attorney's fees thereon, and jurisdiction given in said note to any justice of the peace." *Held*, that the phrase providing for attorneys' fees was simply descriptive, and did not ask for a judgment for that amount in addition to the amount of the claim stated, and that, accordingly, the notice gave the justice jurisdiction, under Code 1873, § 3508, to render the judgment.—Long v. Loughran, 41 Iowa, 543.

[qq] (Iowa, 1877) A justice may enforce by garnishment a judgment which was within his jurisdiction to render, the original demand being under $100, notwithstanding, by the addition of costs, the judgment as rendered was for upwards of $100.—Gillett v. Richards, 46 Iowa, 652.

[r] (Iowa, 1882) In determining the jurisdiction of a justice of the peace to entertain an action on a note the attorneys' fees provided for in the note are to be treated as costs, and not as part of the amount in controversy.—Spiesberger v. Thomas, 59 Iowa, 606, 13 N. W. 745.

[rr] (Kan. 1890) Where the amount claimed in plaintiff's bill of particulars, principal and interest, exceeds $300, a justice of the peace has no jurisdiction, since Comp. Laws, c. 81, § 2, limits his jurisdiction in civil actions for the recovery of money to cases where the amount claimed does not exceed $300.—Ball v. Biggam, 43 Kan. 327, 23 Pac. 565.

[s] (Ky. 1846) A justice of the peace has jurisdiction, though, the interest on the principal debt and costs being added to the principal, the amount exceeds the sum to which his jurisdiction is limited.—Sweeny v. Lowe, 45 Ky. (6 B. Mon.) 314.

[ss] (Me. 1866) Under St. c. 77, § 29, permitting the allowance of quarter costs only "when it shall appear, on rendition of the judgment, that the action should have originally been brought before a justice of the peace," the interest on a verdict between the time of its rendition and the entry of judgment cannot be considered in determining whether the action should have been brought before the justice.—Hervey v. Bangs, 53 Me. 514.

[t] (Minn.) Const. art. 6, § 8, providing that "no justice of the peace shall have jurisdiction of any civil cause where the amount in controversy shall exceed $100," means $100 exclusive of costs.—(1880) Watson v. Ward, 27 Minn. 29, 6 N. W. 407; (1882) Closen v. Allen, 29 Minn. 86, 12 N. W. 146.

[tt] (Miss. 1875) In computing the "amount in controversy," within Const. art. 6, § 23, which limits the jurisdiction of justices of the peace in civil matters to all "causes in which the amount in controversy does not exceed the sum of $150," interest, damages, and costs are to be excluded.—Jackson v. Whitfield, 51 Miss. 202.

[u] (N. C. 1870) The phrase "sum demanded," as used in a provision (Const. art. 4, § 33) giving justices jurisdiction of "actions founded on contracts wherein the sum demanded shall not exceed $200," means the principal alone. Interest is a mere legal incident, and depends on a simple calculation. If the principal is paid, no action lies for the interest.—Hedgecock v. Davis, 64 N. C. 650.

[uu] (Pa. 1867) An alderman has jurisdiction to hear and decide a sci. fa. to revive a judgment, though the interest has increased the claims beyond $100.—McGarry v. Douredoure, 6 Phila. 332.

[v] (S. C. 1810) The jurisdiction of a justice of the peace does not exceed $20; therefore, where a justice gave judgment for a greater amount, the same was set aside as unconstitutional, though the excess was interest which had accrued after suit brought.—Melton v. Ellison's Adm'rs, 2 Brev. 399.

[vv] (S. D. 1892) Under Comp. Laws, §§ 4825, 6042, giving to justices' courts jurisdiction of actions on contract for the recovery of money "only where the sum claimed does not exceed $100," and to the district court exclusive jurisdiction in such actions "when the debt or sum claimed exceeds $100," interest demanded on the debt sued on is to be added to the debt to determine the justice's jurisdiction.—Plunkett v. Evans, 2 S. D. 434, 50 N. W. 961.

[w] (S. D. 1895) Where the amount of a note sued on and the amount of attorney's fees stipulated therein to be paid exceed $100 in the aggregate, a justice of the peace has no jurisdiction of the action, though the stipulation for attorney's fees is void under the statute.—Warder, Bushnell & Glessner Co. v. Raymond, 7 S. D. 451, 64 N. W. 525.

[ww] (Tenn. 1836) Where the principal and interest of a sealed note exceeds $50, the want or failure of consideration cannot be inquired into in a suit before a magistrate; Acts 1817, c. 86, only gives jurisdiction to magistrates where the subject in controversy does not exceed $50.—Wharton v. Thompson, 17 Tenn. (9 Yerg.) 45.

[x] (Tex. 1877) Under the laws, by which suits for less than $200 are to be brought in the justices' and not in the district courts, if the principal of the debt sued for is less than $200, by ever so little, the suit must be brought in the justice's court. Interest is not taken into the account.—Clark v. Brown, 48 Tex. 212.

[xx] (Tex. 1884) Where a justice of the peace had jurisdiction of the original case, he may issue a writ of garnishment on the judgment, though the judgment with accrued interest renders the amount for which the garnishee is liable more than $200.—City of Austin v. Erwin, 2 Willson, Civ. Cas. Ct. App. § 290.

[y] (Tex.) In an action on a promissory note, where plaintiff seeks to recover in addition to the amount 10 per cent. attorney's fees provided therein, the amount thereof must be considered, in determining the jurisdiction of the justice.—(1885) King v. Robinson, 2 Willson, Civ. Cas. Ct. App. § 556; (1891) Waters v. Walker (App.) 17 S. W. 1085.

[yy] (Tex. 1894) A justice has jurisdiction of an action to cancel notes for an amount not exceeding his jurisdiction, though they provide for attorney's fees, in case of collection by legal proceedings, which would bring the amount above his jurisdiction, where the suit is brought before maturity of the notes.—Hilderbrand v. Walter A. Wood Mowing & Reaping Mach. Co., 8 Tex. Civ. App. 132, 27 S. W. 826.

[z] (Utah, 1895) Under Comp. Laws 1888, § 3020, limiting the jurisdiction of a justice of the peace to cases in which the sum claimed is less than $300, a justice cannot include in his judgment interest on the sum claimed from the time suit was brought, if this makes the total amount of the judgment more than $300.—McCormick Harvesting Mach. Co. v. Marchant, 11 Utah, 68, 39 Pac. 483.

[zz] (Wash. 1894) Where a statute provides that a justice of the peace shall have jurisdiction in actions for the recovery of money where the amount "claimed" does not exceed $100 (2

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Hill's Code, § 23), the interest due and claimed on the principal is part of the amount "claimed," within the meaning of the statute.—State v. King County Superior Court, 9 Wash. 369, 37 Pac. 489.

§ 167. Double damages.

[a] (Mich. 1887) A. sued before a justice of the peace for damages caused by negligently allowing a fire to spread to his land, and in one count claimed $100 damages, and in another count claimed $100, and alleged that, by force of How. Ann. St. c. 328, § 1, he was entitled to double damages. The case was tried before a jury, and a verdict of $100 rendered, whereupon the justice entered a judgment for $200. *Held* that, though in actions of tort the justice's jurisdiction is limited to $100, the entry of such judgment was within the jurisdiction of the justice, as the added $100 was in the nature of a penalty, and added to the actual damages in the same manner as costs.—Rosevelt v. Hanold, 65 Mich. 414, 32 N. W. 443.

[b] (Mo. 1876) The statute (Wag. St. p. 809, § 3, cl. 5) giving justices of the peace concurrent jurisdiction with the circuit court, in actions against railroads for killing stock, etc., confers jurisdiction on the former to give judgment for double the amount of damages, regardless of the amount, in the cases mentioned in the damage act.—Parish v. Missouri, K. & T. R. Co., 63 Mo. 284.

[c] (Tenn. 1888) Under Code, § 4130, limiting the jurisdiction of justices in replevin to cases in which the property does not exceed $500 in value; and section 4133, providing that if the justice adjudge the property to belong to defendant, and plaintiff fails to deliver it up, the justice shall render judgment against plaintiff and his sureties for double its value,—a justice may render judgment against a plaintiff in replevin for the value of the property as established on the trial, in any amount not exceeding $1,000, where plaintiff, in his affidavit for the writ, has laid the value at $500, and defendant claims judgment only for $905, the established actual value.—Godsey v. Weatherford, 86 Tenn. (2 Pickle) 670, 8 S. W. 385.

§ 168. Several or split claims exceeding in aggregate limit of jurisdiction.

Compelling consolidation of actions, see post, § 230.

Constitutionality of law authorizing splitting of claims, see ante, § 72 [l].

Presumption of entirety, see post, § 216 [g].

Prohibition against suit on split claim, see "Prohibition."

[a] An entire contract cannot be separated, so as to maintain several suits, and to bring them within the jurisdiction of a magistrate.—(Del. 1836) Messick v. Dawson, 2 Har. 50; (Ga. 1822) Ex parte Gale, R. M. Charlt. 214; (N. Y. 1819) Willard v. Sperry, 16 Johns. 121.

[b] (Ala. 1844) A justice of the peace has jurisdiction of an action to recover a sum not over $50. An action to recover the first installment of a note for $193.50, payable in four installments, at 6, 12, 18, and 24 months, the remaining installments not being due, is within his jurisdiction.—Winston v. Majors, 6 Ala. 659.

[c] (Ark. 1854) By the act of December 21, 1846, passed in pursuance to the third amendment to the constitution, covenant may be maintained before justices of the peace for the recovery of one or more installments of interest due in a bond, when the amount does not exceed $100 at any one suit.—Walker v. Byrd, 15 Ark. 33.

[d] (Ark. 1866) The plaintiff filed with a justice of the peace three separate bills of items arising on an open account against the defendant, the first for $80, the second and third for $75 each. *Held*, that the three bills of items constituted but one account between the parties, and that the aggregate amount of the demand determined the jurisdiction of the court.—Gregory v. Williams, 24 Ark. 177.

[e] (Ga. 1842) Several suits cannot be commenced by the same plaintiff, against the same defendant, at the same term, in a justice's court, on several causes of action, which in the aggregate exceed the jurisdiction of the court.—Planters' & Mechanics' Bank v. Chipley, Ga. Dec. 50, pt. 1.

[f] (Ga. 1842) Parties cannot, with a view to giving a justice jurisdiction of a debt exceeding $30, divide it into smaller sums, though payable on different days.—Planters' & Mechanics' Bank v. Chipley, Ga. Dec. 50, pt. 1.

[g] (Ga. 1883) Where there is a running account, and the balance is carried forward yearly, there is but one account, which cannot be divided so as to give jurisdiction to a justice's court.—Floyd v. Cox, 72 Ga. 147.

[h] (Ind. 1839) The declaration in a justice's court contained three counts, each claiming $50, and had no conclusion limiting the amount claimed. *Held*, that the suit should be dismissed for want of jurisdiction.—Swift v. Woods, 5 Blackf. 97.

[i] (Ind. 1840) A justice of the peace has not jurisdiction of an action, if the amount of the several sums claimed by several counts exceed the sum of which the justice has jurisdiction.—Wetherell v. Inhabitants of Congressional Tp., 5 Blackf. 357.

[j] (Ind. 1852) Where a justice has no jurisdiction, if the value of property exceeds $50, and a declaration in replevin contains two counts, and in each count the property is alleged to be of the value of $40, the justice has no jurisdiction.—Markin v. Jornigan, 3 Ind. 548.

[k] (Ind. 1853) In a suit before a justice of the peace, where the jurisdiction was limited to $50, each count of the declaration had its own conclusion, and in each damages were laid at $50. *Held*, that the plaintiff demanded $100 damages, and the suit must be dismissed for want of jurisdiction.—Bainum v. Small, 4 Ind. 49.

[l] (Ind. 1854) In suits before a justice of the peace, under 2 Rev. St. 1852, § 122, which authorizes justices to take jurisdiction when the amount claimed by any one creditor does not exceed $100, it was *held* that the same creditor might file three separate claims, each amounting to $100, with a separate affidavit and bond, and each claim would constitute a single, independent suit, and that the plaintiff would be, as to each claim, a separate creditor.—State v. King, 5 Ind. 439.

[m] (La. 1860) Where several parties entered into an agreement by which one of them leased to the other a certain lot of ground, upon which were two houses, at a rent of $125 per month, and upon the death of the lessor, the two houses becoming the property of two distinct persons, one of them sought to eject the lessee by suit before a justice of the peace, it was *held* that such a lease could not be divided for the purpose of giving jurisdiction to the justice's court.—State ex rel. Rutherford v. Third Justice of Peace, 15 La. Ann. 660.

[n] (Miss. 1827) One cannot divide an open account, though containing various items, so as

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to give jurisdiction to a justice.—Grayson v. Williams, 1 Miss. (Walk.) 298, 12 Am. Dec. 568.

[o] (Miss. 1875) The rule that plaintiff cannot split up or divide his claim so as to bring several suits at the same time within the jurisdiction of a justice of the peace does not apply to suits instituted at different times, and on different claims, as where one is an open account and the other an acceptance of a bill of exchange.—Ash v. Lee, 51 Miss. 101.

[p] (Mo. 1874) An action against a railroad company for killing a horse, and also for injuring a harness, cannot be brought under two different subdivisions of the justices' act (Wag. St. p. 808), for the purpose of obtaining a judgment beyond the jurisdictional limit of $50.—Dillard v. St. Louis, K. C. & N. R. Co., 58 Mo. 69.

[q] (Mo. 1892) Plaintiff, having a merchandise account against defendant for $600, divided it into three amounts, each within the jurisdiction of a justice of the peace, and on each of the amounts instituted a separate action in a justice's court, at the same time. *Held*, that the justice acquired no jurisdiction in either action.—Robbins v. Conley, 47 Mo. App. 502.

[qq] (N. C. 1873) A party has a right to "split up" his account, so as to include a certain number of items under one warrant, and a certain number under another, and so on, so as to bring the several warrants under the jurisdiction of a justice of the peace.—Caldwell v. Beatty, 69 N. C. 365.

[r] (N. C. 1874) A creditor, whose account consists of several items, either for goods sold, or labor done at different times, each of which is for less than $200, although the aggregate of the account exceeds $200, may sue before a justice for any number of such items not exceeding $200. If, however, the debt is an entire one, consisting of but one item, and exceeds $200, it cannot be divided to give the justice jurisdiction.—Boyle v. Robbins, 71 N. C. 130.

[s] (N. C. 1877) Defendant went into plaintiff's store, and purchased goods, going through the building from floor to floor continuously, making his selections and giving his orders, not leaving the store until he had completed his purchase, nor until he had received the bill for the whole purchase. *Held*, that the account, being for a bill of goods purchased on one day, is to be taken as one entire transaction, in the absence of evidence of a contrary intention; and as the dealing was continuous, and nothing appears on the face of it or in the account rendered indicating that either party intended that each item should constitute a separate transaction, the creditor cannot split it into several demands and actions, so as to give a justice of the peace jurisdiction.—Magruder v. Randolph, 77 N. C. 79.

[t] (N. C. 1886) It is the aggregate of the sums demanded which is "the sum demanded," and which fixes the justice's jurisdiction.—Moore v. Nowell, 94 N. C. 265.

[u] (N. C. 1891) Where plaintiffs' contract provided for furnishing defendant with certain lumber, and on a performance of their contract the amount due them exceeded the jurisdiction of a justice of the peace, they could not split the amount so as to bring three actions within such jurisdiction, though the lumber had been delivered by installments.—McPhail v. Johnson, 109 N. C. 571, 13 S. E. 799.

[v] (N. C. 1894) One who has an account for articles sold, the different items of which constitute separate transactions, and the entire amount of which exceeds the jurisdiction of a justice, may split it up so as to bring his actions within the jurisdictional amount, the account not having become an account stated, by reason of being presented as a whole, and not objected to within a reasonable time.—Simpson v. Elwood, 114 N. C. 528, 19 S. E. 598.

[w] (Pa. 1852) A claim cannot be divided so as to bring the amount within the jurisdiction of the alderman.—Walton v. Vanhorn, 1 Phila. 377.

[ww] (Pa. 1873) Fifty-four actions were brought before a magistrate on separate orders drawn from goods, by the overseers of the poor, on the plaintiff. *Held*, that as it appeared by the evidence that the several orders did not constitute separate contracts, the entire demand against the township constituted but one debt, and the plaintiff could not split it up into sums of less than $100, in order to bring the amount within the jurisdiction of a justice of the peace.—Moneghan v. Conyngham Tp., 2 Luz. Leg. Reg. 145.

[x] (Tenn. 1851) A party will not be permitted to split his cause of action, and bring several suits, in order to give a justice of the peace jurisdiction; but if two accounts are regarded by the parties as separate and distinct, and the justice of the one be acknowledged after judgment upon the other, separate actions may be maintained, and costs recovered.—Johnson v. Pirtle, 31 Tenn. (1 Swan) 262.

[xx] (Vt. 1861) Where one had an account for articles sold to another, who soon after the purchase became associated in partnership with a third person, and the creditor, acting in good faith, severed his account and brought two suits before a justice of the peace, one against the purchaser of the articles alone, and the other against the latter and his new copartner jointly, the severance of the account, which was altogether more than $100, bringing the amount claimed in each suit within the jurisdiction of the justice, it was *held* that the plaintiff was justified in severing the account, although, as it resulted, the purchaser's partner was not in fact liable to the plaintiff, who obtained judgment only against the purchaser; and that the justice, therefore, had jurisdiction of both cases.—Reed v. Stockwell, 34 Vt. 206.

[y] (Vt. 1894) Where several items of personal property are pledged for one loan and no reason exists for a separate demand of each article, the contract of pledge is entire and cannot be split up to give jurisdiction to a justice of the peace.—Bullard v. Thorpe, 66 Vt. 599, 30 Atl. 36, 25 L. R. A. 605, 44 Am. St. Rep. 867.

[yy] (Va. 1883) A. owed B. $126 and gave him three bonds aggregating the amount, each being for less than $50. After all became due, B. sued them before a justice. *Held*, that the justice had no jurisdiction.—James v. Stokes, 77 Va. 225.

[z] (W. Va. 1889) A claim for an amount in excess of a justice's jurisdiction due to two or more persons jointly on a single contract cannot be so divided and apportioned among the creditors without the debtor's consent that the amount assigned to each is within the justice's jurisdiction.—Bodley v. Archibald, 33 W. Va. 229, 10 S. E. 392.

[zz] (W. Va. 1895) A claim for a specific amount of damages for an injury to plaintiff's business cannot be split so as to bring the amount within the jurisdiction of the justice, and then be sued on in several suits.—Hale v. Town of Weston, 40 W. Va. 313, 21 S. E. 742.

§ 169. —— Several bills or notes.

[a] (U. S. 1825) If an entire debt of $250 be settled by the debtor's giving his five several

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promissory notes for $50 each, payable at different times, each note is within the jurisdiction of a justice of the peace; and if all the notes have become payable, he may issue his five separate warrants, and render judgment against the debtor in each case.—Moore v. Hough, Fed. Cas. No. 9,766 [2 Cranch, C. C. 561].

[b] (U. S. 1847) The holder of several notes made by the same party may elect to bring separate action in a justice's court on each note, and the fact that the amount of all the notes combined exceeds the jurisdiction of the justice will not oust the justice of jurisdiction.—Thecker v. Milburn, Fed. Cas. No. 13,876 [Hayw. & H. 271].

[c] (Ala. 1861) A justice of the peace has jurisdiction in suits upon several notes, each under $50, into which a debt exceeding said sum has been divided.—Herrin v. Buckelew, 37 Ala. 585.

[d] (Ala. 1861) Under the statutes the jurisdiction of a justice of the peace extends to causes in which the amount in controversy does not exceed $50; but *held*, in this case, that it included several notes of $50, each made by the same party, on the same day, in payment of a single debt, amounting to the aggregate of their several sums.—Herrin v. Buckelew, 37 Ala. 585.

[e] (Ark. 1849) One suit may be brought before a justice of the peace on several notes where neither of the notes is for a greater sum than $100, though the aggregate sum of all the notes may exceed that amount.—Collins v. Woodruff, 9 Ark. (4 Eng.) 463.

[f] (Ga. 1884) Where one has a material man's lien for an amount in excess of the jurisdiction of a justice, he cannot, by taking small notes and suing in the justice's court, give that court jurisdiction.—Bell v. Rich, 73 Ga. 240.

[g] (Ind. 1880) Where 20 separate suits are brought on the same day before a justice of the peace on as many notes, the amount of each being such as to give him jurisdiction over each suit, he is not deprived of jurisdiction over all of the suits because the aggregate sum of the amounts involved in them exceeds the amount of his jurisdiction.—Luce v. Shoff, 70 Ind. 152.

[h] (Miss. 1853) Where defendant executed three notes to plaintiff, and the amount of the same was beyond the jurisdiction of a justice, plaintiff cannot bring an action on one note before one justice, and on the other two notes before a second justice, the notes having been given in the same transaction.—Scofield v. Pensons, 26 Miss. 402.

[i] (Miss. 1874) Where M. sued out two attachments against S., on two promissory notes, one for $112.70, and the other for $139.28, making the sum of $251.98, *held*, that the plaintiff could not divide his claim so as to bring it within the jurisdiction of a justice of the peace.—Morris v. Shryock, 50 Miss. 590.

[j] (Miss. 1890) The holder of two bills of exchange accepted at different times, maturing at different times, and each within the jurisdictional amount of a justice of the peace, may maintain separate actions on each in justice's court, though together they exceed the justice's jurisdiction, and though, at his election, he might have sued on both in one action in the circuit court.—Drysdale v. Biloxi Canning Co., 67 Miss. 534, 7 South. 541.

[k] (N. C. 1841) The division of a note of upward of $100 into several notes of less amount, by the act of the parties, so that judgments may be taken on them before a justice of the peace, is not in either fraud or evasion of the statute prescribing the jurisdiction of justices of the peace.—Fortescue v. Spencer, 24 N. C. 68.

[l] (Pa. 1852) The holder of two notes made by the same person and exceeding in the aggregate a justice's jurisdiction cannot bring a separate action on each for the purpose of getting within the justice's jurisdiction.—Walton v. Vanhorn, 1 Phila. 377.

[m] (Va. 1816) A., owing B. $80, gave him four single bills for $20 each, payable at different times. After the last bill became due, B. obtained a warrant from a justice of the peace to recover the several sums. *Held*, that the justice had no jurisdiction in the case, as all the notes constituted but one debt.—Hutson v. Lowry, 2 Va. Cas. 42.

[n] (Wis. 1872) Where a statute gave to justices of the peace jurisdiction of "actions arising out of contract, express or implied, wherein the debt or balance due, or damages claimed, should not exceed $200"; and also of "actions on a note, bill, bond, or other instrument in writing given for the payment of money or other valuable article, for any amount exceeding $100, which had been reduced, by credits or payments indorsed thereon, to an amount not exceeding $100,"—*held* that a justice had jurisdiction where the suit was on two notes, the amount due on each of which was less than $100, though the aggregate exceeded that sum.—Howard v. Mansfield, 30 Wis. 75.

§ 170. Remission or abandonment of part of claim.

Remission of part of set-off, see post, § 175.

[a] A creditor may relinquish a part of his claim so as to bring it within the jurisdiction of a justice of the peace.

—(U. S. 1812) Porter v. Rapine, Fed. Cas. No. 11,288 [2 Cranch, C. C. 47]; (1875) Witt v. Hereth, Fed. Cas. No. 17,921 [6 Biss. 474];

(Ala. 1830) King v. Dougherty, 2 Stew. 487;

(Ark. 1895) Hunton v. Luce, 60 Ark. 146, 29 S. W. 151, 28 L. R. A. 221, 46 Am. St. Rep. 165;

(Ill. 1860) Raymond v. Strobel, 24 Ill. (14 Peck) 113; (1872) Carpenter v. Wells, 65 Ill. 451;

(Mich. 1888) Cilley v. Van Patten, 68 Mich. 80, 35 N. W. 831;

(Mo. 1860) Denny v. Eckelkamp, 30 Mo. 140; (1863) Phillips v. Fitzpatrick, 34 Mo. 276;

(N. C. 1894) McPhail v. Johnson, 115 N. C. 298, 20 S. E. 373;

(S. C. 1894) Catawba Mills v. Hood, 42 S. C. 203, 20 S. E. 91;

(Vt. 1856) Danforth v. Streeter, 28 Vt. (2 Williams) 490;

(Wis. 1849) McCormick v. Robinson, 1 Chand. 254, 2 Pin. 276.

CONTRA, see

(Ill. 1834) Sands v. Delap, 2 Ill. (1 Scam.) 168;

(N. J. 1809) Souders v. Stratton, 3 N. J. Law (2 Penning.) 118; (1809) Colwell v. Parcell, Id. 148; (1844) Howell v. Burnett, 20 N. J. Law (Spencer) 265;

(N. C. 1856) Waldo v. Jolly, 49 N. C. 173; (1874) Boyle v. Robbins, 71 N. C. 130;

(Pa. 1861) Collins v. Collins, 37 Pa. (1 Wright) 387; (1873) Bower v. McCormick, 73 Pa. (23 P. F. Smith) 427; (1873) Carey v. Branch, 1 Leg. Chron. 170; (1874) Torbert v. Yocum, 2 Leg. Chron. 294;

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(S. D. 1892) Plunkett v. Evans, 2 S. D. 434, 50 N. W. 961;

(W. Va. 1882) Todd v. Gates, 20 W. Va. 464.

[b] A creditor cannot, without the consent of the debtor, relinquish part of his claim so as to bring it within the jurisdiction of a justice of the peace.

—(U. S. 1824) Burton v. Varnum, Fed. Cas. No. 2,220 [2 Cranch, C. C. 524];

(Ga. 1877) Cox v. Stanton, 58 Ga. 406.

[c] A creditor has no right to give a false credit on a note so as to reduce it to the jurisdiction of a justice of the peace.

—(U. S. 1823) Cazenove v. Darrel, Fed. Cas. No. 2,539 [2 Cranch, C. C. 444].

CONTRA, see

(Wis. 1849) McCormick v. Robinson, 1 Chand. 254, 2 Pin. 276.

[d] (U. S. 1842) A plaintiff cannot withdraw a part of his account so as to bring the balance within the jurisdiction of a justice of the peace, and recover in an action for the part withdrawn, unless with the consent of the defendant. —Greenough v. Langtree, Fed. Cas. No. 5,785 [1 Hayw. & H. 72].

[e] (Ala. 1834) The holder of a promissory note may reduce the amount to a sum within the jurisdiction of a magistrate by entering on it credits to the maker without his consent.—Nibbs v. Moody, 5 Stew. & P. 198.

[f] (Ala. 1850) On the trial of a motion before a justice of the peace against a constable for failing to return an execution, the plaintiff, if his demand is over $50, may remit an amount sufficient to bring the case within the jurisdiction of the justice.—Henderson v. Plumb, 18 Ala. 74.

[g] (Ark. 1847) Where a plaintiff sues for a sum within the jurisdiction of a justice, he is not ousted of his jurisdiction because the evidence shows that the defendant is indebted to the plaintiff in a sum beyond his jurisdiction.—Lafferty v. Day, 7 Ark. (2 Eng.) 258.

[h] (Ill. 1828) Where it appears from the account of the plaintiff that he claims less than $100 before a justice of the peace, the justice is not ousted of his jurisdiction, though a witness should prove that the plaintiff was entitled to more than $100. The plaintiff's own claim must determine the jurisdiction.—Ellis v. Snider, 1 Ill. (Breese) 336.

[i] (Ind. 1861) A justice cannot give himself jurisdiction by rendering judgment for a part only of a demand the whole of which exceeds his jurisdiction.—Thompson v. Kerr, 17 Ind. 288.

[j] (Ind. 1865) Where an account on which an action is brought before a justice of the peace is footed up as amounting to $200, the court has jurisdiction, though a correct footing would make more than said sum.—Mitchell v. Smith, 24 Ind. 252.

[k] (Kan. 1863) A plaintiff, by bringing his suit before a justice of the peace, where he cannot recover more than $100, exclusive of interest and costs, must be understood to have limited his claim to that amount.—Wooster v. McKinley, 1 Kan. 317.

[l] (Mo. 1852) Though the amount of an open account on which action is brought before a justice of the peace exceed his jurisdiction, yet, if the amount claimed on trial be for a sum within the jurisdiction, the justice's judgment for the latter amount is valid.—Best v. Best, 16 Mo. 530.

[m] (Neb. 1888) In replevin before a justice of the peace, the property was appraised at less than $200, but on failure of plaintiff to give an undertaking the property was returned to defendant. The action proceeded "as one for damages only" before the justice, who found the value of plaintiff's interest to be $260; and, on plaintiff's remitting $60, judgment was rendered for $200. *Held*, under Code Civ. Proc. § 1039, providing that, when the value of the property exceeds $200, the justice shall certify the proceeding to the district court, that the justice had jurisdiction to try the case, and to allow the remission, and to render judgment for the balance.—Hill v. Wilkinson, 25 Neb. 103, 41 N. W. 134.

[n] (N. J. 1791) Where the plaintiff claims a sum within the jurisdiction of the justice, it is immaterial what the amount of charges may be. —Johnson v. Colbaugh, 1 N. J. Law (Coxe) 55.

[o] (N. J. 1844) Where, by the express terms of a contract, a certain sum is to be paid on a future day, the creditor cannot, without the debtor's consent, relinquish any part of the judgment to give the justice jurisdiction.—Howell v. Burnett, 20 N. J. Law (Spencer) 265.

[p] (N. Y. 1889) Where, in an action before a justice, the amount due from defendant exceeds the jurisdiction of the justice, but plaintiff elects to take judgment for a sum within his jurisdiction, no objection can be made to such jurisdiction.—Farley v. Gibbs, 51 Hun, 643, 4 N. Y. Supp. 353.

[q] (N. C. 1856) Where divers dealings are included in an account, the aggregate of which exceeds $60, the plaintiff can omit, or give credit for, any items he may choose, so as to bring the case within the jurisdiction of a single magistrate. If there is but one item of dealing which exceeds $60, this cannot be done.—Waldo v. Jolly, 49 N. C. 173.

[r] (N. C. 1882) A justice having no jurisdiction of an action on a bond where the penalty exceeds $200, plaintiff cannot remit any part of the amount of such penalty to give jurisdiction. —Coggins v. Harrell, 86 N. C. 317.

[s] (N. C. 1887) It is only when the principal sum demanded exceeds $200 that the plaintiff must remit the excess of principal above that sum in order to give a justice of the peace jurisdiction of the action, as prescribed and allowed by Code, § 835; and when the plaintiff in his summons claims only $200, and recovers less than that sum, it is not necessary to enter a remittitur, though the memorandum of indebtedness exhibited in evidence by plaintiff shows a greater sum than $200 to be due.—Brantley v. Finch, 97 N. C. 91, 1 S. E. 535.

[t] (Tenn. 1817) One may sustain his claim, in an action before a justice of the peace, by evidence which proves his whole claim to be larger than is within the jurisdiction of a justice of the peace, if he claims only a sum within that jurisdiction.—Boyd v. Hensley, 6 Tenn. (5 Hayw.) 258.

[u] (Tenn. 1843) In actions of indebitatus assumpsit and debt on executed contracts, the plaintiff may relinquish part of his claim, with a view to give a justice of the peace jurisdiction, and recover judgment for the balance.—Carraway v. Burton, 23 Tenn. (4 Humph.) 108.

[v] (Tex. 1857) Whether the holder of a promissory note can bring an action upon it within the jurisdiction of a justice of the peace, by relinquishing the excess of the note over $100, quære.—Mabry v. Little, 19 Tex. 337.

[w] (Tex. 1873) Though a merchant cannot divide his book account and sue on each part, yet he may enter a fictitious credit so as to bring the account within the jurisdiction of a justice's court, and maintain suit on the balance.—Fuller v. Sparks, 39 Tex. 136.

[x] (Vt. 1846) If the holder of a promissory note on which there is due more than $100 in-

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dorse on it, as payment, a sum which will reduce the amount apparently due on the note to a sum less than $100, and do this without any payment being in fact made by the defendant, and for the mere purpose of bringing the note within the jurisdiction of a justice of the peace, and then commence an action on the note before a justice, the action will not, on appeal, be dismissed by the county court, for want of jurisdiction in the justice.—Herren v. Campbell, 19 Vt. 23.

[y] (Vt. 1853) The plaintiff may reduce his claim within the final jurisdiction of a justice, by his writ, declaration, and exhibit or specification, by reducing the price of charges, or by abandoning some.—Warren v. Newfane, 25 Vt. 250.

[yy] (W. Va. 1895) A party claiming unliquidated damages may reduce his claim, so as to bring it within the jurisdiction of a justice of the peace.—Wells v. Michigan Mut. Life Ins. Co., 41 W. Va. 131, 23 S. E. 527.

[z] (Wis. 1844) When an action is brought on an account exceeding in amount the jurisdiction of the justice, and the recovery also exceeds that sum, plaintiff cannot, by remitting the exceess, bring himself within the justice's jurisdiction.—Barker v. Baxter, 1 Pin. 407.

[zz] (Wis. 1865) An indorsement by a justice on the back of a note for $600, that plaintiff offered to release all but $100, is not a credit or payment within Rev. St. c. 120, § 6, giving a justice jurisdiction of an action on a note for more than $100 reduced, by credits or payments indorsed thereon, to an amount not exceeding $100.—Felt v. Felt, 19 Wis. 193.

§ 171. —— Remission of interest.

[a] Plaintiff may relinquish interest on his demand so as to bring it within the jurisdiction of the justice.

—(U. S. 1838) Homans v. Moore, Fed. Cas. No. 6,655 [5 Cranch, C. C. 505];

(Ill. 1860) Raymond v. Strobel, 24 Ill. (14 Peck) 113;

(N. J. 1822) Inhabitants of Saddle River Tp. v. Colfax, 6 N. J. Law (1 Halst.) 115; (1844) Howell v. Burnett, 20 N. J. Law (Spencer) 265;

(Pa. 1863) Evans v. Hall, 45 Pa. (9 Wright) 235; (1885) Cook v. Minick, 1 Pa. Co. Ct. R. 603.

[b] (Ala. 1873) Plaintiff, in attachment issued by and returnable before a justice of the peace, may, where the sum claimed, with interest, exceeds $100, release the excess, even as against defendant's objection, so as to bring the case within the justice's jurisdiction.—Solomon v. Ross, 49 Ala. 198.

[c] (Ill. 1839) A justice of the peace has jurisdiction of an action on a note for $100, if the plaintiff does not claim interest.—Simpson v. Updegraff, 2 Ill. (1 Scam.) 594.

[d] (Ill. 1845) A justice may have jurisdiction of an action on a promissory note, the principal of which does not exceed the limit of his jurisdiction, if the plaintiff does not claim interest.—Bates v. Bulkley, 7 Ill. (2 Gilman) 389.

[e] (Md. 1887) To bring a claim within the pecuniary jurisdiction of a justice, the plaintiff may waive interest on an open account.—Kirk v. Grant, 67 Md. 418, 10 Atl. 230.

[f] (N. J. 1827) While the legal rate of interest is, in the absence of contract, limited to 6 per cent., yet a creditor may, in order to bring his demand within the jurisdiction of a justice of the peace, demand a less rate.—Griffith v. Clute, 9 N. J. Law (4 Halst.) 264.

[g] (N. J. 1844) Where there is a running account between the parties in which the law would allow interest, it is optional with the creditor to waive interest, in order to keep the amount within the jurisdiction of a justice, or to demand it.—Howell v. Burnett, 20 N. J. Law (Spencer) 265.

[h] (N. J. 1844) Where, by the express terms of the contract, a certain sum is to be paid on a future day, with interest, or with legal interest, or with interest at a given rate, the contract is one and entire, and the creditor cannot, without the consent of the debtor, relinquish any part of his interest for the purpose of giving the justice jurisdiction.—Howell v. Burnett, 20 N. J. Law (Spencer) 265.

[i] (N. J. 1844) But where the contract is for the payment of a sum of money on a future day, without naming the interest, the creditor may bring his action for the principal, and relinquish any claim he may lawfully have to damages, for the detention of the debt or the violation of the contract.—Howell v. Burnett, 20 N. J. Law (Spencer) 265.

[j] (S. C. 1810) Where, at the rendition of judgment by a justice of the peace on a note, the interest accrued since the commencement of the suit makes the sum due exceed the jurisdiction of the justice, plaintiff may remit the excess, and a judgment for the balance may be awarded.—Melton v. Ellison's Adm'rs, 2 Brev. 399.

[k] (S. C. 1837) Where $20 for a month's rent had been due but a few days, plaintiff could treat the contract as without interest, and sue before a magistrate.—Varney v. Vosch, 3 Hill, 237.

[l] (Tex. 1853) Whether a party can remit the interest due on a note, for the purpose of applying payments on the note in reduction of the principal, so as to give a justice of the peace jurisdiction, quære. He certainly cannot after the case has been removed to the district court by certiorari.—Hearn v. Cutberth, 10 Tex. 216.

[m] (Vt. 1834) In an action in the justice's court on account, the justice does not lose jurisdiction merely because had plaintiff included interest on his demand, the amount would have exceeded $100.—Gibson v. Sumner, 6 Vt. 163.

[n] (Vt. 1835) The jurisdiction of a justice is determined by inspections of the debit side of plaintiff's book and is not affected by the fact that plaintiff might have charged interest which, if charged, would have made the account exceed $100.—Stone v. Winslow, 7 Vt. 338.

[o] (Vt. 1845) Where a judgment has been rendered for a sum less than $100, but with the interest due on it exceeding $100, the judgment creditor may waive his claim for interest, and sustain an action before a justice of the peace for the amount of the judgment alone.—Parkhurst v. Spalding, 17 Vt. 527.

[p] (Vt. 1856) In an action on an account it appeared that the plaintiff was entitled to interest thereon, which, if charged, would take the account out of the jurisdiction of a justice of the peace. *Held*, that it was optional with the plaintiff whether he should release the claim for interest in order to bring the action within the jurisdiction of a justice.—Paige v. Morgan, 28 Vt. (2 Williams) 565.

§ 172. Original amount as affected by partial payments or reduction from other causes.

Counterclaim exceeding jurisdiction as affected by deducting plaintiff's claim, see post, § 175.
Presumptions in favor of credits, see post, § 216 [b, i, k].
—— *in favor of payments, see* post, § 216 [y].

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[a] A justice has jurisdiction of an action on an account exceeding the limit of his jurisdiction, where the balance claimed amounts to less than that sum.
—(Ala. 1835) Baird v. Nichols, 2 Port. 186;
(Ark. 1846) Hempstead v. Collins, 6 Ark. (1 Eng.) 533;
(Ind. 1834) Newland v. Nees, 3 Blackf. 460;
(Iowa, 1841) Hall v. Biever, 1 Morris, 113; (1843) Cochran v. Glover, Id. 151;
(Mo. 1825) Buckner v. Armour, 1 Mo. 534;
(Pa. 1893) McFarland v. O'Neil, 155 Pa. 260, 25 Atl. 756.
CONTRA, see
(Ill. 1822) Clark v. Cornelius, 1 Ill. (Breese) 46; (1830) Blue v. Weir, Id. 372;
(Wis. 1844) Barker v. Baxter, 1 Pin. 407; (1847) Woodward v. Garner, 2 Pin. 28.

[b] A demand whose amount places it beyond the jurisdiction of a justice's court may be brought within the jurisdiction by payments reducing it.
—(Ga. 1860) Nichols v. McAbee, 30 Ga. 8;
(N. Y. 1847) Lamoure v. Caryl, 4 Denio, 370; (1852) Ward v. Ingraham, 1 E. D. Smith, 538;
(Pa. 1853) Herbert v. Conrad, 1 Am. Law Reg. (O. S.) 440; (1861) Collins v. Collins, 37 Pa. (1 Wright) 387; (1874) Baer v. Garrett, 2 Leg. Chron. 207;
(Tenn. 1814) Thompson v. Gibson, 2 Tenn. (2 Overt.) 235;
(Wis. 1883) Avery v. Rowell, 59 Wis. 82, 17 N. W. 875.

[c] A justice of the peace has jurisdiction over an action in which the original indebtedness exceeds the limit of his jurisdiction, if it has been reduced within that sum by fair credits.
—(Ark. 1846) Brinkley v. Barinds, 7 Ark. (2 Eng.) 165;
(Ill. 1839) Hugunin v. Nicholson, 2 Ill. (1 Scam.) 575;
(Md. 1878) Orme v. Williams, 47 Md. 552;
(N. J. 1832) Farley v. McIntire, 13 N. J. Law (1 J. S. Green) 190;
(Wis. 1883) Avery v. Rowell, 59 Wis. 82, 17 N. W. 875.
CONTRA, see
(Ill. 1832) Simpson v. Rawlings, 2 Ill. (1 Scam.) 28.

[d] Where accounts have been settled between the parties, a justice has jurisdiction, unless the balance exceeds the limit of his jurisdiction.
—(N. Y. 1823) Abernathy v. Abernathy, 2 Cow. 413; (1847) Lamoure v. Caryl, 4 Denio, 370;
(Vt. 1834) Gibson v. Sumner, 6 Vt. 163.

[e] The balance claimed, after deducting credits allowed by the plaintiff, determines whether a justice has jurisdiction.
—(Mo. 1855) Musick v. Chamlin, 22 Mo. 175;
(Tex. 1857) Duer v. Seydell, 20 Tex. 61; (1857) Davis v. Pinckney, Id. 340.

[f] (Ill. 1826) Though the accounts of the plaintiff may originally have amounted to more than $100, yet, if the defendant admits a balance to be due of less than $100, and promises to pay it, a justice of the peace has jurisdiction.—Maurer v. Derrick, 1 Ill. (Breese) 197.

[g] (Ill. 1858) A. and B. owe each other, but A. owes B. more than B. owes A. *Held*, that B. might give credit to A. by indorsement on his note to an amount, even if not due, sufficient to bring his note within the jurisdiction of a justice of the peace.—Korsoski v. Foster, 20 Ill. (10 Peck) 32.

[h] (Ky. 1823) Where the law limits the jurisdiction of justices of the peace to £5, they have no jurisdiction of contracts exceeding that amount, though payments have been made reducing the sum, unless such payments were indorsed.—Farrow v. Summers, 13 Ky. (3 Litt.) 460.

[i] (N. J. 1818) Under statutes authorizing justices to try causes where "the debt, balance, or matter in dispute" is not over $100, where plaintiff demands more than $100, but defendant files an offset reducing it below that sum, the justice may try; but if the plaintiff's demand be proved, and the defendant's not, he cannot render judgment.—Eacrit v. Keen, 4 N. J. Law (1 Southard) 203.

[j] (N. Y. 1853) On the sale of an unfinished house $500 of the purchase money was left in the vendee's hands to complete the building, if not finished by a certain time, and all but a small balance was so expended. *Held*, that the action for the balance was within the jurisdiction of a justice court, as it was not a case of mutual accounts.—Brady v. Durbrow, 2 E. D. Smith, 78.

[k] (N. Y. 1885) Plaintiff claimed that he had deposited many thousands of dollars with defendant, and had drawn all but $25, which he claimed, defendant contending that he had drawn this also. *Held*, that the amount in controversy was $25, and within a justice's jurisdiction. The statute depriving him of jurisdiction "where, in a matter of account, the sum total of the accounts" exceeds $400, did not apply.—Brisbane v. Batavia Bank, 36 Hun, 17.

[l] (N. Y. 1888) Where, by agreement, the bills of particulars filed with the complaint and answer were admitted in evidence, subject to the right to cross-examine, and were considered as sworn to, and plaintiff had annexed to his bill of $281.89 a statement of credits, admitting certain charges, amounting to $92.06, in defendant's bill, for work done, etc., when his entire claim was for $221.11, such charges cannot be regarded as payments on plaintiff's claim so as to reduce the aggregate of the accounts below $400, and thus give the justice jurisdiction.—Milbanks v. Coonley, 49 Hun, 610, 2 N. Y. Supp. 167.

[m] (N. Y. 1888) The fact that defendant, in a complaint in a former action against plaintiff to recover the amount now adduced as a set-off, avers that defendant has paid in offset, as set forth in the bill of items, a certain amount, is not ground for treating that amount as a payment, and thus reducing the aggregate of defendant's items.—Milbanks v. Coonley, 49 Hun, 610, 2 N. Y. Supp. 167.

[n] (N. Y. 1888) Nor can such statement of credits be treated as an allowance of defendant's claim to that extent; it appearing, on a comparison of items, that the prices differ where the charges are identical.—Milbanks v. Coonley, 49 Hun, 610, 2 N. Y. Supp. 167.

[o] (N. Y. 1891) Code Civ. Proc. § 2863, provides that a justice of the peace shall not have jurisdiction of a civil action "where, in a matter of account, the sum total of the accounts of both parties, proved to the satisfaction of the justice, exceeds $400." Plaintiff and defendant presented accounts whereof the total was largely in excess of the jurisdiction of the court, but which were reduced by the justice's findings on either side to amounts the total of which was within the jurisdictional limit. *Held*, that the existence of credits on either side was a question of fact for the justice, and that having found them to exist, and to reduce the claim of each party to sums whereof the total

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was less than $400, he had properly taken jurisdiction of the case.—Shaw v. Roberts, 60 Hun, 580, 14 N. Y. Supp. 579.

[p] (N. C. 1846) A liquidated account, within the statute giving jurisdiction to magistrates of liquidated accounts over $60 and under $100, is one in which the balance is stated, and leaving no necessity for extrinsic evidence.—Midgett v. Watson, 29 N. C. 143.

[q] (N. C. 1858) To antedate a credit, so as to produce the effect of reducing the amount due on a note to a sum within the jurisdiction of a justice of the peace, is an evasion of the law, and judgment should be rendered for the defendant.—Ramsour v. Barrett, 50 N. C. 409.

[r] (N. C. 1883) A person having an account against another for work and labor done may give the other credit for such sums as may be justly due him on account; and if the balance be thereby reduced below $60, he may warrant for it before a single magistrate, and the other party can neither object to the jurisdiction, nor insist upon having his account of the same items allowed as a set-off to the plaintiff's demand.—McRae v. McRae, 20 N. C. 81.

[s] (Pa. 1841) One who has a demand exceeding $100 cannot give jurisdiction to a justice of the peace by allowing a set-off or counter demand of the defendant so as to reduce his claim below $100.—Stroh v. Uhrich, 1 Watts & S. 57.

[t] (Pa. 1877) Defendant owed plaintiff $108. Plaintiff had received from defendant some wood and coal for which he had agreed to allow what was right. He allowed $8.50, thus reducing the amount claimed to $99.50, for which he brought suit before a justice whose jurisdiction did not exceed $100. *Held*, that plaintiff had no right to make the set-off, that being a privilege of defendant, and that the justice was without jurisdiction.—James v. Frick, 12 Phila. 443.

[u] (Pa.) A claim in excess of the amount over which a justice of the peace has jurisdiction cannot be reduced to a jurisdictional amount by separate and distinct items of set-off constituting an independent debt; but such reduction must be by direct payments on the claim, or by dealings that amount to actual payments.—(1884) O'Connell v. Bank, 2 Chest. Co. Rep. 296; (1895) Wanner v. Zimmerman (Com. Pl.) 5 Pa. Dist. R. 29.

[v] (Pa. 1884) Where a claim is above the limit of the jurisdiction of the justice of the peace, plaintiff cannot offset a book account acknowledged by himself and so bring the claim within the justice's jurisdiction.—Lucas Coal Co. v. Struble, 3 Lanc. Law Rev. 300.

[vv] (Tex. 1853) Payments on a note will be applied, in the absence of any agreement, to the extinguishment of the interest, and not in reduction of the principal so as to give a justice of the peace jurisdiction.—Hearn v. Cutberth, 10 Tex. 216.

[w] (Vt. 1834) An action on a book account was commenced before a justice when the debit side of plaintiff's account exceeded $100. Before trial the parties adjusted the account and certified to the justice the amount due, which was less than $100. *Held*, that the justice had jurisdiction to render judgment for such amount.—Fargo v. Remington, 6 Vt. 131.

[ww] (Vt. 1834) Where plaintiff declares for an indebtedness of $100 in each of several counts, but in his specification shows a balance of charges and credits of a less sum, a justice has jurisdiction. The amount of the original debt, if reduced by payments, does not affect the jurisdiction.—Stevens v. Howe, 6 Vt. 572.

[x] (Vt. 1843) Where the balance found due on settlement is charged in a new account, a justice has jurisdiction of the action on it, if such balance together with the other items of charge does not exceed $100, notwithstanding the items embraced in the former settlement together with the new items would exceed that amount.—Spear v. Peck, 15 Vt. 566.

[xx] (Vt. 1856) Property delivered for trial, and charged on a book, but returned before suit brought, may afterwards be charged off to prevent a justice, before whom the cause is tried, from being ousted of his jurisdiction.—Paige v. Morgan, 28 Vt. (2 Williams) 565.

[y] (Wis. 1880) In an action in a justice's court on an account, it is only where the items of account between the parties, which still remain open to investigation, exceed in the aggregate $500, that the cause is beyond the justice's jurisdiction; and, where one item of the litigated account is a balance alleged to be due on a previous settlement, and the settlement is not denied, or is found to have been made in fact, the amount included in the prior account does not affect the question of jurisdiction.—Cuer v. Ross, 49 Wis. 652, 6 N. W. 331.

[yy] (Wis. 1880) Where the present owners of logs on which a lien is claimed for the amount of a debt are joined as defendants with the debtor, though they may not be bound by the settlement between plaintiff and the debtor, yet, in the absence of any attempt to impeach such settlement, the amount of the prior account will not affect the justice's jurisdiction; nor will it be affected by the fact that an examination of the whole account is necessary in order to determine to what extent the indebtedness is a lien.—Cuer v. Ross, 49 Wis. 652, 6 N. W. 331.

[z] (Wis. 1881) On a complaint in justice's court for commissions amounting to $200 on sales of sewing machines, there was proof that, by the contract on which the commissions were earned, they amounted to over $1,200, of which over $1,100 had been paid, and that there had never been a settlement of the account or balance struck by the parties. *Held*, that there was no jurisdiction.—Henckel v. Wheeler & Wilson Mfg. Co., 51 Wis. 363, 7 N. W. 780.

[zz] (Wis. 1882) Where the action involved the examination of an account exceeding $500, but the complaint was one of account stated, and the balance found due was $33, the action was within the jurisdiction of a justice.—Orr v. Le Clair, 55 Wis. 93, 12 N. W. 356.

(F) SET-OFFS AND COUNTER-CLAIMS.

IN GENERAL, § 173.
AMOUNT OR VALUE AS AFFECTING JURISDICTION, § 174.
— ORIGINAL AMOUNT AS AFFECTED BY DEDUCTION OF PLAINTIFF'S CLAIMS OR REDUCTION FROM OTHER CAUSES, § 175.

Pendency of action before justice in which claim might be set off as ground for abatement of other action, see "Abatement and Revival," vol. 1, cc. 60, 61, § 46.

§ 173. In general.

[a] (Ark. 1887) In an action in a justice's court for the rent of a farm, it is no objection to a counterclaim based on the fact that the farm was smaller than represented, that such claim constitutes an action of tort, over which the justice had no jurisdiction, as such defense may be re-

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garded as a plea of failure of consideration.—Harris v. Simpson, 50 Ark. 427, 8 S. W. 177.

[b] (Ga. 1896) Though the defendant in an action ex delicto brought in a justice's court may plead as a set-off a demand against the plaintiff arising ex contractu, where the latter is insolvent, and unable to respond, and the collection of the defendant's claim would otherwise be hazarded, yet, if the alleged insolvency is not proved, plaintiff, on making out his case, is entitled to recover, though he may admit the correctness and justness of the defendant's counterclaim.—Follendore v. Follendore, 99 Ga. 71, 24 S. E. 407.

[c] (Ill. 1873) In a suit before a justice to recover for professional services in setting a broken arm, the justice has jurisdiction to render judgment on a plea setting up malpractice on the part of plaintiff.—Howell v. Goodrich, 69 Ill. 556.

[d] (Kan. 1888) In an action before a justice for balance due on book account, defendant cannot set off "damages to her crop by the stock of the plaintiff, in the sum of $14."—Christy v. Jones, 30 Kan. 183, 18 Pac. 56.

[e] (Mo. 1890) The provisions of Rev. St. 1879, §§ 2989, 3060, for the prosecution of a counterclaim when plaintiff dismisses his action, and for the amendment of a counterclaim on appeal, show a legislative intent to allow a justice of the peace to entertain a counterclaim by a defendant to the extent of giving defendant an affirmative judgment for the excess of his claim over plaintiff's demand; and, where the justice has jurisdiction of the subject-matter of such counterclaim, the question whether he shall be allowed to exercise it is one of procedure, and does not come within the principle that jurisdiction cannot be conferred on justices of the peace by implication.—Green v. Beebe, 39 Mo. App. 465.

[f] (N. Y. 1806) In an action before a justice of the peace, under the £10 act, every demand arising on contract may be set off.—McCumber v. Goodrich, 1 Johns. 56.

[g] (N. Y. 1811) Accounts or demands in justices' courts, as in cases of set-off in other courts, must have existed at the commencement of the suit. So a breach of a promise to discontinue a suit cannot be set off in that suit.—Cobb v. Curtiss, 8 Johns. 470.

[h] (N. Y. 1816) A set-off is not admissible in a justice's court, in an action founded on tort.—Dygert v. Coppernoll, 13 Johns. 210.

[i] (N. Y. 1869) Code Civ. Proc. § 64, expressly giving a right to set up a "counterclaim" in an action before a justice of the peace, intends that the counterclaim be such as is included in section 150, defining "counterclaims," which statute was in force when section 64 was enacted.—Williams v. Bitner, 1 Lans. 200.

[j] (N. Y. 1874) In an action in a justice's court by a veterinary surgeon for professional services, the defendant may show in counterclaim that he had purchased a team of horses, relying on plaintiff's professional recommendation and his promise to be responsible if they did not prove to be as represented, and that the team were not as represented.—Williams v. Wieting, 3 Thomp. & C. 439.

[k] (N. C. 1882) A counterclaim consisting of an alleged indebtedness arising out of unadjusted partnership dealings between the parties cannot be allowed in suit before a justice.—Love v. Rhyne, 86 N. C. 576.

[l] (Pa. 1831) The effect of Act March, 1810, § 7, providing that a defendant who shall neglect to set off his demand against a plaintiff in justice's court, when same does not exceed $100, shall be forever barred from recovering by any subsequent suit, is to give jurisdiction to a justice, in a suit pending before him, not only of the plaintiff's demand arising from contract where it does not exceed $100, but also jurisdiction of any corresponding demand of defendant which does not exceed the pecuniary limit of his jurisdiction.—Slyhoof v. Flitcraft, 1 Ashm. 171.

[m] (Pa. 1833) Where one party bona fide institutes proceedings against another, for a debt or demand arising from contract, before a justice of the peace, the effect of the commencement of such proceedings is to give the justice exclusive jurisdiction, during their pendency, not only of the plaintiff's demand, but of any legal set-off the defendant may have within the jurisdiction of the justice.—White v. Johnson, 2 Ashm. 146.

[n] (Pa. 1835) A justice can only receive as a set-off a claim of which he would have had jurisdiction had the parties before him been reversed.—Henion v. Morton, 2 Ashm. 150.

[o] (Pa. 1835) A defendant in an action for work and labor in a justice's court cannot set off a claim for damages for malfeasance; the justice having no jurisdiction of such a cause of action where the parties are reversed.—Henion v. Morton, 2 Ashm. 150.

[p] (Pa. 1886) A justice of the peace has jurisdiction of a set-off in an action for wages arising from damages on plaintiff's nonperformance or negligent performance of his work.—Rafferty v. Clark, 2 Pa. Co. Ct. R. 301.

[q] (Wis. 1888) Under Rev. St. § 3626, regulating the practice in justice courts, the plea of counterclaim is not available to the defendant.—Hartel v. Kite, 70 Wis. 396, 36 N. W. 7.

§ 174. Amount or value as affecting jurisdiction.

Offset or counterclaim as reducing plaintiff's claim to within limit of jurisdiction, see ante, § 172.

[a] In an action before a justice of the peace, if the balance claimed by the defendant, after satisfying the plaintiff's claim, exceeds the jurisdiction of the justice, the set-off should be rejected entirely.

—(Ill. 1862) Seafkas v. Evey, 29 Ill. (19 Peck) 178;

(Ind. 1840) Alexander v. Peck, 5 Blackf. 308; (1849) Gharkey v. Halstead, 1 Ind. (1 Cart.) 389, Smith, 208;

(Tex. 1894) Pickett v. Edwards (Civ. App.) 25 S. W. 32.

[b] A defendant cannot oust a justice of his jurisdiction by setting up a demand against the plaintiff of a sum greater than is within his jurisdiction.

—(Colo. 1894) Ramer v. Smith, 4 Colo. App. 434, 36 Pac. 302;

(N. J. 1809) Hoffman v. Reading, 3 N. J. Law (2 Penning.) 561.

[c] In a suit before a justice of the peace, a set-off for a greater sum than the defendant could have maintained an action on before the same magistrate cannot be pleaded, being beyond the jurisdiction of the court.

—(Cal. 1863) Malson v. Vaughn, 23 Cal. 61;

(Pa. 1835) Henion v. Morton, 2 Ashm. 150.

[d] (Ala. 1824) In an action before a justice of the peace having jurisdiction in actions to recover less than $50, the defendant may file in offset a debt exceeding that amount.—Bowman v. Gary, Minor, 326.

[e] (Cal. 1866) A defendant in a case before a justice of the peace has no legal right to set

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up a counterclaim for more than $300.—Maxfield v. Johnson, 30 Cal. 545.

[f] (Ind. 1859) The judgment claimed in set-off, and not the amount of set-off pleaded, determines whether the suit is within the jurisdiction of a justice.—Murphy v. Evans, 11 Ind. 517.

[g] (Kan. 1863) Jurisdiction having once vested in a justice of the peace, and been exercised in summoning witnesses and jurors, is not devested by the plaintiff's amending his bill of particulars, after the jury had been impaneled and sworn, and claiming an additional sum, which, together with that first claimed, will make an amount beyond the jurisdiction of the court; this having been done by way of offset to a counterclaim of the defendant.—Wooster v. McKinley, 1 Kan. 317.

[h] (Minn. 1872) A justice of the peace is not ousted of jurisdiction by defendant's putting in a counterclaim, which alone, or with the amount claimed in the complaint, exceeds $100, the limit of his jurisdiction.—Barber v. Kennedy, 18 Minn. 216 (Gil. 196).

[i] (Mo. 1883) In an action before a justice of the peace to recover for work done on defendant's bridge, the latter admitted the claim, but alleged, by way of recoupment, that plaintiff, when employed on another occasion to watch defendant's engine, negligently allowed the engine to become damaged to an amount equal to plaintiff's claim ($90). *Held* that, under the statute then in force, such cross demand being for more than $50 was not within the jurisdiction of the court, and hence a judgment for any part thereof was erroneous.—Emery v. St. Louis, K. & N. W. Ry. Co., 77 Mo. 339.

[j] (N. J. 1889) When a plea of set-off claiming a balance of more than $200 is tendered in a justice's court, the justice should overrule the plea for want of jurisdiction, and proceed with the trial of plaintiff's demand; Rev. St. p. 538, limiting the jurisdiction of justices to causes involving not more than $200.—Clancy v. Neumeyer, 51 N. J. Law (22 Vroom) 299, 17 Atl. 154.

[k] (N. Y. 1813) Where, in a justice court, defendant avers a set-off exceeding a justice's jurisdiction, but substantiates it only to a sum within the jurisdiction, it must be allowed.—Smith v. Burke, 10 Johns. 110.

[l] (N. Y. 1856) Under the Code, a justice of the peace has no jurisdiction in cases where the parties have mutual demands against each other arising on contract and amounting together to over $400, when such demands are contested.—Stilwell v. Staples, 12 N. Y. Super. Ct. (5 Duer) 691, 3 Abb. Prac. 365.

[m] (N. Y. 1889) Code Civ. Proc. § 501, imposes no limit on the amount of a counterclaim which defendant may set up in a justice's court, and it cannot be objected that such counterclaim exceeds the amount of a justice's jurisdiction.—Heigel v. Willis, 50 Hun, 586, 3 N. Y. Supp. 497.

[n] (N. C. 1880) A defendant sued in contract in a justice's court may plead an independent cross demand arising ex contractu, the principal of which is beyond the justice's jurisdiction.—McClenahan v. Cotten, 83 N. C. 332.

[o] (N. C. 1880) Where the defendant, in an action before a justice, sets up a counterclaim composed mainly of items subject to the legislative scale, and remits the excess over $200, *held* that the claim, when so reduced, is a claim for $200 in lawful money, not in depreciated paper.—Derr v. Stubbs, 83 N. C. 539.

[p] (N. C.) A counterclaim cannot be asserted in a justice's court, the amount of which exceeds his jurisdiction.—(1881) Boyett v. Vaughan, 85 N. C. 363; (1882) Meneely v. Craven, 86 N. C. 364; (1883) Raisin v. Thomas, 88 N. C. 148.

[q] (Pa. 1861) A justice has no jurisdiction of a disputed set-off exceeding in amount $100.—Milliken v. Gardner, 37 Pa. (1 Wright) 456.

[r] (Pa. 1869) Where plaintiff states a claim exceeding a justice's jurisdiction, and that defendant claims a certain sum as set-off which brings the claim within the jurisdiction, but defendant himself claims another set-off bringing the amount of his set-off above the justice's jurisdiction, the justice has no jurisdiction.—Jones v. Stauffer, 1 Leg. Gaz. 91.

[s] (Pa. 1882) A justice of the peace has no jurisdiction of a set-off exceeding $100, where he has no jurisdiction of the original action above that amount.—Kraus v. Bickhart, 1 Chest. Co. Rep. 479.

[t] (Pa. 1895) Under the statute giving justices of the peace jurisdiction up to $300 in actions for rent, a justice has jurisdiction of a proceeding by a tenant to offset against the landlord's distress warrant a debt due him from the landlord, though the amount of the rent claimed is more than $100.—Lowenstein v. Helfrich (Com. Pl.) 7 Kulp, 533.

[u] (S. C. 1895) A justice is deprived of jurisdiction by a counterclaim for an amount exceeding $100.—Haygood v. Boney, 43 S. C. 63, 20 S. E. 803.

[v] (Tenn. 1833) In an action before a justice of the peace on a note, the defendant is entitled to set off an open account, though it be for more than $50.—McClain v. Kincaid, 13 Tenn. (5 Yerg.) 232.

[w] (Vt. 1827) A justice of the peace may render judgment for the balance, in case of mutual offsets, though it be for more than the sum of $100.—Ex parte Hatch, 2 Aikens, 28.

[x] (Vt. 1842) In an action of book account, if the debit side of the plaintiff's book is less than $100, and he sue before a justice, and the debit side of the defendant's book is more than $100, the latter cannot bring it in before the justice by way of offset.—Temple v. Bradley, 14 Vt. 254.

[y] (Vt. 1870) A justice is not ousted of jurisdiction by the fact that, after defendant has pleaded an offset, the plaintiff claims an offset to that, and the two sums claimed by plaintiff exceed the limit of the justice's jurisdiction; unless, perhaps, where the amount first sued for, and the plaintiff's offset, appear to be parts of the same demand.—Talbot v. Robinson, 42 Vt. 698.

§ 175. —— Original amount as affected by deduction of plaintiff's claims or reduction from other causes.

[a] (Dak. 1887) Under Justices' Code, § 2, subd. 1, giving a justice jurisdiction of an action "where the sum claimed does not exceed $100," the amount involved is within a justice's jurisdiction, where the complaint asks for judgment for $82, and the answer sets up counterclaims amounting to $135, and asks for judgment for $53.—Purcell v. Booth, 6 Dak. 17, 50 N. W. 196.

[b] (Ga. 1881) Where, in a justice's court on a plea of set-off of $100, the jury found for defendant in more than that sum, *held* that he would not be allowed to write down the finding to $100, so as to have judgment.—Ware v. Fambro, 67 Ga. 515.

[c] (Ill. 1841) A justice of the peace has jurisdiction of a set-off exceeding $100, where

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the balance claimed by the defendant does not exceed that sum. And, if the balance exceeds that sum, the justice must either allow so much of the note as will set off the plaintiff's claim, and give judgment for the defendant for costs, or dismiss the suit altogether.—Nichols v. Ruckells, 4 Ill. (3 Scam.) 298.

[d] (Iowa, 1846) Though a set-off in an action before a magistrate exceeds the jurisdiction of the magistrate, a set-off will be allowed where it appears that the defendant admits a portion of the plaintiff's claim and claims a balance within the magistrate's jurisdiction.—West v. Hatfield, Morris, 493.

[e] (Miss. 1837) A larger amount than the plaintiff's claim may be set off in a justice's court, if the balance does not exceed its jurisdiction.—Glass v. Moss, 2 Miss. (1 How.) 519.

[f, g] (Mo.) In an action before a justice, defendant cannot prove set-off in an amount which exceeds the jurisdiction of the justice, though by crediting plaintiff's demand the claim is reduced within his jurisdiction.—(1855) Almeida v. Sigerson, 20 Mo. 497; (1874) Reed v. Snodgrass, 55 Mo. 180.

[h] (N. C. 1880) The constitutional provision restricting the jurisdiction of justices of the peace in actions on contracts contemplates his adjudication on claims within the required limits, and therefore it is not allowable for a defendant to set up a counterclaim for so much as will extinguish the plaintiff's claim and permit the defendant to recover $200; in such case, the remission must be absolute of all in excess of the justice's jurisdiction.—Derr v. Stubbs, 83 N. C. 539.

[i] (Ohio, 1880) The clause in Justices' Code 1853, § 108, which authorizes the defendant to withhold the amount of his claim which is in excess of the jurisdiction of the justice, and to make the same the subject of a subsequent action, does not relate to a claim for unliquidated damages. Where such is the nature of the claim, the whole excess must be remitted, or the justice is without jurisdiction to act on the claim.—Wooleever v. Stewart, 36 Ohio St. 146, 38 Am. Rep. 569.

[j] (Tex. 1860) A defendant in a justice's court may plead in set-off, and recover a balance not exceeding $100 of an account exceeding $100.—Dalby v. Murphy, 25 Tex. 354.

[k] (Tex. 1881) A defendant in a justice's court may plead in reconvention a claim for damages exceeding the court's jurisdiction, where he asks judgment for the difference between such claim and the claim of plaintiff, and such difference is within the court's jurisdiction.—Mulhaul v. Feller, 1 White & W. Civ. Cas. Ct. App. § 1162.

[l] (Tex. 1892) Where defendant's counterclaim exceeds the court's jurisdiction, he may waive the excess, and bring himself within its jurisdiction.—Scott v. Mexican Nat. R. Co. (App.) 18 S. W. 137.

(G) NATURE OF REMEDY OR RELIEF.

1. IN GENERAL, §§ 176-182.
2. EQUITABLE JURISDICTION AND RELIEF, §§ 184-188.

Amount or value as determining jurisdiction, see ante, §§ 148-172.
Constitutionality of statutes conferring jurisdiction of remedy or relief, see ante, § 72 [a, g].
Authority to subpœna witness to compel attendance in court of record, see "Witnesses," I.
—— *to take affidavits, see* "Affidavits," vol. 2, cc. 17-20, §§ 22, 27 [b, d].
—— *to take affidavits for attachment, see* "Attachment," vol. 5, cc. 441, 442, § 227.
—— *to take depositions, see* "Depositions," vol. 16, cc. 1014-1018, §§ 72, 75.
Commitment of infants to reform school, see "Reformatories."
Compelling making of affidavit, see "Affidavits," vol. 2, c. 13, § 17 [b-d].
Forcible detainer in general, see "Forcible Entry and Detainer," vol. 23, cc. 1326, 1327, § 82.

1. IN GENERAL.

NATURE OF REMEDY OR RELIEF IN GENERAL, § 176.
ATTACHMENT, § 177.
GARNISHMENT, § 178.
PROCEEDINGS TO RECOVER PERSONAL PROPERTY, § 179.
SUMMARY REMEDIES AGAINST SHERIFFS AND CONSTABLES AND THEIR SURETIES, § 180.
SUMMARY REMEDIES BY SURETY AGAINST PRINCIPAL OR CO-SURETY, § 181.
MANDAMUS, § 182.
APPOINTMENT OF GUARDIAN AD LITEM, § 183.

§ 176. Nature of remedy or relief in general.

[a] (Ill. 1847) A justice of the peace has jurisdiction of an action in assumpsit.—Bedell v. Janney, 9 Ill. (4 Gilman) 193.

[b] (Ill. 1847) A justice of the peace has jurisdiction of an action of debt.—Bedell v. Janney, 9 Ill. (4 Gilman) 193.

[c] (Ill. 1858) To authorize the selection by a justice of the peace of arbitrators, there must be a suit pending before him.—Shirk v. Trainer, 20 Ill. (10 Peck) 301.

[d] (Ind. 1860) Justices of the peace have jurisdiction, in actions to recover the possession of real estate, only where the relation of landlord and tenant exists; or where there has been an unlawful or forcible entry into lands, and either a peaceable or forcible detainer thereof; or where, having peaceably obtained possession, one unlawfully and forcibly keeps the same.—Short v. Bridwell, 15 Ind. 211.

[e] (Ky. 1809) An action in which the party has a right to a trial by jury is excluded from the jurisdiction of a justice of the peace, irrespective of the amount in issue.—Singleton v. Madison, 4 Ky. (1 Bibb) 342.

[f] (S. C. 1823) Justices of the quorum, as commissioners of special bail, have jurisdiction to carry into execution the prison bounds act.—Noyes v. Haynesworth, 2 McCord, 367.

§ 177. Attachment.

Against foreign corporation, see ante, § 135 [b].
Amount or value as determining jurisdiction, see ante, §§ 156, 165.
Certification to court of record of attachment against nonresident, see post, § 243 [o].
Constitutionality of statute authorizing justice to issue attachment returnable to court of record, see ante, § 72 [f].
—— *authorizing levy on land, see* ante, § 72 [ii].
Jurisdiction of interplea by third persons as incidental, see post, § 189 [d, e, k, l].

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Procedure, see post, §§ 280–294.
Authority to take affidavits for attachments in general, see "Attachment," vol. 5, cc. 441, 442, § 227.

[a] (U. S. 1820) An attachment by a justice of the peace, under Act Va. Dec. 26, 1792, can only be issued by a justice of the county in which the defendant resides, or from which he is privately removing, or in which he absconds or conceals himself.—Sears v. Noon, Fed. Cas. No. 12,590 [2 Cranch, C. C. 220].

[b, c] (Ala. 1881) Code, § 3606, requiring suits before justices of the peace to be brought in the precinct of defendant's permanent residence, is confined in its operation to suits commenced by summons, and does not apply to actions begun by attachment of goods, as they are in their nature proceedings in rem.—Atkinson v. Wiggins, 69 Ala. 190.

[d] (Ala. 1881) Notaries public, appointed to have and exercise the same jurisdiction as justices of the peace, may issue attachments returnable before them to enforce the collection of debts not exceeding the amount of $100.—Griffin v. Appleby, 69 Ala. 409.

[e] (Ala. 1882) Notaries public, appointed by the governor to "have and exercise the same jurisdiction as justices of the peace," have authority to issue attachments within the precincts for which they are appointed, returnable before themselves.—Rice v. Watts, 71 Ala. 593.

[f] (Ala. 1882) A notary public with the jurisdiction of a justice of the peace has authority to issue an attachment returnable before himself for the collection of a demand within a justice's jurisdiction.—Rice v. Watts, 71 Ala. 593.

[g] (Ala. 1886) By an act incorporating a town, it was provided that the mayor "shall possess all the powers and jurisdiction of a justice of the peace in civil and criminal cases, concurrent with and which are now exercised by justices of the peace, * * * and his signature or acts in such cases shall be of equal force as if done by him expressly as a justice." *Held*, that the mayor could issue a writ of attachment for a sum less than $100.—Bain v. Mitchell, 82 Ala. 304, 2 South. 706.

[h] (Ark. 1840) Under Act Oct. 22, 1823, § 29, allowing attachments where the "defendant is not a resident of or residing in this territory, or is about to remove himself and effects without this territory," an attachment may issue though defendant is a nonresident and without the jurisdiction of the justice issuing the writ.—Jones v. Buzzard, 2 Ark. (2 Pike) 415.

[i] (Ark. 1840) There is nothing in the organic law, or in any subsequent territorial act, forbidding a justice of the peace the right of issuing writs of attachment returnable to the circuit court, as provided by Act Oct. 22, 1823, § 29.—Jones v. Buzzard, 2 Ark. (2 Pike) 415.

[j] (Ark. 1877) Gantt's Dig. § 441, giving the mortgagee a right of attachment on personal property, has exclusive reference to circuit courts, and the right of attachment thereunder cannot be asserted before a justice of the peace.—Lemay v. Williams, 32 Ark. 166.

[k] (D. C. 1885) Under the Revised Statutes, justices of the peace in the District of Columbia have jurisdiction to issue attachments for rent.—Gross v. Goldsmith, 4 Mackey, 126.

[l] (Fla. 1893) Under Acts 1875, c. 2040, an attachment issued by a justice of the peace could not legally be levied on real estate.—McGehee v. Wilkins, 31 Fla. 88, 12 South. 228.

[m] (Ill. 1860) If the nature and amount of the claim is within the jurisdiction of a justice, he can entertain a suit begun by attachment against a steamboat as well as if begun by an ordinary summons.—The Delta v. Walker, 24 Ill. (14 Peck) 233.

[n] (Ind. 1865) A justice of the peace has no jurisdiction in an action aginst an inhabitant of the state, who is not a resident of his township, when it was not commenced by capias, though an attachment was sued out which was levied on his property.—Michael v. Thomas, 24 Ind. 72.

[o] (Ind. 1881) An action on contract against a resident of Indiana before a justice, unless commenced by capias, must be brought in the township of the defendant's residence, if there is a competent justice in such township, and the fact that a writ of attachment is issued and property has been seized in the township where the suit is brought does not take the case out of the rule.—Wilkinson v. Moore, 79 Ind. 397.

[p] (Iowa, 1877) That an attachment is issued does not give a justice jurisdiction of an action for recovery of money against a resident of another county.—Gates v. Wagner, 46 Iowa, 355.

[pp] (Iowa, 1889) Under Code 1873, § 3511, providing that "suits commenced by attachment may be commenced in any county and township wherein any portion of the property is found, and justices shall have jurisdiction therein within the county," a justice of the peace has jurisdiction of an action commenced by the attachment of property within the township, though defendant is a nonresident of, and is not found within, the state, and is not personally served with notice. Sections 3507, 3509, limiting the jurisdiction of justices to the county, and prescribing that suit may be brought in the township where plaintiff or defendant resides, and section 3517, providing that actions in justices' courts are commenced by voluntary appearance or by notice, apply only to actions commenced by personal service, or to actions in the district court.—Anderson v. Union Pac. Ry. Co., 77 Iowa, 445, 42 N. W. 366.

[q] (Md. 1798) Under the act of 1795, a justice of the peace has no authority to issue his warrant to the clerk of the general court directing him to issue an attachment.—Smith v. Greenleaf, 4 Har. & McH. 162.

[qq] (N. J. 1833) Attachment Act, § 1, authorizes writs of attachment to be issued out of the supreme court, or common pleas, directed, "To the sheriff or coroner"; section 14 provides that, if the sheriff "or other officer" shall by mistake attach goods claimed by a third person, it shall be lawful for such sheriff or officer to summon a jury to try the right of property; and section 33 authorizes justices of the peace to issue attachments for a limited amount, directed to constables, who "shall execute the same in manner aforesaid." Small Cause Act, § 26, passed later, authorizes the claimant of attached property to make application to a justice of the peace, and expressly gives jurisdiction to the justice and prescribes his duties; and section 45 repeals all acts within the purview of that act and contradictory thereto. Act February, 1830, supplementary to the attachment act, did not expressly repeal Small Cause Act, § 26. *Held*, that the words "sheriff or other officer," as used in the original and supplementary act, in section 14 and others, mean only coroners or such officers, other than sheriffs, to whom it appertains to execute process out of the superior courts, and did not by construction deprive justices of the peace of jurisdiction conferred by Small Cause Act, § 26.—Stryker v. Skillman, 14 N. J. Law (2 J. S. Green) 180.

[r] (N. Y. 1818) Rev. St. p. 228, authorizing any justice of the peace in any county to issue an attachment in certain cases where the debtor "is about to depart from such county, or is concealed within the same" with intent to defraud, does not warrant an attachment against

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a debtor who is resident of another county and merely passing through the county where the suit is brought.—Dudley v. Staples, 15 Johns. 196.

[rr] (Ohio, 1861) Act March 14, 1853, § 28, authorizing an attachment in justice court against nonresidents of the county, or foreign corporations, does not authorize an attachment against a domestic corporation not residing in the county.—Boley v. Ohio Life Ins. & Trust Co., 12 Ohio St. 139.

[s] (Ohio, 1866) Where one claims to be the owner of property which has been taken by an officer under an order of attachment issued against another, a justice of the peace has no jurisdiction, under Code, §§ 426, 427, to try the right of the claimant to the property against his consent and at the instance of the officer alone, nor to render judgment against him in the premises.—Jones v. Carr, 16 Ohio St. 420.

[ss] (Ohio, 1874) Under Swan & C. St. p. 776, a domestic corporation may be proceeded against by attachment before a justice of the peace in a county wherein such corporation has no office or place of business, on the ground that it is a nonresident of such county.—Champion Mach. Co. v. Huston, 24 Ohio St. 503.

[t] (Pa. 1838) The act of June 13, 1836, did not deprive justices of the peace of jurisdiction in cases of domestic attachment where the debt or demand did not exceed $100.—Riley v. Dekker, 2 Miles, 183.

[tt] (Pa. 1838) The act of June 13, 1836, relating to domestic attachments, does not oust a justice of the peace of jurisdiction under the acts of August 22, 1752, or December 4, 1807. —Riley v. Dekker, 2 Miles, 183.

[u] (Pa. 1850) Act July 11, 1842, §§ 27, 28, authorizing a justice of the peace to issue an attachment when a capias cannot issue, on proof that defendant is about to remove his property from the county to defraud his creditors, does not authorize the justice to issue an attachment against a nonresident of the state. —Appeal of Vansyckel, 13 Pa. (1 Harris) 128.

[uu] (Pa. 1876) Under Act July 12, 1842, authorizing justices of the peace to issue writs of domestic attachment, they have no jurisdiction in cases where the defendant resides out of the state.—Sharpless v. Lansing, 1 Chest. Co. Rep. 502.

[v] (Pa. 1886) Under the act of July 7, 1879, enlarging the jurisdiction of justices of the peace to $300, a justice does not have jurisdiction of an attachment against a nonresident debtor to that amount.—Pagett v. Truby, 1 Pa. Co. Ct. R. 596.

[vv] (Pa. 1886) Under Act July 12, 1842, § 17, a magistrate has no jurisdiction of an action in attachment against a nonresident of the state.—Roberts v. Wright, 2 Pa. Co. Ct. R. 175.

[w] (S. C.) A magistrate has no authority, under the act of 1788, to issue an attachment against the goods of one actually out of the state, but only against the goods of those who conceal themselves, or are in the act of moving.—(1794) Blakely v. Bradford, 1 Bay, 361; (1818) McKenzie v. Buchan, 1 Nott & McC. 205.

[ww] (S. C. 1814) A justice of the peace can issue an attachment only on contracts, and not for torts; the words "debtor" and "creditor" being alone used in the act authorizing justices to issue attachments.—White v. Meloy, Tread. Const. 467.

[x] (S. C. 1882) A justice of the peace has jurisdiction to issue an attachment in an action to foreclose an agricultural lien.—Jones v. Clarkson, 16 S. C. 628.

[xx] (Tenn. 1823) Under Act 1794, c. 1, § 56, providing that a justice of the peace, in cases where he has jurisdiction, may issue an original attachment against the estate of any absconding or absent debtor, and that the proceedings thereon shall be in a summary way, and the defendant may replevy the goods attached, a justice of the peace has no jurisdiction to issue an attachment on land.—Puckett's Lessee v. Owen, 7 Tenn. (Peck) 167.

[y] (Tenn. 1828) Acts 1777, c. 2, authorizing justices of the peace to issue attachments against absconding or nonresident debtors "and make the same returnable to any of the said courts where the same is cognizable," does not authorize them to render judgment on such attachments.—Den v. Wharton, 9 Tenn. (1 Yerg.) 125.

[yy] (Tenn. 1830) Under Acts 1794, c. 1, § 56, authorizing justices of the peace to issue attachments "directed to the sheriff or any constable of the county," a justice of the peace cannot issue an attachment against property within his county owned by a resident of another county.—Stewart v. Roberts, 9 Tenn. (1 Yerg.) 387.

[z] (Tenn. 1851) Justices of the peace may issue attachments under the statute in aid of suits in the circuit court.—Thompson v. Carper, 30 Tenn. (11 Humph.) 542.

[zz] (Tex. 1883) Justices of the peace have jurisdiction to foreclose attachment liens on land for amounts within their jurisdiction; exclusive jurisdiction not being vested in the district courts by Const. 1876, art. 5, § 8.—Hillebrand v. McMahan, 59 Tex. 450.

§ 178. Garnishment.

Against executor, see ante, § 138 [i].

Amount or value as determining jurisdiction, see ante, §§ 156, 165.

[a] (Ala. 1860) A justice of the peace has authority, under the Code, to issue a garnishment on a judgment rendered by him.—Gould v. Meyer, 36 Ala. 565.

[b] (Colo. 1881) Act Feb. 21, 1879, authorizing justices of the peace to issue garnishee process, may be so construed as to permit the issue of such process on a judgment rendered before the enactment of the statute; the statute being remedial, and no constitutional rule being affected by such construction.—Fisher v. Hervey, 6 Colo. 16.

[c] (Colo. 1887) A justice of the peace has jurisdiction by statute to try the issue raised by an answer in garnishee process setting forth that the garnishees held property by virtue of a chattel mortgage to them, to which a traverse is made alleging fraud and delaying creditors, and charging the garnishees with knowledge and participation in the fraud.—Welsh v. Noyes, 10 Colo. 133, 14 Pac. 317.

[d] (Ga. 1878) D. recovered a judgment against B. in the superior court. B. recovered one against A. in a justice's court. D. obtained a summons of garnishment against A. in the justice's court. A. paid his judgment to the justice, and was discharged. *Held*, that the justice's court had no jurisdiction over the garnishment.—Durden v. Belt, 61 Ga. 545.

[e] (Me. 1835) One summoned as trustee in a process of foreign attachment is "a defendant" within St. 1827, c. 359, which provides that where there are two or more defendants living in different counties, a justice suit may be maintained against them all in the county in which either defendant lives.—Boynton v. Fly, 12 Me. (3 Fairf.) 17.

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[f] (N. J.) On a justice's judgment in attachment proceedings lawfully instituted before him, he has jurisdiction of an action by sci. fa. against a garnishee who resides within the limits of a city in which a district court is established. This is not, within Revision, p. 1302, § 6, a case "arising under the district court act."—(1883) New York, L. E. & W. R. Co. v. Cookson, 45 N. J. Law (16 Vroom) 302; (1884) Id., 46 N. J. Law (17 Vroom) 208.

[g] (Pa. 1886) Act April 15, 1845, § 1, conferring authority on justices of the peace to issue attachment executions, does not enlarge the jurisdiction of justices of the peace under the Act of March 20, 1810.—Hintermeister v. Ithaca Organ & Piano Co., 1 Pa. Co. Ct. R. 268.

[h] (Pa. 1898) Under Act 1845, § 1, extending the jurisdiction of justices of the peace to the issuing, trial, etc., of all process required by the act of 1836, relating to attachment, the justice has jurisdiction to try the truth of the answer of a garnishee.—Strouse v. Lawrence (Com. Pl.) 13 Pa. Co. Ct. R. 131.

[i] (Tenn. 1814) Act 1794 (1 Hayw. Revisal, p. 194) § 56, requiring attachments to be levied on property, and section 22, authorizing the summoning of a garnishee in attachments in a court of record, do not authorize a justice of the peace to summon a garnishee.—Seawell v. Murphy, 3 Tenn. (Cooke) 478.

[j] (Tenn. 1842) A justice of the peace, having rendered judgment against a defendant for $197.71, had, by consequence thereof, power to sequestrate the debts of the defendant in the execution, by garnishment to that amount. —Cheairs v. Slaten, 22 Tenn. (3 Humph.) 101.

§ 179. Proceedings to recover personal property.

Amount or value as determining jurisdiction, see ante, §§ 153, 163.

Procedure in replevin in general, see "Replevin."

[a] (U. S. 1830) Detinue is an action in form ex contractu and not ex delicto, and hence is within the jurisdiction of a justice of the peace.—Maynadier v. Duff, Fed. Cas. No. 9,349 [4 Cranch, C. C. 4].

[b] (Ala. 1840) Justices of the peace have no jurisdiction of detinue even though the value of the property detained is less than $50.—Williams v. Hinton, 1 Ala. 297.

[c] (Ind. 1844) Act 1838, concerning tenants holding over, and authorizing proceedings before justices of the peace, only authorizes proceedings for the recovery of the possession of real estate, and damages for its detention. It has no relation to personal property.—Ricketts v. Ash, 7 Blackf. 274.

[d] (Ind. 1859) Under 2 Rev. St. p. 464, § 71, a plaintiff may, in all cases where his personal property, to an amount not exceeding $100, is taken by attachment issued from the common pleas against another person, proceed before a justice of the peace to recover such property.—Rodman v. Kelly, 13 Ind. 377.

[e] (Kan. 1887) Where an action of replevin is commenced before a justice by a resident of the county against a nonresident, and defendant is properly served in the county where the action is commenced, but the property is not obtained, and has never been wrongfully detained in that county, but has been and is wrongfully detained by defendant in the county where he resides, the court has jurisdiction to determine the case as one for damages only under Comp. Laws, § 4622, providing for such trial when the property has not been taken.—Huckell v. McCoy, 38 Kan. 53, 15 Pac. 870.

[f] (Mass. 1844) A justice of the peace has no jurisdiction in replevin, except replevin for beasts distrained for going at large or impounded for doing damage.—Jordan v. Dennis, 48 Mass. (7 Metc.) 590.

[g] (Mich. 1887) Act No. 188, Laws 1879, gives a justice of the peace jurisdiction of an action of replevin for beasts distrained or impounded for unlawfully running at large, and trespassing on the premises of the distrainor.—Pistorius v. Swarthout, 67 Mich. 186, 34 N. W. 547.

[h] (N. Y. 1882) Under Code Civ. Proc. § 2933, providing that where summons has been personally served, the justice must proceed to determine the action, though plaintiff has not required the chattel to be replevied; section 1730, providing that, if the chattel recovered in an action of replevin was not replevied, the final judgment must award plaintiff the sum fixed as to the value thereof, to be paid by defendant if possession is not delivered to plaintiff; and section 1726, directing that when the verdict awards to plaintiff a chattel which has not been replevied, it must also fix the value of the chattel, which latter two sections are made applicable to justices' courts by section 2931,—an action of replevin may now be maintained in justices' courts, though no process is issued for the replevying of the chattel sued for when the action is commenced, or at any time before the execution is issued on the judgment obtained.—Delin v. Stohl, 2 Civ. Proc. R. 222.

[i] (N. Y. 1889) Under Code Civ. Proc. § 2933, providing that "where the summons [in replevin in a justice's court] has been personally served upon the defendant, or where he appears, the justice must proceed to hear and determine the action although the plaintiff has not required the chattel to be replevied," a justice has jurisdiction of an action to recover a chattel, though there has been no requisition.—Guyon v. Rooney, 53 Hun, 633, 6 N. Y. Supp. 99, 17 Civ. Proc. R. 172; Id., 55 Hun, 606, 7 N. Y. Supp. 811.

[j] (N. C. 1886) Where the action is to recover $80 due on a contract, it does not become an action of claim and delivery, so as to oust the justice of his jurisdiction, by reason of the fact that plaintiff files an affidavit and obtains an order of seizure of the property described therein.—Morris v. O'Briant, 94 N. C. 72.

[k] (N. C. 1895) All forms of actions having been abolished, an allegation in the complaint, in an action to recover for rent, that defendant wrongfully detains the crop on which the rent is a lien, does not deprive the justice of jurisdiction, on the ground that the action is one of claim and delivery, and not one ex contractu.—Hargrove v. Harris, 116 N. C. 418, 21 S. E. 916.

[l] (S. C. 1886) Code, § 71, subd. 11, gives jurisdiction to trial justices in "an action to recover the possession of personal property claimed, the value of which * * * shall not exceed" $100. Const. art. 4, § 22, declares that justices "shall have such jurisdiction as may be provided by law in actions ex delicto, when the damages claimed do not exceed $100." *Held*, that a justice had jurisdiction of an action for claim and delivery, and damages for detention thereof, where the value of the property and damages did not exceed $100. —Dillard v. Samuels, 25 S. C. 318.

[m] (Tenn. 1858) Act 1851, c. 32, conferring on justices of the peace jurisdiction of actions of replevin where the amount does not exceed $50, is not repealed by Act 1854, c. 60.—Hockaday v. Wilson, 38 Tenn. (1 Head) 113.

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[n] (Vt. 1855) A justice has no jurisdiction in replevin, except for beasts distrained or impounded, even where the value of the property is less than seven dollars.—Glover v. Chase, 27 Vt. (1 Williams) 533.

[o] (Vt. 1866) A justice of the peace has jurisdiction in replevin for goods and chattels unlawfully taken or detained of value not exceeding $20.—Tripp v. Leland, 39 Vt. 63.

[p] (Wis. 1858) Replevin, in form as prescribed by the Revised Statutes, in justices' courts, is not abolished by Code, tit. 7, c. 2, which relates exclusively to courts of record.—Pulis v. Dearing, 7 Wis. 221.

§ 180. Summary remedies against sheriffs and constables and their sureties.

[a] (Ala. 1881) Justices of the peace have no jurisdiction, under Code, §§ 3663–3675, to render summary judgments against sheriffs for any negligence or malfeasance in serving process returnable before them.—Thompson v. Acree, 69 Ala. 178.

[b] (Ky. 1822) A justice of the peace has no jurisdiction of a motion against a constable for failing to return an execution, the act of 1815, authorizing such motion, having expired.—Lane v. Young, 11 Ky. (1 Litt.) 40; Abbey v. Thomas, 12 Ky. (2 Litt.) 166.

[c] (Ohio, 1843) St. 1884, § 116, authorizing a justice of the peace, whenever a constable should make a false return or fail to make any on the application of a party injured, to proceed against such constable by sci. fa., applies to returns on mesne process.—Powell v. Jones, 12 Ohio, 35.

[d] (Pa. 1834) The jurisdiction of a justice to issue a sci. fa. against the sureties of a delinquent constable, under the act of March 20, 1810, is not taken away by the act of March 29, 1824.—Evans v. Frey, 3 Watts, 208.

[e] (Tenn. 1842) A justice of the peace has no power to render judgment by motion against a constable and his sureties, for failing to pay over money not collected, by virtue of process in his hands.—McGreggor v. McCorkle, 22 Tenn. (3 Humph.) 578.

§ 181. Summary remedies by surety against principal or co-surety.

[a] (Ind. 1843) The summary remedy by notice and motion by a surety against his cosurety for contribution provided by Rev. St. 1838, p. 233, is within the jurisdiction of the justice of the peace court, where the justice has jurisdiction of the subject-matter to the amount sued for.—Cating v. Stewart, 6 Blackf. 372.

[b] (Tenn. 1849) Act 1809, c. 69, confers upon justices of the peace no jurisdiction to enable them to render judgment on motion against a principal, in favor of the surety on any note, bill, bond, or obligation which the surety may have become liable to pay by reason of a judgment rendered against him.—Vanbibber v. Vanbibber, 29 Tenn. (10 Humph.) 53.

[c] (Tenn. 1854) A justice of the peace has no jurisdiction of a motion by a surety against his principal, unless such suretyship appears on the face of the note, bill, bond, or obligation which is the foundation thereof.—Cannon v. Wood, 34 Tenn. (2 Sneed) 177.

§ 182. Mandamus.

[a] (N. C. 1881) A justice of the peace has no jurisdiction of a mandamus proceeding by a teacher of a free school to compel the school committee by whom he was employed to give an order on the county treasurer for the sum due him for his services.—Robinson v. Howard, 84 N. C. 151.

§ 183. Appointment of guardian ad litem.

[a] (N. Y.) A justice of the peace may appoint a guardian ad litem for an infant.—(1807) Mockey v. Grey, 2 Johns. 192; (1823) Bullard v. Spoor, 2 Cow. 430.

2. EQUITABLE JURISDICTION AND RELIEF.

IN GENERAL, § 184.
ENFORCEMENT OF LIENS IN GENERAL, § 185.
CREDITORS' SUIT, § 186.
SETTLEMENT OF PARTNERSHIP AFFAIRS, § 187.
EQUITABLE RELIEF AGAINST MARRIED WOMEN, § 188.

Amount or value as determining jurisdiction, see ante, § 150 [q, r].

Constitutionality of statute conferring equitable jurisdiction, see ante, § 72 [kk].

Counterclaim arising out of unadjusted partnership dealings, see ante, § 173 [k].

§ 184. In general.

[a] (Ala. 1853) The statute (Clay's Dig. p. 358, § 1) giving justices of the peace jurisdiction of actions for the recovery of "all debts and demands not exceeding $50 for a sum or balance due," does not confer jurisdiction to determine purely equitable rights in actions involving over $20, so that the parties are excluded as witnesses, but jurisdiction of such actions remains in the court of chancery.—Hall v. Cannte, 22 Ala. 650.

[b] (Ark. 1884) While a justice of the peace may apply equitable doctrines, he cannot administer equitable relief.—Whitesides v. Kershaw, 44 Ark. 377.

[c] (Cal. 1891) An action against a receiver appointed to receive and hold the rents of land pending an appeal in ejectment, brought by one to whom the successful party assigns her right to such rents, is not an equitable action, but an action for money had and received, and a justice has jurisdiction thereof. The rents in his hands are no part of the judgment in ejectment.—Garniss v. Superior Court of San Francisco, 88 Cal. 413, 26 Pac. 351.

[d] (Del. 1842) A justice of the peace has jurisdiction to try an action founded on a lost note; the remedy being at law.—Moore v. Frame, 3 Har. 427.

[e] (Ga. 1895) Where the vendee in a conditional sale of personalty, after paying part of the price, abandoned the property, and the vendor took possession thereof under the contract, the equities of the parties could not be adjusted in a garnishment returnable to a justice's court, sued out by a creditor of the vendee against the vendor, since a justice's court has no equity jurisdiction.—Woodruff v. M. G. McDonald Furniture Co., 96 Ga. 86, 23 S. E. 195.

[f] (Ind. 1854) Under the act of 1847, authorizing writs of ne exeat, until the bond required by the statute was filed, a justice had no authority to issue the writ.—Straughan v. Inge, 5 Ind. 157.

[g] (Ind. 1872) Under the provisions of the Code of Procedure, abolishing the distinction between actions at law and suits in equity, justices of the peace, where they have jurisdiction of the subject-matter of an action, unless there is some special provision of law to the

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contrary, may apply thereto equitable as well as legal principles, in the same manner, and to the same extent, as courts of record. It was the evident design of the Code to abolish, in practice, all distinction between law and equity, and to invest every court having jurisdiction of a civil action with a power to hear and determine the same in accordance with equitable as well as legal principles.—Snell v. Mohan, 38 Ind. 494.

[h] (Kan. 1891) In an action in justice's court, the bill of particulars alleged that plaintiff had sold defendant cattle of the value of $595, admitted payment of $488, and prayed judgment for the balance, $107. *Held*, that other allegations in the bill detailing the particulars of the transactions, including the fact that plaintiff had made a mistake in figuring the aggregate price of the cattle at the time of the sale, did not render the action one to reform the contract of sale, so as to deprive the justice of jurisdiction.—Griffin v. O'Neil, 47 Kan. 116, 27 Pac. 826.

[i] (Ky. 1840) The statute of 1838, conferring chancery jurisdiction on justices of the peace in action to enforce judgments, applies also to judgments against executors or administrators.—Sherwood v. Campbell's Adm'r, 40 Ky. (1 B. Mon.) 54.

[j] (Mo. 1859) In a proceeding for an unlawful detainer, a justice of the peace has no power to inquire and decide whether a parol contract ought to be enforced, and to give equitable relief on the ground that the contract has been taken out of the statute of frauds by part performance.—Ridgley v. Stillwell, 28 Mo. 400.

[k] (Mo. 1876) The jurisdiction of a justice of the peace to dispossess a tenant is not affected by the fact that the lease is held by a trustee for another; the equitable character of the trust relation not conferring any equitable rights as against the landlord, and therefore not giving occasion for equitable inquiry into it.—January v. Stephenson, 2 Mo. App. 266.

[l] (Mo. 1886) A justice has no jurisdiction of a suit for specific performance.—Enlow v. Newland, 22 Mo. App. 581.

[m] (Mo. 1887) Justices have nothing to do with estoppels in pais.—Hicks v. Martin, 25 Mo. App. 359.

[n] (Mo. 1889) In an action of unlawful detainer before a justice of the peace, defendant claimed under a lease made by the carpenter who built the house, with the consent and as agent of the owner, who had received several months' rents under it. It appeared that the agent's authority rested in parol, so that under Rev. St. §§ 2509, 3078, the tenancy was one from month to month, and terminable by a month's notice. *Held*, that such rental, with possession and part payment of rent, constituted an equitable defense unavailable to defendant, under Rev. St. 1879, § 2837, precluding justices of the peace from the exercise of equitable jurisdiction.—Orr v. McCurdy, 34 Mo. App. 418.

[o] (Mo. 1896) The defense of an estoppel in pais is an equitable defense, and cannot be raised in an action before a justice of the peace.—Phillips v. Burrows, 64 Mo. App. 351, 2 Mo. App. Rep'r, 1001.

[p] (Neb. 1884) The vendee under a contract of sale which declared that it should be forfeited upon his failure to make any payment of the purchase money, and that if allowed to remain in possession after nonpayment, he should hold the property as tenant at will, cannot upon default be sued for its forcible entry and detention, under Code Civ. Proc. § 1020, which gives a justice jurisdiction in such proceedings against tenants holding over their terms, because his equities under the contract cannot be adjudicated in a justice's court.—Chicago, B. & Q. R. Co. v. Skupa, 16 Neb. 341, 20 N. W. 393; Grimm v. Kucera, 16 Neb. 349, 20 N. W. 396.

[q] (N. M. 1862) A justice of the peace has no jurisdiction to enforce specific performance of a contract to build a house on a certain tract of land, by an alternative judgment requiring defendant to build the house or to pay a certain sum, and an execution to enforce such an alternative judgment is void on its face.—Munis v. Herrera, 1 N. M. 362.

[r] (N. C. 1881) A justice of the peace has jurisdiction to try an action on a lost note wherein a sum less than $200 is demanded, and is competent to exercise the power of requiring in such case the indemnity of the defendant. The relief sought is not equitable.—Fisher v. Webb, 84 N. C. 44.

[s] (N. C. 1881) Where, in a summary proceeding in ejectment before a justice of the peace, the testimony shows that equities growing out of a contract to purchase are to be adjusted, the proceeding should be dismissed for want of jurisdiction.—Parker v. Allen, 84 N. C. 466.

[t] (N. C. 1882) A justice's court, having incidental jurisdiction of every question necessary to the proper determination of an action within its jurisdiction, may permit an equity to be set up as a defense, though having no affirmative equitable jurisdiction.—Lutz v. Thompson, 87 N. C. 334.

[u] (N. C. 1892) A justice having jurisdiction of the principal matter of an action on a bond may allow a release of the surety to be set up as a defense, though such defense is of an equitable nature.—Bell v. Howerton, 111 N. C. 69, 15 S. E. 891.

[v] (N. C. 1896) Where the allegations and proof in an action in justice's court showed that plaintiff was entitled to judgment against the defendant for a balance due for services rendered, the relief should be granted, even though the plaintiff's prayer asks for equitable relief by reformation of an accounting between the parties on the ground of mistake.—Holden v. Warren, 118 N. C. 326, 24 S. E. 770.

[w] (Ohio, 1860) A justice of the peace has no equity jurisdiction or power.—Carey v. Richards, 2 Ohio Dec. 630.

[x] (Ohio, 1893) The power to hear and determine controversies between heirs of an intestate, where the fact of advancements to such heirs is to be ascertained, and the legal effect thereof upon their several rights on distribution adjudicated, is an equity power, which a justice of the peace has no authority to exercise.—Moore v. Freeman, 50 Ohio St. 592, 35 N. E. 502.

[y] (Tenn. 1847) Act 1817, c. 68, § 1, authorizes a justice of the peace to inquire into the consideration of contracts under seal where the sum does not exceed $50; but it does not give to a justice the general power of court of chancery in other respects.—Bryan v. Buckholder, 27 Tenn. (8 Humph.) 561.

[yy] (Tex. 1858) In this state equitable defenses are available in courts of law and before justices of the peace, though the latter cannot exercise equity powers in taking jurisdiction or giving affirmative relief.—Gibson v. Moore, 22 Tex. 611.

[z] (Tex. 1889) A justice of the peace cannot grant an injunction, but may try cases involving equitable as well as legal rights.—Crawford v. Sandridge, 75 Tex. 383, 12 S. W. 853.

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[zz] (Tex. 1889) A justice of the peace has jurisdiction of a suit to ascertain and fix the amount justly due, for which there is a lien on land, and to reform the contract as to the amount secured by the lien.—Crawford v. Sandridge, 75 Tex. 383, 12 S. W. 853.

§ 185. Enforcement of liens in general.

[a] (Ark. 1884) Under Const. art. 7, § 40, providing that a justice of the peace shall have no jurisdiction where a lien on land is involved, a justice of the peace can take no jurisdiction of a mechanic's lien on real estate.—Cotton v. Penzel, 44 Ark. 484.

[b] (Ga. 1879) Under the lien law of 1878, a justice of the peace may administer the affidavit and issue the execution for a laborer's lien.—Dexter v. Glover, 62 Ga. 312.

[c] (Ind. 1860) A suit to enforce a mechanic's lien on real estate is in the nature of a foreclosure suit, and is not within 2 Rev. St. p. 451, § 10, conferring civil jurisdiction upon justices.—Ainsworth v. Atkinson, 14 Ind. 538.

[d] (Ind. 1872) A justice of the peace has no jurisdiction to foreclose a chattel mortgage.—Snell v. Mohan, 38 Ind. 494.

[e] (Mo. 1874) The jurisdiction conferred on justices of the peace by Act 1872 over actions to enforce a mechanic's lien, where the amount involved is less than $50, is not taken from them, nor conferred on circuit courts, by reason of the fact that justices' courts have no process by which nonresident defendants in such proceedings can be reached.—Stamps v. Bridwell, 57 Mo. 22.

[f] (Mo. 1894) Under Rev. St. 1889, § 6122, giving justices jurisdiction in civil cases for recovery of money on contract or tort, on a bond, or for a penalty, the amount involved not exceeding $250, a justice has no jurisdiction to enforce a lien for the expense of a sidewalk, which Act March 30, 1887, § 2, provides may be enforced in any court of competent jurisdiction, though such proceeding does not affect title to real estate, jurisdiction of which is denied a justice by Rev. St. § 6124.—City of Pleasant Hill v. Dasher, 120 Mo. 675, 25 S. W. 566.

[g] (Ohio, 1876) The enforcement of a claim for labor under the provisions of the mechanic's lien law of March 31, 1874, as to railroads (71 Ohio Laws, p. 51), may be had before a justice of the peace by an action at law. The case is not an equity suit to assert a lien on a fund, but is of legal cognizance, and no priorities are given, though the claim may be reduced by other claims which the company may set up by answer.—Scioto Val. Ry. Co. v. Cronin, 1 Wkly. Law Bul. 315.

[h] (Tenn. 1879) Justices of the peace have no jurisdiction to enforce a lien on land for taxes in amount not exceeding $50.—State v. Covington, 72 Tenn. (4 Lea) 51.

[i] (Tex. 1858) A justice's court has no jurisdiction to enforce mortgages or vendor's liens, certainly where the property exceeds $100, though the balance due may be less.—Lane v. Howard, 22 Tex. 7.

[j] (Tex. 1881) Rev. St. art. 1539, giving justices' courts jurisdiction to foreclose liens on personal property, does not give them jurisdiction to foreclose a lien on the grade or roadbed of a railroad.—Texas & P. R. Co. v. McMullen, 1 White & W. Civ. Cas. Ct. App. § 162.

[k] (Tex. 1881) Under Rev. St. art. 1544, providing that justices of the peace shall have no jurisdiction in suits for the trial of title to lands, or of suits for the enforcement of liens on lands, a justice court has no jurisdiction to foreclose a lien on a railroad grade or roadbed; the same being land within the statute.—Texas & P. Ry. Co. v. McMullen, 1 White & W. Civ. Cas. Ct. App. § 160.

§ 186. Creditors' suit.

Creditors' suit against executor or administrator, see ante, § 138 [k].

[a] (Ohio, 1855) A justice of the peace has no jurisdiction to subject a chose in action belonging to a judgment debtor to the payment of the judgment; and hence the superior court has such jurisdiction though the judgment is less than $100.—Devou v. Simpson, 1 Handy, 557.

§ 187. Settlement of partnership affairs.

[a] (Ill. 1844) Partners may submit their partnership accounts to the decision of a justice of the peace, under the provisions of the act "concerning justices of the peace and constables," and he may entertain jurisdiction of the matter, and enter up a judgment in such case, provided the amount in issue does not exceed his jurisdiction.—Hyatt v. Harmon, 6 Ill. (1 Gilman) 379.

[b] (Mo. 1888) An action by one partner against another, on an unsettled account of more than one item, is strictly an equitable action, of which, under Rev. St. § 2837, a justice of the peace has no jurisdiction.—Rankin v. Fairley, 29 Mo. App. 587.

[c] (N. Y. 1820) An action for the adjustment of a partnership account cannot be brought before a justice of the peace.—Rickey v. Bowne, 18 Johns. 131.

[d] (N. C. 1890) An action by an assignee of an insolvent firm for the value of a note included in the assignment, against an indorsee to whom the note was assigned by one partner in settlement of a private debt, does not involve an account and settlement of the partnership matters of the insolvent firm, and a justice of the peace has jurisdiction.—Hartness v. Wallace, 106 N. C. 427, 11 S. E. 259.

[e] (N. C. 1891) In an action on a note executed by defendant to one K., who transferred it to plaintiffs, defendant pleaded payment, and introduced evidence that he and K., after the execution of the note, entered into partnership to gin cotton; that, at the dissolution of this partnership, he told K. to apply his share of the proceeds of the cotton left at the gin to the payment of the note; that K. sold the cotton, and applied the proceeds to that end. K., being called to testify, denied this, and asserted that defendant had told him to sell the cotton, and apply the proceeds to the payment of the firm's debts, which he did. He further testified that he went to defendant for a settlement, but never could get it. *Held*, that the settlement of the partnership affairs was not involved, and the action was therefore within the jurisdiction of a justice of the peace.—Hooks v. Houston, 109 N. C. 623, 14 S. E. 49.

§ 188. Equitable relief against married women.

[a] (N. Y. 1856) A justice of the peace, having no equity jurisdiction, cannot try an action to enforce the application of the separate property of a married woman to the payment of a promissory note which she has given for the benefit of such separate property.—Coon v. Brook, 21 Barb. 546.

[b] (N. C. 1883) An action against a married woman upon a promise to pay for work done on premises owned and held as her separate estate is not cognizable in the court of a jus-

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tice of the peace. Such court is a common-law court, and its jurisdiction does not, therefore, embrace causes of an equitable nature.—Dougherty v. Sprinkle, 88 N. C. 300.

[c] (N. C. 1889) As a justice of the peace has only jurisdiction of common-law actions, he cannot entertain an action on a note given by a married woman not a free trader, though she retains the property for which the note was given, and uses it after her husband's death, as at common law a married woman's contract is absolutely void.—Berry v. Henderson, 102 N. C. 525, 9 S. E. 455.

[d] (N. C. 1890) Where a feme sole employs a servant for an indefinite time, compensation for services rendered after marriage can only be recovered against the wife when charged expressly or by necessary implication on her separate estate, and only then by an action in the superior court; the justice of the peace having no equitable jurisdiction.—Bevill v. Cox, 107 N. C. 175, 12 S. E. 52, 11 L. R. A. 274.

[e] (Ohio, 1876) Suit to charge the debts of a married woman upon her separate estate cannot be brought before a justice of the peace.—Allison v. Porter, 29 Ohio St. 136.

[f] (Ohio, 1878) A justice of the peace has no jurisdiction of an action against a married woman to recover for services in selling her separate real estate.—McConnell v. Nolan, 1 Cleve. Law Rep. 268.

[g] (Ohio, 1881) A justice of the peace, having no chancery jurisdiction, cannot render a personal judgment against a married woman.—Schultz v. Myer, 6 Ohio Dec. 1086.

(H) ANCILLARY AND INCIDENTAL JURISDICTION.

Incidental question of title as affecting jurisdiction, see ante, § 84 [c].

§ 189. In general.

[a] (U. S. 1837) A justice of the peace may have jurisdiction of a matter incidentally, of which he would not, if it were the principal cause of action. Therefore he may have jurisdiction in an action of debt on a bond, in the penalty of $50, conditioned that, if a certain bay mare should be proved not to be the property of A., the bond should be in full force, otherwise void, and thus collaterally try the title to the mare.—Moore v. Waters, Fed. Cas. No. 9,780 [5 Cranch, C. C. 283].

[b] (Ark. 1847) Justices of the peace cannot decide upon matters of which they have no jurisdiction, as mere incidents to the subject-matter of a suit. To do so would be a fraud on the law.—Fitzgerald v. Beebe, 7 Ark. (2 Eng.) 305, 46 Am. Dec. 285.

[bb] (Colo. 1894) Where the property of a third person is attached under a writ issued by a justice of the peace, the owner may intervene, and have his property released, even though its value exceeds the amount over which a justice has jurisdiction; and a verdict and judgment in his favor in such proceeding will be valid, provided the damages do not exceed the justice's jurisdiction.—Corthell v. Mead, 19 Colo. 386, 35 Pac. 741.

[c] (Mo. 1863) A justice of the peace has jurisdiction to enter judgment on motion on a forthcoming bond taken in an attachment suit commenced before him, though the penalty exceeds his jurisdiction in a direct suit on the bond. Rev. Code 1855, pp. 266, 925, 926.—McDowell v. Morgan, 33 Mo. 555.

[d] (Mo. 1875) In an attachment suit before a justice of the peace, where the amount originally sued for is within the jurisdiction, he will also have jurisdiction of the interplea, though the value of the property attached and of that claimed exceeds the amount for which suit may be brought in that court.—Mills v. Thomson, 61 Mo. 415.

[e] (Mo. 1893) A justice of the peace has jurisdiction, in an action of attachment, to hear and determine an interplea for the attached property, though it exceeds in value the amount fixed by law as the limit of justices' jurisd ction; since the interplea is an incident growing out of the main action.—Springfield Engine & Thresher Co. v. Glazier, 55 Mo. App. 95.

[f] (N. Y. 1850) A justice of the peace, in a proceeding instituted and had before him according to the provisions of a statute of the state, which statute requires him to issue his warrant for the collection of the costs, possesses all needful authority to decide on the amount of costs as incidental and absolutely necessary to enable him to issue the warrant.—Voorhees v. Martin, 12 Barb. 508.

[g] (N. Y. 1877) A justice of the peace, in an action regularly brought before him to recover a penalty for less than $200, has jurisdiction to pass on every question involved in the action, including the validity of the law imposing the penalty.—Hallock v. Dominy, 69 N. Y. 238.

[h] (N. C. 1843) Where a justice of the peace has jurisdiction of the principal question, as on a contract to pay for certain articles, he also has the jurisdiction to determine every incidental question, as, for instance, whether the condition upon which the contract has been executed has been performed.—Garrett v. Shaw, 25 N. C. 395.

[i] (N. C. 1882) A justice's court, having jurisdiction of the principal matter of an action, has incidental jurisdiction of every question necessary to its proper determination, and may permit an equity to be set up as a defense, though having no affirmative equitable jurisdiction.—Lutz v. Thompson, 87 N. C. 334.

[j] (N. C. 1892) A justice, who has obtained jurisdiction of the principal matter of an action, as on a bond, has jurisdiction also of every question necessary to its determination; and may allow, therefore, a release of the surety to be set up as a defense, though such a defense is equitable in its nature.—Bell v. Howerton, 111 N. C. 69, 15 S. E. 891.

[k] (N. C. 1896) Attachment of personal property is only ancillary to the action, and a justice of the peace may entertain an interplea to determine the title, though the value of the property exceed $50.—Gramling v. Dickey, 118 N. C. 986, 24 S. E. 671.

[l] (Pa. 1892) Where a justice of the peace issues an attachment under Act July 12, 1842, he has no authority to determine the claims of third persons to ownership of the property attached, for the act makes no provision for such an inquiry and adjudication by him.—Jackson v. Bradley (Com. Pl.) 11 Pa. Co. Ct. R. 321.

(I) LOSS AND DIVESTITURE OF JURISDICTION.

IN GENERAL, § 190.
ABSENCE OR DELAY OF JUSTICE, § 191.
ABSENCE OR DELAY OF PLAINTIFF, § 192.
CONTINUANCES OR ADJOURNMENTS AS OUSTING JURISDICTION, § 193.
—— ADJOURNMENT AT UNAUTHORIZED TIME, § 194.

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—— ADJOURNMENTS FOR INDEFINITE PERIODS, § 195.
—— INSUFFICIENT ENTRIES OF ADJOURNMENT ON DOCKET, § 196.
—— PERSONS ENTITLED TO RAISE OBJECTION, § 197.
RESTORATION OF JURISDICTION, § 198.

Constitutionality of statute devesting justice of jurisdiction, see ante, § 72 [qq].
Title to land as ousting jurisdiction, see ante, §§ 83–97.

§ 190. In general.

See ante, § 73 [g].
Withdrawal of appearance as ousting jurisdiction, see post, § 276 [d].

[a] (Cal. 1855) A. commenced in a justice's court an action of forcible entry and detainer. The justice, instead of proceeding to try the case, certified it to the district court. *Held*, the transfer of the cause was illegal, and could not defeat the plaintiff's rights by operating a discontinuance.—Larue v. Gaskins, 5 Cal. 507.

[b] (Iowa, 1881) Upon an application for change of venue, in an action before a justice, the duty of determining the justice to whom the transfer is to be made is a judicial one, and a mere mistake in sending it to a justice in the county other than the nearest one is judicial error, only, and does not oust the jurisdiction, and the question cannot be raised in a collateral proceeding.—Tennis v. Anderson, 55 Iowa, 625, 8 N. W. 477.

[c] (Mich. 1891) How. Ann. St. § 6938, provides that judgment of nonsuit shall be entered by a justice of the peace against a plaintiff for failure to appear within an hour after the return of the process. *Held*, that while, by judicial construction, this section has been applied to defendants, as regards them it is not a jurisdictional requirement, but is merely a privilege; and the justice does not lose jurisdiction by not waiting an hour for defendant to appear, and the justice's entry of judgment need not show that he so waited.—Talbot v. Kuhn, 89 Mich. 30, 50 N. W. 791, 28 Am. St. Rep. 273.

[d] (Minn. 1869) Gen. St. 1866, c. 65, § 21, prescribing the time when pleadings are to take place in a justice's court, is imperative, and, unless complied with, the justice loses his jurisdiction.—Mattice v. Litcherding, 14 Minn. 142 (Gil. 110).

[e] (N. J. 1838) Where a justice of the peace has dismissed a jury because of their inability to reach a verdict, his jurisdiction has ceased, and he has no authority to grant a new trial.—Gulick v. Van Tilburg, 16 N. J. Law (1 Har.) 417.

[f] (N. J. 1839) In the court of small causes, where the jury cannot agree on their verdict and are dismissed by the justice, his jurisdiction in the cause is at an end.—Waddell v. Physick, 17 N. J. Law (2 Har.) 331.

[g] (N. Y. 1849) Where a justice of the peace has once acquired jurisdiction, he will not lose it by subsequent error or irregularity.—Hard v. Shipman, 6 Barb. 621.

[h] (Or. 1877) The jurisdiction of a justice of the peace, once obtained over the subject-matter of an action, continues until the action abates or is legally disposed of by the justice. The rendering of a void judgment by the justice does not terminate the action, so as to prevent such justice from issuing an alias summons and acquiring jurisdiction of the person of the defendant.—Knapp v. King, 6 Or. 243.

[i] (Or. 1891) A complaint against a railroad company was filed with a justice of the peace, who issued a summons to the company's agent. On this summons a judgment by default was entered, which was afterwards set aside on the plaintiff's motion, and an alias summons issued. Before the service of the alias summons the company had sued out a writ to review and set aside the void judgment. It appeared before the justice, and filed an answer in abatement, to which a demurrer was sustained. The company made no further defense, and judgment was entered against it. *Held*, that the void judgment did not terminate the jurisdiction of the justice, and the company was bound by the second judgment.—Southern Pac. Co. v. Russell, 20 Or. 459, 26 Pac. 304.

[j] (Pa. 1894) The payment of costs of a justice on his promise to discontinue a suit is the end of the action, and deprives the justice of further jurisdiction.—Musser's Adm'r v. Simpson (Com. Pl.) 14 Pa. Co. Ct. R. 526.

[k] (Wis. 1890) Where one of several defendants to an action in justice's court is not served with process, and does not appear, a judgment by default against him is a nullity, and does not terminate the justice's jurisdiction over the others.—French v. Higgins, 77 Wis. 121, 45 N. W. 817.

§ 191. Absence or delay of justice.

Delay in rendering judgment as ousting jurisdiction, see post, §§ 390–392.

[a] (Kan. 1873) Where a justice on September 2d, the time to which the case had been previously adjourned, was engaged in other official business, and the case was not called until the Monday following, at which last-mentioned time the case appears to have been tried and the judgment complained of rendered, *held*, that the justice did not lose jurisdiction of the case.—Kaub v. Mitchell, 12 Kan. 57.

[b] (Kan. 1891) Judgment rendered by a justice was afterwards set aside by him on defendant's motion, and a new trial set for a future day. On that day the parties appeared, but the justice was absent from his office. Afterwards the justice set aside the order setting aside the judgment and granting a new trial, and execution was issued on the judgment. *Held*, that after the judgment was set aside it ceased to exist, and that the justice, by his absence on the day set for the new trial, lost jurisdiction of the case, so that his order reinstating the judgment was void.—Olson v. Nunnally, 47 Kan. 391, 28 Pac. 149, 27 Am. St. Rep. 296.

[c] (Me. 1840) The absence of the justice at the time and place to which he has continued a case operates a discontinuance.—Spencer v. Perry, 17 Me. (5 Shep.) 413.

[d] (Me. 1840) In an action before a justice, if he is not present at the time when the writ is made returnable, and the case is not continued as provided by statute in such cases, it operates a discontinuance.—Martin v. Fales, 18 Me. (6 Shep.) 23, 36 Am. Dec. 693.

[e] (Mich. 1861) The fact that the justice was a few minutes late at the hour set for the hearing of an adjourned case, being employed on a coroner's inquest, will not work a discontinuance, though defendant may have left the office at the end of the hour.—Stadler v. Moors, 9 Mich. 264.

[f] (Mich. 1880) A justice of the peace was also superintendent of the poor, under appointment from the board of supervisors. At the hour to which a cause was adjourned he was absent, attending to duties as such superintendent. Returning within half an hour after its expiration, he notified defendant of his readiness to proceed, but, he refusing to appear, adjournment was had, notice served on defendant, and judgment on default finally entered against him.

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Held, that the justice's absence was not on official duties as justice, and his judgment was erroneous.—Roberts v. Hathaway, 42 Mich. 592, 4 N. W. 307.

[g] (N. Y. 1809) If the parties appear on the return day, and the justice does not attend, but sends a note, without signing it, adjourning the court, it is not an adjournment which the parties are bound to notice. The cause is discontinued, and all subsequent proceedings are void.—Wiest v. Critsinger, 4 Johns. 117.

[h] (N. Y. 1810) Where a justice adjourned a cause until 10 o'clock, a. m., and the defendant appeared at the time and place, and, after waiting nearly three hours, went away, and the justice came soon after, and proceeded to hear the cause on the part of the plaintiff, and gave judgment against the defendant, *held*, that the delay of the justice to attend was unreasonable, and that the cause thereby became discontinued.—Taft v. Grosfent, 5 Johns. 353.

[i] (N. Y. 1814) A delay on the part of a justice to open his court for more than two hours after the time appointed by the summons, and then adjourning the cause to another day, when he heard it ex parte, amounts to a discontinuance of the suit.—McCarthy v. McPherson, 11 Johns. 407.

[j] (N. Y. 1815) A delay in proceeding to trial, caused by the justice being engaged in another cause, will not work a discontinuance of the suit.—Chamberlain v. Lovet, 12 Johns. 217.

[k] (N. Y. 1823) Where a justice fails to attend at the adjourned day, the cause is discontinued.—Stoddard v. Holmes, 1 Cow. 245.

[l] (N. Y. 1833) Generally, unless a cause is tried within an hour after the time appointed, the omission amounts to a discontinuance; but, if the justice is engaged at the hour in trying another cause, which occupies him till after the time, this is a good reason for delay, and he may proceed as soon as possible after his other official engagements are disposed of.—Hunt v. Wickwire, 10 Wend. 103, 25 Am. Dec. 545.

[m] (N. Y. 1848) A justice, by absenting himself from the court at the time appointed for the hearing, does not oust his authority to proceed with the cause, where he appears within a few minutes thereafter and notifies the party of his intention to proceed with the trial.—Everitt v. Lisk, 1 Code Rep. 70.

[n] (N. Y. 1851) The departure of a justice, after his refusal to adjourn the cause on application of defendant, from the place of trial, stating that it was uncertain at what time he should return, was a discontinuance of the suit, and all proceedings thereafter were without jurisdiction, unless the parties voluntarily awaited his return, or in some manner assented to the delay.—Lynsky v. Pendegrast, 2 E. D. Smith, 43.

[o] (N. Y. 1878) A justice of the peace loses jurisdiction of an action by failing to appear within one hour after the time to which it has been adjourned.—Flint v. Gault, 15 Hun, 213.

[p] (Pa. 1883) Where an alderman was not present at his office at a time fixed for hearing in an action, he loses jurisdiction, and a judgment thereafter entered in the absence of defendant is void.—Henderson v. Alexander, 1 Lanc. Law Rev. 11.

[q] (Vt. 1837) The absence of a justice of the peace from a place to which a cause has been adjourned by him for the whole half day within which the cause was set down for trial is a discontinuance of the action.—Brown v. Stacy, 9 Vt. 118.

[r] (Vt. 1839) Where a justice fails to make an entry of an action within two hours after the time set for trial, as provided by statute, the fact that he was purposely detained by defendant until after the expiration of the two hours cannot give him jurisdiction, though defendant appears after such two hours, and the justice offers him a hearing, which he declines.—Phelps v. Birge, 11 Vt. 161.

[s] (Vt. 1840) Where a justice who signs a writ is absent on the return day, any other justice, in order to continue the suit, must be present at the place set for trial within two hours after the time set in the writ, and have the writ in his possession. If this is not done, the suit is discontinued, and no after proceedings can be legally had.—Crawford v. Cheney, 12 Vt. 567.

[t] (Vt. 1846) A justice of the peace before whom a writ was returnable was absent on the return day. The plaintiff carried the writ to the residence of another justice, and had him enter a continuance, and, after two hours had elapsed from the time of the return, such justice came to the place of return, where the parties still were, and affirmed the continuance. *Held*, that the suit was discontinued, so that a subsequent judgment by default could not be sustained, since another justice, in order regularly to continue a cause, where the justice before whom the writ is returnable is absent on return day, must be present at the place of return within two hours from the time appointed for the return.—Hinman v. Swift, 18 Vt. 315.

§ 192. Absence or delay of plaintiff.

[a] (Mich. 1874) The failure of a plaintiff to appear within an hour of the time to which a cause in a justice's court has been adjourned for the completion of the trial operates as a discontinuance, and deprives the justice of all jurisdiction thereafter to render any judgment against the defendant, or any judgment whatever, except that of nonsuit and for costs.—Brady v. Taber, 29 Mich. 199.

[b] (N. Y. 1812) If the plaintiff, or some person on his behalf, do not appear on the return of process before a justice of the peace, it is a discontinuance; and, if the justice proceed in the cause, it is error, even though, on the return of process, the note on which the suit was brought was delivered to the justice, with a request of the defendant indorsed on it to enter judgment against him.—Sprague v. Shed, 9 Johns. 140.

[c] (N. Y. 1814) Where, after issue in a justice court, defendant appears at the time appointed, but plaintiff does not appear, and the justice is informed that he is near at hand, and delays calling and nonsuiting him on defendant's motion, who soon after leaves court, and plaintiff in about an hour appears, when the justice proceeds to hear and decide the cause, there is no such unreasonable delay as will work a discontinuance.—Wilde v. Dunn, 11 Johns. 459.

[d] (N. Y. 1818) Where the trial of a cause before a justice, after being commenced, was suspended for a time, and, when resumed, the plaintiff did not appear, it was *held* that it was a discontinuance, and that the justice could not proceed with the trial.—Baldwin v. Carter, 15 Johns. 496.

[e] (N. Y. 1856) The failure of the plaintiff in a justice's court to appear on the day to which a case has been adjourned works a discontinuance of the action.—Norris v. Bleakley, 1 Hilt. 90, 3 Abb. Prac. 107.

[f] (N. Y. 1890) Plaintiff procured a summons returnable on a certain day. On that day plaintiff did not appear, but sent word desiring an adjournment to another day, which was granted, and defendant's motion to dismiss denied. *Held*, that the justice lost jurisdiction of the case by reason of plaintiff's failure to appear within one hour after the time specified in the

summons for the return thereof, as required by Code Civ. Proc. § 2934, and that his adjournment of the case to another day was void.—Todd v. Doremus, 60 Hun, 385, 15 N. Y. Supp. 470.

[g] (Tex. 1858) The fact that there is nothing done by plaintiff in the prosecution of a suit in a justice's court for a period of more than four years operates as a discontinuance of the suit.—Flanagan v. Smith, 21 Tex. 493.

§ 193. Continuances or adjournments as ousting jurisdiction.

[a] (Ark. 1887) Under Mansf. Dig. § 4064, which provides that when a justice of the peace shall be satisfied that a jury sworn in his cause, after being out a reasonable time, cannot agree on a verdict, he may discharge them and issue a summons for another, to appear at a time not more than three days distant, the justice does not lose jurisdiction over the subject-matter by a continuance and summons for a new jury to appear at a time four days distant.—Wheeler & Wilson Mfg. Co. v. Donahoe, 49 Ark. 318, 5 S. W. 342.

[b] (Conn. 1864) To make an adjournment by a justice of the peace from day to day legal, so as to prevent a discontinuance, there must have been an actual adjournment.—Town of New Haven v. Rogers, 32 Conn. 221.

[c] (Ill. 1880) The act of a justice of the peace in continuing a case 33 days against the plaintiff's consent on request of the defendant's attorney for 30 days' continuance to take a deposition, *held* to operate as a discontinuance, and the judgment rendered to be void.—Crichton v. Beebe, 7 Ill. App. (7 Bradw.) 272.

[d] (Iowa, 1892) Where a justice, in violation of Code 1873, § 3527, adjourned a cause for more than three days, plaintiff alone consenting, he lost jurisdiction, notwithstanding that an agent of defendant was subsequently given verbal notice by plaintiff of the day to which the cause was adjourned.—Iowa Union Tel. Co. v. Boylan, 86 Iowa, 90, 52 N. W. 1122.

[e] (Iowa, 1892) An adjournment by a justice on his own motion for more than three days ousts his jurisdiction, and a default judgment entered after such adjournment is void.—Iowa Union Tel. Co. v. Boylan, 86 Iowa, 90, 52 N. W. 1122.

[f] (Mich. 1887) Under How. Ann. St. § 6003, allowing an adjournment of a cause by a justice of the peace for a period not exceeding six days, an adjournment for a longer period operates as a discontinuance of the suit.—Scullen v. George, 65 Mich. 215, 31 N. W. 841.

[g] (Mich. 1891) How. Ann. St. § 7094, provides that "on the return of the warrant with the accused the said justice shall proceed to * * * determine the cause within one week," unless the excusable absence of witnesses shall render a continuance necessary. *Held*, that a justice lost jurisdiction by adjourning for eight days an action for breach of the peace at the request of an absent attorney claiming authority to act for defendants, when the latter in open court expressly repudiated such authority, and demanded immediate trial.—Village of Vicksburg v. Briggs, 85 Mich. 502, 48 N. W. 625.

[h] (Mich. 1891) At the time a summons was returnable before a justice plaintiffs appeared by counsel, and defendant in person and by his counsel's clerk. It was then mutually agreed that the cause stand adjourned until a certain day and hour, and the parties dispersed. A few minutes thereafter, plaintiffs' attorney, finding that he would be unable to attend at the time set, by telephone obtained consent of defendant's counsel to have the cause adjourned to the day following that to which the case had already been adjourned and so informed the justice. Thereafter the justice changed the minutes of the adjournment to the latter date. Plaintiffs appeared at said time, and, defendant not appearing, trial proceeded ex parte, resulting in a judgment for plaintiffs. *Held*, that the justice did not lose jurisdiction by reason of the irregularity of the adjournment.—Simon v. Sempliner, 86 Mich. 136, 48 N. W. 700.

[i] (Minn. 1861) An adjournment in a justice's court on an insufficient affidavit amounts to a discontinuance.—School Dist. No. 7 of Wright County v. Thompson, 5 Minn. 280 (Gil. 221).

[j] (Minn. 1881) Where plaintiff, in an action in a justice's court, appears and files his complaint on the return day, but defendant does not appear, the justice does not lose jurisdiction by holding the case open until the second day thereafter to enable plaintiff to make his proofs.—Gillett v. Truax, 27 Minn. 528, 8 N. W. 767.

[k] (N. J. 1793) On the return day of a summons both parties appeared, and plaintiff craved a jury. A venire was granted by the justice, returnable on December 8th. On the return day the justice was taken sick, and no adjournment was made. Two days afterwards plaintiff craved another venire, which was issued, returnable on the 24th, and notice of trial was regularly served on defendant. *Held*, that the failure to enter a regular continuance of the cause did not operate as a discontinuance of the suit, where everything was done fairly and with notice.—Darlings v. Corey, 1 N. J. Law (Coxe) 200.

[l] (N. J. 1886) On the affidavit used in procuring an adjournment a second adjournment was granted plaintiff to a time more than 30 days from the first appearance. The second adjourned day plaintiff did not appear; but defendant appeared and moved to dismiss, which was denied, and a further adjournment granted. Defendant did not appear on the last adjourned day, and judgment was rendered against him. *Held*, that it was without jurisdiction and void.—Savage v. Collins, 49 N. J. Law (20 Vroom) 167, 6 Atl. 502.

[m] (N. Y.) An adjournment, improperly made by a justice of the peace, amounts to a discontinuance.—(1807) Gamage v. Law, 2 Johns. 192; (1833) Kimball v. Mack, 10 Wend. 497.

[n] (N. Y. 1811) Where a justice adjourns a cause, on the suggestion of the plaintiff that the defendant had agreed to an adjournment, and on the affidavit of the plaintiff of the absence of a material witness, without showing due diligence to procure his attendance, the adjournment is unauthorized, and amounts to a discontinuance.—Proudfit v. Henman, 8 Johns. 391.

[o] (N. Y. 1849) A justice of the peace will not lose jurisdiction of a cause by erroneously adjourning it contrary to the agreement of the parties.—Hard v. Shipman, 6 Barb. 621.

[p] (N. Y. 1860) By an adjournment in excess of the power of a justice of the peace, he loses jurisdiction of the case.—Peck v. Andrews, 32 Barb. 445.

[q] (N. Y. 1870) If the defendant does not appear in a justice's court, an adjournment for more than eight days, either on motion of the justice or at plaintiff's request, is irregular, and the justice loses jurisdiction.—Miller v. Larmon, 38 How. Prac. 417.

[r] (N. Y. 1885) On summary proceedings for the possession of real estate before a justice of the peace, where defendant moved to dismiss

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the proceedings, and the justice, after hearing the testimony relative thereto, adjourned the proceedings for the purpose of a decision thereon, the adjournment was unauthorized, and operated as a discontinuance of the proceedings.—Kiernan v. Reming, 2 How. Prac. (N. S.) 89, 7 Civ. Proc. R. 311.

[s] (N. Y. 1887) An adjournment of a summary proceeding to dissolve an injunction pending in a justice court does not operate as a discontinuance of the proceedings and render further proceedings therein void.—Goff v. Vedder, 12 Civ. Proc. R. 358.

[t] (N. Y. 1887) Code Civ. Proc. §§ 2960, 2983, authorizing an adjournment of an action on plaintiff's motion, on the return day, for not more than eight days, and a further adjournment when he desires a commission to take testimony, constitute the only authority for granting a continuance on plaintiff's motion, and an adjournment for a longer time, or under different circumstances, deprives the justice of jurisdiction.—Redford v. Snow, 46 Hun, 370.

[u] (N. Y. 1889) Code Civ. Proc. § 2959, provides that at the time of the return of a summons, or the joinder of issue without process, but at no other time, a justice may adjourn the trial of an action not more than eight days, unless defendant has been arrested; and section 2960 provides that at such time the justice must, on plaintiff's application, adjourn the trial not more than eight days, but not unless on plaintiff's oath, if required by defendant, that it cannot be safely proceeded with for want of some material testimony. On the return day of a summons, which had been personally served on defendant, the court on its own motion adjourned the trial five days for defendant's failure to appear. On the adjourned day, defendant again failing to appear, and plaintiff's attorney having produced satisfactory evidence of plaintiff's illness, the trial was again adjourned for five days, at the expiration of which judgment was rendered for plaintiff on defendant's failure to appear. *Held*, that the adjournments were regular and the justice did not lose jurisdiction.—Rogers v. Edmonds, 55 Hun, 604, 7 N. Y. Supp. 881.

[v] (N. Y. 1891) A verbal agreement was made between counsel that a cause in a justice's court should be adjourned to a day thereafter, to be agreed on by them, and, in default of such agreement, that the court might appoint a day for the trial. Plaintiff's counsel notified the justice of a day agreed on, and the justice notified defendants' counsel, who telegraphed to his clients, but could get no reply. Judgment was taken against defendants by default on the day so fixed. *Held*, that the verbal agreement between counsel was too loose to keep the cause in court, and that the judgment against defendants should be reversed for want of jurisdiction.—Bonney v. Paul, 61 Hun, 620, 15 N. Y. Supp. 442.

[w] (Vt. 1869) Where a summons from a justice's court was returnable at a hotel owned by plaintiff, and on the return day plaintiff, claiming that the suit had been settled, prohibited the justice from holding court in his hotel, and the justice adjourned the trial to another convenient day and place, such adjournment, the plaintiff being duly notified, did not operate as a discontinuance, ousting the justice of jurisdiction.—Remick v. Sanborn, 42 Vt. 477.

[ww] (Vt. 1874) If a justice of the peace continue a cause returnable before him without the knowledge or consent of the defendant, and without attending with the writ at the time and place of trial, it operates as a discontinuance of the suit.—Pinney v. Petty, 47 Vt. 616.

[x] (Wash. 1888) Where the petition for certiorari to a justice's judgment shows that the cause was continued to a certain day, which was Sunday, and afterwards proceeded without a new notice to, or personal appearance of, defendant, it is error to dismiss the application for insufficiency, as the justice thereby lost jurisdiction over the person of defendant, which could not be regained without a new notice, or waiver by appearance.—Taylor v. Ringer, 3 Wash. T. 539, 19 Pac. 147.

[xx] (Wash. 1890) Under Code, § 1769, which provides that a justice of the peace may, on the application of either party, continue a case for any time not exceeding 60 days, a continuance of a case for more than 60 days will devest the justice of jurisdiction unless it was by consent of both parties.—Nelson v. Campbell, 1 Wash. St. 261, 24 Pac. 539.

[y] (Wis. 1861) An adjournment by a justice of a suit before him for more than 90 days, works a discontinuance of the action.—Mahr v. Young, 13 Wis. 634.

[yy] (Wis. 1871) If a justice of the peace grants a second adjournment on plaintiff's motion, without defendant's consent and without the oath required by Rev. St. c. 120, § 62, he loses jurisdiction.—Baizer v. Lasch, 28 Wis. 268.

[z] (Wis. 1888) Rev. St. § 3631, provides that in justices' courts no adjournment, after the first, shall be allowed unless the party applying shall show by oath that he cannot safely proceed to trial. There having already been two adjournments for cause shown, the case was again adjourned, on motion of plaintiff, and cause shown, against the objections of defendant, after the jury was sworn. On the adjourned day plaintiff appeared; but defendant, though in court, refused to appear. On motion of plaintiff but without affidavit or cause shown, the case was again adjourned. On the day to which the case was adjourned, defendant did not appear, and judgment was rendered against him. *Held*, that the adjournment was unauthorized by law, depriving the justice of jurisdiction, and the judgment should be reversed.—State v. Gust, 70 Wis. 631, 35 N. W. 559.

[zz] (Wis. 1896) Rev. St. § 3631, provides that no adjournment after the first shall be allowed on application of a party, unless he satisfy the justice, by oath, that he cannot safely proceed to trial; and section 3586 provides that if a justice of the peace be unable, from sickness, to attend to business when there is pending before him any matter undetermined, he may deliver his docket to some other justice, who may thereupon proceed to try and determine such matter. *Held*, that a justice lost jurisdiction by a second adjournment, "by consent of plaintiff, and in consequence of sickness of the court," in the absence of defendant.—Gallager v. Serfling, 92 Wis. 544, 66 N. W. 692.

§ 194. —— Adjournment at unauthorized time.

[a] (Mich. 1861) The adjournment of a cause by a justice on his own motion, in the absence and without the consent of the defendant, at any other time than on the return day of the writ, is a discontinuance of the cause, ousting him of jurisdiction.—Stadler v. Moors, 9 Mich. 264.

[b] (N. J. 1880) By adjournment before the day appointed for trial, in the absence of parties and without their consent, the justice loses jurisdiction.—Dittmar Powder Mfg. Co. v. Leon, 42 N. J. Law (13 Vroom) 540.

[c] (N. Y. 1891) Upon the return of a summons in a justice's court, plaintiff, without

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pleading, obtained an adjournment of two days, defendants objecting, to procure counsel, and thereafter, upon the adjourned day, recovered a judgment against defendants. *Held*, that Code Civ. Proc. § 2959, providing that "at the time of the return of a summons or of joinder of issue without process, but at no other time, the justice may, in his discretion, and upon his own motion, adjourn the trial of the action," etc., applied only to proceedings after issue joined, and that, under section 2934, providing that, "where both parties appear upon the return of the summons, an issue must be joined before an adjournment is had, except when the defendant neglects or refuses to plead," the justice, by the unauthorized adjournment, lost jurisdiction of the case.—Duel v. Sykes, 59 Hun, 117, 13 N. Y. Supp. 166.

§ 195. —— Adjournments for indefinite periods.

[a] (Neb. 1891) A justice of the peace who continues an action, according to the stipulation of the parties, until the determination of a similar action in the district court, loses jurisdiction, because the adjournment is for an indefinite period.—Lininger v. Glenn, 33 Neb. 187, 49 N. W. 1128.

[b] (N. J. 1854) Where a cause in a justice's court is adjourned without fixing a day, but to such day as counsel shall agree upon, and the defendant's counsel refuses to agree to a day, the cause is out of court, and the justice cannot fix a day and give notice thereof to the defendant.—Woodworth v. Wolverton, 24 N. J. Law (4 Zab.) 419.

[c] (Wis. 1866) Where a justice of the peace adjourns a cause, without specifying the hour of the day or the place to which it is adjourned, he loses jurisdiction, and the judgment is void.—Crandall v. Bacon, 20 Wis. 639, 91 Am. Dec. 451.

§ 196. —— Insufficient entries of adjournment on docket.

[a] (Mich. 1896) The suspension of the trial of a case by a justice from noon until 10 o'clock the following morning is not an "adjournment," such as is provided for by 2 How. Ann. St. §§ 6899–6903, and which is required by section 7053 to be entered on the docket, with a statement of the time and place, and the justice does not by such action lose jurisdiction, though the place is not shown by the docket entry.—Woempener v. Ketchum, 110 Mich. 34, 67 N. W. 1106.

[b] (Minn. 1896) Where defendant did not appear, and the cause was adjourned for three days, but the justice omitted to state in his docket on whose motion adjournment was had, the justice did not lose jurisdiction.—Wheeler v. Paterson, 64 Minn. 231, 66 N. W. 964, 58 Am. St. Rep. 527.

[c] (Wis. 1863) Unless the hour of the day and also the place to which a cause is adjourned by a justice of the peace is entered upon his docket at the time of the adjournment, he loses jurisdiction of the cause.—Brown v. Kellogg, 17 Wis. 475.

[d] (Wis. 1864) After a cause was submitted by both parties, the justice took time to consider, and made an entry on his docket that the cause was "continued" to a specified day and hour (being within the time limited by Rev. St. c. 120, § 96), but without mentioning any place. *Held*, that the omission did not operate as a discontinuance of the cause.—Wheeler v. Smith, 18 Wis. 651.

[e] (Wis. 1867) A justice does not lose jurisdiction of a cause by the clerical mistake of writing the letter "p." instead of "m.," in a docket entry of an adjournment to another certain day, "at 10 o'clock, a. p." The entire omission of "a. p." or "a. m." would not make the designation of the time fatally defective for uncertainty.—Taylor v. Wilkinson, 22 Wis. 40.

[f] (Wis. 1878) Unless the docket entry of a justice of the peace shows the place, day, and hour to which a cause is adjourned, he loses jurisdiction, notwithstanding a return that he stated the place, etc., orally.—Brahmstead v. Ward, 44 Wis. 591.

[g] (Wis. 1883) The failure of a justice of the peace to enter in his docket the place, as well as the time, to which a cause pending before him is adjourned, defeats his jurisdiction, unless the parties voluntarily appear in the action subsequently, and renders all subsequent proceedings therein void.—Witt v. Henze, 58 Wis. 244, 16 N. W. 609.

[h] (Wis. 1890) A recess taken by a justice's court at 2 o'clock p. m. until 10 o'clock a. m. of the following day, on account of the illness of the justice, is not an "adjournment," within Rev. St. § 3574, subd. 5, which requires the justice to enter in his docket "every adjournment, stating at whose request, and to what time and place"; and hence the justice does not lose jurisdiction by his failure to enter in his docket the place to which the recess was taken.—French v. Higgins, 77 Wis. 121, 45 N. W. 817.

§ 197. —— Persons entitled to raise objection.

[a] (Mich. 1874) A defendant, who consented to an adjournment of a case against him in a justice court on account of the illness of the justice, cannot complain that such adjournment was made on the motion of the justice, and was for more than six days, and hence amounted to a discontinuance, which deprived the justice of jurisdiction.—Patterson v. McRea, 29 Mich. 258.

[b] (Neb. 1893) On application of defendant, and with the consent of plaintiff, a justice of the peace adjourned a suit for more than 90 days from the return day of the summons. On the day to which the cause stood adjourned, defendant objected to the jurisdiction of the justice on the ground that the action had been continued beyond the 90 days limited by Code Civ. Proc. § 961, which objection was overruled. *Held*, that such adjournment did not operate as a discontinuance of the action, and that defendant was estopped from claiming the same.—Fischer v. Cooley, 36 Neb. 626, 54 N. W. 960.

§ 198. Restoration of jurisdiction.

Appearance by attorney without proof of authority as restoring jurisdiction, see post, § 278 [q].

[a] (Mass. 1835) Where, in trespass before a justice of the peace, the filing of a plea of title to real estate has ousted his jurisdiction, it cannot be restored by pleading over and joining an issue not involving the question of title.—Kelley v. Taylor, 34 Mass. (17 Pick.) 218.

[b] (Wis. 1863) Where a justice of the peace adjourned a case without entering the hour of the day and the place to which it was adjourned on his docket, and thereby lost jurisdiction, a subsequent entry did not operate to supply the defect or restore jurisdiction.—Brown v. Kellogg, 17 Wis. 475.

(J) DISQUALIFICATION TO ACT.

IN GENERAL, § 199.
RELATIONSHIP, § 200.
COUNSEL OR AGENT FOR PARTIES, § 201.
INTEREST AS CITIZEN OR TAXPAYER, § 202.
TAVERN KEEPERS, § 203.

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Disqualification as ground for plea in abatement on appeal, see post, § 663.
—— *as witness, see* post, § 347.
Liability on acting when disqualified, see ante, § 37.
Validity of proceedings before disqualified justice, see post, § 224 [1].
Waiver by appearance, see post, § 270.
—— *of disqualification, see* post, §§ 221, 601.
Disqualification to try slave accused of capital offense, see "Slaves."

§ 199. In general.

[a] (U. S. 1809) A magistrate, who has received a deed of trust from an insolvent debtor which is fraudulent in law as to creditors, is incompetent to act as a magistrate in the discharge of the debtor under the insolvent law of Virginia.—Slacum v. Simms, 9 U. S. (5 Cranch) 363, 3 L. Ed. 126.

[b] (U. S. 1805) The mayor of Washington, D. C., cannot exercise jurisdiction in a case in which he is a party.—Barney v. City of Washington, Fed. Cas. No. 1,033 [1 Cranch, C. C. 248].

[c] (Ala. 1895) The disqualifications declared by Code, § 647, providing that no justice "must sit in any cause or proceeding in which he is * * * related to either party within the fourth degree of consanguinity or affinity," are not exclusive of the disqualifications of the common law.—Pegues v. Baker, 110 Ala. 251, 17 South. 943.

[d] (La. 1883) A justice of the peace is not recusable in a case contesting the validity of an ordinance passed by a town council while he was a member thereof.—City of Alexandria v. Williams, 35 La. Ann. 329.

[e] (Me. 1844) The mere fact that a justice of the peace and of the quorum has issued a citation to the creditor does not disqualify him from acting in the same case in the examination of the debtor.—Ayer v. Woodman, 24 Me. (11 Shep.) 196.

[f] (Me. 1882) The fact that one of the justices hearing the disclosure of a poor debtor was a creditor of the debtor does not disqualify him from acting.—Fuller v. Davis, 73 Me. 556.

[g] (Mass.) Any interest of a justice of the peace in a penalty, though minute, takes away his jurisdiction; the only exception being where there is a necessity for the justice to act in order to prevent a failure of justice.—(1816) Pearce v. Atwood, 13 Mass. 324; (1828) Hill v. Wells, 23 Mass. (6 Pick.) 104.

[h] (Mass. 1850) A justice of the peace cannot take jurisdiction of an action, if he has an interest in the suit and has instigated the prosecution of the same.—Richardson v. Welcome, 60 Mass. (6 Cush.) 331.

[i] (Mich. 1890) A plea based on How. Ann. St. § 6822, providing that no justice shall take cognizance of any cause or do any judicial act when he shall be interested in such cause, is sufficient when it shows that the justice was an interested party when the plea was filed, though he may have had no interest when the warrant issued.—Clark v. Mikesell, 81 Mich. 45, 45 N. W. 377; Howes v. Same, 81 Mich. 51, 45 N. W. 378.

[j] (Minn. 1875) Under Gen. St. c. 64, § 4, and c. 65, § 4, providing that a justice of the peace shall not sit in a case in which he is directly or indirectly interested, a justice of the peace cannot issue a search warrant for his own property; and, where the fact that he has done so appears on the face of the warrant itself, it will be no protection to the officer acting under it.—Jordan v. Henry, 22 Minn. 245.

[k] (N. H. 1844) Where A., B., and C. are co-sureties, and A. pays his share to reimburse the advances of B., and is discharged by B. from further claim, he has no such interest in the event of a suit brought by B. to recover a similar contributory payment from C. as to prevent his presiding at the same as a magistrate.—Russell v. Perry, 16 N. H. 100.

[l] (N. J. 1864) Under the game law (Nix. Dig. p. 334) a justice of the peace, who is the owner of the land trespassed on, cannot act as justice in a proceeding to recover the penalty therefor.—Schroder v. Ehlers, 31 N. J. Law (2 Vroom) 44.

[m] (N. Y. 1854) The statute, which declares that no judge of any court shall sit as such in any cause to which he is a party, extends to justices of the peace sitting in the court of sessions.—Baldwin v. McArthur, 17 Barb. 414.

[n] (N. Y. 1865) A justice of the peace is not disqualified from trying a cause and rendering judgment therein by reason of his having been a juror in an action between the same parties and for the same cause of action, wherein a verdict was rendered for the plaintiff.—Travis v. Jenkins, 30 How. Prac. 152.

[o] (Pa. 1888) A justice of the peace is not disqualified from trying a suit to recover a penalty for the violation of a municipal ordinance because he is also the town clerk under a salary.—Commonwealth v. Fenstermacher, 5 Pa. Co. Ct. R. 424.

[p] (R. I. 1886) In an action of trover for the conversion of a uniform belonging to plaintiff, a military company, a justice, who is a member of the company, is interested, and cannot take jurisdiction, though the interest is only for the time of membership.—Kentish Artillery v. Gardiner, 15 R. I. 296, 3 Atl. 662.

[q] (Tex. 1893) A justice of the peace is disqualified from rendering judgment, in garnishment proceedings by the fact that, before his appointment to the office, he had become a surety for plaintiff on the garnishment bond.—Franco-Texan Land Co. v. Howe, 3 Tex. Civ. App. 315, 22 S. W. 766.

[r] (Tex. 1893) A land agent who is in partnership with an attorney under an agreement to pool their earnings, and divide them equally, is disqualified from acting as justice of the peace in an action wherein his partner is attorney for one of the parties.—Franco-Texan Land Co. v. Howe, 3 Tex. Civ. App. 315, 22 S. W. 766.

[s] (Vt. 1836) Under the statute of 1832, by which any justice of the peace who could legally try a cause between the parties may continue it till the justice before whom the process is returnable shall be able to attend, when such justice is unable, by reason of sickness or other cause, to attend at the time originally appointed for the trial, a justice who is interested as bail for the prosecution cannot continue the cause.—Howe v. Hosford, 8 Vt. 220.

[t] (Vt. 1837) A justice of the peace, interested in the event of the suit, may nevertheless sign a writ returnable to the county court.—Graham v. Todd, 9 Vt. 166.

[u] (Vt. 1863) A justice of the peace is not legally disqualified to take jurisdiction of and try a case, for the reason that he had previously, as one of a board of arbitrators between the same parties and in reference to the subject-matter of the suit, upon a hearing of such matter as such arbitrator, formed an opinion and expressed the same to his associate arbitrator.—Batchelder v. Nourse, 35 Vt. 642.

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[v] (Wis. 1863) Where the justice knows the fact of his disqualification he should act on his own knowledge, and transmit the case to some other justice in the county; but, if he should not know the fact until after issue is joined, he should decline to proceed with the case whenever he ascertains it, and remove the case according to the statute.—Hibbard v. Odell, 16 Wis. 633.

§ 200. Relationship.

Validity of proceeding before justice disqualified by relationship, see post, § 224 [i].
Waiver of disqualification, see post, § 221.

[a] (Ala. 1895) A justice of the peace who married a first cousin of defendant is incompetent to try the cause, when there are children of the marriage surviving, though the wife be dead.—Pegues v. Baker, 110 Ala. 251, 17 South. 943.

[b] (Ga. 1889) A justice of the peace is not disqualified from presiding in a case where one of the parties married a cousin of the justice's wife; the party and the justice not being otherwise related.—Blalock v. Waldrup, 84 Ga. 145, 10 S. E. 622, 20 Am. St. Rep. 350.

[c] (Ind. 1849) A judgment confessed before a justice of the peace is not void because confessed in favor of a brother of the justice.—Eastwood v. Buel, 1 Ind. (1 Cart.) 434, 1 Smith, 376.

[d] (Ind. 1852) A justice of the peace has no jurisdiction of a cause where his brother-in-law is the plaintiff.—Dawson v. Wells, 3 Ind. 398.

[e] (Ind. 1862) Under the statutes a justice who was fifth cousin to one of the parties was *held* not to be disqualified thereby.—Brady v. Richardson, 18 Ind. 1.

[f] (Ind. 1877) Relationship by affinity ceases with the dissolution of the marriage creating it, except so far as the children of such marriage are concerned; and therefore the fact that a deceased former wife of a party to an action pending before a justice of the peace is the aunt of the wife of such justice does not deprive the latter of jurisdiction, whether there be issue of such marriage or not.—Trout v. Drawhorn, 57 Ind. 570.

[g] (Me. 1849) A justice of the peace who has married a sister of one of the plaintiffs is disqualified from taking jurisdiction of the case, except by the express consent of the parties interested; and this whether his wife be living at the time of the suit or not, and whether the plaintiff sue for his own or for another's benefit.—Spear v. Robinson, 29 Me. (16 Shep.) 531.

[h] (N. H. 1837) An application was made to magistrates by an individual to take the poor debtor's oath, and one of the magistrates selected by him was an uncle of the debtor, which fact was unknown to the creditor or his attorney, so that the exception could not be taken at the hearing. *Held*, that the discharge was invalid.—Gear v. Smith, 9 N. H. 63.

[i] (N. H. 1841) The fact that one of the magistrates selected to administer a poor debtor's oath is a brother of the poor debtor will not disqualify him to act.—Allen v. Bruce, 12 N. H. 418.

[j] (N. J. 1875) If one of the justices making the order of affiliation in proceedings under the New Jersey bastardy act is a cousin of the mother of the bastard, the proceedings will, on certiorari, be quashed, as the relationship disqualifies him from acting therein.—Stoll v. Garliss, 38 N. J. Law (9 Vroom) 200.

[k] (N. Y. 1821) Where a justice of the peace before whom a suit was brought was the son-in-law of the plaintiff, and persisted in trying the cause, notwithstanding the objection made by the plaintiff, it was *held* that these facts were of themselves evidence that the trial was not impartial, and that there was sufficient ground for reversing the judgment; the damage being excessive.—Bellows v. Pearson, 19 Johns. 172.

[l] (N. Y. 1839) A justice of the peace cannot issue process, or proceed in any suit in which he is related by consanguinity or affinity to either of the parties.—Edwards v. Russell, 21 Wend. 63.

[m] (N. Y. 1841) A justice cannot sit in a cause in which the real party in interest, though not the nominal party, has married the sister of the wife of the justice.—Foot v. Morgan, 1 Hill, 654.

[n] (N. Y. 1845) Where it appeared that the plaintiff's brother had married the widow of the brother of the justice before whom a cause was to be tried, and that she was dead, and that there was no issue of such marriage, the justice was not disqualified by such affinity.—Carman v. Newell, 1 Denio, 25.

[o] (N. Y. 1845) Where a brother of the justice was the husband of the plaintiff's sister, the justice was not thereby disqualified from taking jurisdiction of the case.—Higbe v. Leonard, 1 Denio, 186.

[p] (N. Y. 1847) A justice of the peace cannot act as such on the trial of a cause, where one of the parties is his second cousin.—Post v. Black, 5 Denio, 66.

[q] (N. Y. 1857) Under 2 Rev. St. (2d Ed.) p. 204, § 2, providing that no judge of any court can sit as such in any case in which he would be excluded from being a juror by reason of consanguinity to a party in interest, a relation to a stockholder of a corporation cannot sit as justice of the peace in an action against the corporation.—Place v. Butternuts Woolen & Cotton Mfg. Co., 28 Barb. 503.

[r] (N. Y. 1871) An overseer of the poor commenced bastardy proceedings before a justice of the peace, who was his son-in-law, and whose wife was still living, and this justice associated another with himself, and after the usual proceedings the justices made an order of filiation, and for the neglect of the party charged to comply with the same committed him to jail. *Held*, that the overseer was a party to the proceedings in such case, and that the proceedings were void.—Rivenburgh v. Henness, 4 Lans. 208.

[s] (Pa. 1829) Where the justice of the peace before whom an action is brought is the brother of the plaintiff, he is disqualified from acting in the case.—McGee v. Jackson, 2 Pa. Co. Ct. R. 136.

[t] (Pa. 1829) A justice of the peace has no jurisdiction to issue process at the instance of his own relatives or to decide their suits.—McGee v. Jackson, 5 Haz. Reg. 27.

[u] (Pa. 1886) Where the justice of the peace before whom an action is brought is the father-in-law of the plaintiff, and the facts indicate a bias on his part in favor of plaintiff, his judgment will be set aside.—Watterson v. Ramsey, 2 Pa. Co. Ct. R. 137.

[v] (Pa. 1887) Where a justice of the peace before whom an action is brought is a son of the plaintiff, he is disqualified from proceeding in the case.—Singer v. Singer Mfg. Co., 2 Pa. Co. Ct. R. 578.

[w] (Pa. 1887) Where a justice of the peace before whom an action is brought is the son-in-law of one plaintiff and a brother-in-law of an-

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other, he is disqualified from proceeding in the case.—Spidle v. Robinson, 2 Pa. Co. Ct. R. 642.

[x] (Vt. 1831) Rendering judgment on voluntary confession of a debtor is "taking cognizance of a cause" within the act, and cannot be done by a justice of the peace related to one of the parties.—Hill v. Wait, 5 Vt. 124.

[y] (Vt. 1834) In a suit by a corporation, a justice's jurisdiction is not ousted by his being a relation to one of the corporators and stockholders.—Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315.

[yy] (Wis. 1851) Quære, are brothers-in-law "near of kin" within Rev. St. c. 88, § 47, so as to exclude a justice from trying a cause in which his brother-in-law is a party?—Rector v. Drury, 4 Chand. 24, 3 Pin. 298.

[z] (Wis. 1863) The word "kin," in its strictest sense, includes only relations by blood. In its general sense, as used in Rev. St. c. 120, § 48, it includes both relations by blood and marriage, and a justice of the peace is disqualified from trying a cause to which his son-in-law is a party.—Hibbard v. Odell, 16 Wis. 633.

[zz] (Wis. 1884) A justice of the peace is "near of kin" to his son-in-law, within Rev. St. § 3617, providing that where the justice is near of kin to one of the parties he shall transmit the action to some other justice, and has, therefore, no jurisdiction to render judgment in such an action.—Elderkin v. Wiswell, 61 Wis. 498, 21 N. W. 541.

§ 201. Counsel or agent for parties.

[a] (Conn. 1891) Gen. St. § 3392, provides that no person shall be committed to prison without a mittimus, signed by a proper magistrate; and sections 672, 675, provide that no justice of the peace shall "act" in any cause where he is attorney, or where he may receive a direct pecuniary benefit, or be liable for costs. *Held*, that the word "act" referred, not alone to judicial action in the trial of a cause, but to every act not purely ministerial, and that a justice was disqualified to sign a mittimus in an action at law in which he was attorney for plaintiff, or in which he was attorney and bondsman, in that it was requisite for him first to find the cause of commitment.—Yudkin v. Gates, 60 Conn. 426, 22 Atl. 776.

[b] (Ind. 1887) An answer to a motion under Rev. St. § 4030, to enforce in the circuit court a justice's judgment against a railroad for injury to stock, alleging that the judgment was rendered by a justice who, while hearing the case, was acting as plaintiff's counsel therein, sets up a valid defense.—Chicago & A. Ry. Co. v. Summers, 113 Ind. 10, 14 N. E. 733, 3 Am. St. Rep. 616.

[c] (Ind. 1893) The fact that the justice of the peace before whom an action is tried was plaintiff's agent for the collection of claims, including the claim in suit, under an agreement by which he was to receive a commission on all claims collected without suit, and that he tried to collect this claim, and, not being able to do so, issued process thereon just as if it had been left with him for suit, does not necessarily disqualify him to try the case, so as to render his judgment void, but objection to his qualification may be waived by failure to object before judgment.—Baldwin v. Runyon, 8 Ind. App. 344, 35 N. E. 509.

[d] (Kan. 1890) A justice of the peace who receives for collection a number of notes upon an agreement that if suits are brought on the notes he is not to receive his costs, "unless he can make them out of defendants," is an interested party, and is disqualified to sit as justice in such actions.—Limerick v. Murlatt, 43 Kan. 318, 23 Pac. 567.

[e] (Me. 1863) A justice selected by a poor debtor to hear his disclosure, if he is not related by consanguinity or affinity, and has no pecuniary interest in the result, may be considered "disinterested"; and his official act will not be rendered void because he had counseled and aided the debtor in preparing for his disclosure, although this should have deterred him from acting as one of the justices.—Lovering v. Lamson, 50 Me. 334.

[f] (Mass. 1869) The fact that a magistrate drew and attested the lease and notice to quit *held* not to disqualify him to try an action under Gen. St. c. 137, for possession of the leased premises.—Cook v. Berth, 102 Mass. 372.

[g] (Mich. 1882) Suit on a promissory note cannot be brought before a justice of the peace to whom it has been indorsed for collection, as he thereby becomes plaintiff's agent therefor.—Wheeler v. West, 49 Mich. 505, 13 N. W. 836.

[h] (Mich. 1884) The fact that a claim was sent to a justice for collection does not disqualify him to try a suit subsequently instituted thereon.—Moon v. Stevens, 53 Mich. 144, 18 N. W. 600.

[i] (N. H. 1824) A justice of the peace who makes out a summons to bring before him a party against whom an information has been filed for neglect of military duty does not thereby become of counsel in the case, so as to be disqualified to try it.—Wood v. Fletcher, 3 N. H. 61.

[j] (N. Y. 1861) Where the justice who rendered the judgment had been counsel for the plaintiff in a suit before another justice for the same matters declared for before himself, but on application refused to dismiss the action, *held*, that the judgment should be reversed.—Carrington v. Andrews, 12 Abb. Prac. 348.

[k] (N. Y. 1861) The provision of Laws 1847, p. 319, c. 280, § 81, that "no judge of any court shall have a voice in the decision of any cause in which he has been counsel, attorney, or solicitor, or in the subject-matter of which he is interested," applies to justices of the peace.—Carrington v. Andrews, 12 Abb. Prac. 348.

[l] (N. Y. 1889) Where a justice of the peace, who was also an attorney at law, two days after a summons issued by him, accepted a retainer from the plaintiff to bring another suit for him in the supreme court, the judgment entered by the justice for the plaintiff in the original suit should be set aside, though there probably was no corrupt intent in accepting the retainer.—Hubbell v. Harbeck, 54 Hun, 147, 7 N. Y. Supp. 243.

[m] (N. Y. 1891) The affidavit of defendant that a few days before the action was commenced she received a letter signed by C., the justice who issued the summons against her, and who was also a practicing lawyer, stating that plaintiff had left with him an account of $50 against defendant for collection, and unless it was settled plaintiff would feel obliged to bring an action to enforce its collection, does not show that the account was left with him as an attorney, and does not disqualify him to try the suit.—McLouth v. Myers, 61 Hun, 624, 16 N. Y. Supp. 779.

[n] (Vt. 1847) The attorney who makes the writ cannot sign it as justice of the peace and take a recognizance for costs.—Ingraham v. Leland, 19 Vt. 304.

[o] (Vt. 1847) Deciding whether a proper officer can seasonably be had to serve process, and giving authority to some person, not a public officer, to serve it, if the fact be found neg-

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atively, is a judicial act, and cannot be done by a justice who is an attorney in the suit.—Ingraham v. Leland, 19 Vt. 304.

§ 202. Interest as citizen or taxpayer.

[a] A justice of the peace may take jurisdiction of an action for a penalty, though part of the avails go into the treasury of the town where he resides.

—(Colo 1871) Deitz v. City of Central, 1 Colo. 323;

(Me. 1888) State v. Craig, 80 Me. 85, 13 Atl. 129;

(N. Y. 1814) Corwein v. Hames, 11 Johns. 76.

CONTRA, see

(Vt. 1838) Waters v. Day, 10 Vt. 487.

[b] (Conn. 1804) A justice of the peace, inhabitant of the town interested, may, on complaint of the selectmen founded on the statute of bastardy, recognize the defendant to appear at the county court.—Davis v. Salisbury, 1 Day, 278.

[c] (Conn. 1817) In an action by the selectmen of a town, on the statute "to prevent encroachments on highways," it was *held* that the town was not interested in the event of such a suit, and that, consequently, a judgment in such action by a justice of the peace of the town was not erroneous.—Tomlinson v Leavenworth, 2 Conn. 202.

[d] (Ill. 1870) Gross' Comp. p. 777, art. 17, § 10, provides that all penalties under this act, not exceeding $100, may be sued for before any justice of the peace of the proper county. Article 12, § 6, of the same act provides that no action in favor of a town shall be brought before any of the justices of the peace residing in the town for the benefit of which the same is prosecuted. *Held* to limit the jurisdiction of suits by towns to recover penalties for obstructing highways to justices of the peace not residing in the plaintiff town.—Town of Chatham v. Mason, 53 Ill. 411.

[e] (Me. 1881) Upon a poor debtor's disclosure on an execution in favor of the inhabitants of a town, a justice who is one of such inhabitants is not disinterested, as required by Rev. St. c. 113, § 28.—Norridgewock v. Sawtelle, 72 Me. 484.

[f] (Mass. 1858) A penalty for violation of a by-law of a town against obstructing its streets, though payable into the town treasury, may be recovered under Rev. St. c. 15, § 13, by complaint before any justice of the town, notwithstanding St. 1847, c. 166.—Hall v. Kent, 77 Mass. (11 Gray) 467.

[g] (Mass. 1861) Prior to Gen. St. c. 122, § 13, a magistrate had no jurisdiction of an action made returnable before him, in which the inhabitants of the town in which he lived were summoned as trustees of the defendant; and a recognizance taken in such suit is void.—Clark v. Lamb, 84 Mass. (2 Allen) 396.

[h] (Mo. 1861) In a proceeding to widen a street, as provided in the act incorporating the city of Lexington, the fact that the mayor is the owner of a lot on the street sought to be widened does not disqualify him from the performance of the duties assigned to him as presiding judge of the mayor's court before which the proceeding is held.—City of Lexington v. Long, 31 Mo. 369.

[i] (N. Y. 1843) A suit may be brought before a justice of the peace, in the name of the overseers of the poor, to recover the penalty given by 1 Rev. St. p. 680, § 15, for selling spirituous liquors, though the justice reside in the same town.—Wood v. Rice, 6 Hill, 58.

[j] (Pa.) Justices of the peace are incompetent, on the ground of interest, to grant an order for the removal of a pauper from their own township to another.—(1842) Overseers of Washington v. Overseers of Beaver, 3 Watts & S. 548; (1843) McVeytown v. Union Tp., 5 Watts & S. 434.

[k] (Pa. 1875) The interest which excludes a justice from acting in awarding an order of removal of a pauper is personal, and creates a want of jurisdiction on his part over the matter before him.—Rose Tp. v. Clover Tp., 32 Leg. Int. 449.

[l] (Tenn. 1826) A magistrate who is a member of an incorporated town is not thereby disqualified from trying a suit in which the corporation is a party.—Town of Jonesborough v. McKee, 10 Tenn. (2 Yerg.) 167.

[m] (Vt. 1844) A plea in abatement in a bastardy case prosecuted in the interest of a town, averring that the justice before whom the primary proceedings were had was "a lawful inhabitant and citizen of said town," does not disclose any interest in the justice, as it does not import that he was liable to pay taxes in the town.—Pierce v. Butler, 16 Vt. 101.

[n] (Vt. 1873) Justices of the peace are not disqualified from making an order of removal of a pauper merely because they are rated inhabitants and taxpayers in a town which is a party to the proceedings.—Morristown v. Fairfield, 46 Vt. 33.

[o] (Vt. 1892) In an action to recover the expense of supporting a pauper chargeable to defendant, it appeared that plaintiff, defendant, and three other towns formed an association for the purpose of supporting their poor on a common farm, the several towns to bear any deficit in proportion to the number of weeks their paupers had been maintained; that for the year covering the time laid in the declaration there was a deficit which was apportioned among the towns on such basis; and that plaintiff paid the association at this rate for keeping the pauper. Defendant pleaded that the town of E. was a member of the association, and so interested in the suit, and that the justice of the peace before whom it was tried was a resident and taxpayer in E. *Held* that, as each town was to pay for the expense of its own paupers, the town of E. was not interested in the suit, and that the justice was not disqualified.—Town of Jericho v. Town of Underhill, 64 Vt. 362, 24 Atl. 251.

[p] (Wis. 1879) Tayl. St. c. 18, § 96, provides that, "in case the town treasurer is unable to collect any tax assessed upon any personal property, and payable by any person named in his tax list, he shall make and file with some justice of the peace of his county an affidavit," etc. Chapter 120, § 10, subd. 4, as amended by Laws 1871, c. 146, provides that no justice shall have cognizance of any action for or against any town in which the justice is elected. *Held*, that the provisions of the latter section, relating to the jurisdiction of justices in ordinary cases, do not apply to a special proceeding, under the provisions of section 96, for the collection of a tax on personal property.—Town of Hancock v. Merriman, 46 Wis. 159, 49 N. W. 970.

§ 203. Tavern keepers.

Holding court in tavern in general, see post, § 233 [g].

[a] (N. Y. 1804) Where a tavern is kept in the house of a justice and for his benefit, although the license is in the name of another who lived in his house, he is within 1 Rev. Laws, p. 502, § 20, prohibiting a justice of the peace who is an innkeeper, or living in a house in which an inn is kept, from trying any cause

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for selling spirituous liquors without a license.—Schermerhorn v. Tripp, 2 Caines, 108.

[b] (N. Y. 1811) Where, after suit was commenced, the justice moved into a part of a tavern house, and there tried the cause, while a tavern was kept in the other part of the house, there being free communication between the parts, it was *held* that the case was within St. 24th Sess. c. 165, prohibiting a justice residing in such house from trying any cause under that act.—Low v. Rice, 8 Johns. 409.

[c] (N. Y. 1816) A justice of the peace who in fact keeps a tavern, though he has no license for that purpose, is disqualified from trying a cause.—Clayton v. Per Dun, 13 Johns. 218.

[d] (N. Y. 1816) A justice of the peace who keeps a tavern being disqualified from trying a cause, it is immaterial whether or not suit was instituted before or after he commenced keeping the tavern.—Clayton v. Per Dun, 13 Johns. 218.

[e] (N. Y. 1845) 2 Rev. St. p. 226, § 6, provides that, if a person elected a justice of the peace shall become a tavern keeper, he shall not have any power to act as such justice. *Held*, that a statute passed to confirm the official acts of a certain justice and relieve him from liabilities and forfeitures, though it stated that he became a tavern keeper on a particular day, was not evidence of that fact, so as to deprive him of jurisdiction to try a case after such date.—Parmelee v. Thompson, 7 Hill, 77.

[f] (N. Y. 1845) A justice of the peace is not deprived of his jurisdiction by being a tavern keeper, provided he was such at the time of his election; aliter, of a justice who became a tavern keeper after his election.—Parmelee v. Thompson, 7 Hill, 77.

[g] (N. Y. 1849) The statute respecting the jurisdiction of justices of the peace who shall become innkeepers does not make the election of an innkeeper to that office void, nor does it affect his jurisdiction under other statutes. He is suspended, on becoming an innkeeper, merely as to the powers and duties conferred by the statute which suspends him.—Rice v. Milks, 7 Barb. 337.

(K) POWERS AFTER EXPIRATION OF TERM AND OVER PROCEEDINGS BEFORE OTHER JUSTICES.

POWERS AFTER EXPIRATION OF TERM, § 204.
POWERS OF SUCCESSOR OVER PROCEEDINGS BEFORE FORMER JUSTICE, § 205.
POWERS OF OTHER JUSTICES OVER PROCEEDINGS WITHIN JURISDICTION OF JUDGE OR JUSTICE WHO HAS RESIGNED OR IS DISQUALIFED, ABSENT FROM COURT, OR DISABLED, § 206.

§ 204. Powers after expiration of term.

[a] (Ark. 1885) The fact that the term of the justice has ended before the commencement of the term of the circuit court at which the statute directs him to file a transcript of fines and forfeitures does not excuse him for not doing so.—Knox v. State, 45 Ark. 500.

[b] (Conn. 1859) Under Rev. St. tit. 1, § 139, which authorizes a justice of the peace, after the expiration of his term of office, to perfect his records, a justice whose term has expired, and who has removed from the state, may perfect his records in another state.—Hawley v. Middlebrook, 28 Conn. 527.

[c] (Kan. 1877) A justice received an appeal bond just before he removed from the township, whereby he vacated his office; and just afterwards, and within the proper time, he indorsed his approval, dating it back to the time when he received the bond. *Held*, that the act might be sustained, as relating back.—Haas v. Lees, 18 Kan. 449.

[d] (Me. 1834) In making up and completing his records, a justice of the peace acts ministerially, and not judicially. Consequently he may do it when not in commission.—Matthews v. Houghton, 11 Me. (2 Fairf.) 377.

[e] (Me. 1853) A justice of the peace, in issuing an execution on a judgment rendered by him, acts ministerially, and not judicially, and his power to renew executions continues for the term of two years after his judicial powers, under his commission, expire.—Jones v. Elliott, 35 Me. 137.

[f] (Mo. 1881) A judgment entered by a justice of the peace after the expiration of his term of office is a nullity.—Gage v. Vail, 73 Mo. 454.

[g] (N. J. 1811) The expiration of the commission of a justice of the peace is a discontinuance of a cause pending before him.—Ross v. Ford, 3 N. J. Law (2 Penning.) 906.

[h] (N. J. 1833) After a justice's commission had expired, he could not, before the statute of February, 1834, accept an appeal bond, nor do any other official act, even in a case that was before him while in office.—Tichenor v. Hewson, 14 N. J. Law (2 J. S. Green) 26.

[i] (N. Y. 1888) Under Code, § 52, providing that, in case of removal from office or other disability of an officer before whom a special proceeding has been instituted, it may be continued before his successor, where a trial in summary proceedings to recover realty was had before a justice on December 28th, and the case was adjourned by consent to January 4th following, and the term of the justice expired on January 1st, he could not thereafter finish the trial of the case and render a judgment therein.—In re Rodding, 14 Civ. Proc. R. 47.

[j] (Pa.) A justice of the peace cannot certify a transcript to another justice after his term of office has expired.—(1851) Regle v. Nugent, 2 Pars. Eq. Cas. 297; (1865) Koons v. Headley, 49 Pa. (13 Wright) 168; (1881) Singley v. Fisher, 2 Leg. Rec. 168; (1881) Koch v. Shimer, 1 Lehigh Val. Law Rep. 77.

[k] (Vt. 1860) While a justice of the peace is alive and continues to reside in the county for which he was appointed, he is the proper certifying officer of his own records, though he may be out of office.—Carruth v. Tighe, 32 Vt. 626.

§ 205. Powers of successor over proceedings before former justice.

Appearance before successor as conferring jurisdiction, see post, § 267 [k].

Costs of proceedings before former justice as taxable on trial before successor, see "Costs," vol. 13, c. 29, § 15 [b].

[a] (Ark. 1852) The successor in office of a justice of the peace may enter up his predecessor's judgment nunc pro tunc.—Adams v. Thompson, 12 Ark. (7 Eng.) 670.

[b] (Ark. 1878) A justice of the peace may correct a judgment rendered by his predecessor in office by a nunc pro tunc order.—Gates v. Bennett, 33 Ark. 475.

[c] (Ark. 1891) Where an order of dismissal for want of prosecution of proceedings before a justice of the peace is set aside by consent of the parties, and a trial had and a judgment rendered for the plaintiff, which, however, is not entered on the docket of the justice, who soon

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afterwards dies, it is competent for his successor to enter the judgment nunc pro tunc, and parol evidence is admissible to show that such a judgment was in fact rendered, so as to authorize such entry.—St. Louis, I. M. & S. Ry. Co. v. Winfrey, 16 S. W. 572.

[d] (Cal. 1852) It being provided by the practice act that, where a judge or justice trying a cause may be called as a witness, he may order the case to be tried before another judge or justice, a justice before whom a cause was properly brought sent it to the mayor of a city, who, denying his own jurisdiction, sent it back; and it was tried by the successor in office of the justice who sent it to him, his predecessor having resigned, and the judgment rendered by the last justice sustained.—Julian v. Gallen, 2 Cal. 358.

[e] (Iowa, 1892) In a suit against an absconding debtor, where funds were garnished and service had by posting notices, the justice who issued the process resigned before the return day set in the notices, and some time after the return day a successor was appointed, who set a day for trial, and notified all the parties except defendant. *Held*, that he had acquired no jurisdiction of defendant; Code 1873, § 3610, providing that the hearing must be on the day set in the notices.—Evans v. Richards, 85 Iowa, 620, 52 N. W. 541.

[f] (Kan. 1894) The successor of a justice of the peace has the power, under the direction of the district court, to supply omissions in a transcript of his predecessor, and for that purpose may file with the clerk of the district court a new and completed transcript from the official records in his possession.—St. Louis & S. F. Ry. Co. v. Hurst, 52 Kan. 609, 35 Pac. 211.

[g] (Minn. 1881) An action pending before a justice of the peace when his term of office expires is not transferred by operation of law to his successor, so as to give the latter jurisdiction of the case.—Anderson v. Hanson, 28 Minn. 400, 10 N. W. 429.

[h, i] (Tex. 1854) The successor in office of a justice of the peace cannot revise the action of his predecessor.—Haley v. Villeneuve, 11 Tex. 617.

[j] (Tex. 1886) Under the general law of the state, by which justices of the peace succeed to the books and papers of their predecessors, and are required to dispose of their unfinished business, the law, in effect, authorizes them to execute the former's valid judgments, no matter upon what cause of action rendered, in as ample a manner as if a special statute, giving them that power, had been enacted.—Bryant v. Buckner (Sup.) 2 S. W. 452.

[k] (Wash. 1890) A complaint coming into the possession of a justice of the peace, by reason of his succession to that office, will be presumed to have been filed by him, if at all, on the day he entered upon the office, though marked several days later; and citation to defendant must require him to appear within 20 days from that date, under Code, § 1712, requiring defendant to be cited to appear at a time within 20 days from the filing of the complaint.—Nelson v. Campbell, 1 Wash. St. 261, 24 Pac. 539.

[l] (Wis. 1880) Though the expiration of the term for which a particular person is elected to an office does not create any "vacancy" in the office within the statute which provides for filling vacancies by appointment or election, still Rev. St. 1878, § 3591, declaring that whenever the office of any justice shall become vacant by resignation, removal, or otherwise, his successor may proceed to try any action then undetermined, and may issue a transcript also upon any judgment rendered by his predecessor, must be construed as covering the case of one who ceases to be a justice by reason of the expiration of his term, and as allowing transcripts of judgments rendered by him to be issued by his successor.—Stamm v. Dixon, 49 Wis. 328, 5 N. W. 858.

§ 206. Powers of other justices over proceedings within jurisdiction of judge or justice who has resigned or is disqualified, absent from court, or disabled.

Appearance as conferring jurisdiction on other justice, see post, § 267 [t, v].

Duty of parties to call other justice on expiration of term of incumbent pending action, see post, § 362 [m].

Issuance of execution on judgment rendered by justice of other county, see post, § 429.

Power to vacate judgment rendered by another justice, see post, § 401 [o].

[a] (Ala. 1886) An execution on a judgment rendered by a justice of the peace, issued by another justice, is not void on that account.—Sandlin v. Anderson, 82 Ala. 330, 3 South. 28.

[b] (Ala. 1890) Code 1876, § 754, provides that two justices shall be elected in each precinct, and section 3608 that if there is no justice in a precinct, or if he is incompetent, the cause may be tried by the justice of an adjoining precinct. *Held* that the justice of an adjoining precinct has no jurisdiction in another unless it appear that both of the justices in the latter are incompetent or disqualified.—Horton v. Elliott, 90 Ala. 480, 8 South. 103.

[c] (Ga. 1854) The judgments of justices' courts may be renewed to the same extent that judgments of higher courts may be; and it is not necessary that the justice presiding should be the same justice who presided when the judgment was rendered.—Wilcher v. Hamilton, 15 Ga. 435.

[d] (Ga. 1892) Where the term of office of a notary public, who is ex officio justice of the peace, has expired after an appeal from his judgment to a jury has been entered, and his successor has not been commissioned or sworn, the other justice of the district may preside in a trial of the appeal before the jury, especially when neither of the parties, before verdict, makes any objection to his so presiding.—Harrison v. Perry, 90 Ga. 206, 15 S. E. 742.

[e] (Ill. 1854) A., a justice of the peace, removed from the county and made over his docket and papers to B., then the nearest justice to A. B. afterwards removed from the state, and transferred his docket and papers, including those of A., to C., who issued an execution on the judgment rendered by A. *Held*, that the execution was properly issued; C. being vested with as much power over one docket as the other.—Martin v. Walker, 15 Ill. (5 Peck) 377.

[f] (Ind. 1854) The fact that the only justice of the peace within the township where a defendant resides declines to act does not give jurisdiction of the suit to a justice in another township, under Rev. St. 1843, p. 863. The plaintiff in such case is left to his remedy against the magistrate.—Poyser v. Murray, 6 Ind. 35.

[g] (Ind. 1871) Under the statute providing that a person claiming property which has been seized by virtue of an execution against another issued by a justice of the peace may file his complaint with the justice issuing the writ, if he is disqualified from acting and has no successor, there is no jurisdiction in any other justice to act.—Test v. Beeson, 37 Ind. 380.

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[h] (Ky. 1833) One justice of the peace has no authority to issue an execution upon the judgment of another, who remains in office and retains his records.—Clifford v. Cabiness, 31 Ky. (1 Dana) 384.

[i] (Mo. 1834) A justice of the peace cannot issue a scire facias on a judgment obtained before another justice to show cause why execution should not issue.—Wilson v. Tiernan, 3 Mo. 577.

[j] (N. J. 1837) A scire facias to revive a judgment of a justice of the peace must be issued by the same justice and can be by no other. If he be dead or out of commission, the only remedy is debt upon the judgment.—Tindall v. Carson, 16 N. J. Law (1 Har.) 94.

[k] (N. Y. 1860) 3 Rev. St. (5th Ed.) pp. 398, 399, §§ 86–98, provides that the justice of the peace before whom proceedings for a reassessment of damages occasioned by the laying out of a highway are initiated shall certify the verdict. *Held*, that a certification of another justice is not warranted by the fact that the highway commissioners procured the justice before whom the proceedings were commenced to absent himself, so that he could not be found; such absence not being a "disability," within 3 Rev. St. (5th Ed.) p. 475, § 25, which authorizes another justice to act in place of one disabled.—People v. Ulster County Sup'rs, 32 Barb. 473.

[kk] (Ohio, 1876) During the pendency of a civil action brought before a justice of the peace and continued, the justice resigned, and his official papers and docket were placed in the hands of the sole remaining justice in the township. *Held*, that the latter had authority, under Swan & C. St. p. 806, § 208, to try the case and render judgment.—Pittsburg, C. & St. L. Ry. Co. v. Fleming, 30 Ohio St. 480.

[l] (Pa. 1841) Any justice of the peace has jurisdiction, on the delivery of a transcript to him, to recover the amount of a judgment rendered by another justice of the peace, who has resigned his office but retains his docket. The proceeding may be by summons.—Ingle v. Homman, 1 Watts & S. 414.

[m] (Pa. 1846) Executions issued by one justice on the transcript of another justice of the same county, who was at that time in commission and acting in his office, are void.—Hallowell v. Williams, 4 Pa. (4 Barr) 389.

[n] (Pa. 1867) An alderman has jurisdiction on a sci. fa. sur judgment entered before an alderman whose commission has expired.—McGarry v. Douredoure, 6 Phila. 332.

[o] (Pa. 1888) One justice of the peace cannot issue an alias summons from proceedings before another justice of the peace, where the latter justice is alive, in commission, and within the district, though he is sick and unable to attend to business.—Fetters v. Leonard, 5 Pa. Co. Ct. R. 653.

[p] (Tenn. 1871) S., a justice of the peace before whom a suit was pending, was sick on the day of trial, and procured M., another justice of the same district, to try the case. Upon the judgment rendered by M., S. afterwards issued execution. *Held*, that the whole proceeding was regular, and the execution valid.—Fowler v. McDaniel, 53 Tenn. (6 Heisk.) 529.

[q] (Tex. 1894) A justice court, having obtained jurisdiction under Sayles' Civ. St. art. 1537, providing that, when any justice shall be absent from his precinct, the nearest justice in the county may perform his duties, retains it until the case is removed by appeal.—Crawford v. Saunders (Civ. App.) 29 S. W. 102.

[r] (Vt. 1850) A writ of scire facias, for the purpose of enforcing a judgment rendered by a justice of the peace, cannot be brought before another justice of the peace. It can only issue from the court in which the judgment was rendered.—Gibson v. Davis, 22 Vt. 374.

[s] (Vt. 1854) A justice, continuing a writ for another in his absence, has no further jurisdiction than mere naked continuance.—Braynard v. Burpee, 27 Vt. (1 Williams) 616.

[t] (Wis. 1871) Where a justice of the peace was authorized to take jurisdiction of an action only in case of the "absence, sickness, or other inability" of a municipal judge, *held*, that the fact that such judge declined to act in the cause did not give the justice jurisdiction.—Klaise v. State, 27 Wis. 462.

(L) JURISDICTION TO BE SHOWN BY RECORD, AND PRESUMPTIONS.

JURISDICTION TO BE SHOWN BY RECORD, § 207.
— JURISDICTION OF SUBJECT-MATTER, § 208.
— JURISDICTION OF FEME COVERT, § 209.
— JURISDICTION AS DEPENDENT ON PLACE OF BRINGING SUIT, § 210.
— JURISDICTION AS DEPENDENT ON AMOUNT OR VALUE IN CONTROVERSY, § 211.
— JURISDICTION OF OTHER JUSTICE AS DEPENDENT ON INABILITY OF REGULAR OFFICER, § 212.
— JURISDICTION AS DEPENDENT ON CONSENT, § 213.
— PROCESS, NOTICE, OR APPEARANCE, § 214.
PLEADING JURISDICTIONAL FACTS, § 215.
PRESUMPTIONS AS TO JURISDICTION, § 216.

See post, §§ 449–464.

Jurisdiction to be shown on face of execution, see post, § 430 [d, f, t].

Jurisdiction in salvage proceeding, see "Salvage," III.

§ 207. Jurisdiction to be shown by record.

[a] The jurisdiction of a justice of the peace must appear from the record of the proceedings.

—(U. S. 1824) Walker v. Turner, 22 U. S. (9 Wheat.) 541, 6 L. Ed. 155;

(Ark. 1843) Reeves v. Clarke, 5 Ark. (5 Pike) 27; (1845) Pendleton v. Fowler, 6 Ark. (1 Eng.) 41; (1845) Levy v. Shurman, Id. 182, 42 Am. Dec. 690; (1846) Latham v. Jones, 6 Ark. (1 Eng.) 371;

(Ind. 1883) Newman v. Manning, 89 Ind. 422;

(Me. 1841) Granite Bank v. Treat, 18 Me. (6 Shep.) 340;

(Minn. 1871) Clague v. Hodgson, 16 Minn. 329 (Gil. 291);

(N. H. 1846) Flanders v. Atkinson, 18 N. H. 167;

(Pa. 1871) McGinnis v. Vernon, 67 Pa. (17 P. F. Smith) 149; (1874) Yeich v. Peterson, 2 Leg. Chron. 269; (1879) Williams v. McCue, 1 Lack. Leg. Rec. 398; (1880) Smith v. Noone, 1 Leg. Rec. Rep. 165; (1887) Hourner v. Wetherill, 10 Atl. 40; (1887) Jermyn v. Higgins, 4 Lanc. Law Rev. 185; (1888) Lovell Mfg. Co. v. Dougherty, 5 Pa. Co. Ct. R. 399; (1888) Fahnestock v. Bushey, 5 Lanc. Law Rev. 57; (1893) Wood v. Bronson (Com. Pl.) 12 Pa. Co. Ct. R. 545.

[b] (Ill. 1870) In an action to recover the price of property sold to defendant under an execution issued on a judgment rendered by a police magistrate, his docket, duly proved,

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showing the judgment, is competent evidence on plaintiff's behalf, though it did not appear thereby that the magistrate had jurisdiction, as competency of evidence does not depend on the extent to which facts are proved thereby.—Willoughby v. Dewey, 54 Ill. 266.

[c] (Ind. 1854) Jurisdiction of a justice of the peace must appear on the face of the proceeding. No presumption is made in its favor. Therefore, where a justice issued a writ of ne exeat, and it did not appear of record that a bond for the payment of costs and damages was filed as required by the act of 1847, the judgment should be reversed.—Straughan v. Inge, 5 Ind. 157.

[d] (Iowa, 1881) The jurisdiction of a justice of the peace is limited; but to require that he should show that his proceedings were within the statute by negativing the grounds by which it may be taken away is to require more than a sound construction of the statute warrants or is reconcilable to settled practice of law.—Lanpher v. Dewell, 56 Iowa, 153, 9 N. W. 101.

[e] (Kan. 1892) A summons was issued by a justice of the peace, returnable on June 4, 1886, at 10 o'clock a. m., and was regularly served, and judgment was afterwards rendered against defendant by default. The record showing the manner of rendering the judgment reads: "June 4, 1886, 10 o'clock a. m. The plaintiff present by his agent, L. The defendants, being three times called, still fail to appear. Upon hearing the proof and allegations of the plaintiff, I do render judgment by default. It is therefore," etc., and here follows the judgment. *Held*, that it does not appear that the judgment is void on its face for the reason that it was rendered within less than an hour after the time specified in the summons for the appearance of the parties, and therefore before the justice had acquired sufficient jurisdiction to render it.—Green v. Tower, 49 Kan. 302, 30 Pac. 468.

[f] (Mich. 1895) In an action on a justice's judgment, the failure of the justice's docket to show that he acquired and retained jurisdiction cannot be supplied by memoranda made by him on the file wrapper.—Rasch v. Bissell, 106 Mich. 106, 64 N. W. 7.

[g] (Minn. 1871) An affidavit for the transfer of a case to another justice, when filed, is a part of the record, within the rule that in action in justice court the record must show facts which confer upon it jurisdiction both of the person and cause of action.—McGinty v. Warner, 17 Minn. 41 (Gil. 23).

[h] (Minn. 1896) It is not essential to the validity of a judgment obtained in a justice court without personal service of the summons that the justice docket or judgment should disclose the fact that a security bond was filed before the judgment was entered.—Vaule v. Miller, 64 Minn. 485, 67 N. W. 540.

[i] (Mo. 1885) In a proceeding before a justice to enforce a mechanic's lien, all jurisdictional facts must appear affirmatively on the face of the proceedings; and a filing of a sufficient statement before the justice is a jurisdictional fact.—Ewing v. Donnelly, 20 Mo. App. 6.

[j] (Mo. 1891) Lodging with a justice of the peace of the paper which is the foundation of the action being requisite to jurisdiction, it must by some means be made affirmatively to appear by the record, if not by a docket entry, then by the paper itself being among the original papers in the cause.—Olin v. Zeigler, 46 Mo. App. 193.

[k] (Mo. 1893) The jurisdiction of a justice of the peace is sufficiently shown if it appears from the entire record of the proceeding.—Sappington v. Lenz, 53 Mo. App. 44.

[l] (Mo. 1893) It is sufficient to the validity of a judgment of a justice that the jurisdictional facts appear anywhere on the face of the proceedings, and they need not appear in his docket entries.—Collins v. Kammann, 55 Mo. App. 464.

[m] (N. J. 1833) On a proceeding under Rev. Laws, p. 637, § 26, providing that on execution out of the court for trial of small causes, if a third person claims the goods, claimant may have a jury to try his right, the justice must make up a record to show his proceeding in the matter to be within the scope of his authority.—Baird v. Johnson, 14 N. J. Law (2 J. S. Green) 120.

[n] (N. J. 1854) Where a justice acts under a special statutory authority, everything necessary to his jurisdiction should be shown on the face of the proceedings before him.—State v. Williamstown & G. I. Turnpike Co., 24 N. J. Law (4 Zab.) 547.

[o] (N. Y. 1854) The record of a justice holding special sessions must show that judgment was rendered when his court was in session.—Lattimore v. People, 10 How. Prac. 336.

[p] (N. Y. 1890) It is not essential to the validity of a justice's judgment that the return should affirmatively show that the justice waited an hour after the time mentioned in the summons before proceeding with the cause in the absence of defendant, as required by Code Civ. Proc. § 2893.—Knight v. Willson, 55 Hun, 559, 9 N. Y. Supp. 20.

[q] (N. C. 1846) Continuances of a justice's warrant in a civil case need not appear on the face of the proceedings, to prevent them from being void on their face.—State v. Conoly, 28 N. C. 243.

[r] (Ohio, 1861) Under Justice Code, § 7, providing that if any debtor shall appear before a justice without process, and confess that he is indebted to another, such justice may, on application of the creditor, render judgment on such confession, such judgment is not void because the justice's docket does not show that it was rendered on the application of the creditor.—Wilson v. Wickersham, 2 Ohio Dec. 545.

[s] (Pa.) In summary proceedings for the possession of premises under the landlord and tenant act, the record must show affirmatively the necessary fact to give the court jurisdiction.—(1865) McGrath v. Donally, 6 Phila. 43; (1868) Miller v. Frees, 1 Woodw. Dec. 409; (1871) McGinnis v. Vernon, 67 Pa. (17 P. F. Smith) 149; (1880) Hiester v. Brown, 11 Lanc. Bar. 159.

[t] (Pa. 1868) In a penal action before a magistrate, the record must affirmatively show that he had jurisdiction.—Adams v. Commonwealth, 1 Woodw. Dec. 417.

[u] (Pa. 1876) A suit for the recovery of a fine for violation of a borough ordinance before a justice of the peace is not a summary proceeding, but in the nature of a civil action for the recovery of the debt, and therefore the record must contain all the requirements necessary to support such suit.—Borough v. Gill, 1 Leg. Rec. 88.

[v] (Pa.) The record of a justice on a judgment by default must show jurisdiction affirmatively.—(1879) Starch v. Snyder, 1 Leg. Rec. Rep. 172; (1880) Smith v. Noone, Id. 165.

[w] (Pa. 1881) Where it appears from the record of the justice of the peace that an action was brought for the recovery of a note, but the judgment was rendered for a specified

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sum of money, it sufficiently appears that the action was for the amount of the note, and not for the recovery of its possession, of which the justice would have no jurisdiction.—Leamy v. McClure, 1 Chest. Co. Rep. 220.

[x] (S. D. 1894) Though the justice's docket should contain a record of all facts essential to his jurisdiction, the judgment, properly entitled, stating the amount thereof, including costs, and the time when rendered, is not void because it fails to show jurisdiction expressly.—Williams v. Rice, 6 S. D. 9, 60 N. W. 153.

[y] (Wis. 1882) In statutory proceedings by garnishment in a justice court, the jurisdiction must affirmatively appear from the record; and, where that fails to show the affidavit required by the statute as the foundation of the proceedings, a docket entry that an affidavit was made and filed cannot give validity to the judgment.—Wells v. American Exp. Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695.

§ 208. —— Jurisdiction of subject-matter.

[a] (Colo. 1873) Under Rev. St. c. 50, § 4, requiring a justice of the peace to note on his docket "the amount and nature of the debt sued for," though jurisdiction as to the subject-matter of the action in which the judgment was rendered must be shown, where plaintiff relies on such judgment to establish title, it may be shown by evidence without the record.—Liss v. Wilcoxen, 2 Colo. 85.

[b] (Colo. 1873) Where plaintiff relied on a judgment of a justice of the peace to establish his title in an action of unlawful detainer, the jurisdiction of the justice as to the subject-matter of the action in which such judgment was rendered was not sufficiently shown by the circumstance that it was for a debt and in an amount of which the justice had jurisdiction, where "the amount and nature of the debt sued for" were not noted on the docket, as required by Rev. St. c. 50, § 4.—Liss v. Wilcoxen, 2 Colo. 85.

[c] (Colo. 1888) The omission of a justice of the peace to record in his docket the nature of the debt sued for, as required by Gen. St. § 2061, is not a fatal jurisdictional defect; but on appeal to the county court, where both parties appear and go to trial on the merits, the jurisdiction of the justice may be shown by evidence outside the record.—Behymer v. Nordloh, 12 Colo. 352, 21 Pac. 37.

[cc] (Minn. 1869) The jurisdiction of a justice of the peace must appear from the "brief statement of the nature of the plaintiff's demand," which he is required to enter in his docket, under Gen. St. 1866, c. 65, § 7, and cannot be shown by the judgment entered therein.—Barnes v. Holton, 14 Minn. 357 (Gil. 275).

[d] (Pa. 1814) If it appear on the justice's record that the plaintiff has stated his cause of action generally, it is sufficient to show jurisdiction of the subject-matter.—McEntire v. McElduff, 1 Serg. & R. 19.

[e] (Pa. 1865) In a proceeding to recover a penalty under a city ordinance, conducted partly before an alderman and partly before the mayor of the city, where the record contains no recital of the ordinance containing the cause of action and conferring the jurisdiction, and no statement of acts done within the city that would amount to a violation, the judgment cannot be sustained.—Hennershitz v. City of Reading, 1 Woodw. Dec. 264.

[f] (Pa. 1887) Where the record of a justice of the peace states the cause of action to be for "trespass and damage to personal property not exceeding $300," it is a sufficient statement to bring the action within the jurisdiction of the justice, under Act March 22, 1814, for "injury done or committed."—Reese v. Deyett, 4 C. P. Rep. 53.

[g] (Pa. 1893) Since Act May 25, 1887, gives the word "trespass" a wider meaning than it had formerly, a justice's record is insufficient to show jurisdiction when it merely designates the action as "trespass for damages for injuries done on real estate," though Act March 22, 1814, expressly confers on justices jurisdiction of such actions.—Wood v. Bronson (Com. Pl.) 12 Pa. Co. Ct. R. 545.

[h] (Pa.) Where the record of a justice of the peace simply states that the action is on a contract, without showing that it is a contract of which he has jurisdiction, it is insufficient.—(1895) Pearre v. White (Com. Pl.) 4 Pa. Dist. R. 504; (1896) Barnett v. Fisher (Com. Pl.) 5 Pa. Dist. R. 277, 26 Pittsb. Leg. J. (N. S.) 393.

[i] (Tex. 1860) A judgment of a justice, rendered under Act Jan. 27, 1842, § 10, providing that, if any sheriff fails or refuses to pay over money collected on execution, he shall be liable to pay 10 per cent. a month on the amount so collected, besides interest and costs, and that the sum may be recovered by motion against his sureties, is void, if the record fails to show that the justice had jurisdiction over the subject-matter.—Mitchell v. Runkle, 25 Tex. Supp. 132.

[j] (Wis. 1895) Where the docket of a justice does not show the nature of the action, whether any pleas were made by the parties, nor any other facts showing jurisdiction of the subject-matter, the judgment rendered is void.—Jones v. Hunt, 90 Wis. 199, 63 N. W. 81.

§ 209. —— Jurisdiction of feme covert.

[a] (Pa. 1871) To sustain a judgment in a justice court against a married woman, the record must show a cause of action against her herself, and it is not sufficient that the evidence showed such fact.—O'Mallery v. Dempsey, 3 Leg. Gaz. 225.

[b] (Pa. 1872) Where the proceedings before a justice of the peace, in which judgment is entered against a married woman, do not show on their face that she is liable, the judgment is void, as the fact that such proof is made must be shown by the record.—Ingham v. Sickler, 1 Leg. Chron. 151.

[c] (Pa. 1873) Where there is a justice's judgment against a married woman for family necessaries, it must be aver.ed of record, as well as shown by the evidence, that the debt was contracted by her personally or by some one under her authority.—O'Malley v. Dempsey, 2 Luz. Leg. Reg. 77.

[d] (Pa. 1873) To sustain a justice's judgment against a husband and wife, intended to be levied on the wife's estate, a cause of action against her must be declared of record.—O'Malley v. Dempsey, 2 Luz. Leg. Reg. 77.

[e] (Pa. 1873) Where judgment was recovered in a justice's court against a married woman for building materials used in improving her estate, the record must show that they were contracted for by herself, and not by herself and her husband together.—O'Malley v. Dempsey, 2 Luz. Leg. Reg. 77.

[f] (Pa. 1875) A joint judgment, obtained against a husband and wife in proceedings before a justice, which did not show affirmatively that the debt sued for was contracted by the wife and for necessaries for her family, was void, and no judgment of revival could be had thereon.—Glenn v. Bracey, 7 Leg. Gaz. 174.

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[g] (Pa.) Where the record of a justice of the peace fails to show the liability of a married woman, a judgment as to her is void for want of jurisdiction.—(1877) Krause v. Leiby, 1 Leg. Rec. 74; (1879) Heffner v. Beahler, Id. 118.

[h] (Pa. 1879) The record of a justice of the peace on a judgment against a married woman must show her liability, or the judgment will be void.—Starch v. Snyder, 1 Leg. Rec. 172.

[i] (Pa. 1879) A judgment against a married woman before a justice of the peace, which does not affirmatively show her liability on a contract within Act 1848, is invalid.—Hecker v. Haak, 88 Pa. 238.

[j] (Pa. 1880) A judgment against a married woman is invalid, unless the record itself shows the liability under the statute.—Rice v. Ketzelman, 1 Chest. Co. Rep. 174.

[k] (Pa. 1881) The record of a justice of the peace, where it is intended to bind an estate of a married woman, must show everything necessary to give jurisdiction.—Sherman v. Reed, 2 Leg. Rec. 220.

[l, m] (Pa. 1883) Where the record of a judgment by a justice in an action against a married woman does not clearly show a liability on her part, the judgment will be set aside on certiorari.—Fraelich v. Mowrer, 1 Lanc. Law Rev. 49.

[n] (Pa. 1884) A record averring a claim for "family necessaries" is not sufficient to support a judgment against a married woman, unless it also avers a contract made by her.—Stephens v. Hadsell, 3 Kulp, 66.

[o] (Pa. 1884) A joint action of debt against a husband and wife for rent cannot be maintained; it not appearing on the justice's record that it was alleged or proved that the debt was contracted by her and was for necessaries.—Edwards v. Carr, 3 Kulp, 192.

[p] (Pa. 1884) The record of a judgment in a magistrate's court against a married woman must show that the debt was contracted by the wife for the necessaries of life and on the credit of her separate estate, or it will be set aside.—Hartzell v. Osborne, 15 Wkly. Notes Cas. 142.

[q] (Pa. 1886) In an action against husband and wife for necessaries, the judgment record of the justice must show the liability of the wife.—Rodgers v. Carr, 3 C. P. Rep. 216.

[r] (Pa. 1886) Under Act April 11, 1848, § 8, in an action against a husband and wife for necessaries, no judgment can be entered against the wife, except on proof that the debt was contracted by the wife and incurred for articles necessary for the support of their family; and a judgment by default in common pleas on a transcript of an alderman, showing no such proof, is void.—Gould v. McFall, 111 Pa. 66, 2 Atl. 403.

[s] (Pa. 1887) On scire facias to revive a judgment, a transcript of a justice of the peace stated that "the debt in suit had been contracted by defendant, Judith Weber, for necessaries, to wit, medical attendance furnished by plaintiff to the family of Judith Weber," and stated that "summons was served by producing the original summons to defendants, and informing them of the contents thereof." *Held*, that this, together with a further statement that, after proper hearing, judgment was entered against defendants, sufficiently complied with the rule that a judgment against a married woman before a justice of the peace must affirmatively show her liability within the statute.—Weber v. Detwiller, 8 Atl. 910.

[t] (Pa. 1887) To enable recovery from a married woman for necessaries, it is not requisite that the evidence adduced to establish the claim that the debt was incurred by the wife, and that it was for necessaries, be entered on the justice's record.—Fenstermacher v. Xander, 116 Pa. 41, 10 Atl. 128.

[u] (Pa. 1887) A justice's judgment against a married woman will be struck from the record, unless it affirmatively appears thereby that her liability was on a contract allowed by the statute.—Rosenfelt v. Wagner, 2 Lehigh Val. Law Rep. 371.

[v] (Pa. 1888) Under Married Woman's Act June 3, 1887, the record of a justice's judgment, to be binding against a married woman, should show that the suit was brought for necessaries.—Myers v. Stauffer, 5 Pa. Co. Ct. R. 657, 22 Wkly. Notes Cas. 412.

[w] (Pa. 1888) Under the married person's property act of June 3, 1887, the record of a justice's judgment, in order to bind a married woman, must set forth the facts which bring her within the act. Where the record shows merely an action on back accounts, the judgment will be stricken off.—Ames v. Hugg, 6 Pa. Co. Ct. R. 83.

[x] (Pa. 1890) Under Act 1848, § 7, which forbids judgment against a married woman unless it be "proved" that she contracted the debt, and that the articles furnished were necessaries, an entry by a justice, in a suit for necessaries, of "Claim investigated," will not be sufficient to sustain a judgment against a married woman.—Rauch v. Young (Com. Pl.) 9 Pa. Co. Ct. R. 416.

[y] (Pa. 1892) A justice's judgment against a married woman which does not show on its face her liability on the contract within the statute is void.—March v. McCardle (Com. Pl.) 1 Pa. Dist. R. 677.

[z] (Pa. 1893) A judgment rendered by an alderman against a married woman prior to the passage of the act of 1887 will be stricken off where the record does not show that the debt was one for which a married woman could be made liable.—Shreiner v. Dommel (Com. Pl.) 2 Pa. Dist. R. 332; Dornes v. Staley, Id.; Rice v. Foy, Id. 333.

[zz] (Pa. 1894) Where an action for necessaries furnished defendants is apparently against husband and wife, but the record fails to disclose the relationship, it was proper for the justice to render judgment against the female defendant as one against a married woman on her contract for necessaries.—Burnes v. Maloney (Com. Pl.) 7 Kulp, 341.

§ 210. —— Jurisdiction as dependent on place of bringing suit.

[a] (Cal. 1860) The record of proceedings in a justice court must affirmatively show that the suit was brought in the proper township.—Lowe v. Alexander, 15 Cal. 296.

[b] (Mo. 1880) The record of a justice in proceedings under the landlord and tenant act must show that he lived in the ward in which the property was situated, or in the adjoining ward.—Hessey v. Heitkamp, 9 Mo. App. 36.

[c] (Mo. 1885) The record of the justice must show affirmatively, in actions for killing stock, where the statute affords a remedy only for stock killed in the township of the justice or the adjoining township, that the stock was killed in one of such townships.—Roberts v. Missouri Pac. Ry. Co., 19 Mo. App. 649; Backenstoe v. Wabash, St. L. & P. R. Co., 23 Mo. App. 148.

[d] (Mo. 1886) The jurisdiction of a justice of the peace is purely local and statutory, and, in a suit against a railway corporation for the killing of live-stock, it must affirmatively appear

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that the action was brought in the township where the injury occurred, or in some adjoining township, under section 2835, Revision 1879.—Rohland v. St. Louis & S. F. Ry. Co., 89 Mo. 180, 1 S. W. 147.

[e] (Mo. 1891) The charter of Kansas City confers jurisdiction to render judgment on a special tax bill on "the recorder of the city, or any justice of the peace of the city." *Held* that, in a suit on a special tax bill, the docket of the justice must show that he is a justice of the city.—Corrigan v. Morris, 43 Mo. App. 456.

[f] (Mo. 1894) The record in an action of unlawful detainer must show that the detained premises are in the justice's county, or the justice will have no jurisdiction.—Johnson v. Fischer, 56 Mo. App. 552.

[g] (Pa.) The record of proceedings before a justice in an action for trespass to real estate must show that the estate was situated within the county.—(1811) Pennell v. Foster, 1 Browne, 355; (1844) Brown v. Quinton, 3 Pa. Law J. 425. CONTRA, see (1845) Brown v. Fruit, 5 Pa. Law J. 222.

[h] (Pa. 1883) Where an alderman, in a suit for the violation of a city ordinance providing that no person shall purchase on market days within market hours any marketable provisions for the purpose of retailing same, gives judgment for the amount of the penalty for violation thereof, his docket should set forth that the market so held was within the limits of the city.—Lemon v. Reidel, 1 Lanc. Law Rev. 3.

§ 211. —— Jurisdiction as dependent on amount or value in controversy.

[a] (Colo. 1888) The omission of a justice of the peace to record in his docket the amount of the debt sued for, as required by Gen. St. § 2061, is not a fatal jurisdictional defect; but, on appeal to the county court where both parties appear and go to trial on the merits, the jurisdiction of the justice may be shown by evidence outside the record.—Behymer v. Nordloh, 12 Colo. 352, 21 Pac. 37.

[b] (Ind. 1824) Justices of the peace, by a statute of 1823, had a general jurisdiction to the amount of $50, and they could take judgment by confession for any amount not exceeding $100, provided the defendant made oath that the judgment was not confessed to defraud creditors. *Held*, that the justice's record of a judgment confessed, exceeding $50, must show the oath to have been taken, or he will be considered as having had no jurisdiction.—McFadin v. Gill, 1 Blackf. 309.

[c] (Mich. 1884) Where, in replevin before a justice, the affidavit does not state that the property does not exceed $100 in value, the justice has no jurisdiction.—Sager v. Shutts, 53 Mich. 116, 18 N. W. 580.

[d] (Mo. 1869) In an action commenced before a justice of the peace for damages in killing stock, where the amount claimed is $170, a sum exceeding the jurisdiction of the court, unless it comes within the provisions of the act of 1861, entitled "An act to extend the jurisdiction of justices' courts," the fact that it does should appear on the face of the papers in the justice court in order to confer jurisdiction.—Hansberger v. Pacific R. Co., 43 Mo. 196.

§ 212. —— Jurisdiction of other justice as dependent on inability of regular officer.

[a] (Iowa, 1859) When, under the amended charter of Muscatine (Laws 1853, p. 137), a justice hears a case, on account of the inability of the mayor, the regular officer, to act therein, the inability of the mayor must appear of record to confer jurisdiction.—Muscatine v. Steck, 7 Iowa (7 Clarke) 505.

[b] (Me. 1880) Where different justices from the one before whom a writ is made returnable continue and try the case, in order to give them jurisdiction, it must appear on the record that the justice named in the writ is unable to attend, under Rev. St. c. 83, § 12.—Inman v. Whiting, 70 Me. 445.

[c] (Minn. 1870) Under St. c. 65, § 18, relating to the transfer of actions from one justice of the peace to another, the docket of a justice before whom an action has been commenced, and who has allowed the case, upon proper affidavits, to be transferred to another justice, must, to give jurisdiction to the latter, show that such transfer was ordered to that particular justice. A simple statement of the transfer, without indicating to what particular justice the case is transferred, will not confer jurisdiction.—Rahilly v. Lane, 15 Minn. 447 (Gil. 360).

[d] (Mo. 1839) Where justices of the peace exercise jurisdiction in an adjoining township, under a statutory provision allowing them to do so when the justice of the latter township is disqualified, etc., their records need not show that the facts existed to authorize them to exercise the jurisdiction, but this may be shown aliunde.—Lates v. Perkins, 6 Mo. 57.

§ 213. —— Jurisdiction as dependent on consent.

[a] (Iowa, 1884) A judgment rendered by a justice of the peace, and the subsequent proceedings thereunder, including a sale of land on execution, are not rendered void by a failure of the record to show that the consent of the parties was given that the justice might take jurisdiction of the case, since this is not required by Code 1873, § 3515, prescribing what the record shall contain, though, by the provisions of section 3508, such consent was necessary to confer jurisdiction.—Schlisman v. Webber, 65 Iowa, 114, 21 N. W. 209.

§ 214. —— Process, notice, or appearance.

See post, § 454.

[a] (Cal. 1858) The failure of the justice to enter the return of service on his docket is not fatal to a default judgment on appeal.—Denmark v. Liening, 10 Cal. 93.

[b] (Cal. 1883) An entry in the docket of a justice of the peace to the effect that summons was returned served does not show a valid service, or that jurisdiction was acquired.—Kane v. Desmond, 63 Cal. 464.

[c] (Del. 1850) In proceedings by attachment the justice's record must show how notice was given. A record that notice was given "according to law" is insufficient to give the justice jurisdiction.—Johnson v. Layton, 5 Har. 252.

[d] (Del. 1875) The record of a judgment by default on summons returnable forthwith for want of appearance should state that it was returnable forthwith because the justice was satisfied that delay was dangerous to plaintiff's interests.—Gray v. Vandyke, 5 Houst. 134.

[e] (Ga. 1853) The record of a justice's judgment should show that service was made on the defendant of the summons or warrant in the original suit, that it may be seen that the justice had jurisdiction of the person.—Gray v. McNeal, 12 Ga. 424.

[f] (Ind. 1861) A justice's record ran: "Now comes A. with a power of attorney to confess judgment. Whereupon the defendant, by his attorney, waived the issuing and service of process, and confessed judgment," etc. *Held*, that this record, though informal, and perhaps

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irregular, was sufficient for the basis of an action, and sufficiently showed jurisdiction in the justice over the person of the defendant.—Dragoo v. Graham, 17 Ind. 427.

[g] (Ind. 1867) A judgment rendered by a justice of the peace on default is not made void by the fact that the summons and return of service are not set out in the record. The statute which prescribes the requisites of a justice's docket (2 Gav. & H. St. p. 581) makes it the duty of the justice to keep a record of the proceedings in each case,—that is, to record the facts as they occur,—but does not require him to copy on his docket the summons and other proceedings that may be issued by him in the cause.—Taylor v. McClure, 28 Ind. 39.

[h] (Iowa, 1887) Where the record of a justice's judgment on a written contract to be performed in his township shows service of the original notice on defendant, then living in another county, by a return indorsed thereon purporting to be signed by a constable of the latter county, it sufficiently shows jurisdiction.—Baker v. Jamison, 73 Iowa, 698, 36 N. W. 647.

[i] (Me. 1863) A record of a justice, showing that a writ made returnable before him "at his dwelling house," to wit, "at his office," in a certain town, was entered at a "place separate and at a short distance from said dwelling house," in said town, "which place said justice uses as his office for the trial of actions brought before him," is insufficient to show that the justice had jurisdiction.—Stanton v. Hatch, 52 Me. 244.

[ii] (Mich. 1862) Entry on a justice's docket that "the parties appeared," and judgment was rendered by confession, imports the presence of both plaintiff and defendant.—Kinyon v. Fowler, 10 Mich. 16.

[j] (Mich. 1872) A docket entry which does not show whether the plaintiff appeared on any particular day out of several, and does not show that he appeared within an hour after the return day of the process, fails to show that the justice was authorized to render judgment; and it is inadmissible to prove the validity of the judgment, since, under Comp. Laws 1857, § 3777, cl. 2, a failure of plaintiff to appear within an hour after the time set for hearing works a discontinuance of the case.—Redman v. White, 25 Mich. 523.

[jj] (Mich. 1885) To show jurisdiction, a justice's docket must show the hour, as well as the day, of the appearance, and a failure in such respect cannot be helped by parol.—Mudge v. Yaples, 58 Mich. 307, 25 N. W. 297.

[k] (Mich. 1886) The docket must affirmatively show, when there is no appearance of the defendant, that the plaintiff appeared within one hour of the time named on the return day, or jurisdiction is lost.—Post v. Harper, 61 Mich. 434, 28 N. W. 161.

[kk] (Mich. 1890) Where defendant appears specially, and objects to the jurisdiction for want of authority in the person serving the process, and appeals from a judgment overruling his objection, the justice's record must show the jurisdictional facts; and no presumption will be indulged in favor of their existence.—Gadsby v. Stimer, 79 Mich. 260, 44 N. W. 606.

[l] (Minn. 1872) When parties appeared before a justice at the time specified in the summons, and without any objection to the time of appearance, the failure of the justice's docket to show when they appeared affects the regularity of the docket, but not the regularity of the justice's judgment.—Tyrrell v. Jones, 18 Minn. 312 (Gil. 281).

[ll] (Minn. 1872) Failure of the justice's docket to show appearance of parties, that fact appearing otherwise in the record, is mere irregularity, not affecting his judgment.—Tyrrell v. Jones, 18 Minn. 312 (Gil. 281).

[m] (Mo. 1858) A judgment rendered in a justice's court, which is not a court of general authority, is void, unless it is shown by the record that the justice acquired jurisdiction by service of process or by the appearance of the defendant.—Bersch v. Schneider, 27 Mo. 101.

[mm] (Mo. 1885) In a proceeding before a justice to enforce a mechanic's lien, the filing of notice in the clerk's office of the circuit court before beginning suit must appear of record.—Ewing v. Donnelly, 20 Mo. App. 6.

[n] (Neb. 1895) The record of a judgment by default entered by a justice of the peace must show that the summons was served on defendant, as that is necessary to show jurisdiction.—Muller v. Plue, 45 Neb. 701, 64 N. W. 232.

[nn] (Neb. 1895) The record of a judgment by default entered by a justice of the peace must show that plaintiff appeared within one hour of the time named in the summons, as that is necessary to show jurisdiction.—Muller v. Plue, 45 Neb. 701, 64 N. W. 232.

[o] (Nev. 1865) A justice's judgment will be held void when the record does not affirmatively show that the summons was served within the territorial jurisdiction of the justice, or that the defendant appeared.—Mallett v. Uncle Sam Gold & Silver Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

[oo] (N. J. 1857) Proof of the advertisement of an attachment, being essential to entitle the justice to try the case in the defendant's absence, must be stated on the docket.—Lentz v. Collin, 26 N. J. Law (2 Dutch.) 218.

[p] (N. Y. 1847) Where a justice's docket, given in evidence to prove a judgment, stated the issuing and personal service of a summons on a day named, and that on a subsequent day, specified, which was six days after the service of the summons, the plaintiff appeared and declared, and that judgment was rendered, but it was not otherwise stated on what day the summons was returnable, it was *held* that the docket sufficiently showed jurisdiction to have been obtained in the suit.—Groff v. Griswold, 1 Denio, 432.

[pp] (Ohio, 1891) An objection to the validity of a judgment by a justice of the peace taken by default, on the ground that the return on his docket did not show that the amount claimed to be due was indorsed on the writ, cannot be maintained, since Rev. St. § 594, only requires the justice to enter on his docket the date of the writ and the time of its return.—Cook v. Dinsmore, 5 Ohio Cir. Ct. R. 385.

[q] (Pa. 1840) A judgment for over $100 before a justice is void, unless it appear on the face of the record that the parties appeared before him and confessed the same.—Camp v. Wood, 10 Watts, 118.

[qq] (Pa. 1856) In an action before an alderman it must appear on the record that 30 days' notice in due form has been given to an alderman sued before suit was brought against him for his official acts.—Ashton v. Isard, 2 Phila. 39.

[r] (Pa.) The record of a justice's default judgment must show that the return of service was made on oath or affirmation.—(1870) Shultz v. Sweigart, 2 Lanc. Bar, No. 1, p. 1; (1873) Sauser v. Werntz, 1 Leg. Chron. 249; (1879) Deerbeck v. Hildebrand, 10 Lanc. Bar, 152; (1879) Hawthorn v. Filler, 1 Leg. Rec.

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Rep. 48; (1882) Adler v. Patrick, 1 Chest. Co. Rep. 465; (1894) Knoblauch v. Hefron (Com. Pl.) 3 Pa. Dist. R. 765.

[rr] (Pa. 1872) Where a judgment is rendered by a justice of the peace by default, the record must show that proper process was served, or the judgment will be reversed on certiorari.—Klugh v. Rouse, 4 Lanc. Bar, No. 14, p. 1.

[s] (Pa. 1874) To justify the court in sustaining as regular the service of a justice's summons, it must appear by the record that the constable who deputed the plaintiff's agent to serve same was a constable of the county, or within the proper class, or that such officer appeared before the justice and identified his official character as a constable of the county. —Warren v. Wells, 3 Luz. Leg. Reg. 111.

[ss] (Pa. 1875) The record of a justice of the peace, which shows that the defendant was summoned to appear at 1:30 o'clock p. m., and that judgment was rendered at 2 o'clock, the defendant not appearing, is defective, since it does not show that defendant might not have been present at the hour stated.—Smith v. Fetherston, 32 Leg. Int. 40.

[t] (Pa. 1879) To sustain a judgment by default, the record must show a legal service of the summons.—Deerbeck v. Hildebrand, 10 Lanc. Bar, 152; Commonwealth v. Turnpike Co., 1 Law T. (N. S.) 127.

[tt] (Pa. 1883) Where defendant does not appear before the justice, it must appear by the record that the process was issued and served in the manner prescribed by law.—Fraelich v. Mowrer, 1 Lanc. Law Rev. 49.

[u] (Pa. 1884) The record of a justice on a judgment by default must show affirmatively that plaintiff, or some one on his behalf, appeared at the time of the hearing before the justice.—Karche v. Bach, 1 Lehigh Val. Law Rep. 118.

[uu] (Pa. 1891) Judgment of a justice for plaintiff will be reversed where the record fails to show that a copy of affidavit of claim was served on defendant, or that defendant waived service, or that plaintiff or his agent appeared and substantiated his claim by proof.—Abbey v. Young (Com. Pl.) 10 Pa. Co. Ct. R. 476.

[v] (Pa. 1892) Where a judgment by default is rendered by a justice of the peace, the record must show that the plaintiff appeared on the day and at the hour mentioned in the summons.—Gwinner v. Brendt (Com. Pl.) 6 Kulp, 532.

[vv] (Pa. 1892) The justice's docket must show an appearance of plaintiff at the time mentioned in the summons.—Ellenberger v. Bush (Com. Pl.) 2 Pa. Dist. R. 50.

[w] (Pa. 1896) The record of a justice of the peace, though failing to show that summons was served on the defendant, and stating only that it was indorsed "Served," was sufficient to support a judgment for plaintiff.—Missemer v. Trout (Com. Pl.) 17 Pa. Co. Ct. R. 317.

[ww] (S. C. 1839) Proceedings before an inferior court are void, unless they carry upon their face the evidence of jurisdiction; and therefore the oath upon which a magistrate issues an attachment, though it need not be taken in writing, must be recited in the writ.—Devall v. Taylor, 1 Cheves, 5.

[x] (S. C. 1882) An inference of an appearance by defendant is not warranted by the mere fact of an indorsement on the summons by the trial justice of a taxation of costs for "hearing, examination of witness, and subpœna," and jurisdiction does not appear sufficiently.—Barron v. Dent, 17 S. C. 75.

[xx] (Tex. 1860) A judgment of a justice, rendered under Act Jan. 27, 1842, § 10, providing that, if any sheriff fails or refuses to pay over money collected on execution, he shall be liable to pay 10 per cent. a month on the amount so collected, besides interest and costs, and that the sum may be recovered by motion against his sureties, is void if the record fails to show that defendant had notice or that he appeared in the proceeding.—Mitchell v. Runkle, 25 Tex. Supp. 132.

[y] (Tex. 1888) Justices' courts, not being courts of special jurisdiction, in which all the facts giving them jurisdiction must appear, the fact that a transcript from the justice does not show expressly that all defendants in an action were cited to appear, does not invalidate the judgment.—Hance v. Galveston Wharf Co., 70 Tex. 115, 8 S. W. 76.

[yy] (Tex. 1894) Where the citation is served on the defendant, a nonresident outside of the state, a mere entry in the justice's docket that an attorney appeared for defendant is insufficient, under Rev. St. art. 1579, to show that defendant made an appearance, and a personal judgment against defendant is void.—Schneider v. Gray, 7 Tex. Civ. App. 25, 26 S. W. 640.

[z] (Vt.) Where a defendant, who was a resident of the state, is out of the state at the time of commencing a suit, and the return does not show notice, the plaintiff must show notice before judgment is rendered, and that fact must appear on the face of the justice records, or proceedings must be had agreeably to Comp. St. p. 236, §§ 58, 59.—(1826) Marvin v. Wilkins, 1 Aiken, 107; (1853) Kidder v. Hadley, 25 Vt. 544.

§ 215. Pleading jurisdictional facts.

In action on judgment, see post, § 423.

[a] (Ark. 1852) Where, in trover for a gun, defendant claims title under a judgment rendered under Dig. c. 153, § 52, which provides for the forfeiture of guns found in the hands of slaves, the plea should state all the facts necessary to show jurisdiction on the part of the justice rendering the judgment of forfeiture. —Jones v. Mason, 12 Ark. (7 Eng.) 687.

[b] (Ind. 1837) The statement of demand filed in an action before a justice of the peace need not show that the justice has jurisdiction; but, if it show the contrary, the suit must be dismissed.—Perkins v. Smith, 4 Blackf. 299.

[c] (Ind. 1882) Where a complaint before a justice of the peace is for the recovery of real estate, and fails to show the relation of landlord and tenant between the parties to the suit, which relation alone would give jurisdiction, such complaint is insufficient on motion in arrest of judgment in the circuit court.—Burgett v. Bothwell, 86 Ind. 149.

[d, e] (Md. 1857) In an action against a constable a plea alleging that certain property was taken by defendant by virtue of an attachment issued by a justice of the peace, implies that the writ was legally issued (Act 1856, c. 112, subc. 2, art. 4, § 60), and the facts necessary to jurisdiction in the justice need not be set forth.—Campbell v. Webb, 11 Md. 471.

[f] (Mo. 1876) To give a justice jurisdiction of an action for killing live stock on a railroad, the statement of the cause of action must specify the locality where the injury occurred.—Haggard v. Atlantic & P. R. Co., 63 Mo. 302.

[g] (Mo. 1876) In an action for rent before a justice of the peace under Wag. St. p. 882, §§ 33–35, which require that the landlord shall file a statement setting forth the terms on which the property was rented and the amount of rent actually due, which shall not exceed the

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jurisdiction of a justice, plaintiff's complaint must specify the exact sum, or, if rent be payable in particular products or material, the exact amount thereof, demanded and due.—Cook v. Decker, 63 Mo. 328.

[h] (Mo. 1888) In an action against a railroad company before a justice of the peace, under Rev. St. § 809, for killing stock in a township other than that in which the suit is brought, the fact that the two townships adjoin each other is jurisdictional and must be averred.—Wiseman v. St. Louis, A. & T. Ry. Co., 30 Mo. App. 516, Kinion v. Kansas City, S. & M. R. Co., Id. 573.

[i] (Mo. 1893) Where an action before a justice of the peace for killing stock is brought in the township adjoining the one where the killing occurred, it should be so alleged in the complaint.—Jones v. Chicago, B. & K. C. Ry. Co., 52 Mo. App. 381.

[j] (Mo. 1894) Rev. St. § 2079, providing that in pleading a judgment by a court of special jurisdiction it shall be sufficient to allege it as having been "duly made," and, if this be denied, the pleader shall show the jurisdictional facts, applies to the pleading of a judgment of a justice of the peace condemning land for reservoir area for a railroad.—Musick v. Kansas City, S. & M. R. Co., 124 Mo. 544, 28 S. W. 72.

[k] (Mo. 1894) In an action against a railroad company under Rev. St. § 2611, for double damages for killing stock, the fact that the stock was killed in the township in which the action was brought, or in an adjoining township, is jurisdictional, and an averment thereof is essential.—Mier v. St. Louis, I. M. & S. R. Co., 56 Mo. App. 655.

[l, m] (Mo. 1894) In an action before a justice of the peace against a railroad company to recover double damages for the killing of stock, an allegation that the township in which such stock was killed is adjacent to the one in which the action is instituted will, in the absence of objection, be deemed equivalent to an allegation that the one township adjoins the other.—Harrison v. St. Louis, I. M. & S. Ry. Co., 58 Mo. App. 463.

[n, o] (N. J.) A credit given by the plaintiff to reduce his demand within the jurisdiction of a justice of the peace ought to appear on the state of demand itself.—(1807) Price v. Smock, 2 N. J. Law (1 Penning.) 206; (1809) Caldwell v. French, 3 N. J. Law (2 Penning.) 613; (1866) Keep v. Kelly, 32 N. J. Law (3 Vroom) 56.

[p] (N. J. 1870) Since a justice of the peace is given a special jurisdiction under the landlord and tenant act over actions to recover possession from a tenant, every fact necessary to show that the justice had jurisdiction of the case must appear in the pleadings.—Hopper v. Chamberlain, 34 N. J. Law (5 Vroom) 220.

[q] (N. Y. 1826) In trespass, a plea of justification by overseers of the poor that they seized plaintiff's property by virtue of a warrant of two justices, issued on defendant's application, on the ground that plaintiff had left his wife and children a charge on the town, must state affirmatively that the plaintiff had left his wife and children a charge, since this is necessary to give the justice jurisdiction.—Bowman v. Russ, 6 Cow. 234.

[r] (N. Y. 1844) A plea of justification under an attachment issued by the justice must set forth the facts upon which the jurisdiction of the justice is founded. General averments that the proceedings were according to the statute are not sufficient.—Van Etten v. Hurst, 6 Hill, 311, 41 Am. Dec. 748.

[s] (N. Y. 1850) In an action for assault and battery and false imprisonment, a plea in justification under warrant of arrest issued by a justice of the peace in a civil suit is sufficient, where enough is shown to bring the case within the general language of the act conferring jurisdiction, though, if within certain exceptions of the act, the warrant would have been unauthorized.—Foster v. Hazen, 12 Barb. 547.

[t] (N. Y. 1886) Buffalo City Charter, tit. 2, § 10, as amended by Laws 1885, c. 181, provides that a justice of the peace in a certain ward in Buffalo shall have jurisdiction in civil actions and proceedings only where the defendant is a nonresident at the time the action or proceeding is commenced. *Held*, that the fact of nonresidence is not a jurisdictional fact, which must be pleaded to authorize a judgment in plaintiff's favor.—Griffin v. Norton, 5 N. Y. St. Rep. 812.

[tt] (Pa. 1851) On an appeal from the judgment of a justice of the peace, it was *held* that it need not appear in the declaration that the claim of the plaintiff was for an amount within the jurisdiction of the court; that it was sufficient if it appeared on the trial.—Hackman v. Flory, 16 Pa. (4 Harris) 196.

[u] (Vt. 1840) In actions on promissory notes before justices of the peace, it must appear, either from the declaration or from the indorsements on the note or notes, that the sum due is less than $100, or the case will be dismissed on motion.—Perkins v. Rich, 12 Vt. 595.

[v] (Wis. 1859) Under the old practice, a justification of a trespass under a justice's execution must set out in detail the facts, to show jurisdiction.—Roys v. Lull, 9 Wis. 324.

§ 216. Presumptions as to jurisdiction.

On appeal, see post, § 705.

On certiorari, see post, §§ 812, 813.

[a] The jurisdiction of a justice of the peace or other inferior magistrate will not be presumed.

—(Ala. 1890) Horton v. Elliott, 90 Ala. 480, 8 South. 103;
(Ark. 1843) Reeves v. Clarke, 5 Ark. (5 Pike) 27;
(Cal. 1883) Kane v. Desmond, 63 Cal. 464;
(Ind. 1854) Straughan v. Inge, 5 Ind. 157; (1881) Wilkinson v. Moore, 79 Ind. 397;
(Me. 1856) Lane v. Crosby, 42 Me. 327;
(Mich. 1847) Spear v. Carter, 1 Mich. (Man.) 19, 48 Am. Dec. 688;
(Minn. 1871) Clague v. Hodgson, 16 Minn. 329 (Gil. 291).
(Nev. 1865) Mallett v. Uncle Sam Gold & Silver Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

[b] (U. S. 1824) If a creditor gives a credit upon his account so as to bring it within the jurisdiction of a justice of the peace, and if the debtor does not object to the credit before the justice, his assent to the credit will be presumed, in the District of Columbia.—Maddox v. Stewart, Fed. Cas. No. 8,934 [2 Cranch, C. C. 523].

[c, d] (Cal.) One who sets up a judgment of a justice must affirmatively show every fact necessary to confer jurisdiction.—(1859) Swain v. Chase, 12 Cal. 283; (1863) Rowley v. Howard, 23 Cal. 401; (1867) Jolley v. Foltz, 34 Cal. 321.

[e, f] (Cal. 1867) In an action in a justice's court it did not appear that the defendant against whom judgment by default was rendered resided in the township in which the action was commenced, or that he was within any of

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the exceptions enumerated in section 525 of the practice act. *Held*, that when the proceedings and judgment in such action, as contained in the docket and other papers alone, were offered in evidence against the defendant in another action, they were properly rejected, because jurisdiction of the person of the defendant did not affirmatively appear.—Jolley v. Foltz, 34 Cal. 321.

[g] (Ga. 1843) To oust a justice court of jurisdiction on the ground that the entire demand has been divided into several smaller ones, it must be proved before the justice that the whole demand was originally entire.—Pinckard v. Ware, Ga. Dec. 172, pt. 2; Kendall v. Justices of 675th Dist. of Muscogee County, Ga. Dec. 185, pt. 2.

[h] (Ga. 1869) Where a justice of the peace officially indorsed a fi. fa., but without naming the county, the legal presumption is that he was a justice of the peace for the county in which the levy was made; especially after the lapse of 30 years.—Thomas v. Malcom, 39 Ga. 329, 99 Am. Dec. 459.

[i] (Ill. 1839) The court will presume that a credit, allowed on an account by the plaintiff in a suit before a justice, which, if allowed, would bring the case within the jurisdiction of the justice, was fair, until the contrary is shown.—Hugunin v. Nicholson, 2 Ill. (1 Scam.) 575.

[j] (Ill. 1854) A., a justice of the peace, removed from the county and made over his docket and papers to B., then the nearest justice to A.; B. afterwards removed from the state and transferred his docket and papers, including those of A., to C., who issued an execution on the judgment by A. *Held*, that it would be presumed in support of his jurisdiction that he was the nearest justice.—Martin v. Walker, 15 Ill. (5 Peck) 377.

[k] (Ind. 1841) Though a note filed before a justice of the peace as a cause of action be, on its face, for a sum beyond his jurisdiction, yet, if the amount actually demanded and recovered be within it, the presumption is that the note had been so reduced by credits as to authorize the justice, under the statute, to take cognizance of the cause.—Remington v. Henry, 6 Blackf. 64.

[l] (Ind. 1857) There is no presumption in law that a justice of the peace of a foreign state has jurisdiction to render judgment in a civil action.—Willey v. Strickland, 8 Ind. 453.

[m] (Ind. 1862) Where the justice does not certify the cause up, and the pleadings do not put the title in issue, and there is nothing to show what the proof was before the justice, it will be presumed that he did his duty, and that the proof did not put the title in issue.—Wall v. Albertson, 18 Ind. 145.

[n] (Ind. 1875) An affidavit in support of a motion for a writ of mandate to compel a justice of the peace to issue a summons in a civil action must allege that the justice is not related by blood or marriage to either party.—Logansport, C. & S. W. R. Co. v. Groniger, 51 Ind. 383.

[o] (Ind. 1891) Justices of the peace are inferior courts of statutory powers, and no presumption can be invoked in favor of their judgments on points relating to their jurisdiction.—Goodwin v. Barnett (App.) 28 N. E. 115.

[oo] (Ind. 1892) Rev. St. 1881, § 1433, gives justices of the peace concurrent jurisdiction to determine certain suits, where the value in controversy does not exceed $200. *Held*, in an action to recover replevied property, that though the complaint alleges that the justice who issued the writ of replevin, and the party who procured it, knew that the value of the property to be replevied was $300, yet where it is not shown how the justice had such information, nor claimed that the complaint filed in the action of replevin did not show that the value of the property did not exceed $200, it will be presumed that the justice acted in good faith, and had jurisdiction of the matter.—Lemert v. Shaffer, 5 Ind. App. 468, 31 N. E. 1128.

[p] (Iowa, 1877) In the absence of any showing to the contrary in the justice's record, jurisdiction of a garnishment once acquired is presumed to have continued to the judgment, though more than three days intervened between the answer and the judgment.—Moore v. Reeves, 47 Iowa, 30.

[pp] (Mich. 1847) Credit will not be given to a confession of judgment before a justice of the peace, unless it is clearly and affirmatively shown that he had jurisdiction to render it.—Spear v. Carter, 1 Mich. (Man.) 19, 48 Am. Dec. 688.

[q] (Mich. 1865) Where, under Comp. Laws, § 3893, a justice certifies a transcript of a judgment from the docket of a former justice, the original docket and judgment must be presumed to be under his legal control.—Facey v. Fuller, 13 Mich. 527.

[qq] (Mich. 1873) Where it is shown that a justice of the peace originally obtained jurisdiction of an action, it will be presumed in support of the judgment rendered therein that jurisdiction continued until entry of such judgment.—Saunders v. Tioga Mfg. Co., 27 Mich. 520.

[r] (Mo. 1857) Where defendant to an action in a justice court was served with process in the township in which it was begun, it will be presumed, in another action involving such judgment, in the absence of evidence to the contrary, that he resided therein.—Franse v. Owens, 25 Mo. 329.

[rr] (Mo. 1886) Where suit is brought for double damages before a justice for the killing of plaintiff's hogs in a township alleged to be adjoining that in which suit was brought, and there is failure to prove either that the killing was done in the township alleged, or that that township adjoined the one where the suit was brought, the action cannot be maintained.—Palmer v. Missouri Pac. Ry. Co., 21 Mo. App. 437.

[s] (N. J. 1856) In special statutory proceedings in justice's court to compel a turnpike company to cease taking toll when its road is out of repair, under Act Feb. 22, 1852 (Nix. Dig. p. 603), authorizing the incorporation of plank road companies, everything necessary to give jurisdiction must be shown.—Bergen Turnpike Co. v. Walker, 25 N. J. Law (1 Dutch.) 554.

[ss] (N. Y. 1847) A count, in a suit in a justice's court, charging an injury to plaintiff's clothing, is good, as the court will not intend that it was incidental to an assault and battery, of which latter matter a justice of the peace has no jurisdiction.—Rich v. Hogeboom, 4 Denio, 453.

[t] (N. Y. 1855) Although, in the justice's return of a case in which judgment has been rendered by him, no facts appear affirmatively to show that he had jurisdiction of the subject-matter and the person, yet if the docket of the justice is read in evidence without objection, and no objection taken to the validity of the judgment, or the sufficiency of the evidence to show that the justice had jurisdiction, the facts necessary to confer jurisdiction will be presumed.—Westbrook v. Douglass, 21 Barb. 602.

[tt] (N. Y. 1891) The affidavit of defendant recited that a few days before the action was commenced she received a letter signed by C., the justice who issued the summons against her

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and who was also a practicing lawyer, stating that plaintiff had left with him an account of $50 against defendant for collection, and that unless it was settled plaintiff would feel obliged to bring an action to enforce its collection. *Held*, that it would not be presumed against the jurisdiction of the justice that he was acting as an attorney in writing for the plaintiff.—McLouth v. Myers, 61 Hun, 624, 16 N. Y. Supp. 779.

[u] (N. C. 1837) The term "book account" may comprehend a signed account as well as an open one, and where judgment of a single justice appears to have been given on a warrant, as due by book account, for an amount beyond the jurisdiction of a justice to render on an open account, it will be taken, in support of the justice's jurisdiction, that the book account was a signed account.—Turner v. Edwards, 19 N. C. 539.

[uu] (N. C. 1896) Where a cause of action could be brought either for breach of contract or in tort for negligence, and plaintiff sues before a justice, in order to sustain the jurisdiction of the justice it will be presumed that the action was brought on the contract.—Schulhofer v. Richmond & D. R. Co., 118 N. C. 1096, 24 S. E. 709.

[v] (Pa. 1895) Where a judgment of a justice of the peace was allowed to stand for over a year after the entry, every reasonable presumption consistent with the record will be made in favor of the jurisdiction and regularity of the proceedings.—Cooke v. Shoemaker (Com. Pl.) 8 Kulp, 212, 17 Pa. Co. Ct. R. 641.

[vv] (Tenn. 1874) A justice's judgment is not invalidated by the fact that the warrant fails to affirmatively show that the note upon which the judgment was rendered was for an amount within the justice's jurisdiction, as that fact will be presumed.—Elliott v. Jordan, 66 Tenn. (7 Baxt.) 376.

[w] (Tex. 1857) Where the record of a justice of the peace shows that judgment was had against some defendants on appearance, any defendant not duly served, in order to impeach the judgment on that ground, must allege and prove that he did not appear in court.—Howerton v. Luckie, 18 Tex. 237.

[ww] (Tex. 1858) A justice of the peace will be presumed to have acted within his jurisdiction, although his entry of judgment is so made that its terms are applicable to a case in which he had no jurisdiction as well as to one which he had authority to decide.—Bumpus v. Fisher, 21 Tex. 561.

[x] (Tex. 1887) A judgment in personam of a justice of the peace showed that it was obtained on service by publication, which was allowable, under Act Aug. 7, 1848, if defendant was absent from the state or transient. It did not appear on what ground publication was ordered. In a transfer of certain scrip indorsed thereon, 15 years before judgment, defendant was described as of a foreign state. *Held*, that it should not be presumed, in a collateral proceeding, that defendant was nonresident, so as to invalidate the judgment.—Traylor v. Lide (Sup.) 7 S. W. 58.

[xx] (Tex. 1895) A judgment of a justice of the peace, though silent as to service of citation, will be presumed to be valid, on collateral attack, until the contrary is shown, either from the record, or by evidence aliunde.—Hambel v. Davis (Civ. App.) 33 S. W. 251.

[y] (Vt. 1840) In order to sustain the jurisdiction of a justice of the peace of an action on a note as to the amount in controversy, if a payment is alleged in general terms, without time or place, it will be presumed to have been made at the date of the note.—Perkins v. Rich, 12 Vt. 595.

[yy] (Vt. 1852) The same rule of construction is extended in favor of the jurisdiction of justices of the peace as is done in favor of courts of general jurisdiction.—Wright v. Hazen, 24 Vt. 143.

[z] (Wis. 1859) Though the Code allows a general allegation of jurisdiction in the case of the inferior courts, as justices' courts, yet if the jurisdiction is denied the jurisdictional facts must be affirmatively shown at the trial, as under the old practice.—Roys v. Lull, 9 Wis. 324.

[zz] (Wis. 1880) Under Laws 1877, c. 192, providing that a justice shall not issue process unless prior thereto a complaint shall be made and filed by one of certain officers, to give the justice jurisdiction of an action it must appear affirmatively that the complaint was made and filed by a person authorized by the statute; it cannot be presumed.—State v. Gillen, 49 Wis. 683, 6 N. W. 250.

(M) CONSENT OF PARTIES TO JURISDICTION, AND WAIVER AND CURE OF OBJECTIONS.

CONSENT OF PARTIES TO JURISDICTION, § 217.
WAIVER OR CURE OF OBJECTIONS, § 218.
— WAIVER OF OBJECTION THAT TITLE TO LAND IS INVOLVED, § 219.
— WAIVER OF OBJECTIONS TO PLACE OF BRINGING SUIT, § 220.
— WAIVER OF DISQUALIFICATION OF JUSTICE, § 221.

Appearance as conferring jurisdiction or waiving objections, see post, §§ 267, 272, 273.

§ 217. Consent of parties to jurisdiction.

[a] (Ala. 1834) Where a defendant consents to be sued in a justice court in a county other than that in which he resides, he cannot, on appeal to the county court, plead his privilege to be sued in the county of his residence.—McKinney v. Low, 1 Port. 129.

[b] (Cal. 1857) Consent of parties cannot give a justice jurisdiction beyond $200.—Feillett v. Engler, 8 Cal. 76.

[c] (Ga. 1889) Where a magistrate issued an attachment, and went outside of the limits of his jurisdiction, and tried a claim filed against the property attached, he had neither jurisdiction of the person of the claimant nor of the suit, and jurisdiction could not be conferred by an agreement of the claimant to that effect.—Block v. Henderson, 82 Ga. 23, 8 S. E. 877, 14 Am. St. Rep. 138, 3 L. R. A. 325.

[d] (Ind. 1877) Jurisdiction by consent of parties cannot be given to a justice of the peace in a controversy exceeding $200.—Horton v. Sawyer, 59 Ind. 587.

[e] (Iowa) A justice of the peace has jurisdiction to render a judgment on an award of arbitrators where, by agreement of the parties to the arbitration, judgment is so to be rendered thereon, and where the amount of the award does not exceed the sum limiting the jurisdiction of the justice to render judgment by consent.—(1866) Van Horn v. Bellar, 20 Iowa, 253; (1868) Whitis v. Culver, 25 Iowa, 30.

[f] (Iowa, 1880) A clause in a note for less than $300, bearing interest, that "consent is hereby given that a justice of the peace may

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have jurisdiction on this note to the amount of $300," confers, under Code 1873, § 3508, and Const. art. 11, § 1,—both of which declare that the jurisdiction of justices of the peace shall extend to all civil cases where the amount in controversy does not exceed $100, and, by consent of parties, may be extended to any amount not exceeding $300,—jurisdiction upon any justice who would otherwise have had jurisdiction but for the statutory limitation to $100.—Marshalltown Bank v. Kennedy, 53 Iowa, 357, 5 N. W. 508.

[g] (Iowa, 1882) Since, under Code 1873, § 3508, a justice of the peace cannot have jurisdiction in excess of $100, except by consent, where the parties to a note for $225 agree therein that judgment may be taken on it before any justice of the peace of Dallas county, a judgment on such note, rendered by a justice of the peace of Polk county, is void, though the note was payable there.—Brown v. Davis, 59 Iowa, 641, 13 N. W. 861.

[h] (Iowa, 1886) A tenant gave his note for rent in an amount in excess of a justice's jurisdiction, agreeing that the justice might have jurisdiction. *Held*, that the justice had jurisdiction thereunder of a proceeding to enforce the landlord's lien as against a subtenant.—Houghton v. Bauer, 70 Iowa, 314, 30 N. W. 577.

[i] (Me. 1855) The jurisdiction of magistrates can arise only from the express provision of statute, and not from the agreement of parties.—Call v. Mitchell, 39 Me. 465.

[j] (Mich. 1847) Where jurisdiction is unqualifiedly withheld from a justice, consent will not render the proceedings valid.—Spear v. Carter, 1 Mich. (Man.) 19, 48 Am. Dec. 688.

[k] (Miss. 1881) Consent of parties will not confer jurisdiction on a justice's court where none exists, but will bind the parties, if the thing consented to could lawfully be done by the court under any circumstances without consent.—Rice v. Locke, 59 Miss. 189.

[l] (Mo. 1893) The rule that jurisdiction of persons may be conferred by consent applies to justices' courts.—Grimm v. Dundee Land & Investment Co., 55 Mo. App. 457.

[m] (N. J. 1790) Where the justice who issues the warrant is absent when the writ is returned, and the parties voluntarily submit to the decision of another justice, the judgment by such second justice is good.—Quigley v. Baldwin, 1 N. J. Law (Coxe) 37; Johnson v. ———, Id. 44.

[n] (N. Y. 1823) In trespass, the consent of one defendant to appear and go to trial, after the cause has been discontinued on account of the justice's absence on the day set for trial, will not give jurisdiction as to the other defendants.—Stoddard v. Holmes, 1 Cow. 245.

[o] (N. Y. 1823) Where a cause is discontinued by the absence of a justice on the day of trial, the parties may confer jurisdiction by consent, and appearing and going to trial on another day.—Stoddard v. Holmes, 1 Cow. 245.

[p] (N. Y. 1831) In an action of trespass in a justice's court, the consent of the parties that the suit shall proceed, notwithstanding that it involves the title to lands, does not confer jurisdiction.—Striker v. Mott, 6 Wend. 465.

[q] (N. Y. 1850) Consent gives no jurisdiction to the justice over the subject-matter, but does over the person.—Hogan v. Baker, 2 E. D. Smith, 22.

[r] (N. C. 1881) Where a contract creates the legal relation of vendor and vendee, and not that of landlord and tenant, so that a justice of the peace has no jurisdiction of a summary proceeding in ejectment by the vendor under the landlord and tenant act, such jurisdiction cannot be conferred by consent of the parties embraced in the contract.—Hughes v. Mason, 84 N. C. 472.

[s] (Ohio, 1853) In any proper form, one may delegate to another complete authority to regulate, control, dispose of, receive, and receipt for his property of whatever description; but he cannot, by any form of commission, whatever the powers of the agent may be, confer on a justice of the peace a power not given by the statute.—McCleary v. McLain, 2 Ohio St. 368.

[t] (Ohio, 1861) Jurisdiction cannot be given to a justice of the peace by consent in cases where he has no jurisdiction over the subject-matter.—Place v. Welch, 2 Ohio Dec. 542.

[u] (Pa. 1869) Where, in an action before a justice, the amount involved exceeds his jurisdiction, the parties cannot, by consent, after the suit is instituted, give the justice jurisdiction of the cause.—Jones v. Stauffer, 1 Leg. Gaz. 91.

[v] (Tex. 1894) Where the appointment of a justice of the peace was void, consent of parties cannot give him jurisdiction.—Crawford v. Saunders (Civ. App.) 29 S. W. 102.

§ 218. Waiver or cure of objections.

To jurisdiction of justice taking cause on change of venue, see post, § 240.

[a] (Ala. 1879) Code, § 757, provides that a justice of the peace shall have jurisdiction of all "actions brought to recover specific property where the value does not exceed $50." *Held*, that where the value of the property exceeds $50, though averred in the complaint as less than that sum, the defect of jurisdiction is not cured when properly presented by plea in abatement by a verdict for plaintiff assessing the value at less than $50.—Carter v. Alford, 64 Ala. 236.

[b] (Cal. 1886) Where, in an action before a justice of the peace to recover a sum of money due on an assessment for street work in a municipality, no question as to the legality of the assessment is raised by answer verified by oath of the defendant, no evidence of such legality can be received, and the justice's court retains jurisdiction.—Williams v. Mecartney, 69 Cal. 556, 11 Pac. 186.

[c] (Colo. 1891) Where, after the trial of an action in justice's court, the parties stipulate for its submission to the district court, which has jurisdiction of the subject-matter, and proceed to trial, an objection that the justice had no jurisdiction, and that consequently the district court has no authority to try the case, comes too late.—Edwards v. Smith, 16 Colo. 529, 27 Pac. 809.

[d] (Ga. 1843) Where several suits are brought between the same parties in a justice's court, the defendant can take advantage of their amounting to more than $30 only by a plea to the jurisdiction, and if not so taken the objection is waived.—Gresham v. Landens, Ga. Dec. 149, pt. 2.

[e] (Ga. 1880) Where a justice's summons in a suit for more than $50 was made returnable in less than 20 days, the defect in jurisdiction was not cured by an agreement to waive all defects.—Thurston v. Wilkerson, 65 Ga. 557.

[f] (Ill. 1871) Where a person not a justice of the peace assumes the functions of such officer, and issues a writ of replevin, he is a trespasser; but if the defendant therein procures a change of venue to a person who is a justice, and proceeds to trial before the latter, he thereby confers jurisdiction on him, both as to the

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person and the subject-matter.—Graves v. Shoefelt, 60 Ill. 462.

[g] (Ind. 1862) Where a justice of the peace disregards a plea to the jurisdiction, and the defendant then pleads to the merits, he thereby waives all question of jurisdiction.—Storm v. Worland, 19 Ind. 203.

[h] (Iowa, 1878) Where a justice of the peace has no jurisdiction of an action, the fact that defendant, after the overruling of a motion to dismiss, filed an answer, will not give him jurisdiction.—McMeans v. Cameron, 51 Iowa, 691, 49 N. W. 856.

[i] (Mich. 1884) An objection to the jurisdiction of a justice of the peace is waived where defendant pleads the general issue and the parties proceed to trial on the merits.—Singer Mfg. Co. v. Benjamin, 55 Mich. 330, 21 N. W. 358, 23 N. W. 25.

[j] (Mo. 1855) Where a suit is brought before a justice of the peace for a sum exceeding that magistrate's jurisdiction, waiver of this error does not confer jurisdiction.—Stone v. Corbett, 20 Mo. 350.

[k] (Mo. 1893) The rule that jurisdiction of the person may be conferred by waiver applies to justices' courts.—Grimm v. Dundee Land & Investment Co., 55 Mo. App. 457.

[l] (N. J. 1890) A party against whom a judgment is rendered in a justice's court in New Jersey, in a matter over which the justice had no jurisdiction, can raise the objection to the jurisdiction of the court either upon a certiorari or upon an appeal.—Steinlein v. Folwell (Sup.) 20 Atl. 1079.

[m] (N. Y. 1850) A defendant does not waive a plea to the jurisdiction of a justice by pleading the general issue after the justice has overruled his first plea.—Allen v. Stone, 9 Barb. 60.

[n] (N. Y. 1851) Where the statute expressly declares that a justice shall have no jurisdiction of the cause if the defendant be not proceeded against as the law prescribes, this strips the justice of all official authority, and he has no more power to accept a waiver, and thus acquire jurisdiction, than a private individual would have.—Robinson v. West, 11 Barb. 309, reversing (1847) 3 N. Y. Super. Ct. (1 Sandf.) 19.

[o] (Ohio, 1861) Where a justice of the peace has jurisdiction of the subject-matter, and the defendant has some privilege which exempts him from jurisdiction, he may waive the privilege, and thereby confer jurisdiction on the justice.—Place v. Welch, 2 Ohio Dec. 542.

[p] (Pa. 1877) Where a judgment of a justice of the peace against a married woman was void for want of jurisdiction, failure on her part to appeal was not a waiver of the want of jurisdiction.—Krause v. Leiby, 1 Leg. Rec. 74.

[q] (Pa. 1884) Want of jurisdiction can be taken advantage of at any time on the jurisdiction of the justice of the peace.—Lucas Coal Co. v. Struble, 3 Lanc. Law Rev. 300.

§ 219. —— Waiver of objection that title to land is involved.

[a] (N. J. 1833) In the court for the trial of small causes, the justice may allow a defendant to file a plea of title after the return day of the summons, but not after the day to which the cause should be first adjourned.—Shannon v. Flood, 13 N. J. Law (1 J. S. Green) 301.

[b] (N. Y. 1818) In an action of trespass on land, before a justice, the plea of title comes too late, after pleading the general issue, demanding a jury, and obtaining an adjournment. —Quimby v. Hart, 15 Johns. 304.

[c] (N. Y. 1850) To entitle a defendant to a dismissal of a cause pending before a justice, on the ground that the title to land comes in question, he must call the justice's attention specifically to the objection, by at least disputing the title of the plaintiff.—Browne v. Scofield, 8 Barb. 239.

[d] (N. Y. 1851) Where the complaint in a justice's court is so drawn that the defendant can set up title in his answer, and, on giving the requisite security, oust the justice of his jurisdiction, but omits to do so, the justice retains his jurisdiction, and the defendant will be precluded from drawing it in question on the trial.—Adams v. Rivers, 11 Barb. 390.

[e] (N. Y. 1856) The justice ought to give defendant a liberal opportunity of amending his answer, if necessary so as to set up title.—Smith v. Mitten, 13 How. Prac. 325.

[f] (N. Y. 1858) In an action before a justice of the peace to recover penalties for passing a toll gate without paying the tolls, if the defendant intended to raise the question of title, he should have set forth in his answer the matter showing that title would come in question, and should have given the undertaking. Not having done so, the justice had jurisdiction of the cause, and the defendant was precluded, in his defense, from drawing the title in question.—Fredonia & S. Plank Road Co. v. Wait, 27 Barb. 214.

[g] (N. Y.) Under the Code of Procedure, a defendant in a justice's court who would interpose a plea of title is not absolutely required to do so at the time of joining issue, as under the Revised Statutes; but this, like any other defense, may be interposed by amendment at any time before trial, when substantial justice shall be promoted thereby.—(1866) Hinds v. Page, 6 Abb. Prac. (N. S.) 58; (1868) Weeks v. Stroble, 36 How. Prac. 123.

[h] (Pa. 1868) Under Act March 22, 1814, requiring an affidavit that title to land would come in question to be made, in order to oust the jurisdiction of the magistrate, "before the trial of the action," it is not essential in every case that the affidavit be made before any witnesses are examined; a reasonable and liberal intendment is to be made in favor of the statutory right of defendant.—Geiger v. Geiger, 1 Woodw. Dec. 404.

[i] (Vt. 1854) Where the title to land is concerned in an action, and the justice consequently has no jurisdiction, it is a defect which may be taken advantage of at any time during the pendency of the action.—Thayer v. Montgomery, 26 Vt. 491.

[j] (Wis. 1883) The existence of a right of way, being an interest in land, cannot be contested in a justice's court, under Rev. St. 1878, § 3573; and, if its existence be relied on as a defense to an action of trespass begun in such court, it must be specially pleaded, and the statutory bond tendered to take the case to the circuit court, or the defense is waived.—Lowitz v. Leverentz, 57 Wis. 596, 15 N. W. 842.

§ 220. —— Waiver of objections to place of bringing suit.

[a] (Cal. 1860) The failure of the defendant, after summons served, to appear and object that suit was brought in the wrong township, is no waiver of the objection to the justice's jurisdiction.—Lowe v. Alexander, 15 Cal. 296.

[b] (Cal. 1895) Under Code Civ. Proc. § 890, providing, in regard to justices of the peace, that if the objection that the action is brought in the wrong county "is not taken at the trial it

is waived," the objection may be taken by answer, and urged on the trial, and therefore an answer to the merits does not waive such objection.—Holbrook, Merrill & Stetson v. Superior Court of Sacramento County, 106 Cal. 589, 39 Pac. 936.

[c] (Ga. 1880) Where the justice of the defendant's district was disqualified, his objection that the justice of another district, before whom the case was tried on its merits, did not have jurisdiction over his person, *held* to come too late, being first raised after judgment.—Dozier v. Allen, 65 Ga. 254.

[d] (Ind. 1854) The jurisdiction of a justice of the peace, in cases where the defendant is resident in another township, is not destroyed by Rev. St. 1843, p. 863, § 4; unless such defendant appear and plead to the jurisdiction, after being duly served with process, the justice has power to render judgment against him.—State v. Carter, 6 Ind. 38.

[e] (N. Y. 1848) Where defendant did not appear in an action, his failure to object that it was brought before a justice of a town in which the parties did not reside is not a waiver of the error, though he might have appeared and objected.—Tiffany v. Gilbert, 4 Barb. 320.

[f] (N. Y. 1850) 2 Rev. St. art. 226, providing that every action cognizable before a justice shall be brought before some justice of the town in which the parties, or some one of them, reside, or of an adjoining town, is in the nature of an exception to article 225, which gives jurisdiction to justices generally, and must be pleaded by a party seeking to bring himself within its provisions.—Foster v. Hazen, 12 Barb. 547.

[g] (N. Y. 1868) A defendant by answering a complaint in a justice's court waives any defense on the ground of nonresidence, though his attorney made a statement in regard to such nonresidence, where he does not plead such fact or make an affidavit.—Osburne v. Gilbert, 52 Barb. 158.

[h] (N. Y. 1890) Where a justice of the peace acquires no jurisdiction of the person of defendant because neither of the parties resides in his town, the failure of defendant to appear and object to the jurisdiction does not waive the objection.—Larocque v. Harvey, 57 Hun, 366, 10 N. Y. Supp. 576.

[i] (Ohio, 1881) Where a resident of one township was sued before a magistrate in another and goes to trial on the merits, without objection to the jurisdiction, he will be taken to have waived his right to object.—Caldwell v. High (D. C.) 8 Ohio Dec. 183, 6 Wkly. Law Bul. 201.

[j] (Tex. 1881) The right of a party in a justice court to be sued within the precinct or county of his residence may be expressly or impliedly waived.—Masterson v. Ashcom, 54 Tex. 324.

§ 221. —— Waiver of disqualification of justice.

[a] (Conn. 1888) Under Gen. St. § 676, authorizing parties by consent in writing to waive a disqualification of a justice of the peace, such waiver must be in writing, and is not affected by proceeding to trial without objection, even with knowledge of the disqualification.—Keeler v. Stead, 56 Conn. 501, 16 Atl. 552, 7 Am. St. Rep. 320.

[b] (Ind. 1893) The objection to a justice's trial of a cause because of his disqualification may be waived.—Baldwin v. Runyan, 8 Ind. App. 344, 35 N. E. 569.

[c] (N. H. 1858) Where, in a bastardy proceeding, the magistrate before whom the complaint was made, and the preliminary examination had, was a resident citizen and taxpayer of the complainant town, and these facts were known to respondent and his counsel at the time, but they designedly omitted to make any objection on that account until after various proceedings in courts of unquestioned authority having jurisdiction of the cause, the objection came too late.—Warren v. Glynn, 37 N. H. 340.

[d] (N. H. 1859) Objections to the competency of a justice having general jurisdiction of the subject to try a case, because the town of which he is a resident is pecuniarily involved, will be considered to have been waived, unless shown to have been taken at the earliest practical moment after the incompetency became known to the party objecting.—Gilmanton v. Ham, 38 N. H. 108.

[e] (N. Y. 1857) A defendant may prove the relationship of the justice of the peace, before whom the action is tried, to himself, for the purpose of showing want of jurisdiction, though his answer discloses no such defense, and he files no plea to the jurisdiction.—Place v. Butternuts Woolen & Cotton Mfg. Co., 28 Barb. 503.

[f] (Tenn. 1880) A confession of judgment in writing before a justice of the peace related to one of the parties is a waiver in writing of the relationship, within Code, § 4098.—Hilton v. Miller, 73 Tenn. (5 Lea) 395.

[g] (Wis. 1851) After a final judgment has been rendered by a justice of the peace, it is too late to object that the justice is brother-in-law of the plaintiff.—Rector v. Drury, 4 Chand. 24, 3 Pin. 298.

[h] (Wis. 1851) The objection that a justice is "near of kin" to one of the parties litigant, within the meaning of Rev. St. c. 88, § 47, may be waived.—Rector v. Drury, 4 Chand. 24, 3 Pin. 298.

[i] (Wis. 1863) It is not necessary that the disqualification of the justice through relationship be made to appear before joining issue.—Hibbard v. Odell, 16 Wis. 633.

(N) DETERMINATION OF QUESTIONS OF JURISDICTION.

DETERMINATION OF QUESTIONS OF JURISDICTION, § 222.
MODE AND SUFFICIENCY OF OBJECTIONS, § 223.

§ 222. Determination of questions of jurisdiction.

[a] (U. S. 1880) A New York statute provides that justices of the peace shall have civil jurisdiction in certain cases, including "an action to recover the possession of personal property claimed, the value of which, as stated in the affidavit of the plaintiff, his agent or attorney, shall not exceed the sum of $200." It is further provided in the same statute that, before any process shall issue, the plaintiff, his agent or attorney, shall make proof, by affidavit, showing among other things the "actual value" of the property claimed. *Held*, that such affidavit is an essential prerequisite to the attaching of the jurisdiction of the court.—Daily v. Doe (D. C.) 3 Fed. 903.

[aa] (Ark. 1883) A justice of the peace, having no jurisdiction to try the title to land, should refuse an interplea for land on which an attachment from his court has been levied, and proceed to judgment without reference to the title.—Cunningham v. Holland, 40 Ark. 556.

[b] (Colo. 1871) An action of unlawful detainer against a tenant holding over before a justice of the peace is not defeated by raising

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a question of title, but the effect is only to remove the cause to another court.—Klopfer v. Keller, 1 Colo. 410.

[c] (Iowa, 1849) A justice of the peace may ex officio determine what townships are within his jurisdiction.—Wright v. Phillips, 2 G. Greene, 191.

[d] (Iowa, 1856) The pleading of the defendant raising a question of title is not the test of the justice's jurisdiction, though if it appear on the trial that title is involved, the justice will be without jurisdiction.—Cox v. Graham, 3 Iowa (3 Clarke) 347.

[e] (Ky. 1818) Where a declaration is not filed, the evidence must show a demand within a justice's jurisdiction.—Patterson v. Martin, 8 Ky. (1 A. K. Marsh.) 348; Latham v. Ford, Id. 410.

[f] (La. 1895) A justice of the peace who is, by a party litigant in his court, recused on the charge of having a personal and pecuniary interest in the suit, is incompetent to make any order other than one of recusation and assignment to some other justice.—State ex rel. Hogsett v. Patin, 47 La. Ann. 1592, 18 South. 622.

[g] (Mass. 1837) In an action of trespass quare clausum before a justice of the peace, where a plea of title to the land is filed, the justice is not devested of his jurisdiction over the case in all respects, but may act on a motion to waive or amend the plea, or to amend the declaration, or to newly assign; and if the pleadings, as definitely fixed by the parties, do not present a question of title to real estate, he should proceed to try the cause.—Magoun v. Lapham, 36 Mass. (19 Pick.) 419; Wesson v. Joslin, Id. 422, note.

[h] (Minn. 1871) It is error, in dismissing an action for want of jurisdiction in a justice court, to give judgment for costs against plaintiff, though he appears generally.—McGinty v. Warner, 17 Minn. 41 (Gil. 23).

[i] (Miss. 1876) When one who is a freeholder and householder is sued before a justice in a wrong district, this, under the laws, defeats the jurisdiction of the justice. He has no power to make any order for the transfer of the cause to the proper district, but must simply disclaim jurisdiction.—Cain v. Simpson, 53 Miss. 521.

[j] (Mo. 1883) The justice's transcript, as well as the plaintiff's statement of his cause of action, may be looked to for the purpose of determining whether the stock, for killing which defendant railroad company is sued, were killed in the township wherein suit is brought, so as to confer jurisdiction on the justice.—Fields v. Wabash, St. L. & P. Ry. Co., 80 Mo. 208.

[k] (Mo. 1893) Where the jurisdiction of a justice of the peace is questioned, the constable's return of service of summons is admissible, either to support or to oppose the docket entries of the justice.—Sappington v. Lenz, 53 Mo. App. 44.

[l] (N. J. 1875) Where, on challenge to a justice of the peace for having counseled the plaintiffs and expressed his opinion on the matter in controversy, three triors are appointed, their determination of the facts is conclusive under Revision 1874, p. 652, § 262.—Davis v. Mahany, 38 N. J. Law (9 Vroom) 104.

[m] (N. Y. 1831) A plea of title before a justice, and a compliance with the requirements of the statute in such cases, does not oust the justice of jurisdiction, in an action of debt for a penalty for not removing an obstruction in a highway. It is the duty of the justice to decide whether such plea, when put in, is appropriate to the action prosecuted before him.—Fleet v. Youngs, 7 Wend. 291.

[n] (N. Y. 1888) The decision of the justice on the question whether the sum total of the accounts of the parties exceeds $400, thus determining his jurisdiction, is not conclusive in the sense that it cannot be reviewed. If incorrect, though not fatal to his jurisdiction, it is nevertheless error for which the judgment will be reversed.—Milbanks v. Coonley, 49 Hun, 610, 2 N. Y. Supp. 167.

[o] (N. C. 1831) A justice of the peace can try the truth of any plea which, if sustained, would bar an action within his jurisdiction.—Haines v. Dalton, 14 N. C. 91.

[p] (N. C. 1873) The jurisdiction of a justice of the peace cannot be proven by witnesses, but must be determined by the court.—Bridgers v. Bridgers, 69 N. C. 451.

[q] (N. C. 1881) In a summary proceeding in ejectment before a justice of the peace, it is the province of the court to determine whether title to land is in controversy.—Parker v. Allen, 84 N. C. 466.

[r] (Pa. 1803) The court, in examining the proceedings of justices of the peace, will call in the aid of affidavits to ascertain whether they have exceeded their jurisdiction.—Burginhofen v. Martin, 3 Yeates, 479.

[s] (Pa. 1855) In proceedings by a landlord to recover possession of the demised premises, under the act of April 3, 1830, the defendant's affidavit that the title to land will come in question will not oust the jurisdiction of the justice. That fact must be proved like any other fact in the case.—Essler v. Johnson, 25 Pa. (1 Casey) 350.

[t] (Pa. 1872) Under Act March 22, 1814, providing that a justice shall have no jurisdiction of an action for rent when the title to land may come in question, an affidavit in such an action that the title to land will come in question is conclusive on the justice.—Gruber v. Sheetz, 2 Woodw. Dec. 63.

[u] (Pa. 1872) The filing of an affidavit that title to realty will come in question does not oust the justice of jurisdiction, in proceedings under the landlord and tenant act of 1863; the act being complete in itself and not providing for such ouster by affidavit. The tenant's remedy is by appeal.—Livingood v. Moyer, 2 Woodw. Dec. 65.

[v] (Pa. 1892) Under the law of 1810 (5 Smith's Laws, p. 170, § 20) and of 1814 (6 Smith's Laws, p. 183, § 6), ousting justices of jurisdiction of cases involving title to land on defendant's affidavit, that such title will come in question, it is the duty of the justice on such affidavit to dismiss the case, without requiring payment or tender of one-half the cost.—Williams v. Williams (Com. Pl.) 6 Kulp, 415.

[w] (Tenn. 1874) Where the value of the property replevied is found to be beyond the jurisdiction of the justice of the peace, he can only render judgment for costs, though the plaintiff dismisses the suit.—Jacobs v. Parker, 66 Tenn. (7 Baxt.) 434.

[x] (Vt. 1884) Where of two counts, trespass and case, the justice has jurisdiction of one, the count in trespass, he cannot amend himself into jurisdiction by striking out the action of case.—French v. Holt, 57 Vt. 187.

[y] (Wis. 1877) Where, in an action of replevin, a justice's judgment determines the value of the property to be over $200, he has no further jurisdiction, whatever the value may in fact be, except to render the statutory judgment of abatement (Rev. St. c. 120, § 145), including costs in defendant's favor and dam-

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ages for caption and detention of the property seized by the officer.—Darling v. Conklin, 42 Wis. 478.

§ 223. Mode and sufficiency of objections.

Demurrer as raising objection to jurisdiction, see ante, § 97 [b, c, q].

[a] (Ala. 1892) When the lack of jurisdiction appears from the complaint filed in the justice's court, a motion may be made to dismiss the action; and, if the want of jurisdiction does not so appear, the facts may be shown by a plea in abatement denying jurisdiction.—Louisville & N. R. Co. v. Barker, 96 Ala. 435, 11 South. 453.

[b] (Cal. 1856) An objection to the jurisdiction of a justice on the ground of excess of value of the subject in controversy is properly taken by answer.—Small v. Gwinn, 6 Cal. 447.

[c] (Cal. 1886) In an action before a justice of the peace to recover a sum of money due on an assessment for street work in a municipality, the question of the legality of the assessment, so as to oust the justice of jurisdiction, can only be raised by answer, verified by oath, of the defendant.—Williams v. Mecartney, 69 Cal. 556, 11 Pac. 186.

[d] (Cal. 1894) Plaintiff alleged that defendant agreed to locate him on vacant government land, which it failed to do. Defendant admitted the contract, and alleged that it did locate plaintiff on vacant government land; "that defendant is informed and believes that plaintiff claims that said lands were not vacant government lands, but that they were in the possession of some other person; and that defendant alleges that they were not in the possession of some other person at the time of the location of plaintiff thereon." *Held*, that the title and possession of real property was not necessarily put in issue by the pleadings, so as to deprive a justice of the peace of jurisdiction.—Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196.

[e] (Conn. 1793) A traverse of a plaintiff's title, in an action of trespass, amounts to the general issue, and is not such a plea of title as will take an action from a justice of the peace.—Abel v. Abel, 1 Root, 549.

[f] (Conn. 1793) A plea of title before a justice of the peace, though insufficiently set forth, is sufficient to take the cause from the justice.—Riggs v. Woodruff, 2 Root, 35.

[g] (Del. 1888) Under Rev. Code, c. 128, as amended by Act March 8, 1875, and Act March 9, 1877, giving a justice of the peace jurisdiction to try a proceeding for trespass on real estate, but providing for arrest of the proceeding before him on defendant claiming ownership of the premises, and giving security for transfer to the superior court, though defendant gives to the justice a paper stating that the place where the trespass was alleged was his freehold and soil, still if, on being asked by the justice on what ground he claimed the land, he said that he did not own it, the justice was not bound to consider that he claimed the ownership of the premises or of a right of way thereover.—Legates v. Lingo (Super.) 8 Houst. 154, 32 Atl. 80.

[h] (Ga. 1892) Since a plea to the jurisdiction must show that there is another court in the state which has jurisdiction, a plea to a suit in a justice's court in F. county, which alleges that at the commencement thereof defendant was a resident of De K. county, and resides there now, and has so resided for the past year, that said court has no jurisdiction of the person of defendant, and that a suit against defendant by the same plaintiff and on the same subject-matter is pending in the court of defendant's residence, is insufficient, it not being shown what court in De K. county has jurisdiction.—Fain v. Crawford, 91 Ga. 30, 16 S. E. 106.

[i] (Ind. 1832) A statute provides that no person shall be bound to answer any summons issued by a justice in a civil action in any other township than the one in which such defendant actually resides, or where the debt was contracted or the cause of action accrued, or where defendant may be found, unless there is no such justice who can legally issue such summons, etc. To an action of debt before a justice of the peace in a certain township, defendant pleaded that he was not a resident there, nor was the debt contracted there. *Held*, that such defense was insufficient, as the defendant might not have lived in the township, nor the debt have been contracted there, and yet have been within the justice's jurisdiction.—Nelson v. Zink, 3 Blackf. 101.

[j] (Ind. 1837) The want of jurisdiction in a justice of the peace may be pleaded or given in evidence under the general issue.—Perkins v. Smith, 4 Blackf. 299.

[k] (Ind. 1862) Title to real estate may be put in issue before a justice of the peace (1) by pleading, supported by affidavit, and (2) by proof adduced on the trial.—Wall v. Albertson, 18 Ind. 145.

[kk] (Ind. 1862) A defendant's plea to the jurisdiction before a justice of the peace, averring himself to be a resident of another township, is defective unless it also avers that there is in his own township a justice competent to act, and unless the plea is verified.—Storm v. Worland, 19 Ind. 203.

[l] (Ind. 1892) In an action before a justice by D. to recover possession of premises leased to defendant, September 26, 1890, defendant filed a plea asking that the cause of action abate and be certified to the circuit court, "because the title to land was involved;" "that defendant purchased said lot of D. on the ——— day of September, 1890," and paid "$125 on December 13, 1890, purchase money on said lot; that defendant is not the tenant of plaintiff, but claims said lot by right of purchase." *Held*, that such plea did not put the title to land in issue, since it did not show whether the alleged purchase was before or after the commencement of the tenancy, or whether or not plaintiff was defendant's vendor, nor did it allege a conveyance.—Millikan v. Davenport, 5 Ind. App. 257, 31 N. E. 1122.

[ll] (Iowa, 1859) An action on a promissory note, against the maker and indorser, was commenced before a justice of the peace. The indorser appeared before the justice, and moved to dismiss the action, for the reason that he resided in a different township from that in which the action was brought, which motion was not sworn to, and which was overruled. He then sued out a writ of error, and the judgment of the justice was affirmed in the district court. *Held*, that the motion was properly overruled.—Shellenberger v. Ward, 8 Iowa (8 Clarke) 425.

[m] (Iowa, 1893) Code 1873, § 3535, provides that if the title to land be put in issue by pleadings supported by affidavit, the justice shall thereupon certify the cause and papers to the district court. *Held*, that where defendant's answer putting in issue the title to the land was unsupported by affidavit, a motion by him for dismissal was properly overruled.—Delzell v. Burlington, C. R. & N. Ry. Co., 89 Iowa, 208, 56 N. W. 433.

[mm] (Iowa, 1893) A motion to dismiss a suit because the title to land is involved is

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properly denied when no motion is made to transfer the cause to the district court, as provided by Code 1873, § 3535.—Delzell v. Burlington, C. R. & N. Ry. Co., 89 Iowa, 208, 56 N. W. 433.

[n] (Me. 1832) Since St. 1831, c. 514, abolishing special pleading, the general issue, with a brief statement of soil and freehold, in an action of trespass quare clausum fregit brought before a justice of the peace, is sufficient to bar any further proceedings before him, except the taking of a recognizance to prosecute the plea in the court of common pleas; this statute having virtually repealed so much of St. 1821, c. 76, § 10, as requires that, in such cases, the title to the locus in quo should be specially pleaded.—Hodgdon v. Foster, 9 Me. (9 Greenl.) 113.

[nn] (Md. 1877) The question of jurisdiction, in a suit before a justice of the peace, must be raised before the justice by filing the verified allegation prescribed by Code, art. 51, § 33, or by plea or other proper proceeding when the case is in the circuit court on appeal.—Cole v. Hynes, 46 Md. 181.

[o] (Mass. 1864) The best way for defendant in replevin to avail himself of an objection to the jurisdiction, where the goods replevied do not exceed $20 in value, is by plea in abatement; but a motion to dismiss may be made at the trial.—Davenport v. Burke, 91 Mass. (9 Allen) 116.

[p] (Neb.) A defendant who appears specially in a case for the purpose of objecting to the jurisdiction of the court over his person must specifically point out the defect which it is claimed prevents the court from acquiring jurisdiction.—(1884) Freeman v. Burks, 16 Neb. 328, 20 N. W. 207; (1887) Bell v. White Lake Lumber Co., 21 Neb. 525, 32 N. W. 561; (1890) Brown v. Goodyear, 29 Neb. 376, 45 N. W. 618.

[pp] (N. H. 1836) The constitution empowers the general court to give justices of the peace jurisdiction in civil causes when the title of real estate is not concerned. Act Dec. 31, 1828, § 5, provides that defendant in a justice court may give any special matter in evidence under the general issue, except such as may bring the title of real estate in question. Section 3 provides that where in trespass before a justice defendant pleads the general issue, he shall not be allowed to bring the title of real estate in question; and that when defendant pleads a special plea, whereby the title of real estate is drawn in question, the justice shall record such plea, and no further proceedings shall be had before him. Act July 2, 1831, enacts that in all civil actions defendant may plead the general issue, which shall be joined by plaintiff; and either party may give in evidence any matter in support or defense of the action, on filing in the court a brief statement of such matter. *Held*, that where, in trespass quare clausum fregit in justice's court, defendant pleads the general issue and files a brief statement setting forth matter which brings the title to real estate in question, the justice is not deprived of jurisdiction by such brief statement.—Foster v. Leavitt, 8 N. H. 353.

[q] (N. H. 1855) In an action of trespass before a justice, a plea of title in a third person, or in the defendant, with a traverse of the plaintiff's title, is good.—Foster v. Lane, 30 N. H. (10 Fost.) 305.

[qq] (N. Y. 1812) A plea of title is not valid, unless reduced to writing, in proceedings before a justice of the peace.—Sage v. Barnes, 9 Johns. 365.

[r] (N. Y. 1847) Where a declaration in a justice's court contained a count for a cause of action within his jurisdiction, and another for a matter of which he had no jurisdiction, it was *held* that a plea to the jurisdiction answering both counts was bad.—Rich v. Hogeboom, 4 Denio, 453.

[rr] (N. Y. 1872) The only demurrer to a complaint which is allowed in a justice's court is when the complaint is not sufficiently explicit to enable the defendant to understand it, or when it contains no cause of action. Neither of these causes of demurrer applies to an objection that the action is brought in a wrong county.—Lapham v. Rice, 63 Barb. 485.

[s] (N. Y. 1895) An answer alleging that defendants were the "owners in fee" of the premises at the time of the trespass sued for sufficiently sets forth "facts showing that title to real property will come in question" (Code Civ. Proc. § 2951) to require the justice to discontinue the action.—Manfredi v. Wiederman (Com. Pl.) 14 Misc. Rep. 342, 35 N. Y. Supp. 680.

[ss] (Pa. 1867) In a landlord and tenant case under the act of April 3, 1830, if the title to land comes in question, the alderman has no jurisdiction, and an assertion of this authenticated by evidence is sufficient, without affidavit by defendant, to defeat the jurisdiction.—Allen v. Ash, 6 Phila. 312.

[t] (Pa. 1868) Under Act 1772, in an action before a justice of the peace, the tenant must make the affidavit that the title to the premises in question is in dispute, the affidavit of his wife is not sufficient, unless it appears that she interferes with his consent to oust the jurisdiction of the justice.—Haffner v. Hoeckley, 3 Brewst. 253.

[tt] (Pa. 1872) In an action before a justice of the peace, an affidavit setting out "that in the above suit the title to land must come in question positively" is sufficient, and ousts the jurisdiction.—Stevens v. Sarver, 29 Leg. Int. 46.

[u] (Pa. 1872) Under Act March 20, 1810, § 1, excepting from the jurisdiction of justices cases of real contract where the title of land "may" come in question, an affidavit that the title will come in question, as required by Act 1814, is superfluous.—Gruber v. Sheetz, 2 Woodw. Dec. 63.

[uu] (Pa. 1883) An affidavit that the title to lands will come in question, in an action before a justice of the peace, under the act of March 2, 1813, may be made by the attorney for the defendant, and the jurisdiction of the justice is thereby ousted.—Acker v. Moore, 2 Chest. Co. Rep. 169.

[v] (Tenn. 1879) A plea to the jurisdiction of a justice of the peace cannot be received under Code, § 2901, unless filed in writing.—Crutchfield v. Durando, 71 Tenn. (3 Lea) 68.

[vv] (Tex. 1886) In a justice court, a plea of privilege to be sued in the county of defendant's residence is sufficient, where filed at the appearance term in due order of pleading, if it alleges the residence of defendant to be in a county other than that in which suit was brought, and denies that they had contracted to perform the contract or obligation for a breach of which recovery was sought in the county in which suit was brought.—Walthew v. Milby, 3 Willson, Civ. Cas. Ct. App. § 119.

[w] (Tex. 1890) A plea to the jurisdiction, in a suit before a justice in A. county, that defendant "is now a bona fide citizen of precinct No. 2, C. county, Texas, and was so residing in said precinct No. 2, C. county, at and long before the institution of this suit," is defective in not alleging that defendant was not a resident of A. county.—Noel v. Denman, 76 Tex. 306, 13 S. W. 318.

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[ww] (Tex. 1893) In an action in a justice court one of the defendants, who was a nonresident of the county in which the action was brought, filed a plea negativing all the jurisdictional facts, if he had been sued alone, and averring that his codefendant, who was a resident of the county, was not his partner, or in any way interested in the business out of which the action arose, or liable to plaintiff, but omitting to aver that the codefendant was made a party for the fraudulent purpose of conferring jurisdiction. *Held*, that the plea was fatally defective because of such omission.—Needham v. Dial, 4 Tex. Civ. App. 141, 23 S. W. 240.

[x] (Utah, 1877) In an action by a city in the justice's court for taxes, where the complaint alleges that defendant is indebted to the city in a certain amount for taxes on real estate, and asks judgment, and the answer is a mere denial, and is not verified, no issue involving the title to real property or the legality of a tax is raised, so as to oust the justice of jurisdiction under Comp. Laws 1888, § 3543.—City of Willard City v. Woodland, 7 Utah, 192, 26 Pac. 284.

[xx] (Utah, 1886) Rev. St. U. S. § 1867, provides that no justice of the peace in any territory shall have jurisdiction of any case wherein title to land comes in question. Code Civ. Proc. § 707, provides that, "if it appears from the answer of defendant, verified by his oath, that the determination of the action will necessarily involve title to real estate," the justice must suspend proceedings, etc. *Held* that, where it appears that such title is involved, the justice has no jurisdiction, even though the answer be not "verified by oath."—People v. House, 4 Utah, 369, 10 Pac. 838.

[y] (Utah, 1894) Comp. Laws 1888, § 3537, requires actions in a justice court to be begun and tried in the precinct or city of defendant's residence, unless there be no justice court therein; and section 3595 provides for dismissal without prejudice when it is objected at the trial and appears by the evidence that the action is brought in the wrong county, precinct, or city. *Held*, that defendant need not specially appear to move for such dismissal, but may object by answer, and prove the facts on the trial.—Kansas City Hardware Co. v. Neilson, 10 Utah, 27, 36 Pac. 131.

[yy] (Vt. 1844) An allegation in a plea to the jurisdiction, in a bastardy case controlled by the overseer of the town of B., that the justice before whom the primary proceedings were had was the "lawfully appointed agent of the town of B. to prosecute and defend suits in which said town was interested," is insufficient, on demurrer, to bring the case within the provisions of the statute which prohibits a justice from taking cognizance of any cause, or doing any judicial act, when he shall have been of counsel.—Pierce v. Butler, 16 Vt. 101.

[z] (Vt. 1848) A plea in abatement, which alleges that "the justice of the peace who signed said writ, and took security by way of recognizance for the costs of prosecution in said suit, was, at the time of signing said writ and taking said security by way of recognizance for the costs of prosecution, as justice of the peace, as aforesaid, and still is, related to the said defendant within the fourth degree of affinity," is defective, in not containing an allegation, except by way of recital, that the writ was signed by said justice.—Landon v. Roberts, 20 Vt. 286.

[zz] (Wis. 1863) It is not necessary that the disqualification of a justice be made to appear by affidavit of the opposite party.—Hibbard v. Odell, 16 Wis. 633.

(O) ACTS AND PROCEEDINGS WITHOUT JURISDICTION.

§ 224. In general.

Executions, see post, § 426.
Judgments, see post, §§ 374, 375.
—— *default judgments, see* post, §§ 382 [b, g], 383.
—— *on confession, see* post, § 377 [x, xx].
Liability of justice for acts without jurisdiction, see ante, §§ 36–40, 42.
Relief against unauthorized acts, collateral attack on judgment, see post, § 410.
—— *equitable relief, see* post, §§ 402–407.
—— *prohibition, see* "Prohibition."

[a] (U. S. 1836) Where process issued beyond the limits of the township is not within the exception of the statute limiting process to the township, it is utterly void, and no justification to the officer acting under it.—Leadbetter v. Kendall, Fed. Cas. No. 8,157a [Hemp. 302].

[b] (U. S. 1852) An order made by a justice upon a matter not within his jurisdiction is void.—Greene v. Briggs, Fed. Cas. No. 5,764 [1 Curt. 311].

[c] (Ala. 1853) An attachment issued by a justice of the peace against a domestic executor or administrator whose testator or intestate at the time of his death was a resident of Alabama, being issued without jurisdiction, is absolutely void, creating no lien on the property attached.—Taliaferro v. Lane, 23 Ala. 369.

[d] (Ala. 1887) Code 1886, § 3538, provides that no debt in any court of record can be attached by any process issued by and returnable before a justice of the peace. Defendant in a judgment in the circuit court procured himself to be garnished before a justice, and petitioned the circuit court to restrain the collection of the judgment before the justice, and to have the amount credited on the original judgment. *Held* properly refused.—Sharpe v. Wharton, 85 Ala. 225, 3 South. 787.

[e] (Cal. 1852) A magistrate who had no jurisdiction to the extent of the debt claimed had no authority to issue an attachment therefor; and the attachment bond executed and taken is void.—Benedict v. Bray, 2 Cal. 251, 56 Am. Dec. 332.

[f] (Ind. 1831) The jurisdiction of a justice of the peace is limited; when that jurisdiction is transcended, everything done is void. This principle applies whether the want of jurisdiction embraces the subject-matter or the person.—Hall v. Rogers, 2 Blackf. 429.

[g] (Ind. 1861) The record of a judgment rendered by a justice in a case beyond his jurisdiction cannot be used in evidence to show diligence in prosecuting a note against the makers.—Thompson v. Kerr, 17 Ind. 288.

[h] (N. Y. 1844) A defendant need not appear to a summons of a justice laying damages at $100, as he has no jurisdiction.—Yager v. Hannah, 6 Hill, 631.

[i] (N. Y. 1863) When a justice of the peace acts in violation of the statute that no judge of any court can sit in a cause where he is related to either of the parties, all his proceedings are utterly void, even if no objection has been made on this account.—Schoonmaker v. Clearwater, 41 Barb. 200, affirmed Chambers v. Clearwater (1864) 1 Abb. Dec. 341.

[j] (N. Y. 1887) Where a justice of the peace has no jurisdiction whatever, and undertakes to act, his acts are coram non judice and void, though if he has jurisdiction, and errs in the

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exercise of it, his acts are voidable only.—Tracy v. Seamans, 7 N. Y. St. Rep. 144.

[k] (N. C. 1834) The acts of 1820 and 1829 do not give justices jurisdiction beyond $60, except when the debt is secured by bond or note, or a liquidated account; and an attachment founded on two judgments for a sum exceeding that amount is void.—Bryan v. Washington, 15 N. C. 479.

[l] (N. C. 1872) Proceedings taken before a justice of the peace to recover the possession of land, where the title comes in question, are not absolutely null as regards the plaintiff.—Dulin v. Howard, 66 N. C. 433.

[m] (N. C. 1872) The defendant in a proceeding before a justice over which he has no jurisdiction may treat it as an absolute nullity.—Dulin v. Howard, 66 N. C. 433.

[n] (N. C. 1872) The party instituting proceedings before a justice over which he has no jurisdiction cannot treat them as absolute nullities after having taken the benefit of them.—Dulin v. Howard, 66 N. C. 433.

[o] (Ohio, 1817) Where the matter in dispute between the parties in an action before a justice of the peace was of an amount exceeding his jurisdiction, his proceedings were coram non judice and void.—Aten v. Morgan, Tapp. 232.

[p] (Pa. 1785) Where it appears upon the face of the record that the justice has exceeded his jurisdiction, by giving judgment and issuing execution for a greater sum than the act of assembly allows, the court will consider the whole as a nullity, and discharge a defendant committed under such judgment.—Geyger v. Stoy, 1 Dall. 135.

[q] (Pa. 1881) When an alderman or justice has no jurisdiction in original proceedings before him, all the subsequent proceedings are erroneous and void.—McGovern v. McTague, 13 Lanc. Bar, 119.

[r] (S. C. 1839) If the proceedings of a justice, from whom a writ of domestic attachment issued, show upon their face that the justice had no authority to grant the attachment, or if they fail to show that he had, then no judgment can be given upon it, but the whole is an absolute nullity; and it is of no consequence in what way the defect is brought to the view of the court, or at whose motion it is quashed.—Devall v. Taylor, 1 McMul. 460.

[s] (S. C. 1850) Under Act 1839, providing that an attachment may be issued by a magistrate in sums of and under $20 where the debtor is absent from the state, a domestic attachment issued by a magistrate against a debtor for a claim of $56, on the ground that he has absconded and concealed himself so that process could not be enforced against him, is void where the defendant was absent from the state when the attachment issued.—Lindau v. Arnold, 4 Strob. 290.

IV. PROCEDURE IN CIVIL CASES.

(A) IN GENERAL, §§ 225-234.
(B) VENUE, CHANGE OF VENUE, TRANSFER AND REMOVAL OF CAUSE, §§ 235-245.
(C) LIMITATIONS AND PARTIES, §§ 246-249.
(D) PROCESS, §§ 250-265.
(E) APPEARANCE AND REPRESENTATION BY ATTORNEY, ARREST AND BAIL, §§ 266-279.
(F) ATTACHMENT, §§ 280-294.
(G) GARNISHMENT, §§ 295-305.
(H) PLEADING, §§ 306-342.
(I) STIPULATIONS, MOTIONS, EVIDENCE, WITNESSES, DEPOSITIONS, AND AFFIDAVITS, §§ 343-348.
(J) DISMISSAL AND NONSUIT, §§ 349, 350.
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(L) TRIAL, NEW TRIAL, AND APPEAL TO JURY, §§ 362-372.
(M) JUDGMENT, §§ 373-425.
(N) EXECUTION, §§ 426-447.
(O) OBJECTIONS AND EXCEPTIONS, WAIVER AND CURE, § 448.
(P) RECORDS AND DOCKETS, §§ 449-464.

Jurisdiction in civil cases, see ante, §§ 71–224.
Review of proceedings, see post, §§ 465–830.
Contempt of justice as indictable offense, see "Contempt," vol. 10, c. 2379, § 4 [u]; c. 2381, § 6 [n].
Mandamus to justice, see "Mandamus," II. (A).
Pendency of action before justice in which claim might be set off as ground for abatement of other action, see "Abatement and Revival," vol. 1, cc. 60, 61, § 46.
Power of legislature to authorize justice to issue attachment returnable to circuit court, see "Constitutional Law," vol. 10, c. 1405, § 124 [h].
Procedure in replevin, see "Replevin."
Prohibition against proceedings, see "Prohibition."
Taking affidavits for attachments, see "Attachment," vol. 5, cc. 441, 442, § 227.
Tax sale by justice, see "Taxation," VIII., IX.
Validity of unauthorized bond ordered by justice, see "Bonds," vol. 8, cc. 60–63, § 41.

COSTS.

Allowance in suit brought in court of record involving title of land, though within jurisdictional amount of justice, see "Costs," vol. 13, cc. 73, 74, § 44.
—— *of attorney's fees as costs on judgment in magistrate's court, see* "Costs," vol. 13, c. 642, § 674 [x].
Authority to award in civil actions, see "Costs," vol 13, c. 29, § 15.
In action of book account or book debt, see "Account, Action on," vol. 1, c. 784, § 94 [b].
In penal actions, see "Penalties," II.
On recovering in court of record amount within jurisdiction of justice, see "Costs," vol. 13, cc. 102–109, §§ 67, 68.
On removal to higher court of case involving title to land, see "Costs," vol. 13, cc. 74, 75, § 45.
Power to permit suit in forma pauperis, see "Costs," vol. 13, c. 478, § 499 [d].
—— *to require security for costs, see* "Costs," vol. 13, c. 422, § 415.

CRIMINAL JURISDICTION AND PROCEDURE.

Acquittal before justice as bar to prosecution on indictment, see "Criminal Law," vol. 14, cc. 999, 1000, §§ 347, 350.
—— *on indictment as bar to prosecution before justice, see* "Criminal Law," vol. 14, cc. 999, 1000, § 348.
Admissibility in evidence of confession of accused made to justice, see "Criminal Law," vol. 14, c. 1845, § 1154 [c]; c. 1875, § 1181 [a].

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CRIMINAL JURISDICTION AND PROCEDURE.

Admissibility of transcript from docket, see "Criminal Law," vol. 14, c. 1697, § 1019 [ll].

Authority to adjourn preliminary examination of prisoner on bailable offense, see "Criminal Law," vol. 14, c. 1118, § 478 [a].

—— *to administer oath to complainant in criminal prosecution, see* "Criminal Law," vol. 14, c. 1074, § 418 [b, c].

—— *to issue warrant on complaint for offense committed in another county, see* "Criminal Law," vol. 14, cc. 1092, 1093, § 440.

Conviction under defective complaint as constituting former jeopardy, see "Criminal Law," vol. 14, c. 1005, § 363.

Disclosure of names of private prosecutors to defendant in prosecution before justice, see "Criminal Law," vol. 14, c. 2188, § 1430 [d].

Jurisdiction, see "Criminal Law," vol. 14, cc. 734–754, §§ 130–136.

Necessity for preliminary complaint or affidavit on binding over defendant in criminal prosecution, see "Criminal Law," vol. 14, c. 1073, § 415 [b].

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(A) IN GENERAL.

MODE AND FORM IN GENERAL, § 225.
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TIME FOR TAKING PROCEEDINGS OR HOLDING COURT. § 232.
PLACE FOR TAKING PROCEEDINGS OR HOLDING COURT, § 233.
PAYMENT TO JUSTICE OR OFFICER, § 234.

§ 225. Mode and form in general.

[a] (Iowa, 1845) Where an action before a justice of the peace seems to have been substantially brought, it will be sustained, though not according to strict technical rules.—Culbertson v. Tomlinson, 1 Morris, 404.

[b] (Mo. 1828) In proceedings before a justice of the peace, the statute has dispensed with all matters of mere form.—Casey v. Clark, 2 Mo. 11.

[c] (Mo. 1852) In proceedings in cases arising before justices of the peace, much liberality is allowed in construing the acts of the parties, as well as of the justices themselves.—Mooney v. Williams, 15 Mo. 442.

[d] (Tenn. 1845) A liberal, and not a restricted, construction will be given to the proceedings of justices of the peace.—Heffly v. Hall, 24 Tenn. (5 Humph.) 581.

[e] (Tenn. 1850) Substantial accuracy is all that can be had or will be required in proceedings before justices of the peace.—Glass v. Stovall, 29 Tenn. (10 Humph.) 453.

[f] (Tex. 1885) Great liberality is indulged with respect to the proceedings in a justice court, as the real object is to attain substantial justice.—Brunswig v. Kramer, 2 Willson, Civ. Cas. Ct. App. § 804.

§ 226. Constitutional and statutory provisions.

[a] (Ga. 1894) Act Nov. 11, 1889, as amended by Act Dec. 20, 1893, does not, by providing that justices of the peace and notaries public, who are ex officio justices of the peace, "may hold their courts at the same or different time, or at the same or different place as they may desire," violate the constitution (Code, § 5153), requiring justices of the peace to hold court monthly at fixed times and places.—Brooks v. Mutual Loan & Banking Co., 95 Ga. 178, 22 S. E. 55.

[b] (Kan. 1863) The justices' act as well as the Code must be construed liberally, with a view to promote its object, and assist the parties in obtaining justice.—Wooster v. McKinley, 1 Kan. 317.

[c] (Neb. 1876) Act 1875, authorizing justices in cities and towns to hold their offices in other precincts than that for which they were elected, is unconstitutional. — State v. Shropshire, 4 Neb. 411.

[d] (Tenn. 1865) Code, § 2754, in reference to the commencement and continuance of suits, does not apply to suits brought before justices of the peace.—Maynard v. May, 42 Tenn. (2 Cold.) 44.

§ 227. Conformity to practice in courts of record.

[a] (Ind. 1864) The practice in attachment proceedings is the same in justices' as in the superior courts.—Dunn v. Crocker, 22 Ind. 324.

[b] (Tex. 1851) Justices of the peace are not supposed to be skilled in the forms of judicial proceedings observed in courts of record. If their proceedings are intelligible, and attain substantially the ends of justice, they are generally sustained.—Clay v. Clay, 7 Tex. 250.

[c] (Tex. 1881) Proceedings in a justice's court by a distress warrant will be sustained, if they are intelligible and the ends of justice are attained, though all the forms of procedure essential in courts of record have not been observed.—Conway v. Merrifield, 1 White & W. Civ. Cas. Ct. App. § 1025.

§ 228. Forms of action.

[a] (Ill. 1859) A party may succeed in any form of action, if the justice of the peace had jurisdiction of the subject-matter.—Swingley v. Haynes, 22 Ill. (12 Peck) 214.

[b] (Ill. 1860) If the proof before a justice entitles the plaintiff to recover, he should have judgment, notwithstanding mistakes in the form of action.—Chicago & R. I. R. Co. v. Reid, 24 Ill. (14 Peck) 144.

[c] (Ill. 1862) It is immaterial what form of action may be specified in a summons issued by a justice of the peace, if he had jurisdiction of the subject-matter.—Brewster v. Grover, 29 Ill. (19 Peck) 246.

[d] (Ill. 1878) Where, in a suit on a contract for services in a justice court, plaintiff fails to establish the amount agreed to be paid, he may recover on a quantum meruit, notwithstanding his attempt to prove a fixed amount.—Phillips v. Roberts, 90 Ill. 492.

[e] (Ind. 1854) In a suit originating before a justice of the peace, no great strictness is required as to form of action.—Brush v. Carpenter, 6 Ind. 78.

[f] (Miss. 1848) The only thing a justice has to determine is the question of indebtedness, without regard to the technical form of the action. His is not a common-law court.—Stier v. Surget, 18 Miss. (10 Smedes & M.) 154.

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[g] (Pa. 1888) Under the act of May 12, 1887, an alderman has no power to amend his record, so as to make the form of action one in trespass instead of assumpsit.—Fahnestock v. Bushey, 5 Lanc. Law Rev. 57.

[h] (Pa. 1892) Under Act March 22, 1814, § 1, which provides that justices of the peace shall have jurisdiction of actions of trespass for damages to real or personal property, when the value of the property or the damages claimed do not exceed $100, an action of trespass will not lie for milk sold and delivered.—Weisberger v. White (Com. Pl.) 12 Pa. Co. Ct. R. 224.

[i] (Tenn. 1845) The several forms of action cannot be preserved and enforced in suits before justices of the peace.—Bodenhamer v. Bodenhamer, 25 Tenn. (6 Humph.) 264.

§ 229. Joinder of causes of action.

[a] (Ind. 1883) An action before a justice of the peace will not be dismissed for misjoinder of causes of action.—Koons v. Williamson, 90 Ind. 599.

[b] (Mo. 1881) The original statement, in an action before a justice of the peace, was based on the 43d section of the railroad law. An amended statement contained two counts, one of which was based on another act. *Held*, that this was allowable, both counts referring to the same injury; and that plaintiff could not be required to elect on which count he would proceed.—Lincoln v. St. Louis, I. M. & S. Ry. Co., 75 Mo. 27.

[c] (Mo. 1886) That a suit before a justice on a contract is improperly joined with one in tort is not jurisdictional, unless the aggregate of both claims exceeds the amount of the justice's jurisdiction.—Gerber v. McCoy, 23 Mo. App. 295.

[d] (N. J. 1828) A charge in the plaintiff's state of demand in a justice's court, "To loading vessel at his wharf," etc., may be considered as a charge of wharfage, and not a trespass, and hence may be joined with a count in debt.—Cornelius v. Ivins, 10 N. J. Law (5 Halst.) 56.

[e] (N. J. 1864) A state of demand in a justice's court contained two counts: The first setting forth a sale and delivery by the plaintiff to the defendant of a horse, for the price of $200, and claiming an unpaid balance of $100; the second averring a special agreement whereby the defendant was to pay for the horse $100 in cash, and a lot of land of the value of $100, and that the defendant refused to convey the lot, and concluding with a demand of the balance of the value of the horse, to wit, $100. *Held*, that there was a misjoinder of counts, notwithstanding that it appeared on the trial that the agreement aforesaid was void, as not in writing; that fact not being pleaded.—Hinchman v. Rutan, 31 N. J. Law (2 Vroom) 496.

[f] (N. Y. 1808) In an action before a justice of the peace, the objection that the plaintiff has declared both on a contract and a tort must be made at the time of pleading.—McNeil v. Scoffield, 3 Johns. 436.

[g] (N. Y. 1841) The misjoinder of counts in a justice's court is not a fatal defect in pleading; no objection being interposed until after verdict.—Whitney v. Crim, 1 Hill, 61; West v. Stanley, Id. 69.

[h] (N. Y. 1854) Where the plaintiff improperly joins several causes of action, e. g., one on contract with one in tort, the objection should be taken by requiring him to elect, before proceeding to trial, which cause he will proceed for, and, if the justice refuses to compel him to elect, the judgment will be reversed.—Burdick v. McAmbly, 9 How. Prac. 117.

[i] (N. Y. 1895) In a justice's court misjoinder of causes of action is not a ground for demurrer, nor is it a "defense" in the sense that it must be alleged in the answer.—Gerould v. Cronk, 85 Hun, 500, 33 N. Y. Supp. 202.

[j] (N. Y. 1895) In an action in a justice's court an objection that there is a misjoinder of causes is waived unless raised before proceeding to trial.—Gerould v. Cronk, 85 Hun, 500, 33 N. Y. Supp. 202.

[k] (Pa. 1882) Distinct cases of trespass and debt cannot be joined in the same action before a justice of the peace.—Yetter v. Carpenter, 1 Chest. Co. Rep. 523.

[l] (Vt. 1884) To warrant a joinder of causes of action under Rev. Laws, § 912, providing for the joinder of trespass and case, though for the same cause of action, the justice of the peace must otherwise have jurisdiction of both forms of action in the concrete case.—French v. Holt, 57 Vt. 187.

[m] (W. Va. 1894) Plaintiff suing before a justice alleged in his first count that defendant, a railroad company, negligently ran its train and killed plaintiff's horse. The second count set up that defendant bound itself by written contract to maintain the necessary cattle guards, and through its failure to do so the injury occurred. *Held*, that the counts were properly joined.—Harrow v. Ohio River R. Co., 38 W. Va. 711, 18 S. E. 926.

[n] (Wis. 1851) The pleadings before a justice of the peace were oral, and it appeared from the minutes entered in the justice's docket that the declaration was in assumpsit. The plaintiff amended his declaration by adding a special count, with reference to which the entry in the docket was that the plaintiff added a "special count, and declared against the defendants, as innkeepers, for two buffalo robes of the value of $20, which they refused to deliver plaintiff, it being plaintiff's property." *Held*, on demurrer for misjoinder of counts, that the special count was in assumpsit, and that therefore there was no misjoinder.—Hibbard v. Bell, 3 Chand. 206, 3 Pin. 190.

§ 230. Consolidation of actions.

[a] (Ark. 1849) Where in one of three suits before a justice of the peace the cause of action was filed with the justice before the issuance of the writ, and in the other two this was not done, and defendant moved for the consolidation of the three suits, and pleaded to and defended the consolidated suit, the jurisdiction of the justice was nevertheless restricted to the cause of action filed.—Everett v. Clements, 9 Ark. (4 Eng.) 478.

[b] (Ill. 1834) Where two distinct suits are brought before the same justice, on the same day, on two demands which might be consolidated into one suit, and which, when thus consolidated, would not exceed $100, and one suit is dismissed and judgment is rendered on the other, the proceedings are regular.—McKinney v. Finch, 2 Ill. (1 Scam.) 152.

[c] (Ill. 1878) Rev. St. c. 79, § 49, refers only to suits commenced before a justice of the peace, and only requires a consolidation of demands which do not exceed $200 when consolidated. But where one holds two or more promissory notes, each one constitutes a separate demand, on which he has a right to bring a suit; and if suit is brought on one of them, before a justice, the party is not required to bring in the others, unless they do not amount to more than $200 when consolidated.—Nickerson v. Rockwell, 90 Ill. 460.

[d] (Ill. 1892) In justice's court plaintiff is not bound to consolidate in one suit a demand for labor and one for breach of contract, since

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no exemption can be claimed against a judgment for wages, while it may be against a judgment for breach of contract.—Osborn v. Philpot, 46 Ill. App. 274.

[e] (Mo. 1831) A plaintiff in a justice's court cannot be compelled to consolidate three suits on different notes against the same defendant commenced on the same day.—Barns v. Holland, 3 Mo. 47.

[f] (Mo. 1831) A plaintiff may sue on all or only a part of the demands he may have against the same defendant before a justice of the peace, and cannot be compelled to consolidate his actions after he may have sued on several demands.—Barns v. Holland, 3 Mo. 47.

§ 231. Commencement of action or other proceeding in general.

Converting criminal prosecution into action for damages, see ante, § 116 [b].

Failure to enter action within time limited as ousting jurisdiction, see ante, § 191.

For purpose of limitations, see post, § 246.

[a] (Ga. 1892) A magistrate, when not presiding in court, does not act judicially in answering questions put by counsel on a court day, whether or not a given case has that day been called; and counsel, shaping his conduct by such answer, must take the risk of its being correct.—Ballard Transfer Co. v. Clark, 91 Ga. 234, 18 S. E. 138.

[b] (Iowa, 1875) An action in a justice's court may be commenced simply by the service of a notice on the defendant, save where a writ of replevin is asked for, in which case a petition duly verified must be filed. In all other cases, the filing of the petition forms no part of the commencement of the action, and need be done only on the day of trial.—Duffy v. Dale, 42 Iowa, 215.

[c] (N. Y. 1805) The issuing of a warrant or summons in a justice court is the commencement of the suit.—Boyce v. Morgan, 3 Caines, 133.

[d] (N. Y. 1845) Where parties appeared before a justice of the peace, with a view to the commencement of a suit before him by one of them as plaintiff against the other as defendant, and an adjournment was then had at the request of the defendant, without any issue joined, or any pleadings put in, no suit was thereby commenced.—Lester v. Crary, 1 Denio, 81.

[e] (N. Y. 1845) Suits in justices' courts can only be commenced by process, or by the voluntary appearance of the parties and joining issue.—Lester v. Crary, 1 Denio, 81.

[f] (N. Y. 1870) Where property is levied on under an execution and advertised for sale on a certain day, and the summons in an action for wrongful taking and conversion of the property brought by a third person claiming title is issued by a justice of the peace, and delivered for service on the day of, but before, the sale, and not served until thereafter, there can be no recovery for the sale, since under 2 Rev. St. p. 227, § 12, subd. 2, providing that an action in a justice court is commenced when the summons is delivered to be served, the suit was commenced before the cause of action accrued.—Hodge v. Adee, 2 Lans. 314.

[g] (Pa.) It is a settled rule that the cause of action must exist at the commencement of the suit, and cannot be varied by subsequent circumstances.—(1817) McLaughlin v. Parker, 3 Serg. & R. 144; (1823) Bechtol v. Cobaugh, 10 Serg. & R. 121.

[h] (Pa. 1887) Where actions are brought before different aldermen for counterclaims by the same parties and are made returnable at the same hour, the alderman who first issues summons has jurisdiction.—Tuttle v. Sheridan, 5 Lanc. Law Rev. 1.

§ 232. Time for taking proceedings or holding court.

Absence or delay on part of justice as ousting jurisdiction, see ante, § 191.

—— *on part of plaintiff, see* ante, § 192.

Constitutionality of statute regulating time, see ante, § 226.

On renewal of proceedings after continuance, see post, § 359.

Time for adjournment, see post, § 357.

—— *for staying execution, see* post, § 437.

—— *for taking default, see* post, §§ 385, 386.

Waiver of delay in calling suit, see post, § 448 [x].

[a] (Conn. 1843) Where the hour is designated in the writ, it has been the practice in that state to wait for the appearance of the parties until the expiration of that hour and no longer, unless a reasonable excuse for further indulgence is shown.—Burgess v. Tweedy, 16 Conn. 39.

[b] (Conn. 1877) By long established practice, one hour of grace is allowed to parties in appearing in actions brought before justices of the peace; but the rule is not inflexible in its application, and where the matter comes to one of minutes, allowance should be made for the want of accuracy of ordinary timepieces.—Nugent v. Wrinn, 44 Conn. 273.

[c] (Conn. 1889) Though ordinarily it is the duty of a justice to render judgment against a plaintiff who fails to appear after one hour from the time fixed for trial, the plaintiff cannot complain that judgment was rendered at a later time.—Parmalee v. Town of Bethlehem, 57 Conn. 270, 18 Atl. 94.

[d] (Del. 1846) Judgment by default, before a justice of the peace, cannot be signed until the usual time of closing business for the day, unless a certain hour is fixed for the hearing, with due notice thereof to the defendant.—Colescott v. Bonwill, 4 Har. 364.

[e] (Ga. 1887) Since Act Oct. 8, 1885, justices' courts may hold from day to day until their business is disposed of.—Western & A. R. Co. v. Pitts, 79 Ga. 532, 4 S. E. 921.

[f] (Ga. 1893) Under Act Oct. 8, 1885, a justice's court may hold from day to day until its business is disposed of; and this power is not affected by a publication by the magistrate that his court will continue in session 15 days from the first Monday in each month.—Bostain v. Morris, 93 Ga. 224, 18 S. E. 649.

[g] (Ga. 1895) A notary public, who is an ex officio justice of the peace, may, in a city having a population of over 5,000, lawfully hold his court at a time different from that at which the justice of the peace of the same district holds his court.—Moye v. Walker, 96 Ga. 769, 22 S. E. 276.

[h] (Ill. 1875) It is the duty of a justice of the peace to hold a case open one hour after the time named in the summons for a defendant to appear, but he is not required to wait longer before rendering judgment. At the expiration of the hour, it is his duty to call and dispose of the case, and the presumption is that he does so.—First Nat. Bank v. Beresford, 78 Ill. 391.

[i] (Kan. 1892) Though section 83 of the justices' act provides that if either party fail to appear at the time specified in the summons, "or within one hour thereafter," the cause may proceed at the request of the adverse party, a

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judgment by default, rendered by a justice before expiration of an hour after the time for appearance specified in the summons, is not void on the ground that the justice had not yet acquired jurisdiction to render it, where defendant did not in fact appear within the hour.—Green v. Tower, 49 Kan. 302, 30 Pac. 468.

[j] (Ky. 1847) A justice of the peace may hear a civil cause in vacation, on affidavit of the plaintiff that the defendant is about to remove his property from the state.—Rogers v. Hall, 46 Ky. (7 B. Mon.) 349.

[k] (La. 1883) Under Code, art. 1085, providing that if a party residing in the country fails to appear at the appointed time the justice shall wait two hours, he must so wait if defendant has refused to go to trial and withdrawn from the court.—State ex rel. Montague v. Coquillon, 35 La. Ann. 1101.

[l] (Mass. 1849) The proper time for the entry of an action before a justice of the peace is within the hour named in the writ; and if not so entered, the defendant may refuse to appear, or may appear merely for the purpose of moving to dismiss the action.—Blanchard v. Walker, 58 Mass. (4 Cush.) 455.

[m] (Mich. 1881) In the cases in which Comp. Laws, § 5373, provides that plaintiff may have an hour after the time fixed for hearing, a justice must wait for defendant an equal time.—Bassence v. Jones, 46 Mich. 492, 9 N. W. 531.

[n] (Mo. 1885) Rev. St. § 2848, declares that justices of the peace may hold court on any day except Sunday. A judgment rendered on Thanksgiving Day is, therefore, valid.—Bear v. Youngman, 19 Mo. App. 41.

[o] (Neb. 1883) Where there is no defense to an action before a justice of the peace, the justice need not wait the one hour after the time set for the hearing of a cause required by statute before proceeding to render judgment against defendant.—Wells v. Turner, 14 Neb. 445, 16 N. W. 484.

[p] (N. H. 1841) As a general rule, a party in justice's court who has given notice of a hearing at a particular hour is required to proceed with his case within the hour, unless the hearing is postponed.—Banks v. Johnson, 12 N. H. 445.

[q] (N. Y. 1819) Where defendant in a justice court is ready in court to prove his defense when plaintiff closes his case, he should be allowed to do so, though he was not present when the trial commenced.—Atwood v. Austin, 16 Johns. 180.

[r] (N. Y. 1850) The justice should wait an hour after a summons is returnable before proceeding to swear witnesses in the cause.—Allen v. Stone, 9 Barb. 60.

[s] (N. Y. 1851) In justices' courts in the city of New York, the justice need not wait an hour after the time for appearance mentioned in the summons before proceeding with the case.—Klenck v. De Forest, 3 Code Rep. 185.

[t] (N. Y. 1852) It is not a sufficient case for the reversal of a judgment rendered by a justice of the peace on the return of a summons, that the justice did not appear at the place named in the summons for the trial until half past 3 o'clock, when the summons was returnable at 1 o'clock p. m., if the defendant was present at the trial, although he did not appear in the suit.—Cornell v. Bennett, 11 Barb. 657.

[tt] (N. Y. 1854) A justice is entitled to proceed with a case immediately on the expiration of the time named in the summons.—Appleby v. Strang, 1 Abb. Prac. 143.

[u] (N. Y. 1890) Where the summons in a justice's court is returnable at 9 a. m., and the justice calls the case at 9:45, and, in the absence of defendant, waits until 10 before proceeding, it is a compliance with Code Civ. Proc. § 2893, requiring the justice to wait one hour after the hour specified in the summons for its return, unless the parties sooner appear.—Dunn v. O'Keefe, 56 Hun, 648, 10 N. Y. Supp. 34.

[uu] (Tex. 1888) Rev. St. art. 1547, providing that justices residing at the county seats "shall hold the regular term of their courts on the last Monday of each month," was amended by providing that justices should hold regular terms at such times as might be prescribed by the commissioners' court of the county. *Held*, that a term of court held by a justice at a county seat after the amended article went into effect, but on the day prescribed by the old statute, the commissioners not having taken any action as to the time of holding court, was not without authority of law, and that a judgment rendered at such term was valid.—Stone v. Hill, 72 Tex. 540, 10 S. W. 665.

[v] (Tex. 1889) Rev. St. art. 1547, formerly provided that the justices residing at the county seat should hold regular terms on the last Monday in each month. In 1878 the commissioners' court of a county made an order prescribing the second Monday as the time for holding court in precinct 1 of said county. In 1881 the article was amended to require justices to hold their regular terms at such times as should be described by the commissioners' court of the county. No new order was made as to precinct 1, and a judgment was rendered by a justice thereof on the last Monday of the month. *Held* that, if the county seat was in precinct 1, the court was properly held on that day.—Galveston, H. & S. A. Ry. Co. v. Ware (Sup.) 11 S. W. 554.

[vv] (Tex. 1890) Const. art. 5, § 19, provides that justices of the peace shall hold their courts at such times as may be provided by law. Rev. St. art. 1514, and article 1547 as amended by Act 1881, provide that the times at which justices of the peace shall hold their terms of court shall be fixed by the county commissioners' court. No order was made by the commissioners' court fixing the time of holding court by one B., elected one of the justices of the peace for a certain precinct. But it appeared that such an order had been made in the case of S., a former justice of the peace for such precinct, and that both one who had been justice of the peace for said precinct up to B.'s election, and B., held court at the time indicated in such order. *Held*, that a judgment rendered by B. as justice of the peace was not void as rendered without jurisdiction; it being presumed that the court held by S. was the same court as that held by B., and an order once made fixing the time of holding court continuing in force until changed.—Koehler v. Earl, 77 Tex. 188, 14 S. W. 28.

[w] (Vt. 1824) The statute prescribing that actions must be entered in justices' courts within two hours after the time set in the writ for trial is directory to the justices; they are necessarily judges, in the first instance, of the actual time when actions are entered; and if the party is dissatisfied, he may plead the matter in abatement, and have the fact found by a jury.—Stone v. Proctor, 2 D. Chip. 108.

[ww] (Vt.) To constitute an entry of an action in a justice's court within the purview of the statute, it is at least necessary for the magistrate to be at the place of holding the court within the two hours from the time set for trial, having in his possession the writ, and ready on his part to proceed with the cause.—(1839) Phelps v. Birge, 11 Vt. 161; (1850) Underwood v. Hart, 23 Vt. 120.

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[x] (Vt. 1841) If a justice be at the place appointed for trial, in a writ returnable before him, within two hours after the time appointed, and the writ is then returned so as to be within his knowledge and power, and he comes there for the purpose of taking cognizance of the suit, it is not necessary that he should remain until the defendant appears or until the expiration of the first two hours; nor is it necessary that he should have come to the place of trial with the purpose of proceeding instanter to the hearing. It is enough if he came there to take cognizance of the cause, and to dispose of it in an appropriate mode and convenient time.—Peach v. Mills, 13 Vt. 501.

[xx] (Vt.) It is not necessary for a justice to remain at the particular place set for trial during the whole time allowed for the defendant to appear.—(1850) Underwood v. Hart, 23 Vt. 120; (1853) Hall v. Safford, 25 Vt. 87.

[y] (Vt. 1853) It is the duty of the justice to see that the defendant has his day in court and an opportunity to make his defense; and where the justice ordered the case to stand open for trial, with the understanding that if the defendant appeared by 3 o'clock, or in a reasonable time (1 o'clock being the time set in the writ), the right of appearing and defending the suit should be secured to him, and the justice returned about the hour of 4, and within the time in which he had the power by statute to vacate any record of default, etc., and then notified the counsel of the defendant that the case was open for trial if they desired to make any defense, and requested him to appear and answer for that purpose, it was *held* that this was a full compliance with the duty of the justice, after the case was ordered to stand open.—Hall v. Safford, 25 Vt. 87.

[yy] (Vt. 1853) A case being properly in court, it is competent for the justice to order the case to stand open for trial for a reasonable time.—Hall v. Safford, 25 Vt. 87.

[z] (Wis. 1878) Under Rev. St. c. 120, § 45, as amended by Laws 1875, c. 172, a justice of the peace is required to be in his office at the return hour of process issued by him, and for the next succeeding hour, and, on return of process served, to call the case for trial at the hour specified in the process, but to wait the next succeeding hour for the appearance of the parties. *Held*, that where the process is not returned served nor the case called within the hour named therein, the justice acquires jurisdiction if it be returned served and the case be called within the succeeding hour; and in such event the provision that the case shall be called at the hour named in the process is directory only.—Carter v. Wyatt, 43 Wis. 570.

[zz] (Wis. 1878) Under Rev. St. 1858, c. 120, § 5, providing that, on return of process served, a justice shall wait one hour for the appearance of the parties, etc., a formal appearance to the action is not meant, but personal appearance before the justice.—Brandies v. Robinson, 45 Wis. 464.

§ 233. Place for taking proceedings or holding court.

Place for adjournment, see post, § 357.
—— *for staying execution, see* post, § 437.
Territorial extent of jurisdiction, see ante, §§ 146, 147.

[a] (Conn. 1791) A justice of the peace cannot go out of his town to try a cause.—Scovel v. Smith, 1 Root, 300; Allen v. Vining, Id. 313.

[b] (Conn. 1792) The judgment of a justice of the peace, out of his town, is erroneous.—Abby v. Cargel, 1 Root, 403.

[c] (Ga. 1883) Code, § 457, par. 1, requires justices of the peace to hold court at some convenient place within their district, of which they are to give notice; section 462 provides that any judgment rendered at a different place from the one selected shall be void. *Held* that, on appeal by plaintiff from a judgment for defendant on his plea of set-off, the court having been held at a place different from that selected, the action should be dismissed on plaintiff's motion for want of jurisdiction.—Bozeman v. Singer Mfg. Co., 70 Ga. 685.

[d] (Ga. 1886) A justice of the peace in the city of Augusta cannot hold court and render judgment in a civil case elsewhere than in his own district, notwithstanding the prior local laws of that city, since the taking effect of Const. 1877 and Act 1879, to carry into effect the constitutional provisions relating to the uniformity of practice, and making provisions as to the times and places of holding justices' courts.—Brahe v. Boker, 75 Ga. 881.

[e] (Ga. 1895) A notary public, who is an ex officio justice of the peace, may, in a city having a population of over 5,000, lawfully hold his court at a place different from that at which the justice of the peace of the same district holds his court.—Moye v. Walker, 96 Ga. 769, 22 S. E. 276.

[f] (Iowa, 1879) Where the parties stipulate that the justice may for convenience try a case outside of his own township, the justice does not lose jurisdiction by trying the case in such place.—Rogers v. Loop, 51 Iowa, 41, 50 N. W. 224.

[g] (Mich. 1848) The statute of 1842 provides that no justice of the peace shall hold any court in any barroom, place, etc., where intoxicating liquors are sold. From the justice's return it appeared that the cause was called in the barroom of a tavern and adjourned to an adjoining room in the same house, but the justice had no knowledge that intoxicating liquors were sold there, nor was any proof of such fact offered on the trial, and the court refused to disturb the judgment of the justice.—Savier v. Chipman, 1 Mich. (Man.) 116.

[h] (Minn. 1879) Gen. St. 1878, c. 66, § 2, provides that every justice of the peace "shall keep his office in the town, city, or ward for which he is elected," but that he "may hold his court at any place appointed by him in a town or ward adjoining the town or ward in which he resides, provided the place so appointed be within his county." *Held*, that a justice of the township of Winona cannot hold his court in the city of Winona.—State v. Marvin, 26 Minn. 323, 3 N. W. 991.

[i] (Neb. 1876) A justice of the peace must hold his office in the precinct for which he is elected.—State v. Shropshire, 4 Neb. 411.

[j] (Neb. 1883) Though a justice of the peace is required by Const. art. 6, § 20, to reside in the precinct for which he is elected or appointed, a judgment rendered by him anywhere in his county is valid.—Jones v. Church of the Holy Trinity, 15 Neb. 81, 17 N. W. 362.

[k] (N. Y. 1815) Where a justice tried a cause at a place different from that mentioned in the summons, it was *held* an irregularity for which judgment was reversed.—Stewart v. Meigs, 12 Johns. 417.

[l] (N. Y. 1859) A justice of the peace can take the confession of a judgment out of the town in which he resides anywhere in his county, the Revised Statutes of 1830 (1 Rev. St. p. 102, § 12, restricting him merely in forbidding him to try a civil cause in any town other than the one in which he is chosen.—Pollock v. Aldrich, 17 How. Prac. 109.

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[m] (N. Y. 1867) The provisions of Code, pt. 2, tit. 4, are not applicable to suits commenced in a court of a justice of the peace. Those provisions in regard to the place of trial of actions are expressly made subject to the power of the court to change the place of trial, in the cases provided by statute, and are not applicable to justices' courts, which have not the power to change the place of trial.—Lapham v. Rice, 66 Barb. 487.

[n] (N. D. 1891) Comp. Laws, § 6041, requiring a justice of the peace to perform all his official acts within the township and county for which he was elected, is mandatory.—In re Evingson, 2 N. D. 184, 49 N. W. 783.

[o] (Pa. 1821) A justice of the peace cannot do an official act out of the county for which he was appointed.—Share v. Anderson, 7 Serg. & R. 43, 10 Am. Dec. 421.

[p] (Pa. 1829) A justice of the peace must have his place of administering justice.—King v. King, 1 Pen. & W. 15.

[q] (Pa. 1877) A justice of the peace must preside and keep his office within the limits of the district for which he is commissioned, and his acts outside such districts are invalid.—Morrison v. Stuart, 9 Lanc. Bar, 7.

[r] (Pa. 1877) Under Act Feb. 22, 1802 (Purd. Dig. p. 846), a justice has no authority to act in any other ward than that in which he is commissioned and resides.—Novick v. Buck, 1 Leg. Rec. Rep. 76.

[s] (Pa. 1895) An alderman must keep his office in the ward for which he has been elected, and has no right to hold court and exercise judicial functions in another ward.—Wright v. Millar (Com. Pl.) 1 Lack. Leg. N. 346.

[t] (Tenn. 1895) Const. art. 6, § 15, provides that counties shall be divided into districts, from each of which two justices of the peace shall be elected, whose jurisdiction shall be coextensive with the county. Code, § 4113 (Mill. & V. Code, § 4888), provides that the jurisdiction of such justices is geographically coextensive with the county, and sections 4127, 4128 (Mill. & V. Code, §§ 4902, 4903), require each justice to hold court at some place in his district one day in each month, but authorize him to try any cause at any place within the county, unless prohibited by the Code. *Held*, that a justice, having an office in his district, whereat he holds court one day in each month, has jurisdiction to hear causes at another office, opened by him, out of his district, but within the county, where he holds court when not engaged at his district office.—Strain v. Hefley, 94 Tenn. (10 Pickle) 668, 30 S. W. 747.

[u] (Tex. 1853) A justice of the peace cannot go out of his own precinct and try a cause in another, even by consent of parties.—Foster v. McAdams, 9 Tex. 542.

[v] (Tex. 1871) A justice of the peace elected for one precinct has no right or authority to establish his office and exercise his official functions within the limits of another precinct.—Clements v. City of San Antonio, 34 Tex. 25.

[w] (Tex. 1890) Const. art. 5, § 19, provides that justices of the peace shall hold their courts at such places as may be provided by law. Rev. St. art. 1514, and article 1547, as amended by Act 1881, provide that the places at which justices of the peace shall hold their terms of court shall be fixed by the county commissioners' court. No order was made by the county commissioners' court fixing the place of holding court by one B., elected one of the justices of the peace for a certain precinct. But it appeared that such an order had been made in the case of S., a former justice of the peace for such precinct, and that both one who had been justice of the peace for said precinct up to B.'s election, and B., held court at the place indicated in such order. *Held*, that a judgment rendered by B., as justice of the peace, was not void as rendered without jurisdiction; it being presumed that the court held by S. was the same court as that held by B., and an order once made fixing the place of holding court continuing in force until changed.—Koehler v. Earl, 77 Tex. 188, 14 S. W. 28.

[x] (Wis. 1869) A justice of the peace has no jurisdiction to try a cause in another place than that designated in the summons, unless the defendant waives his right.—Newcomb v. Town of Trempealeau, 24 Wis. 459.

§ 234. Payment to justice or officer.

Liability of justice for loss of money received in satisfaction of judgment, see ante, § 44.

On judgment, see post, § 417.

[a] (Mich. 1866) In making a payment of money in a suit on a note before a justice of the peace, no rule or order is necessary, if it is paid in at the time of or prior to the plea; if after plea, a motion should probably be made for leave.—Phelps v. Town, 14 Mich. 374.

[b] (Mich. 1866) Where, in a suit on a note before a justice of the peace, defendant paid money thereon in open court, the effect on the rights of the parties was the same as when paid into a court of record, and the money belongs to the plaintiff absolutely, and defendant is not responsible for its disposition or payment.—Phelps v. Town, 14 Mich. 374.

[c] (Mo. 1887) Under Rev. St. § 2924, providing that after commencement of suit in justice's court defendant may throw subsequent costs on plaintiff, if he "pay the constable" the full amount which he owes the plaintiff, with accrued costs, the constable of the township where the justice presides is the proper depositary.—Voss v. McGuire, 26 Mo. App. 452.

[d] (Mo. 1887) Under Rev. St. § 2924, providing that after commencement of suit in justice's court defendant may "pay the constable" the amount due the plaintiff, with accrued costs, and if plaintiff fail to recover a larger sum, he shall pay the costs thereafter accruing, the defendant by such payment loses all control over the money, and cannot retake or claim it, but it passes into the custody of the law, subject alone to the demand of the plaintiff.—Voss v. McGuire, 26 Mo. App. 452.

[e] (Neb. 1882) A justice of the peace has no authority to accept a tender of an amount in excess of that involved in an action before him, as where, in an action on a coupon, defendant tenders the amount of both the coupon and the coupon note.—Fletcher v. Daugherty, 13 Neb. 224, 13 N. W. 207.

[f] (N. Y. 1874) For the purpose of taking an appeal from a judgment rendered by a justice of the peace against a third person, plaintiff left with the wife of the justice at his house seven dollars, supposed to be enough to pay the costs and return fee. It was insufficient, and the justice applied the seven dollars on the judgment. *Held*, that the money, when paid to the justice, became the property of R. and no longer that of plaintiff, and plaintiff could not maintain an action against the justice for the same.—Rightmire v. Kimball, 2 Hun, 598, 5 Thomp. & C. 95.

[g] (N. C. 1863) A defendant before a justice of the peace, after trial and judgment against him, but before appeal, paid part of the claim to the justice, who held it till the trial above took place, and then paid it to the clerk of the appellate court. *Held*, that under

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the pleas of "tender" and of "always ready" the measure was unavailing.—Cope v. Bryson, 60 N. C. 112.

(B) VENUE, CHANGE OF VENUE, TRANSFER AND REMOVAL OF CAUSE.

VENUE, § 235.
CHANGE OF VENUE OR TRANSFER OF CAUSE TO OTHER JUSTICE, § 236.
— GROUNDS, § 237.
— TIME FOR APPLICATION, § 238.
— APPLICATION AND PROCEDURE, § 239.
— JURISDICTION AND PROCEEDINGS AFTER CHANGE, § 240.
— SECOND OR SUBSEQUENT CHANGE, § 241.
— JURISDICTION AND PROCEEDINGS AFTER REFUSAL OF CHANGE, § 242.
REMOVAL OF CAUSE TO COURT OF RECORD, § 243.
— PROCEEDINGS AFTER REMOVAL IN GENERAL, § 244.
— AMENDMENTS IN PLEADINGS AND REPLEADING, § 245.

§ 235. Venue.

Domicile or residence of parties as affecting jurisdiction, see ante, §§ 143–147.

[a] (Ala. 1843) Under the statute requiring that a defendant shall be sued before a justice of the peace in the beat in which he resides, or in which the debt was contracted, if a debt be contracted in one beat, and a note given therefor in another, an action will lie on the note in the former beat.—Wright v. Burt, 5 Ala. 29.

[b] (Cal. 1885) Under Code Civ. Proc. § 832, providing that, where a person has contracted to perform an obligation at a particular place, and resides in another county, an action thereon before a justice shall be brought in the county where it is to be performed, or in the county where defendant resides, and section 848, providing that, where an action is brought in the county where the contract was to be performed, and the defendant resides in another county, the summons may be served in the county where he resides, an action for damages for breach of contract may be brought before a justice of the county where it was to be performed, and the summons served in the county where the defendant resides.—Cole v. Fisher, 66 Cal. 441, 5 Pac. 915.

[c] (Colo. 1887) Gen. St. 1883, § 1932, provides that "suits before justices shall be commenced in the township in which the debtor resides, unless the cause of action accrued in the township in which the plaintiff resides, in which case the suit may be commenced where the cause of action accrued or is specifically made payable." *Held*, that the statute does not apply to nonresident debtors.—Charles v. Amos, 10 Colo. 272, 15 Pac. 417.

[d] (Ill. 1877) A justice of the peace of the county where the parties reside may take jurisdiction of an action for damages done to real property in another county.—Pilgrim v. Mellor, 1 Ill. App. (1 Bradw.) 448.

[e] (Ind. 1872) To give a justice of the peace jurisdiction of an action by a landlord to recover possession of real estate, the land must lie in the county where the action is brought.—Jolly v. Ghering, 40 Ind. 139.

[f] (Ind. 1885) The jurisdiction of the mayor of an Indiana city over an action against a railroad company which, by not fencing, has run over plaintiff's stock, is not limited to cases where the stock was run over within the limits of the city.—Wabash, St. L. & P. R. Co. v. Lash, 103 Ind. 80, 2 N. E. 250.

[g] (Iowa, 1875) Where a promissory note is, in terms, made payable in a certain township, a justice of the peace of that township has jurisdiction of the maker, though he resides, and is served with process, in another county.—Klingel v. Palmer, 42 Iowa, 166.

[h] (Me. 1838) Local actions may be brought before a justice of the peace in the county where the defendant lives, though the cause of action accrued from an injury done to real estate within a different county.—Morton v. Chase, 15 Me. (3 Shep.) 188.

[i] (Mass.) An action for injury to real estate, if the damage does not exceed $20, is not local to the county where the land lies, but may be brought before a justice in any county where the defendant may be.—(1818) Sumner v. Finegan, 15 Mass. 280; (1830) Pitman v. Flint, 27 Mass. (10 Pick.) 504.

[j] (Miss. 1879) Under Code, § 1303, replevin before a justice of the peace will not lie in a district where the defendant neither resides nor has property.—Turner v. Lilly, 56 Miss. 576.

[k] (Miss. 1881) Under Code 1880, § 2634, regulating the venue of the action of replevin, a justice of the peace of one district cannot issue a writ of replevin for property held by a defendant in another district, returnable before a justice of the peace in such district.—Richardson v. Davis, 59 Miss. 15.

[l] (Mo. 1885) Under Rev. St. 1879, § 2839, conferring jurisdiction upon justices of the peace in actions against railroad companies for killing or injuring of stock, the jurisdiction is not confined to the justice of the township where the injury occurred, but is extended to the justice of any adjoining township, without regard to the amount involved.—Chaney v. Wabash, St. L. & P. R. Co., 18 Mo. App. 661.

[m] (Mo. 1885) Rev. St. § 2835, gives justices original jurisdiction in actions against a railroad company to recover for killing or injuring stock within their respective townships, without regard to the value of the animals killed, or the amount claimed for killing the same. Section 2839 requires an action against a railroad company for killing or injuring stock, etc., to be brought before a justice of the township in which the injury happened, or in any adjoining township. *Held*, that taking the two sections together, the jurisdiction is still local, and that the locality in which the jurisdiction is exercised extended so as to include any township adjoining the township in which the stock may be injured, etc., and no further; as this jurisdiction as thus extended as purely and entirely local, "without regard to the value of the stock, or the amount claimed for killed the same."—Manuel v. Missouri Pac. Ry. Co., 19 Mo. App. 631.

[n] (Mo. 1885) An action brought before a justice of the peace against a railroad company for double damages for killing stock must be instituted in the township where the killing occurred, or in an adjoining township.—Backenstoe v. Wabash, St. L. & P. Ry. Co., 86 Mo. 492, affirming (1885) 23 Mo. App. 148.

[o] (Mo. 1887) In an action for stock killing, where the complaint alleges that the animal was killed in S. township, and there is some evidence tending to show that it was killed at a point two and one-half miles from C., "in S. township," there is sufficient evidence of venue to go to the jury.—Kinney v. Hannibal & St. J. R. Co., 27 Mo. App. 610.

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[p] (Mo. 1892) Under Rev. St. § 6126, providing that an action before a justice against a railroad company for killing stock shall be brought in the township where the killing occurred, or in an adjoining township, the evidence must show that the suit was so brought, and a mere allegation to that effect, not admitted to be true, is insufficient.—Whitesides v. St. Louis, K. & N. W. R. Co., 49 Mo. App. 250.

[q] (Mo. 1893) An action in a justice's court to enforce a mechanic's lien must be brought in the county where the land sought to be charged is situated.—Schultz v. Larkin, 53 Mo. App. 223.

[r] (N. Y. 1846) Trespass quare clausum fregit may be brought in a justice's court of a different county from that in which the land lies, though the action is a local action.—Graves v. McKeon, 2 Denio, 639.

[s] (N. C. 1891) Under Code, § 871, forbidding a justice of the peace to issue process to any county other than his own where there is only one defendant, and section 191 (applicable to proceedings in superior courts), providing that an action for the recovery of a penalty must be brought in the county where the cause arose, a justice has jurisdiction of an action against a resident of his county for a penalty incurred in another county, in the absence of any provision extending the provision of section 191 to justices' courts.—Fisher v. Bullard, 109 N. C. 574, 13 S. E. 799.

[t] (Ohio, 1861) The act to regulate inclosures (Act Jan. 17, 1840, § 15), which provides that actions of trespass to recover assessments of damages made under the act by township trustees shall be brought in the township in which defendant resides, is not repealed by Justices' Code, § 3, which authorizes a common-law action of trespass in any township where the trespass was committed.—Place v. Welch, 2 Ohio Dec. 542.

[u] (Tex. 1859) A defendant may be sued before a justice in the county where the debt was to be paid, as well as in the one where he resides.—Perry v. Lovett, 24 Tex. 359.

[v] (Tex. 1866) An action for damages to land cannot be brought before a justice of the peace in the precinct where the land lies when the defendant resides in another county.—Cowan v. Nixon, 28 Tex. 230.

[w] (Tex. 1894) Where a boy voluntarily leaves his father's house to seek shelter with another, any persuasion exercised by such other to keep the boy with him is a tort committed in the precinct where he resides, and hence a justice of the peace of another precinct has no jurisdiction of an action brought by the father for enticing away the boy.—Bracken v. Johnson (Civ. App.) 24 S. W. 1101.

[x] (Utah, 1884) Due bills for work done in a certain precinct are not contracts to be performed within such precinct, within Prac. Act (Comp. Laws, p. 1734) subd. 6, which provides that, where a person has contracted to perform any obligation at a particular place, and resides in another precinct, he may be sued in justice's court in the precinct in which it is to be performed.—Fenton v. Salt Lake County, 3 Utah, 423, 4 Pac. 241; Klopenstein v. Woolf, 3 Utah, 426, 4 Pac. 227; Sanders v. Same, 3 Utah, 429, 4 Pac. 228.

[y] (Vt. 1831) Act Oct. 1811, directing that certain suits before justices for goods sold shall be brought in the town where they were sold, does not apply to a single act of selling, on a particular occasion, by one who did not follow the trade of vending goods, or, if he did, was only transiently in the town where the sale was made.—Wainwright v. Berry, 3 Vt. 423.

[z] (Vt. 1853) Rev. St. c. 26, § 16, enacts that suits commenced before a justice to recover debts or demands for goods sold or delivered shall be tried in the town where such commodities were sold, or where the defendant resides. S. & E. had a shop in R. for the manufacture of gravestones, and S. resided there. E. was transiently in another town, where defendant resided, and there sold him a set of gravestones. *Held*, that a suit to recover the value of the stones was properly brought before a justice of the peace in R.—Stone v. Hazen, 25 Vt. 178.

[zz] (Wis. 1875) Under Rev. St. c. 123, actions for the recovery of personal property are transitory, except where the property has been distrained. Therefore the police justice of a city may obtain jurisdiction where the property (not being distrained) was taken by the defendant outside of the city.—Young v. Lego, 38 Wis. 206.

§ 236. Change of venue or transfer of cause to other justice.

Appearance before justice to whom cause is sent as conferring jurisdiction, see post, § 240 [a, hhh].

Transfer of criminal prosecution, see "Criminal Law," vol. 14, cc. 822–825, § 204.

[a] (Cal. 1885) Under the statute of 1875–76, reincorporating the city of San Diego, an action properly brought before a justice of the peace of such city may be transferred for trial before a justice whose office is outside of the city. The general statute as to change of place of trial is applicable to such cases. Code Civ. Proc. §§ 833–835.—Palmer v. Snyder, 67 Cal. 105, 7 Pac. 196.

[b] (Iowa, 1859) Where a party to an action before a justice of the peace files his affidavit, and moves for a change of venue on the ground that the justice is so prejudiced against him that he cannot obtain justice before him, it is error to refuse a change of venue.—Berner v. Frazier, 8 Iowa (8 Clarke) 77.

[c] (Iowa, 1873) Revision, § 2802, providing that if suit is brought in the wrong county the defendant may demand a change of venue to the proper county, does not apply to proceedings before a justice of the peace.—Post v. Brownell, 36 Iowa, 497.

[d] (Iowa, 1877) A change of venue may be taken from the court of a mayor of a city or incorporated town to that of a justice of the peace.—Finch v. Marvin, 46 Iowa, 384.

[e] (Kan. 1882) The granting of a change of venue by a justice is a ministerial act precluding the exercise of judicial discretion.—Herbert v. Beathard, 26 Kan. 746.

[f] (Mo. 1892) The fact that the garnishee in a justice court obtains a change of venue does not affect the jurisdiction of the justice in the principal case.—Martin v. Chicago, R. I. & P. Ry. Co., 50 Mo. App. 428.

[g] (Neb. 1893) Where a proper affidavit for a change of venue from one justice of the peace to another, on the ground of bias and prejudice, under Code, §§ 958a, 958b (Consol. St. §§ 5428, 5429), is seasonably filed, and the provisions of the statute relating to the payment of costs are complied with, it is the imperative duty of the justice before whom the objection is made to transfer the cause to the nearest justice of the county to whom the same objections do not apply.—Peyton v. Johnson, 37 Neb. 886, 56 N. W. 728.

[h] (Neb. 1895) When an affidavit by a defendant for a change of venue of a cause pending before a justice of the peace is filed, and the costs have been paid, under Code Civ. Proc.

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§ 958a, it is mandatory on the justice to transfer the cause to the nearest justice of the county to whom the objections stated in the affidavit do not apply.—Paul v. Ziebell, 43 Neb. 424, 61 N. W. 630.

[i] (Tex. 1889) Rev. St. art. 1560, provides that, "if there be no justice of the peace qualified to try the suit in the proper precinct, the suit may be commenced before the nearest justice of the peace of the county who is not disqualified to try the same." *Held*, that a suit could be brought in the proper precinct though the justice therein was disqualified, by reason of his relation to one of the parties, and then transferred to the nearest justice.—Morris v. Foreaker (App.) 15 S. W. 37.

[j] (Wis. 1881) Under Rev. St. 1878, § 3616, which provides that if the defendant shall, before any proceedings are had on his part, make oath that from prejudice, or other cause, he believes the justice will not decide impartially, such justice shall immediately transmit the case to another justice, an execution defendant in garnishment proceedings issued by a justice in aid of a judgment previously rendered by him or his predecessor is not entitled to a removal on the ground of prejudice.—Garland v. McKitrick, 52 Wis. 261, 9 N. W. 160.

[k] (Wis. 1885) A village charter conferred on each of the justices of the village, which is situated in two counties, jurisdiction coextensive with the limits of both counties, and a cause removed from a justice of the village may be sent to the nearest justice, though the latter may live in the other county.—Starkweather v. Sawyer, 63 Wis. 297, 23 N. W. 566.

§ 237. —— Grounds.

[a] (Cal. 1855) Where a justice is interested in a cause, he should transfer it as is provided by statute.—Larue v. Gaskins, 5 Cal. 507.

[b] (Minn. 1858) Under Laws 1849, p. 19, a justice of the peace has no right to transfer a cause to another justice on an affidavit of partiality or prejudice, but only on affidavit, filed before issue joined, that the justice is a material witness, or where it was proved that he is near of kin to plaintiff. The remedy for errors from partiality or prejudice is by appeal or certiorari.—Cooper v. Brewster, 1 Minn. 94 (Gil. 73).

[c] (Ohio, 1859) If the defendant wishes the justice as a witness, he should, before the trial, cause the cause to be removed for trial before another justice, according to the express provisions of the Code.—McMillen v. Andrews, 10 Ohio St. 112.

§ 238. —— Time for application.

Demanding change of venue after removal of cause to court of record, see post, § 244 [b, c].

[a] (Iowa, 1849) Application for change of venue may be made to a justice of the peace at any time after appearance of the parties, and before the jury is sworn or the trial submitted to the justice.—Lyne v. Hoyle, 2 G. Geene, 135.

[b] (Iowa, 1855) A case was tried before a justice, and the jury disagreed; just before a second jury was sworn, a party applied for a change of venue. *Held*, that this was "before the trial commenced" (St. Jan. 24, 1853), and in time.—Marshall v. Kinney, 1 Iowa (1 Clarke) 580.

[c] (Iowa, 1866) An application for a change of venue from one justice to another should be made before the commencement of the trial.—McKenney v. Hopkins, 20 Iowa, 495.

[d] (Kan. 1882) A party may procure a change of venue in a justice's court, after the cause has been continued, and before the day to which it has been continued.—Herbert v. Beathard, 26 Kan. 746.

[e] (Minn. 1859) Rev. St. art. 4, c. 69, § 65, relating to justices' courts, provides that change of venue may be had "at any time before trial shall have commenced." *Held*, that neither the settlement of the pleadings, nor the argument of a motion to dissolve an attachment, is a commencement of the trial, and that an application for a change of venue before the commencement of a trial on the merits is in time.—Curtis v. Moore, 3 Minn. 29 (Gil. 7).

[f] (Mo. 1890) A change of venue may be granted by a justice of the peace, before the return day of the summons, on the appearance of both parties before him.—Weber v. Cummings, 39 Mo. App. 518.

[g] (Neb. 1890) Under Code, § 954, allowing a change of venue before justices of the peace at any time before trial, none can be granted after a judgment given in the absence of the defendant, which has been conditionally set aside.—Tyler v. Baxter, 29 Neb. 688, 46 N. W. 153.

[h] (Wis. 1884) An application to remove a case because the justice before whom the suit was instituted is a material witness is too late after issue has been joined and witnesses for plaintiff sworn.—Jacubeck v. Hewitt, 61 Wis. 96, 20 N. W. 372.

§ 239. —— Application and procedure.

[a] (Iowa, 1882) When a justice of the peace grants a change of venue, he must send the papers to the nearest justice, as provided by Code 1873, § 3534, and must name him. Until he does so name him, he retains jurisdiction.—Bremner v. Hallowell, 59 Iowa, 433, 13 N. W. 412.

[b] (Iowa, 1893) Under Miller's Code, § 3516, providing that the proceedings prescribed for the circuit court shall be pursued in a justice's court; and section 2596, providing that a change of venue in the circuit court shall not be deemed perfected until the costs caused thereby are paid by the applicant; and section 3842, providing that an officer performing any service is entitled to his fees in advance,—a justice of the peace may demand his fees before granting a change of venue, and, on the failure of the applicant to make such payment, the justice may retain jurisdiction over the cause.—Holmes v. Butts, 87 Iowa, 412, 54 N. W. 249.

[c] (Kan. 1876) Where a defendant makes an application in a justice's court for a change of venue, but does not pay or offer to pay any costs, and does not confess or offer to confess a judgment for any costs, though his attention is called to the matter by the plaintiff, the justice may rightfully overrule the application.—Chapin v. Brown, 17 Kan. 142.

[d] (Kan. 1882) Justices' Code, §§ 78, 79, requiring a plaintiff applying for a change of venue in a justice's court to pay costs or confess judgment therefor, do not excuse the justice's refusal to attach his jurat and signature to plaintiff's affidavit for such change of venue, or to file such affidavit, though plaintiff does not pay costs or confess judgment therefor.—Herbert v. Beathard, 26 Kan. 746.

[e] (Mich. 1886) A motion to remove a cause, under How. Ann. St. § 6937, providing that if, before issue is joined in a justice's court, defendant files an affidavit that the justice is a material witness for defendant, or has advised with plaintiff in regard to the matter in controversy, the cause shall be transferred to one of the nearest justices in the county, provided defendant shall pay the accrued costs and 50

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cents for the transcript, will be denied, unless it appears that both the costs and fee for making the transcript have been paid or tendered.—Oakley v. Dunn, 63 Mich. 494, 30 N. W. 96.

[f] (Minn. 1871) The entry in the docket of a justice of the peace, relating to the transfer of a cause to another justice, was as follows: "Defendant made affidavit that he could not safely proceed to trial before the undersigned, and asked change of venue. The court granted the change, and sent the cause before P. Bliss, Esq., of the city of Owatonna, at 1 p. m." *Held*, that this was a sufficient order for such transfer.—McGinty v. Warner, 17 Minn. 41 (Gil. 23).

[g] (Mo. 1895) A justice may not refuse to allow a change of venue except on payment in advance of his fee therefor, there being definite provision by Rev. St. 1889, §§ 5007, 6244, for other modes of collecting his fees.—State ex rel. Uedeking v. McCracken, 1 Mo. App. Rep'r, 223.

[h] (Mo. 1895) A justice cannot impose on persons applying for change of venue the condition that the costs be paid.—Endicott v. Hall, 61 Mo. App. 185, 1 Mo. App. Rep'r, 340.

[i] (Neb. 1887) Where a justice of the peace, on application for a change of venue, made an order transferring the cause to one R., supposed to be the nearest justice to whom no objection would apply, but on the next day ascertained that said justice had resigned, whereupon he changed the order, transferring the cause to one B., the nearest justice exercising the duties of his office, all parties being notified of said change, and a trial was thereafter had before B. and a jury, at which the parties appeared, there is no error.—Hitchcock v. McKinster, 21 Neb. 148, 31 N. W. 507.

[j] (Neb. 1893) Under Code, §§ 958a, 958b (Consol. St. §§ 5428, 5429), allowing a change of venue from one justice of the peace to another on the ground of bias and prejudice, an affidavit for a change of venue is sufficient if it is in the language of the statute, and need not set out the facts showing bias and prejudice.—Peyton v. Johnson, 37 Neb. 886, 56 N. W. 728.

[k] (Neb. 1893) Under Code, §§ 958a, 958b (Consol. St. §§ 5428, 5429), allowing a change of venue from one justice of the peace to another on the ground of bias and prejudice, and providing that, on the filing of the proper affidavit, the cause shall be transferred to the nearest justice to whom said objections do not apply, where an affidavit states that "F. A. W., the nearest justice to whom said cause could be transferred, is, as affiant verily believes, biased and prejudiced against affiant, so that a fair and impartial hearing cannot be had before him," it is error for the justice before whom the action is pending to order the venue changed to such nearest justice.—Peyton v. Johnson, 37 Neb. 886, 56 N. W. 728.

[l] (Neb. 1895) In an affidavit for a change of venue from a justice, under Code Civ. Proc. § 958a, defendant may set up a well-founded objection disqualifying the nearest or any other justice in the county.—Paul v. Ziebell, 43 Neb. 424, 61 N. W. 630.

[m] (Neb. 1895) Where defendant has filed an affidavit of prejudice, for a change of venue from a justice, under Code Civ. Proc. § 958a, plaintiff cannot show prejudice of the nearest justice in order to prevent defendant from procuring a change of venue.—Paul v. Ziebell, 43 Neb. 424, 61 N. W. 630.

[n] (Wis. 1871) Rev. St. c. 120, § 47, does not require a party who desires to have a cause in justice's court removed, to make an affidavit, but only an oath, "that from prejudice or other cause he believes the justice will not decide impartially in the matter." And where the oath is reduced to writing, and signed and filed as on affidavit in the cause, it is sufficient to authorize a removal of the cause, though deficient as an affidavit for lack of a venue. The affidavit includes the oath, and may show what facts the affiant swore to, and thus be available as an oath, although it may be entirely unavailable as an affidavit.—Burns v. Doyle, 28 Wis. 460.

[o] (Wis. 1884) Where a part of the defendants make affidavit of the prejudice of a justice of the peace, and afterwards all appear and join in a motion for the removal of the case to the nearest justice in the county, tendering the proper costs, the affidavit of prejudice is sufficient, and it is the duty of the justice to remove the case as requested; and, if defendants refuse to appear further in the action, the justice loses jurisdiction of the case.—Hillriegel v. Truman, 60 Wis. 253, 19 N. W. 79.

[p] (Wis. 1884) A justice is not bound to grant an application for a removal on the ground that he is prejudiced or is a material witness, where the application is made by one defendant only, the other not joining.—Jacubeck v. Hewitt, 61 Wis. 96, 20 N. W. 372.

[q] (Wis. 1892) An affidavit by a person charged with a tort, in support of an application to change venue from one justice to another, under Rev. St. § 4809, providing that such person "shall make oath that from prejudice or other cause he believes that such justice will not decide impartially in the matter," which does not set out the facts constituting the alleged "prejudice or other cause," is insufficient.—Hager v. Falk, 82 Wis. 644, 52 N. W. 432.

[r] (Wis. 1894) A justice of the peace was *held* not to have been deprived of jurisdiction by an affidavit of prejudice for removal of the cause to the nearest justice made by one only of two defendants.—State v. Roberts, 87 Wis. 292, 58 N. W. 409.

§ 240. —— Jurisdiction and proceedings after change.

[a] (Ark. 1890) Where plaintiff filed with a justice a note indorsed "Paid," upon which he appeared as a co-maker with defendant, and an entry was made on the docket that plaintiff claimed he was surety for defendant, and had paid the note for him, and afterwards defendant obtained a change of venue, filed this record before a second justice, and entered his appearance, he cannot question the jurisdiction of the second justice.—Buffington v. Sipe, 58 Ark. 235, 13 S. W. 763.

[aa] (Ind. 1869) Where a justice has failed to certify his transcript to another justice, in case of a change of venue, the cause should be remanded back for trial.—Todhunter v. Marshall, 32 Ind. 96.

[aaa] (Ind. 1871) Where a defendant appeared before a justice of the peace and agreed on a day for trial, and afterwards asked for and obtained a change of venue, *held*, that he had fully submitted himself to the jurisdiction of the justice before whom the action was commenced, and that he could not plead to the jurisdiction of the justice before whom the cause was sent.—Nesbit v. Long, 37 Ind. 300.

[b] (Ind. 1877) A party to an action before a justice of the peace, who procures several changes of venue, cannot, after voluntarily appearing, object that one of such changes was improperly taken, or that the justice to whom the venue was changed had no jurisdiction over his person.—Mayes v. Goldsmith, 58 Ind. 94.

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[c] (Iowa, 1855) In an action before a justice of the peace, after the jury had failed to agree and were discharged, the plaintiff obtained a change of venue to another justice on the ground that the first justice was a material witness for him. Upon the appearance before the second justice the defendant moved specially to dismiss the suit, for the reason that the change of venue was erroneously granted, and that the second justice had no jurisdiction of the cause. *Held*, that it was not error in the justice to refuse to dismiss.—Marshall v. Kinney, 1 Iowa (1 Clarke) 96.

[d] (Iowa, 1855) A change of venue by a justice may be erroneous, but it is not void, so that the second justice has no jurisdiction.—Marshall v. Kinney, 1 Iowa (1 Clarke) 96.

[e] (Kan. 1890) Where an action is commenced before a justice of the peace, who is interested in the result thereof, and a change of venue is had on the ground of prejudice, it is proper for the justice to whom the case is transferred to dismiss all prior proceedings on motion of defendant, because the action was commenced before a justice who was disqualified.—Limerick v. Murlatt, 43 Kan. 318, 23 Pac. 567.

[f] (Minn.) Where a case is transferred from one justice of the peace to an adjoining justice, and the ordering of the transfer does not appear in the docket of the justice from whom the transfer is made as required by Gen. St. 1866, c. 65, § 18, neither the subsequent appearance of the parties before the justice to whom it is sent, nor recitals in his docket, will confer jurisdiction upon such justice.—(1870) Rahilly v. Lane, 15 Minn. 447 (Gil. 360); (1871) McGinty v. Warner, 17 Minn. 41 (Gil. 23).

[g] (Minn. 1871) On a change of venue in a justice's court, the transcript stated that defendant made affidavit that he could not safely proceed to trial before "the undersigned," and asked for a change of venue. The justice certified that the papers transmitted with the transcript of his docket were all there were in the case, but no affidavit for the change was received by the justice to whom they were so transmitted. *Held*, that diminution of the record, and not want of jurisdiction, was shown, and the change having been made at defendant's request, it was to be presumed, as against him, that the affidavit was sufficient, until the contrary appeared.—McGinty v. Warner, 17 Minn. 41 (Gil. 23).

[h] (Minn. 1895) A party to an action in justice's court who obtained a transfer to another justice cannot object that the cause was improperly transferred because of an insufficient affidavit for removal.—Oltman v. Yost, 62 Minn. 261, 64 N. W. 564.

[hh] (Mo. 1895) A general appearance by the parties in a justice's court to which the venue of a case is changed, and also in the circuit court on appeal, confers jurisdiction to try the cause of action.—Buzzard v. Hapeman, 61 Mo. App. 464, 1 Mo. App. Rep'r, 657.

[hhh] (Mo. 1896) Though plaintiff in an action on account fails to file the account with the justice, defendant's application for a change of venue, and his appearance before the justice to whom the case is sent, confer jurisdiction over his person.—Carter v. Womack, 64 Mo. App. 338, 2 Mo. App. Rep'r, 997.

[i] (Neb. 1887) Where, on a change of venue, a cause is transferred to a justice of the peace, who, by reason of bias and prejudice, is unable to try the case, a motion to dismiss, filed by the defendant, is properly overruled. The proper motion in such case is to remand.—Hitchcock v. McKinster, 21 Neb. 148, 31 N. W. 507.

[j] (Wis. 1843) It cannot be objected, after trial, that a justice to whom a cause was transferred was not the nearest justice to the one before whom the cause originated.—Cox v. Groshong, 1 Pin. 307.

[k] (Wis. 1886) By proceeding to trial before a justice to whose court the case is removed, the parties waive the right to object to his jurisdiction, on the ground of a defect in the affidavit for removal.—Magmer v. Renk, 65 Wis. 364, 27 N. W. 26.

§ 241. —— Second or subsequent change.

[a] (Cal. 1863) Where the venue of an action before a justice has been once changed, a further change may be ordered for good cause shown.—People v. Hubbard, 22 Cal. 34.

[b] (Ind. 1877) Where a change of venue is taken in a cause from one justice of the peace to another of the same township, the latter may, in certain cases, on a change being taken from him, send the cause to a justice of the peace of another township.—Mayes v. Goldsmith, 58 Ind. 94.

[c] (Kan. 1882) The procuring of a change of venue by defendant in an action before a justice will not preclude plaintiff from thereafter procuring another change of venue.—Herbert v. Beathard, 26 Kan. 746.

§ 242. —— Jurisdiction and proceedings after refusal of change.

[a] (Kan. 1883) Where a sufficient application for a change of venue is made, under Comp. Laws 1879, c. 81, art. 7, and judgment for costs confessed before a justice, it is the duty of the justice to make the change; but, if he refuse, he does not lose his jurisdiction, and his subsequent acts are not necessarily nullities.—Barnhart v. Davis, 30 Kan. 520, 2 Pac. 633.

[b] (Mo. 1895) Under Rev. St. 1889, § 6241, providing that, after affidavit for change of venue is filed, the justice shall have no further jurisdiction, a judgment entered after such filing is absolutely void.—Endicott v. Hall, 61 Mo. App. 185, 1 Mo. App. Rep'r, 340.

§ 243. Removal of cause to court of record.

Actions involving title to land as requiring removal, see ante, §§ 83–97.

Necessity for removal of attachment suit where same property is attached under writ from court of record, see post, § 287 [f].

Unauthorized certification as ousting justice's jurisdiction, see ante, § 190 [a].

Mandamus to compel certification, see "Mandamus," II. (A).

[a] (Conn. 1834) Double pleading of title to an action of trespass quare clausum before a justice of the peace is not allowable under the statute for the purpose of removing the cause to a higher court.—Lamb v. Beebe, 10 Conn. 322.

[b] (Iowa, 1889) The law does not authorize the transfer of an action from a justice's court to the district court before final judgment, though the parties consent thereto.—Evans v. Phelps, 77 Iowa, 526, 42 N. W. 432.

[c] (Kan. 1888) Where in an action before a justice of the peace, the answer shows that the title to land is in dispute, and the action is held for trial by the justice, and judgment rendered, and defendant appeals, the district court has jurisdiction to try such case as though certified by the justice, under Comp. Laws 1885, c. 81, § 7.—Lyman v. Stanton, 39 Kan. 443, 18 Pac. 513.

[d] (Mass. 1844) The record of a justice of the peace, before whom trespass was brought, showed that defendant pleaded the general issue, which was joined, and that, "the defendant of-

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fering in evidence title to the real estate upon which the alleged trespass was committed, the plaintiff appealed to the next court of common pleas," etc., "and entered into recognizance, as the law directs, to prosecute said appeal there with effect." Plaintiff entered said action in the next court of common pleas, judgment was there rendered against him, and he brought error to reverse said judgment, on the ground that the action was not rightly removed into the common pleas and that said court had no jurisdiction thereof. *Held*, that it sufficiently appeared on the justice's record that the title to real estate was brought in question; that the term "appealed" was not used technically, but was meant to express plaintiff's election to remove the case to the court of common pleas; and that said court had jurisdiction of the case.—Lawrence v. Souther, 49 Mass. (8 Metc.) 166.

[e, f] (N. Y. 1814) In an action before a justice defendant entered a plea of title, and entered into a recognizance to appear and put in claim at the next term of the court of common pleas on a suit commenced against him there by the plaintiff. *Held*, in an action on the recognizance, plaintiff must show that at such next term of the common pleas he commenced the suit against the original defendant.—Brown v. Van Duzen, 11 Johns. 472.

[g] (N. Y. 1849) Where, in an action before a justice of the peace, defendant pleaded title to land and delivered to a justice the undertakings for removal required by Code, § 56, but failed to accept service of the complaint and summons filed by the plaintiff thereafter within the time allowed by such section, the higher court had no jurisdiction to permit defendant to accept service thereafter, since without service of summons there is no case before the court.—Davis v. Jones, 3 Code Rep. 63, 4 How. Prac. 340.

[h, i] (N. Y. 1853) Where defendant, on raising a question of title, fails to comply literally with the terms of the undertaking filed with the justice which is required by Code 1849, § 56, by omitting to give the written admission of service of the summons and complaint, but puts in his answer in the supreme court, he has substantially performed his obligation, and plaintiff, by accepting the answer without the written admission, waives his right to require a literal compliance with the terms of the undertaking, and such waiver does not affect the identity of the suits before the justice and in the supreme court.—Wiggins v. Tallmadge, 7 How. Prac. 404.

[j, k] (N. Y. 1879) An action was brought to recover damages for trespass on land before a justice. Defendant interposed a plea of title, and gave an undertaking conditioned that, if plaintiff should within 20 days from the date thereof deposit with the justice the summons and complaint in an action in the supreme court, defendant would within 20 days give an admission in writing of service. *Held*, that the bond was insufficient under Laws 1854, c. 96, § 12, providing the condition of the bond should show that defendant would give an admission of the services of summons and complaint in the superior court, if plaintiff should deposit such summons and complaint with the justice.—Kohlbrenner v. Elsheimer, 19 Hun, 88.

[l] (N. Y. 1890) Code Civ. Proc. §§ 2951, 2952, provide that an action in justice's court must be discontinued where defendant files an affidavit showing that the title to land will come in question, and delivers to the justice an undertaking, with one or more sureties, "approved by the justice," conditioned that defendant will admit service in a new action brought by plaintiff in the proper court. *Held* that, after such affidavit and undertaking have been filed by defendant, the justice could not retain jurisdiction of the cause, by arbitrarily refusing to approve the undertaking, without examining the surety, and without giving any reasons for his disapproval, and that a judgment thereafter rendered against defendant in his absence must be reversed on appeal.—Harding v. Ellston (Co. Ct.) 13 N. Y. Supp. 549, 19 Civ. Proc. R. 252.

[m, n] (N. C. 1848) Where an attachment is made returnable to a single justice of the peace, and several garnishees are summoned, the justice cannot refer the matter to the county court, unless plaintiff makes affidavit that the garnishees owed the defendant such a debt, or had property belonging to him of such a nature, or made such a statement of facts, that the justice could not give judgment. The simple statement by the justice that plaintiff made the proper affidavit is insufficient.—Miller v. Bates, 30 N. C. 477.

[o] (Ohio, 1861) An attachment suit, commenced before a justice on the ground that defendant was a nonresident of the county, cannot be certified to or proceeded with in the common pleas on a return that defendant had no effects liable to be seized, except land, since an attachment cannot issue from the common pleas against a nonresident, except where he lives without the state.—Breckenridge v. Grace, 2 Ohio Dec. 558.

[p] (Ohio, 1861) Where an attachment suit is commenced before a justice, and there is a return that defendant has no effects liable to seizure, except lands, the case may be certified to the common pleas, if it be one which can be proceeded with in said court in all respects as if the same had originated there.—Breckenridge v. Grace, 2 Ohio Dec. 558.

[q] (Ohio, 1861) Under Justice Code, § 53, providing that in attachment cases, where no effects are found, except land, the justice shall certify the case to the common pleas, applies to cases where the amount is less than $100, as well as those over that amount.—Breckenridge v. Grace, 2 Ohio Dec. 558.

[r] (Ohio, 1861) Justice Code, § 53, authorizing an attachment case to be certified to the common pleas when there has been an examination of the garnishee, does not restrict the right to have a case certified to such cases.—Breckenridge v. Grace, 2 Ohio Dec. 558.

[s] (Ohio, 1894) Rev. St. § 6618, provides that when the appraised value of property taken by replevin in justice's court, exceeds $300, the justice shall certify the proceedings to the court of common pleas, and "thereupon" shall file the original papers, etc., in the clerk's office of such court. *Held*, that "thereupon" means as soon thereafter as it is possible to do so.—Bernhard v. Iglauer (Com. Pl.) 31 Wkly. Law Bul. 163.

[t] (Pa. 1895) Under Act March 20, 1810, § 14, providing that, if it shall appear "by due proof, on oath or affirmation," that a judgment was confessed before a justice of the peace for the purpose of defrauding creditors, the parties shall certify the proceedings to the common pleas, a verified affidavit in the words of the act is sufficient, and the proof need not satisfy the justice that the judgment was confessed with a view to defraud creditors.—Minick v. Tharp (Com. Pl.) 5 Pa. Dist. R. 44.

[u] (Utah, 1883) Unless authorized by statute, a justice of the peace cannot certify a case to another court. If he finds the case not within his jurisdiction, he must dismiss it.—Crismon v. Tufts, 2 Pac. 705.

[v] (Vt. 1829) Act Oct. 28, 1826, repealing Act Nov. 19, 1824, § 2, which requires a justice of the peace to refuse to take jurisdiction of a cause where the defendant pleads title to

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land, and to certify the records and proceedings to the county court for trial, is a valid law; and hence a removal of an action by a justice on such ground is erroneous.—Easterbrook v. Low, 2 Vt. 135.

[w, x] (Wash. 1891) Where a justice has taken jurisdiction of a case involving more than his jurisdictional amount, and an appeal is taken from his judgment, it will be treated as a proper transfer of the case to the superior court.—Moore v. Perrott, 2 Wash. St. 1, 25 Pac. 906.

[y] (Wis. 1857) Under a statute providing that, in actions commenced before a justice, when the title to land comes in question, the defendant, on tendering plea and notice thereof, may have the question certified to the circuit court, the plea and notice must clearly show that the title to land was in question.—Verbeck v. Verbeck, 6 Wis. 159.

[z] (Wis. 1857) The statute having prescribed the manner in which an action commenced before a justice of the peace may be removed to the circuit court, the mode thereby provided must be pursued, and the statute complied with, in order to give that court jurisdiction.—Verbeck v. Verbeck, 6 Wis. 159.

§ 244. —— Proceedings after removal in general.

Costs on removal of case involving title, see "Costs," vol. 13, cc. 74, 75, § 45.

[a] (Ala. 1860) A complaint for forcible entry and detainer in an action commenced in a justice's court should not be stricken from the files, after the cause has been removed to the city court of Mobile, because of a variance between it and the justice's indorsement on the summons of the cause of action.—Van Aspen v. Townsend, 36 Ala. 582.

[b] (Cal. 1889) Where the defendant in an action commenced in a justice's court asks to have the cause transferred to the superior court of the county where he is sued, for the reason that the cause involves the legality of a tax, there is no authority, upon the transfer being made, to transfer the cause to another county for trial.—Powell v. Sutro, 21 Pac. 436.

[c] (Cal. 1889) In an action before a justice to recover taxes paid for defendant, the answer averred illegality of the taxes; whereupon, as required by Code Civ. Proc. § 838, the cause was certified to the superior court of the county. *Held*, under section 396, providing that the trial may be had in the county in which an action is brought, though it be not the proper county, unless defendant, at the time he appears and answers or demurs, demands in writing that the trial be had in the proper county, that a demand for change of venue, made in the superior court, was too late.—Powell v. Sutro, 80 Cal. 559, 22 Pac. 308.

[d] (Ind. 1846) If a suit in a justice's court, in which the defendant is entitled to the general issue, be certified to the probate court, the trial in the latter court should be by jury, though the defendant fail to appear there.—Owen v. Moore, 8 Blackf. 79.

[e] (Ind. 1853) The only office of a plea that the title to real estate is involved is to remove the cause to the circuit court, which then proceeds to its final determination as though it had been commenced in that court.—Love v. Bohan, 4 Ind. 235.

[f] (Kan. 1872) Where, on a trial before a justice of the peace, defendant pleads to the justice's jurisdiction, and the justice, finding that the title to land is in controversy, certifies the case to the district court, on appeal defendant is estopped from insisting that the justice had jurisdiction.—Bernstein v. Smith, 10 Kan. 55.

[g] (Mich. 1873) Where an action of trespass, commenced before a justice of the peace, has been certified to the circuit court under Comp. Laws 1871, § 5330, for the reason that it appeared from plaintiff's evidence that a question of title to land was involved, the fact that the defendant had failed to give notice with his plea that title would come in question does not, on the trial in the circuit, operate as an admission of the plaintiff's title, so as to exclude evidence of title in defendant. The case stands in the circuit subject to the same rules of proof and disproof as though it had been originally commenced there.—Kawson v Finlay, 27 Mich. 268.

[h] (Minn. 1877) Where a cause is certified by a justice to the district court, under Gen. St. c. 65, § 35, on the ground that the title to real estate is involved, and it does not in fact so appear on the trial before the justice, the objection should be seasonably brought to the attention of the district court by an affidavit and motion for further return, showing what the evidence on the question of title was; and, in the absence of such motion, the judgment of the district court will not be disturbed.—Lindekugel v. Angelhofer, 24 Minn. 324.

[hh] (Minn. 1877) The docket entry of a justice of the peace, of the certificate and return to the district court of a cause, under Gen. St. 1866, c. 65, § 35, on the ground that the same involves the title to real estate, the pleadings showing that the title may be involved, and the cause otherwise being one within the justice's jurisdiction, is prima facie sufficient to invest the district court with complete jurisdiction.—Lindekugel v. Angelhofer, 24 Minn. 324.

[i] (Mo. 1887) Under Rev. St. § 2931, an action of landlord's summons, certified to the circuit court by a justice of the peace on affidavit that it involves the title to real estate, is triable at the return term, even in counties which have 40,000 inhabitants or less.—Anselm v. Groby, 26 Mo. App. 126.

[j] (N. H. 1881) Where the defendant in trespass qu. cl. fr. has, by claiming title to the locus in quo, induced the plaintiff to bring the action in the supreme court, he is estopped to deny on the trial that the title was in dispute.—Carpenter v. Britton, 61 N. H. 430.

[k] (N. J. 1862) A defendant, who, in trespass before a justice of the peace, tenders a plea as one of title and gives a title bond reciting such plea, and that it has been given as one of title, is not estopped to deny, on the plaintiff's bringing suit in this court, that the plea is not one of title, where there is no evidence of willful misrepresentation by the defendant which induced the plaintiff to act to his injury.—Yawger v. Manning, 30 N. J. Law (1 Vroom) 182.

[l] (N. M. 1892) Comp. Laws 1884, § 2443, requiring a trial de novo in all cases originating before a justice of the peace and removed into the district court, and that such court shall allow all amendments necessary in furtherance of justice, includes an action of replevin so originating, and it was error to refuse an application to amend an affidavit which did not state the value of the property in question on the ground that no application to amend was made before the justice of the peace, and that the defect was jurisdictional.—Romero v. Luna, 6 N. M. 440, 30 Pac. 855.

[m] (N. M. 1892) The statute in regard to actions of replevin requiring the writ, if issued without the required affidavit, to be quashed, does not deprive complainant of the right to amend the writ on removal from a justice's

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court to the district court, since Comp. Laws 1884, § 2443, requires a trial de novo, and provides that such amendments shall be allowed as are necessary in furtherance of justice.—Romero v. Luna, 6 N. M. 440, 30 Pac. 855.

[n] (N. Y. 1832) The rule that showing title to any lands in a town will support a plea of liberum tenementum where the declaration is general does not entitle a defendant to a verdict who, on removal of a cause from a justice's court to the common pleas, attempts to show that the plaintiff had not possession of a title to the locus in quo, by proving title to lands generally in third persons in the same town.—Ellice v. Boyer, 8 Wend. 503.

[o] (N. Y. 1832) To enable a defendant, on removal of trespass quare clausum fregit from a justice court to the common pleas, to avail himself of the benefit of Laws 1824, p. 283, which authorizes a defendant, notwithstanding the plea of title, to show that the plaintiff had not possession of or title to the premises at the time the cause of action accrued, he must object before the justice to the generality of the description of the premises.—Ellice v. Boyer, 8 Wend. 503.

[p] (N. Y. 1850) Where an action has been commenced before a justice of the peace, and discontinued by the interposition of a plea of title, and an action is commenced thereupon in the supreme court, the former suit is ended, and the action in the supreme court is a new action for the same cause, and must be commenced as other actions are, and be governed by the same rules of pleading as other actions in that court.—Jewett v. Jewett, 1 Code R. (N. S.) 409, 6 How. Prac. 185.

[q] (N. Y. 1851) In an action of trespass in a justice's court, defendant pleaded title to the land in question. The action was thereupon discontinued and plaintiff sued on the same cause of action in the supreme court. Defendant had judgment, and plaintiff appealed to the court of appeals. Code, § 11, denies the court of appeals jurisdiction of an appeal in an action originally commenced in a court of a justice of the peace. *Held*, that plaintiff's appeal was within the prohibition.—Brown v. Brown, 6 How. Prac. 320.

[r] (N. Y. 1354) It is very much doubted whether, in a cause originating in a justice court, continued by plea of title in the county court, and then transferred to the supreme court, it is the duty of the court, after trial is moved on, to entertain any inquiry into the question of the jurisdiction of the county court over the person of the defendant, provided enough appears to show that such jurisdiction may exist, which may be by the opening statements of counsel, as well as by a copy of the summons and proceedings before the justice. If such facts should be made to appear by the copy pleadings and proceedings before the justice, the court should allow them to be annexed to the pleadings in the county court.—Clyde & R. Plank Road Co. v. Baker, 12 How. Prac. 371.

[rr] (N. Y. 1854) In an action begun before a justice of the peace, and continued by a plea of title in the county court, it is not necessary, to give the county court jurisdiction, that it should appear that defendant was a resident of the county when the action was commenced, since the fact that the justice had acquired jurisdiction of his person, together with the proceedings before him, was sufficient to give the county court jurisdiction.—Clyde & R. Plank Road Co. v. Baker, 12 How. Prac. 371.

[rrr] (N. Y. 1858) Under Code, §§ 55–60, providing that in suits before a justice of the peace, where the title to real property shall be involved, defendant may give an undertaking conditioned that, if plaintiff within a stated time thereafter shall deposit with the justice a complaint and summons in an action in the county court for the same cause of action, the suit in the justice's court shall be discontinued, a suit in the county court, commenced after the discontinuance, pursuant to such provisions, of a suit for the same cause of action in the justice's court, is a suit arising in a justice's court, within Const. art. 6, § 14, providing that the county court shall have jurisdiction of actions arising in a justice's court.—Cook v. Nellis, 18 N. Y. 126.

[s] (N. Y. 1878) A defendant, having availed himself of a decision of a justice of the peace discontinuing an action, is estopped from claiming, in a subsequent action in the supreme court wherein plaintiff recovered less than $50, that the justice had jurisdiction.—Bradner v. Howard, 75 N. Y. 417, affirmed (1878) 14 Hun, 420.

[ss] (N. C. 1889) Under Code, § 838, providing that, when an action before a justice is dismissed on answer and proof that title to land is in question, suit may be brought in the superior court, and defendant shall not be admitted to deny jurisdiction, that court will entertain an action, not within its original jurisdiction, on an allegation that to a suit before a justice defendant objected that title to land was in question, which objection was overruled by the justice, but sustained on appeal to the superior court.—Peck v. Culberson, 104 N. C. 425, 10 S. E. 511.

[t] (Ohio, 1859) Where, in an action of replevin commenced before a justice of the peace, the property was appraised at over $100 and the proceedings were certified to the common pleas, where plaintiff defaulted, and defendant gave evidence on an inquiry of damages, plaintiff may, in answer to the proofs of defendant, give evidence that he is the owner and entitled to the possession of the property; and such evidence will conclude the defendant from a judgment for nominal damages.—Louden v. Clark, 2 Ohio Dec. 161.

[u] (Ohio, 1859) Where, in an action of replevin commenced before a justice of the peace, the property was appraised at over $100, and the proceedings were certified to the common pleas under Justice Code, § 145, the defendant cannot proceed to have his damages assessed on plaintiff's default without first filing a petition.—Louden v. Clark, 2 Ohio Dec. 161.

[v] (Ohio, 1861) Where an attachment suit is commenced before a justice, and there is a return that the defendant has no effects liable to be seized, except land, and the case is certified to the common pleas, there must be filed in that court a petition and affidavit for attachment specifying one of the causes enumerated by Civ. Code, § 191, and summons must issue, and an order of attachment and undertaking must be filed, under Code, § 193, unless defendant is a foreign corporation or a nonresident of the state.—Breckenridge v. Grace, 2 Ohio Dec. 558.

[w] (Wis. 1857) Where an action properly within the jurisdiction of the district court is certified by a justice to the circuit court on the theory that it was without the jurisdiction of the justice, voluntary appearance of both parties does not give jurisdiction to the circuit court.—Verbeck v. Verbeck, 6 Wis. 159.

§ 245. —— Amendments in pleadings and repleading.

[a] (Ala. 1884) Where the original complaint filed in justice court was for forcible entry and detainer, on removal of the cause to the circuit court, a complaint for unlawful detainer may be filed.—Littleton v. Clayton, 77 Ala. 571.

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[b] (Ind. 1879) After a suit to obtain possession of lands is certified by a justice to the circuit court, that court is not limited to the jurisdiction of the justice, as in ordinary appeals. It has the case as if it had been originally commenced therein, and it is not necessary that one who has been joined as a defendant in the justice court, and who claims title as against both plaintiff and defendant, should set up his title in his counterclaim any more particularly than would have been necessary to obtain possession of the land under Code, § 595.—Bibbler v. Walker, 69 Ind. 362.

[c] (Me. 1832) Where the title to real estate has been specially pleaded to an action of trespass quare clausum fregit brought before a justice of the peace, and the cause has been brought up from the common pleas by demurrer, it is not the course of this court to permit the defendant to add any other plea which could have been tried by the justice.—Copeland v. Bean, 9 Me. (9 Greenl.) 19.

[d] (Mass. 1811) In trespass quare clausum, commenced before a justice of the peace and carried to the court of common pleas on a plea of title, the plaintiff may amend his declaration by alleging any torts in the same close, or by giving a more accurate description of the close.—Cuminge v. Rawson, 7 Mass. 440.

[e] (Mass.) In trespass quare clausum, removed from before a justice of the peace on a plea of title, the court above has no authority to allow a new assignment.—(1837) Magoun v. Lapham, 36 Mass. (19 Pick.) 419; (1838) Johnson v. Shed, 38 Mass. (21 Pick.) 225.

[f] (N. H. 1853) The plaintiff may new assign, as matter of right, in an action of trespass commenced before a justice, and entered at the court of common pleas because of a plea of title to real estate.—Janvrin v. Scammon, 26 N. H. (6 Fost.) 360.

[g] (N. J. 1810) After plea of title in trespass before a justice, defendant cannot plead the general issue in the supreme court, and give notice of special matter, but must rely on his plea of title.—Westervelt v. Merenus, 3 N. J. Law (2 Penning.) 693.

[h] (N. J. 1829) If, on plea of title, an action is carried from a justice of the peace to the supreme court, where the plaintiff in his declaration enlarges his demand beyond what he demanded in the action before the justice, the defendant will not be confined to his plea.—Snedicker v. White, 11 N. J. Law (6 Halst.) 87.

[i] (N. J. 1843) If an action of trespass quare clausum is brought in a court for the trial of small causes, the defendant pleads title and gives bond, and an action is thereupon brought in the supreme court, the plaintiff, in his replication to the common bar, may make a new assignment, setting out the locus in quo with greater certainty than was done below, without thereby releasing the defendant from his obligation to plead and rely upon title only; but he cannot enlarge or change his complaint either in his declaration or replication, or assign a close in a different township from that named in the state of demand filed before the justice.—Tindall v. Tindall, 20 N. J. Law (Spencer) 146.

[ii] (N. J. 1846) Elm. Dig. pp. 282, 283, §§ 33, 34, requiring a justice in an action of trespass quare clausum fregit to dismiss the suit where defendant pleads title, does not preclude defendant, when the action is commenced in the supreme court, from pleading title in a different person than the one alleged to have title in his plea before the justice.—Phillips v. Kent, 20 N. J. Law (Spencer) 686.

[j] (N. J. 1847) In trespass quare clausum fregit, brought in the supreme court after plea of title before a justice, the defendant cannot plead "not guilty," or "leave and license"; but those pleas will be struck out on motion, and he will be confined to his plea of title.—Campfield v. Johnson, 21 N. J. Law (1 Zab.) 83.

[k] (N. J. 1862) Where an action of trespass q. c. f., in which defendant pleaded title and right of way, is dismissed in the justice court, and thereafter an action with the same declaration is commenced in the supreme court, the pleas in the supreme court must be the same as those filed in the justice court, and a plea of not guilty should be struck out as not the same plea. A plea of liberum tenementum is proper.—Brain v. Snyder, 30 N. J. Law (1 Vroom) 56.

[l] (N. J. 1862) In trespass q. c. brought before a justice and removed to the supreme court on plea of title, a plea in the latter court that the locus in quo was a highway, and a plea that it was a by-way, were both struck out as not being pleas of title.—Brain v. Snyder, 30 N. J. Law (1 Vroom) 56.

[m] (N. M. 1892) On removal into the district court of a cause originating before a justice, an amendment in the pleadings intended to secure a trial de novo on the merits under Comp. Laws 1884, § 2443, is permissible, being an amendment in furtherance of justice.—Romero v. Luna, 6 N. M. 440, 30 Pac. 855.

[n] (N. Y. 1827) In trespass quare clausum fregit, brought in the common pleas because the defendant pleaded title in the justice's court, the defendant is confined in the common pleas to his plea of title, which admits the trespass; and, if he pleads the general issue, the court should confine him to his plea of title, and not require the plaintiff to prove the trespass.—Marsh v. Berry, 7 Cow. 344.

[o] (N. Y. 1832) Under Acts 1824, p. 283, if defendant in an action of trespass q. c. f. puts in a plea of title before the justice, plaintiff may new assign, notwithstanding the provision in the act that on the trial in the common pleas he shall declare for the same cause of action.—Ellice v. Boyer, 8 Wend. 503.

[p] (N. Y. 1834) Where the pleadings in an action removed to the common pleas from a justice, because the title to land is in question, vary from what they were before the justice, and the parties have acquiesced in such variance, the cause will be treated as an original suit in the common pleas. The plaintiff may new assign in the justice's court, but he cannot do so in the court above.—Tuthill v. Clark, 11 Wend. 642.

[q] (N. Y. 1838) Where the defendant has pleaded title to a declaration of trespass quare clausum in a justice's court, the plaintiff, if he prosecutes in the common pleas, may there declare, particularly describing the close, though he did not do so in the justice's court.—People v. Albany Common Pleas, 19 Wend. 123.

[r, s] (N. Y. 1847) Where an action commenced before a justice of the peace is removed to the common pleas by reason of a special plea of title interposed by defendant under Rev. St. p. 236, § 59, which is not such as to form an issue between the parties, plaintiff may interpose a demurrer in the common pleas to such plea, tendering an issue of law on the matters contained therein; and such demurrer is not a departure from the pleadings, and a motion to strike it out will be denied.—Dorman v. Lang, 3 How. Prac. 59.

[t] (N. Y. 1848) Though title set up in justice's court by answer ousts the justice's jurisdiction before a reply is put in, the necessity

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for a reply when a new suit is instituted in the supreme court is not thereby superseded.—Royce v. Brown, 3 How. Prac. 391.

[u] (N. Y. 1849) In a cause commenced in a justice's court, and removed to the common pleas by plea of title to the land, the plaintiff's proof must be confined to his declaration.—Houghtaling v. Houghtaling, 5 Barb. 379.

[v] (N. Y. 1849) Under the Code of 1849, where title is set up in a justice's court by answer, and a new suit is brought in the supreme court for the same cause, to which defendant puts in the same answer as below, no reply should be put in.—McNamara v. Biteley, 4 How. Prac. 44, 2 Code Rep. 42.

[w] (N. Y. 1850) Where, in an action before a justice, a plea of title is interposed, and the case thereupon removed, defendant cannot amend his answer in matters of substance.—Wendell v. Mitchell, 5 How. Prac. 424.

[x] (N. Y. 1851) In actions commenced in the supreme court after a discontinuance in a justice court by reason of the title to land coming in question, where defendant sets up title to land as a defense, the plaintiff may reply to the answer the same as in other suits commenced in the supreme court.—Kiddle v. Degroot, 1 Code R. (N. S.) 202.

[y] (N. Y. 1853) Code 1849, § 60, relating to the removal of causes from the justice's court to the supreme court when title to real property comes in question, providing that the answer of defendant shall be the same which he made before the justice, does not require defendant to use the identical words in his answer in the supreme court that he used in the justice's court, but only the same substantial defense; and he may abandon part of his defense before the justice when he comes to answer in the supreme court, and the defense will be the same within the meaning of the statute.—Wiggins v. Tallmadge, 7 How. Prac. 404.

[z] (N. Y. 1883) Code, § 2957, providing that, where a new action is brought in a court of record after the discontinuance of an action before a justice of the peace because of a plea of title, the complaint must be for the same cause of action only as that relied on before the justice, does not prohibit the plaintiff from making such cause of action perfect by inserting in the complaint new allegations necessary for the purpose, such as an allegation that defendant is a corporation.—Fox v. Erie Preserving Co., 93 N. Y. 54.

[zz] (Va. 1793) If the defendant, after issue joined, remove the suit by habeas corpus into a superior court, the plaintiff may declare anew in the superior court.—Verell v. Coleman, 4 Call, 230.

(C) LIMITATIONS AND PARTIES.

LIMITATION OF ACTIONS, § 246.
PARTIES, § 247.
—— NEW PARTIES AND CHANGE OF PARTIES, § 248.
—— DEFECTS AND OBJECTIONS, AMENDMENT, WAIVER, AND CURE, § 249.

§ 246. Limitation of actions.

To revive judgments, see post, § 416.

[a] (Ill. 1870) The bar of limitations may intervene between the time of issuing an unserved summons by a justice and the issuance and service of an alias summons.—Bell v. Dart, 54 Ill. 526.

[b] (Ind. 1834) The statute of limitations may be pleaded in a suit before a justice of the peace.—Hoyt v. Reed, 3 Blackf. 368.

[c] (Kan. 1875) It is not necessary in a justice's court that the statute of limitations should be specially pleaded, or that the question should be raised by demurrer. It may be raised by objecting to evidence introduced on the trial for the purpose of proving a claim barred by the statute.—Sanford v. Shepard, 14 Kan. 228.

[d] (Mass. 1817) Under St. 1783, c. 42, a defendant may avail himself before a justice of the peace of the statute of limitations under the general issue.—Williams v. Root, 14 Mass. 273.

[e] (Mich. 1880) To an action on a promissory note brought in justice court, defendant pleaded orally: "Defendant pleads limitation of statute; that the cause of action did not accrue within six years preceding commencement of suit." *Held* sufficient, though the statute requires the general issue to be pleaded in all cases in a justice court, with a notice of any special defense, as the objection was only to the form of the plea, which the justice should have corrected when entering it in his docket in due form. His failure will not deprive defendant of his defense. If imperfect, he should be allowed to amend.—Eddy v. Manshaun, 42 Mich. 532, 4 N. W. 286.

[f] (Mich. 1880) In an action in a justice's court on a note given eight years before, payable one day after date, where defendant has pleaded that he did not "undertake and promise" within six years, he should be allowed the defense of the statute of limitations, the plea fairly apprising plaintiff of that defense.—Snyder v. Winsor, 44 Mich. 140, 6 N. W. 197.

[g] (Mich. 1882) A suit is not begun for the purposes of the statute of limitations by merely filling out a summons, and leaving it in the justice's office until the return day, or by retaining it in the plaintiff's custody. It must be issued with the intent that, if practicable, it shall be served.—Howell v. Shepard, 48 Mich. 472, 12 N. W. 661.

[h] (Mo. 1890) Under Rev. St. 1889, § 6136, providing that a suit instituted by process shall be deemed to have been commenced "upon delivery of the writ to the constable to be served, and he shall note thereon the time of receiving the same," a suit on a special tax bill is barred where the tax bill was deposited with the justice before the expiration of the five years, but the process was not delivered to the constable until after it had expired.—Turner v. Burns, 42 Mo. App. 94.

[i] (Mo. 1896) The last clause of Rev. St. 1889, § 2013, providing that "the filing of a petition in a court of record, or a statement or account before a court not of record, and suing out of process therein, shall be taken and deemed the commencement of a suit," does not conflict with section 6136, as to justices of the peace, and an action is commenced before a justice, so as to stop the running of limitations, when process is delivered to a constable to be served.—Hornsby v. Stevens, 65 Mo. App. 185, 2 Mo. App. Rep'r, 1218.

[j] (Mo. 1896) Limitations need not be pleaded before a justice of the peace, where no formal pleadings are required.—Hornsby v. Stevens, 65 Mo. App. 185, 2 Mo. App. Rep'r, 1218.

[k] (N. J.) A justice cannot overrule a plea of the statute.—(1806) Sayres v. Scudder, 2 N. J. Law (1 Penning.) 53; (1809) Neafie v. Ackerman, 3 N. J. Law (2 Penning.) 562.

[l] (N. Y. 1859) In the absence of proof showing when summons in a justice's court was issued, the day of its service will be taken as the

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beginning of the action, for the purpose of the statute of limitations.—McGraw v. Walker, 2 Hilt. 404.

[m] (Tenn. 1839) The statute of limitations of three years is not a bar to an action before a justice of the peace founded on a simple contract, on which an action of debt might be maintained if of sufficient amount to force the parties into a court of record.—Phipps v. Richmond, 20 Tenn. (1 Humph.) 21.

[n] (Wis. 1871) On the first day to which a cause in justice's court was adjourned after issue joined, an amendment to the answer was allowed, and, after a second adjournment for trial, a further amendment, setting up the statute of limitations, was refused. *Held* no abuse of discretion. On such an application, the court may properly consider the character of the defense proposed to be set up; and a defense founded on the statute of limitations is not favored.—Fogarty v. Horrigan, 28 Wis. 142.

§ 247. Parties.

In action on justice's judgment, see post, § 418 [r].

To judgment, see post, § 394.

[a] (Ala. 1845) Though the amount in controversy is less than $50, and the suit was commenced before a justice of the peace, yet the plaintiff, who sues for the use of another, cannot recover for work and labor done for the beneficial plaintiff, unless he stood in such a relation that the right to compensation inured to him.—Mooney v. Ivey, 8 Ala. 810.

[b] (Conn. 1868) G. was summoned to appear before a justice of the peace and "answer unto Ward Wheeler, as committee of school district No. 10, of the town of R., in a plea that to the said school district the defendant render the sum of ten dollars which he justly owes for the tuition of his children, as by the rate bills and books of the plaintiff, ready in court to be produced, fully appears." *Held*, that school district No. 10, and not Ward Wheeler, was the plaintiff in the writ.—Goodsell v. Wheeler, 34 Conn. 485.

[c] (Ill. 1898) Parties cannot be sued jointly before a justice of the peace who cannot be so sued in a court of record.—Columbian Hard Wood Lumber Co. v. Langley, 51 Ill. App. 100.

[d] (Mo. 1887) Under Rev. St. 1879, § 2905, providing that a party in a justice's court may appear and conduct his suit by an agent, the suit cannot be maintained in the agent's name.—Crescent Furniture & Lumber Co. v. Raddatz, 28 Mo. App. 210.

[e] (Mo. 1888) Under Rev. St. § 2852, concerning statements to be filed before justices of the peace, a note does not constitute a sufficient statement in a suit on it unless it discloses a demand in favor of plaintiff; and an administrator, suing on a note, must allege that he sues as administrator.—Smith v. Zimmerman, 29 Mo. App. 249.

[f] (N. Y. 1844) The summons and declaration in a justice's court must agree in respect to the names and number of the defendants.—Leggett v. Raymond, 6 Hill, 639.

[g] (N. Y. 1888) A summons in a justice's court described defendant as "commissioner of highways in the town of W." In the title of the written complaint he was described in the same manner, but in the body he was called "defendant," not mentioning name or title. There was also a special allegation that "the board directed that money should be raised to pay plaintiff, and that the same was paid defendant to pay plaintiff." *Held*, that the action was brought against defendant in his official capacity.—Buyce v. Buyce, 48 Hun, 433, 1 N. Y. Supp. 642.

[h] (Pa. 1892) Proceedings on an attachment under Act 1842, before a justice of the peace, will be reversed on a certiorari where the action is brought in the name of an agent, and not his principal, and the bond is similarly executed.—Powell v. Roderick (Com. Pl.) 6 Kulp, 400, 11 Pa. Co. Ct. R. 191, 1 Pa. Dist. R. 120.

§ 248. —— New parties and change of parties.

Death of party and substitution of personal representative, see "Abatement and Revival," vol. 1, c. 224, § 298 [e].

[a] A justice of the peace cannot permit an amendment which changes the parties.
—(Ala. 1876) Davis Ave. R. Co. v. Mallon, 57 Ala. 168;
(Vt. 1839) Emerson v. Wilson, 11 Vt. 357, 34 Am. Dec. 695.

[b] (Ala. 1830) Laws 1812, p. 70, § 4, providing that, where suit is brought by one for the use of another, the death of the nominal plaintiff shall not abate the suit, has no application to a case where the nominal plaintiff was deceased before suit was brought. In such case an amendment cannot be allowed by the justice to change the name of the party plaintiff.—Frierson v. Blakesley, 3 Stew. 267.

[c] (Kan. 1878) A justice of the peace may properly amend a bill of particulars by substituting the name of another party as plaintiff.—Haulin v. Baxter, 20 Kan. 134.

[d] (Mo. 1887) A suit brought in an agent's name cannot be amended by substituting the principal's name.—Crescent Furniture & Lumber Co. v. Raddaty, 28 Mo. App. 210.

[e] (N. Y. 1837) It is no cause of reversal of a justice's judgment that on the trial of the cause the justice himself discharged one of several defendants in an action of trespass, against whom no evidence had been given, and permitted him to be examined as a witness, instead of directing the jury to find him not guilty.—Noyes v. Hewitt, 18 Wend. 141.

[f] (N. Y. 1846) A justice of the peace has no power to compel the substitution of new parties in a suit before him; the provision in 2 Rev. St. p. 474, § 100, not being applicable to justices' courts.—Colegrove v. Breed, 2 Denio, 125.

[g] (N. Y. 1854) Whether a justice of the peace has power to grant an amendment by striking out the name of one of the coplaintiffs, quære.—Gates v. Ward, 17 Barb. 424.

[h] (N. Y. 1854) Where a justice's court, on motion of both of two plaintiffs, in an action of tort, has allowed an amendment to be made by striking out the name of one of them, it has no power to restore the party whose name was stricken out as a coplaintiff, if objection be made.—Gates v. Ward, 17 Barb. 424.

[i] (N. Y. 1855) The provisions of Code, tit. 6, respecting amendments by adding or striking out the names of parties, refer to the pleadings in civil actions, and are necessarily confined to courts of record, which are clothed with discretion in reference to the terms on which amendments shall be allowed, and possess the appropriate machinery by which their orders may be enforced. Those provisions are not applicable to justices' courts.—Webster v. Hopkins, 11 How. Prac. 140.

[j] (N. Y. 1867) A justice of the peace has no power to strike out of a summons, after it has been served, the name of one defendant,

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and proceed to trial and judgment against the other.—Gilmore v. Jacobs, 48 Barb. 336.

[k] (N. Y. 1874) A justice's court has power, in an action brought jointly by two plaintiffs, to amend by striking out the name of one.—Lapham v. Rice, 55 N. Y. 472.

[l] (Ohio, 1885) A party sued before a justice of the peace may interplead adverse claimants.—Geller v. Puchta, 1 O. C. D. 18.

[m] (Pa. 1846) A justice of the peace before whom the suit is brought against one in his private and individual capacity, may, before hearing, so amend as to show the action to be against the defendant as executor, especially after notice to the defendant that such was the fact.—Wilson v. Wilson, 3 Clark, 419, 5 Pa. Law J. 461.

[n] (Tex. 1886) It is not error, after a plea in abatement for nonjoinder, in an action for rent, brought in the name of one joint tenant of premises leased in the name of both, for a justice's court to make the other joint tenant a party to the suit, and permit the case to proceed to judgment on its merits.—Weinsteine v. Harrison, 66 Tex. 546, 1 S. W. 626.

§ 249. —— Defects and objections, amendment, waiver, and cure.

Misnomer in judgment as affecting execution see post, § 426 [g].

—— *in process as affecting validity of default judgment, see* post, § 383 [o].

New parties and change of parties, see ante, § 248.

[a] (U. S. 1836) Proceedings before a justice of the peace need not be formal, and, where the pleadings offered will enable the magistrate to decide the case according to the right of the matter, he may reject a plea of misnomer in abatement.—Hall v. Washington, Fed. Cas. No. 5,953 [4 Cranch, C. C. 722].

[b] (Ala. 1876) Where a summons from a justice of the peace was against "M., president Davis Avenue Railroad Company," a complaint against "Davis Avenue Railroad Company" should have been stricken from the file on motion.—Davis Ave. R. Co. v. Mallon, 57 Ala. 168.

[c] (Ark. 1875) Where an account in proper form is filed before a justice of the peace as the foundation of an action, and is lost, and a substituted account is filed in which the name of the creditor is omitted, he should be permitted to amend at any time.—Martin v. McClellan, 30 Ark. 405.

[d] (Cal. 1887) The designation in an action in a justice's court of the defendant, "John C. McDonald," as "John McDonald," does not affect the validity of the proceedings.—Allison v. Thomas, 72 Cal. 562, 14 Pac. 309.

[e] (Ga. 1875) The omission of the word "as" before "executor" in a suit before a justice of the peace will not vitiate the proceeding.—Dorsey v. Black, 55 Ga. 315.

[f] (Ill. 1874) As no written pleadings are required before a justice of the peace, the fact that the information or complaint in an action before a justice to recover a fine imposed on school officers by School Law 1872, § 76, and the affidavit on which the justice issued the summons, did not run in the name of the people of the state, was immaterial. It is sufficient if the process by which the defendants are brought into court runs in the name of the people.—Newton v. People, 72 Ill. 507.

[g] (Ind. 1877) Where a complaint in a justice's court set out only the initials of the plaintiff's Christian name, the defect was cured by a written answer, filed by the defendant, setting out the full names of all the parties.—Sherrod v. Shirley, 57 Ind. 13.

[h] (Iowa, 1844) Where no objection is made at the time to a change in the name of the plaintiff in a suit before a justice of the peace, it is a waiver of the irregularity, and the defendant will not, after judgment, be permitted to take advantage of it.—Cornelius v. McIlvaine, 1 Morris, 318.

[i] (Iowa, 1850) In an action commenced before a justice of the peace a misnomer may be taken advantage of by motion, as well as by plea.—Hall v. Bennett, 2 G. Greene, 466.

[j] (Mich. 1882) A complaint filed with a justice in a proceeding to recover possession of premises is not jurisdictionally defective in omitting the name of defendant from the body of the instrument if there is enough in it to supply the name.—Olson v. Muskegon Circuit Judge, 49 Mich. 85, 13 N. W. 369.

[k] (Mich. 1889) In an action before a justice of the peace against a corporation, summons was duly issued and served, and on trial plaintiff made oral declaration "against the defendant," giving the wrong corporate name, and, on default, judgment was duly rendered and entered against defendant, as described in the summons. *Held*, that the judgment was valid, as How. Ann. St. §§ 7633, 7635, provide that after judgment any variation in the record from any process, pleading, or proceeding had in such cause shall be amended accordingly, and that no judgment on default shall be reversed, impaired, or affected by mistake in the name of a party where the name has once been correctly alleged in the pleadings or proceedings.—Bole v. Sands & Maxwell Lumber Co., 77 Mich. 289, 43 N. W. 873.

[l] (Mich. 1890) In a justice's court, a motion by defendant to dismiss, because plaintiff's full Christian name does not appear in affidavit, writ, or declaration, is equivalent to a plea in abatement.—Fisher v. Northrup, 79 Mich. 287, 44 N. W. 610, 7 L. R. A. 629.

[m] (Mo. 1874) The fact that a suit between two firms before a justice of the peace is entitled of their firm names only is not such an error as to work a dismissal; a correction under the statute being practicable.—Rohrbough v. Reed, 57 Mo. 292.

[n] (Neb. 1881) A bill of particulars described plaintiffs by their individual names, doing business as "The Citizens' Bank." The summons omitted the names, and described them simply as "The Citizens' Bank." *Held*, that the justice might allow the bill of particulars to be amended so as to conform to the summons.—Haskins v. Citizens' Bank, 12 Neb. 39, 10 N. W. 466.

[o] (Neb. 1884) The proper method of raising the objection in a justice's court that plaintiff has no legal capacity to sue in the name in which the suit is brought is by plea in abatement, and it cannot be raised by objection to the jurisdiction of the court.—Smelt v. Knapp, 16 Neb. 53, 20 N. W. 20.

[p] (Neb. 1884) An objection that plaintiff has "no legal capacity to sue in the name or initial letters of the name W. S. Knapp," in which the action was brought, cannot be made on special appearance for that purpose, but, if at all, by plea in abatement.—Smelt v. Knapp, 16 Neb. 53, 20 N. W. 20.

[q] (N. J. 1817) If there be two administrators, and one only be sued before a justice, it need not be pleaded in abatement; but the defendant may have nonsuit on motion.—Ryerson v. Ryerson, 4 N. J. Law (1 Southard) 363.

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[r] (N. J. 1828) In courts for the trial of small causes, the infancy of plaintiff may be taken advantage of by motion to dismiss.—Smith v. Van Houten, 9 N. J. Law (4 Halst.) 881.

[s] (N. Y. 1833) Where, in a bill of particulars presented in a justice's court as part of plaintiff's declaration, defendants, sued as partners, are described as belonging to a particular association, plaintiff is not precluded from proving his account against defendants as belonging to an association with a name different from that in the bill of particulars, notwithstanding the misdescription of the name or style of the association in the bill of particulars.—Benson v. Brown, 10 Wend. 258.

[t] (N. Y. 1854) Defendant, by consenting to a subsequent motion to amend a complaint, or by going to trial, does not waive an objection to the justice, who allowed an amendment by striking out the name of two plaintiffs in an action for tort, restoring him again as coplaintiff.—Gates v. Ward, 17 Barb. 424.

[u] (N. Y. 1855) Where a plaintiff is tenant in common with another, the defendant, under the Code of Procedure, may raise the objection in a justice's court on a motion for a nonsuit on the trial, where the defect of the parties appears on the face of the complaint.—Rice v. Hollenbeck, 19 Barb. 664.

[v] (N. Y. 1878) The requirement of Code, §§ 147, 148, that a defendant not objecting by answer to a defect of parties that does not appear in the complaint waives the same, is a provision "respecting parties," which, by section 64, subd. 15, is made applicable to justices' courts.—Frazier v. Gibson, 15 Hun, 37.

[w] (N. Y. 1891) Under Code Civ. Proc. § 2939, a complaint in a justice court is not demurrable on the ground of misjoinder of parties plaintiff.—Lord v. Lord, 58 Hun, 601, 11 N. Y. Supp. 389.

(D) PROCESS.

1. NATURE, ISSUANCE, REQUISITES, AND VALIDITY. §§ 250-257.
2. SERVICE AND RETURN OR PROOF OF SERVICE, §§ 258-263.
3. DEFECTS, OBJECTIONS, AND AMENDMENTS, §§ 264, 265.

Attachment, see post, §§ 280–294.
Execution, see post, §§ 426–447.
Garnishment, see post, §§ 295–305.
Notice of amendment of bill of particulars, see post, § 331.
—— *of application for new trial, see* post, § 371 [c, f, i, n].
—— *of execution sale, see* post, § 442 [i, l].
—— *of motion to open default judgment, see* post, § 388 [a, m, n, p].
—— *of rendering judgment, see* post, § 391.
—— *of trial, see* post, § 362 [b, c].
—— *to enter satisfaction of judgment, see* post, § 417 [t].
On opening or vacating judgment, see post, § 401 [d, j, x, yy].
Process as affecting sci. fa. against bail to stay execution, see post, § 439 [x].
—— *as dispensing with pleadings, see* post, § 307 [c, d].
—— *in action on judgment, see* post, § 422.
—— *in support of attachment, see* post, § 289.
—— *in support of garnishment, see* post, § 297.
—— *to sustain default judgment, see* post, § 383.
—— *to sustain judgment, see* post, § 375.
Showing process on record, see ante, §§ 214, 454.
Subpœna for witness, see post, § 346 [t].
Warrant for arrest, see post, § 279.
Search warrants, see "Searches and Seizures."
Writs of replevin, see "Replevin," III.

1. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

NATURE, NECESSITY, AND FORMS OF PROCESS, § 250.
ISSUANCE, § 251.
REQUISITES AND VALIDITY, § 252.
—— STATEMENT AS TO NATURE, FORM, AND CAUSE OF ACTION, § 253.
—— DIRECTIONS AS TO TIME FOR RETURN OR APPEARANCE, § 254.
—— DIRECTIONS AS TO PLACE FOR APPEARANCE, § 255.
—— RETURN TO OTHER JUSTICE, § 256.
—— SIGNATURE AND SEAL, § 257.

§ 250. Nature, necessity, and forms of process.

Appearance as waiving process, see post, § 272.

[a] (Ga. 1851) The jurisdiction given to the justice's court is to hear and determine suits by summons or warrant; and a copy of the process is to be served by the constable personally on the defendant or left at his usual and notorious place of abode.—Fitzgerald v. Adams, 9 Ga. 471.

[b] (Ga. 1883) A summons to the defendant is indispensable to give a justice jurisdiction.—Jeffers v. Ware, 72 Ga. 135.

[c] (Ga. 1893) When a case in a justice's court is suspended to give opportunity to settle it, and a settlement is attempted, but fails, both parties knowing of the failure, neither is entitled to notice when the case afterwards comes up for trial.—Bostain v. Morris, 93 Ga. 224, 18 S. E. 649.

[d] (Ill. 1840) A justice of the peace can render judgment against a defendant only where process is personally served on him, or he appears in person before the justice and waives it.—Evans v. Pierce, 3 Ill. (2 Scam.) 468.

[e] (Mass. 1832) Error lies to reverse a judgment of a justice of the peace, rendered on a writ which had not been served on the defendant.—Arnold v. Tourtellot, 30 Mass. (13 Pick.) 172.

[f] (Mich. 1861) A justice was a few minutes late at the hour set for the hearing of an adjourned case, and, being employed on a coroner's inquest, defendant left the office at the end of the hour. *Held* that, if defendant was ignorant of the cause of the justice's absence, he should have been notified of his return, and shown to have received the notice before further proceedings.—Stadler v. Moors, 9 Mich. 264.

[g] (Mich. 1875) Comp. Laws, § 5264, authorizing the issuance of a short summons when the plaintiff is a nonresident, is permissive only.—Moore v. Vrooman, 32 Mich. 526.

[h] (Mich. 1880) Where, in a suit before a justice of the peace there is no proper service of summons, or appearance by defendant, the court acquires no jurisdiction, though defendant has actual notice of the pendency of such proceedings.—Vleit v. Westenhaver, 42 Mich. 593, 4 N. W. 448.

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[i] (Miss. 1888) Plaintiff filed with a justice of the peace three claims against defendant railroad for damages for injuries to his stock on three different occasions. The justice docketed three actions, but issued only one writ. Defendant appeared to one action only, and moved to consolidate all the actions, which was denied, and after trial judgment was rendered for plaintiff. Defendant refused to appear to the other actions, and judgment was rendered against it by default. *Held* that, if there were three actions, no jurisdiction was obtained over defendant, except in the first one.—Louisville & N. R. Co. v. McCollister, 66 Miss. 106, 5 South. 695.

[j] (N. J. 1835) A justice cannot adjourn a cause on an adjourned day, in the absence of the defendant and without his consent, and then hear the cause in his absence and without notice.—Brannin v. Voorhees, 14 N. J. Law (2 J. S. Green) 590.

[k] (N. Y. 1843) Prior to Acts 1840, p. 125, one residing out of the state could not be sued in a justice's court by a short summons.—Dowd v. Stall, 5 Hill, 186.

[l] (N. Y. 1845) Since the passage of the act exempting nonresidents of the state from arrest for debt (St. 1840, p. 120, § 1), a short summons or attachment is the proper process against such nonresidents, when sued before a justice of the peace; and any other process would be void.—Thompson v. Sayre, 1 Denio, 175.

[m] (N. Y. 1846) Joint debtors may be sued in a justice's court by "long summons," though one of them be a nonresident of the county.—Burghart v. Rice, 2 Denio, 95.

[n] (N. Y. 1848) A defendant resident in New York City and a nonresident may be sued together by long summons.—Murphy v. Mooney, 4 N. Y. Super. Ct. (2 Sandf.) 288.

[o] (N. Y. 1850) A summons is the ordinary process of the justice's court, and issues on the mere suggestion of the plaintiff.—Barnes v. Harris, 4 N. Y. (4 Comst.) 374.

[p] (N. Y. 1850) A person having no legal residence anywhere may be sued by long summons. That process is appropriate unless the defendant is a nonresident of the county.—Barnes v. Harris, 4 N. Y. (4 Comst.) 374.

[q] (N. Y. 1855) A justice has no jurisdiction to issue a short summons in an action to recover back fees illegally charged in a bill of costs collected of the plaintiff by an attorney.—Waters v. Whittemore, 22 Barb. 593.

[r] (N. Y. 1855) Nor can such short summons, in any case, go against a defendant who is a nonresident of the county, except when the plaintiff's demand arises on contract, express or implied.—Waters v. Whittemore, 22 Barb. 593.

[s] (N. Y. 1871) A short summons can only be issued against defendants who come within that class of persons who, by the nonimprisonment act of 1831, now adopted as a part of the provisions in relation to justices' courts (3 Rev. St. [5th Ed.] p. 462, §§ 212–215), cannot be proceeded against by long summons or warrant.—Rue v. Perry, 41 How. Prac. 385.

[t] (Pa. 1876) Where a judgment has been obtained before a justice of the peace without summons served, the court of common pleas will order the judgment and execution set aside.—Huddy v. Putt, 13 Phila. 550.

[u] (Pa. 1885) A summons against "Martha Male" will not give the justice jurisdiction to render judgment for want of appearance against "Margaret Meyl," who was served, unless the amendment of the record is accompanied with an alias summons or a rule to show cause why the amendment should not be made.—Meyl v. Wiedeman, 3 C. P. Rep. 96.

[v] (Pa. 1885) Where an alderman, while defendant is under arrest, changes the form of the action against him from criminal to civil, without having issued a summons or given defendant further notice, the proceedings will be reversed on certiorari.—Commonwealth v. Blessington, 3 Lanc. Law Rev. 153.

[w] (Pa. 1886) Under Act July 12, 1842, an action before a justice of the peace against a nonresident debtor may be begun either by a short or long summons.—Beninghouse v. Felt, 1 Pa. Co. Ct. R. 496.

[x] (Pa. 1888) Where a continuance is granted without day in a justice court, defendant is entitled to notice of the day of the hearing in sufficient time in advance thereof to enable him to prepare his defense.—Hunt v. Laufer, 6 Pa. Co. Ct. R. 337.

[y] (W. Va. 1895) In order that jurisdiction be conferred on a justice the summons must be issued and served.—Colborn v. Booth, 41 W. Va. 289, 23 S. E. 556.

§ 251. Issuance.

Territorial limits within which justice may issue process, see ante, § 147.

[a] (Del. 1858) It is error for a justice of the peace to issue a summons returnable forthwith on the representation of the plaintiff that he believed he would lose the benefit of the process by delay, without his oath or affirmation thereto, or without the justice's being otherwise satisfied of its truth.—Bishop v. Carpenter, 1 Houst. 526.

[b] (Ill. 1873) A justice of the peace having jurisdiction throughout his county may issue any writ where he has jurisdiction, wherever he may be in the county, so that he make it returnable to his office, which must be in his township.—Durfee v. Grinnell, 69 Ill. 371.

[c] (N. Y. 1842) A short summons in favor of a nonresident of the county may be issued by any justice of the county, though he and the defendant do not reside in the same or adjoining towns.—Onderdonk v. Ranlett, 3 Hill, 323.

[d] (N. Y. 1850) The authority of a justice of the peace to issue a long summons on the request of the plaintiff is as ample as to issue a warrant or attachment on a special application and proof required by law.—Barnes v. Harris, 4 N. Y. (4 Comst.) 374.

[e] (N. Y. 1852) A justice cannot proceed by a short summons against a defendant as a nonresident, without proof of such nonresidence to give him jurisdiction.—Sperry v. Major, 1 E. D. Smith, 361.

[f] (N. Y. 1871) A short summons, being an extraordinary process, can only issue on proper preliminary proof.—Rue v. Perry, 41 How. Prac. 385.

[g] (N. Y. 1871) It must be made to appear by affidavit to the justice that defendant comes within the class of persons who by the nonimprisonment act of 1831 cannot be proceeded against by long summons or warrant before a short summons should issue.—Rue v. Perry, 41 How. Prac. 385.

[h] (N. Y. 1875) A justice of the peace has no jurisdiction to issue a short summons, under the nonimprisonment act of 1831 (4 Edm. St. at Large, p. 472), without the affidavit required by section 19, art. 2, tit. 4, c. 2, pt. 3, Rev. St. The affidavit should state that the defendant is a nonresident, that the cause of action arose

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on contract, and facts showing that the defendant cannot be arrested under the provisions of the nonimprisonment act. It need not state that the plaintiff is a resident. If he is a resident, the justice has jurisdiction to issue the summons without taking security, even though the fact has not been proved before he issues the summons. It is sufficient for the plaintiff to state in his affidavit that the cause of action arose on contract, express or implied, and he need not go into the particulars of his demand.—Wende v. Bradley, 5 Hun, 513.

[i] (N. Y. 1875) Where a short summons was issued by a justice of the peace on an affidavit by plaintiff that he had, as he believed, a good cause of action arising on contract against the defendant, "upon which, according to the provisions of section 31 of the act to abolish imprisonment for debt and to punish fraudulent debtors, no warrant" could issue, *held*, that the affidavit was sufficient and the summons properly issued.—Clark v. Wellington, 5 Hun, 638.

[j] (Ohio, 1859) Under Swan's St. p. 528, § 54, a bill of particulars must be filed by plaintiff in a justice court before the summons can issue.—McCarty v. Blake, 2 Ohio Dec. 155.

[k] (S. C. 1888) Under Code, § 88, subd. 16, providing that, in actions where more than $25 is demanded, the complaint shall be served 20 days before trial, but, if plaintiff has reason to fear that he will lose his debt by such delay, the justice, if satisfied that there is good reason, may make the process returnable in such time as justice may require, such good reason is shown by affidavit that defendant had removed property covered by plaintiff's lien from the county, and had openly avowed that he would never pay the bond sued on.—Cavender v. Ward, 28 S. C. 470, 6 S. E. 302.

§ 252. Requisites and validity.

Deputations to serve process, see post, § 259.

Misnomer in justice's summons as affecting validity of default judgment, see post, § 383 [o].

Stamp taxes on justice's process, see "Internal Revenue," vol. 29, cc. 333–335, § 42.

[a] (Ark. 1881) A justice's summons must, under the act of 1873, be directed to a constable.—McCabe v. Payne, 37 Ark. 450.

[b] (Cal. 1895) Under Code Civ. Proc. c. 5, art. 1, tit. 1, pt. 1, § 91, providing that process shall be issued by the justices' clerk "upon the order of the presiding justice," the summons need not state that it was so issued, and, if such recital be made, a mistake therein as to the name of the presiding justice will not affect the jurisdiction of the court.—Helms v. Dunne, 107 Cal. 117, 40 Pac. 100.

[c] (Ga. 1856) Process sued out of an inferior court, bearing teste in the name of but one of the justices, is legal and sufficient.—Brown v. Roberts, 19 Ga. 424.

[d] (Ill. 1850) The statute requiring the justice to indorse the amount of the plaintiff's demand on the back of the summons is directory, and, when he has omitted to do so altogether, it ought not to operate to defeat the action, especially when the objection was first taken in the circuit court.—Eaton v. Graham, 11 Ill. (1 Peck) 619.

[e, f] (Ind.) The provision of the statute requiring the justice to direct process to a special constable by name is imperative, and not directory.—(1864) Benninghoof v. Finney, 22 Ind. 101; (1872) Schaw v. Dietrichs, Wilson, 153.

[g] (Iowa, 1849) The amount of the plaintiff's claim need not be mentioned in the body of a summons from a justice of the peace; but the amount claimed, including interest and costs, should be indorsed thereon.—Hedinger v. Silsbee, 2 G. Greene, 363.

[h] (Iowa, 1866) In the notice of an action on a note in a justice's court, the plaintiffs described themselves as heirs of the payee. *Held*, that this statement in the notice might be regarded as mere descriptio personæ, or might be rejected as immaterial.—King v. Gottschalk, 21 Iowa, 512.

[i] (Mich. 1893) How. Ann. St. § 6829, does not require a short summons in justice's court to show on its face why a long summons was not used.—Stoll v. Padley, 98 Mich. 13, 56 N. W. 1042.

[j] (Mo. 1825) The summons of a justice's writ must run in the name of the state.—Charless v. Marney, 1 Mo. 537.

[k] (N. J. 1888) The fact that the summons issued by a justice was indorsed on the back as "in the court for the trial of small causes," such indorsement being no part of the summons, is not ground for an objection that jurisdiction was taken in that court, instead of the justice's court.—O'Hagan v. Crossman, 50 N. J. Law (21 Vroom) 516, 14 Atl. 752.

[l] (N. Y. 1822) If a justice of the peace delivers to a party a summons signed by him in blank, to be filled up with the names of the parties, etc., in his presence and under his control, it is not a violation of the fourth section of the act of April 7, 1820; aliter, if the party receiving a blank summons fills it up out of the presence of the justice, though before it is delivered to a constable to be served.—People v. Smith, 20 Johns. 63.

[m] (N. Y. 1855) The indorsement on a summons issued by a justice of the peace, "issued according to the proceedings of title nine, chapter twentieth, part first, of the Revised Statutes," was a substantial compliance with the statute, which has "provisions" instead of "proceedings."—Andrews v. Harrington, 19 Barb. 343.

[n] (N. Y. 1891) Code Civ. Proc. § 3135, provides that a mandate issued by a justice of the peace must be signed by him, and must be entirely filled up at the time when it is delivered to the officer to be executed, so as to have no blank, either in the date thereof or otherwise; and that a mandate delivered to an officer contrary to this section is void. *Held*, that the justice acquires no jurisdiction where a summons is issued, signed in blank, to plaintiff's attorneys, who afterwards inserted the names of the parties and the date, and gave it to the officer to be served.—Hannaman v. Muckle (Co. Ct.) 15 N. Y. Supp. 961, 20 Civ. Proc. R. 296.

[o] (N. C. 1888) Under Code, § 832, providing that summons issued by justices of the peace shall contain the amount of the sum demanded by plaintiff, a summons to answer a complaint for the detention of a mule, without specifying its value, is insufficient.—Leathers v. Morris, 101 N. C. 184, 7 S. E. 783.

[p] (Pa. 1821) All civil process of a justice must be directed to a constable for service.—Clark v. Worley, 7 Serg. & R. 352.

[q] (S. D. 1891) Where a summons in justice's court fully sets out facts constituting a cause of action in tort, a complaint stating the same facts will not be set aside because the summons notifies the defendant that, if he fails to answer, judgment will be taken for the amount specified in the summons, instead of notifying him that the plaintiff will apply to the court for the relief demanded.—Berry v. Bingaman, 1 S. D. 525, 47 N. W. 825.

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[r] (Tenn. 1874) A justice's warrant, summoning a defendant to appear and answer, is not invalidated by the use of the abbreviation "Tenn." for "Tennessee."—Elliott v. Jordan, 66 Tenn. (7 Baxt.) 376.

[s] (Tex. 1894) Under Rev. St. art. 1570, providing that a citation shall contain "the names of all the parties to the suit," the omission of the name of one of the defendants from a citation before a justice court leaves the justice without jurisdiction.—Hunt v. Achison, T. & S. F. Ry. Co. (Civ. App.) 28 S. W. 460.

[t] (Utah, 1877) Where an officer brings a suit in his official character, the summons must affirmatively disclose the official capacity in which he claims to act; otherwise, it should be quashed on motion, even in an action before a justice of the peace.—Hamilton v. Spiers, 2 Utah, 225.

[u] (Vt. 1844) Where the magistrate who signed the original writ, in an action of debt to recover a penalty given by the statute to a town, indorsed upon the writ and signed the following minute: "I hereby certify that this writ was exhibited to me and filed in my office, this 9th day of June, A. D. 1842,"—it was *held* that it was not a compliance with the statute (Rev. St. p. 304, § 9), and the action was, upon motion made at the first appearance in the case, dismissed.—Montpelier v. Andrews, 16 Vt. 604.

[v] (Vt. 1847) A justice's writ filled up by the constable, is void, though done at the request of the attorney for the plaintiff and under his supervision.—Winchell v. Pond, 19 Vt. 198.

[w] (Vt. 1847) Under Rev. St. c. 11, § 26, providing that no sheriff or deputy sheriff shall be allowed to make any writ, declaration, plea, etc., except in his own case, and declaring all such acts to be void, a writ filled up by a constable is void; the term "sheriff," as used in that section, being a generic term, including all officers whose duties are of a like nature.—Winchell v. Pond, 19 Vt. 198.

[x] (Wis. 1852) Justices of the peace must strictly follow the form of any writ when the same is prescribed by statute.—Streeter v. Frank, 4 Chand. 93, 3 Pin. 386.

§ 253. —— Statement as to nature, form, and cause of action.

[a] (U. S. 1832) Where the summons of an Arkansas justice of the peace describes the cause of action as a "note of hand," a "bond" or "writing obligatory" cannot be received in evidence; for it is variant from the summons.—Madding v. Peyton, Fed. Cas. No. 8,933a [Hemp. 192].

[b, c] (U. S. 1837) The plaintiff cannot, in an action before a justice of the peace in the District of Columbia, recover on a cause of action different from that stated in the warrant.—Foy v. Talburt, Fed. Cas. No. 5,020 [5 Cranch, C. C. 124].

[d] (Ala. 1880) In a summary proceeding against a constable and his sureties, instituted before a justice, for failure to levy an attachment (Code, §§ 3663, 3671), the notice must briefly describe the process, stating when and by whom issued, the names of the parties, and when received by the constable, and must aver that he failed to execute it, whereby plaintiff lost his debt; but it is not necessary to file a written motion in the justice's court.—Abrams v. Johnson, 65 Ala. 465.

[e] (Ark. 1838) In an action before a justice of the peace, the cause of action must be stated in the summons with sufficient certainty to apprise the defendant of the legal character of the action.—Jeffery v. Underwood, 1 Ark. (1 Pike) 108.

[f] (Ark. 1838) It is not necessary to state the kind of action in the summons, and, if stated, it is merely surplusage.—Jeffery v. Underwood, 1 Ark. (1 Pike) 108.

[g] (Ga. 1878) A summons commencing a suit for debt in a justice's court need not set forth the cause of action; that not being required by Code, § 4139.—Davis v. Wilson, 61 Ga. 388.

[h] (Iowa, 1855) In an action before a justice of the peace by the indorsee against the indorser of a promissory note, the notice is only required to state the cause of action in general terms, sufficient to apprise defendant of the nature of the claim.—Hall v. Monahan, 1 Iowa (1 Clarke) 554.

[i] (Iowa, 1864) In an action before a justice of the peace to recover for damages in the purchase of oxen, evidence of a warranty of the oxen is admissible, though the notice only states that the cause of action is $40 damages in the sale of oxen.—Dilley v. Nusum, 17 Iowa, 288.

[j] (Iowa, 1878) In an action before a justice of the peace, a notice that the plaintiff claimed of the defendant "on a promissory note," though the latter was merely guarantor of the note, is "sufficient to apprise the defendant of the nature of the claim against him," as required by Code 1873, § 3518.—Francis v. Bentley, 50 Iowa, 59.

[k] (Mo. 1882) A statement, in a summons issued by a justice of the peace, of the nature of the suit and the sum demanded, was not required until Rev. St. 1879, § 2858.—Anthony v. St. Louis, I. M. & S. Ry. Co., 76 Mo. 18.

[l] (Mo. 1886) Under Rev. St. § 2858, providing that a summons issued by a justice of the peace shall state the nature of the suit, and the sum demanded, a summons which merely states that the plaintiff demands a certain sum, but fails to state the nature of the suit,—e. g., on a note, or an account, or for trespass upon person or property,—is defective.—Hill v. St. Louis Ore & Steel Co., 90 Mo. 103, 2 S. W. 289.

[m] (Mo. 1888) Under Rev. St. § 2858, defining process in the justice court, and providing that it shall state the nature of the suit and the sum demanded, a summons issued by a justice which describes the nature of the action as "for $250 damages, as per statement filed," is sufficient.—Damhorst v. Missouri Pac. Ry. Co., 32 Mo. App. 350.

[n] (N. J. 1856) The design of section 13 of the act constituting courts for the trial of small causes is that the real debt claimed shall be inserted in the process, and a variance will be fatal.—Coyle v. Coyle, 26 N. J. Law (2 Dutch.) 132.

[o] (N. Y. 1849) The summons from a justice court, which does not state on its face the alleged cause of action, is a nullity.—Ellis v. Merit, 2 Code Rep. 68.

[p] (N. Y. 1850) In justice court, the summons must state the nature of the cause of action, or a judgment taken in defendant's absence will be set aside.—Cooper v. Chamberlain, 2 Code Rep. 142.

[q] (N. Y. 1850) Service and return of summons containing no statement of the cause of action gives a justice no jurisdiction.—Hogan v. Baker, 2 E. D. Smith, 22.

[r] (N. Y. 1851) The summons from a justice's court need not state the plea.—Smith v. Joyce, 12 Barb. 21.

[s] (N. Y. 1852) An omission in the summons issued by a justice of the peace to state the

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plea in which the defendant is to answer the plaintiff, or the nature of the claim alleged by the plaintiff, is no cause for reversing a judgment rendered by the justice.—Cornell v. Bennett, 11 Barb. 657.

[t] (N. Y. 1852) The particular plea need not be stated in a summons from a justice. It is enough to state that it required the plaintiff to answer "in a civil action for damage and false representations in the sale of a horse."—Delancy v. Nagle, 16 Barb. 96.

[u] (N. Y. 1854) A summons issued from a justice's court, requiring "the defendant to answer the complaint of the plaintiff for personal services," sufficiently states the cause of action.—Bissell v. Dean, 3 E. D. Smith, 172.

[v] (N. C. 1882) To give a justice jurisdiction of civil actions under Const. art. 4, § 27, the summons, as a substitute for a complaint in such case, must show upon its face that the cause of action is within his cognizance.—Allen v. Jackson, 86 N. C. 321.

[w] (Tenn. 1835) Under Act 1777, c. 23, imposing a penalty on millers for taking unlawful toll, a justice's process in an action to recover such penalty, after stating the facts constituting the unlawful taking, need not state it was taken contrary to the statute; that being a mere conclusion.—Kirby v. Rice, 16 Tenn. (8 Yerg.) 442.

[x] (Tenn. 1835) In an action for recovery of a penalty for refusing to grind a grist in turn, a justice's process stating that defendant refused to grind grist in turn for a certain person, and first ground for others who came to the mill later, sufficiently charges a violation of St. 1777, c. 23, § 10, requiring grists to be ground in the order of their receipt, under a penalty.—Kirby v. Lee, 16 Tenn. (8 Yerg.) 439.

[xx] (Pa. 1886) In actions for penalties before justices of the peace, the summons of the justice need not set forth the form of action, since such penalties are recoverable as debts of like amounts.—Kern v. Commonwealth, 2 Del. Co. Ct. R. 490.

[y] (Pa. 1890) Where, in an action before a justice of the peace, the defendant is summoned to answer an action of trespass, the plaintiff cannot recover on a claim for goods sold and delivered.—Weisberger v. White (Com. Pl.) 2 Pa. Dist. R. 626.

[yy] (Tenn. 1844) A warrant to an action before a justice of the peace is not in lieu of a declaration. It is simply a summons to appear, and need contain only a general statement of the cause of action.—Wood v. Hancock, 23 Tenn. (4 Humph.) 465.

[z] (Tenn. 1847) Where a defendant was summoned before a justice of the peace to answer "in a plea of trespass for the fraudulent detention of a note for the woodwork of a wagon, to the plaintiff's damage fifty dollars," it was *held* that this was a sufficient warrant in trover before a justice.—Seals v. Cummings, 27 Tenn. (8 Humph.) 442.

[zz] (Tenn. 1873) Under a justice's process stating the cause of action to be debt on a constable's receipt, no recovery ought to be allowed on any other than the receipt therewith filed, especially after a plea of non est factum, averring a material alteration.—Watkins v. Kittrell, 62 Tenn. (3 Baxt.) 38.

§ 254. —— Directions as to time for return or appearance.

[a] (Cal. 1857) A justice cannot make a summons returnable more than 10 days from date.—Deidesheimer v. Brown, 8 Cal. 339.

[b] (Conn. 1843) In a suit before a justice of the peace, not only the day of appearance, but the hour of the day, ought to be designated in the writ; and, though a judgment might be good if no hour was designated, yet such an omission would be fatal on a plea of abatement.—Burgess v. Tweedy, 16 Conn. 39.

[c] (Ga. 1880) A justice's summons, in a suit for more than $50, returnable in less than 20 days, gives no jurisdiction.—Thurston v. Wilkerson, 65 Ga. 557.

[d] (Ind. 1861) A writ, in a civil cause, running more than 30 days before return, issued by a justice of the peace, is void, either as notice to defendant, as commencement of an action, or for any other purpose whatsoever; for it is not authorized by statute.—Ohio & M. R. Co. v. Hanna, 16 Ind. 391.

[e] (Ind. 1862) A summons issued in a civil case by a justice of the peace, running more than 30 days before return, is invalid, and creates no obligation on the defendant to answer thereto.—Fuller v. Indianapolis & C. R. Co., 18 Ind. 91.

[f] (Iowa, 1854) Code 1851, § 2274, requires the notice of actions in a justice's court to state the amount for which judgment will be taken if the defendant fails to appear at the "time" and place therein fixed. *Held* that, where the notice fixed the time as "11 o'clock m.," the justice acquired no jurisdiction.—Hodges v. Brett, 4 G. Greene, 345.

[g] (Mich. 1880) Under Comp. St. 1871, § 5264, providing that a summons in a justice court may be made returnable not less than two days from the date thereof, and shall be served at least two days before the time of appearance mentioned therein, a summons issued and served on June 25th, and returnable on June 27th, is insufficient.—Evarts v. Fisk, 44 Mich. 515, 7 N. W. 81.

[h] (Mich. 1883) Comp. Laws, §§ 5264, 5265, providing that a summons against a nonresident defendant shall be returnable not less than two nor more than four days from its issue, require two secular days between the issue and return of the writ; and no jurisdiction is acquired when the writ is issued on Friday, and is made returnable the following Monday.—Simson v. Durfee, 50 Mich. 80, 14 N. W. 706.

[i] (Minn. 1878) Under Gen. St. 1866, c. 65, § 10, providing that a summons issued by a justice of the peace "shall be entirely filled up, and have no blank, either in date or otherwise, at the time of its delivery to an officer to be executed," a summons issued with a blank as to the return day is absolutely void, and its service and return after the blank is filled by another person confer no jurisdiction.—Craighead v. Martin, 25 Minn. 41.

[j] (Minn. 1884) A summons issued by a justice of the peace required the defendant to appear before him "at 10 o'clock in the —— noon." *Held*, that the summons was void, under Gen. St. 1878, c. 65, § 12, requiring that such a summons "shall be entirely filled up, and have no blank, either in date or otherwise, at the time of its delivery to an officer to be executed," and declares that a summons "issued contrary to the provisions of this section shall be void."—Seurer v. Horst, 31 Minn. 479, 18 N. W. 283.

[jj] (Miss. 1893) Code 1880, § 2194, provides for the trial of a cause before a justice, at any reasonable time other than the regular term, when the plaintiff or defendant is a nonresident, and it is shown by the oath of either party that delay to the regular term will be of injury to him, and authorizes the writ to be made returnable at such "reasonable time."

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Section 2196 provides that the summons shall be executed five days before the return term, and any summons issued within five days before its return day shall be made returnable to the next succeeding term of the court after that, to be held within five days, unless a shorter day shall be named, in pursuance of section 2194. *Held*, that the justice has power to decide what constitutes "reasonable time" within section 2194.—Goodbar v. Owen, 70 Miss. 840, 12 South. 556.

[k] (Mo. 1845) Making a writ returnable before a justice of the peace on a day not the regular court day of the justice is not ground to dismiss the writ.—Harper v. Baker, 9 Mo. 116.

[l] (Mo. 1858) Where a writ is made returnable before a justice of the peace in less time than that fixed by law, it is void.—Williams v. Bower, 26 Mo. 601.

[m] (N. Y. 1837) The summons from the justice's court, served on the defendant, must set forth the time for his appearance.—Stewart v. Smith, 17 Wend. 517.

[n] (N. Y. 1848) By statute, a nonresident plaintiff may sue in a justice's court, by a short summons having not more than 4 nor less than 2 days to run, or by long summons having not more than 12 nor less than 6 days to run. *Held*, in the case of a summons returnable 5 days from date, that the justice had no jurisdiction.—King v. Dowdall, 4 N. Y. Super. Ct. (2 Sandf.) 131.

[o] (N. Y. 1859) According to section 33 of the nonimprisonment act (Laws 1831, c. 300), prescribing a short summons, a justice of the peace can acquire no jurisdiction over a nonresident defendant by a service of a summons returnable in four days.—Willins v. Wheeler, 28 Barb. 669, 8 Abb. Prac. 116.

[p] (N. Y. 1867) Where a summons in an action in a justice's court is returnable on the day of a general election, and there is no appearance, the justice acquires no jurisdiction,—not even to adjourn the proceedings to another day.—People v. Schwartz, 8 Abb. Prac. (N. S.) 395.

[q] (N. D. 1894) Service of a summons issued by a justice of the peace, returnable, not on any particular day, but on the seventh day after service thereof, confers no jurisdiction of defendant.—Miner v. Francis, 3 N. D. 549, 58 N. W. 343.

[r] (Or. 1887) In an action in a justice's court under the Oregon forcible entry and detainer act a summons is not void which requires the defendant to answer in less than 6 days after its date; the time when the defendant may be required to answer being determined by section 5 of said act, which provides that "the summons shall be served and returned as in other cases. Such service shall not be less than 2 nor more than 4 days before the day of trial appointed by the justice." Section 8 of the justice's act, providing that the summons must require the defendant to appear at a time named therein not less than 6 nor more than 20 days from the date thereof, is not applicable to actions of forcible entry and detainer.—Belfils v. Flint, 15 Or. 158, 14 Pac. 295.

[s] (Pa. 1862) A summons issued on August 3, 1861, and made returnable on May 10th next, is fatally defective, and a judgment by default based thereon will be set aside.—Hunter v. Weidner, 1 Woodw. Dec. 6.

[t] (Pa. 1880) Process in a justice's court cannot be made returnable more than six days from its date.—Turnpike Co. v. Commonwealth, 2 Law T. (N. S.) 233.

[u] (S. C. 1888) Under Code Civ. Proc. § 71, subd. 12, requiring the trial justice to issue a summons directed to defendant, requiring him to appear not more than 20 days from the date thereof, a summons returnable more than 20 days from the date of its issue confers no jurisdiction on the justice when objected to on trial.—Simmons v. Cochran, 29 S. C. 31, 6 S. E. 859.

[v] (S. C. 1895) Code, § 88, subd. 16, as amended by Act Dec. 22, 1891, provides that when $25 or more is demanded the complaint shall be served on defendant not less than 20 days before the day therein fixed for trial. *Held*, that a justice's summons which required defendant to appear "on the twentieth day from service of this summons, exclusive of the day of service, at 10 o'clock a. m.," was insufficient to give the justice jurisdiction to render a judgment at the time fixed in the summons.—Adkins v. Moore, 43 S. C. 173, 20 S. E. 985.

[w] (S. C. 1896) Code Civ. Proc. § 88, subd. 16, provides that, when $25 or more are demanded, the complaint shall be served on defendant not less than 20 days before the day therein fixed for trial. Section 71, subd. 12, applicable to actions of claim and delivery only, provides that the trial justice shall issue a summons directed to defendant requiring him to appear not more than 20 days from the date thereof. *Held*, in an action for claim and delivery, that a summons, otherwise sufficient, which required defendant to appear in less than 20 days from the date thereof, was sufficient to give the justice jurisdiction, though it also contained a demand for the value of the property in case it could not be returned.—Kelley v. Kennemore, 47 S. C. 256, 25 S. E. 134; Barr v. Same, Id.

[x] (S. C. 1896) Code Civ. Proc. § 88, subd. 16, gives defendant in an action in a justice's court 20 days to answer after summons served, provided, if plaintiff shall make affidavit that he is apprehensive of losing his debt by such delay, and the justice considers there is good reason therefor, he may make such process returnable in such time as justice may require. *Held* that, where such affidavit was filed, the justice could make his process returnable at 10 o'clock a. m. of the day of service.—Cothran v. Knight, 47 S. C. 243, 25 S. E. 142.

[y] (S. D. 1895) A summons for relief issued by a justice of the peace in an action for a specific sum of money, and made returnable on a legal holiday, is a nullity; and the justice has no jurisdiction to adjourn the case, or to enter judgment at the adjourned trial.—Leonosio v. Bartilino, 7 S. D. 93, 63 N. W. 543.

[z] (Tex. 1893) Rev. St. arts. 1568, 1570, under the title of "Justices' Courts," requires a citation to be made returnable at the first day of "some" term of court. *Held*, that such citation need not be made returnable at the "next" term of court.—White v. Johnson, 5 Tex. Civ. App. 480, 24 S. W. 568.

§ 255. —— Directions as to place for appearance.

[a] (Ark. 1886) A warning order to appear signed by a justice of the peace is sufficiently definite as to the justice before whom the appearance is to be made, though the justice is not named in the order.—Webster v. Daniel, 47 Ark. 131, 14 S. W. 550.

[b] (Del. 1835) A summons notifying defendant to appear in a town before a justice named is not sufficiently certain, without designating his office or some other place.—Coulter v. Layton, 1 Har. 494.

[c] (Mo. 1848) A summons, issued by a justice of the peace, requiring the defendant "to ap-

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pear before one of the justices of the peace," etc., "at my office," etc, omitting the words "me," or "the undersigned," was *held* to be sufficient.—Smith v. Young, 11 Mo. 566.

[d] (N. Y. 1837) A justice's summons must set forth the place for defendant to appear.—Stewart v. Smith, 17 Wend. 517.

[e] (Pa. 1880) A justice's summons is fatally defective unless it informs the defendant where he is to appear. The words "appear before the subscriber" are insufficient.—Murdy v. McCutcheon, 95 Pa. 435.

[f] (Pa. 1892) Where a borough is divided into a number of wards, a justice of the peace must designate in a summons the ward in which his office is situated.—Ritchie v. Perd (Com. Pl.) 11 Pa. Co. Ct. R. 590.

[g] (Pa. 1894) A summons, in an action in justice's court, which fails to state the ward in which the justice's office is located, is insufficient to sustain a judgment by default.—Lumber & Feed Co. v. Curley (Com. Pl.) 15 Pa. Co. Ct. R. 428.

[h] (Pa. 1895) A summons commanding defendant to appear before a justice of the peace in "Jackson," with nothing to show where such place is, is fatally defective.—Bogert v. Miller (Com. Pl.) 8 Kulp, 67, 16 Pa. Co. Ct. R. 592.

[i] (Pa. 1895) A summons by a justice of the peace, which does not state where his office is, or that he has an office, but simply that he is "one of the justices of the peace in and for said county," is defective.—Skinner v. Morrow (Com. Pl.) 8 Kulp, 108, 16 Pa. Co. Ct. R. 606, 4 Pa. Dist. R. 701.

[j] (Wis. 1860) The venue of a justice's summons was O. county, town of G., and the defendant was ordered to appear at the justice's office in the village of M. *Held*, that the summons was good; M. being in G.—Barnum v. Fitzpatrick, 11 Wis. 81.

§ 256. —— Return to other justice.

[a] (Conn. 1869) Under a statute providing that every justice of the peace may issue and sign any returns which may be served and returned before any court in the state, a writ of summary process to recover possession of leased property may be signed by one justice and made returnable before another.—McNamara v. Rogers, 36 Conn. 205.

[b] (N. C. 1892) Since the constitution of 1868 (article 4, § 27) and enactment of certain laws, among them section 827 of the Code, requiring justices of the peace to keep a record of their proceedings, and section 833, commanding any officer to whom a summons of theirs may have been directed to return same as soon as executed to the justice issuing it, such a summons cannot be made returnable to any other justice, except in bastardy proceedings and in ejectment, in which cases, under sections 32, 1767, it may still be made returnable to some other justice if desired.—Williams v. Bowling, 111 N. C. 295, 16 S. E. 176.

§ 257. —— Signature and seal.

[a] (Cal. 1895) Under Code Civ. Proc. c. 5, art. 1, tit. 1, pt. 1, § 95, declaring that justices' courts shall be governed by the laws regulating proceedings before justices, "so far as such provisions were not altered or modified in this article," a summons, signed by the clerk of the justices' court, in accordance with section 91 of the same article, is valid, that provision modifying Code Civ. Proc. § 844, requiring process to be signed by the justice.—Helms v. Dunne, 107 Cal. 117, 40 Pac. 100.

[b] (Cal. 1895) A summons from the justice's court, signed by W., "Clerk of the Said Court," is valid, though "justices' clerk" is the proper designation.—Helms v. Dunne, 107 Cal. 117, 40 Pac. 100.

[c] (Ill. 1846) Where a probate justice is required to keep an official seal, and is also invested by statute with the powers of a justice of the peace, it is not necessary that he should affix his official seal as probate justice to a summons issued by him as a justice of the peace.—Dunlap v. Ennis, 8 Ill. (3 Gilman) 286.

[d] (Ill. 1850) A probate justice of the peace, when acting in that capacity, must affix the seal of the probate court to the process issued by him.—Williams v. Blankenship, 12 Ill. (2 Peck) 122.

[e] (Me. 1854) It is unnecessary that a justice should sign a writ issued by him personally, but it is sufficient if signed by one duly authorized.—Achorn v. Matthews, 38 Me. 173.

[f] (Miss. 1840) A scroll affixed to the name of the justice, with the word "Seal" written within it, is a good seal of a writ of a justice of the peace.—Wright v. The Vesta, 6 Miss. (5 How.) 152.

[g] (N. H. 1844) The failure of a justice of the peace to sign the summons in proceedings before him, as required by Rev. St. c. 209, and Id. c. 182, § 5, is fatal to the proceedings.—Smith v. Smith, 15 N. H. 55.

[h] (N. H. 1851) A justice's writ, signed by the authority of the justice, but not in his presence, was *held* not to be valid.—Kidder v. Prescott, 24 N. H. (4 Fost.) 263.

[i] (N. H. 1853) Where the name of the justice of the peace before whom a writ is returnable is affixed thereto by his direction and in his presence, such writ is legally signed by the justice.—Hanson v. Rowe, 26 N. H. (6 Fost.) 327.

[j] (N. J.) The signature of a justice to a summons is sufficient if it give his surname in full, and his Christian name by initials.—(1853) Wood v. Fithian, 24 N. J. Law (4 Zab.) 33; (1855) Id. 838.

[k] (Tenn. 1882) A justice of the peace cannot authorize another to sign his name to the original process; this being an official act.—Kirkwood v. Smith, 77 Tenn. (9 Lea) 228.

[l] (W. Va. 1895) A justice of the peace issuing a summons in an action for the recovery of money must sign the same, in order that the action commence.—Colborn v. Booth, 41 W. Va. 289, 23 S. E. 556.

2. SERVICE AND RETURN OR PROOF OF SERVICE.

SERVICE IN GENERAL, § 258.
AUTHORITY OR CAPACITY TO SERVE, § 259.
LEAVING COPY AT RESIDENCE, § 260.
PUBLICATION OR OTHER NOTICE, § 261.
RETURN AND PROOF OF SERVICE, § 262.
——FORM AND REQUISITES, § 263.

Service of notice of motion to amend writ, see post, § 265 [i].

§ 258. Service in general.

[a] (Conn. 1789) A town, when sued before a justice, is entitled to 12 days' notice.—Payne v. Bacon, 1 Root, 109.

[b] (Ga. 1893) Under Act Oct. 17, 1885 (Laws 1885, p. 103), which provides that, whenever process from any court is not served for the required length of time before the appearance term of the court from which it issues, such service shall be good for the next succeed-

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ing term thereafter, which succeeding term shall be the appearance term of the cause, the word "process" includes a summons from a justice's court.—Hyfield v. Sims, 90 Ga. 808, 16 S. E. 990.

[c] (Ga. 1896) There was no error in refusing to dismiss an action pending on the appeal in the superior court from a justice's court, on the ground that the promissory note sued on, instead of a copy of the same, was attached to the original summons by which the action was begun.—Bull v. Edward Thompson Co., 99 Ga. 134, 25 S. E. 31.

[d] (Ind. 1846) The statute of 1838 required the summons of a justice of the peace to be served at least three days (the day of service being excluded from the computation) before the time of appearance.—Wort v. Finley, 8 Blackf. 335.

[e] (Kan. 1887) A summons in an action before a justice of the peace, issued and served on the 31st day of October, to appear at 2:30 p. m. of the 3d day of November, is served three days before the time of appearance.—Foster v. Markland, 37 Kan. 32, 14 Pac. 452.

[f] (Kan. 1888) Under the Justices' Code, providing that a summons issued by a justice must, unless accompanied with an order of arrest, be served at least three days before the time of the appearance, the statutory rule of computing time obtains, and the day of service is excluded, but that of appearance included.—Schultz v. Hine, 39 Kan. 334, 18 Pac. 221.

[g] (Mich. 1889) Service of summons, issued by a justice of the peace on a nonresident of the county, while therein in attendance on the trial of an action as a party and witness, is unauthorized, and should be set aside on motion.—Letherby v. Shaver, 73 Mich. 500, 41 N. W. 677.

[h] (Mo. 1893) Rev. St. 1889, § 6570, which provides that "the time within which an act is to be done shall be computed by excluding the first day and including the last," applies to section 6148, which requires the service of a summons, issued by justice of the peace, at least 10 days before the day of appearance.—Sappington v. Lenz, 53 Mo. App. 44.

[i] (Neb. 1894) Under Code Civ. Proc. § 911, which provides that a justice's summons must be served "at least three days before the time of appearance," a summons served on the 26th and returnable on the 29th day of the same month is sufficient.—White v. German Ins. Co., 15 Neb. 660, 20 N. W. 30.

[j] (Neb. 1887) A summons was issued by a justice of the peace, and delivered to the sheriff of the county for service, who returned the same, with the manner of service indorsed thereon as follows: "August 23, 1884. Received this writ, and on the twenty-third day of August, 1884, I served the same on the within-named defendant, H. J. Palmer, by leaving a copy of the within summons with George Palmer, and by him, the said George Palmer, in my presence, at the time of said service, delivered the same, being a true copy of the within summons, with all the indorsements thereon, certified by me to be a true copy, to said H. J. Palmer,"—properly signed by the officer. *Held* to be a compliance with the requirements of Civ. Code, § 911, providing for the service of summons "by delivering a copy to the defendant, or leaving the same at his usual place of residence," and that the service gave jurisdiction.—Palmer v. Belcher, 21 Neb. 58, 31 N. W. 262.

[k] (Neb. 1891) In an action in justice's court on a joint demand against three defendants, plaintiff, who has been able to obtain service on only two of them while the action was pending in justice's court, may serve the third during the pendency of an appeal in the district court.—Houston v. Pepperl, 32 Neb. 828, 49 N. W. 803.

[l] (Neb. 1892) A summons issued by a justice court must be served at least three days before the time set for trial, as required by Code Civ. Proc. § 911, or there is no legal service.—Leake v. Gallogly, 34 Neb. 857, 52 N. W. 824.

[m] (Neb. 1893) Under Code, § 1024, declaring that the summons in an action of forcible detainer shall be served three days before the trial, a summons in such action issued and served three days prior to the day appointed for trial, including the day of service, is sufficient to confer jurisdiction over the person of the defendant.—Messick v. Wigent, 37 Neb. 692, 56 N. W. 493.

[n] (N. J. 1831) Where summons in a justice's action is required by law to be made five days before the return day thereof, a service on the 26th of April of a summons returnable on May 1st following is sufficient.—Day v. Hall, 12 N. J. Law (7 Halst.) 203.

[o] (N. Y. 1862) Where a constable, in serving a summons issued by a justice, who had two offices, stated to the defendant that it was returnable at the office other than that stated in the summons, the process was not duly served, and the justice acquired no jurisdiction over defendant's person.—Waring v. McKinley, 62 Barb. 612.

[p] (N. Y. 1889) A certificate of the constable that he served the summons and complaint on defendant at W., "by delivering to him a copy thereof," does not show a sufficient compliance with Laws 1881, c. 414, § 1, which requires service of summons and complaint on defendant "by delivering to and leaving with him, personally, true copies thereof." The copies must be left with the defendant.—McMullin v. Mackey, 53 Hun, 638, 6 N. Y. Supp. 885.

[q] (N. C. 1871) A summons in a civil action before a justice of the peace is not required to be executed by leaving a copy with the defendant.—Kirkland v. Hogan, 65 N. C. 144.

[r] (Or. 1871) Under a statute requiring the copy of the complaint served on defendant to be certified by the plaintiff, his agent, or attorney, or by the county clerk, if the action is before a justice of the peace, a copy certified by the justice of the peace is sufficiently certified to authorize its service with the summons.—Marrooney v. McKay, 3 Or. 372.

[s] (Or. 1887) A copy of the complaint, certified by the justice before whom the cause was pending or by the plaintiff, must be served on the defendant.—Belfils v. Flint, 15 Or. 158, 14 Pac. 295.

[t] (Pa. 1854) The return, "Copy served personally on defendant," is defective, not being a compliance with the statutory requirement that service shall be by producing the original summons to defendant and informing him of the contents, or by leaving a copy at his dwelling house in the presence of a member of his family.—Lenore v. Ingram, 1 Phila. 519.

[u] (Pa. 1873) Service of summons by reading the contents thereof personally to the party to be served is a substantial compliance with the requirements of the statute.—French v. Pennsylvania & N. Y. Canal & R. Co., 1 Leg. Chron. 66.

[v] (Pa. 1895) A justice of the peace will, on certiorari, be held not to have had jurisdiction; the record showing less than five days' service of summons, and not showing that defendant

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was a nonresident of the county, so as to make four days' service sufficient.—Overshire v. Cook (Com. Pl.) 8 Kulp, 164.

[w] (Vt. 1843) If a writ, returnable before a justice of the peace, is put into the hands of an officer for service more than 60 days before the return day therein named, it is his duty, under the statute, to omit making any service thereof until within 60 days before the return day.—Nelson v. Denison, 17 Vt. 73.

[x] (Vt. 1890) R. L. Vt. § 1402, provides that where an action is brought against a nonresident defendant he may be notified of its pendency by delivery to him at any place without the state "of copies of the process and pleading, and of an order for such delivery stating the time and place when and where he is required to appear, all under the hand of the clerk of the court or of a judge or justice thereof." Section 1403 provides for the mode of delivery, and section 1404 provides that thereafter the action may proceed, and the judgment shall bind property within the state as if defendant had been served therein. *Held*, that these sections are applicable to actions before a justice of the peace.—Hogle v. Mott, 62 Vt. 255, 20 Atl. 276, 22 Am. St. Rep. 106.

§ 259. Authority or capacity to serve.

Authority of coroner where sheriff is party to action, see "Sheriffs and Constables," III.

Of constable when sheriff is party to action, see "Sheriffs and Constables," III.

[a] (Ark. 1881) Any officer authorized to serve process may serve a justice's summons.—McCabe v. Payne, 37 Ark. 450.

[b] (Colo. 1896) Under Mills' Ann. St. § 2794, providing that a justice may appoint a special constable to serve papers in any particular case by written indorsement under seal of the justice on the back of the process which the person is deputed to serve, an appointment by the clerk of a justice without indorsement on the process is invalid, and confers no authority to serve process.—Hamill v. Ferrier, 8 Colo. App. 266, 45 Pac. 522.

[c] (Conn. 1786) The certificate of a justice, addressing a writ to an indifferent person, because no proper officer could be had without expense and inconvenience, is conclusive, and the court cannot inquire into its truth.—Lawrence v. Kingman, Kirby, 6.

[d] (Conn. 1826) Under the laws relating to the service of a writ by an indifferent person, the certificate of the justice must show that the oath was administered in the words prescribed by the statute.—Case v. Humphrey, 6 Conn. 130.

[e] (Conn. 1826) The certificate of the justice on a writ brought by A. against B. recited: "Personally appeared C., and made solemn oath that he verily believed the plaintiff to be in danger of losing the within-described debt, unless an indifferent person be deputed for the immediate service of this writ." *Held*, that under the statute relating to the service of writs by indifferent persons, requiring that the person taking the oath shall be the plaintiff or his attorney, the certificate was insufficient.—Case v. Humphrey, 6 Conn. 130.

[f] (Ga. 1894) Under Act Oct. 17, 1885, the sheriff can serve a summons in a suit before a justice of the peace.—Early County v. Powell, 94 Ga. 680, 20 S. E. 10.

[g] (Ill. 1838) Rev. Laws, p. 399, § 51 (Gale's St. p. 412, § 51), providing that the appointment of a constable pro tem. by a justice of the peace to execute process must be made by indorsement on the back of the process, a constable pro tem. cannot be appointed to serve a summons or other personal notice in a civil suit.—Gordon v. Knapp, 2 Ill. (1 Scam.) 488.

[h] (Ill. 1885) A justice of the peace cannot appoint a constable pro tem. to serve a summons or other personal notice in a civil suit; and the justice will not acquire jurisdiction of defendant's person by the service of such summons by the constable.—Hill v. Blackwelder, 113 Ill. 283.

[i] (La. 1894) Under Code Proc. art. 1077, any constable of the parish can serve the citation issued by a justice of the peace.—State ex rel. Police Jury of St. Martin Parish v. Dupre, 46 La. Ann. 117, 14 South. 907.

[j] (Me. 1850) The constable of a town may serve a justice's writ on any person within that town, though such person may be an inhabitant of another town.—Blanchard v. Day, 31 Me. 494.

[k] (Mich. 1878) In indorsing on a summons a deputation of authority to serve it, the justice need not certify that the person authorized is of age and not interested in the suit. It is not presumed that he selects an incompetent person.—Buel v. Duke, 38 Mich. 167.

[l] (Mich. 1885) The competent person, empowered by How. Ann. St. § 6827, to serve a justice's summons, must appear to have been personally designated by the justice, and must be selected on sufficient inquiry to determine his competency.—Moore v. Rasch, 57 Mich. 54, 23 N. W. 456.

[m] (Mich. 1886) The justice should indorse the appointment of a private person to serve a summons on it, as directed by How. Ann. St. § 7074, and he acquires no jurisdiction of a defendant served by a person whose authority is not so indorsed.—Union Mut. Fire Ins. Co. v. Page, 61 Mich. 72, 27 N. W. 859.

[n] (Mich. 1886) Where a private person to whom a justice of the peace gives a summons for service makes an affidavit that he is not "directly interested" in the action, he is not clearly shown to be disinterested, as the inference arising from his language is that he is indirectly interested, and disqualified to serve the summons under the statute.—Union Mut. Fire Ins. Co. v. Page, 61 Mich. 72, 27 N. W. 859.

[o] (Mich. 1890) Under How. Ann. St. § 7074, providing that a justice may on the request of a party, by authority indorsed on the process, empower a proper person of lawful age, and not a party or interested, to execute it, the request of the party and the fitness of the appointee must appear on the indorsement.—Gadsby v. Stimer, 79 Mich. 280, 44 N. W. 606.

[p] (Mo. 1895) Rev. St. § 6927, providing that citations shall be placed in the hands of the constable of the town in which the suit is pending, are directory merely, and service by the constable of another township is valid.—Bick v. Wilkerson, 62 Mo. App. 31, 1 Mo. App. Rep'r, 727.

[pp] (Neb. 1881) Under Code Civ. Proc. § 1094, which provides that a justice may, in writing on the process, specially deputize any suitable person to serve process, authority in the following words indorsed on the process is sufficient: "The State of Nebraska, to Job Hathaway, of Said County, Specially Deputized to Serve These Papers—Greeting."—Haskins v. Citizens' Bank, 12 Neb. 39, 10 N. W. 466.

[q] (Neb. 1882) A justice of the peace is not within Code Civ. Proc. § 882, which provides that a "court or judge, for good cause, may appoint a person to serve a particular process or order," and service of process by a person ap-

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pointed by a justice is invalid.—Republican Val. R. Co. v. Sayre, 13 Neb. 280, 13 N. W. 404.

[qq] (Neb. 1891) Under Code, § 1094, providing that at the request of a party, and on being satisfied that it is expedient, a justice may depute a discreet person to serve a summons, and that "such deputation must be in writing on the process," the appointment need not show that the justice was requested to make it, nor that he was satisfied that it was expedient to do so, and it is sufficient to address the summons to the appointee as "special constable."—Morse v. Carpenter, 31 Neb. 224, 47 N. W. 853.

[r] (N. J. 1837) The marshal of the city of Perth Amboy is not authorized to serve process from the court for the trial of small causes.—Dunham v. Solomon, 16 N. J. Law (1 Har.) 50.

[rr] (N. Y. 1806) Under 1 Laws, p. 500, § 15, being an act for the more speedy recovery of debts to the value of $25, a constable of a county may serve writs issuing from a justice's court in any part of the county.—Mills v. Kennedy, 1 Johns. 502.

[s] (N. Y. 1823) A summons in a justice's court may be served by the plaintiff himself, either where he is himself a constable or specially deputed for the purpose.—Tuttle v. Hunt, 2 Cow. 436.

[ss] (N. Y. 1829) A plaintiff who is a constable may serve a summons issued by a justice.—Putnam v. Man, 3 Wend. 202, 20 Am. Dec. 686.

[t] (N. Y. 1895) Under Code Civ. Proc. § 3156, providing that the justice may authorize any proper person of full age, not a party to the action, to serve the summons, service by plaintiff under an authorization by the justice is void.—Warring v. Keeler, 11 Misc. Rep. 451, 33 N. Y. Supp. 415, 24 Civ. Proc. R. 427.

[tt] (N. C. 1884) A justice of the peace has no authority to depute a special officer to serve process in a civil action.—McKee v. Angel, 90 N. C. 60.

[u] (N. C. 1896) Code, § 645, provides that a justice may, "in extraordinary cases," appoint any one not a party to execute his mandate. *Held*, that the decision of the justice as to when such cases arise is conclusive.—State v. Wynne, 118 N. C. 1206, 24 S. E. 216.

[uu] (Or. 1886) There is no legal service by a constable's deputy, except the record shows that he was acting under a regular appointment for the purpose.—Prickett v. Cleek, 13 Or. 415, 11 Pac. 49.

[v] (Or. 1894) Under Hill's Ann. Laws, § 2173, providing for the appointment of persons to serve processes in justices' courts whenever they would otherwise not be served for want of an officer, one appointed by indorsement on the summons reciting that "the constable of said district being unable to act herein, and it appearing that the within process will not be served for want of an officer, I hereby appoint W. to make service," and signed by the justice, is sufficiently authorized.—North Pac. Cycle Co. v. Thomas, 26 Or. 381, 38 Pac. 307, 46 Am. St. Rep. 636.

[vv] (Pa. 1894) A special deputation to serve a justice's process must show that it was made by the constable of the proper county, or the record must identify his official character.—Metropolitan Life Ins. Co. v. Cook (Com. Pl.) 7 Kulp, 257, 14 Pa. Co. Ct. R. 434.

[w] (Tenn. 1850) A deputation indorsed on a legal process by a justice of the peace, authorizing a person to execute a legal process, must express the full name of such person, or it will be void for uncertainty, and will confer no authority on any person.—Allison v. Hampton, 30 Tenn. (11 Humph.) 71.

[ww] (Vt. 1834) An appointment by a justice of the peace to serve process is a judicial act, and cannot be done by proxy.—Ex parte Kellogg, 6 Vt. 509.

[x] (Vt. 1837) A person regularly authorized to serve a writ by a justice of the peace may serve the same in any county to the officers of which it may by law be directed, though it is not in fact directed to such officers.—Clark v. Washburn, 9 Vt. 302.

[xx] (Vt. 1839) A justice of the peace signed a blank writ, and a deputation on the back of it, in blank, which deputation was afterwards filled up by a third person, without the direction or knowledge of such justice, and the person thus deputized made service of the writ by attaching property. *Held*, that such deputation was void, and that the person thus deputized was a trespasser.—Ross v. Fuller, 12 Vt. 265, 36 Am. Dec. 342.

[y] (Vt. 1849) If a justice's writ be directed in the body of it to an indifferent person named in the form of a deputation in a county court writ, stating the reason of such direction to be the want of a proper officer seasonably to be had, the person so named will not be authorized to serve such writ.—Edgerton v. Barrett, 21 Vt. 196.

[yy] (Vt. 1856) The authority of a special officer, appointed at the discretion of the justice to serve a writ under the statute, cannot be extended beyond the expiration of the time of service without the concurrence of the magistrate.—Carr v. Tyler, 28 Vt. (2 Williams) 783.

[z] (Vt. 1859) A citation signed by the justice of the peace of one county, directed to any sheriff in the state, notifying defendant in a suit pending in another county to appear at the taking of a deposition out of the state, may be served on the defendant in his own county by the sheriff of the county whence the citation issued.—Parker v. Meader, 32 Vt. 300.

[zz] (Wis. 1857) Under Rev. St. c. 88, § 80, any "credible evidence," other than the plaintiff's affidavit, is sufficient to authorize the justice to order service by one not an officer.—Betts v. Stevens, 6 Wis. 398.

§ 260. Leaving copy at residence.

[a] (Ga. 1895) A justice's court acquires jurisdiction of defendant on service of the summons by leaving a copy thereof at defendant's residence, though he was temporarily absent.—Moye v. Walker, 96 Ga. 769, 22 S. E. 276.

[b] (Pa. 1879) The service of summons in justice court by leaving a copy at the defendant's house with a member of the family is insufficient.—Smith v. Moone, 1 Leg. Rec. Rep. 165.

[c] (Wis. 1856) The service of summons by leaving a copy at the usual place of abode of the defendant with one of his family of suitable age and discretion is sufficient to give a justice jurisdiction.—Frederick v. Clark, 5 Wis. 191.

§ 261. Publication or other notice.

[a] (Cal. 1863) The summons in an action before a justice having been returned not served, because defendant could not be found, that official may, on affidavit that defendant is concealing himself in order to avoid process, issue a new summons and order notice by publication.—Seaver v. Fitzgerald, 23 Cal. 85.

[b] (Mo. 1878) The courts cannot supply the omission of the statute to provide for an order

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of publication against a nonresident defendant in a mechanic's lien proceeding before a justice of the peace.—Bieswaenger v. Werner, 5 Mo. App. 582.

[c] (Mo. 1892) A finding by a justice of the peace that defendant has absconded from his usual place of abode, and cannot be found in the county, is not sufficient to sustain an order of publication, since it does not appear therefrom that he could not be summoned, under Rev. St. § 6148, by leaving a copy of the summons at his usual place of abode with a member of his family.—Byrd v. Steele, 49 Mo. App. 419.

[d] (Nev. 1869) An order for issuing a summons from a justice's court, and an order for serving it by publication, cannot be combined. The order for publication presupposes the existence of a summons. Unless one has previously been issued, such order is premature.—Little v. Currie, 5 Nev. 90.

[e] (Tex. 1888) Rev. St. art. 1572, provides that all rules governing the service of citations issued out of the district courts, except when otherwise provided, shall govern also the justices' courts so far as applicable; article 1577 fixes appearance day after publication of process from justice's court; article 1617 also recognizes the validity of a judgment rendered by a justice against a defendant cited by publication; and article 152 provides that justices may issue attachments where defendant is not a resident of the state. *Held*, under these statutes, that process from justices' courts may be served by publication under the rules governing district courts.—Davis v. Robinson, 70 Tex. 394, 7 S. W. 749.

[f] (Tex. 1896) Act Aug. 13, 1870, authorizing service by publication in suits before justices of the peace, was not affected by the repeal of the printing act, in November, 1871.—Hambel v. Davis, 89 Tex. 256, 34 S. W. 439, 59 Am. St. Rep. 46, affirming judgment (Civ. App. 1895) 33 S. W. 251.

§ 262. Return and proof of service.

[a] (Cal. 1858) The officer's return on the summons is evidence of the service.—Denmark v. Liening, 10 Cal. 93.

[b] (Cal. 1860) A recital in the docket of a justice that the summons was "returned duly served" is, upon the question of the sufficiency of the service, of no value as against the return of the officer.—Lowe v. Alexander, 15 Cal. 296.

[c] (Ill. 1881) Where a constable's return shows service of process in a suit before a justice of the peace, the justice has no authority to issue sci. fa. on the ground that one of the defendants has not been served.—Leitch v. Colson, 8 Ill. App. 458.

[d] (Kan. 1878) In an action to recover possession of real property, the plaintiff's title was founded upon a sheriff's deed made in pursuance of an execution sale founded on a transcript of a justice's judgment, rendered on default against the then owner of the land in controversy on faith of a constable's return of service of summons, which showed service by leaving a certified copy at the residence of defendant. *Held*, that to permit the defendant to impeach the deed, judgment, and constable's return, by showing that the return was false, as defendant was not at the time a resident of Kansas, but in the Indian Territory, was correct.—Mastin v. Gray, 19 Kan. 458, 27 Am. Rep. 149.

[e] (Mich. 1879) The return of a justice's summons certified that he had "personally served the within summons on the within-named defendant, by reading the same and by giving a copy, on the 5th day of August, 1874." *Held* prima facie sufficient to give jurisdiction.—Merrick v. Mayhue, 40 Mich. 196.

[f] (Mich. 1886) Where the affidavit of service of summons in justice's court does not show that the affidavit of the amount claimed to be due was served with the process, such affidavit is not prima facie evidence of the facts stated therein, under How. Ann. St. § 7525.—Gordon v. Sibley, 59 Mich. 250, 26 N. W. 485.

[g] (Mich. 1893) A defendant in a summons issued by a justice may appear on the return day, and by affidavit dispute the return of the officer, and show that the summons was served on him more than 12 days before the return day.—Lane v. Jones, 94 Mich. 540, 54 N. W. 283.

[h] (Minn. 1892) In an action to set aside a justice's judgment, rendered by default on the constable's certificate of service of the summons, the return of the officer may be impeached.—Knutson v. Davies, 51 Minn. 363, 53 N. W. 646.

[i,j] (Miss. 1884) Where the return to a summons is equivocal as to which of two defendants is served, the justice may decide whether the service was personal or not.—Fleming v. Nunn, 61 Miss. 603.

[k] (Miss. 1893) A sheriff's deed, after sale on an execution issued on a justice's judgment, should not be canceled on the ground that the judgment debtor was not served in the action in which the judgment was rendered, where the return shows personal service, the officer making it testifies that service was made as returned, and the justice testifies that on return day such debtor told him he had no defense to the action, and to enter judgment, and where the only evidence that it was not served is given by such debtor.—Quarles v. Hiern, 70 Miss. 891, 14 South. 23.

[l] (Mo. 1843) The return of a constable on a writ is only prima facie evidence of the facts therein contained.—Perryman v. State, to Use of Relfe, 8 Mo. 208.

[m] (Neb. 1890) Where a summons issued by a justice, and made returnable at an hour named, does not specify that standard time is relied upon, it will be presumed that common time was intended.—Searles v. Averhoff, 28 Neb. 668, 44 N. W. 872.

[n] (N. J.) A justice cannot proceed in a cause, in the absence of the defendant, until the summons is duly returned according to law.—(1806) Layton v. Cooper, 2 N. J. Law (1 Penning.) 62; (1830) Rape v. Titus, 11 N. J. Law (6 Halst.) 314.

[o] (N. Y. 1829) The return of a justice's summons served by the plaintiff, who is a constable, cannot be impeached in an action of trespass for an arrest on execution upon the judgment rendered on the return of such summons. If the return be false, the remedy is by action for a false return against the constable.—Putnam v. Man, 3 Wend. 202, 20 Am. Dec. 686.

[p] (N. Y. 1846) The certificate of a justice of the peace, on certiorari, that he delivered the summons in the suit to a constable on a certain day, does not show that he had legal evidence before him that the suit was commenced on that day. Such delivery is no part of his official duty, and he cannot take notice thereof without evidence.—Cornell v. Moulton, 3 Denio, 12.

[q] (N. Y. 1853) Where a summons from a justice was actually served on the defendant's son, in defendant's absence, the constable's re-

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turn of service on the person may be contradicted on appeal.—Fitch v. Devlin, 15 Barb. 47.

[r] (N. Y. 1854) A constable's return of service on a summons cannot be collaterally attacked in another action for defeating the judgment recovered under it.—New York & E. R. Co. v. Purdy, 18 Barb. 574.

[s] (N. Y. 1856) The return of the constable in a suit before the justice's court is not traversable. If it is false, the remedy is by an action for a false return.—Perry v. Tynen, 22 Barb. 137.

[t] (N. Y. 1859) The justice cannot of his own knowledge certify as to the day when the summons was issued, but the fact must be proved by competent evidence.—McGraw v. Walker, 2 Hilt. 404.

[u] (N. Y. 1868) A person deputed by a justice to serve a summons must make a return in writing in the same manner that a constable is required to do, in order to give the justice jurisdiction.—Jackson v. Sherwood, 50 Barb. 356.

[v] (N. Y. 1871) A constable's oral evidence of the service of a summons is admissible before a justice as a basis for "proceedings to recover possession of land" (2 Rev. St. p. 514, § 32); and this is so although he may have made a written return by affidavit.—Robinson v. McManus, 4 Lans. 380.

[w] (N. Y. 1889) On the return day named in the summons, defendant appeared specially, and moved to dismiss on the ground that service was not had on him personally, and offered to prove the fact. *Held*, that it was error to reject the evidence on the ground that the constable's return, showing personal service, was conclusive.—Wheeler & Wilson Mfg. Co. v. McLaughlin, 54 Hun, 639, 8 N. Y. Supp. 95.

[x] (Pa. 1864) In estimating the five days for the return of the summons before a justice of the peace, the day of the date is to be excluded.—Ferris v. Zeidler, 5 Phila. 529.

[xx] (Pa. 1872) In computing the time for the return day of the summons before a justice, the day on which it is issued will be excluded, and the day on which it is returnable will be included.—Brenner v. Dombach, 3 Lanc. Bar, No. 40, p. 2.

[y] (Pa. 1873) A return by a constable of the service of summons on an agent of the railroad company will be held conclusive that the person served was such an agent as the law allows services to be made upon, and indefinite expressions, such as "said to be," or "who acknowledged himself to be," will be regarded as surplusage.—French v. Pennsylvania & N. Y. Canal & R. Co., 1 Leg. Chron. 66.

[yy] (Pa. 1893) Where a magistrate's summons showed a return, "Served by copy," and there was nothing to show that service of the copy was not made in the manner prescribed by law, the presumption is that the service was so made, though the docket shows service by leaving the copy at the defendant's place of business.—Sweeney v. Girolo, 154 Pa. 609, 26 Atl. 600, 32 Wkly. Notes Cas. 404.

[z] (R. I. 1889) An original writ in a justice's court, which is returnable at 10 o'clock, must be returned not later than 11 to give the court jurisdiction over the defendant; and neither a previous agreement of defendant's counsel to waive the time, nor a custom to enter delayed writs and continue them, can give the court jurisdiction if the writ is not returned within the time above stated.—Brown v. Carroll, 16 R. I. 604, 18 Atl. 283.

[zz] (Tenn. 1873) A constable's return under oath that he executed a summons on both defendants, supported by the justice's indorsement of judgment thereon and issuance of execution, is not impeached by the mere denial of one of the defendants that he had been served.—Myers v. Hammond, 65 Tenn. (6 Baxt.) 61.

§ 263. —— Form and requisites.

[a] (Iowa, 1859) A return in an action before a justice, "Served the within by reading," is defective, in not showing that it was read to defendant.—Bain v. Galyear, 10 Iowa, 585.

[b] (Kan. 1873) It is not necessary that a special constable, who has been legally appointed and qualified under section 172 of the justice's act, should verify his return to a writ which he has served by oath or affidavit.—Winsor v. Cole, 10 Kan. 620; Winsor v. Goddard, Id. 625.

[c] (Mich. 1848) The return to a summons in these words, "Served the within by reading personally," the statute requiring it to be served by reading it to defendant and delivering him a copy, is bad, and does not give the justice jurisdiction of the person of the defendant.—Campau v. Fairbanks, 1 Mich. (Man.) 151.

[d] (Mich. 1856) A return on a justice's writ of "Personally served true copies of the within by reading," is sufficient.—Shaw v. Moser, 8 Mich. 71.

[e] (Minn. 1896) A return of service of summons issued by a justice of the peace, by leaving a copy of the same at defendant's usual place of abode, need not state that defendant could not be found.—Vaule v. Miller, 64 Minn. 485, 67 N. W. 540.

[f] (Minn. 1896) The return of service of summons in justice's court need not state the name of the person with whom the copy was left at defendant's residence.—Vaule v. Miller, 64 Minn. 485, 67 N. W. 540.

[g] (Minn. 1896) A return of service of summons issued by a justice upon defendant, by leaving a copy thereof at defendant's "last usual place of abode," under Gen. St. 1894, § 4967, is not invalidated by its omission to use the word "last."—Vaule v. Miller, 64 Minn. 485, 67 N. W. 540.

[h, i] (Mo. 1851) The return of a constable on a warrant against a steamboat, showing that he executed it by going on board the boat and reading the same to the clerk, and by finding the sheriff in charge of her, is sufficient to give the justice jurisdiction, under the statute.—The Eureka v. Noel, 14 Mo. 513; Parkinson v. The Robert Fulton, 15 Mo. 258.

[j] (Mo. 1870) The return of a constable on an order of publication issued in an attachment proceeding before a justice, showing that the same was executed by "posting in four public places," etc., but not that it was posted 20 days before the day when defendant was obliged to appear, as required by Wag. St. p. 196, § 77, gives the justice no jurisdiction over the defendant.—McCloon v. Beattie, 46 Mo. 391.

[k] (N. Y. 1823) The return of a summons in a justice's court, "Personally served," and stating the time of such service, is sufficient.—Legg v. Stillman, 2 Cow. 418; Tuttle v. Hunt, Id. 436.

[l] (N. Y. 1842) The return to a summons served by a constable should state the time, as well as the manner, of service.—Bromley v. Smith, 2 Hill, 517.

[m] (N. Y. 1849) To give a justice jurisdiction, there must be a return showing personal service of process, and an entry on the justice's docket. "Sept. 1, sums. 2 pers., by S. B. Ward const. 11, pltff. appears," furnishes no evidence of such personal service.—Manning v. Johnson, 7 Barb. 457.

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[n] (N. Y. 1850) Where, in a suit before a justice, a constable returns a summons "Served by copy" only, the return will not be held, when collaterally before the court, to be so far defective as to amount to a jurisdictional defect.—Foster v. Hazen, 12 Barb. 547.

[o] (N. Y. 1851) An officer is not required to state in his return to a justice's process what in particular he did to constitute the service he returns, but it will be presumed he did all the law requires.—Van Kirk v. Wilds, 11 Barb. 520.

[p] (N. Y. 1852) Where a summons is issued by a justice of the peace, a return showing proper service on one defendant is sufficient, without negative additions explaining how the summons was served, or why it was not served, on the others.—Fogg v. Child, 13 Barb. 246.

[q] (N. Y. 1857) A constable brought a summons to the justice who issued it, and stated that he had made personal service of it on defendant, and asked the justice to write his return on it; and the justice, in the presence of the constable, wrote a return, but no name was signed. *Held*, under 2 Rev. St. p. 228, § 16, providing that the constable serving summons shall return thereon in writing the time and manner in which he executed the same and sign his name thereto, that the return was invalid.—Reno v. Pinder, 24 Barb. 423, judgment reversed (1859) 20 N. Y. 298.

[r] (N. Y. 1863) Where a summons is directed to any constable of the proper county, a return thereon, indorsed that the same was personally served by A. B., constable, is sufficient. This is clearly to the effect that the summons was served by a constable of that county, and the justice is bound to recognize it, without further proof. The constable being a public officer, acting under oath, the return itself affords presumptive evidence of the fact that the person certifying the service was a constable of the county.—Potter v. Whittaker, 27 How. Prac. 10.

[s] (N. Y. 1875) The return of a copy of a justice's court summons: "Served. Copy left the ninth day of February, 1869,"—there being no statement that the defendant could not be found, was not sufficient to show a legal service, or to authorize the justice to proceed in the action, in the absence of the defendant.—Sperry v. Reynolds, 65 N. Y. 179.

[t] (N. Y. 1891) A certificate of a constable that the written summons and complaint were personally served on defendant at a specified time and place, by delivery to him of copies thereof, is not a sufficient compliance with Laws 1881, c. 414, § 1, which requires service of summons in a justice's court to be served on defendant by "delivery to and leaving with him personally true copies thereof"; the certificates being defective in not stating that the constable left with defendant the copies of the complaint and summons delivered by the constable to defendant.—Syracuse Moulding Co. v. Squires, 61 Hun, 48, 15 N. Y. Supp. 321, 21 Civ. Proc. R. 58, reversing (1890) 19 Civ. Proc. R. 241, 13 N. Y. Supp. 547, and following McMullin v. Mackey (1889) 53 Hun, 638, 6 N. Y. Supp. 885.

[u] (N. Y. 1891) A constable's return of a summons in a justice's court, which shows that it was served in the same town as that in which the venue was laid in the summons, but does not state that either party was a resident of the county in which the action was brought, sufficiently shows jurisdiction in the justice, under Code Civ. Proc. § 2869, subd. 3, which provides that an action against a nonresident of the county may be brought before a justice of the town in which he (defendant) is at the time of the commencement of the action.—Syracuse Moulding Co. v. Squires, 61 Hun, 48, 15 N. Y. Supp. 321, 21 Civ. Proc. R. 58.

[uu] (Or. 1887) Where the return on a summons in forcible entry and detainer does not show that a copy of the complaint, certified as required by statute, was served on the defendant, the service is insufficient to warrant a judgment by default. Whether the statute has been complied with is to be determined by the officer's return.—Belfils v. Flint, 15 Or. 158, 14 Pac. 295.

[v] (Pa. 1872) The return of the service of summons in an action before a justice must show clearly and accurately the manner of the service.—City of Philadelphia v. Cathcart, 6 Leg. Gaz. 1.

[vv] (Pa. 1873) A return of a justice's summons, "Served by serving a copy of original summons on defendant," is not sufficient, as the return must show the manner of the service.—City of Philadelphia v. Cathcart, 31 Leg. Int. 4.

[w] (Pa. 1874) To hold nonresident defendants by service of a justice's summons on an alleged agent, the return of the officer must show that he complied with the act by serving the summons at the usual place of business or residence of such agent.—Yeich v. Peterson, 2 Leg. Chron. 269.

[ww] (Pa. 1879) Where the return of a justice's summons appears on the record to have been simply acknowledged by the officer serving it, and not to have been made on oath or affirmation, the return is defective, and judgment rendered thereon is invalid.—Starch v. Snyder, 1 Leg. Rec. 172.

[x] (Pa. 1880) A return to a justice's summons, "Served personally on the within named party," is bad; and where the defendant does not appear, and judgment is rendered against him by default, the proceedings will be set aside.—Commonwealth v. Savery, 1 Chest. Co. Rep. 179.

[xx] (Pa. 1882) The provisions of Act 1810, § 6, requiring return of service of a justice's summons to be on oath or affirmation, apply to a proceeding against a constable for not returning an execution under section 12 of the same act.—Adler v. Patrick, 1 Chest. Co. Rep. 465.

[y] (Pa. 1887) The return of an officer serving a summons from the justice court upon an agent of a corporation should state the name of the agent.—Singer v. Singer Mfg. Co., 2 Pa. Co. Ct. R. 578.

[yy] (S. C. 1877) The return of a constable on a summons in an action in a trial justice's court, showing service by leaving a copy at the defendant's "most notorious place of residence," he being absent at the time, is proof of a sufficient service.—Henneman v. Thomson, 8 S. C. (8 Rich.) 115.

[z] (S. C. 1880) Where the record of a case decided by a trial justice showed that the following indorsement had been made on the original summons: "Served in person by Calvin Josey, May 7, 1877. Distance, eighteen miles for each." *Held*, that it failed to show that the defendant had been served with process.—State v. Cohen, 13 S. C. 198.

[zz] (Wis. 1857) The return of a person serving a summons in place of an officer under the appointment of a justice need not be verified by affidavit.—Betts v. Stevens, 6 Wis. 398.

3. DEFECTS, OBJECTIONS, AND AMENDMENTS.

DEFECTS AND OBJECTIONS, WAIVER, AND CURE, § 264.
AMENDMENT OR ALTERATION, § 265.

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§ 264. Defects and objections, waiver, and cure.

Appearance as waiving defects in process, see post, §§ 273, 274.

Collateral attack on judgment for defects in process, see post, § 411.

[a] (Ark. 1881) A justice's summons, erroneously directed to the coroner for service, is not void, but voidable.—McCabe v. Payne, 37 Ark. 450.

[b] (Ark. 1886) Failure to make proof of publication in the form prescribed by law of a warning order to appear before a justice of the peace cannot be taken advantage of in a collateral proceeding.—Webster v. Daniel, 47 Ark. 131, 14 S. W. 550.

[c] (Ind. 1847) In a suit before a justice of the peace, the summons was returnable on the 6th of June, and was served on the 4th of that month. Defendant moved for a dismissal of the suit, on the ground of insufficient service, and, this being overruled, moved for and obtained a continuance. *Held*, that by moving for and obtaining said continuance, defendant waived the objection as to the service of the summons.—Thayer v. Dove, 8 Blackf. 567.

[d] (Ind. 1859) Under Code 1852, making it the duty of a justice of the peace before whom a suit is brought, where there is a want of sufficient service which is not waived by consent, to continue the cause, though, on such service, judgment by default cannot be rendered against a party till the statutory time of notice has expired, still it operates to inform him of the pendency of the suit, and he is bound to take notice of the subsequent action of the court therein.—Michigan Southern & N. I. R. Co. v. Shannon, 13 Ind. 171.

[e] (Ind. 1864) Where, in a suit brought in a justice's court, the defendant makes a special appearance, and moves that the case be dismissed, on the ground of insufficient service, and the justice overrules the motion, but continues the cause for 28 days, and the defendant is then defaulted, he is not entitled, on appeal to the circuit court and renewal of his motion, to have it granted; the continuance giving him sufficient notice.—Toledo & W. R. Co. v. Talbert, 23 Ind. 438.

[f] (Iowa, 1854) Where a notice of action in a justice court does not satisfy the requirements of Code 1851, §§ 2272–2274, prescribing the requisite of notices in such actions, the justice acquires no jurisdiction.—Milbourn v. Fouts, 4 G. Greene, 346.

[g] (Iowa, 1855) By answering without objection before a justice, defects in the service of the notice are waived.—Houston v. Walcott, 1 Iowa (1 Clarke) 86.

[h] (Kan. 1890) Where a summons is issued by a justice of the peace, and served by a constable, by leaving a true copy, with all the indorsements thereon, at the usual place of residence of the defendant, the failure of the officer to make a certificate that such copy is a true copy of the original summons, renders such service voidable only, and not void.—Friend v. Green, 43 Kan. 167, 23 Pac. 98.

[i] (Mich. 1878) After a defendant has pleaded to the merits, he cannot move for a dismissal of the case because the constable so amends his return as to show the service to have been insufficient.—Slattery v. Hilliker, 39 Mich. 573.

[j] (Mich. 1890) Where the officer serving a summons is unable to find defendant, and fails to leave copies at defendant's last place of residence, as required by How. Ann. St. §§ 6827, 6841, respectively, or to return that there was no such last place of residence in the county, the justice before whom the action is brought does not acquire jurisdiction.—Segar v. Muskegon Shingle & Lumber Co., 81 Mich. 344, 45 N. W. 982.

[k] (Mich. 1894) Any objection in a justice court to the sufficiency of the declaration constitutes a general demurrer, and waives defects in the return of the officer to the summons.—Stevens v. Harris, 99 Mich. 230, 58 N. W. 230.

[l] (Minn. 1884) In replevin before a justice of the peace, defendant, by answering without objecting to defects in the process waives such objections.—McKee v. Metraw, 31 Minn. 429, 18 N. W. 148.

[m] (N. H. 1853) In debt on a judgment, exception cannot be taken because the writ in the original action was not signed by the justice.—Nichols v. Smith, 26 N. H. (6 Post.) 298.

[n] (N. Y. 1823) Though the process in a suit before a justice of the peace under the $25 act be for $25 only, and the declaration recites a larger sum, the variance is immaterial.—Dennison v. Collins, 1 Cow. 111.

[o] (N. Y. 1844) Where the summons was against L. and V., but was not served on V., and the declaration was against L. alone, who pleaded the general issue, such plea amounted to a waiver of the irregularity.—Leggett v. Raymond, 6 Hill, 639.

[p] (N. Y. 1852) A defect in the form of a justice's summons cannot be objected to by the defendant, after having pleaded and gone to trial on the merits.—Bray v. Andreas, 1 E. D. Smith, 387.

[q] (N. Y. 1857) Where the return of a summons issued by a justice of the peace was invalid, the justice acquired no jurisdiction.—Reno v. Pinder, 24 Barb. 423, judgment reversed (1859) 20 N. Y. 298.

[r] (N. Y. 1857) The objection that a short summons has been issued where a long one was the only proper process is not waived by pleading to the merits after objection has been made and overruled.—Belden v. New York & H. R. R. Co., 15 How. Prac. 17.

[s] (N. Y. 1858) An objection that a nonresident could sue only by short summons on giving security for costs is waived, if not taken before judgment, where there was an appearance by defendant.—Haulenbeck v. Gillies, 2 Hilt. 238.

[t] (N. Y. 1859) Nonimprisonment Act (Laws 1831, c. 300) § 33, prescribes a short summons as the only process by which a nonresident can be sued in a justice's court, and provides that otherwise the justice shall have no jurisdiction. *Held* that, where the process did not comply with the statute, the defect of jurisdiction was not waived by defendant's failure to appear and object to the form of process.—Willius v. Wheeler, 28 Barb. 669, 8 Abb. Prac. 116, 17 How. Prac. 93.

[tt] (N. Y. 1862) Where process has been defectively served, the defendant cannot come into court and by plea or answer set up such defect or want of service to defeat the action, but may by affidavit show the error and ask a dismissal of the proceedings; and, if the justice disregards his objection, he may, on appeal from the judgment, have a review of the question and obtain the relief denied him.—Waring v. McKinley, 62 Barb. 612.

[u] (N. Y. 1892) The provision of Code Civ. Proc. § 2877, that in actions before a justice of the peace the summons must be returnable at a time therein specified, not less than 6 nor more than 12 days after the date when issued, is not jurisdictional, and a defendant, in order to avail himself of any irregularity of such

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kind, must appear before the justice and there make objection.—Lindsay v. Tansley, 63 Hun, 635, 18 N. Y. Supp. 317.

[uu] (N. C. 1888) Where a justice's summons to answer a complaint for the detention of a mule does not specify its value, the defect is not cured by an affidavit stating the value to be about the amount to which the justice's jurisdiction is limited.—Leathers v. Morris, 101 N. C. 184, 7 S. E. 783.

[v] (N. C. 1893) Though a summons issued by one justice of the peace cannot be made returnable before another justice, except as is specially provided by statute in certain cases, where defendant proceeds to trial without objection, the justice before whom it is made returnable acquires jurisdiction.—Cherry v. Lilly, 113 N. C. 26, 18 S. E. 76.

[vv] (Pa. 1861) Where a nonresident has been sued before a justice of the peace with a long summons, instead of a short summons, as required by Act July 12, 1842, § 26, he is not estopped by acceptance of service from setting up want of jurisdiction in the justice in case no appearance has been made.—Fulmer v. Kinney, 5 Pa. Co. Ct. R. 426.

[w] (Pa. 1888) A nonresident defendant, having been sued before a justice with a long summons, instead of a short summons, as required by Act April 6, 1842, § 26, is not estopped by acceptance of service from setting up want of jurisdiction in the justice in case no appearance has been made.—Fulmer v. Kinney, 5 Pa. Co. Ct. R. 426; Myers v. Stauffer, Id. 657.

[ww] (S. C. 1888) The failure of a trial justice to sign the original summons is cured by the written acceptance of a copy of the summons.—Benson v. Carrier, 28 S. C. 119, 5 S. E. 272.

[x] (Tex. 1884) An answer to the merits in justice court is a waiver of, and cures, whatever defects there may have been in the citation or in its service.—Fulton v. Thomas, 2 Willson, Civ. Cas. Ct. App. § 243.

[xx] (Vt. 1845) In trespass on a freehold before a justice of the peace, the writ will abate, if made returnable in the town where the land lies, if neither of the parties resides in that town.—June v. Conant, 17 Vt. 656.

[y] (Vt. 1847) If an attorney make a writ, and indorse his name on it as attorney for the plaintiff, and also sign the writ as justice of the peace, and, for want of a proper officer seasonably to be had, direct the writ to an indifferent person, by whom it is served, the process will abate.—Ingraham v. Leland, 19 Vt. 304.

[yy] (Vt. 1847) If the attorney who makes the writ signs it as justice of the peace, and takes a recognizance for costs, the process is abatable.—Ingraham v. Leland, 19 Vt. 304.

[z] (Vt. 1848) An objection, in an action commenced before a justice of the peace, that the writ was not made returnable in the town in which one of the parties resides, is matter of abatement, which, if not pleaded at the first appearance before the justice, is waived.—University of Vermont v. Joslyn, 21 Vt. 52.

[zz] (W. Va. 1887) If the summons in a case before a justice states a legal cause of action, and is in other respects sufficient, the justice ought not to quash it because it states two or more causes of action.—Fouse v. Vandervort, 30 W. Va. 327, 4 S. E. 298.

§ 265. Amendment or alteration.

Amendment on appeal, see post, § 681.

[a] (Ga. 1855) The officer may amend his return on a justice's court summons after judgment.—Freeman v. Carhart, 17 Ga. 348.

[b] (Ga. 1877) The fact that the summons in an action of account in the justice's or the county court does not have annexed to it a copy of the account sued on is not ground for dismissal, since the summons is amendable in that particular.—Woods v. Johnson, 58 Ga. 138.

[c] (Ga. 1886) Where a summons from a justice's court, which by Code, § 4139, is required to be addressed to a constable, and to command defendant to appear at the place of trial, is addressed to defendant, whose name does not appear on its face, but is elsewhere on the paper, the defects therein are amendable.—Telford v. Coggins, 76 Ga. 683.

[d] (Ill. 1875) Under Gross' St. 1872, p. 238, § 38, authorizing a justice of the peace to amend the summons so that it will conform to the names of the parties, a request for an amendment need not be made in writing.—Wadhams v. Hotchkiss, 80 Ill. 437.

[e] (Mass. 1854) A writ, made on the 26th of April, 1853, but bearing date of the 26th of May, 1853, returnable before a justice of the peace "on the 7th day of May next," and entered on the 7th of May, 1853, may be amended, by leave of the justice, after the appearance of the defendant, by substituting the true date.—McIniffe v. Wheelock, 67 Mass. (1 Gray) 600.

[f] (Mass. 1862) A justice of the peace may allow an amendment of a writ returnable before him, before trial, reducing the ad damnum to a sum which will bring the case within his jurisdiction, if he has jurisdiction of the parties and subject-matter.—Hart v. Waitt, 85 Mass. (3 Allen) 532.

[g] (Mass. 1870) A justice of the peace may fix the day when a writ shall be returned before himself, by altering the return day of the writ in the hands of the officer before service, without violation of a prohibition (Gen. St. c. 120, § 53) against being "concerned in the institution" of a suit before himself.—Lapham v. Locke, 103 Mass. 555.

[h] (Mich. 1872) Under Comp. Laws, § 421, prohibiting any sheriff from drawing or filling up any writ, a sheriff's alteration of the teste and return day of a justice's summons, though by the justice's authority, renders the writ void.—Garrison v. Hoyt, 25 Mich. 509.

[i] (Mich. 1885) After judgment in a justice's court, service of notice of motion to amend the return to the writ, made on a person not specially authorized by defendant to be his attorney or agent for such judgment, does not give the justice jurisdiction of the motion.—Clark v. McGregor, 55 Mich. 412, 21 N. W. 866.

[j] (Mich. 1890) A judgment of a justice of the peace, offered in evidence in the circuit court, cannot be amended at that time by the justice, then in court, by indorsing on the summons, which was not served by an officer, that it was served by "any competent person," as required by How. Ann. St. § 6827.—King v. Bates, 80 Mich. 367, 45 N. W. 147, 20 Am. St. Rep. 518.

[k] (Mo. 1893) A town marshal, appointed by a justice as a special constable to serve a writ, cannot amend his return as special constable, to show that he acted as town marshal.—Mitchell v. Shaw, 53 Mo. App. 652.

[l] (Mo. 1895) A constable can amend a return so as to make it conform to the facts, with the permission of the justice in whose court the records remain.—Cassidy Bros. Commission Co. v. Estep, 63 Mo. App. 540, 1 Mo. App. Rep'r, 506.

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[m] (N. J. 1880) An omission in a summons to describe a justice of the peace as of the county for which he is elected may be amended under section 112 of the small cause act.—Drake v. Berry, 42 N. J. Law (13 Vroom) 60.

[n] (N. Y. 1883) Under 2 Rev. St. p. 424, § 1, providing that the court in which any action shall be pending shall have power to amend any process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, at any time before judgment rendered therein, a summons in a justice's court at the suit of several plaintiffs may be amended, after the return of the same, by changing the Christian name of one of the plaintiffs.—Brace v. Benson, 10 Wend. 213.

[o] (N. Y. 1847) A justice of the peace is authorized to amend the date and return of a summons, after it has been served.—Arnold v. Maltby, 4 Denio, 496.

[p] (N. Y. 1856) A justice has authority to allow the constable to amend his return; and this power is not lost by the defendant, after an unsuccessful objection to the jurisdiction, refusing to appear.—Perry v. Tynen, 22 Barb. 137.

[q, r] (N. Y. 1856) Code, § 173, allowing amendments to a constable's return, as well after as before judgment, is in addition to 2 Rev. St. p. 429, § 1, allowing amendments to be made at any time before judgment, and both remain in force.—Perry v. Tynen, 22 Barb. 137.

[s] (N. Y. 1864) A justice of the peace cannot amend a summons issued out of his court, by correcting the name of the defendant therein, after service of the summons, and when the defendant has not appeared.—Hoffman v. Fish, 18 Abb. Prac. 76.

[t] (N. Y. 1865) A justice of the peace has power to amend a summons, by correcting the year named in it, after the parties have appeared in the cause, where no objection is taken to the summons, and no motion is made to quash the proceedings on account of the error.—Bradbury v. Van Nostrand, 45 Barb. 194.

[u] (N. Y. 1880) Where a justice certified that he issued and delivered a summons on the 23d day of January, and the constable in his return certified that he served it on the 3d day of January, on affidavit that the constable inadvertently omitted the figure "2," the justice could amend the return before or after judgment.—Snyder v. Schram, 59 How. Prac. 404.

[v] (N. Y. 1890) Code Civ. Proc. § 723, which provides that, in pursuance of justice, a court may, at any stage of the action, amend any process by correcting a mistake in the name of a party, does not authorize the court to correct a mistake as to defendant's name in the summons, unless it has in some way obtained jurisdiction of his person; and where a summons issues from justice's court against defendant by a wrong name, and he does not appear, the judgment against him is void, though before its rendition the summons was so amended as to give his true name.—McGill v. Weil (Co. Ct.) 10 N. Y. Supp. 246, 19 Civ. Proc. R. 43.

[w] (N. C. 1886) The justice of the peace has power to make such amendments to the summons as will show the action to be within the jurisdiction of the court where it originated.—Singer Mfg. Co. v. Barrett, 95 N. C. 36.

[x] (N. C. 1893) Where the original summons in an action before a justice to recover personalty fails to state the value, the justice may allow an amendment, under Code, § 840, rule 9, or section 908, giving him power to amend any warrant, process, pleading, or proceeding, either in form or substance, or under section 273, permitting an amendment inserting other allegations material to the case.—Cox v. Grisham, 113 N. C. 279, 18 S. E. 212.

[y] (Pa. 1891) Defendant testified that a material interlineation in a summons was made after service; the justice of the peace who tried the case testified to the contrary; and the constable was unable to say whether it was so made or not, but stated that the words in dispute were in the execution. The execution showed on its face that the constable was mistaken. *Held*, that the interlineation must be presumed to have been made before service.—Fitzgerald v. Campbell (Com. Pl.) 10 Pa. Co. Ct. R. 396.

[yy] (Pa. 1892) Where a summons was served on the treasurer of a corporation, but in the return he is described as clerk, and the justice, on being informed of the fact, substitutes the word "treasurer" for "clerk," it is not such an irregularity as to call for reversing the judgment.—Albert Lewis Lumber & Mfg. Co. v. Ruggles (Com. Pl.) 2 Pa. Dist. R. 34.

[z] (Vt. 1847) The county court has no power to permit the magistrate who signed the original writ to amend the direction, after the case has been entered in court, by inserting therein the statute reasons for making a special authorization to serve; and the affidavit of the magistrate that he omitted the requisite matter by mistake can have no effect.—Dolbear v. Hancock, 19 Vt. 388.

[zz] (Wis. 1865) In a justice's court, as in a court of record, the sheriff may be permitted, either before or after judgment, to amend his return to the summons according to the facts.—Bacon v. Bassett, 19 Wis. 45.

(E) APPEARANCE AND REPRESENTATION BY ATTORNEY, ARREST, AND BAIL.

WHAT CONSTITUTES APPEARANCE IN GENERAL, § 266.
OPERATION AND EFFECT IN GENERAL, § 267.
WAIVER OF DEFECTS IN GENERAL, § 268.
WAIVER OF OBJECTIONS TO JURISDICTION OVER AMOUNT INVOLVED, § 269.
WAIVER OF DISQUALIFICATION OF JUSTICE, § 270.
WAIVER OF OBJECTIONS TO PLACE OF BRINGING SUIT, § 271.
WAIVER OF PROCESS OR NOTICE, § 272.
WAIVER OF DEFECTS IN PROCESS OR NOTICE, § 273.
WAIVER OF DEFECTS IN SERVICE OR RETURN OF PROCESS, § 274.
WAIVER OF IRREGULAR ADJOURNMENTS, § 275.
WITHDRAWAL, STRIKING OUT, AND FAILURE TO APPEAR, § 276.
REPRESENTATION BY ATTORNEY OR THIRD PERSON, § 277.
—— AUTHORITY, § 278.
ARREST AND BAIL, § 279.

Appearance in attachment proceeding, see post, § 289.
—— *in garnishment proceeding, see* post, § 297.
—— *to sustain judgment, see* post, § 375 [f].
—— *to sustain judgment by default, see* post, § 383.
—— *to sustain judgment on confession, see* post, § 380.
Showing appearance of record, see ante, § 214.

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§ 266. What constitutes appearance in general.

Appearance by attorney as appearance of party, see post, §§ 277, 278.

—— *in attachment suit, see* post, § 289.

[a] (Del. 1842) A defendant, in an action before a justice of the peace, asked a postponement, and by letter put in a plea of the general issue, but declined appearing in person. *Held*, that this was an appearance, so as to authorize a judgment or hearing.—Davis v. Rees, 3 Har. 490.

[b] (Kan. 1894) An appearance by defendant after judgment in justice court by motion to set aside such judgment as void for want of service is not a general appearance.—Shaw v. Rowland, 32 Kan. 154, 4 Pac. 146.

[c] (Kan. 1894) An appearance before a justice to contest a summons and the service, and to dismiss the action, is not a general appearance.—Downing v. W. J. Gow & Bros. Mortg. Inv. Co., 53 Kan. 246, 36 Pac. 335.

[d] (Mich. 1892) A written request by plaintiff, presented to a justice of the peace at the time the writ was returnable, to continue the case, constitutes an appearance on his part, and gives the justice jurisdiction to act.—Wagner v. Kellogg, 92 Mich. 616, 52 N. W. 1017.

[e] (Mo. 1883) Where, in an action brought before a justice, neither party was a resident of the county, defendant's taking out subpœnas for witnesses and moving for security for costs, preliminary to a motion to dismiss for want of jurisdiction, does not constitute an appearance sufficient to confer jurisdiction on the justice, even admitting that it could be conferred by consent.—Smith v. Simpson, 80 Mo. 634.

[f] (Neb. 1895) A motion by defendant in a justice court for a retaxation of costs constitutes a general appearance.—Dryfus v. Moline Milburn & Stoddard Co., 43 Neb. 233, 61 N. W. 599.

[g] (N. Y. 1870) Where a short summons is issued from a justice under the act of 1831, and returned not personally served, and the defendant appears in person to object to the sufficiency of the affidavit, such appearance is not a general appearance, and does not confer jurisdiction.—Stevens v. Benton, 39 How. Prac. 13.

[h] (N. Y. 1895) Defendant in civil action, who is brought before justice under warrant of arrest, does not voluntarily appear in action.—Ramsay v. Robinson, 86 Hun, 511, 33 N. Y. Supp. 910.

[i] (Wash. 1889) Code, § 1755, provides that the parties to an action in a justice's court, shall be entitled to one hour in which to appear, after the time mentioned in the notice for appearance. Section 72 provides that "a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him." *Held*, that a defendant must, in person or by attorney, give notice of his appearance within an hour of the time set for trial, and a mere corporal presence of defendant or his agent at the place of trial, within the hour, is not sufficient.—McCoy v. Bell, 1 Wash. St. 504, 20 Pac. 595.

§ 267. Operation and effect in general.

Appearance before justice taking cause on change of venue, see ante, § 240.

—— *in circuit court after removal from justice, see* ante, § 244 [w].

[a] (U. S. 1860) An appearance by an agent of the owner and a defense of the suit by him will not give to the justice jurisdiction of a claim against a vessel, where the verified complaint required by statute, setting out the plaintiff's demand in all particulars, is not complied with.—The G. H. Montague, Fed. Cas. No. 5,377 [4 Blatchf. 461].

[b] (U. S. 1880) Where plaintiff's affidavit of value of chattels sought to be recovered in a justice's court was an essential prerequisite to the attaching of jurisdiction of the subject-matter, the failure to make the affidavit was not waived by defendant's appearing and not taking the objection.—Dailey v. Doe (D. C.) 3 Fed. 903.

[c, d] (Ark.) Where a defendant has appeared before a justice of the peace, he cannot, on appeal after a trial upon the merits, claim that the justice had not jurisdiction of his person.—(1867) Sykes v. Laferry, 25 Ark. 99; (1887) Wheeler & Wilson Mfg. Co. v. Donahoe, 49 Ark. 318, 5 S. W. 342.

[e] (Ind. 1865) Where the justice before whom a cause was tried had jurisdiction of the subject-matter of the suit, and the parties appeared and submitted without objection to the jurisdiction over their persons, an objection to the jurisdiction will not be heard on appeal.—Vanschoiack v. Farrow, 25 Ind. 310.

[f, g] (Ind. 1885) Where a person appears before a justice, and goes to trial without pleading to the jurisdiction, he waives all question as to jurisdiction over his person, and no such question can be raised by motion to dismiss.—Day v. Henry, 104 Ind. 324, 4 N. E. 44.

[h] (Mich. 1880) A general appearance before a justice of the peace by defendant in attachment cannot be considered a submission to the jurisdiction, when taken in connection with defendant's motion to dismiss the writ for want of proper service.—Michels v. Stork, 44 Mich. 2, 5 N. W. 1034.

[i] (Mich.) An appearance by attorney before a justice of the peace for the sole purpose of presenting an objection for all the defendants will not authorize the justice to receive evidence to prove the guilt of the objecting defendant with the others of an alleged joint conversion, and to award judgment against her.—(1880) McLean v. Isbell, 44 Mich. 129, 6 N. W. 210; (1881) Monroe v. Heintzman, 46 Mich. 12, 8 N. W. 571.

[j] (Mich. 1894) Any objection in a justice court to the sufficiency of the declaration constitutes a general demurrer, and gives the court jurisdiction.—Stevens v. Harris, 99 Mich. 230, 58 N. W. 230.

[k] (Minn. 1881) The term of office of a justice of the peace before whom an action had been commenced by summons expired before the return day of the summons. On the return day the parties appeared before the successor of the justice who issued the summons to whom the docket had been delivered, as required by law, and filed a complaint and answers, and the cause was then adjourned on defendant's motion. *Held*, that defendant consented to the jurisdiction of the new justice, within Gen. St. 1878, c. 65, § 10, providing that "actions may be instituted before a justice of the peace, either by the voluntary appearance and agreement of the parties or by the usual process."—Anderson v. Hanson, 28 Minn. 400, 10 N. W. 429.

[l, m] (Minn. 1886) The special appearance of a defendant in an action before a justice of the peace for the purpose of objecting to the jurisdiction of the justice over his person, and his presence in court when the case is tried, cannot constitute a submission to the jurisdiction.—Higgins v. Beveridge, 35 Minn. 285, 28 N. W. 506.

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[n, o] (Mo. 1859) When a justice has jurisdiction over the subject-matter, the appearance of the defendant and his consent to a continuance are a waiver of any objection to the jurisdiction of the person.—Bohn v. Devlin, 28 Mo. 319.

[p] (Neb. 1892) Defendant, by appearing before a justice and moving to set aside his default, submitted himself to the jurisdiction of the court and waived all objections to the jurisdiction over his person.—Leake v. Gallogly, 34 Neb. 857, 52 N. W. 824.

[q] (Neb. 1895) A motion by defendant in a justice court for a retaxation of costs, being a general appearance, waives objections to jurisdiction over him.—Dryfus v. Moline, Milburn & Stoddard Co., 43 Neb. 233, 61 N. W. 599.

[r] (N. Y. 1811) The appearance of the defendant, and going to trial before a justice, will not give him jurisdiction, where there is none in law.—Low v. Rice, 8 Johns. 409.

[s] (N. Y. 1851) Though a justice has no jurisdiction of a suit against a foreign corporation, such corporation may confer jurisdiction by appearing and answering without objecting to the want of jurisdiction.—Paulding v. Hudson Mfg. Co., 3 Code Rep. 223.

[t] (N. Y. 1859) Where proceedings were begun before one justice, and adjourned to his private office outside of his district, at which place by consent of parties, the justice being absent, the parties submitted the case on the pleadings to another justice, it not appearing by the return that the first justice was absent from or unable to attend at his usual place of holding court, the latter did not acquire jurisdiction by appearance to try the case at the adjourned time and place, as the absence of the first amounted to a discontinuance.—Reed v. Warth, 2 Hilt. 281.

[u] (N. Y. 1869) Laws 1831, c. 300, §§ 37, 38, relating to attachments, provides that, if the attachment shall be returned personally served on defendant, the justice shall on the return day proceed to hear, etc., and that if, at the return day, it appear by the return that property was attached, and a copy of the inventory and attachment was not personally served, and defendant shall not appear, plaintiff may take out a summons against defendant, and if such summons be returned that defendant cannot be found after diligent inquiry, or that the same has been personally served on defendant, in either case the justice shall proceed to hear, etc., as upon a summons returned personally served. *Held* that, where defendant does not on return of summons, appear specially and object to the irregularity of the attachment proceedings, and claim that jurisdiction has not been obtained, but appears generally and voluntarily joins issue in the action on the merits, he confers jurisdiction, if it has not been previously acquired.—Stevens v. Benton, 2 Lans. 156.

[v] (Ohio, 1876) A justice of the peace, pending a civil action before him, resigned, and transferred his docket, papers, etc., to the nearest justice of the township. The parties to the action appeared before the latter justice and agreed on a day for the trial. The defendant also demanded a jury, which was accordingly awarded him. *Held* a waiver of all objection to the jurisdiction of the justice.—Pittsburg, C. & St. L. Ry. Co. v. Fleming, 30 Ohio St. 480.

[w] (Ohio, 1878) Where, in an action before a justice of the peace, defendant, instead of objecting to the court's jurisdiction before appearance, appears and makes such objection, and also pleads payment and the general issue, he waives the objection as to jurisdiction and submits thereto.—Miller v. Creighton, 7 Ohio Dec. 602, 4 Wkly. Law Bul. 139.

[x] (Utah, 1896) If a defendant appears in justice court in obedience to the summons, and consents to proceed with the trial, he waives any objection he may have based on the justice's want of jurisdiction over his person.—Kuhn v. Mount, 13 Utah, 108, 44 Pac. 1036.

[y] (Wash. 1890) Defendant appeared before a justice, and asked for a continuance for one day, which was granted, and on the next day he appeared specially and objected to the jurisdiction for certain irregularities. *Held*, that his appearance had not conferred jurisdiction.—Nelson v. Campbell, 1 Wash. St. 261, 24 Pac. 539.

§ 268. Waiver of defects in general.

In garnishment proceeding, see post, § 297 [y].

[a] (Ariz. 1894) Illegality in the justice's proceedings is not waived by special appearance to object to the jurisdiction, nor by answer and defense after objection overruled.—Dial v. Olsen, 36 Pac. 175.

[b] (Del. 1845) Though a justice of the peace can render judgment only on a day to which the case stands adjourned, objection cannot be taken if the parties appeared and went to trial on another day.—Lynch's Ex'r v. Hill, 4 Har. 312.

[c] (Ill. 1864) A motion to dismiss a suit commenced before a justice of the peace for obstructing a public highway, for the want of a complaint in writing, will not be granted, where the defendant has previously appeared and obtained a continuance of the cause.—Clifford v. Town of Eagle, 35 Ill. 444.

[d] (Ind. 1861) In replevin before a justice, any defects in the affidavits are cured by an appearance, and going to trial on the merits without objection made.—Smith v. Emerson, 16 Ind. 355.

[e] (Ind. 1891) Where a judgment rendered on default in a justice's court was set aside on motion of defendant, and on the day set for the new trial plaintiff, by her attorneys, was present and agreed to a continuance, she is deemed to have waived any objections to the order setting aside the default.—State v. Martin, 3 Ind. App. 20, 29 N. E. 164.

[f] (Iowa, 1873) Error in refusal of a justice of the peace to dismiss an action for want of prosecution is waived by defendant's subsequent appearance and motion for change of venue.—Rahn v. Greer, 37 Iowa, 627.

[g] (Kan. 1887) Where a justice of the peace made an order granting a new trial after the expiration of the five days allowed by law for such order, and plaintiff acquiesced in the decision, and submitted his cause and person to the justice's jurisdiction, and also to that of the district court, he was precluded from objecting to the jurisdiction of the justice granting the order.—Scott v. Kreamer, 37 Kan. 753, 16 Pac. 123.

[h] (Mich. 1881) Where a justice, becoming ill, directs that a suit, begun before him, be tried before another justice having jurisdiction of the subject-matter, the parties, by appearing and trying the case on its merits without objection, waive all questions of regularity, and the judgment is binding.—Smith v. St. Joseph Circuit Judge, 46 Mich. 338, 9 N. W. 440.

[i] (Minn. 1874) The failure of a justice to enter in his docket a statement of plaintiff's demand and defendant's set-off, where the pleadings are in writing, is a mere irregularity, which is waived by defendant's voluntary appearance, joinder in pleading, and going to trial on the merits.—Steinhart v. Pitcher, 20 Minn. 102 (Gil. 86).

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[j] (Mo. 1883) The requirement that, on change of venue from a justice of the peace, the papers must be sent to the nearest justice, not being jurisdictional, is waived by an appearance to the merits before the justice to whom the papers are sent.—Voigt v. Avery, 14 Mo. App. 48.

[k] (Mo. 1890) After a nonsuit on a trial before a justice of the peace, the justice, by consent of the parties, set aside the nonsuit, and the case was again tried by him, the parties voluntarily appearing at such trial. *Held*, that the judgment rendered by the justice thereon was valid, though a justice has no power to set aside a nonsuit or other judgment or grant a new trial.—State v. Boettger, 39 Mo. App. 684.

[l] (Mo. 1890) Where one of the defendants personally appeared at the trial, and another personally entered his appearance at the date of the trial, they could not complain that the justice's docket failed to show a continuance from a return day to the day of actual return five days later.—Building & Planing Mill Co. v. Huber, 42 Mo. App. 432.

[m] (Mo. 1890) A justice of the peace having no authority to set aside a judgment not rendered by default, appearance at the new trial will not confer jurisdiction.—Leith v. Shingleton, 42 Mo. App. 449.,

[n] (Neb. 1889) Judgment by default was rendered by a justice against defendant, after appearance and adjournment, which judgment was, on motion, set aside under the provisions of Civ. Code, § 1001. Defendant thereupon filed a motion for a change of venue, which was granted, the cause being sent to another justice, where both parties appeared, and on the demand of the plaintiff a jury trial was had on the merits. *Held* that, by the appearance and trial before the second justice, the plaintiff waived whatever error was committed by the first justice in setting aside the judgment and granting a new trial.—Dawson v. Welsh, 25 Neb. 626, 41 N. W. 549.

[o] (N. Y. 1823) Where a cause has been discontinued by reason of the justice's nonattendance at the adjourned day, the parties may confer jurisdiction by appearing and going to trial on another day agreed on.—Stoddard v. Holmes, 1 Cow. 245.

[p] (N. Y. 1848) In a justice's court, where defendant pleaded puis darrein continuance an agreement to submit to arbitration the matters in controversy, the fact that defendant appeared on the trial after the plea was overruled by the justice will not be taken as a waiver by defendant of the discontinuance of the suit.—Ressequie v. Brownson, 4 Barb. 541.

[q] (N. Y. 1856) A justice who had adjourned a case until 11 o'clock of a certain day, thinking that the hour of adjournment was 10 o'clock, by mistake gave judgment against the defendant, who having subsequently appeared, the default was taken off, and the case was tried on its merits. *Held* that, if there was any irregularity in these proceedings, it was waived by the action of the defendant, and the judgment was affirmed.—Scranton v. Levy, 1 Hilt. 261, 4 Abb. Prac. 21.

[r] (Ohio, 1894) Where, in replevin, a justice of the peace has jurisdiction of the subject-matter and of defendant, and the latter appears, and gives a redelivery bond, and proceeds to trial on the merits, the justice is not deprived of jurisdiction because the affidavit filed by plaintiff does not contain certain allegations required by statute.—Gaiser v. Heim, 8 Ohio Cir. Ct. R. 120.

[s] (Pa. 1842) Irregularities are waived by appearance and confession of judgment.—Quay v. Kuckner, 3 Pa. Law J. 307.

[t] (Pa. 1844) Though the affidavit made and bonds executed by the plaintiff under Act July 12, 1842, § 27, in order to secure an attachment, are defective, the defendant waives the irregularity by appearing and confessing judgment.—Quay v. Kuckner, 2 Clark, 79.

[u] (Pa. 1868) Defendant's appearance at the hearing before the justice in a qui tam action waives the want of an information.—Adams v. Commonwealth, 1 Woodw. Dec. 417.

[v] (Tex. 1857) Where, in an action on a note, the justice issued a distress warrant, no bond being given nor affidavit made until after such issue, and defendant appeared and made no objection, but by agreement of parties the matter was submitted to arbitrators, and on their award in plaintiff's favor execution issued, defendant could not maintain trespass against the justice for the improper issuance of the distress, having waived the right by his appearance and submission.—Mabry v. Little, 19 Tex. 337.

[w] (Tex. 1870) Appearing and defending on a new trial without objection is a waiver of any irregularity in the proceedings of the justice granting it.—McHam v. Gentry, 33 Tex. 441.

[x] (Wis. 1860) Complaint before a justice for seaman's wages was signed, "H. T.," and the jurat was added: "Subscribed and sworn to before me, this," etc. "J. H. H., Just. of Peace." *Held*, that any defect in this verification, if it were defective, was cured by the appearance of the master, and his going to trial on the merits, without objecting to the defect.—Anderson v. Morris, 12 Wis. 689.

§ 269. Waiver of objections to jurisdiction over amount involved.

[a] (Iowa, 1886) A justice of the peace does not gain jurisdiction of an action, in which the notice claims a greater sum than he has jurisdiction of, by the defendant appearing and demurring to the notice on the ground that the justice has no jurisdiction, nor by the plaintiff filing his petition, after such appearance, for an amount within the jurisdiction of the court.—Hynds v. Fay, 70 Iowa, 433, 30 N. W. 683.

[b] (Pa. 1890) Where an attachment is issued by a justice of the peace for an amount in excess of his jurisdiction, but defendant appears and makes a defense on the merits, the rest of the proceedings will be allowed to stand, though the attachment will be quashed.—Fair v. Hamlin (Com. Pl.) 9 Pa. Co. Ct. R. 8.

[c] (Tex. 1857) When the holder of a promissory note for a greater sum than $100, in order to sue in a justice's court, relinquished the excess of the note above that sum, and the defendant appeared and made no objection, defendant could not maintain trespass against the justice for want of jurisdiction, having waived the right by his appearance and submission.—Mabry v. Little, 19 Tex. 337.

§ 270. Waiver of disqualification of justice.

[a] (N. Y. 1816) A justice of the peace who keeps a tavern being disqualified from trying a cause, appearance and consent to trial before him cannot confer jurisdiction.—Clayton v. Per Dun, 13 Johns. 218.

[b] (Vt. 1836) Where a justice of the peace, interested as bail for the prosecution, continues a cause, and the parties appear at the time and place to which the cause is continued, take a trial on the merits, and interpose no objection on account of the improper continuance, they cannot afterwards move to dismiss for that reason; the irregularity being waived.—Howe v. Hosford, 8 Vt. 220.

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[c] (Vt. 1851) If, after a suit has been once continued by the justice of the peace before whom the writ is made returnable, it be again continued, in the absence of the justice, by another justice of the peace, who is related to the plaintiff within the fourth degree of consanguinity, yet if the defendant subsequently appear in the suit, and suffer a judgment to be rendered against him by consent, and appeal therefrom to the county court, it will be a waiver by him of the irregularity in the previous proceedings.—Austin v. Smith, 23 Vt. 704.

§ 271. Waiver of objections to place of bringing suit.

[a] (Colo. 1882) By appearance one may waive his right to be sued in a justice's court of the township of his residence, if the justice before whom the case is brought has jurisdiction of the subject-matter.—Denver, S. P. & P. R. Co. v. Roberts, 6 Colo. 333.

[b] (Ind. 1891) A defendant, who appears and defends an action before a justice of the peace, without first raising any question as to jurisdiction, cannot object, on appeal, that the complaint does not affirmatively show that the action was brought in the proper township.—Buck v. Young, 1 Ind. App. 558, 27 N. E. 1106.

[c] (Iowa, 1849) Under Laws 1847, p. 90, § 6, limiting the jurisdiction of justices of the peace to suits in which citizens of the county are defendants, nonresident defendants, by appearing and going to trial, do not waive the jurisdictional objection.—Chapman v. Morgan, 2 G. Greene, 374.

[d] (Iowa, 1873) After appearing, and moving for and obtaining a change of venue to another justice, it is too late for defendant to object to the jurisdiction on the ground that suit was commenced against him in another county than his residence.—Post v. Brownell, 36 Iowa, 497.

[e] (Iowa, 1876) In an action before a justice of the peace against a citizen of another county, jurisdiction is not conferred by the appearance of the defendant; and, even after such appearance, a motion to dismiss for want of jurisdiction should be sustained.—Boyer v. Moore, 42 Iowa, 544.

[f] (Mass. 1863) A defendant, who has voluntarily appeared and submitted to the jurisdiction of a justice of the peace before whom an action against him has been brought, cannot afterwards, when the case has been brought by appeal to the superior court, object to the jurisdiction of the court on the ground that the writ was served upon him, and that he lived, in another county than that in which it was returnable.—Cahoon v. Harlow, 89 Mass. (7 Allen) 151.

[g] (Miss. 1892) Under Const. 1869, art. 6, § 23, providing that "a competent number of justices of the peace * * * shall be chosen in each county by the qualified electors thereof, by districts," a provision of the town charter making the mayor ex officio justice of the peace for the whole district of which the town is a part is void as to that part of the district outside of the town, and the appearance of defendant before such justice of the peace is not a waiver of his right to raise the question in the circuit court of the jurisdiction of the justice, within Code 1880, § 2354, providing that "appeals to the circuit court shall be tried anew," unless it appears on appeal "that the suit was brought before a justice of the peace not having jurisdiction," when the suit shall be dismissed.—Heggie v. Stone, 70 Miss. 39, 12 South. 253.

[h] (N. Y. 1848) Under 2 Rev. Laws, p. 379, § 103 peremptorily requiring an action in a justice's court to be dismissed where neither party resides within the justice's district, appearing and going to trial does not confer jurisdiction.—Cornell v. Smith, 4 N. Y. Super. Ct. (2 Sandf.) 290.

[i] (Ohio, 1876) Where, in an action before the magistrate of a township, the defendants appear and file an affidavit for a continuance, such appearance waives the objection to the magistrate's jurisdiction of the persons of defendants that they are both residents of another township, and such objection cannot be made on the expiration of the continuance.—Mack v. Stephens, 7 Ohio Dec. 92, 1 Wkly. Law Bul. 104.

[j] (Tex. 1884) A plea to be sued in the county of residence comes too late when the cause has been continued by consent, since the parties by appearing gave the court jurisdiction.—McDonald v. Blount, 2 Willson, Civ. Cas. Ct. App. § 344.

§ 272. Waiver of process or notice.

In attachment suit, see post, § 289 [g].

[a] (Ark. 1839) Where one of several defendants in a justice's court is not served with process, but appears, and joins in a writ of error, he must be regarded as duly served.—Woolford v. Howell, 2 Ark. (2 Pike) 1.

[b] (Ark. 1852) In a suit before a justice of the peace, where there is no valid service on the defendant, if he appears on the return day, obtains a continuance, and on judgment against him appeals, he becomes a party to the cause.—Jester v. Hopper, 13 Ark. (8 Eng.) 43.

[c] (Ga. 1887) Under Code, § 3335, providing that appearance and pleading waive service, appearance in a justice's court, and pleading in writing to the merits, will not waive service, if want of service be likewise pleaded, since matters in abatement and in bar may be pleaded in the same answer.—Western & A. R. Co. v. Pitts, 79 Ga. 532, 4 S. E. 921.

[d] (Ill. 1873) Where the record of a case tried before a justice of the peace shows that a summons was issued and returned served, but not the manner of the service, and that the defendants appeared and went to trial, the appearance will give the justice jurisdiction, whether the summons was served or not.—Fink v. Disbrow, 69 Ill. 76.

[e] (Ill. 1873) A justice of the peace may proceed with the case as though the defendant had appeared in obedience to a summons duly issued and served, where a defendant appears in the justice's court and voluntarily submits to its jurisdiction without the issuance and service of summons.—Bliss v. Harris, 70 Ill. 343.

[f] (Ill. 1876) A voluntary appearance before a justice dispenses with process.—Hohmann v. Eiterman, 83 Ill. 92.

[g] (Ill. 1878) Where no summons is served in an action before a justice, the appearance of defendant by his attorney and taking an appeal to the circuit court supersedes the necessity of the summons.—Reynolds v. Town of Foster, 89 Ill. 259.

[h] (Ill. 1894) One who becomes defendant to a pending replevin suit, and voluntarily appears, waives the filing of an affidavit as to him, and the issue of a writ and service thereof.—Udell v. Slocum, 56 Ill. App. 216.

[i] (Kan. 1894) A special appearance before a justice to contest a summons and the service, and to dismiss the action, is not a waiver of service.—Downing v. W. J. Gow & Bros. Mortgage Inv. Co., 53 Kan. 246, 36 Pac. 335.

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[j] (Mo. 1831) Where a legal notice has not been given, the court will not presume such notice from the fact that the party entitled to such notice comes into court and moves to dismiss the cause; but if the party to whom notice should have been given proceeds in the cause by pleading to the merits, or by doing any other act to admit notice, the court will presume such notice.—Bonney v. Baldwin, 3 Mo. 49.

[k] (N. Y. 1842) Where a defendant in a justice's court waives objections to the jurisdiction, and appears, the court has jurisdiction of his person, though there be no process to bring in the defendant.—Malone v. Clark, 2 Hill, 657.

[l] (N. Y. 1850) The appearance of a defendant before a justice, by attorney, on the return of an attachment, supersedes the necessity of a summons, and gives the justice jurisdiction of the cause.—Conway v. Hitchins, 9 Barb. 378.

[m] (Wis. 1853) An appearance, plea, and submission of a cause to a justice of the peace waive any want of service.—Heeron v. Beckwith, 1 Wis. 17.

§ 273. Waiver of defects in process or notice.

Appearance on appeal as waiver of defects in process, see post, §§ 596–598.
In attachment suit, see post, § 289 [t].

[a] Failure to indorse the amount of plaintiff's claim on the summons issued by the justice of the peace is waived by general appearance.
—(Ind. 1839) Swift v. Woods, 5 Blackf. 97;
(Iowa, 1849) Hedinger v. Silsbee, 2 G. Greene, 363.

[b] (Del. 1858) Though it is error for a justice to issue a summons returnable forthwith on the representation of plaintiff that he believed he would lose the benefit of the process by delay, without his oath thereto or without the justice being otherwise satisfied of its truth, the defect is waived and cured by defendant's appearance and going to trial without excepting to it.—Bishop v. Carpenter, 1 Houst. 526.

[c] (Ill. 1864) If a capias is improperly issued, instead of a summons, but the defendant is not arrested, and voluntarily appears, it answers the same purpose as a summons, and there is no ground for quashing the writ.—Ewbanks v. Town of Ashley, 36 Ill. 177.

[d] (Ill. 1873) Defendant's appearance was sufficient to invest the justice with jurisdiction to render judgment against him for the amount claimed by plaintiff in an action in which defendant was brought before the justice on a capias, without its appearing that an affidavit was filed sufficient to authorize the issuance of the writ, and in which he voluntarily confessed that he was indebted to plaintiff in the sum demanded, and that it was due and unpaid, without making any objection to the manner of bringing him into court.—Bliss v. Harris, 70 Ill. 343.

[e] (Ill. 1883) The failure of a justice's summons, issued to one whose land is sought to be taken for a public highway, to run in the name of the people, as required by law, is waived by his appearance at the trial without objection.—McManus v. McDonough, 107 Ill. 95.

[f] (Ind. 1844) Where defendant appeared to an action before a justice of the peace without objecting to the process, he cannot object to it on appeal in the circuit court.—Vermilya v. Davis, 7 Blackf. 158.

[g] (Ind. 1845) Defendant, by appearing to a suit in a justice's court and pleading in bar, waives all objection to the form of the process.—Dudley v. Fisher, 7 Blackf. 553.

[h] (Ind. 1861) In replevin before a justice, any defects in the manner of bringing defendants into court are cured by appearance and going to trial on the merits without objection.—Smith v. Emerson, 16 Ind. 355.

[i] (Ind. 1883) Where defendant appears in an action before a justice and procures a continuance, he cannot move, on appeal in the circuit court, to set aside the summons for insufficiency.—Sargent v. Flaid, 90 Ind. 501.

[j] (Miss. 1885) Where a writ issued by a justice of the peace of one district, and made returnable to "a justice's court to be held at" a place in another district, omitted the name of the justice before whom it was to be returned, *held*, that defect was waived by the appearance of the parties before a justice at the place named.—Armitage v. Rector, 62 Miss. 600.

[k] (Mo. 1858) Where a writ is made returnable before a justice of the peace in less time than that fixed by law, the defect is not waived by an appearance for a motion to dismiss.—Williams v. Bower, 26 Mo. 601.

[l] (Mo. 1873) Under Wag. St. p. 813, art. 2, § 4, providing that "suits may be instituted before a justice either by voluntary appearance or by process," the defendant's voluntary appearance is a waiver of all defects of process.—Griffin v. Van Meter, 53 Mo. 430.

[m] (Mo. 1875) Where a party appears so far as to consent to a continuance, he waives any insufficiency of summons and brings himself within the jurisdiction of the court.—Peters v. St. Louis & I. M. R. Co., 59 Mo. 406.

[n] (Nev. 1865) An objection to a summons in a suit before a justice of the peace, that it had no revenue stamp, is too late after the defendant has appeared and answered.—Armstrong v. Paul, 1 Nev. 134.

[o] (N. J. 1848) Any irregularity in issuing a warrant is waived by the appearance of defendant before the justice and entering into recognizance, without objection.—Foulkes v. Young, 21 N. J. Law (1 Zab.) 438.

[p] (N. J. 1880) An omission in a summons to describe a justice as of the county for which he is elected may be cured by appearance and proceeding without objection.—Drake v. Berry, 42 N. J. Law (13 Vroom) 60.

[q] (N. J. 1889) In an action against a tenant for removal, formal defects in a summons are waived by an appearance, adjournment on application of the tenant, subsequent trial, and examination of witnesses, before objection is made.—Palmer v. Sanders, 51 N. J. Law (22 Vroom) 408, 17 Atl. 1084.

[r] (N. Y. 1804) Defects in a warrant issued by a justice of the peace are cured by the party appearing and pleading the general issue.—Day v. Wilber, 2 Caines, 134.

[s] (N. Y. 1850) Defects in the process are waived by an appearance and answer without objection, in an action in a justice's court.—Heilner v. Barras, 3 Code Rep. 17.

[t] (N. Y. 1850) Though the service and return of a summons containing no statement of the cause of action gives the justice no jurisdiction, if defendant appears and pleads, the defect is waived and cannot be urged on appeal.—Hogan v. Baker, 2 E. D. Smith, 22.

[tt] (N. Y. 1852) A justice, having no jurisdiction of the cause by virtue of the summons issued, may, by the defendant's appearance and

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plea, acquire jurisdiction of the person.—Andrews v. Thorp, 1 E. D. Smith, 615.

[u] (N. Y. 1863) A summons to a nonresident, in the form of that to a resident of the county, is an irregularity, under the statute, which declares that in such case the justice shall have no jurisdiction, but not a nullity; and the defendant, appearing and pleading, without objection to the form of summons, waives the irregularity, and cannot afterwards object to a judgment on the ground of want of jurisdiction.—Clapp v. Graves, 26 N. Y. 418.

[uu] (Pa.) Where defendant appears in response to a summons from the alderman, made returnable after too long a time, the appearance cures the irregularity.—(1808) Stroup v. McClure, 4 Yeates, 523; (1885) McGinley v. McDonough, 3 Lanc. Law Rev. 202.

[v] (Pa. 1851) Though the commencement of an action for the arrest of defendant on a capias for his simple breach of contract is illegal, the appearance of defendant waives the irregularity.—Shannon v. Madden, 1 Phila. 254.

[vv] (Pa. 1868) Defendant's appearance at the hearing before a justice in a qui tam action waives defects in the summons.—Adams v. Commonwealth, 1 Woodw. Dec. 417.

[w] (Pa. 1869) Proceedings were begun under Landlord and Tenant Act Dec. 14, 1863, § 1 (P. L. 1864, p. 1125), to recover certain leased premises; the justice issuing an ordinary summons in debt without reference to any complaint made. The defendant came to the office at the time of the hearing, but would not remain to make any defense or hear testimony. *Held* not such an appearance as waived the irregularity of the summons.—Givens v. Miller, 62 Pa. (12 P. F. Smith) 133.

[ww] (Pa. 1887) The appearance of the defendant cures any irregularity in the summons.—Tuttle v. Sheridan, 5 Lanc. Law Rev. 1.

[x] (Pa. 1888) Though a short summons was issued, in place of a long summons, in an action before a justice of the peace, a defense to the merits is a waiver of the objections to the regularity of the summons.—Myers v. Stauffer, 5 Pa. Co. Ct. R. 657.

[xx] (S. C. 1888) Where a summons is made returnable in less than the time required by law, the defect is waived by appearance before the justice without objection and a defense to the action.—Benson v. Carrier, 28 S. C. 119, 5 S. E. 272.

[y] (S. C. 1896) Though a justice's summons requires defendant to appear within less than the time provided by Code, § 88, subd. 16, as amended by Act Dec. 22, 1891, defendant, by appearing before judgment, and answering and demurring to the merits, waives his right to question the jurisdiction of the justice because of such defect.—Rosamond v. Earle, 46 S. C. 9, 24 S. E. 44.

[yy] (W. Va. 1891) In order to take advantage of any defect in the summons in a justice's court, defendant must appear for that purpose only, and must so state in submitting the motion to quash; and a general appearance, whether to move a continuance or for any other purpose, will be regarded as a waiver of all defects in the writ.—Layne v. Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123.

[z] (W. Va. 1891) If, in a justice's court, defendant appears and submits two motions simultaneously, one for a continuance and one to quash the return on the writ, and at a subsequent day, to which the case has been continued, he appears, and, without requiring the justice to act upon his motion to quash, files an informal plea in bar and proceeds to trial, he will be deemed to have waived his objection to the writ.—Layne v. Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123.

[zz] (Wis. 1875) Defendant having appeared before the justice, pleaded to the merits, and gone to trial, and having afterwards appealed and litigated the cause on the merits in the circuit court, all defects in the process were waived, and the court had jurisdiction to try and determine the controversy.—Fairfield v. Madison Mfg. Co., 38 Wis. 346.

§ 274. Waiver of defects in service or return of process.

In attachment suit, see post, § 289 [m, x, y].

[a] (Colo. 1888) Where, after a special appearance by a railroad company in response to a summons served on a station agent, it appears generally, and moves for a nonsuit at the close of plaintiff's case, it thereby waives any objections to the service, and becomes subject to the jurisdiction of the justice.—Colorado Cent. R. Co. v. Caldwell, 11 Colo. 545, 19 Pac. 542.

[b] (Ill. 1878) An appearance before a justice and the taking of an appeal to the circuit court waives any defect in the service of process.—Reynolds v. Town of Foster, 89 Ill. 257.

[c] (Iowa, 1862) A defendant cannot, after he has by his own appearance or that of his attorney recognized the validity of service of notice on his agent, object to the jurisdiction of the court.—Baker v. Kerr, 13 Iowa, 884.

[d] (Iowa, 1878) Under Code 1873, §§ 2626, 3516, appearance by attorney before a justice to object to the jurisdiction precludes objection to the sufficiency of the service of summons.—Church v. Crossman, 49 Iowa, 444.

[e] (Kan. 1884) An appearance by defendant, after judgment in justice's court, by motion to set aside such judgment as void for want of service, does not waive defects of service.—Shaw v. Rowland, 32 Kan. 154, 4 Pac. 146.

[f] (Mass. 1861) A defendant is deemed to have waived a defect in the service of a summons from a justice's court where, after he had been defaulted, he appeared generally for the purpose of objecting to the taxation of costs in the justice court, and appealed from the taxation made by the clerk, and, on its affirmance by the court, entered a general appeal from the judgment. Hence he cannot thereafter, on appeal, for the first time raise the objection that the service of the summons was defective.—Briggs v. Humphrey, 83 Mass. (1 Allen) 371.

[g] (Mich. 1882) A justice does not lose jurisdiction of a proceeding to recover possession of land merely because the constable does not make return to the summons until an hour after the time fixed, if the parties are present and remain in attendance without objection.—Olson v. Muskegon Circuit Judge, 49 Mich. 85, 13 N. W. 369.

[h] (Mich. 1895) Irregularities relating to the sufficiency of the service and return of summons in an action before a justice are cured where the parties appear and adjourn the case by consent, without pleading.—Waldron v. Palmer, 104 Mich. 556, 62 N. W. 731.

[i] (Minn. 1872) The summons in a justice's court was returned "served by leaving a copy," etc., instead of "by reading the same to defendant," as prescribed by statute. *Held*, that defendant, by appearing and neglecting to object to such service, waived the defect, though such appearance was special, and for the purpose of objecting to the jurisdiction of the justice upon other grounds.—Tyrrell v. Jones, 18 Minn. 312 (Gil. 281).

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[j] (Minn. 1874) The service of summons in an action by the city marshal, as well as the failure to enter on the docket the official return, are mere irregularities, which are waived by the voluntary appearance of the defendant, joining in the pleadings, and going to trial on the merits.—Steinhart v. Pitcher, 20 Minn. 102 (Gil. 86).

[k] (Mo. 1883) By appearing generally before a justice and moving to set aside a judgment by default, defendant waives any defect in the service of the summons.—Gant v. Chicago, R. I. & P. Ry. Co., 79 Mo. 502; Fitterling v. Missouri Pac. Ry. Co., 79 Mo. 504.

[l] (Mo. 1883) Defendant, by appearing before a justice and introducing evidence after the denial of his special motion to dismiss the suit, waives defective service and confers jurisdiction of his person on the court.—Fitterling v. Missouri Pac. Ry. Co., 79 Mo. 504.

[m] (Mo. 1886) An appearance has the effect of waiving defects in service of summons, etc. Such appearance may take place a number of times before the cause is finally submitted for trial.—Smith v. Wineland, 21 Mo. App. 387.

[n] (N. Y. 1803) In summary proceeding before a justice to dispossess tenants for nonpayment of rent, an irregularity in the service of process is cured by defendants' general appearance on the return day.—Grafton v. Brigham, 70 Hun, 131, 24 N. Y. Supp. 54.

[o] (Ohio, 1876) In a civil action before a justice of the peace, the defendant, who had not been legally served, filed with the justice before the trial a bill of particulars of his set-off in the action. *Held* a voluntary appearance, conferring upon the justice jurisdiction of the person of the defendant.—Godfred v. Godfred, 30 Ohio St. 53.

[p] (Ohio, 1880) The judgment debtor cannot allege want of jurisdiction of a justice over his person where he appears and causes an undertaking for stay of execution to be approved; his action being a waiver of any defect in the service of the summons in the action.—Shafer v. Hockheimer, 36 Ohio St. 215.

[q] (Pa. 1883) One who appears before a justice, and goes to trial without objection, waives all questions relating to the return of summons and the time of service.—Weidenhamer v. Bertle, 103 Pa. 448.

[r] (W. Va. 1891) In order to take advantage of any defect in the return of process in a justice's court, defendant must appear specially for that purpose, and a general appearance, whether to move a continuance or for any other purpose, will be regarded as a waiver of defects in the return.—Layne v. Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123.

[s] (Wis. 1853) Where defendant appeared before a justice on the return day of the writ and pleaded to the action, witnesses were sworn on the issue, and the cause submitted to the justice, who rendered judgment, from which an appeal was taken, it is too late to move in the county court to dismiss for defective service; the appearance, plea, and submission being a waiver to all objections to the service, and giving the court jurisdiction of the person.—Heeron v. Beckwith, 1 Wis. 17.

[t] (Wis. 1875) Defendant having appeared before the justice, pleaded to the merits, and gone to trial, and having afterwards appealed and litigated the cause on the merits in the circuit court, all defects in the service of process were waived.—Fairfield v. Madison Mfg. Co., 38 Wis. 346.

§ 275. Waiver of irregular adjournments.

[a] (Me. 1840) If a case is illegally continued, an appearance by the defendant at the time and place for the purpose of protesting against such continuance is no waiver of the illegality.—Martin v. Fales, 18 Me. (6 Shep.) 23, 36 Am. Dec. 693.

[b] (Minn. 1874) The failure of the justice who tried the cause to enter the place of an adjournment in his docket, as also the irregular entry of an adjournment, are mere irregularities, which are waived, by the voluntary appearance of the defendant, joining in the pleadings, and going to trial on the merits.—Steinhart v. Pitcher, 20 Minn. 102 (Gil. 86).

[c] (Minn. 1894) An appearance and proceeding with a trial at the time to which the trial is adjourned by the justice is a waiver of any error in making the adjournment.—Mead v. Sanders, 57 Minn. 108, 58 N. W. 683.

[d] (N. J. 1793) The appearance of the parties on the summons is a regular commencement of the suit, attaching it to the justice, and obviates the necessity of entering regular continuances, where everything is done fairly and with notice.—Darlings v. Corey, 1 N. J. Law (Coxe) 200.

[e] (N. J. 1807) Where the justice erroneously continued a cause more than 15 days from the return of summons, the fact that defendant appeared on the last day of the adjournment was not material, when he took no part in the trial.—White v. Lippincot, 2 N. J. Law (1 Penning.) 266.

[f] (N. J. 1808) Where the justice erroneously adjourned a case for more than 15 days from the return of summons, and at the meeting of the parties on the last adjournment they mutually agreed to a rule of reference and proceeded to judgment, the error was waived.—Chance v. Chambers, 2 N. J. Law (1 Penning.) 884.

[g] (N. J. 1819) An adjournment by a justice of a suit at his own convenience for a time longer than 15 days from the return of the summons is cured by the parties appearing and going to trial.—Hillman v. Hayden, 5 N. J. Law (2 Southard) 575.

[h] (N. Y. 1799) Where, after an adjournment in a justice court for a time longer than authorized by law, defendant appears and examines witnesses, he waives the irregularity.—Palmer v. Green, 1 Johns. Cas. 101.

[i] (N. Y.) If a party appear and go to trial on the merits, it is a waiver of any objection to an adjournment irregularly granted.—(1811) Dunham v. Heyden, 7 Johns. 381; (1812) Willoughby v. Carleton, 9 Johns. 136.

[j] (N. Y. 1842) It a justice improperly adjourn a cause, and the parties appear on the day of adjournment, they waive the irregularity.—Tifft v. Culver, 3 Hill, 180.

[k] (N. Y. 1854) The defendant appeared on the 18th of May, and requested a further adjournment, and, before his motion had been decided, objected to any proceedings being had in the cause, as the prior adjournment had not been made in court, nor when the justice was present. *Held*, that this appearance did not cure the irregularity of the adjournment, but was a waiver of it, on condition that a further adjournment should be had, and, the condition not being granted, that it did not become an absolute waiver, nor binding upon the defendant.—Weeks v. Lyon, 18 Barb. 530.

[l] (N. Y. 1891) Where defendant's objection to an adjournment was made in due time, but has been overruled, he does not waive the ob-

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jection by subsequently appearing and defending on the merits.—Hannaman v. Muckle (Co. Ct.) 15 N. Y. Supp. 961, 20 Civ. Proc. R. 296.

[m] (N. Y. 1894) Where defendant in a justice court objected to a second adjournment on the ground that the court had no authority to grant it, and the return shows that, on the adjourned day, "parties appeared and answered. Defendant offered the objections, in writing, his counsel made to the adjournment, and went away,"—the objection is not waived, as the return shows that defendant's appearance was only for the purpose of filing the objections.—Crisp v. Rice, 83 Hun, 465, 31 N. Y. Supp. 908.

[n] (Vt. 1877) The record showed that, after a suit had been continued by a justice, other than the one before whom the suit was pending, for a period exceeding 30 days, the defendant and trustee appeared, the defendant pleaded that "he did not owe the plaintiff," a jury trial was had upon the merits, a verdict was returned for the plaintiff, judgment was rendered thereon against the defendant, and the trustee was discharged. *Held*, that this was a waiver of the irregularity of granting a continuance for more than 30 days, and was such a submission to the jurisdiction of the justice as cured the irregularity.—Bryant v. Pember, 43 Vt. 599.

§ 276. Withdrawal, striking out, and failure to appear.

Failure to appear as ground for dismissal, see post, § 350.

[a] (U. S. 1822) Nonappearance of the plaintiff or his empowered agent in a suit on a specialty before a justice of the peace is no ground for reversing judgment in his favor.—Taylor v. Hogan, Fed. Cas. No. 13,794a [Hemp. 16].

[b] (Mich. 1883) If a justice, whether properly or not, has, at the request of an attorney, erased his docket entry of the appearance of such attorney for defendant, he ought not to proceed in the case without notice to the defendant, or the attorney who had assumed to appear for him.—McKenzie v. King, 51 Mich. 461, 16 N. W. 813.

[c] (N. Y. 1878) Defendant's failure to appear in a justice's court is not an admission of plaintiff's claim.—Blair v. Bartlett, 75 N. Y. 150, 31 Am. Rep. 455.

[d] (Or. 1869) Withdrawing defendant's appearance does not oust a justice of jurisdiction over his person, though it was acquired by his appearance.—White v. Thompson, 3 Or. 115.

§ 277. Representation by attorney or third person.

[a] (Iowa, 1873) Appearance by defendant's attorney for the purpose of cross-examining plaintiff's witnesses, where the case was retained by the justice of the peace after a change of venue had been ordered, will have the effect of a full appearance, though the attorney disclaimed appearing for defendant.—Rahn v. Greer, 37 Iowa, 627.

[b] (Kan. 1888) Where an attorney for defendants, assuming to make an appearance specially, asks a continuance because defendants themselves are absent, which is refused, and he leaves the court, and trial is proceeded with, defendants are "absent" under Comp. Laws, 1879, c. 81, § 114, notwithstanding the action of their attorney.—Covart v. Haskins, 39 Kan. 571, 18 Pac. 522.

[c] (N. J. 1808) On a trial of a cause before a justice of the peace, it is within the justice's discretion to admit an unlicensed attorney to appear for one of the parties.—McWhorter v. Bloom, 3 N. J. Law (2 Penning.) 134.

[d] (N. J. 1810) The appearance of his attorney is equivalent to the appearance of the party in an action before a justice.—Morgan v. Eldridge, 3 N. J. Law (2 Penning.) 658.

[e] (N. J. 1833) Defendant's son appeared with a power of attorney, filed a plea, and secured an adjournment. On the day for trial the son again appeared and offered to make defense. *Held* that, having recognized the son's authority, it was error for the justice, without assigning any cause, to refuse to hear the defense.—Bowlsby v. Johnston, 13 N. J. Law (1 J. S. Green) 349.

[f] (N. J. 1833) It is a matter of sound discretion with a justice whether to permit a defendant to appear by an attorney in fact or not.—Bowlsby v. Johnston, 13 N. J. Law (1 J. S. Green) 349.

[g] (N. Y. 1810) If the parties appeared by attorney before a justice of the peace, it was error, though it were by mutual consent.—Smith v. Goodrich, 5 Johns. 358.

[h] (N. Y. 1847) Under the act creating justices' courts, and providing for appearance therein of a party in person or "attorney," the latter word includes any one to whom a party may delegate his appearance.—Hughes v. Mulvey, 3 N. Y. Super. Ct. (1 Sandf.) 92.

[i] (N. Y. 1850) Judiciary Act, § 52, which forbids a partner or clerk of a judge to practice before him "as an attorney, solicitor, or counsel," is not applicable to justice's court.—Fox v. Jackson, 8 Barb. 355.

[j] (N. Y. 1851) Where a person commenced a suit before a justice in the name of another, pretending to be the assignee of a claim in favor of the latter against the defendant, and appeared as attorney for the nominal plaintiff on the trial, falsely swearing his authority to do so, and on an appeal by the defendant retained an attorney to appear for the respondent and afterwards to defend a writ of error, the nominal plaintiff was not bound by the acts of the attorney until he had notice of the suit.—Allen v. Stone, 10 Barb. 547.

[k] (N. Y. 1854) A justice is authorized to proceed with a trial where an individual appears as attorney for the defendant, makes oath that he is authorized to appear to answer to the suit, asks for no adjournment, but procures a subpœna for witnesses for the defendant, and proceeds to trial, and makes no objection to the proceedings.—Armstrong v. Craig, 18 Barb. 387.

[l] (N. Y. 1856) In an action in a justice's court concerning the property of a married woman, the justice may appoint a next friend.—Walker v. Swayzee, 3 Abb. Prac. 136.

[m] (N. Y. 1888) Code Civ. Proc. § 2886, provides that "a party to an action before a justice of the peace, who is of full age, may appear and prosecute or defend the same in person or by attorney, at his election." Section 2889 provides that "any person other than the constable who served the summons or the venire, or the law partner or clerk of the justice, may be the attorney for a party to an action before a justice of the peace." *Held*, that an adult defendant to an action before a justice of the peace could appear by a minor, as his attorney in fact; there being no attorneys at law in justices' courts.—Peck v. Hayes (Co. Ct.) 3 N. Y. Supp. 836, 14 Civ. Proc. R. 110.

§ 278. —— Authority.

[a] (Mich. 1875) Under Comp. Laws 1871, § 5305, the person appearing as plaintiff's attorney in justice's court must prove his authority, where defendant does not appear.—Scofield v. Cahoon, 31 Mich. 206.

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[b] (Mich. 1875) Comp. Laws 1871, § 5479, forbidding the reversal of a judgment "merely for the omission or misrecital of an oath," does not cure the failure of plaintiff's attorney to prove his authority in justice court, where defendant did not appear.—Scofield v. Cahoon, 31 Mich. 206.

[c] (Mich. 1882) It is ground for reversing a justice's judgment, rendered in the absence of both parties, that plaintiff's attorney did not prove his authority.—Woodbridge v. Robinson, 49 Mich. 228, 13 N. W. 527.

[d] (Mich. 1883) Under Comp. Laws, § 5305, providing that authority to appear in a justice court as attorney for a party shall be proved where requested by the opposite party, such authority cannot be shown by letter from a third person requesting his appearance for the party, it nowhere else appearing that the person had authority to make the request.—Blood v. Westbrook, 50 Mich. 443, 15 N. W. 544.

[e] (Mich. 1885) No one is standing attorney for a party to a justice's judgment, and as such entitled to receive service of notices in relation thereto, without special authorization.—Clark v. McGregor, 55 Mich. 412, 21 N. W. 866.

[f] (Mich. 1887) Under How. Ann. St. § 6846, which requires a justice to continue the cause for at least 30 days from the return day, when an attachment is not personally served, and the defendant does not appear, it is of no importance in what way the plaintiff appeared on the return day; and, when the docket shows that on the adjourned day plaintiff appeared in person, the judgment for plaintiff then rendered cannot be objected to on the ground that the attorney who appeared for plaintiff on both days did not prove his authority, as required by section 6870.—Churchill v. Goldsmith, 64 Mich. 250, 31 N. W. 187.

[g] (Mich. 1893) An allegation of error, that an attorney did not sufficiently prove his authority in writing to appear for plaintiff, cannot be sustained, where the return of the justice shows that the attorney "not only proved his authority to appear orally, but produced, when sworn in said cause, other documentary proof."—Stoll v. Padley, 98 Mich. 13, 56 N. W. 1042.

[h] (N. Y. 1809) Under St. 31st Sess. c. 204 (since repealed), prohibiting a party from appearing by attorney in a justice's court, except the party be sick or absent from the county, the knowledge of the justice of such sickness or absence is not sufficient to allow an appearance by attorney. There must be proof of the fact.—Rosekrans v. Van Antwerp, 4 Johns. 228.

[i] (N. Y. 1817) If an attorney is called on to produce his power to appear in a justice's court, the execution of it must be duly proved.—Timmerman v. Morrison, 14 Johns. 369.

[j] (N. Y. 1823) A parol authority is sufficient to authorize an attorney to appear for a party before a justice.—Gaul v. Groat, 1 Cow. 113; Tullock v. Cunningham, Id. 256; Pixley v. Butts, 2 Cow. 421.

[k] (N. Y. 1823) The power of attorney to appear for either party in a justice's court may be proved by the attorney himself.—Tullock v. Cunningham, 1 Cow. 256.

[l, m] (N. Y. 1823) A justice has no right to decide, from his own knowledge, that an attorney has authority to appear, without any evidence.—Beaver v. Van Every, 2 Cow. 429.

[n] (N. Y. 1836) A justice of the peace is not bound to require proof of the authority of a person who claims to appear as attorney for one of the parties to a cause prosecuted before him, if the opposite party does not object, since 2 Rev. St. p. 233, § 45, requires proof to be taken unless the authority is admitted, and a failure to object must be regarded as an admission.—Ackerman v. Finch, 15 Wend. 652.

[o] (N. Y. 1842) Where an attorney, on the return of a summons before a justice, appeared for plaintiff and testified that the action was on a note left with him for collection, this is sufficient evidence of his right to appear as plaintiff's attorney.—McMinn v. Richtmyer, 3 Hill, 236.

[p] (N. Y. 1843) A justice of the peace cannot allow one to appear as attorney, on information received by the justice out of court as to the attorney's authority.—Fanning v. Trowbridge, 5 Hill, 428.

[q] (N. Y. 1847) The office of attorney, in the professional sense of the term, is not known in justices' courts; and an appearance for a defendant by one claiming to be his attorney, without proof of his authority, does not restore the jurisdiction of such a court, where it has been lost by an unauthorized adjournment.—Bailey v. Delaplaine, 3 N. Y. Super. Ct. (1 Sandf.) 11.

[r] (N. Y. 1848) Where, in an action before a justice of the peace, a person appeared at the joining of issue in behalf of one of the parties, without objection and without any evidence of his authority, but the party himself appeared at the time of the issue, this was sufficient evidence that the issue was joined by his authority.—Underhill v. Taylor, 2 Barb. 348.

[s] (N. Y. 1852) Where letters were directed by the attorney to the client in relation to the subject-matter of the suit, and several answers were received from the client in due course of mail, all in the same handwriting and dated at the client's residence, which letters contained a general authority to the attorney to take such steps, legal or otherwise, as he might deem advisable for the recovery of a debt, it was sufficient to authorize the attorney to appear for the client in justice court.—Bush v. Miller, 13 Barb. 481.

[t] (N. Y. 1854) An attorney who assumes to appear for a party in a justice's court must prove his authority, if required to do so by the adverse party.—Hirshfield v. Landman, 3 E. D. Smith, 208.

[u] (N. Y. 1854) Where an attorney, in an action before a justice, on evidence of his authority being demanded, testified that he received authority from plaintiff's brother, who had exhibited to him written authority from the plaintiff himself, and no objection was made to the admission of such evidence, without the production and proof of the execution of the writing, it was sufficient to establish the attorney's authority.—Hirshfield v. Landman, 3 E. D. Smith, 208.

[v] (N. Y. 1855) Where an attorney declared, on oath, his authority to appear for plaintiffs, who were overseers of the poor, in an action before a justice for a penalty, and the defendant appeared and defended, his authority was *held* sufficient.—Andrews v. Harrington, 19 Barb. 343.

[w] (N. Y. 1870) Where a person acting as an attorney assumes to appear for a defendant in a justice's court, at the joining of issue and on the adjourned day, without authority in fact, and is not sworn or questioned as to his authority to appear, either by the justice or the plaintiff, there is no appearance by the defendant which concludes him. Such appearance, however, concludes the plaintiff.—Miller v. Larmon, 38 How. Prac. 417.

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[ww] (N. Y. 1872) The statute (2 Rev. St. 233, § 45) providing for the appearance of the defendant in an action in a justice's court makes no distinction between the proof required to be made of authority to appear in the case of a summons personally served and of one served by leaving a copy only. In either case such authority is admitted, where the opposite party appears and joins issue without objection to the absence of proof of it.—Sperry v. Reynolds, 5 Lans. 407, reversed (1875) 65 N. Y. 179.

[x] (N. Y. 1874) Where a person appears for defendant without authority, and plaintiff appears in person, defendant can take no advantage of the unauthorized appearance.—Roberts v. Burrell, 3 Thomp. & C. 30.

[xx] (N. Y. 1875) Where a summons issuing from a justice of the peace is served by copy, an appearance by another person in behalf of the party served is not such presumptive evidence of his authority to appear as to give the justice jurisdiction over the cause.—Sperry v. Reynolds, 65 N. Y. 179, reversing (1872) 5 Lans. 407.

[y] (N. Y. 1886) A justice has a right to enter judgment on the supposition that an attorney who appeared on the return day and consented to an adjournment on defendant's behalf was duly authorized to appear; plaintiff not having questioned the authority.—Rickey v. Christie, 40 Hun, 278.

[yy] (N. Y. 1888) Where a person appears in a justice court as the attorney of a corporation in an action on account, and there was present at the time of such appearance the manager of the corporation's store, who was sworn and testified as a witness, the authority of the attorney was sufficiently established, though he did not swear to the fact of his authority.—Crown Point Iron Co. v. Fitzgerald, 14 N. Y. St. Rep. 427.

[z] (N. Y. 1891) Where the return of the justice before whom a cause was tried states that "M. appeared and answered for the plaintiff, and was by me sworn as to his authority to appear," it shows a compliance with Code Civ. Proc. § 2890, which provides that the justice shall not allow a person to appear as an attorney, unless such person's authority as attorney is admitted by the adverse party, or is proved by the affidavit of himself or another.—Syracuse Moulding Co. v. Squires, 61 Hun, 48, 15 N. Y. Supp. 321, 21 Civ. Proc. R. 58, reversing judgment 13 N. Y. Supp. 547, 19 Civ. Proc. R. 241.

[zz] (Pa. 1896) In an attachment in justice's court, the defendant being absent, his wife appeared with an attorney, and asked leave to file a plea in abatement, and to be heard. *Held*, that it was error for the justice to refuse to enter the plea on the ground that there was no power of attorney from the defendant authorizing any one to file a plea or to be heard in his behalf.—Carlisle v. Rankin (Com. Pl.) 17 Pa. Co. Ct. R. 319, 5 Pa. Dist. R. 246, 26 Pittsb. Leg. J. (N. S.) 364.

§ 279. Arrest and bail.

Appearance under warrant for arrest as voluntary, see ante, § 266 [h].

Execution against the person, see post, § 446.

Arrest of witness for nonattendance at criminal prosecution, see "Witnesses," I.

[a] (U. S. 1823) A justice of the peace in Alexandria county, D. C., has no power to issue a capias ad respondendum, or warrant of arrest, for a small debt, before judgment.—Ex parte Minor, Fed. Cas. No. 9,643 [2 Cranch, C. C. 404].

[b] (Ala. 1841) No objection can be taken to a warrant issued by a justice of the peace in the "firm" name of the plaintiffs.—Snow v. Ray, 2 Ala. 344.

[c] (Conn. 1842) A warrant issued by a justice of the peace on the complaint of an executor or administrator, against a person having in his possession and refusing to deliver up effects belonging to the testator's or intestate's estate, may be directed for service to an indifferent person.—Kelsey v. Parmelee, 15 Conn. 260.

[d] (Ind. 1841) A capias ad respondendum was the proper process in suits in a justice's court, under the statute of 1838, where the defendant was not a resident and householder in the county; and the justice could issue such writ, in case of the defendant's nonresidence, without an affidavit of that fact being filed.—McFarlan v. McJinsey, 6 Blackf. 85.

[e] (Ind. 1876) Where the appointment of a special constable to serve a warrant for the arrest of the defendant is noted on the docket of the justice, either before or after the appointment is made, the appointment itself need not be made in writing.—Britton v. State, 54 Ind. 535.

[f] (Ky. 1825) Justices can issue scire facias on recognizances of special bail taken in cases before them, and give judgment for execution.—Peyton v. Moseley, 19 Ky. (3 T. B. Mon.) 77.

[g] (N. J. 1879) Act March 4, 1873 (Laws 1873, p. 275), establishing district courts in Newark, provides that the civil jurisdiction previously exercised by justices of the peace within the city shall be vested in the district courts; and Act March 12, 1879, increasing the jurisdiction of justices of the peace, provides that no justice of the peace in any city having a district court shall have jurisdiction over any cause cognizable in such district court. *Held*, that a justice of the peace in the city of Newark is without jurisdiction to issue a civil warrant for the arrest of a defendant.—England v. McDermott, 2 N. J. Law J. 238.

[h] (N. Y. 1812) Under St. 31st Sess. 31, c. 204, § 4, for the recovery of debts to the value of $25, a justice cannot issue a warrant against a freeholder or person having a family, on the oath of the plaintiff; but the proof of the defendant's being about to depart, or of the danger of losing the debt, must be by other and legal evidence.—Brown v. Hinchman, 9 Johns. 75.

[i] (N. Y. 1813) Under Acts 32d Sess. c. 186, § 1, a justice of the peace may grant a warrant, on the oath of the plaintiff himself, in the cases provided for by Acts 31st Sess. c. 204, § 4.—Terry v. Fargo, 10 Johns. 114.

[j] (N. Y. 1815) Where, on the return of a summons before a justice, served by copy, the defendant does not appear, the justice may issue a warrant.—Reed v. Gillet, 12 Johns. 296.

[k] (N. Y. 1828) In cases in justices' courts, where summons is the regular process, a warrant without oath is irregular and void. Without the oath, the justice has no jurisdiction over the person of the defendant.—Gold v. Bissell, 1 Wend. 210, 19 Am. Dec. 480.

[l] (N. Y. 1828) Under the $50 act (Acts 47th Sess. c. 238), requiring that, in all cases where a warrant shall issue, the constable shall be commanded to take the defendant and bring him or her forthwith before the justice, etc., to give a justice jurisdiction under the warrant, defendant must be arrested and brought into court before the justice.—Colvin v. Luther, 9 Cow. 61.

[m] (N. Y. 1829) Under the justice's act of 1824, the oath of the party applying for a war-

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rant is proof, within the meaning of the statute, whereon the necessity of issuing a warrant may be determined; and it seems that, under the Revised Statutes, the affidavit of the party would be sufficient.—Bissell v. Hills, 3 Wend. 389.

[n] (N. Y. 1834) Where a suit is brought in a justice's court in the name of two plaintiffs, an affidavit that one of the plaintiffs is a nonresident of the county is not sufficient to authorize the issuing of a warrant.—Linnell v. Sutherland, 11 Wend. 568.

[o] (N. Y. 1834) Where a suit is brought in a justice's court in the name of two plaintiffs, one of whom is a nonresident, and the demands belong to the nonresident plaintiff solely by assignment, the assignment must be shown, in order to authorize the issuance of a warrant.—Linnell v. Sutherland, 11 Wend. 568.

[p] (N. Y. 1835) In a suit before a justice of the peace against joint debtors, a nonresident plaintiff is entitled to proceed by warrant, though one of the defendants is a nonresident of the county in which the process issues.—Dearborn v. Kent, 14 Wend. 183.

[q] (N. Y. 1842) Under the charter of Utica, providing that the first process in an action to recover a penalty imposed by the common council shall be by warrant, the warrant may issue without the preliminary affidavit required by 2 Rev. St. p. 220, § 18; the charter having been granted since the act.—Walker v. Cruikshank, 2 Hill, 296.

[r] (N. Y. 1845) To authorize a justice of the peace to issue a warrant for trespass against a nonresident, the applicant must by affidavit state the facts and circumstances within his knowledge showing the grounds of his application.—Whitney v. Shufelt, 1 Denio, 592.

[s] (N. C. 1835) In debt before a single magistrate for one year's hire, on a covenant to pay $60 annually for two years for the hire of a slave, and also to furnish him with food and drink, the warrant calling for that sum due by bond is supported by the production of the covenant.—Hamilton v. McCarty, 18 N. C. 226.

[t] (N. C. 1835) In a warrant under a penal statute before a single justice, the omission of a reference to the statute will be fatal, even after verdict.—Buncombe Turnpike Co. v. McCarson, 18 N. C. 306.

[u] (N. C. 1837) A warrant from a justice, stating the parties, the sum demanded, and how due, is sufficient, as Act 1794, § 2, requires only that these shall be stated.—Hamilton v. Jervis, 19 N. C. 227.

[v] (N. C. 1845) A warrant from a justice in a civil case must name the proper parties and state a cause of action within a justice's jurisdiction, both as to the nature and amount of the demand.—Duffy v. Averitt, 27 N. C. 455.

[w] (N. C. 1845) A warrant from a justice in a civil case need not on its face be returnable on a certain day or at a certain place, but only within 30 days. The day and place are to be notified by the constable who serves the warrant.—Duffy v. Averitt, 27 N. C. 455.

[x, y] (N. C.) A warrant from a justice in a civil case requires no seal.—(1845) Duffy v. Averitt, 27 N. C. 455; (1847) Parker v. Gilreath, 29 N. C. 400.

[z] (N. C. 1851) In the description of a note in a warrant from a justice of the peace the same strictness is not required as in a description in a declaration in court. It is sufficient if the warrant describes the cause of action so as to bring it within the jurisdiction of a single justice as defined by statute.—Emmit v. McMillan, 35 N. C. 7.

[zz] (Wis. 1862) A warrant, in the form provided in criminal cases, against a party proceeded against for a forfeiture enforceable only by civil action, though irregular and liable to be set aside on motion, is not void, and the error of the justice as to the form of the warrant will not deprive him of jurisdiction.—Carter v. Dow, 16 Wis. 298.

(F) ATTACHMENT.

NATURE OF REMEDY, CAUSES OF ACTION, PARTIES, AND GROUNDS, § 280.
PROPERTY SUBJECT TO ATTACHMENT, § 281.
AFFIDAVITS AND PROCEEDINGS TO PROCURE, § 282.
SECURITY, § 283.
WRIT OR WARRANT, § 284.
LEVY AND SERVICE OF WRIT, § 285.
LIEN AND PRIORITIES, § 286.
CUSTODY AND DISPOSITION OF PROPERTY, § 287.
PROCEEDINGS TO SUPPORT OR ENFORCE, § 288.
—— PROCESS IN ACTION AND APPEARANCE, § 289.
QUASHING, VACATING, AND DISSOLUTION, § 290.
CLAIMS BY THIRD PERSONS, § 291.
RETURN, § 292.
LIABILITIES ON BONDS AND UNDERTAKINGS, § 293.
WRONGFUL ATTACHMENT, § 294.

Attachment execution, see post, §§ 295–305.
Effect of appeal on attachment proceedings, see post, § 604.
Jurisdiction of justice, see ante, §§ 156, 165, 177.
—— *attachment in excess of jurisdiction, see* ante, § 224.

§ 280. Nature of remedy, causes of action, parties, and grounds.

[a] (Minn. 1892) An attachment may be issued in a justice's court in an action on contract in which the damages claimed are unliquidated.—Baumgardner v. Dowagiac Mfg. Co., 50 Minn. 381, 52 N. W. 964.

[b] (Miss. 1857) The provisions of the statute (Hutch. Code, p. 801) giving any creditor an attachment against the estate of a debtor who has removed or is removing out of the state, are applicable to attachments for debts within the jurisdiction of justices of the peace.—Davidson v. Martin, 33 Miss. 530.

[c] (N. Y. 1824) To give a justice jurisdiction of a cause on attachment, it must appear affirmatively that the defendant is concealed in the county, or has departed or is about to depart the county, with the intent mentioned in the act.—Adkins v. Brewer, 3 Cow. 206, 15 Am. Dec. 264.

[d] (N. Y. 1836) The fact that a defendant conceals himself to avoid an arrest in the name of the people, authorized by Sess. Laws 1831, p. 396, § 4, to enable a creditor to collect of a debtor guilty of fraud, is not a ground of attachment, under 2 Rev. St. p. 230, § 26, authorized when defendant conceals himself to avoid the service of civil process.—Lynde v. Montgomery, 15 Wend. 461.

[e] (N. Y. 1850) The process of attachment in a justice's court is extraordinary, and can issue only on special application and on proof required by law.—Barnes v. Harris, 4 N. Y. (4 Comst.) 374.

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[f] (N. Y. 1871) A justice of the peace has no jurisdiction to issue an attachment under 27 Rev. St. p. 230, § 26, on affidavits and papers, unless it shall satisfactorily appear to the justice that such debtor has departed or is about to depart from the county where he last resided, with intent to defraud his creditors or to avoid the service of any civil process, or that such debtor keeps himself concealed with the like intent.—Garrison v. Marshall, 44 How. Prac. 193.

[g] (N. Y. 1885) An attachment in a justice court is a provisional remedy, and an error of the justice in regard thereto is not cause for reversal, if the case was properly decided on the merits.—Rosenthal v. Grouse, 1 How. Prac. (N. S.) 447, 7 Civ. Proc. R. 135.

[h] (Pa. 1872) An attachment under section 27 of the act of 1842 cannot issue, except on an affidavit, satisfactory to the alderman or justice, that defendant is about to remove, assign, dispose of, or secrete any of "his property" (or has done so) with intent to defraud his creditors. That he has absconded or secreted himself is no ground for proceeding under this section.—Howard v. Joice, 4 Leg. Gaz. 30.

§ 281. Property subject to attachment.

See post, § 288 [b].

Property subject to execution, see post, § 427.

—— *to garnishment, see* post, § 295.

[a] (Miss. 1866) An attachment issued by and returnable before a justice of the peace for a sum not exceeding $50 cannot be levied on real estate.—Plummer v. West, 41 Miss. 69.

[b] (Ohio, 1891) A pew in a church is real estate, and hence is not subject to attachment issued by a justice of the peace; he having no jurisdiction over realty.—Deutsch v. Maurice, 11 Ohio Dec. 436.

[c] (Pa. 1859) A constable cannot, under Act July 12, 1842, levy an attachment issuing from a justice of the peace by virtue of that act on any property which is not capable of manual seizure and of manual surrender by the defendant or his bail.—Wolbert v. Fackler, 32 Pa. (8 Casey) 452.

[d] (Pa. 1888) Where there is no statutory provision authorizing an attachment to be issued by a justice against a legacy or other interest in an estate of a decedent, an attachment will not lie against a charge in favor of the debtor on certain lands of which his father died seised, payable on the death of debtor's mother.—Messinger v. Mantz, 13 Atl. 197.

[e] (Pa. 1895) A building on a leasehold is not attachable under Act July 12, 1842.—Thomas v. Morasco (Com. Pl.) 5 Pa. Dist. R. 133.

§ 282. Affidavits and proceedings to procure.

Affidavits as dispensing with pleadings, see post, § 288 [a, n, t, zz].

Authority of justice to take affidavit for attachment, in general, see "Attachment," vol. 5, cc. 441, 442, § 227.

[a] (Ala. 1831) Where an attachment is issued by a justice for a sum within his jurisdiction on an insufficient affidavit, the proceedings are not void, but only voidable.—Parmer v. Ballard, 3 Stew. 326.

[b] (Iowa, 1860) A technical defect in an affidavit for an attachment issued by a justice will not invalidate the writ, so as to render an officer serving it liable, as he would be if acting under void process; it not being shown that the justice had no jurisdiction of the principal suit.—State v. Foster, 10 Iowa, 435.

[c] (Mich. 1892) Where the ground of an attachment in the justice court is that defendant is a nonresident, but the affidavit of attachment states that defendant "has resided" in the state for one month before suit, an amendment by the insertion of "not" before "resided" is not authorized by How. Ann. St. § 7631, empowering the court in which any action is pending to amend "any process, pleading, or proceeding in such action, either in form or substance."—Freer v. White, 91 Mich. 74, 51 N. W. 807.

[d] (Minn. 1859) An affidavit setting forth facts which would have authorized a justice of the peace to make an attachment returnable in three days, and also facts authorizing him to make it returnable in six days, the writ having been made returnable in six days, is sufficient to give him jurisdiction.—Curtis v. Moore, 3 Minn. 29 (Gil. 7).

[e] (Minn. 1859) Under Rev. St. art. 4, c. 69, § 94, relating to attachments in the justices' courts, which provides that the affidavit shall state certain facts to entitle the writ to issue, it is not necessary that the evidence of the facts on which the right to the writ depends should appear in the affidavit. It is sufficient if the existence of grounds is averred, in the language of the statute.—Curtis v. Moore, 3 Minn. 29 (Gil. 7).

[f] (Minn. 1859) In the justice's court an affidavit for the attachment is sufficient if it follows the words of the statute, for the statute requires that it "shall state" the enumerated facts, etc., and does not require that they "shall appear" therefrom.—Curtis v. Moore, 3 Minn. 29 (Gil. 7).

[g] (Mo. 1872) In an attachment suit before a justice of the peace, the justice may allow the affidavit for attachment to be so amended after the original levy as to authorize the seizure of property otherwise exempt from attachment, and the amendment will relate back to the date of the original levy.—State v. Lynn, 51 Mo. 114.

[h] (N. Y. 1813) By the "satisfactory proof" required by the statute, in order to authorize a justice of the peace to issue an attachment, is meant legal evidence, and not the creditor's oath; but, if issued on such oath, the proceedings are not void, but only erroneous.—Van Steenbergh v. Kortz, 10 Johns. 167.

[i] (N. Y. 1833) Under 2 Rev. St. p. 230, § 28, requiring the affidavit for attachment in justice court to state the amount due by the defendant to the creditor and the grounds on which the application is founded, and the facts and circumstances to establish which shall also be verified by the affidavits of two disinterested witnesses, plaintiff's affidavit that from reports and information he believed that his debtor kept out of a county to avoid payment of his debts, and of his witnesses that they had been informed that he had departed, and, as his creditors said, for the purpose of defrauding them, are insufficient to authorize an attachment.—Tallman v. Bigelow, 10 Wend. 420.

[j] (N. Y. 1835) The affidavit on which the application for an attachment under the act to abolish imprisonment, etc., is made, before a justice, must state that the acts charged on the defendant were done with the intent to defraud creditors, and the facts and circumstances relied on must be set forth in the affidavit. They cannot be supplied by verbal proof.—Comfort v. Gillespie, 13 Wend. 404.

[k] (N. Y. 1836) A summons or attachment authorized by section 33 of the act to abolish imprisonment may issue from a justice court, without any affidavit whatever, against a defendant residing out of the county in which process is asked.—Clark v. Luce, 15 Wend. 479.

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[l] (N. Y. 1847) An affidavit, on an application for an attachment in a justice's court, in which the facts are stated on the belief only of the deponent, is fatally defective.—Dewey v. Greene, 4 Denio, 93.

[m] (N. Y. 1850) An affidavit made by a plaintiff, on applying to a justice of the peace to issue an attachment against a defendant, stating that the application "is made on the ground that the defendant has assigned or secreted his property with intent to defraud his creditors," though according to the words of the statute, is insufficient unless the facts and circumstances stated therein warrant a belief that the defendant has assigned or secreted his property with intent to defraud his creditors.—Frost v. Willard, 9 Barb. 440.

[n] (N. Y. 1851) On an application to a justice of the peace for an attachment against a defendant, there must be an affidavit proving the grounds on which the application is founded in all cases, not excepting nonresidents.—Van Kirk v. Wilds, 11 Barb. 520.

[nn] (N. Y. 1851) If an affidavit states that the plaintiff has a debt against the defendant of a specified amount arising upon contract, and that the defendant is a nonresident of the county, it is enough to warrant issuing an attachment by the justice.—Van Kirk v. Wilds, 11 Barb. 520.

[o] (N. Y. 1851) An affidavit before a justice of the peace, which would be sufficient under the nonimprisonment act, is sufficient for an attachment under the Revised Statutes.—Colver v. Van Valen, 6 How. Prac. 102.

[oo] (N. Y. 1852) The jurisdiction of a justice to issue an attachment under the act to abolish imprisonment for debt does not attach until the proof required by the statute is made.—Davis v. Marshall, 14 Barb. 96.

[p] (N. Y. 1853) An application for an attachment on the ground that the debtor had left the county where he last lived to defraud his creditors must be accompanied by an affidavit of the applicant, stating the grounds of it; and he must prove facts and circumstances to sustain such grounds by his own affidavit or that of another or others.—Stewart v. Brown, 16 Barb. 367.

[pp] (N. Y. 1861) An affidavit containing some legal evidence that a debtor has departed with intent to defraud his creditors gives jurisdiction to a justice to issue an attachment, and his judgment thereon is good until directly attacked.—Kissock v. Grant, 34 Barb. 144.

[q] (N. Y. 1864) Where a justice of the peace is sufficiently satisfied of the facts stated in an affidavit for an attachment to issue his warrant, third parties cannot attack it collaterally.—Bascom v. Smith, 31 N. Y. 595.

[qq] (N. Y. 1864) An affidavit for attachment in a justice's court which stated that the debtors were not residents of the county in which the proceedings were brought, but were residents of another county named, sufficiently alleged their nonresidence, so as to sustain the jurisdiction of the justice issuing the attachment.—Bascom v. Smith, 31 N. Y. 595.

[r] (N. Y. 1866) Where application for attachment is made to a justice on the ground that defendant has left the county with intent to defraud his creditors, an affidavit which merely states that he left with intent not to return, or secretly and without the knowledge of his family, is insufficient.—Kelly v. Archer, 48 Barb. 68.

[rr] (N. Y. 1872) On an application to a justice of the peace for an attachment, an affidavit showing grounds under the Revised Statutes and also under Laws 1831, p. 300, § 30, will authorize its issue under either.—Reinmiller v. Skidmore, 7 Lans. 161.

[s] (N. Y. 1873) An attachment was issued by a justice of the peace on the ground that defendant had departed from the state with intent to defraud his creditors. The affidavit stated that defendant bought the goods on a credit of 30 days on the false representation that he was in the habit of purchasing for cash, and that his stock was paid for; that before the credit expired he departed; that all of his stock had been purchased on credit, and not paid for. *Held* sufficient proof of an intent to defraud creditors to give the justice jurisdiction.—Schoonmaker v. Spencer, 54 N. Y. 366.

[ss] (N. Y. 1874) In the affidavit in justice's court for an attachment against an absconding debtor's property, the intent with which defendant removed his property, and the fact that defendant had gone West to reside, may be stated on information and belief.—Ketchum v. Vidvard, 4 Thomp. & C. 138.

[t] (N. Y. 1874) Where an affidavit for an attachment issued by a justice of the peace was such that the justice might so construe it as to give him jurisdiction, *held*, that the attachment could not be held void in a collateral proceeding.—Ketchum v. Vidvard, 4 Thomp. & C. 138.

[tt] (N. Y. 1877) In an action brought in a justice court against a nonresident by a short attachment, an affidavit reciting that defendant is justly indebted to deponent on a demand arising on contract in a stated sum, and that defendant is not a resident of the county, and no warrant can issue against him, is insufficient, because not stating facts and circumstances which, under the Revised Statutes and the act of 1831 would entitle plaintiff to a long attachment, and because not showing how the demand of plaintiff arose on contract, and not showing that the demand is not one in which a warrant could issue.—Garlock v. James, 55 How. Prac. 306.

[u] (N. Y. 1891) Under Code Civ. Proc. § 2906, which provides that plaintiff, to entitle himself to an order of attachment, must show to the satisfaction of the justice that defendant "has departed, or is about to depart, from the county where he last resided, with intent to defraud his creditors or to avoid the service of process, or keeps himself concealed with the like intent," an affidavit by plaintiff that "defendant has disposed of in part and is about to dispose of the balance of all his property, and as deponent is informed and believes, with intent to defraud his creditors; * * * that the grounds of deponent's belief are as follows, viz.: That defendant has shipped out of the county large quantities of hay, * * * and is making preparations to move out of the county with all his property," and has made no efforts or promises to pay any of his debts to plaintiff or to others,—is insufficient.—Bump v. Dehany, 59 Hun, 619, 12 N. Y. Supp. 901.

[uu] (Ohio, 1862) From the fact of an affidavit appearing to have been issued at the commencement of the attachment proceedings, though denominated an "affidavit for proceedings against S., as garnishee," it may be presumed to have contained a legal cause for attachment.—Carper v. Richards, 13 Ohio St. 219.

[v] (Ohio, 1862) Under such affidavit, in the absence of any mention of an undertaking, and a return of the summons "Not found," the nonresidence of the defendant, one of the causes for attachment, will be presumed to have been stated in the affidavit.—Carper v. Richards, 13 Ohio St. 219.

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[vv] (Pa. 1881) Under Act May 8, 1874, the affidavit in proceedings by attachment, after a specification of the plaintiff's claim, is restricted to an averment that defendant is a nonresident of the commonwealth.—Pratt v. Mosser, 1 Lehigh Val. Law Rep. 178.

[w] (Pa. 1890) Act July 12, 1842, § 27, authorizes the issuing of an attachment against an absconding debtor on proof "to the satisfaction of the justice" by the affidavit of plaintiff or other person. *Held*, that proof "to the satisfaction of the justice" was not the sole test of the sufficiency of the affidavit.—Curwensville Mfg. Co. v. Bloom (Com. Pl.) 10 Pa. Co. Ct. R. 295.

[ww] (Pa. 1890) An affidavit that plaintiff has every reason to believe that defendant is about to dispose of his personal property and leave the county is insufficient, under Act July 12, 1842, § 27, authorizing the issuing of an attachment on "proof" satisfactory to the justice.—Curwensville Mfg. Co. v. Bloom (Com. Pl.) 10 Pa. Co. Ct. R. 295.

[x] (Pa. 1892) An affidavit for an attachment, which avers that "defendant is about to dispose of his personal property and depart from the county, with intent to defraud his creditors," as it charges fraud in the language of the statute, is sufficient to give a justice of the peace jurisdiction to issue an attachment, under Act July 12, 1842 (Purd. Dig. p. 989), which provides that he shall issue it "upon proof" by affidavit to his satisfaction "that defendant is about to remove from the county any of his property, with intent to defraud his creditors."—Spencer v. Bloom, 149 Pa. 106, 24 Atl. 185; Moore v. Same, Id.

[xx] (Pa. 1892) An affidavit for an attachment, which alleges that affiant "has good reason to believe" that defendant is about to dispose of his property and leave the county with intent to defraud his creditors, without stating any facts upon which such belief is founded, is not sufficient to give a justice of the peace jurisdiction, under Act July 12, 1842 (Purd. Dig. p. 989) § 27, which provides that he shall issue an attachment "upon proof" by affidavit that defendant is about to remove from the county any of his property, or is about to dispose of it, with intent to defraud his creditors.—Gates v. Bloom, 149 Pa. 107, 24 Atl. 184, 30 Wkly. Notes Cas. 127.

[y] (Pa. 1892) An affidavit in attachment proceedings before a justice, "that the defendant is going away out of the county with intent to defraud his creditors" is insufficient.—Griffis v. Swick (Com. Pl.) 12 Pa. Co. Ct. R. 389, 2 Pa. Dist. R. 550.

[yy] (S. C. 1818) It is not necessary that the oath taken by the magistrate before issuing an attachment should be in writing.—McKenzie v. Buchan, 1 Nott & McC. 205.

[z] (Tenn. 1832) In attachments issued by justices of the peace, the debt must be sworn to by the plaintiff before the writ issues, or the proceedings will be void.—Walker v. Wynne, 11 Tenn. (3 Yerg.) 62.

[zz] (W. Va. 1895) An attachment may be sued out before a justice of the peace on plaintiff's filing an affidavit at the commencement of the action or at some time during its pendency.—Colborn v. Booth, 41 W. Va. 289, 23 S. E. 556.

§ 283. Security.

Liabilities on bonds and undertakings, see post, § 293.

[a] (Ark. 1869) No bond need be filed with a justice of the peace before issue of an attachment.—Stewart v. Houston, 25 Ark. 311.

[b] (Md. 1895) A justice of the peace not having power to require plaintiff, before issuing an attachment in a suit against a nonresident, to furnish a bond to prosecute the suit with effect, action cannot be maintained on such a bond.—Snyder v. Gillott, 32 Atl. 245.

[c] (Md. 1895) A justice of the peace has no power to require a plaintiff, before issue of an attachment in a suit against a nonresident, to furnish a bond to prosecute the suit with effect, or, in case of failure thereof, to pay to the nonresident debtor the costs of such suit as may be awarded against him.—Snyder v. Gillott, 32 Atl. 245.

[d] (Mo. 1849) A bond given under the statute in regard to attachments, which does not contain all the statutory conditions, is a good bond as to the conditions which it does contain.—State v. Berry, 12 Mo. 376.

[e, f] (N. Y. 1845) The provision of the act requiring a bond to be executed as one of the conditions to the issuing of an attachment (Laws 1831, p. 404, § 35) is not satisfied by the execution of a covenant to pay $100, or to pay all damages and costs, etc.; and, where only such covenant is executed, the justice does not require any jurisdiction to issue an attachment.—Homan v. Brinckerhoff, 1 Denio, 184.

[g] (N. Y. 1850) In order to procure an attachment from a justice of the peace against a nonresident of the county, under section 33 of the act to abolish imprisonment for debt (2 Rev. St. [2d Ed.] p. 202, § 292), a bond with security must be given by the applicant.—Bennett v. Brown, 4 N. Y. (4 Comst.) 254.

[h] (N. Y. 1852) The jurisdiction of a justice to issue an attachment under the act to abolish imprisonment for debt does not attach until bond filed.—Davis v. Marshall, 14 Barb. 96.

[i] (N. Y. 1864) Where an attachment bond is taken by a justice of the peace as sufficient for the purpose for which it is given, the approval of the bond by the justice is sufficient, as against third parties, even if he does not expressly certify it was executed in his presence.—Bascom v. Smith, 31 N. Y. 595.

[j] (N. Y. 1875) An instrument without a seal is not sufficient as a bond, under 2 Rev. St. p. 230, § 29, to confer on a justice's court jurisdiction to issue an attachment.—Tiffany v. Lord, 65 N. Y. 310.

[k] (N. Y. 1889) A justice of the peace has authority to allow an amended undertaking in attachment to be filed nunc pro tunc.—Riley v. Skidmore, 53 Hun, 632, 6 N. Y. Supp. 107.

[l] (Pa. 1887) Irregularities in the form of the condition, or in the number of sureties, in an attachment bond, in an action before a justice of the peace, do not avoid a judgment subsequently rendered.—Kramer v. Wellendorff, 10 Atl. 892.

[m] (S. C. 1793) An attachment bond taken by a justice of the peace was by mistake made with condition to prosecute an action in the county for a demand exceeding the jurisdiction of that court. *Held*, that the bond was void, and demurrer sustained to an action for breach of the condition.—Harville v. Meyers, 1 Brev. 3.

[n] (S. C. 1833) An attachment bond, signed in blank and afterwards filled up by the magistrate, is void.—Perminter v. McDaniel, 1 Hill, 267, 26 Am. Dec. 179.

§ 284. Writ or warrant.

Return to writ, see post, § 292.
Service of writ, see post, § 285.

[a] (Ala. 1839) The statute of 1836, requiring that process issued from the clerk's office of

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any court shall be directed "To any sheriff of the state," does not embrace attachments issued by justices of the peace.—Alford v. Johnson, 9 Port. 320.

[b] (Ala. 1868) A writ of attachment is not substantially defective for failure to expressly state before whom further proceedings thereon will be had; the inference being that they will be had before the justice who issued the writ.—Bruner v. Kinsel, 42 Ala. 493.

[c] (Ala. 1891) Under Code, § 2956, which provides: "When an attachment is issued by a justice of the peace, if the amount of the debt does not exceed the penalty of the constable's bond, the justice may, by indorsement on the process, direct it to be executed by the constable of the precinct," etc.,—a writ addressed to the sheriff "or constable of beat 3," etc., was sufficiently indorsed by the justice, and the levy by such constable was valid.—Drewry v. Leinkauff, 94 Ala. 486, 10 South. 352.

[d] (Conn. 1794) Writs of attachment may be directed to indifferent persons, to serve, by a justice of the peace.—Tyler v. Atwater, 2 Root, 72.

[e] (Conn. 1832) A writ, purporting on its face to be directed in the usual manner, had on the back of it a certificate of the magistrate who signed the writ, that the plaintiff's agent appeared and made affidavit respecting the writ in the words prescribed by the statute, adding "therefore this writ is directed to U. T., an indifferent person, to serve and return." *Held*, that it sufficiently appeared that the magistrate administered the oath according to the requirements of the statute, that the writ was directed to an indifferent person and that the name of such person was inserted in the writ, and that he was consequently duly authorized to serve the process.—Kellogg v. Wadhams, 9 Conn. 201.

[f] (Ga. 1879) An attachment is not void because, being returnable to a justice's court, it was improperly directed "To all and singular the sheriffs and constables of the state," instead of merely to "constables."—Buchanan v. Sterling, 63 Ga. 227.

[g] (Ga. 1879) The levy of an attachment by a proper officer is not void because the writ was improperly directed.—Warren v. Purtell, 63 Ga. 428.

[h] (Ky. 1801) An order of attachment which does not show that it was issued by a justice of the peace, and does not contain any charge which justified its issue, cannot be sustained.—McLorty v. Davis, 2 Ky. (Ky. Dec.) 57.

[i] (Ky. 1820) Though an attachment must issue from a justice of the county where defendant was last a resident, such fact need not be set forth in the attachment.—Plumpton v. Cook, 9 Ky. (2 A. K. Marsh.) 450.

[j] (Md. 1878) Since the warrant of the justice of the peace to the clerk lies at the foundation of the proceeding in attachment, it cannot be amended.—Halley v. Jackson, 48 Md. 254.

[k] (Mass. 1851) A writ, in a civil action pending before a justice of the peace, which directs the officer "to attach the goods or estate of ——— to the value of $20, and for want thereof to take the body of the said W. D.," may be amended, by leave of the justice, by inserting the defendant's name in the blank space.—McGuire v. Davis, 62 Mass. (8 Cush.) 356.

[l] (Minn. 1859) On one of the grounds stated in the affidavit for an attachment before a justice, the writ could have been made returnable in three days, on the other in six. *Held*, that either might be rejected as surplusage, and that the writ might be sustained on the other.—Curtis v. Moore, 3 Minn. 29 (Gil. 7).

[m] (Minn. 1881) A writ of attachment issued by a justice of the peace commanded the sheriff to attach goods of defendant to satisfy the sum of $100, "with interest and costs of suit," and also to summon defendant to answer to plaintiff in a civil action, "to his damages $100 or under." *Held*, that the writ was not to be construed as commanding a levy to satisfy a greater sum than $100, with costs and interest after judgment, as such greater sum would have been beyond the jurisdiction of the justice, and such construction would make the writ illegal on its face.—Hines v. Chambers, 29 Minn. 7, 11 N. W. 129.

[n] (Minn. 1893) A writ of attachment, by which an action is commenced in a justice's court, is sufficient to give jurisdiction if it be in the form prescribed by statute, requiring defendant to be summoned to appear at the office of the justice in a specified county, though the town is not named.—Beseman v. Weber, 53 Minn. 174, 54 N. W. 1053.

[o] (Miss. 1881) An attachment issued by a mayor, who was ex officio a justice of the peace, was not void because returnable within less than five days from the date of its issuance.—Baldwin v. Flash, 58 Miss. 593.

[p] (Miss. 1892) Code 1880, § 2191, provides that the jurisdiction of a justice of the peace shall be coextensive with his county, and he may issue any process to be executed in any part of his county, but every freeholder or householder shall be sued in the district in which he resides, or in the district in which the debt was contracted or the property may be found. Section 2475 provides that a justice may issue attachments returnable before himself or any other justice of any district in which defendant or any of his property may be found. *Held*, that an attachment issued by a justice against a nonresident, and levied on property in a district other than the one in which such justice resided, and in which there were qualified justices, was properly made returnable before the justice who issued it.—Griggs v. Jesse French Piano & Organ Co., 70 Miss. 211, 14 South. 24.

[q] (N. Y. 1835) 2 Rev. St. p. 267, § 233, requiring process from a justice's court to be filled up before issuing, does not preclude the justice from amending an attachment after a return thereof by inserting therein the amount of the debt sworn to by plaintiff, as required by page 230, § 30; pages 225, 424, and 425 giving the justices the power of amendment before judgment possessed by courts of record.—Near v. Van Alstyne, 14 Wend. 230.

[r] (N. C. 1844) Attachments from a justice, like other original process, not made returnable on a certain day, are void.—Clark v. Quinn, 27 N. C. 175.

[s] (N. C. 1844) An attachment before a justice of the peace not made, on its face, returnable within 30 days from the issuing thereof, is void, by the express provisions of the act of assembly concerning attachments.—Clark v. Quinn, 27 N. C. 175.

[t] (N. C. 1849) An attachment issued by a justice at chambers, and not made returnable at any time or place, is void.—Houston v. Porter, 32 N. C. 174.

[u] (N. C. 1859) A constable levied an attachment on real estate, and after judgment of condemnation, by a justice having jurisdiction of the amount, the writ was returned to court, where an order of sale was made. *Held*, that the omission of the magistrate to set out in the writ a day of return, being a mere irregu-

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larity, was cured.—McLane v. Moore, 51 N. C. 520.

[v] (Pa. 1895) Under Act 1874, providing that attachments against nonresident debtors shall be made returnable not less than two nor more than four days from the date thereof, a justice of the peace has no jurisdiction to issue a writ returnable in five days, though the fourth day falls on Sunday.—Protzman v. Wolff (Com. Pl.) 4 Pa. Dist. R. 473.

[w] (S. C. 1839) The oath on which a magistrate issues an attachment, though it need not be in writing, must be recited in the writ.—Devall v. Taylor, 1 Cheves, 5.

[x] (S. C. 1882) An attachment issued by a justice in an action to enforce an agricultural lien cannot be attacked collaterally.—Jones v. Clarkson, 16 S. C. 628.

[y] (Tenn.) An attachment issued by a justice of the peace under Acts 1794, c. 1, § 56, authorizing the issuance by justices of attachments against the estate of absconding debtors, in suits cognizable by them, must be under seal.—(1832) Walker v. Wynne, 11 Tenn. (3 Yerg.) 62; (1833) McCulloch v. Foster, 12 Tenn. (4 Yerg.) 162.

[z] (Wis. 1880) A warrant of attachment issued by a justice of the peace was issued on an affidavit made by one G. W. K. on behalf of plaintiffs, and required defendant to answer "to G. W. K. on behalf of" the plaintiffs named. *Held*, that the writ was not, for that reason, invalid, as the words therein "G. W. K. on behalf of" would be treated as having no legal significance, and would be rejected as surplusage.—Marston v. Hurlbut, 49 Wis. 630, 6 N. W. 316; Olsen v. Same, Id.

§ 285. Levy and service of writ.

[a] (Ala. 1877) The levy of an attachment by a person appointed by a justice to act as a special constable is irregular and void.—Peebles v. Weir, 60 Ala. 413.

[b] (Ala. 1892) Code, § 2956, authorizing an attachment issued by a justice for a sum exceeding his jurisdiction, and returnable in the circuit court, to be levied by the constable in whose beat the process issued, provided the amount does not exceed the amount of the constable's bond, refers only to the regular constable; and such a levy by a special deputy is void.—Carter v. Ellis, 90 Ala. 139, 7 South. 531.

[c] (Colo. 1890) Under Act 1878, in relation to attachments before justices of the peace, requiring notices of the levy in certain instances to be posted in three of the most public places within the precinct, evidence showing that one of such notices was posted on the front door of the court house, one on the side of the stairs leading to the justice's office, and one on a certain corral fence, and that "these places were then regarded, and would now be, three about as public places as could be found in the precinct," shows a sufficient compliance with the statute as against a collateral attack upon the proceedings.—Conway v. John, 14 Colo. 30, 23 Pac. 170.

[d] (Ill. 1893) To give a justice's court jurisdiction to render judgment against a corporation in attachment proceedings, service must be had by either leaving a copy of the writ with some of its officers, agents, or employés, or by posting notices, and mailing a copy of such notice addressed to defendant at its place of residence.—Hinman v. Andrews Opera Co., 49 Ill. App. 135.

[e] (Kan. 1890) Where an officer, having a writ of attachment issued by a justice of the peace, goes to a warehouse where the goods of defendant are and appraises the same, but does not take them into his possession, there is no valid levy, under Comp. Laws, c. 81, § 32, requiring the officer, when the goods can be reached, to "take them into his custody, and hold them subject to the order of the justice," and the officer has not such an interest in the goods as will entitle him to replevy them if they are taken away.—Lyeth v. Griffis, 44 Kan. 159, 24 Pac. 59.

[f] (Ky. 1865) A sheriff is legally authorized, under the Civil Code, to levy an attachment from a justice of the peace.—Turners v. Howard, 63 Ky. (2 Duv.) 112.

[g] (Md. 1857) Acts 1795, c. 56, provided that in proceedings in attachment in the circuit court a short note should be filed, and a copy thereof sent with the writ to be set up at the court house door by the sheriff. *Held*, that under Act 1852, c. 239, providing that all actions of replevin or attachment proceedings before the justice of the peace shall be similar to those in the circuit court, a short note should be filed at the time of issuing the attachment in justice's court, and a copy thereof sent with the writ.—Campbell v. Webb, 11 Md. 471.

[h] (Mich. 1876) Under the statute as to service of writs of attachment from justice's courts, requiring personal service if defendant can be found in the county, and if not, then, as the next best mode, the leaving of certified copies at his last place of residence in the county, and finally, as a last alternative, service on the person found in possession of the property, the officer is bound to use diligence to secure the best service, and may not adopt an inferior one until, after reasonable diligence running through the time given for it, all superior modes are found impracticable. Where service is made by leaving the papers with the person found in possession of the property at a time when there is still another day left available for personal service, or service by leaving a copy at the last place of residence, the justice acquires no jurisdiction of the case.—Town v. Tabor, 34 Mich. 262.

[i] (Mich. 1885) A writ of attachment was issued by a justice of the peace, and the constable on the same day levied on certain property of the defendant, and returned that, because defendant could not be found in the county, he had left a copy of the writ of attachment, and of the inventory of the property, duly certified, at the residence of defendant, with his wife. No personal service was ever had, and defendant did not appear; but plaintiff proceeded to judgment, issued execution, and sold the property. *Held*, that the justice acquired no jurisdiction over the person of the defendant, and that the judgment rendered was void.—Rolfe v. Dudley, 58 Mich. 208, 24 N. W. 657.

[j] (Mich. 1887) In an attachment before a justice of the peace to enforce a lien for labor on logs, service of the writ on the agent of the owner of the logs, without a return by the officer showing that he could not find the owner in his bailiwick, is insufficient.—Noyes v. Hillier, 65 Mich. 636, 32 N. W. 872.

[k] (Mich. 1888) In attachment before a justice, personal service of the writ is insufficient, unless made after levy, and accompanied by an inventory of the property seized, as provided by How. Ann. St. § 6840.—Langtry v. Wayne Circuit Judges, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352.

[l] (Mich. 1890) Where, in an attachment suit in a justice's court, defendant cannot be found, it is the duty of the officer to leave a copy of the writ of attachment at his last place of residence.—Segar v. Muskegon Shingle & Lumber Co., 81 Mich. 344, 45 N. W. 982.

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[m] (Mich. 1896) In attachment before a justice, at which time garnishment proceedings were also commenced, the return of the officer on the writ that "he had the writ in his possession on the 27th day of June; that he carried the writ around for several days after he received it, and that he received it on June 25th; that he could not have served the writ on defendant between June 25th and June 27th, or on either of said days; that the writ was returned to the court after June 27th,"—does not show that the officer retained the writ in his hands and made diligent search for defendant during the time personal service might have been made, and therefore his return of substituted service on June 25th is insufficient to confer jurisdiction under 3 How. Ann. St. § 6841, providing for such service if defendant cannot be found.—Bargh v. L. R. Ermeling & Co., 110 Mich. 164, 67 N. W. 1083.

[n] (N. J. 1857) To justify a justice in appointing a day of trial, some property must be attached.—Lentz v. Callin, 26 N. J. Law (2 Dutch.) 218.

[o] (N. J. 1880) An attachment out of a court for the trial of small causes must be executed in the presence of a freeholder, who must sign the appraisement.—Dittmar Powder Mfg. Co. v. Leon, 42 N. J. Law (13 Vroom) 540.

[p] (N. J. 1895) A justice of the peace issuing an attachment in the court for the trial of small causes cannot deputize a private citizen to execute and return the writ, nor proceed on a writ served by such a person.—Orenstine v. Schaffer, 58 N. J. Law (29 Vroom) 344, 33 Atl. 285.

[q] (N. Y. 1846) Where a writ of attachment against two joint debtors, returnable before a justice of the peace, was returned as served on one only of them, and nothing was said in the return as to the other, the service was held insufficient, and the judgment was reversed.—Cook v. McDoel, 3 Denio, 317.

[r] (N. Y. 1862) Service of a justice's attachment and inventory on a person in charge of the property attached is insufficient unless the defendant has no place of residence within the county.—Marshall v. Canty, 14 Abb. Prac. 237.

[s] (N. Y. 1862) An attachment issued by a justice of the peace against the property of a nonresident, under section 32 of the nonimprisonment act, must be served, together with the inventory, by leaving copies with the person in possession of the goods. An omission of such service will devest the justice of his jurisdiction.—Stone v. Miller, 62 Barb. 430.

[t] (N. C. 1869) A justice of the peace has no right to depute a special officer to execute a civil process; and, therefore, an attachment levied by an officer so appointed is void.—Marsh v. Williams, 63 N. C. 371.

[u] (W. Va. 1895) In order that jurisdiction of an attachment be conferred on a justice, the attachment properly issued must be levied on property of defendant.—Colborn v. Booth, 41 W. Va. 289, 23 S. E. 556.

[v] (Wis. 1870) Where the writ, in an attachment suit before a justice, has not been served on the defendant in person, notice to him that the writ has been issued and property attached must be posted or published at least 15 days before judgment can be taken against him.—Champion v. Argall, 25 Wis. 521.

§ 286. Lien and priorities.

[a] (Ala. 1852) When an attachment issued by, and returnable before, a justice of the peace, is levied by a constable on the defendant's land, and after the rendition of judgment in the suit, an execution issued thereon is levied on the same land, in default of personal property, the lien of the judgment creditor relates back to the date of the levy of the attachment.—Langdon v. Raiford, 20 Ala. 532.

[b] (Cal. 1865) An attachment lien in a suit before a justice of the peace is lost by the dismissal of the suit, and it cannot be restored by the justice's reinstatement of the case and his giving judgment for the plaintiff.—O'Connor v. Blake, 29 Cal. 312.

[c] (La. 1859) When a party has a claim exceeding in amount the jurisdiction of a justice of the peace, and bearing a privilege on property attached by another party in a justice's court, his remedy is by a suit in the district court, claiming his privilege, and enjoining the officer having the writ of attachment issued by the justice from proceeding with its execution and paying over the proceeds to the attaching creditor; or by a rule taken on the attaching creditor, to show cause why he should not be paid by preference out of the proceeds of the sale of the property attached.—Shiff v. Carprette, 14 La. Ann. 801.

[d] (Mass. 1856) Rev. St. c. 90, §§ 83, 84, provide that any person claiming any interest by force of a subsequent attachment, or otherwise, in any property that is attached, in a suit between other persons, may dispute the validity of the prior attachment, by petition to "the court in which the first suit is pending, at any time before final judgment therein." Section 94 provides that nothing contained in the preceding sections shall apply to any action commenced before a justice of the peace. *Held*, that a creditor claiming under an attachment in an action before a justice of the peace cannot, by petition, dispute the validity of a prior attachment in an action in a higher court.—Putnam v. Bixby, 72 Mass. (6 Gray) 528.

[e] (N. Y. 1851) A constable levied on a horse and advertised it for sale. Prior to the day of the sale, an attachment came to his hands by virtue of which he attached the same horse. The property was sold on the first execution, and a sum sufficient to pay that raised, leaving a surplus to pay the amount due in the attachment. Judgment was obtained in the attachment suit, and execution issued thereon to the constable, who levied on this surplus, and applied the avails to satisfy the execution. *Held*, that the lien of the attachment on the horse, by operation of law, became transferred, after the sale, to the surplus money in the hands of the constable.—Wheeler v. Smith, 11 Barb. 345.

[f] (Vt. 1830) If a creditor take judgment on a justice's writ, by agreement with the debtor, at any other day than that set in his writ, he forfeits his lien to a subsequent attacher.—Murray v. Eldridge, 2 Vt. 388.

[g] (Vt. 1843) Under Rev. St. c. 26, § 12, prohibiting the service of a justice writ more than 60 days before the time therein appointed for trial, an officer seizing personal property under such a writ more than 60 days before such time acquires no rights to the property as against a subsequent attachment, though the defendant made no objection to the seizure.—Nelson v. Denison, 17 Vt. 73.

[h] (W. Va. 1895) An attachment from a justice's court creates a lien on leviable chattels only from its levy.—Poling v. Flanagan, 41 W. Va. 191, 23 S. E. 685.

§ 287. Custody and disposition of property.

Delivery to third person claiming ownership, see post, § 291 [b].

Jurisdiction of justice in action on forthcoming bond, see ante, § 189 [c].

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[a] (Ala. 1857) A justice of the peace who has issued an attachment returnable to a court in his county, which has been levied by the sheriff of another county, on perishable property, has authority to make an order for the sale of such property.—Young v. Davis, 30 Ala. 213.

[aa] (Ill. 1895) Where a forthcoming bond in an attachment suit pending before a justice of the peace provided that if such suit should be decided in favor of plaintiff, and such decision should not be appealed from, the goods should be forthcoming to answer the judgment of the court, it meant that the goods were to be forthcoming on a final adjudication in favor of plaintiff, whether such final adjudication was obtained in the justice court, or in the circuit court on appeal.—Conard v. Ehrman, 61 Ill. App. 128.

[b] (Kan. 1888) Justices' Code Neb. § 52, providing that defendant may, at any time before judgment, procure the discharge of an attachment and restoration of the property by executing an undertaking, does not authorize the giving of such undertaking after final judgment.—Woodward v. Witascheck, 38 Kan. 760, 17 Pac. 658.

[c] (Kan. 1895) A forthcoming bond by a defendant who has failed to secure a discharge of the attachment, to the effect that said defendant shall perform the judgment, is a substantial compliance with the Justice Civ. Code, § 52.—Stow v. Shay, 54 Kan. 574, 38 Pac. 784.

[d] (La. 1868) Several suits were brought by colored laborers of M. against him for their wages, and his property was seized. M. obtained the release of his property by giving bonds, with surety, to the justice before whom the suits were pending conditioned, "that if said M. appear at my office and deliver up to me the articles enumerated herein, on Saturday, Feb. 17, 1866, or pay certain judgments or claims against him in favor of a number of colored men, then this bond to be void," etc. *Held*, that the bond was a nullity.—Terrail v. Tinney, 20 La. Ann. 444.

[e] (Miss. 1834) A justice of the peace has no authority to order property attached in a case pending before him to be delivered to the plaintiff, and such order is no defense to an action of trover by the defendant.—Welch v. Jamison, 2 Miss. (1 How.) 160.

[f] (Mo. 1891) When a writ of attachment, issued by a justice of the peace, is levied on property afterwards levied on under a writ of attachment issued by a court of record, the cause before the justice must be transferred to the court of record, by order or certiorari of the latter court, before that court will have jurisdiction to apply any of the proceeds of the property to the satisfaction of the claim sued on before the justice. But the cause before the justice may be prosecuted to final judgment before him, and such removal be thus made after rendition of the judgment.—State Bank of St. Louis v. Steinberg, 44 Mo. App. 401.

[g] (Nev. 1890) St. 1881, p. 56, § 8, provides that, in cases of attachment, etc., any miner, mechanic, etc., may serve on the officer executing the same a sworn statement of his claim at any time before the sale, and shall also notify the creditor at whose instance the writ was issued, and the debtor, if he be found in the county where the property is situated, and if he be not found, then service upon the officer shall be sufficient; and unless, within five days after receiving such notice, either the creditor or debtor disputes the claim, the officer shall pay the amount thereof as the first lien on the proceeds of sale. In a suit in a justice's court, the notices were served on the attaching creditor, and on the sheriff who made the levy, the debtor being not found, and, though the claim was not disputed, the sheriff failed to pay it, but applied the proceeds to the satisfaction of the execution. *Held*, that the justice had jurisdiction, on showing by the claimant, to enter an order requiring the sheriff to pay the amount of the claims.—Alexander v. Archer, 21 Nev. 22, 24 Pac. 373.

[h] (Pa. 1892) Where money of defendant is attached in the hands of an insurance company, it is the duty of the constable, under Act July 12, 1842, § 29, to take the money, or, if that is impracticable, to demand a bond conditioned for its production.—McNamara v. Roderick (Com. Pl.) 11 Pa. Co. Ct. R. 37.

[i] (R. I. 1889) Where it appears from the record in a justice's court that jurisdiction in an attachment suit has lapsed by a failure to return the writ in time, an order of sale made in such suit is void, and is no defense to an action for taking and converting the goods sold thereunder.—Brown v. Carroll, 16 R. I. 604, 18 Atl. 283.

§ 288. Proceedings to support or enforce.

[a] (Ark. 1878) An affidavit for an attachment, in an action before a justice of the peace, stating in substance that plaintiff's claim is for money due for rent of land, that his claim is just and he believes he ought to recover a stated sum, and that defendant has removed certain cotton from the premises without plaintiff's consent, answers the purpose of a complaint or statement of the cause of action, and is a substantial compliance with the statutory requirements.—Tignor v. Bradley, 32 Ark. 781.

[b] (Ga. 1851) Land cannot be levied on and sold under an order of the magistrates in attachments returnable to justices' courts. It must be by virtue of an execution issuing on the judgment in attachment.—Rogers v. McDill, 9 Ga. 506.

[c] (Ga. 1877) No declaration need be filed in an attachment suit in a justice's court.—Smith v. Wilson, 58 Ga. 322.

[d] (Ga. 1890) Where an execution is based solely on an attachment before a justice of the peace, and it is not shown that defendant had notice, as provided by Code, § 3309, or that he replevied the property, or that he appeared and defended, the levy will be dismissed as to property not described in the attachment, and claimed by third persons, though the execution and levy were general.—Reeves v. Chattahoochee Brick Co., 85 Ga. 477, 11 S. E. 837.

[e] (Ill. 1875) In an attachment before a justice of the peace, where there is no personal service upon the defendant, or levy upon his property, and notice, as required by statute, the justice has no jurisdiction, and any judgment rendered is a nullity.—Borders v. Murphy, 78 Ill. 81.

[f] (Ind. 1881) Where defendant in attachment, sued before a justice in a wrong county, is served with process and does not appear to dispute the jurisdiction, the judgment against him on his property cannot be collaterally assailed.—Wilkinson v. Moore, 79 Ind. 397.

[g] (Ind. 1881) Where one is sued before a justice in the wrong county, and no process is served on him, there being merely a levy of attachment, the court has no jurisdiction, and the judgment may be questioned collaterally.—Wilkinson v. Moore, 79 Ind. 397.

[h] (Ind. 1895) The fact that a justice of the peace, who obtained jurisdiction of a nonresident defendant merely by publication of notice and attachment, rendered judgment for a lar-

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ger sum than that demanded in the attachment affidavit, did not render the judgment void.—Gum Elastic Roofing Co. v. Mexico Pub. Co., 140 Ind. 158, 39 N. E. 443, 30 L. R. A. 700.

[i] (Iowa, 1856) The mere statement of the cause of action, without filing a transcript of the judgment whereon it is brought, is sufficient, before a justice, to allow an attachment to issue.—Collins v. Rondolph, 3 G. Greene, 299.

[j] (Md. 1894) Code, art. 52, § 21, providing that where a defendant has been summoned, and fails to appear on the return day, the justice shall fix a subsequent day for trial, not less than 6, nor more than 14, days from the return day, does not apply to attachment proceedings.—Weed v. Lewis, 80 Md. 126, 30 Atl. 610.

[k] (Mich. 1887) A justice of the peace, in an attachment to enforce a lien for labor on logs, cannot, on a service made by the officer of the writ, proceed at once on such day to a trial of the case, especially when the writ is returnable at 10 o'clock.—Noyes v. Hillier, 65 Mich. 636, 32 N. W. 872.

[l] (Minn. 1891) Where an action before a justice against a nonresident is commenced by attachment duly levied, and the summons is ordered to be served by publication, but the return day is fixed at less than six days after the expiration of the period of publication, as required by Gen. St. 1878, c. 65, § 102, a judgment rendered on such return day in favor of plaintiff, defendant not appearing, is void.—Bird v. Norquist, 46 Minn. 318, 48 N. W. 1132.

[m] (Mo. 1884) The duty of a justice of the peace in case of death of defendant pending attachment suit, to proceed to final judgment, is not changed by Rev. St. § 2946, requiring certification to the probate court in case of death in "suits before justices," but not specifying attachment suits.—Abernathy v. Moore, 83 Mo. 65.

[n] (Mo. 1891) While Rev. St. 1889, §§ 525, 526, contemplate that in an action by attachment before a justice the affidavit for attachment and the statement of the cause of action shall be separately made and filed, that practice is not essential to the jurisdiction of the justice, and his jurisdiction will attach where the statement of the cause of action is incorporated in the affidavit.—Holman v. Kerr, 44 Mo. App. 481.

[o] (Mo. 1895) Where no plea in abatement was filed, either before the justice, or in the circuit court on appeal, it is a confession of the grounds alleged for attachment.—Rechnitzer v. Missouri, K. & T. Ry. Co., 60 Mo. App. 409, 1 Mo. App. Rep'r, 279.

[p] (Mont. 1891) Code Civ. Proc. § 80, provides that in case of attachment without personal service the judgment and execution shall be against the "property attached, as provided by section 73 of this chapter." Section 73 is silent upon the subject, as the part referred to in section 80 was repealed by Act March, 1883 (St. 13th Sess. 51). Section 245 provides that, in case of service by publication and proper proof, judgment may be rendered for plaintiff for the amount due, in cases in the district court. There is no statute in the procedure act requiring that the judgment in case of service by publication shall be against the attached property, and it is provided that the procedure in the district courts shall apply to the justices' courts, as far as applicable. Sections 745, 792, 804–806. *Held* that, in case of attachment of a nonresident's property and service by publication in an action in a justice court, a general judgment could be rendered for plaintiff.—State v. Eddy, 10 Mont. 311, 25 Pac. 1032.

[q] (Neb. 1883) An attachment was tried by a justice of the peace on September 28th, and the trial concluded on that day, after which the court took the case under advisement until the next morning at "8:30 o'clock sharp," at which time judgment was rendered. *Held* a sufficient compliance with Code Civ. Proc. § 1002, which provides with respect to attachments that, "when the trial is by justice, judgment must be entered immediately after the close of the trial."—Huff v. Babbott, 14 Neb. 150, 15 N. W. 230.

[r] (Neb. 1895) A finding by a justice of the peace, in an attachment suit, of the sum due plaintiff, an assessment of his recovery, and an order of sale of the attached property, is a judgment in form against defendant, and, where the only relief sought is to subject the attached property to the payment of the debt, is sufficient as an entry.—Smith v. Johnson, 43 Neb. 754, 62 N. W. 217.

[s] (N. J. 1893) Under Revision, p. 54, § 65, providing that defendant, in an attachment issued by a justice of the peace, may, on or before the day set for the hearing, enter his appearance by filing with the justice a bond to the plaintiff, where defendant neglects to file a bond, the justice, after plaintiff rests his case, may refuse to permit defendant to file a bond, since the "hearing" may lawfully consist of plaintiff's case alone.—Hazlitt v. Morrow, 55 N. J. Law (26 Vroom) 547, 26 Atl. 885.

[t] (N. M. 1882) A statement of plaintiff's demand in his affidavit for an attachment is a sufficient declaration, if no objection is made to it, in an action before a justice of the peace. If the demand thus stated is for money had and received, but that proved is of a different nature, as for work and labor, yet the judgment will not be reversed if no objection was made at the trial.—Crolot v. Maloy, 2 N. M. 198.

[u] (Ohio, 1835) A justice of the peace, in an action in attachment, may set aside a judgment, void for want of service of the summons on defendant, and retain the custody of the attached chattels, and issue a new summons in the action, and, on due service thereof, again proceed to judgment.—Wehlen v. Macke, 9 Ohio Dec. 565, 15 Wkly. Law Bul. 125.

[v] (Ohio, 1888) In an action before a justice of the peace, where there is neither actual service nor voluntary appearance, but where jurisdiction is acquired by attachment of property and publication of notice, a justice may render judgment for the full amount of plaintiff's claim, if not in excess of his jurisdiction, but it has no operation beyond the disposition of the property seized.—Chicago & C. Coal Co. v. Manley (Com. Pl.) 10 Ohio Dec. 394, 21 Wkly. Law Bul. 38.

[w] (Tenn. 1871) Under Code, § 3527, making it imperative, in attachment proceedings, on the justice, where the defendant does not appear, to stay final judgment not less than six months, a final judgment, rendered in less than six months after the attachment was levied, is void.—Sorrels v. Wiley, 53 Tenn. (6 Heisk.) 318.

[x] (Tenn. 1872) A judgment of a justice of the peace in an attachment against a nonresident is erroneous where the justice fails to stay the judgment for six months after return of process.—Rumbough v. White, 58 Tenn. (11 Heisk.) 260.

[xx] (Tex. 1881) Under Rev. St. art. 1573, providing that pleadings in justices' courts shall be oral except where otherwise especially provided, a plaintiff need not file any petition for an attachment in an action commenced by attachment.—Henry v. Blasco, 1 White & W. Civ. Cas. Ct. App. § 765.

[y] (Tex. 1895) The judgment of a justice of the peace, rendered on service by publication in

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a suit against a nonresident by attachment on real estate, in accordance with Rev. Civ. St. art. 180a, is not subject to collateral attack on the ground that the citation of publication, otherwise sufficient, makes no mention of the attachment proceedings.—Reid v. Mickles (Civ. App.) 29 S. W. 563.

[yy] (Vt. 1858) If a writ of attachment, returnable before a justice in a different county from that in which it is served, be served by attaching property less than 12 days before the return day, and no appearance is made by defendant, and judgment is given by default, the judgment is valid.—Hammond v. Wilder, 25 Vt. 342.

[z] (Wis. 1851) A judgment rendered by a justice of the peace in favor of the plaintiff in an attachment suit in which the writ had not been returned, and in which the defendant did not appear, is void.—Selby v. Platts, 3 Chand. 183, 3 Pin. 170.

[zz] (Wis. 1875) In an action in a justice's court commenced by attachment, the affidavit on which the warrant of attachment issued is sufficient as an oral complaint.—Ruthe v. Green Bay & M. R. Co., 37 Wis. 344.

§ 289. —— Process in action and appearance.

Service of writ of attachment, see ante, § 285.

[a] (U. S. 1835) An attachment issued upon a single non est, returned upon a justice's warrant for a small debt, will be quashed; the defendant being a resident of the district. Two non ests are necessary.—Doyle v. Richards, Fed. Cas. No. 4,054 [4 Cranch, C. C. 527].

[b] (Cal. 1863) Where an attachment is regularly issued by a justice at the time of the issuance of the first summons, it is not vitiated by failure to serve the first summons and the issuance of the second one.—Seaver v. Fitzgerald, 23 Cal. 86.

[c] (Ill. 1895) The return of a constable in an attachment against a nonresident before a justice of the peace, that he served the notice of suit by posting three copies thereof at three public places in the neighborhood of the justice, and mailing a copy addressed to defendant at his place of residence, though defective in not stating "the places where he posted and mailed copies," as required by Rev. St. 1893, c. 11, par. 50, § 9, is sufficient to sustain a judgment.—Pomeroy v. Rand, McNally & Co., 157 Ill. 176, 41 N. E. 636.

[d] (Iowa, 1845) Where the transcript of a justice of the peace shows an appearance by attorney on a motion to quash the attachment, it will be regarded as an appearance in general, and defendant will be estopped from a motion to dismiss the cause, when taken to the district court on appeal, for want of personal service.—Deshler v. Foster, Morris, 408.

[e] (Iowa, 1865) A notice of an attachment before a justice, posted under Rev. St. § 3951, need not specify the township in which the action is pending.—Johnson v. Dodge, 19 Iowa, 106.

[f] (Iowa, 1865) A defect in the original notice returned "Not found," in a proceeding in attachment in a justice's court, does not affect the jurisdiction over the property attached.—Johnson v. Dodge, 19 Iowa, 106.

[g] (Mich. 1851) In an attachment suit goods were seized, but no such service was made as to give the court jurisdiction over the person of the defendant. On the return of the writ the justice continued the cause to a future day. The defendant appeared before the justice, prior to the adjourned day, and demanded trial. *Held*, that such appearance was a waiver of service of process, and that the defendant thereby subjected his person to the jurisdiction.—O'Hara v. McEnny, 2 Mich. N. P. 164.

[h] (Mich. 1869) A special appearance by defendant in attachment who was not served, to object to the jurisdiction, is not such an appearance as will authorize the justice to proceed to judgment before the expiration of 30 days.—Wright v. Russell, 19 Mich. 346.

[i] (Mich. 1878) Return of substituted service will not give a justice jurisdiction to proceed in attachment, if it does not appear that diligent search was made for the defendant until the time allowed by law for making personal service had expired.—Brown v. Williams, 39 Mich. 755.

[j] (Mich. 1881) Where defendant, by his attorney, makes a special appearance in a justice's court for the sole purpose of moving to quash an attachment, such appearance does not authorize the service on the attorney of notice of an amendment of the return of the attachment.—Bushey v. Raths, 45 Mich. 181, 7 N. W. 802.

[k] (Mich. 1890) Where the officer serving a summons in an attachment suit is unable to find defendant, and fails to leave a copy at his last place of residence, as required by How. Ann. St. §§ 6827, 6841, or to return that there was no such last place of residence in the county, the justice before whom the action is brought does not acquire jurisdiction.—Segar v. Muskegon Shingle & Lumber Co., 81 Mich. 344, 45 N. W. 982.

[l] (Mich. 1892) Where, in a case in justice court, a writ of attachment is made returnable at a certain hour, and neither party actually appears within one hour of the time fixed, a written request by plaintiff to the justice to continue the case to a later hour is sufficient appearance to give the justice jurisdiction to act, and to grant the continuance.—Wagner v. Kellogg, 92 Mich. 616, 52 N. W. 1017.

[m] (Mich. 1895) In attachment before a justice where the service was defective, an appearance and consent to an adjournment, "without prejudice," do not waive the defective service.—Tunningly v. Butcher, 106 Mich. 35, 63 N. W. 994.

[n] (Mo. 1870) A constable's return, on an order of publication issued in an attachment proceeding before a justice of the peace, which does not show that the notice was posted at and for the time required by statute, is not sufficient to give the justice jurisdiction.—McCloon v. Beattie, 46 Mo. 391.

[o] (N. J. 1875) The defendant in attachment in a justice's court must file a bond on appearance.—Davis v. Mahany, 38 N. J. Law (9 Vroom) 104.

[p] (N. J. 1893) Under Revision, p. 54, § 65, providing that defendant, in an attachment issued by a justice of the peace, may, on or before the day set for hearing, enter his appearance by filing with the justice a bond to the plaintiff, it is absolutely necessary that defendant, in order to enter his appearance, file a bond.—Hazlitt v. Morrow, 55 N. J. Law (26 Vroom) 547, 26 Atl. 885.

[q] (N. Y. 1869) Laws 1831, c. 300, §§ 37, 38, relating to attachments, provide that, if the attachment be returned personally served on defendant, the justice shall, on the return day, proceed to hear, etc.; that if, at the return day, it appear by the return that property was attached, and that a copy of the inventory and attachment was not personally served, and defendant shall not appear, plaintiff may take out a summons against defendant; and if such summons be returned that defendant cannot be

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found after diligent inquiry, or that the same has been personally served on defendant, in either case, the justice shall proceed to hear, etc., as upon the summons returned personally served. *Held*, that by appearance the statute means a general appearance, and, if defendant does not so appear, the only thing the justice has jurisdiction to do is to issue a summons in pursuance of such statute.—Stevens v. Benton, 2 Lans. 156.

[r] (Ohio, 1877) To support an attachment issued by a justice of the peace, on an affidavit showing that the defendant so conceals himself that a summons cannot be served on him, it is not necessary that a summons should be issued in the first instance and returned "Not found."—Mawicke v. Wolf (D. C.) 2 Wkly. Law Bul. 87.

[s] (Ohio, 1878) An appearance before a justice of the peace, to move to discharge an attachment, is not a general appearance for all purposes.—Mawiecke v. Wolf, 7 Ohio Dec. 476, 3 Wkly. Law Bul. 458.

[t] (Pa. 1885) An attachment and summons were issued by an alderman, returnable nine days after date. *Held* that, though this was irregular, the irregularity was cured by the defendant's appearance.—McGinley v. McDonough, 3 Lanc. Law Rev. 202.

[u] (Pa. 1886) Under Act July 12, 1842, § 30, requiring summons in case of attachment, where it is not personally served on the defendant, to be returnable not more than eight nor less than five days after its date, a summons returnable three days from its date is defective.—Roberts v. Wright, 2 Pa. Co. Ct. R. 175.

[v] (Tenn. 1872) A judgment of a justice of the peace, in attachment against a nonresident, is erroneous where the justice fails to make publication for defendant, as required by Code, § 3521.—Rumbough v. White, 58 Tenn. (11 Heisk.) 260.

[w] (Tenn. 1872) Where a constable has no process requiring him to summon defendant, a return on a writ of attachment, that he has summoned the defendant, will not give a justice of the peace jurisdiction, on dismissal of the writ, to enter a judgment against the defendant, though defendant enters a plea in abatement; such plea not being an appearance.—Sherry v. Divine, 58 Tenn. (11 Heisk.) 722.

[x] (Vt. 1853) Where a writ in attachment is returnable before a justice in a different county from that in which it is served, and it is served by attaching property less than 12 days before the return day, if the defendant appears, the defect in service cannot be pleaded in bar of the action.—Hammond v. Wilder, 25 Vt. 342.

[y] (Wis. 1871) Any objection to the jurisdiction of the justice for defects in the return to a writ of attachment by which the action was commenced is waived by a general appearance and demand by the defendant for a bill of particulars.—Baizer v. Lasch, 28 Wis. 268.

§ 290. Quashing, vacating, and dissolution.

Bonds for release of property, see ante, § 287 [aa–d].

Liability of sureties on justice's bond for money paid to procure discharge of attachment, see ante, § 57.

[a] (U. S. 1838) It is not sufficient ground for quashing an attachment issued by the circuit court on a warrant from a justice of the peace, under Act Md. 1795, c. 56, that the clerk by mistake wrote the word "cash," instead of "each," in the copy of the short note sent with the writ; the mistake may be corrected.—Hard v. Stone, Fed. Cas. No. 6,046 [5 Cranch, C. C. 503].

[b] (Cal. 1865) The dismissal of an action by a justice of the peace dissolves an attachment, though the case is subsequently reinstated, and the parties appear and try it, and defendant cannot, by submitting himself anew to the jurisdiction of the court, affect the rights of strangers to the action as to the property attached.—O'Connor v. Blake, 29 Cal. 312.

[c] (Cal. 1888) Under Code Civ. Proc. § 553, providing that, "if the defendant recover judgment against the plaintiff, * * * all the property attached remaining in the sheriff's hands must be delivered to the defendant or his agent, the order of attachment shall be discharged, and the property released therefrom," an attachment of defendant's property in a justice's court is dissolved upon judgment in his favor, though plaintiff appeals.—Loveland v. Alvord C. Q. M. Co., 76 Cal. 562, 18 Pac. 682.

[d] (Md. 1846) It is no reason for quashing an attachment, that the affidavit of the creditor was made before a justice of the peace of a different county, if the warrant to issue the attachment was granted by a justice of the county in which the attachment is issued.—Dickinson v. Barnes, 3 Gill, 485.

[e] (Mich.) In proceedings by attachment in a justice's court under How. Ann. St. § 6831 et seq., the affidavit required to be made in support of the attachment is essential to confer jurisdiction; and where this is defective, and the attachment is dissolved, the justice is ousted of his jurisdiction over the defendant, notwithstanding a personal service of the writ.—(1887) Borland v. Kingsbury, 65 Mich. 59, 31 N. W. 620. CONTRA, see (1879) Hills v. Moore, 40 Mich. 210.

[f] (N. H. 1853) An attachment of the real estate of a defendant is not a sufficient service of a writ returnable before a justice of the peace, and may be quashed on motion, when that is the only service.—Farley v. Day, 26 N. H. (6 Fost.) 527.

[g] (N. Y. 1812) Where the proceedings are regular, the justice cannot supersede the attachment, but must, on the return thereof, proceed to hear the cause, as on any other process.—Field v. McVickar, 9 Johns. 130.

[h] (N. Y. 1889) A judgment for defendant in an action before a justice of the peace, in which an attachment is issued, vacates the warrant of attachment.—Blynn v. Smith, 51 Hun, 643, 4 N. Y. Supp. 306.

[i] (N. Y. 1893) Where the summons is not personally served, and defendant's property is attached, under a warrant on an insufficient affidavit, a justice of the peace cannot enter judgment by default under Code Civ. Proc. § 2918, giving the justice such power, in the absence of personal service, only where property "has been duly attached by virtue of a warrant that has not been vacated"; as it is the justice's duty to vacate the attachment, under section 2916, giving him authority, "on his own motion," to vacate attachment "if he deems the papers on which it was granted insufficient to authorize it."—Kingsford v. Butler, 71 Hun, 598, 24 N. Y. Supp. 1094, 23 Civ. Proc. R. 228.

[j] (Ohio, 1854) A justice of the peace discharged an attachment on motion, but rendered judgment for plaintiff. Plaintiff brought an action on the judgment in the superior court, and sued out a second attachment. *Held*, that the justice's order discharging the attachment, being a mere collateral matter not affecting the merits of the action, and made on a summary hearing, and not appealable, did not conclude plaintiff as to any questions of fact, and hence

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he was entitled to a decision on the merits, on a motion to discharge the second attachment.—Brooks v. Todd, 1 Handy, 169.

[k] (Ohio, 1876) A justice of the peace may discharge an attachment made under his order, on the ground that the facts stated in the affidavit on which the order was issued are not true.—Bancroft v. Talbott, 29 Ohio St. 538.

[l] (Ohio, 1877) The rule allowing counter affidavits to be considered on a justice's hearing of a motion to discharge an attachment applies where the property attached is the personal earnings of the debtor, claimed by him to be necessary to the support of his family.—Baer v. Otto, 34 Ohio St. 11.

[m] (Tenn. 1872) Where defendants in attachment in a justice's court are residents, and are summoned to appear, and the court has jurisdiction, or its jurisdiction is not objected to, the case may stand for trial upon its merits, though the attachment be abated.—Kruger v. Stayton, 58 Tenn. (11 Heisk.) 726.

[n] (Tex. 1893) An attachment issued out of justice's court should not be quashed for a variance between the affidavit for the attachment and the affidavit to the itemized account filed by plaintiff, where there is no variance between the statement of plaintiff's cause of action as entered on the justice's docket and the affidavit for attachment.—Brasher v. Cuchia, 4 Tex. Civ. App. 690, 24 S. W. 85.

[o] (Vt. 1879) An illegal exchange of justices by agreement of parties to a suit discharges an attachment.—Wells v. Mansur, 52 Vt. 239.

§ 291. Claims by third persons.

Jurisdiction of justice, see ante, §§ 177 [s], 189 [bb, d, e, k, l], 217 [c].

—— *involving title to land, see* ante, § 84 [b].

[a] (Colo. 1891) Under Gen. St. 1883, § 2011, providing that third persons must assert their rights to property seized under attachment issued by a justice of the peace before the trial of the main action, an appeal by a claimant from an order of the justice dismissing the petition of intervention, because filed after trial in the main action, should be dismissed, as the interveners have no standing in court.—Whalen v. McMahon, 16 Colo. 373, 26 Pac. 583.

[b] (Colo. 1891) The intervener before a justice of the peace, claiming property attached, cannot, by giving a forthcoming bond, become repossessed of property attached pending a determination of the intervention proceeding.—Kinnear v. Flanders, 17 Colo. 11, 28 Pac. 327.

[c] (Colo. 1896) Where, in an action in a justice's court, aided by attachment, a third person claims the attached property, on appeal to the county court by defendant alone the intervener cannot question the correctness of the decision of the justice against his claim.—Winship v. May, 7 Colo. App. 355, 43 Pac. 904.

[d] (Conn. 1874) Gen. St. tit. 1, § 324, providing for a bill in equity on interpleader in foreign attachment, and empowering a court of equity to take entire jurisdiction of the matter pending at law, applies to a foreign attachment before a justice of the peace.—Darrow v. Adams Exp. Co., 41 Conn. 525.

[e] (Ill. 1892) Rev. St. c. 11, entitled "Attachments in Courts of Record," which provides (section 29) for interpleaders, does not apply to attachments before justices of the peace.—Stafford v. Scroggin, 48 Ill. App. 48.

[f] (Ky. 1822) An officer executing an attachment issued by a justice of the peace has no authority to impanel a jury to inquire into the right of property attached.—Dickey v. Evans, 12 Ky. (2 Litt.) 130.

[g] (Mo. 1875) Where a number of horses were attached before a justice, and the jury found for an interpleader "in the sum of $150 for horses," etc., a judgment rendered thereon "for the possession of the property mentioned in the interplea" was unauthorized.—Mills v. Thomson, 61 Mo. 415.

[h] (N. J. 1833) Under Rev. Laws, p. 357, § 14, providing that, if the sheriff or other officer shall attach any goods claimed by a third person as his property, it shall be lawful for such sheriff or officer to summon a jury to try the right of property, the words "or other officer" must be confined in meaning to coroners, or such officers other than sheriffs to whom it appertains to execute process out of the superior courts, and hence a constable has no right to call a jury to try the claim of a third person to property levied on under an attachment issued out of the court for the trial of small causes.—Stryker v. Skillman, 14 N. J. Law (2 J. S. Green) 189.

[i] (N. Y. 1857) Where a bond is given or offered by the claimant of goods which have been attached in double the amount of the demand, it is sufficient to satisfy the statute, though there may have been property attached to a much larger amount than double the value of the debt.—Kamena v. Warner, 15 How. Prac. 5, reversed (1858) 18 N. Y. Super. Ct. (6 Duer) 698.

[j] (N. Y. 1858) Where a constable, on an attachment issued out of a justice court against one person, seizes and removes property found in the possession of another, and the latter claims to be the owner, and desires to proceed under Rev. St. pt. 3, tit. 4, § 31, to perfect a right to have the property restored to his possession, he must, among other things, give a bond in a penalty equal to double the value of the property attached, though such value greatly exceeds the debt on which it was seized.—Kamena v. Wanner, 13 N. Y. Super. Ct. (6 Duer) 698, reversing (1857) 15 How. Prac. 5.

[k] (N. C. 1835) The word "appeal," in Act 1794 (Revision, c. 414), § 9, which provides that where property attached is claimed before a justice by any other person, and the intervention of a jury may be necessary to determine the right, the party claiming such property may appeal to the next county court, is not used in its technical sense, and it is not necessary, or regular, for the justice to pass on a claim of a third person to property attached, before such person can take his case to the county court.—Simpson v. Harry, 18 N. C. 202.

§ 292. Return.

[a] (Del. 1850) In attachment from a justice's court, it is not enough for the return of the officer to state that notice was given "according to law"; aliter, if the justice so state.—Johnson v. Layton, 5 Har. 252.

[b] (Mich. 1873) A justice's writ of attachment cannot be returned "Not found" until the last day for serving the same personally has expired: it is the duty of the officer to make personal service when he can, and the jurisdiction to take any subsequent proceedings depends upon a proper return of a diligent attempt to get service.—Withington v. Southworth, 26 Mich. 381.

[c] (Mich. 1879) Where the marshal has no authority to serve process outside of a city, his return to a writ of attachment issued by a justice will not confer jurisdiction to proceed, unless it shows affirmatively that the writ was served within the city.—Alverson v. Dennison, 40 Mich. 179.

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[d] (Mich. 1880) A return to a justice's writ of attachment, not personally served, that it was left at defendant's "usual place of abode, with his wife," who was informed of its contents, is insufficient.—Michels v. Stork, 44 Mich. 2, 5 N. W. 1034.

[e] (Mich. 1881) Where a constable returns that he has taken property under an attachment issued out of a justice's court, but the return is silent as to the place of seizure, it will be presumed to have been "within the county," as required by Comp. Laws, § 5275.—Bushey v. Raths, 45 Mich. 181, 7 N. W. 802.

[f] (Miss. 1883) The validity of a return on an attachment issued by a justice with the proper indorsement of the receipt and service thereof by the constable is not affected by an indorsement on the writ of its receipt for the constable by a sheriff who was one of the plaintiffs.—Hart v. Forbes, 60 Miss. 745.

[g] (Mo. 1894) A constable's return, though in fact false, that he levied an attachment issued by a justice on defendant's property, and made personal service on the defendant, is conclusive on the parties, and sufficient to give the court jurisdiction.—Shanklin v. Francis, 59 Mo. App. 178, 1 Mo. App. Rep'r, 15.

[h] (N. J. 1857) To justify a justice in appointing a day of trial, it must clearly appear by the constable's return to an attachment that some property has been attached.—Lentz v. Callin, 26 N. J. Law (2 Dutch.) 218.

[i] (N. Y. 1851) Where a constable returns on an attachment from a justice that he has delivered to each of the defendants personally a copy of the attachment and inventory, the return is prima facie sufficient, though the officer does not state that the copies served were certified by him.—Van Kirk v. Wilds, 11 Barb. 520.

[j] (N. Y. 1853) The nonimprisonment act requires personal service on the defendant, if he can be found in the county, instead of leaving the copy at his last place of residence. The return to an attachment issued by a justice recited that the officer seized the goods and chattels, etc., and, the defendant not being found in the county, left a copy of the attachment, etc., with B., in whose possession the goods were found, the defendant having no place of residence in the county. *Held*, that the return was sufficient.—Rosenfield v. Howard, 15 Barb. 546.

[k] (N. Y. 1861) An officer's return to an attachment issued from a justice's court, which stated that "because the defendant could not be found in the city and county of New York, I left a copy of the within attachment and of said inventory, duly certified by me, at the last place of residence of the said defendant," without stating where his last place of residence was, is defective. The officer should have stated the place of residence specifically, but if not specifically, at least that it was within the county of New York.—Egbert v. Watson, 21 How. Prac. 429.

[l] (N. Y. 1862) In order to give a justice of the peace jurisdiction to proceed to trial in an action commenced by warrant of attachment, the return of the officer serving the attachment must show a strict compliance with the statute, especially where the defendant has not appeared.—Marshall v. Canty, 14 Abb. Prac. 237.

[m] (N. Y. 1862) The fact that the attachment, together with the inventory, was served by leaving copies with the person in possession of the goods, must appear from the officer's return.—Stone v. Miller, 62 Barb. 430.

[n] (N. Y. 1864) 3 Rev. St. (5th Ed.) p. 431, § 28, requiring an officer seizing property under an attachment from a justice's court to leave a copy of the attachment, with an inventory of the property, with the one in whose possession the property is found, if defendant cannot be personally served, is not shown to be complied with by a return showing service on defendant's wife in his absence, without showing that she had possession of the property, or that a copy of the inventory thereof had been served on her.—Barnaman v. Williams, 18 Abb. Prac. 158; Williams v. Barnaman, 28 How. Prac. 59.

[o] (N. Y. 1864) A justice of the peace has no jurisdiction to proceed with an action in which an attachment has been issued, until the officer has made a return thereof showing service as required by statute.—Barnaman v. Williams, 18 Abb. Prac. 158; Williams v. Barnaman, 28 How. Prac. 59.

[p] (N. Y. 1864) A return by the officer on an attachment, that he had seized certain property, and, defendants not being found in the county, had served a copy of the attachment on the party in whose possession the property was found, with an inventory attached indorsed thereon, was sufficient to give a justice of the peace jurisdiction as against third parties.—Bascom v. Smith, 31 N. Y. 595.

[q] (Pa. 1892) In attachment proceedings before a justice, a return to the writ which does not show that any copy of the inventory was left with the person in possession of the goods, or that defendant was a nonresident of the county, and could not be found, is insufficient.—Griffis v. Swick (Com. Pl.) 12 Pa. Co. Ct. R. 389, 2 Pa. Dist. R. 550.

[r] (Wis. 1851) In the absence of a return of a writ of attachment at the time fixed therefor, the justice has no authority to proceed with the cause.—Selby v. Platts, 3 Chand. 183, 3 Pin. 170.

§ 293. Liabilities on bonds and undertakings.

Security in general, see ante, § 283.

[a] (Mo. 1863) Where a bond for the forthcoming of the property attached before a justice is taken by the officer, and the property is not produced in obedience to the judgment and order of court, the plaintiff in the attachment has no cause of action upon the bond, either by motion or suit, until the bond is duly assigned to him. Rev. Code 1855, p. 266.—McDowell v. Morgan, 33 Mo. 555.

[b] (N. Y. 1844) If a suit be commenced before a justice on a long process against a nonresident, and the plaintiff fails to appear on the return day, the defendant may recover damages in trespass, or waive the irregularity and take his remedy on the attachment bond.—Bowne v. Mellor, 6 Hill, 496.

[c] (N. Y. 1846) Where a claimant of attached property gives bond, pursuant to the statute, and the plaintiff afterwards brings an action on such bond, the latter need not show that the justice had jurisdiction to issue the attachment.—Whiley v. Sherman, 3 Denio, 185.

[d] (N. Y. 1857) In an action brought under the old practice on a bond given on an application being made to a justice of the peace, for an attachment against property, the defendant may, under the plea of non est factum, prove, in mitigation of damages, that the property was sold by a constable, and a portion of the proceeds applied by him to the payment of an execution issued in another suit.—Bennett v. Brown, 31 Barb. 158.

[e] (N. Y. 1857) Where, on the issuing of an attachment by a justice, a bond is given, conditioned, in case of failure to recover, to pay all damages and costs which the obligee may sustain by reason of the issuing of the attach-

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ment, and the applicant recovers a judgment before the justice, which is afterwards reversed by the court of common pleas, the obligee is entitled to recover, as part of his damages, the costs incurred in the court of common pleas.—Bennett v. Brown, 31 Barb. 158, affirmed (1859) 20 N. Y. 99.

[f] (N. Y. 1859) An attachment bond is not discharged by the recovery of a judgment by the obligor in justice's court, which was reversed on appeal.—Bennett v. Brown, 20 N. Y. 99.

§ 294. Wrongful attachment.

Jurisdiction of justice, see ante, §§ 125 [c], 126 [f], 151 [c].

Liabilities on bonds and undertakings, see ante, § 293.

—— *of officers, see* "Sheriffs and Constables," III.

[a] (Ala. 1850) A declaration in case for wrongfully and vexatiously suing out an attachment before a justice of the peace in Mississippi, which does not show that such justice had authority by the laws of that state to issue attachments, and which contains no averment connecting the defendant with the levy thereof, discloses no ground of action, and is bad on demurrer.—Marshall v. Betner, 17 Ala. 832.

[b] (Ill. 1874) A resident of Indiana commenced an attachment suit before a justice of the peace in Illinois, against another resident of Indiana, who was temporarily in Illinois with property which, by the law of Indiana, was exempt from attachment. The attachment writ was levied on that property. It appeared that both plaintiff and defendant lived in the same county in Indiana, and that the defendant could have been easily found in the county and state where both parties resided. It further appeared that the debt sued for was a just debt, and past due. *Held*, that there was nothing in these facts to justify a finding that the plaintiff was guilty of any abuse of process, or that he had sought the jurisdiction of the courts of Illinois for a fraudulent purpose.—Mitchell v. Shook, 72 Ill. 492.

[c] (Ky. 1838) An attachment issued by a justice having jurisdiction, the recitals of which, and of the bond taken by him, authorize the emanation of the process, and nothing appearing upon the face of the proceedings, or from the proof, to invalidate it, is a good justification in an action of trespass against the plaintiff therein, though it appears that he procured it to be issued and executed without cause, and that it was afterwards discontinued, and the property restored.—Lovier v. Gilpin, 36 Ky. (6 Dana) 321.

[d] (Ky. 1842) Where attachment issues from a justice in a case in which he has jurisdiction, it is a justification, unless causelessly issued to the plaintiff in an action of trespass vi et armis.—Banta v. Reynolds, 42 Ky. (3 B. Mon.) 80.

[e] (N. J. 1889) Where a creditor causes the goods of his debtor to be seized by virtue of attachment issued out of the court of a justice of the peace in New Jersey for the sum of $200, the jurisdiction of the justice in such case being limited to $100, such creditor becomes a trespasser ab initio.—McFadden v. Whitney, 51 N. J. Law (22 Vroom) 391, 18 Atl. 62.

[f] (N. Y. 1844) Where a party proceeds by a justice's attachment to avoid a sale by a debtor as fraudulent with respect to creditors, and is sued in trespass for the wrongful taking, he must show that the justice had jurisdiction.—Van Etten v. Hurst, 6 Hill, 311, 41 Am. Dec. 748.

[g] (N. Y. 1852) Where a justice of the peace issued an attachment under the act to abolish imprisonment for debt, without the proof required by statute, or bond filed, the party on whose application the attachment issued was answerable as a wrongdoer.—Davis v. Marshall, 14 Barb. 96.

[h] (N. Y. 1866) Attachment proceedings in a justice's court against an absconding debtor must comply strictly with the requirements of the statutes providing therefor, or they will be held void for want of jurisdiction; and the judgment creditor taking property thereunder will be held liable to an action for damages for wrongful taking and conversion of such property.—Kelly v. Archer, 48 Barb. 68.

[i] (N. Y. 1889) Where the complaint does not allege that the property levied on was not afterwards returned, or that damages had been incurred as counsel fees, and there is no proof of any injury to credit caused by the attachment, plaintiff is only entitled to nominal damages.—Blynn v. Smith, 51 Hun, 643, 4 N. Y. Supp. 306.

[j] (N. Y. 1889) The levy of a warrant of an attachment unlawfully issued by a justice entitles defendant to nominal damages, and he need not show that the levy was accompanied by damages.—Blynn v. Smith, 51 Hun, 643, 4 N. Y. Supp. 306.

[k] (Ohio, 1857) In an action to recover damages for the wrongful suing out of an attachment in a justice court, an allegation in the petition that the original action was tried by a jury, a verdict found for the defendant therein, and that a judgment was thereupon rendered by the justice against plaintiff, discharging the attachment, and for costs, is a sufficient allegation of the final termination of the original action and attachment proceedings.—Zigler v. Russell, 2 Ohio Dec. 518.

[l] (Wis. 1851) Where a justice of the peace entered judgment in favor of a plaintiff in an attachment suit in which the writ had not been returned and in which the defendant did not appear, and defendant's property was taken and sold under an execution thereunder, the attachment plaintiff was liable in trespass, or trover, for the value thereof.—Selby v. Platts, 3 Chand. 183, 3 Pin. 170.

(G) GARNISHMENT.

CAUSES OF ACTION, AND PERSONS AND PROPERTY SUBJECT TO GARNISHMENT, § 295.
PROCEEDINGS TO PROCURE—AFFIDAVIT, § 296.
WRIT OR SUMMONS, NOTICE, SERVICE AND RETURN, AND APPEARANCE, § 297.
LIEN OF GARNISHMENT, AND LIABILITY OF GARNISHEE, § 298.
PROCEEDINGS TO SUPPORT OR ENFORCE, § 299.
—— JUDGMENT AGAINST GARNISHEE, § 300.
—— ENFORCEMENT OF JUDGMENT AGAINST GARNISHEE, § 301.
DISSOLUTION AND DISCHARGE, § 302.
CLAIMS BY THIRD PERSONS, § 303.
OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT, § 304.
LIABILITIES ON BONDS AND UNDERTAKINGS, § 305.

Attachment, see ante, §§ 280–294.

Change of venue in garnishment proceedings, see ante, § 236 [f, j].

Effect of appeal on garnishment proceedings, see post, § 604.

Jurisdiction of justice in action for wrongful garnishment, see ante, § 125 [b].

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—— *in garnishment proceedings, see* ante, §§ 156, 165, 178.

Transcript of judgment as authority to garnish, see "Garnishment," vol. 24, cc. 1835, 1836, § 10.

§ 295. Causes of action, and persons and property subject to garnishment.

See ante, § 136 [l].

Executors, see ante, § 138 [i].

Property subject to attachment, see ante, § 281.

—— *to execution, see* post, § 427.

Liability of justice as garnishee, see "Garnishment," vol. 24, cc. 1998-2001, § 114 [b, u].

Transcript of judgment as authority to garnish, see "Garnishment," vol. 24, cc. 1835, 1836, § 10.

[a] (Ark. 1844) A justice of the peace having jurisdiction of an action against a corporation may issue the process of garnishment against a debtor of the corporation.—Woodruff v. Griffith, 5 Ark. (5 Pike) 354.

[b] (Ark. 1877) A creditor filed an account and affidavit, as in case of an attachment, with a justice of the peace, against his debtor, and, without process against the latter, sued out a garnishment against a third person. At the return day of the garnishment a summons was issued against the debtor, and served, and judgment rendered against him by default. *Held*, that the proceeding was not begun by attachment, and that the garnishment pending the judgment was void.—Littlejohn v. Lewis, 32 Ark. 423.

[c] (Colo. 1894) Under Gen. St. § 2008, limiting the liability of a garnishee in a justice court to debts or property for which he would otherwise be liable to defendant, an agent of defendant's debtor, through whom payment was to be made, cannot be garnished.—Voorhies v. Denver Hardware Co., 4 Colo. App. 428, 36 Pac. 65.

[d] (Ga. 1865) A distress warrant was issued by a justice of the peace in favor of S., against G., returnable to the inferior court. No affidavit of defense was made by G. *Held*, that process of garnishment could not, by the statute, be based on this proceeding.—Smith v. Green, 34 Ga. 178.

[e] (Ill. 1874) A judgment debtor in the circuit court can be garnished on process issued by a justice of the peace.—Luton v. Hoehn, 72 Ill. 81.

[f] (Ill. 1894) Where an execution issued by a justice of the peace was not signed by him, it was void, and the justice had no power to issue a writ of garnishment on a return of such execution of "No property found."—Dearborn Laundry Co. v. Chicago & A. R. Co., 55 Ill. App. 438.

[g] (Ind. 1889) In an action against a justice of the peace, plaintiff alleged that he had been summoned as a garnishee in attachment proceedings before the justice, and that judgment had been rendered against him on a note, the property of defendant therein, which he paid, but that the justice failed to enter the judgment against him, and the evidence thereof was not preserved, and he was compelled to pay the note at the suit of a subsequent holder; that the justice and his sureties had promised to reimburse him on the abandonment of his right of action on the official bond. Rev. St. 1881, § 936, provides that judgment shall not be rendered against a garnishee until the action against the defendant in attachment is determined, and, if plaintiff fails to recover against either defendant or garnishee, the garnishee shall be discharged. *Held* that, as according to the complaint the judgment rendered against the defendant in attachment was a personal one merely, if a judgment had been rendered against the garnishee it would have been without authority of law, and void.—Emery v. Royal, 117 Ind. 299, 20 N. E. 150.

[h] (Mich.) A judgment recovered before one justice of the peace cannot be garnished in proceedings before another justice of the peace.—(1880) Sievers v. Woodburn Sarven Wheel Co., 43 Mich. 275, 5 N. W. 311; (1882) Noyes v. Foster, 48 Mich. 273, 12 N. W. 221.

[i] (Mich. 1882) A defendant in a suit before a justice of the peace for a debt cannot, pending the suit, be garnished before another justice by a creditor or a plaintiff.—Custer v. White, 49 Mich. 262, 13 N. W. 583.

[j] (Mo. 1870) A judgment, based on the return of a constable to an order of publication, issued in an attachment proceeding before a justice of the peace, showing that the same was executed by posting in four public places, but failing to show that it was posted 20 days before the day when defendant was obliged to appear, as provided by Wag. St. p. 196, § 77, is void, and cannot sustain a judgment against a garnishee.—McCloon v. Beattie, 46 Mo. 391.

[k] (Mo. 1878) Under Wag. St. p. 197, § 84, not allowing evidences of debt to be seized under a justice's attachment, one is not liable as garnishee, on appeal from the justice's judgment, merely for having in his possession a note belonging to the principal debtor.—Osborne v. Schutt, 67 Mo. 712.

[l] (N. H. 1850) A trustee cannot be charged in a suit before a justice of the peace on account of a negotiable note due from him to the principal defendant.—Barker v. Garland, 22 N. H. (2 Fost.) 103.

[m] (Pa. 1844) Under Act June 16, 1836, § 35, fees due a jury are not the subject of an attachment in execution on a justice's judgment.—Simons v. Whartenaby, 2 Clark, 438.

[n] (Pa. 1846) Money in the hands of a debtor of a decedent is not subject to an attachment in execution at the suit of a creditor, on a justice's judgment recovered against the administrator of such decedent.—Hartshorne v. Henderson, 3 Clark, 511.

[o] (Pa. 1881) Without an execution issued on a judgment remaining unsatisfied, before an alderman or justice of the peace, and return of "No goods" (Act April 15, 1845), such magistrate has no jurisdiction to issue an attachment to satisfy the same.—McGovern v. McTague, 13 Lanc. Bar, 119.

[p] (Pa. 1887) There must be a return of "No goods" before a justice can issue an attachment execution.—Mowry v. Thomas, 1 Wilcox, 106.

[q] (Pa. 1888) Act April 5, 1845, conferring jurisdiction on aldermen in attachment execution in proceedings to levy on stock, debts, and deposits of money, and providing that the wages of laborers, or the salary of any person, shall not be liable to attachment in the hands of the employer, confers no jurisdiction on a justice to levy on wages on an attachment execution.—Baker v. Harding, 6 Pa. Co. Ct. R. 21.

[r] (Pa. 1890) Under Act April 15, 1845 (P. L. 459, § 2), which provides that "any justice of the peace before whom any judgment remains unsatisfied, and an execution has returned no goods, may * * * issue an at-

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tachment in the nature of an execution," the issue and return of an execution is a condition precedent to the right to issue such attachment execution.—Snyder v. Miller, 19 Atl. 309.

[s] (Pa. 1893) Act May 8, 1876, does not authorize an attachment against wages, for board, until after judgment.—Thatcher v. Beam (Com. Pl.) 3 Lack. Jur. 177, 14 Pa. Co. Ct. R. 109, 3 Pa. Dist. R. 351.

[t] (Pa. 1895) The provision of Act May 8, 1876, for attachment of wages for board, that "justices of the peace shall have jurisdiction of attachment in case for such purpose," does not authorize attachment as an original process, or otherwise than on a judgment.—McCarty v. Dougherty (Com. Pl.) 16 Pa. Co. Ct. R. 86, 4 Pa. Dist. R. 267; Dillon v. Treverton (Com. Pl.) 16 Pa. Co. Ct. R. 89, 4 Pa. Dist. R. 266.

§ 296. Proceedings to procure—Affidavit.

Appearance as curing defects in affidavit, see post, § 297 [y].

[a] (Wis.) An affidavit for garnishment from a justice's court, which omits to state that the money, effects, goods, and credits of the principal debtor in the garnishee's possession are not exempt, is fatally defective.—(1878) Steen v. Norton, 45 Wis. 412; (1879) Rasmussen v. McCabe, 46 Wis. 600, 1 N. W. 196.

[b] (Wis. 1879) The affidavit in garnishment proceedings in a justice court must conform to the statute, or the justice acquires no jurisdiction.—Rasmussen v. McCabe, 46 Wis. 600, 1 N. W. 196.

[c] (Wis. 1881) An affidavit for garnishment in a justice court is not bad because it states that affiant "verily believes," instead of the statutory form, "has good reason to believe"; the former being the stronger form, and perjury being assignable upon it.—Russell v. Ralph, 53 Wis. 328, 10 N. W. 518.

[d] (Wis. 1881) An affidavit for garnishment in justice court, that the garnishee has property, credits, moneys, and effects, is a sufficient statement that he has personal property.—Russell v. Ralph, 53 Wis. 328, 10 N. W. 518.

[e] (Wis. 1881) An affidavit for garnishment in a justice's court is not defective because it uses the disjunctive form, "is indebted to, or has property."—Russell v. Ralph, 53 Wis. 328, 10 N. W. 518.

[f] (Wis. 1886) The amendment of Rev. St. §§ 2753, 2768, by Laws 1881, c. 86, and Laws 1885, c. 286, requiring that, in garnishment proceedings in the circuit court, the affidavit shall state the amount of plaintiff's claim against defendant over and above all offsets, does not, by mere implication, amend Rev. St. § 3716, prescribing the practice in such cases in justices' courts.—Jones v. St. Onge, 67 Wis. 520, 30 N. W. 927.

§ 297. Writ or summons, notice, service and return, and appearance.

Return of nulla bona as condition precedent to issuance of attachment execution, see ante, § 295 [o, p, r].

[a] (Ala. 1827) Where no valid service of summons has been had on the garnishee, in an action against a nonresident defendant based on such garnishment, a judgment rendered on the affidavit of such garnishee is erroneous, and will not support a judgment against the principal defendant.—Lawrence v. Ware, 1 Stew. 33.

[b] (Del. 1835) Where an attachment clause is added to an execution against a garnishee on a justice's judgment, the garnishee must be summoned to appear at the return day of the execution.—McClay v. Houston's Adm'r, 1 Har. 529.

[bb] (Del. 1881) Where a garnishee, attached on an alias fi. fa. issued by a justice of the peace more than three years after the original was returned, appears to it and answers, he thereby waives objection to the process, and cannot reverse it on certiorari.—Carey v. Brinton, 6 Houst. 340.

[c] (Ga. 1884) A garnishee is not bound to answer where summons was served on him only nine days before the justice's court to which it was returned.—Massengale v. McGinty, 73 Ga. 120.

[d] (Ga. 1884) A justice cannot serve a summons of garnishment.—Massengale v. McGinty, 73 Ga. 120.

[e] (Ga. 1886) Prior to Const. 1877 (Code, § 5153), providing that justice courts must sit "monthly, and at fixed times and places," there was no fixed time for holding such courts. Code 1882, § 4162, providing that written notice shall be given garnishee by plaintiff of the traverse of his answer, and of the time appointed by the justice of the peace for hearing the issue formed on the same, is copied from Acts 1873, p. 48. By Acts 1880, pp. 56, 57 (Code, § 4161), the garnishee must answer at the term of the justice court at which the garnishment is returnable, except that where the summons is served within the 10 days next previous to such term, the answer goes over to the next term. *Held* that, the time and place for hearing the issue being fixed by the constitution and the subsequent act, the reason for giving such notice had ceased, and the statutory provision therefor become inoperative.—Mandeville v. Askew, 78 Ga. 18.

[f] (Ind. 1866) In a proceeding in attachment before a justice of the peace against a nonresident, where the writ of attachment is returned "No property found," and a summons in garnishment is served, the record of the justice must show that notice of the pendency of the suit was given by three successive publications, the last of which was 30 days before the day of trial, in order to support a judgment for the plaintiff.—Andrews v. Powell, 27 Ind. 303.

[g] (Ind. 1883) In an attachment before a justice of the peace, where the summons against the principal defendant was returned unserved, and no property had been attached, there can be no valid judgment against the garnishee, until due notice by publication to the principal defendant had been had.—Newman v. Manning, 89 Ind. 422.

[h] (Ind. 1890) Under Rev. St. Mo. § 473, providing that "when the defendant cannot be summoned, and his property and effects shall be attached," the justice may make an order requiring plaintiff to give service to defendant by advertisement, a justice in Missouri acquired no jurisdiction by publication of notice, where the only attachment was by garnishment of wages which were exempt by the laws of Indiana.—Terre Haute & I. R. Co. v. Baker, 122 Ind. 433, 24 N. E. 83.

[i] (Mich. 1874) Where a garnishee defendant on the return day of the garnishment summons appears and admits his indebtedness to the principal defendant, and authorizes the justice to enter judgment, he thereby waives the want of declaration, second process, and proof, and is estopped from asserting the invalidity of the judgment in a collateral suit.—Bigalow v. Barre, 30 Mich. 1.

[j] (Mich. 1890) A garnishee who appears before the justice and pleads the general issue

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does not thereby waive objections to defects in the proceedings against the principal defendant, but may raise such objections on appeal to the circuit court.—Segar v. Muskegon Shingle & Lumber Co., 81 Mich. 344, 45 N. W. 982.

[k] (Mo. 1862) The return day of a garnishment, on execution from a justice of the peace, is the next law day of the justice, and not the return day of the execution. Rev. Code 1855, p. 965, § 11.—Wise v. Hull, 32 Mo. 209.

[l, m] (Mo. 1884) A garnishee who appears before a justice of the peace without having been legally garnished, and answers interrogatories without objecting to the jurisdiction, is, nevertheless, not estopped from setting up that objection in the circuit court.—Fletcher v. Wear, 81 Mo. 524.

[n] (Mo. 1884) A justice of the peace has no authority to appoint any one to serve a garnishment attachment.—Fletcher v. Wear, 81 Mo. 524.

[o] (Mo. 1886) Under Rev. St. 1879, § 2862, a garnishment summons cannot be served by a constable specially deputized for that service.—Mangold v. Dooley, 89 Mo. 111, 1 S. W. 126.

[p] (N. H. 1856) In trustee proceedings before a justice of the peace, where plaintiff and principal defendant reside in one county, and the trustee in another, the writ should be directed to the sheriff of any county or his deputy, or to any constable of each of the towns wherein either of the parties is resident.—Brown v. Dudley, 33 N. H. 511.

[q, r] (Pa. 1886) Under Act April 29, 1844 (P. L. 512), and Act March 20, 1845 (P. L. 188), service on defendant in an attachment execution is dispensed with only when he resides out of the county, or service cannot be made, and hence, to warrant judgment by default, it is not enough for the return to show that he cannot be found within the officer's bailiwick, since that may be true and yet legal service can be made.—Henaughan v. Golden, 4 Lanc. Law Rev. 75.

[s] (Pa. 1889) An attachment execution cannot be issued by a justice of the peace of another county on a transcript from the docket of a justice in defendant's county.—Miller v. Snyder, 6 Lanc. Law Rev. 92.

[t] (Tenn. 1888) The appearance and answer of a garnishee before a justice in response to a summons, reciting therein a judgment and unsatisfied execution, does not waive the necessity of proving such judgment and unsatisfied execution in the action against the garnishee.—Miller v. Wilson, 86 Tenn. (2 Pickle) 495, 7 S. W. 638.

[u] (Tenn. 1891) Where the notice in a garnishment proceeding in a justice's court on an unsatisfied execution was defective because it was verbal, instead of in writing, the issuance and service of a scire facias, and the failure of the garnishee to defend, will not cure the defect.—Illinois Cent. R. Co. v. Brooks, 90 Tenn. (6 Pickle) 161, 16 S. W. 77, 25 Am. St. Rep. 673.

[v] (Tenn. 1891) Code, § 3800, provides that the officer in whose hand is an unsatisfied execution may summon in writing any person as garnishee to appear and answer the garnishment. On a petition to quash the execution against the garnishee issued by a justice of the peace, it appeared that the officer read to the garnishee's agent the execution in the case against the principal defendant, and verbally told him to appear and answer. *Held*, that the notice was not sufficient to warrant a conditional judgment against the garnishee.—Illinois Cent. R. Co. v. Brooks, 90 Tenn. (6 Pickle) 161, 16 S. W. 77, 25 Am. St. Rep. 673.

[w] (Tex. 1895) A justice of the peace of one county has jurisdiction, for all purposes, of a garnishee living in another county, who voluntarily submits to his jurisdiction by filing an answer, though his answer is defective; and this is not changed by Rev. St. art. 195, providing for the issuance of a commission to take the answers of a garnishee residing in another county when he fails to make answer to the writ, and articles 203, 204, providing that if a commission issues, and the garnishee fails to answer fully, the court may render judgment against him.—Walter A. Wood Mowing & Reaping Mach. Co. v. Edwards, 9 Tex. Civ. App. 537, 29 S. W. 418.

[x] (Wis. 1878) In special statutory proceedings of garnishment the justice of the peace acquires jurisdiction only by compliance with statutory provision, and a voluntary appearance by defendant cannot waive the defect.—Steen v. Norton, 45 Wis. 412.

[y] (Wis.) An affidavit for garnishment in a justice's court, which omits to state that the effects of the principal debtor in the garnishee's possession "are not exempt," is not cured by a voluntary appearance by defendant, and submission to examination.—(1878) Steen v. Norton, 45 Wis. 412; (1879) Rasmussen v. McCabe, 46 Wis. 600, 1 N. W. 196.

[yy] (Wis. 1882) Where a justice's record fails to show the affidavit required by the statute as the foundation of garnishment, an appearance and submission to the court by the garnishee cannot give validity to the judgment.—Wells v. American Exp. Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695.

[z] (Wis. 1894) Where a principal defendant who had not been served with summons appeared in a garnishment proceeding in order to claim a fund garnished as exempt, such appearance did not give the court jurisdiction of the defendant in the principal action.—State v. Cordes, 87 Wis. 373, 58 N. W. 771.

[zz] (Wis. 1894) Where, in a garnishment proceeding before a justice of the peace, the defendant was not personally served, and the notice published was that under the statute relating to attachment, and not that relating to garnishments, the justice had no jurisdiction.—State v. Cordes, 87 Wis. 373, 58 N. W. 771.

§ 298. Lien of garnishment, and liability of garnishee.

[a] (Ill. 1895) Judgment against a garnishee in an action brought before a justice under Rev. St. 1893, c. 11, par. 42, § 1, declaring that attachments may be issued by a justice where the demand does not exceed his jurisdiction, and paragraph 47, § 6, directing the constable to summon as garnishees all persons whom plaintiff may direct, should be only for the amount of the liability of defendant to plaintiff.—Pomeroy v. Rand, McNally & Co., 157 Ill. 176, 41 N. E. 636, reversing Rand v. Pomeroy, (1894) 54 Ill. App. 522, and distinguishing Stahl v. Webster (1850) 11 Ill. (1 Peck) 511.

[b] (Ohio, 1881) Where a plaintiff in garnishment before a justice, against a nonresident defendant, fails to have the cause continued for a definite time between 40 and 60 days, as required by Rev. St. § 6496, and does not advertise for service on the defendant, he loses his priority of lien on the fund garnished, though the garnishee did not answer for three months before.—Vorhess v. Fisher (D. C.) 8 Ohio Dec. 184, 6 Wkly. Law Bul. 202.

§ 299. Proceedings to support or enforce.

[a] (Ga. 1892) Where, in a justice's court, the presiding justice gives judgment against a garnishee, as in case of default, because of

his failure to respond to a notice to produce books and papers, the garnishee is entitled to appeal to a jury in the same court.—Boozer v. Fuller, 88 Ga. 295, 14 S. E. 615.

[b] (Ill. 1885) Under Garnishment Act (1 Starr & C. Ann. St. c. 62) §§ 1, 4, 6, 8, a garnishee before a justice of the peace, when properly summoned, must appear in person before the justice and submit to an oral examination, under oath, and no one else can perform his duty for him.—Cornell v. Payne, 115 Ill. 63, 3 N. E. 718.

[c] (Ill. 1892) A garnishee in a justice court, if he has a defense of a dilatory character, must present the same before an issue on the merits has been formed and is being tried.—Ellis v. Galesburg Base Ball Ass'n, 45 Ill. App. 279.

[d] (Ind. 1873) Where a defendant in an attachment proceeding is personally present in court, a garnishee is not required to question the jurisdictional legality of the proceedings, or their regularity as to the defendant.—Ohio & M. Ry. Co. v. Alvey, 43 Ind. 180.

[e] (Mich. 1880) Where a garnishee's disclosure is too ambiguous to show whether an indebtedness exists, or, if so, to whom, it will not sustain a judgment in a justice court, as the garnishee is a witness for plaintiff, who has the burden of making out by him a prima facie case.—Spears v. Chapman, 43 Mich. 541, 5 N. W. 1038.

[f] (Mich. 1880) A garnishee's disclosure in the justice court must be explicit in its admission to warrant judgment.—Weirich v. Scribner, 44 Mich. 73, 6 N. W. 91.

[g] (Minn. 1875) In garnishment proceedings in a justice court, though the garnishee denied the indebtedness, if the facts which he discloses clearly shows that he owes the defendant a debt which is subject to garnishment proceedings, judgment should go against him.—Donnelly v. O'Connor, 22 Minn. 309.

[h] (Mo. 1865) When a garnishee, in a justice's court, answers that he will not be able to state the exact amount due the defendant in money until a future day, inasmuch as he is to pay a part of the debt in another way than in money, the court may afterwards allow him to file an amended answer on which the case may be tried.—Karnes v. Pritchard, 36 Mo. 135.

[i] (N. C. 1849) An attachment issued by a justice in chambers, and not made returnable at any time or place, being void, a garnishee may object such invalidity of the attachment to any judgment being given against himself.—Houston v. Porter, 32 N. C. 174.

[j] (Ohio, 1883) A garnishee summoned to answer in an action before a justice of the peace may interpose any offset or defense he may have.—Secor v. Witter, 39 Ohio St. 218.

[k] (R. I. 1885) Where the judgment in trustee process before a justice of the peace has been rendered against the trustee by default, he may show that he filed his affidavit or defense, and should not have been charged, in an action against him for neglect, to file such sworn statement.—Eddy v. Providence Mach. Co., 15 R. I. 7, 22 Atl. 1116.

[l] (R. I. 1885) Defendant, a trustee, was served with a writ returnable June 26, 1882, in a justice court, and filed an affidavit describing the case to which it referred. In the corner of the sheet, above the affidavit, appeared the words, "Justice court, June 29, 1882." No other case was pending between the parties, but the court disregarded the affidavit, and charged the defendant as trustee. *Held*, that the affidavit properly applied to the case, since the insertion of the erroneous date in the margin was a mere memorandum which had no reference to the facts in suit.—Eddy v. Providence Mach. Co., 15 R. I. 7, 22 Atl. 1116.

[m] (Tenn. 1871) The recital in the judgment of a justice, that a garnishee came before him and admitted the necessary facts to charge him, is not conclusive on the garnishee; unless his examination is in writing, and signed by him, he may attack such recital in a proper case by petition in certiorari.—Pickler v. Rainey, 51 Tenn. (4 Heisk.) 335.

[n] (Tenn. 1881) A garnishee cannot claim that the justice's execution on which the garnishment notice was based was issued on an insufficient affidavit.—Cowan v. Lowry, 75 Tenn. (7 Lea) 620.

[o] (Tenn. 1891) A garnishee in a justice's court cannot contest the validity of a judgment against the original defendant on which the garnishment proceedings are based.—Illinois Cent. R. Co. v. Brooks, 90 Tenn. (6 Pickle) 161, 16 S. W. 77, 25 Am. St. Rep. 673.

[p] (Vt. 1858) A trustee in a suit brought by the trustee process before a justice of the peace is not entitled to tax costs for counsel fees before the justice.—Miller v. Williams, 30 Vt. 386.

[q] (Wis. 1851) In a garnishment process commenced before a justice of the peace, the transcript of the justice docket showed a proper judgment against the principal debtor, and the entry of final judgment against the garnishee was as follows, "It is by the court considered and adjudged that the said A. B. stand liable for the amount of this judgment, and that the plaintiff may have execution against the said garnishee." *Held*, that the judgment was void for irregularity, as the docket should have disclosed the entry of a separate suit and separate proceedings against the garnishee, and a judgment as in ordinary cases.—Atchison v. Rosalip, 4 Chand. 12, 3 Pin. 288.

[r] (Wis. 1886) In garnishment proceedings before a justice of the peace, the defendant in the original action may, under Rev. St. § 3723, appear in the justice court, and on the appeal in the circuit court, and defend the proceedings against the garnishee, on the ground that the indebtedness of the garnishee to him is not liable to attachment.—Jones v. St. Onge, 67 Wis. 520, 30 N. W. 927.

§ 300. —— Judgment against garnishee.

[a] (Ala. 1827) Where an action has been brought in a justice court against a nonresident, based on an attachment against a garnishee in the state, judgment cannot be rendered against the defendant by default, until after judgment shall have been rendered against the garnishee.—Lawrence v. Ware, 1 Stew. 33.

[b] (Ala. 1831) Though one answer of a garnishee in justice court might authorize more than one judgment, it would be irregular, if not erroneous, to render but one judgment on two or more executions returned nulla bona, notwithstanding they might be at the instance of the same plaintiff against the same original defendant.—Witherspoon v. Barber, 3 Stew. 335.

[c] (Ala. 1852) Defendant sold and delivered to plaintiff a slave, in consideration that plaintiff would pay all the debts then owing by defendant. Plaintiff afterwards commenced suit by attachment in justice court against A., to whom, at the time of the sale, defendant was indebted in the amount of a decree previously rendered against him in the court of probate in favor of A., and defendant was summoned as garnishee, and suffered judgment to be rendered against him, on which execution was afterwards issued. *Held*, that the execution could not be set aside, and satisfaction of the judg-

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ment be entered, on proof of this agreement.—Matthews v. Robinson, 20 Ala. 130.

[d] (Ark. 1869) A justice of the peace may set aside a judgment by default and grant a new trial in a garnishment proceeding as in other cases.—Smith v. Parker, 25 Ark. 518.

[e] (Colo. 1893) A justice's judgment entered by default making final, under a writ of scire facias, a conditional judgment entered by default August 1, 1891, against plaintiffs, as garnishees of N., in a writ of garnishment dated and served July 27, 1891, citing plaintiffs to appear July 1, 1891, is void.—Rice v. American Nat. Bank, 3 Colo. App. 81, 31 Pac. 1024.

[f] (Colo. 1893) A justice's conditional judgment entered August 1, 1891, by default, against plaintiffs, as garnishees of N., in a writ of garnishment dated and served July 27, 1891, citing plaintiffs to appear July 1, 1891, is void.—Rice v. American Nat. Bank, 3 Colo. App. 81, 31 Pac. 1024.

[g] (Del. 1845) On an execution attachment from a justice of the peace, judgment cannot be rendered against the garnishee on a day subsequent to the return day of the execution, except by an adjournment for that purpose.—Hamilton's Garnishee v. Allen, 4 Har. 326.

[h] (Ga. 1871) Under Code, § 3228, a final judgment cannot be entered against a garnishee until a term subsequent to that at which he is required to answer, and a judgment entered before such time is illegal.—Scott v. Patrick, 44 Ga. 188.

[i] (Ga. 1881) Where a justice who issued a garnishment told the garnishee that he had until the next term of court to answer, and the garnishee thereby failed to answer within 10 days, such statement was not an excuse for failure to answer, and would not prevent a judgment against him by default.—Farley v. Bloodworth, 66 Ga. 349.

[j] (Kan. 1885) Where a final judgment has been rendered against a garnishee by a justice of the peace, this being beyond his powers, the garnishee may perpetually enjoin its enforcement by execution.—Missouri Pac. Ry. Co. v. Reid, 34 Kan. 410, 8 Pac. 846.

[k] (Me. 1835) A judgment of a justice of the peace against one summoned as trustee under a process of foreign attachment in a case within his jurisdiction, though erroneous, cannot be avoided collaterally, but may be enforced until reversed on writ of error.—Boynton v. Fly, 12 Me. (3 Fairf.) 17.

[l] (Mo. 1870) A garnishee in execution before a justice is not entitled to an injunction against the plaintiff simply on the ground that the amount seized exceeded the jurisdiction of the justice, or that judgment was entered against him before the return day of the writ. In order to entitle him to such remedy, he must show that it would be against conscience to execute the judgment complained of, that he has not been remiss in his own duties, and that he has been deprived of his right by some fraud or accident.—Davis v. Staples, 45 Mo. 567.

[m] (Mo. 1878) Entry of judgment against a garnishee without the notice promised him by the justice, *held* to entitle him to an injunction against the execution.—Watkins v. Gray, 5 Mo. App. 592.

[n] (Mo. 1880) A motion to set aside a judgment given by default by a justice must be filed within 10 days, and the fact that the judgment was for money, and rendered against a garnishee without evidence that he was indebted to the defendant, forms no exception to the rule.—Roach v. Montserratt Coal Co., 71 Mo. 398.

[o] (Neb. 1892) In a suit to enjoin a judgment causing an apparent lien on land, rendered in a garnishment proceeding after judgment, where it is alleged and admitted by the pleadings that no summons or notice was served on the garnishee nor examination had, but that, in fraud of his rights, the justice found that there was due him from the debtor a certain sum, and gave judgment therefor, whereas in fact he was not indebted to him, the court will declare the judgment void, and not merely set aside the apparent lien thereof.—Cobbey v. Wright, 34 Neb. 771, 52 N. W. 713.

[p] (Neb. 1892) In a petition to enjoin a judgment rendered in a proceeding in garnishment after judgment, it was alleged that no summons or notice had been served on the garnishee, and that he had not been examined, but that, in fraud of his rights, the justice found that there was due from him to the debtor a certain sum, and rendered judgment accordingly, when in fact he was not indebted to the debtor. *Held*, that plaintiff was entitled to an injunction.—Cobbey v. Wright, 34 Neb. 771, 52 N. W. 713.

[q] (Tex. 1871) A justice of the peace has no authority, without further proceedings or proof, to render a judgment against a garnishee who has answered that his indebtedness is on a note not yet due.—Kapp v. Leel, 33 Tex. 811.

[r] (Vt. 1849) A trustee in a suit before a justice of the peace, against whom a judgment by default has been rendered, cannot, under Rev. St. c. 33, § 8, maintain a petition in the county court to vacate the judgment against him.—Denison v. True, 22 Vt. 42.

[s] (Wis. 1851) Where on the examination of a garnishee he makes no objection because the judgment against the defendant has been rendered prior thereto, the judgment against the garnishee is valid.—Rector v. Drury, 4 Chand. 24, 3 Pin. 298.

[t] (Wis. 1877) Where a justice of the peace, having jurisdiction of the garnishment proceeding and of the party, errs in his construction of the garnishee's answer, or in rendering judgment against him for damages, such judgment is merely erroneous, and not void, and the execution sale thereunder passes the title.—Rasmussen v. McCabe, 43 Wis. 471.

[u] (Wis. 1877) Where a justice finds that a garnishee has property of the principal defendant subject to be delivered to him at a future day, the judgment should first direct a delivery of the property to the court at such future day for plaintiff's benefit, and on the garnishee's failure so to deliver, the judgment should go against him for its value.—Rasmussen v. McCabe, 43 Wis. 471.

[v] (Wis. 1879) A garnishment judgment in a justice court is not fatally defective because the record does not show a judgment against a defendant in the original action, as the two records are to be read together, and it is sufficient if such judgment appears from the whole record.—Bushnell v. Allen, 48 Wis. 460, 4 N. W. 599.

[w] (Wis. 1879) Failure of a justice to enter in his docket an adjournment of garnishment proceedings will not affect a judgment subsequently rendered therein.—Bushnell v. Allen, 48 Wis. 460, 4 N. W. 599.

[x] (Wis. 1893) In garnishment proceedings in the justice court, a judgment was rendered against the garnishee, but on the same day, by agreement of parties, the judgment was opened and the action adjourned. On the adjourned day neither the defendant nor the garnishee

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appeared, and judgment was rendered against the garnishee for the amount of the judgment in the main action. *Held*, that the judgment was void, for after the entry of the former judgment, the consent of the garnishee could not give the justice power to reopen the judgment and restore his jurisdiction.—McCormick Harvester Mach. Co. v. James, 54 N. W. 1086.

§ 301. —— Enforcement of judgment against garnishee.

[a] (Kan. 1889) Property of a debtor, in the possession of a garnishee, and delivered to a justice of the peace, under an order of the justice, must be advertised and sold in the township in which the justice resides and holds his office, and a sale of such property made outside of such township is void.—Beamer v. Winter, 41 Kan. 297, 21 Pac. 251.

[b] (Kan. 1889) As the law requires all personal property sold under any process issued by a justice of the peace to be sold in the township where it is seized, personal property delivered into court by a garnishee, under the order of a justice of the peace, must be sold in the township where the notice is served upon the garnishee, as the property is constructively seized where the notice is served.—Beamer v. Winter, 41 Kan. 596, 21 Pac. 1078.

[c] (Ohio, 1861) A garnishee is required to submit to an examination, and if the justice concludes that the statements made by the garnishee admit indebtedness, he may order the sum admitted to be paid into court; but such an order can be enforced only by an action against the garnishee.—Rice v. Whitney, 12 Ohio St. 358.

[d] (Ohio, 1861) Under the Code the plaintiff in attachment ought not to be allowed a more summary remedy against the debtors of the defendant in attachment than their own creditor has. And the exception created by the amendment of section 200 of the Code, made March 17, 1856, which allows an execution as on a judgment where a garnishee after examination is ordered to pay money into court, does not apply to proceedings before a justice of the peace.—Rice v. Whitney, 12 Ohio St. 358.

§ 302. Dissolution and discharge.

Payment of judgment against garnishee as discharge, see post, § 304.

[a] (Mich. 1895) Under How. Ann. St. § 8041, providing that, if plaintiff fails to recover judgment against defendant, it shall be deemed a discontinuance of all proceedings against a garnishee, when construed in connection with sections 8037, 8038, 8040, providing for proceedings against a garnishee after final determination against defendant, a garnishee is not released from plaintiff's claim by a judgment in a justice court in favor of defendant, from which he has appealed.—Erickson v. Duluth, S. S. & A. Ry. Co., 105 Mich. 415, 63 N. W. 420.

[b] (N. H. 1850) Where trustees in proceedings before a justice of the peace do not disclose any funds in their hands, except negotiable notes on which they are liable to the defendant jointly and severally with other persons not summoned as trustees in the suit, they will be discharged.—Barker v. Garland, 22 N. H. (2 Fost.) 103.

§ 303. Claims by third persons.

[a] (Ga. 1888) In garnishment before a justice, certain claimants, on October 21, 1881, filed bond as required by statute, claiming the property sought to be garnished. The garnishee, on November 21, 1881, made a general denial as to assets or indebtedness. On the 19th of December, 1881, plaintiff traversed the answer. *Held* that, after going to trial on the merits, and suing out a certiorari to review the decision of the justice, claimants could not have the traverse dismissed because it was not filed within 10 days after the answer was made, as provided in Code, § 4162.—Pedrick v. McCall, 80 Ga. 491, 5 S. E. 633.

[b] (Kan. 1886) The provisions of chapter 137, Sess. Laws 1877 (Comp. Laws 1879, §§ 45a, 45b, of the Code), providing for interpleas where money, effects, or credits are attached, are applicable to money, effects, or credits attached or garnished in actions commenced before a justice of the peace.—Clark v. Wiss, 34 Kan. 553, 9 Pac. 281.

[c] (Minn. 1875) A claimant in garnishment proceedings before a justice, claiming under an indorsement on a policy of insurance, making it payable to him to the extent of his interest, must, to protect his claim to the debt, prove what his interest is.—Donnelly v. O'Connor, 22 Minn. 309.

[d] (Mo. 1857) An appeal will lie from the decision of a justice of the peace on an interplea concerning property garnished by virtue of an execution.—Smith v. Sterritt, 24 Mo. 260.

§ 304. Operation and effect of garnishment, judgment, or payment.

[a] (Ala. 1881) Where an attachment is issued by a justice of the peace for a sum within his jurisdiction on an insufficient affidavit, the proceedings are voidable only; and a garnishee who has bona fide paid a debt due to defendant in such attachment is thereby protected from a second payment.—Parmer v. Ballard, 3 Stew. 326.

[b] (Ark. 1877) Where a garnishment issued against a third person pending judgment against the debtor was void, and no writ of garnishment was issued after the judgment, there was no seizure of any debt of effects belonging to the debtor in the garnishee's hands, and a judgment against him could not have had the effect to release him from liability to the defendant.—Littlejohn v. Lewis, 32 Ark. 423.

[c] (Ga. 1885) Where, in garnishment in a justice's court, money exempt as wages has been garnished and paid into court by a garnishee defendant, the principal debtor is not estopped to recover the same from the garnishee, as the judgment against the garnishee is, as to him, res inter alios acta.—Curran v. Fleming, 76 Ga. 98.

[d] (Ga. 1886) Though a writ of garnishment cannot issue on a distress warrant, yet where a writ was so issued by a justice of the peace, and the garnishee answered, admitting indebtedness, and judgment was rendered against him, and the amount paid to plaintiff in the distress warrant, the judgment was merely erroneous; and hence a petition would not lie in favor of the defendant under the distress warrant to compel payment to him of the amount so collected and paid.—Taylor v. Benjamin, 76 Ga. 762.

[e] (Ind. 1861) To an assignee's suit on a note for $200, payable in currency, defendants answered that, before the assignment and notice thereof, judgment had been recovered against one of them as garnishee, in a suit of attachment against the payee, which judgment he (defendant) had paid. The transcript of the proceedings in the attachment suit, being made part of the answer, showed that the garnishee had stated that he had in his hands $800 of uncurrent funds, worth $620, belonging to the attachment defendant. *Held*, that this defense was bad, as not showing that the demand set forth in the complaint and that

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passed on in the attachment suit were identical.—Sangster v. Butt, 17 Ind. 354.

[f] (Ind. 1873) A payment by a garnishee to a justice of the peace who has jurisdiction of the subject and of the parties in attachment proceedings is a defense to a suit by the attachment defendant against such garnishee for the same debt, though such proceedings are, as between the creditor and debtor, irregular and reversible.—Ohio & M. Ry. Co. v. Alvey, 43 Ind. 180.

[g] (Ind. 1890) Rev. St. Mo. § 473, provides that "when the defendant cannot be summoned, and his property and effects shall be attached," the justice may make an order requiring plaintiff to give service to defendant by advertisement. *Held*, that as a justice in Missouri acquired no jurisdiction by publication of notice where the only attachment was by garnishment of wages, which were exempt by the laws of Indiana and Missouri, judgment suffered by the garnishee was no protection to an action for such wages.—Terre Haute & I. R. Co. v. Baker, 122 Ind. 433, 24 N. E. 83.

[h] (Iowa, 1882) In the absence of any statutory provision requiring notice of a garnishment proceeding to be served on the judgment debtor, a judgment by a justice of the peace against a garnishee in another county upon his answer is a bar to a suit by the judgment debtor against the garnishee for the same indebtedness, though the justice had no jurisdiction of the debtor.—Smith v. Dickson, 58 Iowa, 444, 10 N. W. 850.

[i] (Kan. 1874) An order of a justice of the peace, in an attachment proceeding, that a garnishee shall pay into court certain money which he owes to the defendant in the action, is not a final determination of plaintiff's right to the money, but is, in effect, merely an assignment of the claim from the debtor to the creditor.—Board of Education v. Scoville, 13 Kan. 17.

[j] (Kan. 1880) In the trial of the truth of a garnishee's answer before a justice of the peace, under Comp. Laws, p. 709, § 44, the justice's decision is not final as to the existence of an indebtedness or as to the ownership of the property.—Fitch v. Manhattan Fire Ins. Co., 23 Kan. 366.

[k] (Kan. 1895) An order of the justice of the peace to a garnishee to pay money into court is not a judgment, but simply gives the creditor the same right to enforce the payment of the money that the debtor previously had.—Bank of Le Roy v. Harding, 1 Kan. App. 389, 41 Pac. 680.

[l] (Mich. 1891) How. Ann. St. § 837, provides that the garnishee may pay to the justice before whom examination is had the amount owed by him, and thereupon such justice shall execute and deliver to him a discharge. *Held*, that payment under the justice's order, directed to plaintiff, who in turn satisfies the judgment on docket, is presumed to have been made in the presence of the justice and with his consent, and is therefore a sufficient compliance with the statute.—Barber v. Howd, 85 Mich. 221, 48 N. W. 539.

[m] (Mich. 1894) Under How. Ann. St. § 8032, which provides that the right to garnish shall not extend to $25 of the sum due the principal defendant for wages where he is a householder, and section 8037, which expressly excepts this labor claim from the indebtedness that may be paid by the garnishee to the justice in advance of the judgment, the garnishee acts at his peril in paying to the justice the amount due the principal defendant for wages, without disclosing whether or not defendant is a householder, or whether it knows this fact; and the householder may recover his exempt wages from the garnishee, notwithstanding such payment, unless he has acted so as to be estopped.—Crisp v. Ft. Wayne & E. Ry. Co., 98 Mich. 648, 57 N. W. 1050, 22 L. R. A. 732.

[n] (Minn. 1870) Under Pub. St. c. 59, §§ 89, 90, authorizing a justice to issue execution at any time on demand, and permitting a garnishee to make payment directly to a justice on demand of plaintiff's attorney, without waiting for execution, such voluntary payment by a garnishee without execution will discharge him, though the judgment on which the garnishment was based was rendered by default on service of summons by publication, and was afterwards opened and set aside on defense made.—Troyer v. Schweizer, 15 Minn. 241 (Gil. 187).

[o] (Mo. 1888) A justice has no jurisdiction to determine the rights of a defendant debtor to exemptions in a garnishment proceeding, and where the debtor has no notice, and is not a party and interposes no claim, his rights are not adjudicated.—State v. Barnett, 96 Mo. 133, 8 S. W. 767.

[p] (Mo. 1890) Under Rev. St. 1879, § 2551, allowing a garnishee in an attachment before a justice of the peace to exonerate himself by paying the money attached to the constable, payment of the money to the justice, who turns it over to the constable, discharges the garnishee, and he is not affected by a subsequent misapplication of the money by the constable.—Melton v. Kansas City, Ft. S. & M. R. Co., 39 Mo. App. 194.

§ 305. Liabilities on bonds and undertakings.

Liability of justice for wrongful attachment, see ante, § 46.

[a] (Kan. 1888) Where a bond is given in a justice's court to release and discharge garnishment proceedings in that court, and it provides that the obligors shall "pay any judgment which may be rendered against him [the defendant] on final hearing of this case," such bond will bind the obligors to pay any final judgment which may be rendered against the defendant in the district court on an appeal by the plaintiff from the justice's court.—Washer v. Campbell, 19 Pac. 858.

[b] (N. Y. 1845) Where a constable, on an attachment in a justice's court, void because no sufficient bond had been given, seized property which was claimed by a stranger, who procured the same to be given up on executing the bond required in such case by 2 Rev. St. p. 231, § 33, plaintiff, being a trespasser in taking the property, could not maintain an action on such bond.—Homan v. Brinckerhoff, 1 Denio, 184.

[c] (Vt. 1893) Sureties who have voluntarily executed a bond in consideration of the discharge of one summoned as trustee for the principal defendant, and who have by such means procured the discharge, cannot object that the justice who accepted the bond and discharged the trustee had lost jurisdiction of the action by the pendency of an appeal.—Rich v. Sowles, 65 Vt. 135, 26 Atl. 585.

(H) PLEADING.

1. IN GENERAL, § 306.
2. DECLARATION, COMPLAINT, PETITION, OR STATEMENT OF DEMAND, §§ 307-323.
3. PLEA OR ANSWER AND CROSS COMPLAINT, §§ 324-326.
4. DEMURRER OR EXCEPTIONS, MOTIONS, AMENDMENTS, AND SUPPLEMENTAL PLEADINGS, §§ 327-332.
5. SIGNATURE AND VERIFICATION, § 333.

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6. BILL OF PARTICULARS AND COPY OF ACCOUNT, AND FILING WRITTEN INSTRUMENT, §§ 334, 335.
7. ISSUES, PROOF, AND VARIANCE, §§ 336-341.
8. DEFECTS AND OBJECTIONS, WAIVER, AND CURE, § 342.

Entering pleadings on docket, see post, § 455.
In action on judgment, see post, § 423.
In attachment proceeding, see ante, § 288.
On appeal, see post, § 688.
Pleading after removal to court of record of cause without justice's jurisdiction, see ante, § 245.
—— *jurisdictional facts. see* ante, § 215.
—— *want of jurisdiction, see* ante, § 223.
Service of copy of pleadings or cause of action with process, see ante, § 258 [c, r, s].

1. IN GENERAL.

§ 306. Pleading in general.

[a] The technical rules of pleading will not be enforced in a trial before a justice of the peace.
—(Ga. 1875) Dorsey v. Black, 55 Ga. 315;
(Ind. 1854) Brush v. Carpenter, 6 Ind. 78; (1860) Indianapolis & C. R. Co. v. McMahan, 14 Ind. 422;
(Iowa, 1855) Hall v. Monahan, 1 Iowa (1 Clarke) 554; (1858) Same v. Monohan, 6 Iowa (6 Clarke) 216, 71 Am. Dec. 404; (1859) Teagarden v. Baker, 9 Iowa, 271; (1871) Shea v. Livingston, 32 Iowa, 158; (1871) West v. Moody, 33 Iowa, 137;
(Mich. 1855) Hurtford v. Holmes, 3 Mich. 460;
(Mo. 1857) Holland v. The R. H. Winslow, 25 Mo. 57; (1860) Quinn v. Stout, 31 Mo. 160;
(N. Y. 1848) Ross v. Hamilton, 3 Barb. 609; (1848) Willard v. Bridge, 4 Barb. 361;
(Wis. 1859) Meyer v. Town of Prairie du Chien, 9 Wis. 233.

[b] The same strictness as to pleadings before a justice is not required as in other courts.
—(Kan. 1887) McAboy v. Talbot, 37 Kan. 19, 14 Pac. 536;
(N. Y. 1830) Musier v. Trumpbour, 5 Wend. 274; (1871) Osborn v. Nelson, 59 Barb. 375;
(Ohio, 1860) Niven v. Smith, 2 Ohio Dec. 337.

[c] Pleadings in a justice's court should be liberally construed.
—(Cal. 1860) Stuart v. Lander, 16 Cal. 372, 76 Am. Dec. 538;
(N. Y. 1848) Ross v. Hamilton, 3 Barb. 609;
(Wis. 1863) Swineford v. Pomeroy, 16 Wis. 553.

[d] No pleadings are necessary in actions before justices of the peace.
—(Md. 1874) Herzberg v. Adams, 39 Md. 309;
(Tenn. 1812) Baker v. Allen, 2 Tenn. (2 Overt.) 175.

[e] (U. S. 1826) No formal pleadings are necessary in actions before justices of the peace.—Davis v. Pitman, Fed. Cas. No. 3,647a [Hemp. 44].

[f] (Ind. 1849) All forms of pleadings are dispensed with by statute in actions before justices of the peace.—Gharkey v. Halstead, Smith, 208.

[g] (Iowa, 1841) In suits before justices of the peace, no regular pleadings are necessary.—Levi v. McCraney, 1 Morris, 91.

[h] (Iowa, 1854) The Code is directory to a justice of the peace to reduce oral pleadings to writing, and the parties should not be prejudiced by his failure to do so.—Sinnamon v. Melbourne, 4 G. Greene, 309.

[i] (Iowa, 1854) In suits begun before a justice of the peace, substantial compliance with the requisitions of the Code is sufficient, without strict regularity and formality in pleadings.—Burton v. Hill, 4 G. Greene, 379.

[j] (Iowa, 1855) A justice of the peace rendered judgment against the defendant, sued as indorser, because no "demand was made before suit brought." Plaintiff appealed to district court. On motion to dismiss the appeal on the ground that no different judgment could be rendered upon the pleadings, it was *held* that nicety of pleading was unnecessary before a justice, and that the issue should be retried.—Hall v. Monahan, 1 Iowa (1 Clarke) 554.

[k] (Kan. 1868) It is error for a justice to refuse, on demand of the defendant, to allow pleadings to be filed before the actual commencement of the trial, though after the trial hour.—West v. Rice, 4 Kan. 563.

[l] (Minn. 1863) Under Comp. St. c. 59, § 24, providing that pleadings in a justice's court "must" take place on the return day of the summons, "or at such time thereafter, not exceeding one week," as the justice may appoint, the justice has no power to receive pleadings after one week from the return day.—Holgate v. Broome, 8 Minn. 243 (Gil. 209).

[m] (Minn. 1869) Under a statute prescribing that pleadings in justices' courts shall take place at the time fixed for appearance in the summons, or, by consent of the parties, within one week thereafter (Gen. St. c. 65, § 21), a justice has no power to receive the pleadings at any other time than that appointed for the appearance of the parties, except by their consent; and a consent to an adjournment does not carry with it a consent to plead after the expiration of a week.—Mattice v. Litcherding, 14 Minn. 142 (Gil. 110).

[n] (Minn. 1888) Oral pleadings made before a justice within one week after the return day of the summons, and on the adjourned day, are in time, under Gen. St. 1878, c. 65, § 23.—Rauen v. Burg, 38 Minn. 389, 37 N. W. 946.

[o] (Mo. 1839) Proceedings before justices of the peace are conducted in a summary manner, without the forms of pleadings.—Thruston v. McClanahan, 5 Mo. 521.

[p] (N. J. 1857) Strict formal pleading is not required in a justice court; but everything in substance must be said and done there that in form is required in the higher court.—Hixon v. Schooley, 26 N. J. Law (2 Dutch.) 461.

[q] (N. Y.) The proceedings of justices of the peace, so far as respects regularity and form, will be reviewed with liberality. Technical nicety and legal precision are not required in the pleadings; but it will be sufficient if there appears to be a good ground of action within his jurisdiction, and that the merits of the cause have been tried.—(1808) McNeil v. Scoffield, 3 Johns. 436; (1813) Pintard v. Tackington, 10 Johns. 104.

[r] (N. Y. 1842) Unless a demurrer is interposed, the pleadings in a justice's court are interpreted liberally.—Chamberlin v. Graves, 2 Hill, 504.

[s] (N. Y. 1848) In justices' courts, pleadings are to be treated with great liberality; and any allegation or denial which apprises the opposite party of what is intended will be sufficient; and, if such party be at a loss as to what is intended, he should require the pleader to be more

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explicit.—Cohen v. Dupont, 3 N. Y. Super. Ct. (1 Sandf.) 260.

[t] (N. Y. 1856) There is no particular mode by which counts or causes of action are to be separated and distinguished from each other in a complaint in a justice's court. Any mode which apprises the defendant of what is intended is sufficient.—Hall v. McKechnie, 22 Barb. 244.

[u] (S. C. 1881) Under Code, § 91, subd. 2, providing that pleadings in trial justices' courts may be either oral or written, either party may plead orally or in writing, without regard to the form of the pleadings on the other side.—Williams v. Irby, 15 S. C. 458.

[v] (Tex. 1884) The same degree of fullness and particularity is not required in respect to oral pleadings as in case of written pleadings.—International & G. N. R. Co. v. Donalson & Co., 2 Willson, Civ. Cas. Ct. App. § 239.

[w] (Tex. 1887) Rev. St. art. 1573, provides that pleadings in a justice's court may be oral, and that a brief statement thereof shall be noted on the docket, and article 1575 provides for amendments in accordance with the rules governing the district and county courts so far as the same may be applicable. *Held* that, under these sections, pleadings are essential to the formation of issues to be tried in those courts.—Moore v. Jordan, 67 Tex. 394, 3 S. W. 317.

[x] (Wis. 1851) Although the strictness in pleading required in courts of record is not expected in proceedings before a justice of the peace, yet sufficient regard must be had to form to prevent the substantial rights of the parties from being sacrificed.—Hibbard v. Bell, 3 Chand. 206, 3 Pin. 190.

[y] (Wis. 1853) Oral pleadings before a justice of the peace will be liberally construed; but, when written pleadings are used, they must abide by the rules of pleading.—Maynard v. Tidball, 2 Wis. 34.

[z] (Wis. 1857) Under the Revised Statutes it is proper that the instrument sued on be filed and then that all the pleadings be oral; but, if the parties elect to adopt the technical forms, they must then be held to reasonable precision and accuracy.—Lester v. French, 6 Wis. 580.

[zz] (Wis. 1859) In an action in justice's court, where the parties resort to written pleadings, the pleadings must contain all necessary substantial averments.—Fobes v. School District, 10 Wis. 117.

2. DECLARATION, COMPLAINT, PETITION, OR STATEMENT OF DEMAND.

NECESSITY AND TIME FOR FILING, § 307.
FORM AND REQUISITES IN GENERAL, § 308.
STATEMENT OF CAUSE OF ACTION IN GENERAL, § 309.
STATEMENT OF PARTICULAR CAUSES OF ACTION, § 310.
— ACTIONS FOR SERVICES RENDERED IN GENERAL, § 311.
— ACTIONS FOR PROFESSIONAL SERVICES, § 312.
— ACTION BY REAL ESTATE AGENT FOR COMMISSIONS, § 313.
— ACTIONS FOR RENT OR FOR USE AND OCCUPATION, § 314.
— ACTIONS ON SEALED INSTRUMENTS, § 315.
— ACTION ON INSURANCE POLICY, § 316.
— ACTIONS FOR BREACH OF WARRANTY, § 317.
— ACTIONS TO RECOVER PERSONAL PROPERTY, § 318.
— ACTIONS BY PURCHASER TO RECOVER MONEY ADVANCED OR OVERPAYMENT MADE BY MISTAKE, § 319.
— ACTION AGAINST RAILROAD COMPANY FOR DETENTION OF GOODS, § 320.
— ACTIONS FOR TORTS, § 321.
— ACTIONS FOR PENALTIES, § 322.
SEPARATING CAUSES OF ACTION, § 323.

Joinder of causes of action, see ante, § 229.

§ 307. Necessity and time for filing.

[a] In a suit on a note in a justice's court, the note itself is a sufficient statement of the plaintiff's cause of action.

—(Ind. 1858) Adams v. Kerns, 11 Ind. 346; (1858) Hauser v. Hays, Id. 368; (1871) Barnett v. Juday, 38 Ind. 86; (1879) Baldwin v. Webster, 68 Ind. 133.

CONTRA, see

(N. J. 1807) Longstreet v. Cummins, 2 N. J. Law (1 Penning.) 209; (1809) Heritage v. Daniels, 3 N. J. Law (2 Penning.) 551; (1810) Cowperwaite v. Horned, Id. 613.

[b] (Ark. 1879) Where the plaintiff, in an action before a justice of the peace, files a certificate of deposit indorsed to him, he states a sufficient cause of action against the defendant, who is the party with whom the deposit was made.—Jacks v. Nelson, 34 Ark. 531.

[c] (Ga. 1883) Under Code, § 4139, there is no pleading in a justice's court, save the summons, to which the justice is required to attach a copy of the cause of action.—Carnes v. Mattox, 71 Ga. 515.

[d] (Ga. 1884) In a case tried in a justice's court, no pleading is necessary, except the summons.—Farkas v. Stewart, 73 Ga. 90.

[e] (Ill. 1864) When jurisdiction is given to justices of the peace for recovery of a penalty imposed by statute, they are authorized to proceed as in other cases, and to hear such cases, like any other civil suit, without a complaint.—Ewbanks v. Town of Ashley, 36 Ill. 177.

[f] (Ind.) In a suit commenced before a justice of the peace by the assignee against the assignor of a promissory note, the note and assignment may be filed as a cause of action.—(1837) Watson v. New, 4 Blackf. 313; (1846) Hardesty v. Kinworthy, 8 Blackf. 304.

[g] (Ind. 1840) The filing of a delivery bond before a justice of the peace as a cause of action is sufficient, without a declaration.—Barber v. Summers, 5 Blackf. 339.

[h] (Ind. 1841) In a suit in a justice's court against a constable and his sureties, on a bond conditioned, etc., the bond, without an assignment of breaches, may be filed as the cause of action, under the statutes.—Olds v. State, 6 Blackf 91.

[i] (Ind. 1851) No formal declaration is necessary in a suit before a justice of the peace.—Ruble v. Massey, 2 Ind. (2 Cart.) 636.

[j] (Ind. 1878) In a suit on a note before a justice of the peace, whether by the payee or assignee thereof, the note itself is a sufficient statement of the plaintiff's cause of action.—Tucker v. Gardiner, 63 Ind. 299.

[k] (Ind. 1880) In a suit before a justice of the peace against the makers of a note payable to the firm name of a partnership, the note itself is a sufficient complaint.—Audleur v. Kuffel, 71 Ind. 543.

[l] (Iowa, 1855) In an action before a justice of the peace by the indorsee against the indorser of a promissory note, no petition is necessary.—Hall v. Monahan, 1 Iowa (1 Clarke) 554.

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[m] (Mass. 1864) St. 1862, c. 20, providing that, when the declaration in an action before a justice of the peace is not inserted in the writ, it shall be filed with the writ when the same is entered, does not authorize the justice to allow the declaration to be filed after the entry of the writ.—Keenan v. Knight, 91 Mass. (9 Allen) 257.

[n] (Mo. 1828) A justice's court has no jurisdiction, where no statement of the cause of action and of the amount claimed is filed as required by section 5 of the act establishing justices' courts.—Odle v. Clark, 2 Mo. 13.

[o] (Mo. 1834) In suits before justices of the peace, the statement of the cause of action is not necessary, except in cases for damages on account of wrongs done.—Harryman v. Robertson, 3 Mo. 449; Harris v. Harman, Id. 450.

[p] (Mo. 1863) An account of goods sold, filed, is a sufficient statement of a cause of action, before a justice of the peace.—Phillips v. Fitzpatrick, 34 Mo. 276.

[q] (Mo. 1880) In suit in a justice's court, a written statement of plaintiff's cause of action is only required when the suit is not on an account, or an instrument of writing which purports to have been executed by defendant.—Mastin Bank v. Hammerslough, 72 Mo. 274.

[r] (N. J.) A state of demand must be filed, and remain of record.—(1806) Sloan v. Holland, 2 N. J. Law (1 Penning.) 141; (1808) Goble v. Snover, 3 N. J. Law (2 Penning.) 407.

[s] (N. J. 1811) The evidence of a demand cannot be delivered to the justice as the state of demand.—Dean v. Whitmore, 3 N. J. Law (2 Penning.) 739.

[t] (N. J. 1819) The plaintiff must file his state of demand on the return day, and before adjournment of the case can be had; and, if not so filed, he must be nonsuited.—Clark v. Read, 5 N. J. Law (2 Southard) 486; Hunt v. South, 5 N. J. Law (2 Southard) 495.

[u] (Pa. 1885) Under Act July 7, 1879, § 2, a statement and affidavit of a claim need not be filed to give a justice of the peace jurisdiction of actions exceeding $100.—Cook v. Minick, 1 Pa. Co. Ct. R. 603.

[v] (Tex. 1883) Under Rev. St. 1879, art. 3120, providing that, where a distress warrant issued by a justice of the peace is made returnable to the county court, plaintiff need not file his petition before suing out the warrant, but may file the same before the appearance day of the term to which the papers are returnable, a petition filed after such appearance day will be dismissed.—Bruner v. Dubard, 1 White & W. Civ. Cas. Ct. App. § 391.

[w] (Wis. 1863) Where plaintiff in a suit before a justice presented two notes, which were described in dates and amounts in the docket of the justice, it was *held* that the notes became the complaint, and stated in substance a cause of action.—Swineford v. Pomeroy, 16 Wis. 553.

§ 308. Form and requisites in general.

[a] (Cal. 1856) The rule that a penal statute must be declared on by the party seeking recovery under it does not apply to proceedings in justices' courts.—O'Callaghan v. Booth, 6 Cal. 63.

[b] (Ind. 1851) In actions commenced before a justice, by or against a firm, it is not essential that the statement of the demand or cause of action should set out the names of the persons composing the firm, though it is necessary that such actions should be brought by or against the persons composing an unincorporated company in their individual names.—Clark v. Dunlap, 2 Ind. (2 Cart.) 551.

[c] (Ind. 1859) In an action before a justice to recover a horse, if a complaint is necessary, a complaint sworn to may be sufficient, as being both a complaint and an affidavit.—Stephens v. Scott, 13 Ind. 515.

[d] (Ind. 1861) In a suit originated before a justice of the peace, the same fullness, certainty, and formality of statement is not required as is demanded in complaints in the superior courts.—Howe v. Young, 16 Ind. 312.

[e] (Iowa, 1849) A verbal statement of the plaintiff's demand, entered on the docket of the justice of the peace, and indorsed on the writ, is all that is required, in a proceeding before him.—Taylor v. Barber, 2 G. Greene, 350.

[f] (Iowa, 1875) It is not necessary to the maintenance of an action before a justice of the peace against a railroad company, for double damages for killing stock, that a petition in writing be filed. An oral statement, embodying in substance plaintiff's claim, is sufficient.—Finch v. Central R. R., 42 Iowa, 304.

[g] (Iowa, 1883) The notice of suit before a justice of the peace stated that the plaintiff claimed of defendant $25.50, with interest, for commissioners', sheriffs', appraisers', and publication fees in viewing a county road, and on return day plaintiff filed a written petition, claiming to recover $25.50 and interest upon a bond signed by defendant as surety, for commissioners', sheriffs', appraisers', and publication fees, whereupon the petition was stricken from the files by the justice. *Held* to be error, as there was no variance between the notice and the petition.—Winneshiek County v. Humpal, 61 Iowa, 172, 16 N. W. 67.

[h, i] (Mo. 1881) The petition in an action before a justice is sufficient, though lacking the completeness requisite in the circuit court.—Razor v. St. Louis, I. M. & S. Ry. Co., 73 Mo. 471; Key v. St. Louis, I. M. & S. Ry. Co., 73 Mo. 475.

[j] (Mo. 1881) Where a statement filed before a justice did not in terms refer to a certain statute, but stated facts which brought the action under the statute, *held*, that the action was properly treated as founded on that statute.—Blewett v. Smith, 74 Mo. 404.

[k] (Mo. 1884) In trespass qu. cl. fr. before a justice, the complaint is sufficiently definite if it lays the place, so as to determine the venue, and the time within a month.—Muckel v. Rose, 15 Mo. App. 393.

[l] (Mo. 1886) The statement, in a justice's court suit to enforce a mechanic's lien, will support a judgment, though inartificially drawn, if it contains the necessary jurisdictional averments.—Schluter v. Wiedenbrocker, 23 Mo. App. 440.

[m] (N. J.) In cases before a justice of the peace, the state of demand need not be drawn up with technical formality. It is sufficient if it is intelligible.—(1806) Lewis v. Albertson, 2 N. J. Law (1 Penning.) 101; (1809) McCannan v. Anderson, 3 N. J. Law (2 Penning.) 560; (1810) Burgin v. Riggens, 3 N. J. Law (2 Penning.) 654.

[n] (N. J. 1807) The state of demand need not be dated, and the justice need not file the same.—Longstreet v. Taylor, 2 N. J. Law (1 Penning.) 267.

[o] (N. J. 1808) In actions on the case for tort, the state of demand need not lay a venue.—Moore v. Whitacar, 3 N. J. Law (2 Penning.) 460.

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[p] (N. J. 1808) Surplusage does not vitiate a state of demand otherwise sufficient, but it will be rejected.—Burt v. Hicks, 3 N. J. Law (2 Penning.) 461.

[q] (N. J. 1852) A state of demand in debt, in the court for the trial of small causes, is not vitiated by concluding "to the damage of the plaintiff $100."—Scott v. Beatty, 23 N. J. Law (3 Zab.) 256.

[r] (N. J. 1893) In civil proceedings before a justice of the peace for the violation of an ordinance passed under "An act respecting licenses in incorporated boroughs" (P. L. 1892, p. 293), if the complaint refer to one section of the ordinance, and the summons to another, the court does not obtain jurisdiction to try defendant for violation of either section.—White v. Borough of Neptune City, 56 N. J. Law (27 Vroom) 222, 28 Atl. 378.

[s] (N. Y. 1835) In a justice's court, a declaration must be good in form, as well as in substance, if it be objected to before the justice; and if on demurrer he adjudges it good, when in fact it was defective in form or substance, his judgment will be reversed.—Stone v. Case, 13 Wend. 283.

[t] (N. Y. 1888) Code Civ. Proc. § 1775, requiring a corporation bringing an action to describe itself in its complaint, so that it may be identified, applies to actions brought by a corporation in a justice's court.—Crown Point Iron Co. v. Fitzgerald, 14 N. Y. St. Rep. 427.

[u] (Pa. 1888) Under Act May 25, 1887, providing that the statement of demand, in an action before a justice of the peace, should be in the form required by Act 1806, a written statement of demand may be filed in the action.—Godcharles v. Laufer, 3 Del. Co. R. 514.

[v] (Pa. 1893) In an action before a justice for a penalty under a local statute or city ordinance, such statute or ordinance must be pleaded to give the justice jurisdiction.—Pittsburgh v. Madden (Com. Pl.) 14 Pa. Co. Ct. R. 120, 24 Pittsb. Leg. J. (N. S.) 283.

[w] (Tex. 1882) Rev. St. art. 1573, providing that pleadings in justices' courts shall be oral, except where otherwise specially provided, renders it unnecessary for a plaintiff suing a railroad company in such court to allege that defendant "was a corporation duly incorporated," though article 1190 requires such an allegation in such suits in district and county courts.—Texas & P. R. Co. v. Miller, 1 White & W. Civ. Cas. Ct. App. § 262.

[x] (Vt. 1834) If the first count show a case within the jurisdiction of a justice, the others may be regarded as only different modes of declaring for the same cause of action.—Thompson v. Colony, 6 Vt. 91.

§ 309. Statement of cause of action in general.

[a] Any statement of the cause of action sufficient to bar another suit and to apprise the defendant of the nature of the claim is sufficient before a justice of the peace.

—(Ind. 1838) Smith v. District Trustees, 5 Blackf. 40; (1857) Mullen v. Decatur County Com'rs, 9 Ind. 502; (1858) Milholland v. Pence, 11 Ind. 203; (1862) Indiana Cent. Ry. Co. v. Leamon, 18 Ind. 173; (1862) Clark v. Benefiel, Id. 405; (1876) Powell v. De Hart, 55 Ind. 94; (1878) City of Goshen v. Kern, 63 Ind. 468, 30 Am. Rep. 234; (1879) De Priest v. State, 68 Ind. 569; (1884) Louisville, N. A. & C. Ry. Co. v. Zink, 92 Ind. 406; (1887) Rice v. Manford, 110 Ind. 596, 11 N. E. 283; (1888) Anderson v. Lipe, 114 Ind. 464, 16 N. E. 833; (1895) Chicago & S. E. Ry. Co. v. Woodard, 13 Ind. App. 296, 41 N. E. 544;
(Mo. 1882) Gibbs v. Missouri Pac. Ry. Co., 11 Mo. App. 459; (1888) Damhorst v. Missouri Pac. Ry. Co., 32 Mo. App. 350; (1890) Boefer v. Sheridan, 42 Mo. App. 226; (1891) Polhans v. Atchison, T. & S. F. R. Co., 45 Mo. App. 153;
(N. J. 1818) Lippencott v. Smith, 4 N. J. Law (1 Southard) 95.

[b] (U. S. 1832) In setting out a cause of action, a substantial compliance with the statute is all that is requisite. Therefore the expression "open account," where the statute says "book account," is not error.—Dillingham v. Skein, Fed. Cas. No. 3,912a [1 Hemp. 181].

[c] (Ind. 1852) Under the statute, the name given to an action in a justice's court is immaterial, and the statement of demand, though very informal, is sufficient.—Taylor v. Webster, 3 Ind. 513.

[d] (Ind. 1858) The rule that any statement, however short or informal it may be, will be a sufficient statement of the cause of action in a justice's court, if enough be shown to bar another action for the same demand and apprise defendant of the nature of the claim, is not changed by the Code of 1852.—Milholland v. Pence, 11 Ind. 203.

[e] (Ind. 1877) A complaint before a justice of the peace must allege facts sufficient to apprise defendant of the nature of the claim against him or it will be deficient, on a motion in arrest of judgment.—Murphy v. Lambert, 59 Ind. 477.

[f] (Iowa, 1872) In a justice's court, a technical setting forth of the cause of action is not demanded. It is sufficient if the notice states the cause of action in general terms sufficient to apprise defendant of the nature of the claim against him.—Fauble v. Stewart, 35 Iowa, 379.

[g] (Mich. 1849) A declaration before a justice of the peace containing a substantial statement of the cause of action will be held sufficient.—Barber v. Taylor, 1 Mich. (Man.) 352.

[gg] (Mo. 1852) No formality in the statement of a cause of action is required before justices of the peace.—Early v. Fleming, 16 Mo. 154.

[h] (Mo. 1891) The statement of a cause of action before a justice of the peace must be a statement of facts, as distinguished from a conclusion of law, must advise the other party with what he is charged, and be sufficiently definite to bar another action; but beyond this no formal precision is requisite.—Dahlgren v. Yocum, 44 Mo. App. 277.

[i] (N. J. 1838) A state of demand, in the court for the trial of small causes, must contain everything, independent of proof, to show that the plaintiff has a legal cause of action.—Meeker v. Garland, 16 N. J. Law (1 Har.) 486.

[j] (N. J. 1857) It is sufficient if the state of demand, in a justice's court, contains in itself a legal cause of action, apprises the defendant of the complaint against him, and so states the case that it may afterwards appear what was decided.—Patten v. Heustis, 26 N. J. Law (2 Dutch.) 293.

[k] (N. J. 1859) In pleading before a justice, the declaration must set forth all the facts material to show a good cause of action.—Denny v. Quintin, 28 N. J. Law (4 Dutch.) 134.

[l] (N. Y. 1803) The declaration in a justice's court should be so far formal as to show the cause of action.—Houghton v. Strong, 1 Caines, 486.

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§ 310. Statement of particular causes of action.

[a] (Ala. 1853) "Plaintiff claims $50 for work and materials" is a sufficient statement to sustain a judgment by default and writ of inquiry in a justice's court.—Martin v. Higgins, 23 Ala. 775.

[b] (Ind. 1837) In a justice's court, a contract containing conditions precedent, to be performed by the plaintiff, may be filed as the cause of action, without an averment of performance of the conditions.—Wiley v. Shank, 4 Blackf. 420.

[c] (Ind. 1842) Where a written contract is filed as the cause of action in a justice's court, the want of an averment of extraneous facts connected with the contract, and necessary to be proved on the trial to sustain the action, is not a fatal objection, if enough be stated to bar another suit for the same demand.—Cook v. Hedges, 6 Blackf. 184.

[d] (Ind. 1868) In an action on a note in justice court, a complaint alleging the execution of a note, whereby defendants promised to pay plaintiff "one hundred & $^{50}/_{100}$," is sufficient.—Griffin v. Cox, 30 Ind. 242.

[e] (Minn. 1869) A complaint in a justice's court averred that, by the terms of an express contract between plaintiff and defendant, defendant ordered of plaintiff certain lumber, to be delivered at a place named, and agreed to pay for the same; that plaintiff delivered 400 feet of a specified kind, at $25 per 1,000 feet, with $3.20 for hauling same, amounting to $13.20; that the lumber delivered was that ordered, and the amounts specified were due and unpaid. *Held* sufficient to sustain a judgment.—Johnson v. Knoblauch, 14 Minn. 16 (Gil. 4).

[f] (Mo. 1860) A statement filed with a justice of the peace in the following form: "A. B. to C. D., Dr. To one horse sold him on the 2d day of November last, $90. St. Louis, February 1, 1858,"—is sufficient.—Quinn v. Stout, 31 Mo. 160.

[g] (Mo. 1870) A writing in the following words: "S. to B. $50. To fifty dollars,"—wholly fails to be a statement of facts constituting a cause of action.—Brashears v. Strock, 46 Mo. 221.

[h] (Mo. 1875) In a suit before a justice on a note given for the purpose of preventing a criminal prosecution, no pleadings being required, it is not necessary to allege that the crime had been committed, and that the payee at the time of taking the note for such consideration knew of the fact of its commission. It is sufficient that these facts appear upon the trial.—Baker v. Farris, 61 Mo. 389.

[i] (Mo. 1875) In a suit before a justice for sums paid on written orders addressed to plaintiff by defendant, on which orders sundry bills of goods were sold to different parties, *held*, that a statement, filed by plaintiff, setting out separately the several orders, was sufficient. He was not required to insert in the statement an itemized account of the goods so delivered.—Wallace v. Moore, 61 Mo. 472.

[j] (Mo. 1877) 2 Wag. St. p. 814, § 13, provides that in suits on account before a justice of the peace "a statement of the facts constituting the cause of action shall be filed with the justice before any process shall be issued in the suit." *Held*, that a dated memorandum, "N. Debtor to S. $14," was insufficient as such statement, under the statute.—Swartz v. Nicholson, 65 Mo. 508.

[k] (Mo. 1883) A statement: "A. to H., Dr. To one-half amount of judgment for debt and costs in favor of G. against said H., in case No. 34 August, 1880, before V., J. P., instituted by G. against A. & H. on their joint contract. Total amount, $44.30,—$22.15,"—is a sufficient statement of a cause of action before a justice of the peace.—Strathmann v. Gorla, 14 Mo. App. 1.

[l] (Mo. 1883) A statement before a justice of the peace that "defendant justly indebted to the plaintiff in the sum of $162, for money had and received heretofore, to wit, on the ——— day of ———, 1882," is not sufficient, under Rev. St. § 2851, requiring "a statement of the account or of the facts constituting the cause of action upon which the suit is founded."—Rosenburg v. Boyd, 14 Mo. App. 429.

[m] (Mo. 1888) A statement filed before a justice of the peace as follows: "T. J. Nutter, plaintiff, vs. W. T. Houston, defendant. For the service of the season of 1887, two mares, balance $18,"—is insufficient, under Rev. St. 1879, requiring the plaintiff in a suit in a justice's court to file "a statement of the account or of the facts constituting the cause of action upon which the suit is founded."—Nutter v. Houston, 32 Mo. App. 451.

[n] (Mo. 1889) The following statement filed before a justice:

"A., Dr. to I.,

For 1 cow, weight 1,063 lbs., at $2.60 per cwt.	$27 63
May 21, by 11 pounds beef	65
Balance due	$26 98

"I."

—is sufficient to advise defendant of the matter with which he is charged, under Rev. St. 1879, §§ 2851, 2852.—Ingalls v. Averitt, 34 Mo. App. 371.

[o] (Mo. 1889) An account filed as a cause of action in a suit before a justice of the peace is sufficient to support a recovery, where it is sufficiently explicit to inform defendant of the nature of the claim against him, and to bar another action for the same cause.—Fleischmann v. Miller, 38 Mo. App. 177; Gregg v. Dunn, Id. 283.

[p] (Mo. 1891) A statement of a cause of action in a justice's court may be sufficient, if drawn in the form of a count for money had and received.—Penninger v. Reilley, 44 Mo. App. 255.

[q] (Mo. 1891) A statement before a justice of the peace as follows: "Pacific Express Company, bought of George Leas, * * * one crank shaft for four by six engine, $18. This shaft was shipped C. O. D., to Frank E. Wells, Eufala, Indian Territory, May 31. Broken by Pacific Company,"—is insufficient, as it does not appear whether it is based on contract or negligence.—Leas v. Pacific Exp. Co., 45 Mo. App. 598.

[qq] (Mo. 1891) A statement filed before a justice of the peace as follows: "Now comes plaintiff, and for cause of action states defendant is indebted to plaintiff for thirty cords of wood, sold and delivered to him, at $1.50, October 20, 1889, per cord, $45; for which he asks judgment, with costs of suit,"—is sufficient.—Strickland v. Quick, 45 Mo. App. 610.

[r] (N. J. 1808) In debt in a justice's court, where, from the whole case stated in the declaration, it appears that the suit is brought for a note of hand and money lent to defendant, it will be held sufficient.—Seely v. Myres, 2 N. J. Law (1 Penning.) 364.

[rr] (N. J. 1808) In an action on an account in a justice court, the state of demand must set out the particular items that defendant may be apprised of, the nature of the demand against

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him. Merely charging defendant with an unsettled balance is too vague and uncertain.—Hagerman v. Titus, 2 N. J. Law (1 Penning.) 164.

[s] (N. J. 1818) In an action on an account before a justice, the statement of the demand must contain the dates of items.—Sims v. Smith, 4 N. J. Law (1 Southard) 92; La Rue v. Boughaner, Id. 104.

[ss] (N. J. 1818) A "state of demand," stating the action to be for money paid, etc., in general, referring to a bill of particulars annexed, is sufficient.—Leonard v. Ware, 4 N. J. Law (1 Southard) 150.

[t] (N. J. 1818) Where the state of demand claimed simply a certain sum as a "balance due on settlement," it was *held* sufficient.—Tichenor v. Colfax, 4 N. J. Law (1 Southard) 153.

[tt] (N. J. 1818) The item in the "state of demand," "to $50 on A.'s account," was *held* sufficiently certain.—Sykes v. Stokes, 4 N. J. Law (1 Southard) 214.

[u] (N. J. 1822) A count for money paid to and for the use of the defendant, at his request, to A., is good in a justice's court.—Vanderveer v. McMackin, 6 N. J. Law (1 Halst.) 213.

[uu] (N. J. 1828) A general charge in the state of demand "To sundries, as per daybook," if it stood alone would be objectionable; but if, on the same date, there is a credit given the defendants for the same amount, and in the same language, the judgment will not be reversed for the generality of the charge.—Cornelius v. Ivins, 10 N. J. Law (5 Halst.) 56.

[v] (N. J. 1830) A state of demand consisting of the following charge: "To amount of goods received,"—is insufficient.—Evans v. McClellan, 12 N. J. Law (7 Halst.) 123.

[vv] (N. J. 1830) A state of demand containing this item: "Also, vendue account of principal and interest $32,"—is bad.—South v. Decou, 12 N. J. Law (7 Halst.) 125.

[w] (N. J. 1833) In an action of debt in justice court, a statement of demand bearing a date and containing charges: "Order P. W. Emley, accepted; duebill I. Horner, accepted; and due bill I. J. Branson, accepted,"—with the amount of each, does not set forth the liability of the defendant sufficiently.—Stewart v. Patterson, 14 N. J. Law (2 J. S. Green) 141.

[ww] (N. J. 1834) A statement of demand in a justice's court for money had and received, in general terms, is defective.—Hutchinson v. Targee, 14 N. J. Law (2 J. S. Green) 386.

[x] (N. J. 1846) In an action in justice's court, an item in plaintiff's state of demand, charging defendant with a "balance struck by defendant on the plaintiff's pass book," with interest thereon, giving the date, but omitting to state the amount of the balance, and affording no means of ascertaining the same, is bad for uncertainty, and the judgment rendered thereon will be reversed on certiorari.—Carter v. Lackey, 20 N. J. Law (Spencer) 608.

[xx] (N. J. 1859) An allegation of "money lent twenty-five dollars" is insufficient.—Denny v. Quintin, 28 N. J. Law (4 Dutch.) 134.

[y] (N. Y. 1830) A declaration in a justice's court, where the plaintiff declares on a book account generally, and at the same time exhibits a written account of items, is good.—Stolp v. Van Cortland, 3 Wend. 492.

[yy] (N. C. 1896) A complaint, in an action begun before a justice of the peace, alleging that plaintiff was the owner of timber on land sold him by defendant; that defendant sold $160 worth thereof, and got the pay therefor; that by reason thereof defendant was indebted to plaintiff in the sum of $160 and interest, which sum defendant in law agreed to pay plaintiff,—should be construed to be on the implied contract, the tort being waived, as a justice has not jurisdiction of torts.—Brittain v. Payne, 118 N. C. 989, 24 S. E. 711.

[z] (Tex. 1859) No formal presentation of the cause of action being requisite in a justice's court, the form in which an account is presented cannot prejudice the case on its merits.—Doyle v. Glasscock, 24 Tex. 200.

[zz] (Wis. 1875) An oral complaint, entered by the justice in a justice's court, reciting that "plaintiff complains for money had and received by the defendant from the plaintiff, and interest thereon, for balance due him to the amount of $230, and asks judgment for $200, with costs of action," is sufficient, under Tayl. St. p. 1362, § 51, subd. 5, which requires the pleading to be "such as to enable a person of common understanding to know what is intended."—Dehnel v. Komrow, 37 Wis. 336.

§ 311. —— Actions for services rendered in general.

[a] (Mo. 1857) A complaint in justice's court was not dismissed for uncertainty, though it stated the demand to have "accrued against the said steamboat on account of the mate, the captain, or the clerk, agents thereof, for work and labor done on board of said steamer as laborer."—Holland v. The R. H. Winslow, 25 Mo. 57.

[b] (Mo. 1880) In an action before a justice of the peace against K., the complaint stated that plaintiff, "on or about the 1st day of October contracted with defendant to blast in a well on the premises of the said K., for which the said K. was to pay the plaintiff $2 per day. The said plaintiff asks judgment for seven days' work, at $2 per day, for which the said plaintiff claims $14." *Held*, that the complaint contained "a statement of the facts constituting a cause of action," within the meaning of the statute.—Armstrong v. Keleher, 71 Mo. 492.

[c] (Mo. 1888) Rev. St. § 2851, provides that "no formal pleadings * * * shall be required in a justice's court, but before any process shall be issued * * * plaintiff shall file with the justice the instrument sued on, or statement of the account, or of the facts constituting the cause of action upon which the suit is founded," etc. *Held*, that a statement of account: "To services of self and team from April 26th to October 25th, 1886, 157 days, at $2.50 per day, as per agreement, $392.50; credit by cash, $158.00; balance due, $234.50,"—is sufficient.—Sturdy v. St. Charles Land & Cattle Co., 33 Mo. App. 44.

[d] (Mo. 1890) Before a justice of the peace, a statement of plaintiff's claim, as follows, is sufficient; "1884. H. B. to J. W., Dr. To amount due for digging well, $60."—Weese v. Brown, 102 Mo. 299, 14 S. W. 945.

[e] (Mo. 1890) A statement of cause of action before a justice, filed in the form of an account, "To balance due for wages as common laborer, ten days, $16.00," is sufficient, as against the objection that it does not designate the time of rendering the services.—Grabbe v. St. Louis Drayage Co., 42 Mo. App. 522.

[f] (Mo. 1891) A statement in a justice's court, alleging that "defendant is indebted to plaintiff for September, 1889, hauling eleven cords of wood to Curzon's switch, at fifty cents per cord, $5.50; September, 1889, for loading four cars with wood at $1.50 per cord, $6.00; total, $11.50,—for which he asks judgment," etc., is sufficient.—Strickland v. Quick, 45 Mo. App. 610.

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[g] (Mo. 1892) In an action brought in justice's court, a statement of plaintiff's cause of action that "defendants are indebted to plaintiff in the sum of $10 for work and labor as a coal miner during the months of February and March, 1890," is sufficient.—Johnson v. Loomis, 50 Mo. App. 142.

[h] (N. J. 1828) In an action for services rendered, the state of demand must state the time when rendered.—Vanguilder v. Stull, 10 N. J. Law (5 Halst.) 233.

[i] (N. J. 1830) In an action by a father to recover wages due to his daughter, the state of demand must show that he is entitled to the wages.—Collet v. Smith, 12 N. J. Law (7 Halst.) 125.

§ 312. —— Actions for professional services.

[a] (Iowa, 1862) A plaintiff before a justice of the peace filed his account "for making a set of teeth upon silver plate," for "making a set of teeth on gold," "for extracting and filling teeth," and "for filling teeth," giving the respective dates. *Held*, that the charges were sufficiently specific, and defendant's motion for a more specific statement was properly overruled.—Brownell v. Smith, 13 Iowa, 287.

[b] (Minn. 1884) The complaint in an action before a justice of the peace, made orally by plaintiff, alleged, as entered by the justice in his docket, "that the defendant is indebted to him in the sum of $1.50 for services to defendant in looking up title to property in the fall of 1883." *Held*, that it sufficiently stated a cause of action.—Guthrie v. Olson, 32 Minn. 465, 21 N. W. 557.

[c] (N. J. 1857) A demand in a justice's court for "visits and medicine" is not sufficient; it not appearing in what capacity the visits were made.—Smith v. Dunn, 26 N. J. Law (2 Dutch.) 212.

§ 313. —— Action by real estate agent for commissions.

[a] (Ind. 1893) A complaint alleged that plaintiffs were real estate agents, and that defendants had placed land with them for sale; that plaintiffs advertised the land; that in response to an inquiry they showed the land and gave the price; that they gave the inquirer the name of one of the defendants; that the land was afterwards purchased by such person from defendants; and that plaintiffs were entitled to a commission for finding a purchaser for the land. *Held*, that the complaint was sufficient in an action commenced before a justice of the peace.—Clifford v. Meyer, 33 N. E. 127.

§ 314. —— Actions for rent or for use and occupation.

[a] (Cal. 1881) The following complaint was brought in a justice's court: "Complaint. Santa Barbara, Oct. 20th, 1879. The Santa Barbara Gas Co., Dr., to Maria Antonia Lataillade. To balance due on rent of land, two hundred and fifty dollars,"—indorsed: "Filed Oct. 20th, 1879. R. D. Smith, Justice of the Peace." *Held*, that it was sufficient.—Lataillade v. Santa Barbara Gas Co., 58 Cal. 4.

[b] (Mo. 1869) A lease is an instrument of writing, within the meaning of Gen. St. 1865, p. 701, § 13, requiring the plaintiff in actions before a justice of the peace to file a written statement of the facts constituting the cause of action, where the suit is not "founded on an account or instrument of writing."—Gillihan v. Wren, 44 Mo. 377.

[c] (Mo. 1876) In an action before a justice of the peace for the rent of mineral lands, an allegation that defendant had taken out of the ground 32,000 pounds of ore, and that one-fourth thereof was due plaintiff, sufficiently specifies the amount due.—Cook v. Decker, 63 Mo. 328.

[d] (Mo. 1876) In an action for rent before a justice, the complaint must specify the exact sum or amount or proportion of products claimed to be due.—Cook v. Decker, 63 Mo. 328.

[e] (Mo. 1891) A statement in a suit before a justice "that defendants were tenants under a lease, and as such tenants failed to account to plaintiff for the rent, * * * and as the tenants of the plaintiff defendants owe and are justly indebted to plaintiff for said rent in the sum of $100, and for molasses the sum of $3.-20," while indefinite in not stating the year for which the rent accrued, the land in respect of which it accrued, or the terms of the contract of renting, is sufficient to confer jurisdiction.—Holman v. Kerr, 44 Mo. App. 481.

[f] (N. J. 1830) A state of demand, claiming a certain sum of money "for that the defendant used and occupied a messuage in the township of Woolwich from March 25, 1823, to March 25, 1824," is insufficient.—Folwell v. Ford, 12 N. J. Law (7 Halst.) 68.

[g] (N. Y. 1856) In an action for rent in a justice's court, a complaint, "One quarter's rent of crystal in Grand street, May 1st, 1854, with interest, $225," was *held* to be sufficient.—Hubbell v. Clark, 1 Hilt. 67.

§ 315. —— Actions on sealed instruments.

[a] (Ind. 1841) The cause of action filed before a justice of the peace in debt against a constable and his surety was a copy of an instrument of writing, purporting to be executed by the defendants, in the form of a constable's bond, except that it was not sealed, with an assignment of breaches of condition appended to it. *Held*, that the cause of action under the statute was sufficient.—State v. Mowbray, 6 Blackf. 90.

[b] (N. J. 1811) In an action on a sealed instrument in a justice court, the state of demand should contain an allegation that some one or more of the stipulations made by the defendant in the agreement have been broken by him, and how.—English v. Horner, 3 N. J. Law (2 Penning.) 816.

[c] (N. Y. 1849) It is not necessary, in a justice's court, in an action on a sealed instrument, that the declaration should contain an averment that the instrument was signed and sealed by the parties, or either of them. It is enough to declare generally for a breach of contract, referring to the contract or agreement in such terms as to identify it, or to set out the contract according to its legal effect, without averring that it was sealed by the parties.—Smith v. Kerr, 3 N. Y. (3 Comst.) 144.

§ 316. —— Action on insurance policy.

[a] (Mo. 1893) In an action before a justice of the peace, a statement which says that the cause of action is based upon an insurance policy filed with the statement, which gives the name of the insured, and the date and number of the policy and its delivery, is sufficient, since it would bar another action on the same policy by the plaintiff.—Wilkinson v. Metropolitan Ins. Co., 54 Mo. App. 661.

§ 317. —— Actions for breach of warranty.

[a] (Mich. 1880) A declaration in a justice's court for breach of warranty in the sale of a horse must show the nature of the warranty and state the breach.—Smith v. Hobart, 43 Mich. 465, 5 N. W. 666.

[b] (Mo. 1891) A statement in a justice's court: "To amount paid him in cash, $6, and the value

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of a silver watch, $10, handed him, all to be the price of a silver watch bought of him, and warranted to be a good timepiece, and which proved to be the contrary, $16.00,"—is sufficiently definite.—Bauer v. Barnett, 46 Mo. App. 654.

§ 318. —— Actions to recover personal property.

[a] (N. Y. 1877) A complaint in a justice court, which simply shows that the action is "for the recovery of personal property valued at $85," does not allege such a wrongful taking or detention of property as will sustain an action of replevin, or any action at all.—Howe Sewing Mach. Co. v. Haupt, 7 Daly, 108.

[b] (N. Y. 1890) Under Code Civ. Proc. § 2940, which provides that pleadings in justices' courts shall be sufficient if they enable a person of common understanding to know what is intended, a complaint in replevin which alleges ownership of, and right of possession to, the property in plaintiff, and that defendant wrongfully detains it under an execution against a third person, is not defective because of its failure to allege that the taking was wrongful, as the facts averred clearly show this to have been the fact.—Button v. Lusk, 57 Hun, 589, 10 N. Y. Supp. 582, 19 Civ. Proc. R. 111.

§ 319. —— Actions by purchaser to recover money advanced or overpayment made by mistake.

[a] (Ind. 1859) A complaint which avers that "the plaintiff purchased of the defendant on," etc., "four head of fat cattle at," etc., "and advanced as part payment thereon $50; that said cattle were to be delivered to the plaintiff at Peru on," etc.; "that the defendant did not deliver them at," etc., "but had failed and refused so to do; nor had he paid or offered to pay said $50," etc.,—is sufficient, before a justice, to entitle the plaintiff to recover the sum advanced and its interest, without an averment that the plaintiff was ready at the time and place to receive and pay for the said cattle.—Desher v. Parks, 13 Ind. 394.

[b] (N. Y. 1887) In justice's court, a complaint alleging that plaintiff's assignor purchased a certain mortgage from defendant on which it was supposed and alleged that there was a certain sum due, when in fact the amount due was less, sufficiently alleges an overpayment by mistake.—First Presbyterian Soc. of Lewiston v. Ayer, 4 N. Y. St. Rep. 388.

§ 320. —— Action against railroad company for detention of goods.

[a] (Tex. 1884) In an action brought in a justice court against a railroad company for breach of contract in the detention of goods, the statement of the cause of action, which merely states the whole amount claimed, without itemizing the damages and interest, is sufficient, since pleadings in justice courts are not subject to the rules governing written pleadings.—Texas & P. Ry. Co. v. Wright, 2 Willson, Civ. Cas. Ct. App. § 339.

§ 321. —— Actions for torts.

[a] (Ind. 1843) The statement of demand in a suit by an administrator in a justice's court was substantially that the defendant on, etc., had "swapped" a certain bay horse to A., the intestate, and delivered the horse to him, and that the defendant afterwards took the horse into his possession without the plaintiff's consent, and converted him to his own use, etc., to the plaintiff's damage, etc. *Held*, that this was a sufficient statement in trover.—Davis v. Davis, 6 Blackf. 394.

[b] (Ind. 1858) In an action before a justice, the cause of action stated thus: "A., Dr., to B., $30, for one gun obtained by fraud,"—dated and signed, was sufficient.—Milholland v. Pence, 11 Ind. 203.

[c] (Ind. 1881) A complaint alleged that plaintiff on a certain date contracted to sell defendant a mare, with foal, of the value of $60, in consideration that defendant would raise the colt and deliver it to plaintiff, but that defendant turned the mare and colt into a lot, by reason of which and the gross negligence of defendant the colt was killed, to plaintiff's damage in the sum of $60. *Held*, that it is shown by reference that the contract of sale was consummated by delivery of the mare, and that a cause of action is sufficiently averred to bar another suit, which is sufficient in actions before a justice of the peace.—Duffy v. Howard, 77 Ind. 182.

[d] (Ind. 1885) Complaints in mayors' and justices' courts are not required to be as full and technical as those filed in the circuit court, but should be liberally construed. So *held* where the complaint in an action by the owner of stock killed against the railroad company failed to charge, in plain and emphatic language, that defendant was in possession of the railroad, and operated the train.—Wabash, St. L. & P. R. Co. v. Lash, 103 Ind. 80, 2 N. E. 250.

[e] (Mo. 1860) Under Rev. Code 1855, p. 931, § 13, requiring the plaintiff in all actions before a justice not founded on account to file a statement of the facts constituting his cause of action before process shall issue, a statement in an action of trespass in these words: "E. W. Warne, in acc't Calvin C. Burt, Dr. To damage done to building and premises in block 84 of the city of St. Louis, $50,"—is sufficient.—Burt v. Warne, 31 Mo. 296.

[f] (Mo. 1880) In an action of trover before a justice of the peace, the property is sufficiently described as "certain household goods," especially where objection is not made until after the verdict.—Meyer v. McCabe, 73 Mo. 236.

[g] (Mo. 1881) In an action against a railroad for negligence, brought before a justice of the peace, plaintiff may allege, as the cause of the injury, both failure of defendant in its statutory duty—as, for instance, ringing the bell—and negligence in other ways; and, if either is proved, the action can be maintained.—Lynn v. Chicago, R. I. & P. R. Co., 75 Mo. 167.

[h] (Mo. 1890) In a suit before a justice of the peace, a statement of the cause of action as follows is sufficient: "St. L. & S. F. R. Co. to T. J. W., Dr. To damages in negligently breaking soda apparatus shipped May 2, 1884, from Oswego, Kansas, to St. Louis, Mo., $200."—Witting v. St. Louis & S. F. Ry. Co., 101 Mo. 631, 14 S. W. 743, 20 Am. St. Rep. 636, 10 L. R. A. 602.

[i] (Mo. 1891) In an action before a justice of the peace against a railway company for the communication of fire by sparks from an engine, it is not necessary to allege negligence on the part of the company; the rule being that the statement of the cause of action only need advise defendant of what he is sued for, and be sufficiently definite to bar another action for the same subject-matter.—Polhans v. Atchison, T. & S. F. R. Co., 45 Mo. App. 153.

[j] (Mo. 1892) A statement before a justice of the peace, alleging that defendant telegraph company negligently changed the words of a dispatch delivered to plaintiff, causing plaintiff to make an unnecessary and useless trip from Racine, Wis., to St. Louis, Mo., and return, to his damage in the sum of $100, sufficiently pleads special damages.—Lee v. Western Union Tel. Co., 51 Mo. App. 375.

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[k] (Mo. 1894) In an action against a railroad company, in a justice's court, for killing plaintiff's stock, a statement is insufficient which reads that defendant is debtor, "for one cow killed on or about July 26, 1891, valued at $25," and no evidence is admissible under it.—Webster v. Atchison, T. & S. F. R. Co., 57 Mo. App. 451.

[l] (Mo. 1896) Under Rev. St. § 6138, providing that a statement before a justice shall contain "a statement of the facts constituting the cause of action," a statement that defendant "did kill five head of hogs, the property of the plaintiff, of the value of $25, wherefore the plaintiff asks judgment," is sufficient.—Glenn v. Weary, 66 Mo. App. 75, 2 Mo. App. Rep'r, 1306.

[m] (N. J. 1808) The state of demand in an action before a justice for cutting and removing timber must state the time, place, and circumstances of the alleged cutting.—Dogherty v. Anderson, 3 N. J. Law (2 Penning.) 428.

[n] (N. J. 1818) A "state of demand," complaining that the defendant caused the goods of the plaintiff to be seized in Bucks county, in the commonwealth of Pennsylvania, by virtue of an execution fraudulently obtained there for $180, when the sum justly due did not exceed $60, and that he caused the said goods to be removed and detained nine months, was *held* wholly insufficient.—Beaumont v. Dunn, 4 N. J. Law (1 Southard) 106.

[o] (N. J. 1818) In an action for damages for preventing the execution of process, the state of demand must show the kind of process and the nature of the injury caused by the prevention.—Kline v. Ramsay, 4 N. J. Law (1 Southard) 141.

[p] (N. J. 1818) In an action against a constable for neglect, the statement of the demand must specify the particular neglect of which he has been guilty.—Boyd v. Rose, 4 N. J. Law (1 Southard) 230.

[q] (N. J. 1836) In trespass on the case before a justice of the peace, a state of demand alleging that the defendant broke down and destroyed the pen in which the plaintiff's sow was kept, by which she was wholly lost to the plaintiff, is bad, unless it also state that the pen was on the land of the plaintiff.—Angus v. Flood, 15 N. J. Law (3 J. S. Green) 437.

[r] (N. Y. 1848) A declaration in trover, in a suit before a justice of the peace, which contains a statement of facts such as, if proved, would sustain a technical declaration in that form of action, and which informs the defendant of the precise nature of the plaintiff's claim and of the character of the evidence by which it is to be sustained, is sufficient.—Willard v. Bridge, 4 Barb. 361.

[s] (Tex. 1889) In an action for damages for removal of a fence, originally brought in justice's court, the following account, viz., "To actual damages for removing a certain fence from around a certain growing crop, etc., and to exemplary damages for the wrongful and malicious removal of the aforesaid fence," is sufficient to support a judgment for the value of the fence that was removed.—Long v. Cude, 75 Tex. 225, 12 S. W. 827.

[t] (Wis. 1854) Though in actions before justices of the peace parties are not held to strictness in pleading, yet the substance of an issue must be formed. Where the action is in form ex delicto, the plaintiff should allege in substance that he has sustained some damage by the act or omission of the defendant, and should set out in an intelligible manner the nature of the act of which he complains.—Phillips v. Bridges, 3 Wis. 270.

§ 322. —— Actions for penalties.

[a] (N. Y. 1896) Under Code Civ. Proc. § 2939, providing for a demurrer in a justice's court "where the complaint is not sufficiently explicit to be understood," defendant's demurrer to a complaint in an action for a penalty for violation of the excise law, which fails to disclose any facts which would apprise him of the nature of his offense, must be sustained.—Village of Cortland v. Howard, 1 App. Div. 131, 37 N. Y. Supp. 843.

§ 323. Separating causes of action.

[a] (N. Y. 1856) A complaint in the justice's court comprised four counts, purporting to state four distinct causes of action. In the first count it was averred that the defendants were indebted to the plaintiffs, as overseers of the poor, in a certain sum, whereby an action had accrued to them as such overseers, according to the statute, specifying the title and two of the sections, which imposed a penalty for selling liquors without a license, to be recovered by an action in the name of the overseers. Each of the other counts alleged a further indebtedness of a like sum and was in all respects similar to the first. *Held*, that the complaint was sufficient in substance to authorize a recovery of the penalty for four several violations of the statute; there being no particular mode of separating counts in a justice's court.—Hall v. McKechnie, 22 Barb. 244.

3. PLEA OR ANSWER AND CROSS COMPLAINT.

IN GENERAL, § 324.
DILATORY PLEAS AND MATTER IN ABATEMENT, § 325.
SET-OFF, COUNTERCLAIM, AND CROSS COMPLAINT, § 326.

Necessity for plea in order to raise issue, see post, § 336.
Pleading limitations, see ante, § 246.
—— *want of jurisdiction, see* ante, § 223.

§ 324. In general.

[a] (Ark. 1884) The failure to file an answer in a justice's court affects no rights on the appeal; the statute not requiring such answer.—Texas & St. L. Ry. v. Hall, 44 Ark. 375.

[b] (Ark. 1886) It is error for a justice of the peace to require a defendant to put in a written or verified answer before being heard.—Carolan v. Carolan, 47 Ark. 511, 2 S. W. 105.

[c] (Cal. 1860) An answer in a justice's court, denying generally the allegations of the complaint, conforms substantially to the requirements of Prac. Act, § 574.—Sullivan v. Cary, 17 Cal. 80.

[d] (Cal. 1862) Under the civil practice act, an answer to a verified complaint in a justice's court is sufficient, if it denies the material allegations, either generally or specifically.—Minturn v. Burr, 20 Cal. 48.

[e] (Ill. 1845) In suits before justices of the peace, the defendant should state his grounds of defense before the trial.—Bates v. Bulkley, 7 Ill. (2 Gilman) 389.

[f] (Ill. 1862) As no written pleadings are required in an action in a justice's court, it is not error to strike a written plea setting up the statute of frauds from the files.—Williams v. Corbet, 28 Ill. (18 Peck) 262.

[g] (Iowa, 1859) In a suit before a justice, where the petition, though in writing and sworn to, does not call for a sworn answer, an oral answer is admissible.—Freibertsheyser v. Rischatch, 10 Iowa, 587.

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[h] (Minn. 1875) Where, in an action in a justice's court, the complaint is filed on the return day of the summons, and defendant, omitting to plead, consents to an adjournment for more than a week, "the pleadings are closed," within Gen. St. c. 65, § 34, authorizing an adjournment in such case, and defendant's right to answer is gone.—O'Brien v. Pomroy, 22 Minn. 130.

[i] (Minn. 1889) Pleadings in justices' courts are to be construed with great liberality, and, where an answer clearly indicates the defense, it must be considered sufficient.—McGrath v. O'Brien, 42 Minn. 13, 43 N. W. 486.

[j] (Mo. 1887) Defendant, in a suit in a justice's court, refused to elect on which of two inconsistent defenses he would stand. *Held*, that his offer of evidence was properly rejected.—Sherman v. Rockwood, 26 Mo. App. 403.

[k] (N. H. 1859) A brief statement of defense is not required before a justice.—Colby v. Stevens, 38 N. H. 191.

[l] (N. J. 1806) A written plea is not required in actions before justices, except in cases of set-off.—Bray v. Van Note, 2 N. J. Law (1 Penning.) 143.

[m] (N. Y. 1814) Where a summons was personally served, and defendant did not appear on its return, and the justice then adjourned the cause for two days, when defendant appeared, tendered a plea, and demanded a venire, such plea was properly overruled by the justice as too late after a default, and defendant was only entitled to give evidence in mitigation of damages.—Snell v. Loucks, 11 Johns. 69.

[n] (N. Y. 1818) Defendant may plead and make his defense, if he appear before the justice enters on the trial of the merits of the cause.—Sweet v. Coon, 15 Johns. 86.

[o] (N. Y. 1822) On the return of a summons personally served in a justice's court, the defendant did not appear, and his default was entered. The plaintiff, after stating his demand, not being prepared to prove it, asked for an adjournment, which was granted, and at the return day the defendant appeared and offered a plea, which the justice refused. *Held*, that the plea should have been received.—Bowen v. Bell, 19 Johns. 390.

[p] (N. Y. 1827) Though the defendant do not appear at the return of the summons, yet he may plead at an adjourned day on paying costs of the adjournment and subsequent proceedings.—Lowther v. Crummie, 8 Cow. 87.

[q] (N. Y. 1828) Where there is no appearance on the return of a summons in a justice's court, and the cause is adjourned to a future day, the defendant or the party in interest has a right to interpose a plea on such adjourned day.—Riley v. Seymour, 1 Wend. 143.

[r] (N. Y. 1834) Where plaintiff, in an action before a justice, after waiting an hour and twenty minutes after the time specified in the summons for appearance of defendant, exhibited his declaration, and proceeded to the proof of his demand by examining two witnesses, and then, an hour and a half after the time specified in the summons for appearance, defendant appeared and asked leave to plead, offering to pay all costs, it was error of the justice to refuse such leave.—Pickert v. Dexter, 12 Wend. 150.

[s] (N. Y. 1834) Where defendant, in an action before a justice, appears on the return day of the summons before the cause is adjourned, or after adjournment, if the plaintiff is still present in court, it seems proper to permit him to plead; and, if defendant appears on the return day of the summons before plaintiff has closed his case, he should be permitted to plead.—Pickert v. Dexter, 12 Wend. 150.

[t] (N. Y. 1839) Notwithstanding the forty-seventh section of the act relating to courts held by justices of the peace, a justice may, in his discretion, upon terms, permit a defendant to come in and plead who did not appear on the return of a summons which had been personally served, but subsequently appeared on a day to which the cause had been adjourned at the request of plaintiff.—Jenkins v. Brown, 21 Wend. 454.

[u] (N. Y. 1884) It is an abuse of discretion for a justice of the peace, during the progress of the trial and while plaintiff is examining his witnesses, to refuse to allow defendant, who has appeared by counsel, to answer and disprove the case as made by plaintiff.—Doty v. Campbell, 1 How. Prac. (N. S.) 101.

[v] (N. Y. 1894) Where a defendant appears before a justice of the peace on the return day of the summons, after the hour limited for his appearance, and after plaintiff has given his evidence, but while plaintiff is still present, but before judgment has been entered, it is error for the justice to refuse to allow defendant to appear and answer.—Thompson v. Sheridan, 80 Hun, 33, 29 N. Y. Supp. 868.

[w] (Tex. 1888) In an action before a justice on an account, an answer denying the correctness of the account, and averring "that plaintiff is indebted to defendant for failing to comply with his contract, * * * to his damage in the sum of $5,000, which defendant now pleads in abatement against plaintiff's claim, if he has any, but asks no judgment against plaintiff, but reserves his right to sue for such damages in the court having jurisdiction thereof, and that the material in the account sued upon is part of such contract," sets up a good defense.—Collins v. Dignowity (Sup.) 8 S. W. 326.

[x] (Wis. 1860) Quære, whether the refusal of a justice to receive defendant's plea, after submission of the case by the plaintiff, is error —Tallmadge v. Potter, 12 Wis. 317.

§ 325. Dilatory pleas and matter in abatement.

For defects in parties, see ante, § 249.

Necessity for pleading in abatement, pendency of other suit, see "Abatement and Revival," vol. 1, cc. 118, 119, § 123 [r, w].

Pendency of action before justice in which claim might be set off as ground for abatement of other action, see "Abatement and Revival," vol. 1, cc. 60, 61, § 46.

[a] (Ala. 1874) A plea in abatement in a justice's court must be filed at the first term at which the case has been for trial, and comes too late after a general continuance.—Noles v. Marable, 50 Ala. 366.

[b] (Ala. 1882) Where, in an action before a justice of the peace for cutting timber, the amount of damages was not stated in the summons, but was alleged in the complaint to be $50, a plea to the jurisdiction on the ground that the damages exceeded $50 was frivolous and properly stricken from the file.—Wagnon v. Turner, 73 Ala. 197.

[c] (Ill. 1885) No written pleadings are required in a case before a justice of the peace, and no technicalities can be availed of; nevertheless, all dilatory defenses must be made at the earliest opportunity, as, for instance, that plaintiff has been adjudged to have no existence by reason of a judgment of quo warranto.—Dodge v. People, 113 Ill. 491, 1 N. E. 826.

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[d] (Ill. 1888) In forcible detainer in a justice's court it is error, after overruling defendant's plea in abatement of the pendency of a former suit, to render judgment against him without requiring plaintiff to give evidence to sustain his demand.—Steele v. Grand Trunk Junction Ry. Co., 125 Ill. 385, 17 N. E. 483.

[e] (Vt. 1824) That an action before a justice of the peace is not seasonably entered is properly pleadable in abatement; and the objection cannot be reached by a motion to dismiss the action.—Stone v. Proctor, 2 D. Chip. 108.

[f] (W. Va. 1891) The proper method to take advantage of any defect in the summons or in the return thereto in a justice's court is by a motion to quash, because in that court there are no formal pleadings, and the question cannot be raised by plea in abatement.—Layne v. Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123.

§ 326. Set-off, counterclaim, and cross complaint.

[a] (Ark. 1854) In a suit before a justice of the peace, a set-off should not be rejected where the plaintiff had verbal notice of it, whether this notice was direct or indirect, though, if, from the manner in which notice was given, the plaintiff was surprised by the set-off, he might claim a continuance.—Reed v. Akin, 14 Ark. 475.

[b, c] (Iowa, 1878) Where a case before a justice of the peace against several defendants had been settled by one of them before the time set for trial, and before the filing of an answer, and it had been so entered upon the docket, *held* to be too late after that time to file a counterclaim.—Holmes v. Hull, 48 Iowa, 177.

[d] (Mich. 1896) In an action commenced before a justice of the peace to recover damages for wrongfully cutting trees on plaintiff's land, contrary to an agreement between plaintiff and defendant, where the pleadings are verbal, a notice of recoupment which does not point out in what respect the contract was broken by plaintiff is insufficient.—Kerr v. Bennett, 109 Mich. 546, 67 N. W. 564.

[e] (Mo. 1896) Under Rev. St. 1889, § 6205, providing that a defendant must give notice of any set-off in an action before a justice before the jury is sworn, the mere filing of a set-off without such notice to the adverse party is insufficient.—Frisby v. Ritman, 66 Mo. App. 418, 2 Mo. App. Rep'r, 1365.

[f] (N. Y.) In an action before a justice of the peace, the defendant must plead or give notice of his set-off at the time of joining issue; and, if he neglects to do so, he cannot afterwards make the set-off at the trial.—(1813) Waring v. Lockwood, 10 Johns. 108; (1815) Sellick v. Fox, 12 Johns. 205.

[g] (N. Y. 1850) On joining issue in a justice's court, it is sufficient for defendants to plead the general issue and give notice that they will prove on the trial that the plaintiff is largely indebted to them for board, washing, and mending, furnished to him at his request, and for money paid, work, labor, and services, and that they will claim a judgment for $100, unless the plaintiff at the time objects to the notice for want of certainty or requires a specification of the nature of the set-off.—Bell v. Davis, 8 Barb. 210.

[h] (Tex. 1884) Where plaintiff in justice court sued defendant for injuries done to his cattle, a plea by defendant in reconvention for damages caused by plaintiff in willfully and maliciously allowing and permitting his cattle to break into defendant's premises and destroy his crop, is sufficient on general exceptions.—Hoskins v. Huling, 2 Willson, Civ. Cas. Ct. App. § 155.

[i] (Tex. 1886) In an action in justice court, where defendant in offset to plaintiff's claim pleads an overcharge made in a previous settlement, it is unnecessary that the plea should allege either mistake or fraud, since the pleadings are not required to be in writing.—Eastham v. Randolph, 3 Willson, Civ. Cas. Ct. App. § 115.

4. DEMURRER OR EXCEPTIONS, MOTIONS, AMENDMENTS, AND SUPPLEMENTAL PLEADINGS.

DEMURRER OR EXCEPTION AND MOTIONS, § 327.
AMENDMENTS IN PLEADINGS, § 328.
— BRINGING CAUSE WITHIN JURISDICTION OF JUSTICE, § 329.
— NEW OR DIFFERENT CAUSE OF ACTION, § 330.
— NOTICE OF AMENDMENT, § 331.
PLEAS PUIS DARREIN CONTINUANCE, § 332.

Defects in parties as ground for demurrer, see ante, § 249 [w].

Demurrer in justice court as motion to dismiss on appeal, see post, 650 [c].

Misjoinder of actions as ground for demurrer, see ante, § 229 [i].

§ 327. Demurrer or exception and motions.

[a] (Mo. 1894) There is no demurrer to a defective complaint filed before a justice of the peace; the remedy being by motion to dismiss, to strike out, or to make the complaint more definite.—Martin v. Creech, 58 Mo. App. 391.

[b] (Neb. 1884) There is no statutory authority for a demurrer to a bill of particulars before a justice of the peace.—Miller v. Mesick, 15 Neb. 646, 20 N. W. 100.

[c] (N. Y. 1829) A demurrer may be interposed to pleadings in the justices' courts.—Van Hoesen v. Van Alstyne, 3 Wend. 75.

[d] (N. Y. 1837) The omission to plead a by-law may be taken advantage of by demurrer in a justice's court, as well as in a court of record.—Harker v. City of New York, 17 Wend. 199.

[e] (N. Y. 1847) Where a declaration in a justice's court set forth no ground of action, and the evidence made out no cause of action, a judgment against the defendant cannot be sustained, though the defendant took issue without demurring, and the plaintiff's allegations were fully proved.—Tifft v. Tifft, 4 Denio, 175.

[f] (N. Y. 1853) A motion to dismiss a complaint on the ground that it does not state facts enough to constitute a cause of action, as it depends on general principles of law and pleading, and not on rules of practice which pertain to courts of justices of the peace, is improper in such courts.—Hilliard v. Austin, 17 Barb. 141.

[g] (N. Y. 1853) Though a motion to dismiss the complaint in an action before a justice of the peace be made on the return day, yet it is error to allow it on the adjourned day, when the parties are ready for trial on the issues joined.—Hilliard v. Austin, 17 Barb. 141.

[h] (N. Y. 1855) A demurrer is the only proper mode of raising an objection to a pleading in a justice's court. The justice has no authority to entertain a motion to strike out a defense.—City of New York v. Mason, 1 Abb. Prac. 344.

[i] (N. Y. 1857) When defendant demurs to the complaint on the ground it does not state,

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etc., a cause of action, and the cause is submitted on the complaint and demurrer, the justice, on overruling the demurrer, may properly render judgment for the plaintiff.—The demurrer admits the facts stated in the complaint, and dispenses with proof of plaintiff's case.—Board of Excise Com'rs of Saratoga County v. Doherty, 16 How. Prac. 46.

[j] (N. Y.) Code Civ. Proc. § 2891, relating to justices' courts, provides that, "if a defendant fails to appear and answer, the plaintiff cannot recover without proving his case." Laws 1881, c. 414, § 3, provides that in certain cases, if the defendant fails to answer or demur to a sworn complaint, he shall be deemed to have admitted its allegations, and the court shall enter judgment for the amount demanded without further proof. *Held*, that the latter act does not repeal, but only modifies, the Code; and that, where defendant demurs, judgment cannot be entered without proof.—(1885) Oulman v. Schmidt, 35 Hun, 345; (1888) Lansing v. Stevens, 50 Hun, 605, 3 N. Y. Supp. 79.

[k] (N. Y. 1888) Laws 1881, c. 414, § 3, provides that, where defendant, in a suit before a justice of the peace, fails to answer or demur, on the return of the summons with proof of service, the court shall deem the allegations of the complaint admitted, and enter judgment for the amount claimed. *Held* that, where defendant demurred, and the demurrer was overruled, the court could not enter judgment without evidence of the amount claimed.—Thomas v. Jones, 47 Hun, 81.

[l] (N. Y. 1896) Under Code Civ. Proc. § 2935, subd. 4, authorizing a demurrer by plaintiff in a justice court "to one or more counterclaims stated in the answer," an answer in such court is not demurrable because it improperly denied any knowledge or information as to the allegation of the complaint.—Singer v. Effler (City Ct. Alb.) 16 Misc. Rep. 334, 39 N. Y. Supp. 720.

[m] (Ohio, 1885) It is not proper practice to file a demurrer to a bill of particulars before the justice of the peace.—Bruden v. Biehl, 1 Ohio Cir. Ct. R. 85.

§ 328. Amendments in pleadings.

See post, § 333 [d].

Amendments after removal to court of record of cause without justice's jurisdiction, see ante, § 245.

—— *on appeal, see* post, §§ 665–693.

—— *respecting parties to action, see* ante, §§ 248, 249.

—— *setting up limitations, see* ante, § 246 [n].

Pleading title in amendment, see ante, § 219.

[a] It is improper for a justice to dismiss an action in his court for defects in the complaint without first giving the right to amend.—(Minn. 1893) Middelstadt v. McIntyre, 55 Minn. 69, 56 N. W. 464; (N. Y. 1853) Hilliard v. Austin, 17 Barb. 141.

[b] (Cal. 1858) Amendments are to be allowed with great liberality in justice cases.—Butler v. King, 10 Cal. 342.

[c] (Cal.) Amendments to complaints are within the discretion of the justice.—(1858) Linhart v. Buiff, 11 Cal. 280; (1859) Canfield v. Bates, 13 Cal. 606.

[d] (Ga. 1895) Since the passage of Act Oct. 16, 1891, amending Act Sept. 26, 1883, it is not essential to the right of amending a plea and making a defense of a suit in justice court on an unconditional written contract that defendant should file a written plea at the first term.—Heyward v. Field, 95 Ga. 714, 22 S. E. 653.

[e] (Mich. 1882) Under Comp. Laws, § 5309, a person arrested and brought before a justice on a civil warrant has a right to a reasonable time for pleading, and where the justice requires him to plead immediately, and he pleads the general issue, and the case is then adjourned, he is entitled of right, and without conditions, to amend his pleadings, and put in any justification he may have on the adjourned day.—Meddaugh v. Williams, 48 Mich. 172, 12 N. W. 34.

[f] (Mich. 1895) A contract provided that, if plaintiff failed to deliver logs to be sawed at defendant's mill, a debt due him from defendant should become payable in lumber at the mill. *Held*, that a declaration thereon filed in a justice court, which failed to allege that plaintiff did not deliver the logs to be sawed, or that he demanded the lumber at the mill, could be amended by the insertion of allegations to that effect.—Stanley v. Anderson, 107 Mich. 384, 65 N. W. 247.

[g] (Mo. 1860) A description of the premises in a statement in an action of trespass before a justice, "building and premises in block number 84 of the city of St. Louis," being sufficient, an amendment adding the words "South Fourth street" is unnecessary, and therefore immaterial.—Burt v. Warne, 31 Mo. 296.

[h] (Mo. 1882) A justice of the peace may allow amendments not changing the cause of action.—Turner v. St. Louis & S. F. Ry. Co., 76 Mo. 261.

[i] (Mo. 1891) An account, filed with a justice of the peace as the basis of an action, is not so fatally defective as to be incapable of amendment, when it consists merely of the item, "To balance for services rendered as traveling salesman, $64.15."—Lustig v. Cohen, 44 Mo. App. 271.

[j] (Mo. 1891) A statement before a justice of the peace that "plaintiff says defendants are justly indebted to him in the sum of $85.68, which sum is due him from defendants for the sale of cigars, wherein plaintiff acted as the agent and salesman of defendants under a certain written contract, and all of said sum of $85.68 is still due plaintiff," states a cause of action, and is subject to amendment.—Dahlgren v. Yocum, 44 Mo. App. 277.

[k] (Mo. 1892) Where an action before a justice of the peace is commenced by a statement of account consisting of one item "for work and labor," the statement, though insufficient to support a judgment, is not so defective as not to allow of amendment.—Lamb v. Bush, 49 Mo. App. 337.

[l] (N. J. 1818) If a plaintiff alters his "state of demand," after filing it in the office of a justice, without express permission of the court, a nonsuit must be entered, or it will vitiate the judgment.—Blackwell v. Leslie, 4 N. J. Law (1 Southard) 112.

[m] (N. Y. 1836) An amendment will be allowed in a justice's court, by adding a plea after the issue joined, on terms necessitating an adjournment, if necessary, notwithstanding 2 Rev. St. p. 238, § 69, provides that, where a suit is commenced by summons, plaintiff can have but one adjournment, not to exceed eight days.—Colvin v. Corwin, 15 Wend. 557.

[n] (N. Y.) A justice of the peace has the same power to allow amendments as courts of record.—(1836) Colvin v. Corwin, 15 Wend. 557; (1845) Babcock v. Lipe, 1 Denio, 139; (1847) Fulton v. Heaton, 1 Barb. 552; (1856) Perry v. Tynen, 22 Barb. 137.

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[o] (N. Y. 1845) A justice of the peace may allow plaintiff to add a new count to his declaration after the case has been adjourned.—Babcock v. Lipe, 1 Denio, 139.

[p] (N. Y. 1847) An application to amend a pleading in a justice's court is addressed to the discretion of the court.—White v. Stevenson, 4 Denio, 193.

[q] (N. Y. 1847) Where the plaintiff in a justice's court declared on a special agreement as a parol writing, which, when produced on the trial, turned out to be under the hands and seals of the parties, it was *held* that the justice could allow the plaintiff to amend, and that he might disregard the variance.—Mosher v. Lawrence, 4 Denio, 419

[r] (N. Y. 1852) Where a justice overrules a defense on the ground that it is not well pleaded, it is the duty of the justice to order the pleading to be amended.—Turck v. Richmond, 13 Barb. 533.

[s] (N. Y. 1856) On demurrer to the complaint in an action in a justice's court, the court, if it deems the objection well taken, should order the pleading to be amended, and has no power to pronounce judgment on a demurrer without such order.—Glasse v. Keulsen, 3 Abb. Prac. 100.

[t] (N. Y. 1871) When it becomes necessary to amend the complaint, in an action commenced in a justice's court to recover for the services of the plaintiff's minor son, in order that it may appear more clearly and specifically upon the face thereof by whom the services were in fact performed, such complaint may be amended on the trial, or after the trial, to conform to the proof.—Osborn v. Nelson, 59 Barb. 375.

[u] (N. Y. 1872) A justice of the peace has the right to allow an amendment of the complaint, on the trial of an action before him, by reducing the amount of damages claimed therein below $50, though the effect of such an amendment will be to deprive the defendant of a right to a new trial in the county court.—Jaycox v. Pinney, 62 Barb. 344.

[v] (N. Y. 1875) In an action before a justice of the peace for injury to plaintiff's buggy in a collision with defendant's wagon, in which a general denial is filed, it is error to refuse to allow defendant to amend his answer to show that since issue was joined an action had been tried by defendant against plaintiff to recover damages for the same collision, in which plaintiff had set up his damages as a counterclaim.—Ryan v. Lewis, 5 Thomp. & C. 662.

[w] (N. Y. 1879) In an action before a justice of the peace by the payee of a note given on the sale of a horse, a refusal to allow the defendant to amend his answer by setting up a breach of warranty is error; the proposed defense not being shown to be false or vexatious.—Walsh v. Cornett, 17 Hun, 27.

[x] (N. Y. 1888) Under Code Civ. Proc. § 2944, allowing pleadings in justices' courts to be amended at any time before or during the trial, if substantial justice will be promoted, the justice must allow an application, made on the adjourned day, to amend the answer by setting up a former suit in bar, where there is nothing to show that it is for delay, or that the proposed defense is false; and though the complaint is verified as required by Laws 1881, c. 414, the absence of a verification of the proposed amended answer cannot be taken as evidence of its falsity, or of bad faith, where it does not appear that a copy of the verified complaint was served with the summons, as required by that act.—Vaughn v. Lego, 49 Hun, 606, 1 N. Y. Supp. 689, 15 Civ. Proc. R. 164.

[y] (N. Y. 1891) In trover brought in a justice's court, defendant denied the complaint, and afterwards filed an amended answer which set up matters of justification, but contained no denial. *Held* that, under the rule that pleadings in justices' courts are to be liberally construed, and since defendant evidently intended the amended answer to be in addition to the denial contained in the original answer, it would be so considered, and all matters which might have constituted a defense under the original and amended answers should have been admitted.—Van Curen v. Switzer, 58 Hun, 602, 11 N. Y. Supp. 263.

[z] (Wis. 1890) Rev. St. § 3626, subd. 11, provides that pleadings in courts of justices of the peace may be "amended at any time before trial, or during the trial, when by such amendment substantial justice will be promoted." *Held*, that the allowance of an amendment in a justice's court after the case was submitted, but before judgment, which made the complaint conform technically to the evidence given on the trial, and did not mislead defendant, was not error.—Hibbard v. Peek, 75 Wis. 619, 44 N. W. 641.

§ 329. —— Bringing cause within jurisdiction of justice.

[a] (Cal. 1858) A justice may allow a complaint to be amended as to jurisdictional facts.—Linhart v. Buiff, 11 Cal. 280.

[b] (Cal. 1862) Where the jurisdiction of a justice's court extends only to a part of the relief sought in a complaint, it is erroneous to dismiss the complaint therefor. The court should direct an amendment or disregard the objectionable matters.—Howard v. Valentine, 20 Cal. 282.

[c] (Ind. 1894) Where, in replevin before a justice, the value of the property and amount of damages claimed together take the case beyond his jurisdiction, the complaint may be amended before appeal by omitting the damages.—Bensch v. Farnsworth, 9 Ind. App. 547, 34 N. E. 751, 37 N. E. 284.

[d] (Ind. 1894) Rev. St. 1894, § 7106 (Rev. St. 1881, § 5225), confers jurisdiction on a justice of the peace in an action to recover real property from a tenant unlawfully holding over. *Held*, that plaintiff, after bringing an action before a justice of the peace to recover real estate in such a manner that the justice had no jurisdiction, may amend his complaint by stating that defendant is plaintiff's tenant, and is unlawfully holding over.—Blair v. Porter, 12 Ind. App. 296, 38 N. E. 874, 40 N. E. 81.

[e] (Minn. 1875) Where, in an action in a justice's court, the complaint claims a sum beyond the jurisdiction of the court, but during the trial the plaintiff amends so as to reduce the claim to a jurisdictional amount, and the trial is then proceeded with by both parties, such court has jurisdiction to enter judgment therein.—Lamberton v. Raymond, 22 Minn. 129.

[f] (Mo. 1872) A justice of the peace may permit a plaintiff to amend his statement, so as to bring the amount within his jurisdiction.—Burden v. Hornsby, 50 Mo. 238.

[g] (N. Y. 1847) Where the plaintiff, in a justice's court, claimed damages in his declaration to an amount beyond the jurisdiction of the justice, and issue was joined and the cause adjourned, it was *held* that the plaintiff, on the adjourned day, might be permitted to amend the declaration so as to bring the case within the justice's jurisdiction, though the defendant objected to the amendment.—Woolley v. Wilber, 4 Denio, 570.

[h] (N. Y. 1856) In an action before a justice of the peace, defendant alleged an assault

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on his horse, while the horse was attached to a buggy, "and while the plaintiff was in said wagon." *Held* that, though not an action for an assault, in which case the justice would have had no jurisdiction, the justice did right in permitting the plaintiff to devest his complaint of the allegations relative to the presence of the plaintiff in the wagon, which he supposed might characterize the action as one of assault, and that the action as amended was clearly one for "injuring property."—Bull v. Colton, 22 Barb. 94.

§ 330. —— New or different cause of action.

[a] (Mo. 1894) A statement of a claim filed in justice court as an account for a certain number of feet of logs, at a certain amount per 1,000, may be amended by showing that it was an account for hauling the logs, this not being a statement of a different cause of action.—Cameron v. Hart, 57 Mo. App. 142.

[b] (N. Y. 1859) Under Code Proc. § 366, a justice's court has power to allow an amendment of a complaint for conversion, changing the allegations from those appropriate to a tort to those appropriate to a mere breach of contract. Such an amendment does not substantially change the cause of action.—Doughty v. Crozier, 9 Abb. Prac. 411.

[c] (N. Y. 1868) Under Code Civ. Proc. § 64, subd. 11, providing that pleadings may be amended at any time before trial when substantial justice will be thereby promoted, a justice of the peace has power to allow an amendment of a complaint before trial by substituting a different form of action for the one brought.—Bigelow v. Dunn, 53 Barb. 570, 36 How. Prac. 120.

[d] (N. Y. 1886) A plaintiff, suing for conversion, may on the trial waive the tort and amend, setting out a second cause of action for liquidated damages under a contract relating to the same subject-matter as the first cause of action.—De Witt v. Greener, 11 Civ. Proc. R. 327.

[e] (N. Y. 1886) Code, § 2044, requiring a justice to allow an amendment to a pleading, if substantial justice will be promoted thereby, he may permit an amendment to a complaint changing a cause of action in tort into one on contract.—De Witt v. Greener, 11 Civ. Proc. R. 327.

[f] (Vt. 1839) A justice of the peace cannot permit an amendment which changes the cause of action.—Emerson v. Wilson, 11 Vt. 357, 34 Am. Dec. 695.

§ 331. —— Notice of amendment.

[a] (Kan. 1872) It is error for a justice of the peace to render a judgment against a defendant on an amended bill of particulars, without the defendant having any notice of the amendment.—Alvey v. Wilson, 9 Kan. 401.

§ 332. Pleas puis darrein continuance.

[a] (N. Y. 1841) A plea puis darrein continuance may be received in a justice's court.—West v. Stanley, 1 Hill, 69.

[b] (N. Y. 1848) In a justice's court, a plea in abatement puis darrein continuance is the proper, if not the only effectual, mode of taking advantage of an agreement to submit to arbitration the matters in controversy in the suit, made after issue joined.—Ressequie v. Brownson, 4 Barb. 541.

5. SIGNATURE AND VERIFICATION.

Verification as necessary in order to raise issue, see post, § 336 [b, n, o, s, tt, z, zz].

§ 333. In general.

[a] (Ark. 1881) Pleadings before justices, whether written or oral, may be without verification.—Shinn v. Tucker, 37 Ark. 580.

[b] (Cal. 1886) Code Civ. Proc. § 446, providing that pleadings in the superior court shall be subscribed by the party or his attorney, does not apply to justices' courts.—Montgomery v. Yolo County Superior Court, 68 Cal. 407, 9 Pac. 720.

[c] (Ill. 1861) Under Scates' Rev. St. p. 254, c. 85, providing that defendant shall not deny on trial the execution of an instrument on which an action is brought, unless his plea is verified by affidavit, in a proceeding before a justice of the peace, defendant, if he deny the execution of an instrument in writing on which the action is brought, whether it is sealed or not, must do so by plea verified by affidavit.—Griswold v. Trustees of Peoria University, 26 Ill. 41, 79 Am. Dec. 361.

[d] (Ind. 1837) Where the certificate of a justice attached to a plea in abatement is imperfect, and it appears that the plea has been properly sworn to, the court should permit the justice to amend the certificate.—Blake v. Nichols, 4 Blackf. 311.

[e] (Ind. 1837) If there be a justice's certificate attached to a plea in abatement, stating that the plea has been sworn to before him, the plea must be considered as sufficiently verified.—Blake v. Nichols, 4 Blackf. 311.

[f] (Ind. 1867) A plea in abatement must be verified by oath or affirmation. This rule applies in courts of record, as well as in justices' courts. The provision of Code 1843, c. 40, art. 8, § 200, expressly requiring such verification, is continued in force by Code 1852 (2 Gav. & H. St. p. 336) § 802.—Indianapolis, P. & C. Ry. Co. v. Summers, 28 Ind. 521.

[g] (Ind. 1872) Where a complaint filed before a justice of the peace is signed by one as next friend of the plaintiff, it is a sufficient consent in writing under 2 Gav. & H. St. p. 42, § 11.—Rowe v. Arnold, 39 Ind. 24.

[h] (Iowa, 1858) The petition was signed, "G. W. & R. Hoover." The justice, after a motion to dismiss, allowed "sworn to" to be added to the jurat, it having been sworn to, and *held* that the mode of signing was not fatally defective. His action was sustained on appeal.—Hoover v. Rhoads, 6 Iowa (6 Clarke) 505.

[i] (Minn. 1878) An unverified answer to a verified complaint in a justice's court is a nullity, and must be treated as such, unless plaintiff does something by which he recognizes its validity as a pleading.—Thompson v. Killian, 25 Minn. 111.

[j] (Miss. 1877) The requirement of Code, § 683, as to a defendant's sworn denial of the execution of an instrument, applies to suits in justices' courts, as well as those in circuit courts.—McBride v. Kilgore, 55 Miss. 242.

[k] (Mo. 1830) A plea in abatement in a justice's court need not be sworn to.—Henry v. Lane, 2 Mo. 201.

[l] (N. Y. 1818) In a court of a justice of the peace, a plea in abatement need not be verified by affidavit.—Gilbert v. Vanderpool, 15 Johns. 242.

[m] (N. Y. 1859) A verification of pleadings in justices' court, to the effect that the affiant believes the pleading to be true, is sufficient.—Schwerin v. Mills, 2 Hilt. 394.

[n] (N. Y. 1891) Under Laws 1881, c. 414, § 1, which provides that, in an action in a jus-

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tice's court on a contract for the recovery of money only, the plaintiff or his agent may make a written complaint, which shall be subscribed by plaintiff or his agent, and shall be verified as provided by Code Civ. Proc. § 526 (prescribing what an affidavit of verification shall contain when made by a party or by a person other than a party), the complaint in an action in a justice's court on a written instrument for the payment of money, brought by plaintiff's agent, who was in possession of the writing sued on, may be verified by the agent.—Syracuse Moulding Co. v. Squires, 61 Hun, 48, 15 N. Y. Supp. 321, 21 Civ. Proc. R. 58, reversing judgment (1891) 13 N. Y. Supp. 547, 19 Civ. Proc. R. 241.

6. BILL OF PARTICULARS AND COPY OF ACCOUNT, AND FILING WRITTEN INSTRUMENT.

BILL OF PARTICULARS, § 334.
FILING WRITTEN INSTRUMENT, § 335.

§ 334. Bill of particulars.

[a] (Ga. 1892) A bill of particulars attached to a summons in a justice's court is an office paper of the court, and, when lost, a copy may be established instanter. That this was done, and that the copy may not have been correct, is not cause for reversing the final judgment.—Ballard Transfer Co. v. Clark, 91 Ga. 234, 18 S. E. 138.

[b] (Ind. 1861) A bill of particulars, with the names of the parties, sufficiently states a cause of action before a justice of the peace.—Smithson v. Dillon, 16 Ind. 169.

[c] (Iowa, 1866) When the cause of action in a justice's court consists of a book account embracing several items, the defendant is entitled to a bill of particulars, or to have the items entered on the justice's docket, if he demands the same.—McKenney v. Hopkins, 20 Iowa, 495.

[d] (Kan. 1863) The filing of a note with the undertaking indorsed thereon, in a case before a justice of the peace, is a sufficient bill of particulars.—Brenner v. Weaver, 1 Kan. 488, 83 Am. Dec. 444.

[e] (Kan. 1875) It is sufficient if a bill of particulars, in a case before a justice, states the essential facts, no matter how rudely and inartistically, yet so that the defendant is not misled, but clearly informed of the exact claim made upon him.—Missouri, K. & T. Ry. Co. v. Brown, 14 Kan. 557.

[f] (Kan. 1887) Pleadings before justices are not to be viewed with great strictness; and mere technical objections, founded on a strict construction of a bill of particulars, may be disregarded.—Krous v. Pratt, 37 Kan. 651, 16 Pac. 103.

[g] (Kan. 1891) In justice's court, a bill of particulars is sufficient which reads: "The plaintiff alleges for his cause of action against H. the use of one two-horse wagon from the 20th day of September, 1887, to the 21st day of November, 1887, 50 days in time between dates, at twenty-five cents per day, $12.50."—High v. Hill, 46 Kan. 96, 26 Pac. 456.

[h] (Kan. 1891) In justice's court, a bill of particulars is sufficient which alleges that the defendant employed plaintiff to solicit a purchaser for certain land, and agreed to pay 5 per cent., or the customary commission; that plaintiff found a purchaser who paid $2,000 for the land, but defendant refused to pay plaintiff, and there is due him on the sale $100.—Pate v. Fitzhugh, 46 Kan. 129, 26 Pac. 452.

[i] (Kan. 1892) Technical precision is not required in the statement of a cause of action in a bill of particulars in a justice's court, but the most liberal construction will be given to it, and a cause of action stated in the most general way will be sustained, in order to uphold a judgment inherently right.—Missouri Pac. Ry. Co. v. Henning, 48 Kan. 465, 29 Pac. 597.

[j] (Kan. 1896) Though a bill of particulars filed before a justice of the peace, in an action to recover of a railroad company damages for stock killed, when strictly construed, imputes the negligence to the railroad train instead of to the servants of the company, it will, under the Code, be *held* sufficient.—Atchison, T. & S. F. R. Co. v. Bartlett, 2 Kan. App. 167, 43 Pac. 284.

[k] (Mich. 1883) Where a bill of the particulars of a defendant's items of set-off has been demanded by plaintiff, and tendered by defendant after the expiration of the time within which it was ordered to be filed, and after he has asked for the striking of a jury, it is error for a justice of the peace, on his motion, to refuse to receive it because not filed sooner.—Boatz v. Berg, 51 Mich. 8, 16 N. W. 184.

[l] (Neb. 1882) A statement in the form of a common debtor and creditor account is sufficient as a bill of particulars on a claim for damages.—Crossley v. Steele, 13 Neb. 219, 13 N. W. 175.

[m] (Neb.) Where an action is brought on a promissory note before a justice of the peace, and the note is copied by him into his docket, and a summons issued thereon, it is a sufficient bill of particulars.—(1883) Wells v. Turner, 14 Neb. 445, 16 N. W. 484; (1885) Phœnix Ins. Co. v. Lemke, 18 Neb. 184, 24 N. W. 727.

[n] (Neb. 1884) The defendant need not file a bill of particulars unless required by the plaintiff so to do, under Code Civ. Proc. § 951, which provides that defendant shall file such bill, as to any set-off, "if required" by the plaintiff.—Clarine v. Nelson, 15 Neb. 440, 19 N. W. 684.

[o] (Neb. 1884) A bill of particulars alleged that defendant was indebted to plaintiff in a certain sum and interest, "on two certain promissory notes hereto attached, marked 'Exhibit A and B,' which is made a part hereof," etc. *Held*, that it stated a cause of action.—Freeman v. Burks, 16 Neb. 328, 20 N. W. 207.

[p] (Neb. 1887) A bill of particulars in an action in a justice's court, setting out that the defendant is indebted to the plaintiff in a sum stated "for 17 stock hogs, weighing 2,240 pounds gross," is sufficient to apprise the defendant of the nature of the action, and will be upheld where no objection is taken until after judgment.—Cook v. Hester, 21 Neb. 369, 32 N. W. 72.

[pp] (N. J.) The copy of account must contain the particular items.—(1806) Clark v. Hillyer, 2 N. J. Law (1 Penning.) 102; (1809) Magee v. Buckbee, 3 N. J Law (2 Penning.) 550.

[q] (N. Y. 1834) In justice court, a defendant who claims a set-off is not bound to furnish a formal bill of particulars, but need only specify the nature of his claim with reasonable certainty.—Harrington v. Ensign, 11 Wend. 554.

[r] (N. Y. 1893) A justice of the peace has no inherent power to strike out or ignore an entire pleading because of failure to comply with an order for a bill of particulars, but is limited to the imposition of the penalty prescribed by Code Civ. Proc. § 531, which provides that the party refusing to give such bill

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of particulars is precluded from giving evidence as to the subject on which it was demanded.—Bloom v. Huyck, 71 Hun, 252, 25 N. Y. Supp. 7.

[s] (Ohio, 1876) Under the requirement of the justice act (Swan & C. St. p. 681, §§ 54, 55) that the bill of particulars before a justice's court must state in a plain and direct manner the facts constituting the cause of action, and that the evidence on the trial shall be confined to the items set forth in the bill, the only test of its sufficiency is whether it will admit proof of sufficient facts to make out the claim.—Scioto Val. Ry. Co. v. Cronin, 1 Wkly. Law Bul. 315.

[t] (Ohio, 1876) The bill is not to be tested by the strict rules applicable to pleadings, but is to be liberally construed.—Scioto Val. Ry. Co. v. Cronin, 1 Wkly. Law Bul. 315, affirmed (1882) 38 Ohio St. 122.

[u] (Okl. 1895) In a justice's court, a bill of particulars for work, which states the title of the court and the names of the parties, and alleges an indebtedness for work at the request of defendant, and that the same is due, is sufficient.—Twine v. Kilgore, 3 Okl. 640, 39 Pac. 388.

[v] (Tex. 1894) The form in which an account filed in an action in a justice's court is drawn up cannot prejudice the right of the plaintiff on the merits of his case as disclosed by the evidence.—Sauger v. Noonan, 27 S. W. 1056.

§ 335. Filing written instrument.

As dispensing with complaint, see ante, § 307.

[a] (Ark. 1844) In a proceeding before a justice of the peace, the instrument or account upon which the action is founded must be filed before the summons issues.—Ex parte Anthony, 5 Ark. (5 Pike) 358.

[b] (Ark.) Where it appears that an account on which a suit is founded is not filed with the justice until after the summons has been issued, it is clear that he can legally take no cognizance of it.—(1845) Pendleton v. Fowler, 6 Ark. (1 Eng.) 41; (1845) Levy v. Shurman, Id. 182, 42 Am. Dec. 690; (1846) Latham v. Jones, Id. 371; (1846) Dickey v. Pettigrew, Id. 424.

[c] (Ark. 1845) Where a plaintiff filed with a justice of the peace, before the summons issued, a bill purporting to be a bank note, on which the name of the defendant did not appear, it was *held* that, as it did not import any liability on the defendant, it could not constitute the foundation of a suit, and was not such a filing of the cause of action as is required by the statute.—Levy v. Shurman, 6 Ark. (1 Eng.) 182, 42 Am. Dec. 690.

[d] (Ark. 1846) Under the statute requiring the plaintiff to file with the justice, before the issuance of the summons, the instrument purporting to have been executed by the defendant, the filing of a note signed by the defendant, payable to a third person, and not legally assigned to the plaintiff, so as to give him a right to sue in his own name, is not a compliance with the statute, and does not give the justice jurisdiction.—Latham v. Jones, 6 Ark. (1 Eng.) 371.

[e] (Ark. 1847) To give a justice of the peace jurisdiction, the cause of action must be filed with him before suing out the summons.—Keath v. Berkley, 7 Ark. (2 Eng.) 469.

[f] (Ark. 1849) The cause of action must be filed with the justice before the issuance of the writ to give him jurisdiction of the case, as well where the defendant appears and pleads as where he makes default.—Everett v. Clements, 9 Ark. (4 Eng.) 478.

[g] (Ark. 1850) A plea to the jurisdiction of a justice of the peace, because no cause of action was filed before summons issued, is a good plea.—Evans v. Parks, 10 Ark. (5 Eng.) 306.

[h] (Iowa, 1856) If the instrument sued on is filed before the justice, his mere failure to mark it "Filed" at the proper time does not prejudice the plaintiff; but the omission may be remedied by an entry nunc pro tunc.—Stone v. Murphy, 2 Iowa (2 Clarke) 35.

[i] (Minn. 1875) In an action in a justice's court on a promissory note the complaint was defective in failing to state that defendant made the note, and that plaintiff was the owner or holder; but on the trial, defendant having withdrawn his answer, plaintiff, without objection, introduced in evidence, and filed with the justice, a note from defendant to plaintiff, corresponding to the description of the one set out in the complaint. *Held*, that the filing of the note might be treated as an amendment, under Gen. St. 1866, c. 65, § 33, permitting amendments during trial to supply omissions in the allegations, and a sufficient compliance with section 28, requiring plaintiff to deliver the instrument sued on to the court.—Royce v. Gray, 21 Minn. 329.

[j] (Miss. 1886) Under Code 1880, § 2196, requiring "the evidence of debt, statement of account, or other written statement of the cause of action," to be lodged with a justice before whom suit is begun, a copy of the note sued on may be filed instead of the original.—Duncan v. Scott County Sup'rs, 64 Miss. 38, 8 South. 204.

[k] (Mo. 1839) The statute of 1835, requiring an instrument in writing on which a suit before a justice of the peace is founded to be filed with the justice before suit commenced, is directory merely, and the filing may be waived by the defendant.—Sublett v. Noland, 5 Mo. 516.

[l] (Mo. 1891) A lodging with a justice of the peace of the paper which is the foundation of the action is requisite to his jurisdiction.—Olin v. Zeigler, 46 Mo. App. 193.

[m] (Mo. 1893) The delivery to a justice of the peace of a contract sued on in his court constitutes a filing, and the filing need not be shown by a file mark.—Collins v. Kammann, 55 Mo. App. 464.

[n] (Mo. 1894) Where an action before a justice of the peace is founded on a note which is not filed before him, neither the justice nor the circuit court on appeal acquires jurisdiction.—Phenix Ins. Co. of Brooklyn v. Foster, 56 Mo. App. 197.

7. ISSUES, PROOF, AND VARIANCE.

MATTERS TO BE PROVED, § 336.
EVIDENCE ADMISSIBLE UNDER PLEADINGS AND WITHOUT PLEA, § 337.
—— DEFENSES, § 338.
—— SET-OFF OR COUNTERCLAIM, § 339.
—— GENERAL ISSUE, WITH OR WITHOUT NOTICE OF SPECIAL MATTER, § 340.
VARIANCE BETWEEN ALLEGATIONS AND PROOF, § 341.

§ 336. Matters to be proved.

Failure to appear as admission of claim, see ante, § 276 [c].

[a] (Cal. 1859) In a suit before a justice, an averment that the plaintiff is administrator of A., not denied, requires no further proof.—Liening v. Gould, 13 Cal. 598.

[b] (Ill. 1842) Act 1838–39, "to amend the several laws in relation to practice in courts of law,"

etc., applies to suits before justices of the peace. In an action before a justice, therefore, an assignee of a note need not prove the assignment, unless it is denied by affidavit.—Archer v. Bogue, 4 Ill. (3 Scam.) 526.

[c] (Ill. 1849) The provision in Rev. St. c. 40, § 7, dispensing, where there is no plea in abatement, with the proof of partnership and of the names of the partners, in a suit brought by a firm, applies as well to suits commenced before justices of the peace as to those brought in the circuit court.—Evans v. Fisher, 10 Ill. (5 Gilman) 569.

[d] (Ill. 1862) In actions before justices of the peace, the defendant has a right to insist on proof of every material fact necessary to a recovery, just as if all the requisite pleas had been filed; and the plaintiff, if a corporation, must prove its corporate existence.—Town of Lewiston v. Proctor, 27 Ill. (17 Peck) 414.

[e] (Ill. 1862) The statute of frauds will be presumed to be pleaded in a justice's court.—Williams v. Corbet, 28 Ill. (18 Peck) 262.

[f] (Ill. 1892) Failure of defendants, or either of them, to deny joint liability by affidavit, when sued on contract in justice's court, as required by Rev. St. c. 110, § 36, relieves plaintiff from proving in the first instance the joint liability of defendants.—Readey v. Schwanzenbach, 46 Ill. App. 348.

[g] (Ill. 1892) Under Prac. Act, § 35, failure to file a plea denying general liability is an implied admission that, if there was a contract by any of defendants, it was that of all.—Fitzpatrick v. Reilly, 46 Ill. App. 520.

[h] (Ind. 1835) The defendant in a justice's court has the benefit of the general issue, though it be not pleaded, and though a special plea be filed.—McHatton v. Bates, 4 Blackf. 63.

[i] (Ind. 1846) Though a suit be commenced in a justice's court, the defendant cannot have the benefit of the plea of non est factum, unless it be pleaded and sworn to.—Neely v. Chinn, 8 Blackf. 84.

[j] (Ind. 1850) In a case originating before a justice, the omission to file a formal replication is not fatal on an objection that there was no issue.—Kinch v. Weatherall, 2 Ind. (2 Cart.) 226.

[k] (Ind. 1854) On a trial before a justice of the peace, the general issue is in by law, and need not be formally pleaded.—Howard v. Cobb, 6 Ind. 5.

[l] (Ind. 1861) The defendant by his waiver of record, may waive the general denial which the statute puts in, in his favor, in all cases before justices of the peace.—Cross v. Pearson, 17 Ind. 612.

[m] (Ind. 1876) On trial of an action before a justice, where there is no answer pleaded, the defendant has the benefit of the general denial; and, if the action be on a note, plaintiff cannot recover, if it is not offered in evidence.—Logansport, C. & S. W. Ry. Co. v. Braden, 53 Ind. 234.

[n] (Kan. 1877) In a justice's court, the existence of a corporation may be put in issue by defendant, without a denial under oath, and even without a written denial of any kind.—Stanley v. Farmers' Bank, 17 Kan. 592.

[o] (Kan. 1890) Where a claim for wages for services rendered by plaintiff to defendant arises from contract, but is not founded on a promissory note or other instrument in writing, and a statement of such claim or demand is made out in detail and in writing by plaintiff, and presented to defendant, such statement constitutes an account, within Justice's Act, § 84, and Civ. Code, § 108, providing that an account duly verified shall be taken as true unless the denial of the same be verified.—Southern Kan. Ry. Co. v. Gould, 44 Kan. 68, 24 Pac. 352.

[p] (Kan. 1894) In an action before a justice of the peace on a verified account, where no bill of particulars or verified denial is filed by defendant, the correctness of the account is admitted by him.—Bolen Coal Co. v. Whittaker Brick Co., 52 Kan. 747, 35 Pac. 810.

[q] (Mich. 1857) The execution of the written instrument declared on before a justice of the peace must be denied on oath at the time of filing to put the party on proof.—Fish v. Hale, 4 Mich. 506.

[r] (Mich. 1858) Where plaintiff in a justice's court declares against two or more defendants as makers of a promissory note, which is signed by a collective name, and which is produced and filed with the justice, the defendants, appearing to the action and pleading the general issue, without oath, are to be taken, under Comp. Laws, §§ 3714, 3767, to admit, not only the execution of note in the abstract, but that it was executed by the parties declared against.—Pegg v. Bidleman, 5 Mich. 26.

[s] (Mich. 1877) In an action before a justice on a written instrument, under which plaintiffs claim as assignees, the filing of the instrument, with the indorsement of an assignment purporting to be executed by an attorney in fact of plaintiffs' assignor, and the failure to deny on oath its execution, will not put defendant in a position of admitting the execution, nor save the plaintiff from making proof thereof.—Hinkley v. Weatherwax, 35 Mich. 510.

[ss] (Minn. 1856) Where, in an action before a justice of the peace, the answer alleges a set-off, and no reply is interposed, the set-off must be taken as admitted.—Taylor v. Bissell, 1 Minn. 225 (Gil. 186).

[t] (Minn. 1861) Under Pub. St. c. 59, §§ 25, 29, 33, relating to pleadings in a justice's court, nothing is admitted in an answer by failure to reply, except a counterclaim.—Walker v. McDonald, 5 Minn. 455 (Gil. 368).

[tt] (Mo. 1858) In suits in justices' courts, a defendant must deny under oath the execution of the instrument sued on, to render proof of it necessary.—Hickman v. Kunkle, 27 Mo. 401.

[u] (Mo. 1875) In the absence of something to show to the contrary, the defendant in a suit before a justice of the peace is presumed to plead the general issue.—Farmers' & Drovers' Bank v. Williamson, 61 Mo. 259.

[uu] (Mo. 1887) Defendant's appearance before the justice is equivalent to a plea of the general issue.—Lewis v. Baker, 24 Mo. App. 682.

[v] (Mo. 1891) In an action before a justice on a note, an affidavit by defendant that he "did not sign the note sued upon" is sufficient to put in issue the "execution" of the note under Rev. St. 1889, § 6217, though the statute uses the word "execution," and not "sign."—Edmonston v. Henry, 45 Mo. App. 346.

[vv] (Mo. 1892) In an action before a justice of the peace, affirmative matter set up by either party is understood to be denied without any allegation to that effect.—Lamb v. Bush, 49 Mo. App. 337.

[w] (N. Y. 1818) A plea of the general issue in a justice's court admits the character in which the plaintiff sues.—Carpenter v. Whitman, 15 Johns. 208.

[ww] (N. Y. 1848) In an action before a justice, the defendant, by refusing to answer or demur, admits the truth of the complaint.—Everitt v. Lisk, 1 Code Rep. 70.

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[x] (N. Y. 1850) Where, in a justice court, defendant puts in an answer of set-off, plaintiff's demand is thereby admitted, and need not be proved.—Young v. Moore, 2 Code Rep. 143.

[xx] (N. Y. 1850) In a justice's court, an answer of payment admits the making and performance of the contract sued on.—De Courcy v. Spalding, 3 Code Rep. 16.

[y] (N. Y. 1888) Code Civ. Proc. § 2891, requiring a plaintiff in a justice's court to prove his case on defendant's default, does not require a plaintiff corporation to prove its own corporate existence.—Crown Point Iron Co. v. Fitzgerald, 14 N. Y. St. Rep. 427.

[yy] (N. Y. 1888) Code Civ. Proc. § 1776, requiring that the description of a corporation need not be proved, unless put in issue, applies in actions brought by a corporation in a justice's court.—Crown Point Iron Co. v. Fitzgerald, 14 N. Y. St. Rep. 427.

[z] (N. Y. 1894) A complaint alleged that defendant, by false and fraudulent representations, induced plaintiff to sell him goods of a certain value, and that plaintiff was damaged to the amount of the value of the goods, less payments made by defendant, and demanded judgment for such amount. *Held*, that the complaint stated a cause of action to recover damages for deceit, and was not, therefore, within Laws 1881, c. 414, providing that, in an action before a justice on contract or on an account, plaintiff may recover on his verified complaint without further proof, where defendant fails to file a verified answer.—Kusselewskey v. Fabricant, 8 Misc. Rep. 104, 29 N. Y. Supp. 1091.

[zz] (Wash. 1890) Where defendant in forcible entry and detainer sets up quiet possession for more than a year before filing the complaint, the fact that plaintiff did not by a reply deny the allegation of quiet possession is not to be taken as a confession of its truth, since, in a justice's court, all new matter in the answer is presumed to be denied, except, as required by Code, § 1757, subd. 3, in cases where a set-off is claimed by way of defense.—Bellingham Bay & B. C. R. Co. v. Strand, 1 Wash. St. 133, 23 Pac. 928.

§ 337. Evidence admissible under pleadings and without plea.

Evidence admissible under process, see ante, § 253 [a, b, c, i, n, xj].

[a] (Ga. 1886) Where, in an action before a justice of the peace, the only cause of action against a married woman was set out by attaching to the summons three notes, one of which was signed by her husband and the other two signed by him as trustee, on one of which her name appeared, there could be no recovery against her, since her trust estate, if she had any, could not be reached by such pleading.—Crusselle v. Chastain, 76 Ga. 840.

[b] (Iowa, 1866) Though a petition in an action before a justice merely claims a certain sum for the loss of a trunk, when the defendant denies generally, the plaintiff may prove the particular manner of the loss and how the trunk came into the defendant's hands.—Byers v. Des Moines Val. R. Co.'s Lessees, 21 Iowa, 54.

[c] (Iowa, 1868) In an action before a justice of the peace against a railroad company to recover damages for cattle killed on the railroad, it is not necessary to plead the notice and affidavit required, under Laws 1862, c. 169, § 6, in order to make them admissible in evidence.—Brandt v. Chicago, R. I. & P. R. Co., 26 Iowa, 114.

[d] (Iowa, 1870) A complaint before a justice of the peace asked $100 "for damages," and alleged trespasses committed by defendant on plaintiff's lands, and alleged that plaintiff had possession thereof, and that defendant "broke and entered said premises by force, and * * * cut down and carried away 100 trees, of the value of $100." *Held*, that plaintiff's recovery was not confined to the value of the trees taken, but might include damages for consequent injuries to the realty, as well as for the breaking.—Dugan v. Hunt, 29 Iowa, 447.

[e] (Mich. 1878) A justice's return set forth that "the plaintiff declared verbally against said defendant on common counts in assumpsit, and also on breach of a written contract, now on file in court, in all for $300, or under." *Held* a sufficient declaration to warrant the admission of the contract in evidence.—Bradshaw v. McLoughlin, 39 Mich. 480.

[f] (Mich. 1893) An oral declaration in a justice's court, alleging the action was brought for back taxes levied and assessed against certain land previous to the date of its purchase by plaintiff from defendant, on which date defendant gave plaintiff a warranty deed thereof, sufficiently apprised defendant that plaintiff claimed that this deed covenanted against such taxes, and that plaintiff sought to recover for a breach of such covenant, so that, under such declaration, special tax rolls were admissible to establish the lien on the land.—Lynch v. Craney, 95 Mich. 199, 54 N. W. 879.

[g] (Mo. 1852) The date at the head of an account, in a justice's court, does not preclude the plaintiff from proving the time when the various items accrued. It does not presuppose the entire indebtedness to have accrued prior to that time. Such a rigid construction of the accounts of illiterate men would tend to prevent justice.—Mooney v. Williams, 15 Mo. 442.

[h] (Mo. 1892) In an action before a justice, plaintiff need not plead special damages in order to recover them.—Glenville v. St. Louis R. Co., 51 Mo. App. 629.

[i] (Mont. 1896) The assignment of an account must be alleged in the declaration, though the action thereon is brought in justice court.—Balden v. Thomasen, 17 Mont. 487, 43 Pac. 627.

[j] (N. Y.) A declaration for "money due on a contract, damages for the nonperformance of a contract," etc., brought in a justice's court, was sufficient to allow the introduction in evidence of a contract for the sale of lands; the defendant having pleaded the general issue and requiring no specifications.—(1843) Young v. Rummell, 5 Hill, 60; (1844) Id., 7 Hill, 503.

[k] (N. Y. 1849) In an action in a justice's court for a breach of one of the engagements in a lease, there was annexed to the declaration, which alleged the breach without mentioning the form of action, a paper purporting to be a copy of the lease, with a notice to the defendants that the same was such copy, containing substantially the provisions set forth in the declaration, and concluding with the usual words, "Signed, sealed," etc., but there were no marks showing that the original had been sealed. *Held*, that plaintiffs might give in evidence and recover on the lease, though a sealed instrument.—Smith v. Kerr, 3 N. Y. (3 Comst.) 144.

[l] (N. Y. 1856) Where, in an action before a justice of the peace, defendant pleads infancy, plaintiff may, without replying or amending at the trial, show a new promise by the defendant after he became of age.—Hodges v. Hunt, 22 Barb. 150.

[m] (N. Y.) A reply being inadmissible in a justice's court, the allegation of new matter

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in the answer must in all cases be deemed controverted by the plaintiff; and it is competent for him to countervail it by evidence, either in direct denial or by way of avoidance.—(1856) Hodges v. Hunt, 22 Barb. 150; (1869) Conklin v. Field, 37 How. Prac. 455.

[n] (N. C. 1833) Plaintiff brought an action by warrant returnable before a single justice, and in such warrant stated his claim to be for "debt due by account for the amount of $76," and offered in evidence an account other than a signed account. *Held*, that such unsigned account was inadmissible, since a justice's jurisdiction in regard to unsigned accounts is limited to sums not exceeding $60, and, the warrant being plaintiff's declaration, no evidence could be rightly received which did not sustain it.—McFarland v. Nixon, 15 N. C. 141.

[o] (Tex. 1885) Since pleadings are not required to be in writing in a justice's court, the facts necessary to entitle a party to recover on an account may be proved without being alleged.—Mensing v. Ayres, 2 Willson, Civ. Cas. Ct. App. § 562.

[p] (Tex. 1886) In an action in a justice court against two railroad companies for professional services rendered to one of them, plaintiffs are entitled to prove the facts which entitle them to recover against both defendants, without alleging them in written pleading.—Gulf, C. & S. F. Ry. Co. v. Hutcheson, 3 Willson, Civ. Cas. Ct. App. § 96.

[q] (Tex. 1894) An account for damages in a justice court against a railroad company under Rev. St. art. 4245, merely stating that it was "for the killing of one brown ox valued at $40," without specifying the manner of killing, is sufficient, after default, to admit proof of the value of the ox.—St. Louis S. W. Ry. Co. v. Denson, 26 S. W. 265.

[r] (Wis. 1862) In trespass before a justice, the complaint set forth damage to growing wheat. *Held* that, under this complaint, a recovery could not be had for injury to grass.—Hassa v. Junger, 15 Wis. 598.

[s] (Wis. 1864) In an action commenced before a justice of the peace, the complaint alleged the cause of action to be "for the balance due on sale and delivery of wheat, * * * sold and delivered to the defendant on," etc., "for an amount of one hundred and fifty bushels, for which plaintiff demands judgment." *Held*, that this was sufficient to admit proof of a mistake made by the parties in settling for wheat delivered by plaintiff to defendant, by reason of which the latter was charged with and paid for 150 bushels less than the amount actually delivered.—Davis v. McKay, 18 Wis. 477.

§ 338. —— Defenses.

Limitations, see ante, § 246 [c, e, f, j].

[a] (Ark. 1846) Usury may be proved, in defense of an action on a note before a justice of the peace, without a plea and affidavit. The statute making them necessary applies only to the superior court.—Howell v. Vinsant, 7 Ark. (2 Eng.) 146.

[b] (Ark. 1847) In an action on a promissory note before a justice of the peace, want of consideration may be inquired into without special plea.—Greer v. George, 8 Ark. (3 Eng.) 131.

[c] (Ga. 1884) In an action in a justice's court, in which defendant pleads a set-off, plaintiff can defend against such plea by showing that the claim on which it is based is settled, without further pleading.—Patterson v. Newton, 74 Ga. 366.

[d] (Ill.) In an action by the assignee of a note before a justice, where defendant desires to question the assignment, he must deny the same by affidavit.—(1851) Hudson v. Dickinson, 12 Ill. (2 Peck) 407; (1863) Foy v. Blackstone, 31 Ill. 538, 83 Am. Dec. 246.

[e] (Ill. 1875) In a suit before a justice of the peace, against two parties as partners, on a note signed by their firm name, no plea is necessary to put in issue either the execution of the note or the fact of partnership. An affidavit presenting the issue is sufficient.—Zuel v. Bowen, 78 Ill. 234.

[f] (Ill. 1879) Under Rev. St. c. 79, § 58, providing that in actions before justices of the peace on contracts against two or more defendants as joint defendants or partners, or joint obligors or payors, proof of the joint liability need not "in the first instance" be given unless such joint liability is denied by affidavit, the defendants may prove the want of such joint liability, though they failed to file such affidavit.—Donnan v. Bang, 3 Ill. App. 400; Same v. Gross, Id. 409.

[g] (Ill. 1890) In an action on a promissory note, before a justice of the peace, a failure to deny the execution of the note by affidavit will bar such defense thereafter.—Judd v. Cralle, 37 Ill. App. 149.

[h] (Ind. 1859) In a suit before a justice of the peace on a promissory note, evidence as to the consideration is admissible without answer.—Riggs v. Adams, 12 Ind. 199.

[i] (Ind. 1877) In any action on contract for the recovery of money, originating before a justice of the peace, evidence of payment may be given without plea.—Hill v. Sleeper, 58 Ind. 221.

[j] (Ind. 1878) Proof of defendant's coverture, or of the failure or want of consideration for a note sued on, is admissible without plea in a suit commenced before a justice of the peace.—Davis v. Grater, 62 Ind. 408.

[k] (Ind. 1885) Papers and docket entries sought to be introduced, with other evidence, in bastardy proceedings, that defendant had been previously sued before the same justice, on the same cause, on complaint of the same woman under another name, are not admissible unless the answer avers that the prior action was commenced by the same person under the other name, and that they were one and the same person.—Morris v. State, 101 Ind. 560, 1 N. E. 70.

[l] (Iowa, 1864) On a trial before a justice of the peace, the defendant may prove a contract by the plaintiff "to do all the defendant's hauling in his business for the season," though the answer sets up the contract as an agreement "to do the hauling necessary to be done for the defendant in his business of bricklaying."—Greff v. Blake, 16 Iowa, 222.

[m] (Iowa, 1865) A general allegation of fraud in an answer in justice court, where strict formality is not required, is sufficient to authorize the admission of testimony thereunder.—Blake v. Graves, 18 Iowa, 312.

[n] (Iowa, 1869) In an action on an account for work and labor before a justice, defendant in his answer averred in set-off that "there was due and owing him, over and above all offsets and credits to which plaintiff may be entitled, the sum," etc., which averment was denied by the reply. *Held*, under the liberal rules of pleading before justices of the peace, that it was not error to admit in evidence in behalf of plaintiff a written contract as evidence of a credit, though not pleaded.—Emerick v. Clemens, 26 Iowa, 332.

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[o] (Kan. 1891) Under Justice's Act, § 84, providing that an account duly verified shall be taken as true unless denied under oath, defendant cannot prove payment unless the account has been so denied.—Gray v. Bryant, 46 Kan. 43, 26 Pac. 470.

[p] (Minn. 1856) Where, in an action before a justice of the peace, the answer alleges a set-off, and no reply is interposed, evidence to contradict the set-off is inadmissible.—Taylor v. Bissell, 1 Minn. 225 (Gil. 186).

[q] (Miss. 1888) Defendant, having orally pleaded want of consideration for the note sued on, proved, without objection, that he, as his wife's agent, had given the note to plaintiffs to pay her debt, and that it was understood that his signature as agent was to bind her alone. *Held* a good defense, though different from that pleaded; the defense not requiring a formal plea.—Currie v. Chambers, 3 South. 412.

[r] (Mo. 1852) Under section 26 of article 5 of the act concerning justices' courts, the only consequence of a failure to deny the execution of a note sued on under oath is to relieve the plaintiff from the necessity of proving its execution. Under a plea of non est factum, without an affidavit every other defense is admissible.—Klein v. Keyes, 17 Mo. 326.

[s] (Mo. 1887) Defendant's appearance before a justice being equivalent to a plea of the general issue, he may make any defense without formal plea.—Lewis v. Baker, 24 Mo. App. 682.

[t] (Mo. 1892) In an action before a justice of the peace contributory negligence need not be pleaded.—Glenville v. St. Louis R. Co., 51 Mo. App. 629.

[u] (N. H. 1835) In trespass q. c. f. before a justice, it is not necessary to plead a license to enter.—Wheeler v. Rowell, 7 N. H. 515.

[v] (N. J. 1851) In a suit before a justice of the peace for a breach of warranty in sale of clover seed, the special damage laid being for injury to the crops merely it was not competent for the defendant to inquire what was the plaintiff's interest in the freehold, and the plaintiff's title could not be inquired into.—Vannoy v. Givens, 23 N. J. Law (3 Zab.) 201.

[w] (N. J. 1885) In trespass cases in justices' courts, if the defendant fails to file a plea of title and give bond in pursuance of section 25 of the small cause act, he cannot justify by showing legal title in himself or a third person, under whose authority he claims the act of alleged trespass was committed.—Edgar v. Anness, 47 N. J. Law (18 Vroom) 465, 2 Atl. 246.

[x] (N. J. 1890) Under the acts relating to courts for the trial of small causes, which provide that no pleas are necessary except those of title or set-off, a certificate of discharge in bankruptcy is admissible in evidence in such courts, without being pleaded.—Vandoren v. Gaston, 52 N. J. Law (23 Vroom) 321, 19 Atl. 608.

[xx] (N. Y. 1810) Under St. 31st Sess. c. 204, § 7, the defendant, in trespass before a justice of the peace under a plea of title, has three grounds of defense, viz., title in himself, title in a third person, and possession out of the plaintiff.—Douglas v. Valentine, 7 Johns. 273.

[y] (N. Y. 1828) Where defendant, in a suit before a justice, has not put in a plea, he is not entitled to offer evidence which goes to defeat the plaintiff's right to recover.—Riley v. Seymour, 1 Wend. 143.

[yy] (N. Y. 1869) In an action in a justice's court, the pendency of another suit for the same cause of action before another justice must be set up by the answer, or no advantage can be taken of it.—Wright v. Maseras, 56 Barb. 521.

[z] (N. Y. 1893) Since, under Code Civ. Proc. § 2940, pleadings in justices' courts are not required to be in any particular form, and parties are not held to technical rules, the statute of frauds may be taken advantage of without being pleaded.—Hartwell v. Young, 67 Hun, 472, 22 N. Y. Supp. 486.

[zz] (Tenn. 1884) Under the provisions of the Code, a defense to a suit before a justice on a note, that it was made at a time other than that of its date, must be set up by a special plea under oath; such defense going to the foundation of the suit, and changing the character of the instrument.—Stephenson v. Landis, 82 Tenn. (14 Lea) 433.

§ 339. —— Set-off or counterclaim.

[a] (Del. 1842) If the defendant, in an action before a justice of the peace, would rely on a counterclaim, he must plead it before the justice.—Thompson v. Pearce, 3 Har. 497.

[b] (Iowa, 1859) In a suit before a justice of the peace, defendant cannot prove a set-off, unless he has pleaded it with his answer.—Lord v. Ellis, 9 Iowa, 301.

[c] (Kan. 1891) In an action commenced in justice's court on an account duly verified, the defendant may prove any set-off or counterclaim he may have, though he has not denied the account under oath as required by Justices' Act, § 84, providing that the correctness of an account duly verified shall be taken as true unless it be denied under oath.—Baughman v. Hale, 45 Kan. 458, 25 Pac. 856.

[d] (N. Y. 1835) It is sufficient, on the joining of an issue in a justice's court, for the defendant to say "that he pleads the general issue, and gives notice of set-off, and claims a balance of $50," unless the plaintiff requires a specification of the nature of the set-off; and if he does not so object, or make such requisition, he cannot subsequently at the trial object to evidence of set-off, for such want of specification at the time of joining issue.—Civill v. Wright, 13 Wend. 403.

[e] (Wis. 1860) In an action before a justice, a set-off was claimed for "notes given by the plaintiff and conveyed to the defendant before the commencement of the suit." There was no demurrer, nor request for an exhibition of the notes. *Held*, that the defendant might give in evidence a note given to him by the plaintiff, and which was due at the time the suit was brought.—Connors v. Taylor, 13 Wis. 230.

§ 340. —— General issue, with or without notice of special matter.

Want of jurisdiction, see ante, § 223 [j, pp].

[a] (Ind. 1836) The defendant in a justice's court may, under the general issue, show that the process had not issued in the proper township.—Thomas v. Winters, 4 Blackf. 161; McCormick v. Maxwell, Id. 168.

[b] (Ind. 1878) A. sold to B. without reservation a tract of land, on which he had placed a mill which was fixed to the ground, and afterwards sold the mill to C., who gave his note to A. for the purchase money. B. refused to allow C. to remove the mill. *Held*, in an action brought upon the note by A. before a justice of the peace, C. could, under a general denial, give evidence either of a failure of consideration or of a breach of implied warranty of title to the mill.—Kennard v. Brough, 64 Ind. 23.

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[c] (Iowa. 1871) In an action on an account before a justice, defendant, under a general denial of indebtedness, may prove payment made at the time he received the articles.—West v. Moody, 33 Iowa, 137.

[d] (Mass. 1811) In trespass q. c. f. before a justice of the peace, defendant cannot give evidence of a right of way under the general issue.—Strout v. Berry, 7 Mass. 385.

[e] (Mass. 1857) Under Rev. St. c. 85, §§ 11, 12, an entry in a record of a justice of the peace that the "defendant appears and pleads orally, and says he is not guilty," is a joinder of issue, and the defendant may give in evidence any matter admissible under any general or special plea in bar.—Wilbur v. Taber, 75 Mass. (9 Gray) 361.

[f] (Mich. 1887) In an action before a justice of the peace against a constable for wrongfully selling plaintiff's property on attachment against his son, where defendant pleads the general issue, with notice that he will set up that he levied on the property, as constable, as the property of the son, such notice is sufficient to apprise plaintiff of the character of the defense, and to admit evidence showing that the transfer of the property was a fraud on creditors.—Whittle v. Bailes, 65 Mich. 640, 32 N. W. 874.

[g] (N. H. 1834) In trespass q. c. f. before a justice of the peace, defendant cannot, under the general issue, show title in himself.—Flagg v. Gotham, 7 N. H. 266.

[h] (N. H. 1835) In trespass before a justice, evidence of a license to enter may be given under the general issue.—Wheeler v. Rowell, 7 N. H. 515.

[i] (N. H. 1859) A tender may be given in evidence before a justice of the peace under the general issue.—Colby v. Stevens, 38 N. H. 191.

[j] (N. H. 1859) Act Dec. 31, 1828, allows defendant in an action before a justice to give any special matter in evidence under the general issue. Act July 2, 1831, allowing either party in all civil actions to give in evidence any special matter under the general issue on filing a brief statement, was construed not to apply to actions before justices. Rev. St. c. 187, § 3, afterwards passed, provided that no special plea should be required in a civil action before a justice and contained substantially the second provision of the second act above cited. *Held*, that the provisions in the revision should be given the same construction as that previously given, and defendant in an action before a justice need not file a brief statement, in order that evidence of tender may be given under the general issue.—Colby v. Stevens, 38 N. H. 191.

[k] (N. J. 1828) In courts for the trial of small causes, the infancy of the plaintiff may be given in evidence under the general issue.—Smith v. Van Houten, 9 N. J. Law (4 Halst.) 381.

[l] (N. J. 1837) Rev. Laws, p. 700, provides that a justice may proceed with a qui tam action for cutting timber, therein authorized, notwithstanding any claim defendant may make to the land, unless defendant gives bond for appearance at the next term of court, where the same may be cognizable in an action of trespass. Rev Laws, p. 629, excludes from the jurisdiction of justices all actions involving title to land. *Held* that, under the general issue in a qui tam action before a justice for cutting timber, ownership of the land by defendant is admissible to show his right of possession.—Hill v. Carter, 16 N. J. Law (1 Har.) 87.

[m] (N. Y. 1813) If the defendant relies on a former trial and judgment, he must plead it, or give notice at the time of joining issue. It is too late, after pleading the general issue, to set up that defense.—Dexter v. Hazen, 10 Johns. 246.

[n] (N. Y. 1829) In an action before a justice of the peace, a defendant, acting in aid of an officer, may justify on such ground under the general issue.—Jennings v. Carter, 2 Wend. 446, 20 Am. Dec. 635.

[o] (N. Y. 1834) Defendant, in an action in justice court, pleaded the general issue and gave notice of a set-off, which he stated was for grain, hides, and boarding. On the same day, after an adjournment, he informed plaintiff's attorney that he had also an account for a stove sold. The justice on the trial refused to receive evidence of the sale of the stove. *Held* error, since the notice of the set-off was sufficient to cover it.—Harrington v. Ensign, 11 Wend. 554.

[p] (N. Y. 1848) In an action of covenant for rent, before a justice, where the defendant pleaded the general issue and "gave notice of special matters," and on the trial, at a subsequent day, the justice allowed him to give evidence of an eviction, it was *held* that the justice was right; it being clear that there was no surprise.—Cohen v. Dupont, 3 N. Y. Super. Ct. (1 Sandf.) 260.

[q] (N. Y. 1873) It is error for a justice of the peace, on a trial before him, to receive evidence under a general denial of the making of a payment since the commencement of the action and joining issue therein, without an amendment of the answer, by leave, for that purpose.—Hall v. Olney, 65 Barb. 27.

[r] (R. I. 1885) Pub. St. c. 196, § 30, provides that whenever an action of trespass shall be brought before any justice court, and the defendant shall plead the general issue, he shall not be allowed to offer any evidence that may bring the title to real estate in question. *Held*, that the word "title," as used in the statute, signifies, not the fact of plaintiff's possession, but his right of possession; and therefore, where a tenant is sued in trespass by his landlord for an injury to the premises, he may controvert the fact of his landlord's possession, whenever he can do so without bringing his right into question.—Carroll v. Rigney, 15 R. I. 81, 23 Atl. 46.

[s] (Vt. 1868) In an action for damages (aside from taxable costs) for commencing a suit and suffering it to be discontinued by the nonattendance of the justice, it is competent to show in defense, under the general issue, that the plaintiff in that case paid the defendant his taxable costs immediately after such discontinuance.—Read v. Amidon, 40 Vt. 169.

§ 341. Variance between allegations and proof.

Variance between process and proof, see ante, § 253 [a–c, i, n, x].

[a] (Ark. 1847) In actions of account before a justice of the peace, the plaintiff is not restricted to his bill of particulars, but he cannot recover more than he claims in the whole.—Lafferty v. Day, 7 Ark. (2 Eng.) 258.

[b] (Mo. 1843) In an action before a justice of the peace to recover $25, the "amount assumed for an order," etc., it was *held* that such bill of particulars was not supported by evidence that the defendant had sold to the plaintiff certain articles in payment of an order, but refused to deliver them, on account of the failure of the drawers. The order was not accepted in writing.—Wathen v. Farr, 8 Mo. 324.

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[c] (Mo. 1855) A variance which is a mere matter of form, and has nothing to do with the substance of the action in causes originating before justices, is not a fatal variance; hence, under a quantum meruit, a plaintiff was allowed to recover on a special contract.—Metz v. Eddy, 21 Mo. 13.

[d] (Mo. 1857) Under a general process "to answer the complaint of the plaintiff," with an account, "J. L. and E. S., partners as L. & S., to C., Dr.," to certain hams and whisky, on proof that the defendants caused a constable to take the property from the plaintiff (the owner), at the suit of the defendants against a third person, and remove it, and that the constable had it still in his possession, the plaintiff may have judgment.—Coughlin v. Lyons, 24 Mo. 533.

[e] (Mo. 1890) Where a statement filed before a justice charges defendant with a conversion of the proceeds of property sold, as well as a conversion of the property, proof that plaintiff consented to the sale does not constitute a variance.—Vette v. Leonori, 42 Mo. App. 217.

[f] (Mo. 1890) Where the statement filed before a justice is in the form of an account, for the value of certain goods, and the proof is of a conversion of such goods, there is no variance. —Kehoe v. Phillipi, 42 Mo. App. 292.

[g] (Mo. 1890) The rule that a party cannot sue for goods sold and delivered and recover for a conversion, though the evidence is sufficient to prove a conversion, applies to suits in justice's courts.—Edwards v. Albrecht, 42 Mo. App. 497.

[h] (Mo. 1891) A recovery cannot be had in an action before a justice of the peace, if the statement of plaintiff's cause of action is drawn in the form of a count at common law for money had and received, and the evidence tends only to establish a cause of action for goods sold and delivered.—Penninger v. Reilley, 44 Mo. App. 255.

[i] (Mo. 1891) In an action before a justice of the peace, a recovery may be had on the theory of an account stated, though the account filed as the basis of the action contains no allegation that defendant promised to pay said balance.—Lustig v. Cohen, 44 Mo. App. 271.

[j] (Mo. 1891) Where, in an action before a justice for breach of contract, the statement alleges a total failure to keep a promise, and the evidence shows a partial failure only, the variance is not material.—Barngrover v. Maack, 46 Mo. App. 407.

[k] (Mo. 1896) In an action in justice court on a paper in the words and figures: "J. J. S. in Acc't with C. E. F. and E. S. S., Dr. Nov. 4. To 45 loads screenings, at $1.75,—$78.75," —recovery could be had on proof of a conversion of the screenings by defendant.—Force v. Squier, 133 Mo. 306, 34 S. W. 574.

[l] (Neb. 1895) Where the pleadings before a justice do not show that the parties litigant were ever partners, it was error to dismiss the action on motion of defendant suggesting that such partnership had been shown by the evidence.—Buckley v. Hook, 43 Neb. 552, 61 N. W. 719.

[m] (N. J.) In an action on the case, the state of demand was for trespass on land. The variance was error.—(1806) Eldreth v. Hoffmire, 2 N. J. Law (1 Penning.) 136; (1808) Hull v. Phillips, Id. 367.

[n] (N. Y. 1831) A plea of justification in a justice's court, under a warrant from the school district No. 1, in the town of O., was supported by evidence of a warrant issued by the trustees of school district No. 1 in O. and P. *Held*, that the variance was not material.—Ring v. Grout, 7 Wend. 341.

[o] (N. Y. 1842) In a declaration in debt, as upon an attachment bond in a justice's court, and oyer served, non est factum was pleaded, but the instrument produced at trial was not a bond, but a covenant to pay the plaintiff $100, or all costs and damages. *Held*, that this was a variance, though the defendant had not craved oyer.—Rockefeller v. Hoysradt, 2 Hill, 616.

[p] (N. Y. 1854) The rule that where a party seeks to recover on a special agreement, and fails in his proof, he may still recover for work under it, if, supposing there had been no special agreement, he could have recovered, applies to pleadings in justices' courts.—Irvine v. Wortendyke, 2 E. D. Smith, 374.

[q] (N. Y. 1887) R. owed plaintiff the same sum that defendant owed R., and the three agreed that defendant should pay the amount to plaintiff, who should release R., which the latter did. *Held* sufficient to sustain a complaint in a justice's court, alleging that defendant was indebted to plaintiff for the amount paid to R. at defendant's request.—Riddle v. Sanders, 10 N. Y. St. Rep. 153.

[r] (N. Y. 1891) In an action in which an account stated was involved the account was properly admitted in evidence by the justice before whom the cause was tried, though the answer merely pleaded payment in full, and did not plead an account stated; Code Civ. Proc. § 2943, providing that a variance between the pleading and proof in a justice court shall be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled thereby to his prejudice.—Schuyler v. Ross, 59 Hun, 628, 13 N. Y. Supp. 944.

[s] (Wis. 1886) There is no variance between a complaint before a justice alleging that a balance was due plaintiff for work and labor and evidence of that fact, and that it was agreed that defendant should retain such balance, but should pay it to plaintiff on demand, with interest.—Otte v. McLean, 67 Wis. 242, 30 N. W. 367.

8. DEFECTS AND OBJECTIONS, WAIVER AND CURE.

§ 342. In general.

Misjoinder of causes of action, see ante, § 229.

[a] (Ala. 1830) Where the parties to an action before a justice of the peace stipulated that the pleadings should be made up at any time after trial, and a defective declaration appeared in the record, the defect will be deemed to have been cured, whether the declaration was filed before or after the stipulation.—McGrew v. Adams, 2 Stew. 502.

[b] (Kan. 1877) Where a bill of particulars in a justice's court contains every fact essential to the cause of action, though stated in the most indefinite way, and no objection is raised to it at the trial, it will be *held* sufficient to sustain the judgment.—Kansas Pac. Ry. Co. v. Taylor, 17 Kan. 566.

[c] (Kan. 1888) In an action before a justice of the peace, in which an answer is filed setting up a partnership between the parties, and alleging the entire business of the partnership, and asking judgment, where no reply or other denial under oath is filed, and the action is tried without objection, the want of such verified reply is waived; and the judgment will not be disturbed because an accounting is had.

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—Ciesielski v. Nowacki, 89 Kan. 340, 18 Pac. 232.

[d] (Me. 1844) Where there has been a trial of issue joined before a magistrate, his decision in favor of the plaintiff must be considered as evidence equivalent to the verdict of a jury, that the plaintiff was entitled to recover upon the testimony introduced; and a defect or omission in the declaration is cured as well by the judgment of the magistrate as by the verdict of a jury.—Emerson v. Lakin, 23 Me. (10 Shep.) 384.

[e] (Mich. 1859) Where action was brought in justice's court, under the statute giving treble damages for trespass on lands and cutting and carrying off timber, etc., and the declaration referred to the chapter of the statute by the wrong number, but otherwise cited it correctly, and it was not demurred to, the error was not fatal.—Achey v. Hull, 7 Mich. 423.

[f] (Mich. 1880) Where, in justice court, defendant pleads to the merits and goes to trial, objections to the evidence, based on a want of fullness in the declaration, will not be considered, where defendant has not been misled.—Chauncey v. Skeels, 43 Mich. 347, 5 N. W. 380.

[g] (Mich. 1880) Where the assignee of an insolvent railroad company transfers to a certain person a conditional promise to pay money to the order of the company by indorsing thereon his name, with the word "assignee," and the transferee files the same with a justice as his sole cause of action, an objection that no assignment or assignments were suggested in the declaration cannot be sustained on a final submission of the case, but could only have been taken advantage of by demurrer.—Wilcox v. Toledo & A. A. R. Co., 43 Mich. 584, 5 N. W. 1003.

[h, i] (Mich. 1881) Objections to a declaration in a justice's court, good in substance, are waived by going to trial on the merits without objection.—Whelpley v. Nash, 46 Mich. 25, 8 N. W. 570.

[j] (Minn. 1858) Where the parties fail to object that the pleadings before a justice are not verified as required by law, and proceed to trial thereon, they will be deemed to have all the effect they could have if verified.—Taylor v. Bissell, 1 Minn. 225 (Gil. 186).

[k] (Minn. 1871) An account headed "Rodney Parker to August Taylor, Dr.," containing items of debit and credit footed up, and balance struck, subscribed by plaintiff, and sworn to before the justice, with whom it was filed as plaintiff's complaint, is sufficient as a complaint after judgment.—Taylor v. Parker, 17 Minn. 469 (Gil. 447).

[l] (Minn. 1875) Defects in pleadings in justices' courts may, as to parties, be waived.—Burt v. Bailey, 21 Minn. 403.

[m] (Minn. 1875) Defendant, in an action in a justice's court, without answering, took an adjournment for a week, at which time an amended verified complaint was filed, then took a change of venue, and subsequently took another adjournment, and venire for a jury. *Held*, that he was thereby precluded from objecting to the jurisdiction of the court on the ground that the complaint filed on the return day was unverified, and the adjournment then granted irregular.—Burt v. Bailey, 21 Minn. 403.

[n] (Minn. 1878) In a justice's court, on the return day, defendant filed an unverified answer to a verified complaint, setting up a counterclaim exceeding plaintiff's demand. No reply was put in, and adjournment, on motion of defendant and by consent of plaintiff, was had. On the adjourned day defendant failed to appear, and judgment was rendered for plaintiff on proofs submitted for amount of his claim. *Held*, that the failure of the plaintiff to object to the want of verification of the answer at the time it was filed, and his consent to an adjournment, was not a waiver of his right to object to it on that ground.—Thompson v. Killian, 25 Minn. 111.

[o] (Mo. 1874) Where the facts necessary as a foundation for an action in a justice's court may be inferred from the statement filed, though they are not shown in direct terms, the statement will be sufficient after verdict.—Wood v. St. Louis, K. C. & N. Ry. Co., 58 Mo. 109.

[p] (Mo. 1881) Where a statement filed before a justice was imperfect, but the sum claimed was within the jurisdiction of the justice, and was for rent, and after the trial of defendant's plea in abatement he appeared to the merits of the case, and it was defendant's right to have the justice require the plaintiff to make a brief verbal statement of his cause of action, and in view of the fact also that the statute requiring the statement has been held to be merely directory, *held* that defendant had waived a more formal statement.—Webb v. Robertson, 74 Mo. 380.

[pp] (Mo. 1892) Failure of a justice of the peace to indorse the date of filing on a pleading lodged with him does not affect his jurisdiction.—Thompson v. Marshall, 50 Mo. App. 145.

[q] (Mo. 1893) Under Rev. St. § 6138, providing that no formal pleadings shall be required in a justice's court, but only a "statement of the facts constituting the cause of action upon which the suit is founded," a statement in an action for damages caused by fire set out by defendant's train, which does not allege negligence, is sufficient on objection raised after verdict.—Polhans v. Atchison, T. & S. F. R. Co., 115 Mo. 535, 22 S. W. 478.

[qq] (Mo. 1893) Defendant, after judgment of affirmance by the circuit court entered on his default, cannot object to the sufficiency of the statement before the justice.—Horn v. Excelsior Springs Co., 52 Mo. App. 548.

[r] (Mont. 1889) Where an action on a note is tried in justice's court without any reference to the answer, which is insufficient, and no exception is taken to evidence on the ground of variance, the sufficiency of the answer cannot be objected to; Code Civ. Proc. §§ 768, 777, providing that in justices' courts pleadings may be oral in actions other than forcible entry and detainer, and that a variance shall be disregarded unless the adverse party has been misled to his prejudice.—Budd v. Power, 8 Mont. 380, 20 Pac. 820.

[rr] (N. J. 1806) In an action on a promissory note, the failure to state the date of the note is cured by a verdict.—Van Dervere v. Ogburn, 2 N. J. Law (1 Penning.) 66; Snyder v. Satterly, Id. 87.

[s] (N. J. 1808) Where the defendant made no objection to the uncertainty of the state of demand, and went to trial on it, the court refused to reverse the judgment for that cause.—Leary v. Van Dyke, 2 N. J. Law (1 Penning.) 870.

[ss] (N. J. 1809) The objection that no consideration was set out in the state of demand was waived, after verdict.—Bigelow v. Pines, 3 N. J. Law (2 Penning.) 523.

[t] (N. J. 1866) In a suit before a justice, where the amount of the demand, aside from the credits, exceeded $100, and the credits were not specifically set forth, the defendant appeared on the return day and filed a statement of the dealings between the parties, showing that

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the plaintiff was indebted to the defendant to an amount which would reduce the plaintiff's demand below $100. No objection was made to the jurisdiction of the court. *Held*, that any defect in the plaintiff's statement of credits was cured by the defendant's admissions.—Keep v. Kelly, 32 N. J. Law (3 Vroom) 56.

[tt] (N. Y. 1815) In the justice's court, a variance between the process and declaration must be objected to before joining issue and going to trial.—Bloodgood v. Overseers of Poor of Jamaica, 12 Johns. 235.

[u] (N. Y. 1845) Where, after a demurrer in a justice's court has been overruled, the demurring party pleads to, or takes issue on, the pleading to which the demurrer related, such demurrer forms no part of the case, on error brought by such demurring party.—Peck v. Cowing, 1 Denio, 222.

[uu] (N. Y. 1848) An objection to the form of a declaration in a justice's court, which may be taken by demurrer, will be considered as waived if not taken at the time of joining issue.—Willard v. Bridge, 4 Barb. 361.

[v] (N. Y. 1852) Where defendant in a justice's court on the decision of a demurrer against him puts in an answer, he thereby waives the demurrer.—Irvine v. Forbes, 11 Barb. 587.

[vv] (N. Y. 1854) Where defendant in a justice's court joins issue on the merits after his demurrer is overruled, he waives the demurrer.—Harper v. Leal, 10 How. Prac. 276.

[w] (N. Y. 1856) On the presentation of a complaint, containing several counts, before the justice's court, the defendants moved to have all but the first stricken out, which was denied, and they made no further objection. *Held*, that if they designed to raise the objection of indefiniteness and uncertainty in the complaint, or that it did not state a cause of action, they should have done so by demurrer, and that these objections were waived by not thus making them.—Hall v. McKechnie, 22 Barb. 244.

[ww] (N. Y. 1886) A plaintiff objecting to an answer verified by an agent, who did not state the reasons why he made the verification, on the ground that it was defectively verified, without specifying the specific defect, is not entitled to judgment by reason of the defect.—Rude v. Crandell, 11 Civ. Proc. R. 11.

[x] (N. C. 1883) Filing an answer to an oral complaint, in an action before a justice of the peace, is a waiver of the right to object that no complaint has been filed; and a judgment rendered on the oral complaint is not void because of failure to file a complaint.—Little v. McCarter, 89 N. C. 233.

[xx] (N. C. 1886) In an action before a justice in which two causes of action are alleged, the first sufficiently, the second defectively, for want of proper averment of jurisdictional facts, the justice may proceed to judgment on the first.—Singer Mfg. Co. v. Barrett, 95 N. C. 36.

[y] (S. C. 1894) Where an affidavit before a justice to enforce a lien on crops for rent fails to state when the crops were raised, or that the land rented was in the county of the justice, but the affidavit of defense states these facts, such defects are cured.—Tinman v. McMeekin, 42 S. C. 311, 20 S. E. 36.

[yy] (Wis. 1859) In pleadings in a justice's court, almost every defect in form will be disregarded unless objected to.—Meyer v. Town of Prairie du Chien, 9 Wis. 233.

[z] (Wis. 1863) Where a complaint was imperfect in not being sufficiently definite and certain, such objection was waived by answering, and going to trial on the merits, in the justice's court.—Jarvis v. Hamilton, 16 Wis. 574.

[zz] (Wis. 1875) If the complaint entered by the justice in justice's court fails to state the particulars of plaintiff's demand with sufficient certainty, the court has power, under Tayl. St. p. 1362, § 51, to compel plaintiff to make it more specific.—Dehnel v. Komrow, 37 Wis. 336.

(I) STIPULATIONS, MOTIONS, EVIDENCE, WITNESSES, DEPOSITIONS, AND AFFIDAVITS.

STIPULATIONS, § 343.
MOTIONS, § 344.
EVIDENCE, § 345.
WITNESSES, § 346.
—— COMPETENCY, § 347.
DEPOSITIONS AND AFFIDAVITS, § 348.

Evidence in actions on judgment, see post, § 424.

§ 343. Stipulations.

[a] (Minn. 1892) In an action in a justice's court, which, without pleadings, had, by consent, been adjourned from the 1st to the 10th, a written stipulation by the parties made on the 7th, and filed on the 9th, that the cause be adjourned from the 10th to the 14th, waives the objection that the justice lost jurisdiction by an adjournment for more than a week without pleadings.—Johnson v. Hagberg, 48 Minn. 221, 50 N. W. 1037.

[b] (N. J. 1889) A stipulation entered into between parties to an action in a justice's court before the return day of the summons, that the cause shall stand adjourned to a certain day without prejudice to either party, does not contain a waiver of the statutory requirement that if defendant have a set-off he shall deliver it to the justice on or before the day to which the hearing shall be first adjourned.—De Mott v. Taylor, 51 N. J. Law (22 Vroom) 307, 17 Atl. 291.

[c] (N. Y. 1823) An agreement that a cause shall be adjourned three days, and that then, if A. do not attend as a witness, the justice may adjourn for such reasonable time as he may deem necessary to procure A.'s attendance, is valid, and cannot be revoked except by consent of both parties.—Richardson v. Brown, 1 Cow. 255.

[d] (N. Y. 1828) The parties agreed, on the suggestion of the justice, to waive their pleadings, and go into their cause on the merits. On judgment being given, one of the parties appealed, and the justice returned the agreement. *Held*, that no objection could have been taken to the form of the pleadings before the justice, and that the agreement extended also to the cause in the common pleas, on appeal, and that no objection to the form of the pleadings could be taken there.—Stephens v. Baird, 9 Cow. 274.

[e] (N. Y. 1887) An oral stipulation, extending indefinitely the time within which a justice may render his judgment, is void, as indefinite.—Flynn v. Hancock, 46 Hun, 368.

[f] (N. Y. 1887) Mere consent to the extension of time in which a justice may render judgment by the attorney for each party, expressed to the justice himself in the absence of the adverse counsel, does not amount to a stipulation.—Flynn v. Hancock, 46 Hun, 368.

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[g] (N. Y. 1887) Authority to make a stipulation extending the time in which a justice may render judgment, after the submission of the action, will not be presumed from the fact that the counsel tried the case.—Flynn v. Hancock, 46 Hun, 368.

[h] (Vt. 1894) A stipulation that, "if there is any reason why either of the parties cannot attend on" the day of trial, "then said cause shall be continued," was properly construed to mean that in the absence of one party, or his counsel, the other should continue the cause without any action by the justice before whom the cause was to be tried.—Standard Granite Co. Quarries v. Aikey, 67 Vt. 116, 30 Atl. 806.

§ 344. Motions.

Entry in docket of motion to reject evidence, see post, § 456 [c].
Motions affecting pleadings, see ante, § 327 [f–h].
—— *for new trial, see* post, §§ 369–371.
—— *to dismiss action, see* post, §§ 349, 350.
—— *to enter satisfaction of judgment, see* post, § 417.
—— *to open or vacate judgments in general, see* post, § 401.
—— *to open defaults, see* post, § 388.

[a] (Conn. 1871) A letter, written out of court by a justice to counsel who had made a motion in cause before him, stating that he had decided not to allow the motion, is not a decision of the motion.—Hollister v. Hollister, 38 Conn. 178.

[b] (Me. 1885) The rule of law that a motion in abatement of an action must be filed at the earliest moment possible, and that, after a general continuance of the action has occurred, such a motion is too late, applies to justice's courts, in the absence of rules of such courts to the contrary.—Otis v. Ellis, 78 Me. 75, 2 Atl. 851.

§ 345. Evidence.

Entering evidence in record, see post, § 456.
In action on judgment, see post, § 424.
Issues, proof, and variance, see ante, §§ 336–341.
Reception of evidence, see post, § 363.
Admissibility in evidence of confessions of accused made to justice of the peace, see "Criminal Law," vol. 14, c. 1845, § 1154 [c]; c. 1875, § 1181 [a].

[a] A justice of the peace cannot act on his own knowledge of a fact as evidence in the case before him.
—(N. J. 1838) Corlies v. Vannote, 16 N. J. Law (1 Har.) 324;
(N. Y. 1807) Burlingham v. Deyer, 2 Johns. 189.

[aa] (U. S. 1820) On an attachment issued by a justice of the peace, under Act Va. Dec. 26, 1792, if the plaintiff's claim arise in part on a note of the defendant taken up by the plaintiff, who was the indorser, the plaintiff's own affidavit is not sufficient evidence of the debt, without producing the note.—Mills v. Wilson, Fed. Cas. No. 9,616 [2 Cranch, C. C. 216].

[b] (Ark. 1847) In an action on a promissory note before a justice of the peace, the filing of a plea of want of consideration, verified by affidavit, does not shift the burden of proof of want of consideration from the defendant to the plaintiff.—Greer v. George, 8 Ark. (3 Eng.) 131.

[c] (Ark. 1886) Under the practice, a judgment may be rendered by a justice of the peace on a verified account, without other proof of its correctness.—Carolan v. Carolan, 47 Ark. 511, 2 S. W. 105.

[d] (Ga. 1860) In establishing an account in justice's court, the preliminary oath, that the party has no evidence to establish the account except his own oath, should be made in writing.—Shirley v. Price, 30 Ga. 328.

[e] (Mich. 1860) While the rules of pleading applied to justices' courts are extremely liberal, a cause of action must be as fully proved in those courts as in any other.—Cicotte v. Morse, 8 Mich. 424.

[f] (Mich. 1873) Where, in an action upon a negotiable instrument, the paper is not on file with the justice, as required by Comp. Laws, § 5310, it was error to admit the instrument in evidence, against objection, without proof of the signature.—Colbath v. Jones, 28 Mich. 280.

[g] (Mo. 1835) The statute of 1831, allowing equitable defenses to be set up to actions at law before justices of the peace, did not change the rules of evidence.—Davis v. Cleaveland, 4 Mo. 206.

[h, i] (Mo. 1838) Under Rev. Code 1825, p. 361, § 18, providing that in a suit founded on a written instrument by the opposite party, such instrument, if filed with a justice before trial, shall be received, unless the other party denied the execution thereof, it was error to allow plaintiff to introduce a bond not the foundation of the action, and which he had not filed with the justice, on the testimony of a witness that he was present when this bond was executed, and that he saw the defendant sign it, but without producing the subscribing witness, or accounting for his absence.—Maupin v. Triplett, 5 Mo. 422.

[j, k] (N. Y. 1813) A justice cannot reject evidence, or act from his own personal knowledge, of the truth of the facts.—Locke v. Smith, 10 Johns. 250.

[l] (N. Y. 1823) Where a cause has been discontinued by reason of the justice's nonattendance at the adjourned day, and plaintiff and one of the defendants appear and go to trial on another day agreed on, declarations of the defendant who did not appear or consent to the arrangement are inadmissible against the other.—Stoddard v. Holmes, 1 Cow. 245.

[m] (N. Y. 1830) The same precision is not required with respect to evidence in justices' courts as in courts of record.—Musier v. Trumpbour, 5 Wend. 274.

[mm] (N. Y. 1855) Though a justice of the peace is to judge whether a witness in a case in his court is competent to testify as an expert, if the justice misjudges, it is as much an error as if he misjudges on any other question. It is not a question of discretion, where his judgment is conclusive.—Wiggins v. Wallace, 19 Barb. 338.

[n] (N. Y. 1857) A justice is not an arbitrator with power to divide the damages in a doubtful case, but is bound to decide against the party who, having the burden of proof, fails to sustain his case.—Prentiss v. Sprague, 1 Hilt. 428.

[o] (N. C. 1888) That a civil action before a justice was dismissed as to one defendant may be shown by parol evidence, the rules for the proof and authentication of the proceedings of courts of record not applying to justices' courts.—State v. Green, 100 N. C. 419, 5 S. E. 422.

[p] (Ohio, 1883) In an action of trespass before a justice of the peace for destroying a fence, the exhibition to the jury of a plat showing the

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location and size of plaintiff's and defendant's lots and the subdivision is not error, since it was not to show title, but to explain testimony.—Dougherty v. O'Connell (D. C.) 12 Wkly. Law Bul. 261.

[q] (Pa. 1854) A judgment of a magistrate against defendant, on the mere production of what was asserted to be his promissory note, but without proof that he was the maker, will be reversed.—Lenore v. Ingram, 1 Phila. 519.

[r] (Pa. 1888) In an action before a justice on an account, in which plaintiff charges defendant with money paid him for lumber, and with sums paid for cartage, crediting him with certain sums "per acc't sales," defendant may show, to defeat the action, though not to establish a set-off, the amount of lumber sold to plaintiff, though that would leave him debtor to defendant in a sum beyond the justice's jurisdiction.—Mills v. David, 15 Atl. 914.

[s] (Pa. 1889) Under Act Sept. 30, 1791, and subsequent acts, justices of the peace are authorized to receive proof of deeds and other instruments of writing in the same manner as judges of the supreme court or courts of common pleas were authorized to do by Act March 18, 1775.—Shiffer v. Broadhead, 126 Pa. 260, 17 Atl. 592, 24 Wkly. Notes Cas. 44.

[t] (Wis. 1883) A paper granting a private way over the land of another, being a grant of an interest in land, within Rev. St. 1878, § 3573, is not admissible in a justice's court as a defense to an action of trespass after the right has been revoked, for the purpose of proving the possession of the grantee, and so establishing his said right, but the right must be established by other evidence.—Lowitz v. Leverentz, 57 Wis. 596, 15 N. W. 842.

§ 346. Witnesses.

Entering names on docket, see post, § 458.
On trial by referees, see post, § 368.
Arrest for nonattendance in criminal prosecution, see "Witnesses," I.
Authority to subpœna witness to compel attendance in court of record, see "Witnesses," I.

[a] (U. S. 1835) A witness, summoned by a justice of the peace of Washington county to attend before him and testify in a suit for a small debt, who fails to attend, may be fined not to exceed 20 shillings Maryland currency, upon the return of an attachment issued by the justice and made returnable to the circuit court for the District of Columbia.—Ex parte Gorman, Fed. Cas. No. 5,628 [4 Cranch, C. C. 572].

[b] (U. S. 1846) Under Act Md. 1791, c. 68, § 8, an attachment for contempt can be issued against a witness who refuses to obey a summons issued by a justice of the peace.—Washington v. Dawson, Fed. Cas. No. 17,227 [1 Hayw. & H. 236].

[c] (Conn. 1874) On arrest of three witnesses for a refusal to appear and testify, a justice of the peace should pass judgment upon each separately.—Humphrey v. Knapp, 41 Conn. 313.

[d] (Ga. 1860) In establishing an account in the justice's court after the preliminary oath, that the party has no other evidence whereby to establish his account except his own oath, the testimony should be oral, giving the adverse party the privilege of cross-examination.—Shirley v. Price, 30 Ga. 328.

[e] (Ill. 1836) The assignor of a note is not the adverse party, within the statute allowing a party in justice's court to prove his claim by the adverse party. Gale's St. p. 420.—Arnold v. Johnson, 2 Ill. (1 Scam.) 196.

[f] (Ill. 1836) Under Gale's St. p. 420, allowing a party in justice court to prove his claim by the adverse party, the testimony must be given by the adverse party in person.—Carver v. Crocker, 2 Ill. (1 Scam.) 265.

[g] (Ill. 1850) The statute authorizing parties to trials commenced before justices of the peace to avail themselves of the oath of the adverse party is in derogation of the principles of the common law, and must be interpreted to embrace only such cases as are strictly within its spirit and letter.—Pickering v. Misner, 11 Ill. (1 Peck) 597.

[h] (Ill. 1850) If the adverse party elects to become a witness, he must testify fairly and fully so far as he may be interrogated.—Pickering v. Misner, 11 Ill. (1 Peck) 597.

[i] (Ind. 1833) Under Act 1831, § 35, regulating the jurisdiction of justices, and which provides that, in all trials in actions of debt or assumpsit before a justice, it shall be lawful for the plaintiff, if defendant deny the debt, to require such defendant to answer on oath to such charge, the plaintiff, in an action of debt commenced before a justice of the peace, may, if the cause of action is denied by plea, on the trial before the justice, examine the defendant, under oath, as a witness.—Hubble v. Hubble, 3 Blackf. 205.

[j] (Ind. 1839) Rev. Code 1831, p. 304, provides that in all trials before justices of the peace it shall be lawful for plaintiff, if the defendant denies the debt, to require him to answer on oath or affirmation to such charge, and whenever defendant alleges matter of payment or set-off, or any other plea in defense or bar of the same, he may in like manner require plaintiff to answer on oath or affirmation, and on the refusal of either party to answer the justice may enter judgment as confessed. *Held*, that defendant could not require plaintiff to testify on oath as to the general issue, or as to any matters not specially pleaded.—Sherry v. Martin, 5 Blackf. 156.

[jj] (N. Y. 1813) An action on the case lies against a person regularly subpœnaed as a witness in a justice's court, and who neglects or refuses to attend.—Hasbrouck v. Baker, 10 Johns. 248.

[jjj] (N. Y. 1817) A witness who is subpœnaed to attend a trial in a justice's court is not entitled to recover from the party subpœnaing him anything for his expenses beyond the 25 cents per diem allowed by the statute.—Fuller v. Mattice, 14 Johns. 357.

[k] (N. Y. 1841) A witness cannot recover against a justice of the peace his fees of attendance. The party calling him is responsible.—Watts v. Van Ness, 1 Hill, 76.

[kk] (N. Y. 1848) A defendant in justice court who appears at the trial and objects to the jurisdiction, but refuses to answer or demur to a complaint in the action, has no right to cross-examine plaintiff.—Everitt v. Lisk, 1 Code Rep. 70.

[l] (N. Y. 1854) Code, § 399, cl. 8, requiring 10 days' notice of the intended examination of an assignor of a thing in action, as a witness, to be given to the adverse party, is applicable to justices' courts.—Collins v. Knapp, 18 Barb. 532.

[m, n] (N. Y. 1856) Service on the defendant's attorney of a notice of the intended examination of the plaintiff's assignor as a witness in a suit before a justice of the peace, made on the same day the summons in the case was issued, and before the attorney had appeared in the suit, *held* to be bad.—Butler v. New York & E. R. Co., 22 Barb. 110.

[o] (N. Y. 1856) Quære, whether service of such a notice on the attorney of the opposite

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party is ever good.—Butler v. New York & E. R. Co., 22 Barb. 110.

[p] (N. Y.) A justice of the peace has no power to commit a witness for a refusal to answer a question in accordance with the provisions of 2 Rev. St. p. 274, § 204, until the party at whose instance the witness attended shall have made the affidavit required by the said section.—(1857) People v. Webster, 14 How. Prac. 242; (1875) Rutherford v. Holmes, 5 Hun, 317, affirmed (1876) 66 N. Y. 368.

[q] (N. Y. 1873) A justice of the peace, holding a court of special sessions, has jurisdiction and authority to punish a person as for a criminal contempt of such court, for willfully and contemptuously refusing to be sworn as a witness by or before such court, or by or before such justice while holding such court as justice of the peace; he having been duly subpœnaed as a witness.—Bowen v. Hunter, 45 How. Prac. 193.

[r] (N. Y. 1875) The fact that a question is put upon the cross-examination of one of the parties to the action, who has been examined as a witness in his own behalf, does not relieve the justice from compliance with the requirement of the statute, that a witness shall not be committed for contempt until the party at whose instance he has attended shall have made the affidavit required by 2 Rev. St. p. 274, § 204.—Rutherford v. Holmes, 5 Hun, 317, affirmed (1876) 66 N. Y. 368.

[s] (Ohio, 1860) Under Civ. Code, § 318, justices of the peace may compel the attendance of witnesses by subpœna.—Harris v. Reams, 2 Ohio Dec. 281.

[ss] (S. C. 1886) Code, § 88, subd. 15, provides "that the provisions of the Code of Procedure respecting forms of actions, parties in actions, the rules of evidence," etc., shall apply to courts of justices. *Held*, that it was error to refuse to permit defendant to cross-examine generally a witness of plaintiff, and a new trial should be granted, although defendant afterwards produced and examined the same witness in his own behalf.—Dillard v. Samuels, 25 S. C. 318.

[t] (Vt. 1862) A subpœna for a witness may be directed by a justice of the peace to an indifferent person to serve.—Smith v. Wilbur, 35 Vt. 133.

§ 347. —— Competency.

[a] (Ala. 1832) In an action before a justice of the peace, to recover more than $20, the defendant may, by his own oath, prove a set-off, provided such set-off does not exceed $20.—Thompson v. Jones, 2 Stew. & P. 46.

[b] (Ala. 1843) Defendant in an action before a justice of the peace cannot prove a credit of $20 on his own oath.—Aiken's Dig. p. 294, § 11.—Ivey v. Pierce, 5 Ala. 374.

[c] (Ala. 1878) The statute making the parties competent witnesses in suits before justices of the peace, when the matter in controversy does not exceed $20, is, in effect, repealed by Code, § 3058.—Lemay v. Walker, 62 Ala. 39.

[d] (Ga. 1860) An account, whose amount places it beyond the statute allowing the plaintiff in a justice's court, under certain circumstances, to prove his demand by his own oath, may be brought within the statute by payments reducing it.—Nichols v. McAbee, 30 Ga. 8.

[e] (Ill. 1850) In case the adverse party, called to testify in justice's court, refuses to be sworn, or, being sworn, refuses to testify to the matter in issue, the party calling him may be sworn as a witness in his own behalf touching that matter.—Pickering v. Misner, 11 Ill. (1 Peck) 597.

[f] (Ill. 1850) If the adverse party elects to become a witness, and exhibits a disposition to conceal anything, or, by his manner of testifying, deprives the party calling him of the benefit of the facts within his knowledge, the court may properly hold this to be a refusal to testify, and allow the party calling him to become a witness.—Pickering v. Misner, 11 Ill. (1 Peck) 597.

[g] (Ill. 1858) To authorize a plaintiff to testify, he must make an affidavit that he has a claim or demand against the defendant; and he must show by his affidavit that he has no witness or other legal testimony to support it.—Lee v. Quirk, 20 Ill. (10 Peck) 392.

[h] (Mich. 1855) Under Rev. St. c. 93, § 5, declaring that, in any action brought before a justice of the peace on a book account, if a party claiming the same shall make oath that there is no disinterested witness who knows the facts relating to such account, the parties to such action may produce in court a book containing the account, and may be examined in relation thereto, where a plaintiff sues for a balance of a book account, if the defendant admits the debts charged against him on the plaintiff's books, plaintiff cannot be sworn as a witness to prove his account, since the only facts in relation to the account which, under the statute, plaintiff was a competent witness to establish, were those which were admitted.—Morse v. Congdon, 3 Mich. 549.

[i] (Mo. 1842) If the plaintiff in justice's court call the defendant, under the statute, to prove his demand, this does not entitle the defendant to testify as to a set-off. The case is not within the principle that a witness called for one purpose becomes witness for all.—Musick v. Musick, 7 Mo. 495.

[j] (Mo. 1844) In an action on a joint and several contract, one of the defendants will not be allowed to testify against his codefendants without their consent, under Rev. St. 1835, p. 361, allowing the plaintiff to subpœna the defendant to testify before a justice of the peace.—Levy v. Hawley, 8 Mo. 510.

[k] (Mo. 1845) Under the statute allowing a party to call on his adversary to testify in a justice's court, and, in case of his refusal, to give his own testimony, he must call on all of the adverse parties, if more than one, and his own testimony will be admissible against those who refuse to testify.—Grigg v. Bodrio, 9 Mo. 223.

[l] (N. J.) A justice of the peace cannot give evidence in his own court.—(1818) McCormick v. Brookfield, 4 N. J. Law (1 Southard) 69; (1838) Corlies v. Vannote, 16 N. J. Law (1 Har.) 324.

[m] (N. Y.) A justice before whom a trial is had cannot be sworn by another justice as a witness in the suit.—(1806) Perry v. Weyman, 1 Johns. 520; (1811) Cobb v. Curtiss, 8 Johns. 470.

[n] (N. C. 1856) Where an action is brought on an account amounting to more than $60, and items are credited thereon so as to bring it within the jurisdiction of a single justice of the peace, the credits being entered for that purpose only, plaintiff cannot prove the account under the book debt law, by his own oath, as under that he has to swear that the account sued on contains a true account of all the dealings.—Waldo v. Jolly, 49 N. C. 173.

[o] (Ohio, 1859) A justice of the peace before whom a cause is being tried by a jury

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cannot testify therein except by consent.—McMillen v. Andrews, 10 Ohio St. 112.

[oo] (Pa. 1840) An action was brought by A. before a justice of the peace, against the defendants, to recover a balance alleged to be due by them for work done. The justice gave judgment against the plaintiff, on the ground that B. was a partner with him in this contract and in the performance of the work, and ought to have been joined as plaintiff. A new action was then brought, in the names of A. and B., for the use of A., against the same defendants. *Held*, that B. was not a competent witness for A. on the trial of this action.—Kelly v. Eichman, 5 Whart. 446.

[p] (Pa. 1856) Proceedings before a justice will be set aside, on certiorari, where the justice examined as a witness a party to the suit, one of several defendants, his codefendants objecting thereto.—Loesch v. Hofsien, 13 Leg. Int. 21.

[q] (S. C. 1822) The act of 1747 (Pub. Laws, p. 214) authorizes a justice to swear the parties litigant before him; and if the defendant will not offer to deny the debt on oath, the oath of the plaintiff shall be sufficient to prove it.—Cohen v. Saddler, 2 McCord, 239.

[r] (Tex. 1849) The plaintiff, at a trial before a justice, made oath that he knew of no person but A. by whom he could prove his account; and by the representation of the sheriff, not sworn, it appeared that A. was then, and almost always was, too drunk to get to the court house. *Held*, by this court, that the plaintiff had not established his right under the statute to prove his own account.—McGee v. Currie, 4 Tex. 217.

§ 348. Depositions and affidavits.

Authority to take affidavits, see "Affidavits," vol. 2, cc. 17, 18, § 22; cc. 19, 20, § 27 [b, d].

—— *depositions, see* "Depositions," vol. 16, cc. 1014–1016, § 72; cc. 1017, 1018, § 75.

Certificate as to authority of justices in return of depositions taken, see "Depositions," vol. 16, cc. 1135–1138, § 175.

Compelling making of affidavits, see "Affidavits," vol. 2, c. 13, § 17 [b–d].

[s] (Iowa, 1870) By Revision, § 4038, a justice of the peace has power, on the application of a person desirous of obtaining the affidavit of another, to require the appearance of the latter before him by a subpœna issued for that purpose; and a refusal to obey a subpœna of the justice thus issued, or to answer when brought before him, is a contempt of his rightful authority, for which the person refusing may be committed by the justice.—Robb v. McDonald, 29 Iowa, 330, 4 Am. Rep. 211.

[b] (N. J. 1827) An affidavit taken before one justice cannot be read to prove a notice in a cause pending before another justice.—Hunt v. Langstroth, 9 N. J. Law (4 Halst.) 223.

[c] (N. Y. 1884) Where, on an application by defendant for a continuance in a justice's court, plaintiff, being a nonresident, asked that her deposition, and that of a witness who appeared in her behalf, be taken, under Code, § 2906, it was error for the justice on the subsequent trial to consider the depositions, without their being offered in evidence.—Livingston v. Morrissey, 6 Civ. Proc. R. 28.

(J) DISMISSAL AND NONSUIT.

VOLUNTARY, § 349.
INVOLUNTARY, § 350.

Costs on dismissal, see "Costs," vol. 13, c. 243, § 202 [d].

Dismissal and nonsuit of forcible detainer, see "Forcible Entry and Detainer," vol. 23, c. 1382, § 154 [a, c].

§ 349. Voluntary.

[a] (Ind. 1871) Where a plaintiff having a joint cause of action against several persons triable in a justice court issues process against all of them, but part of the defendants are not found, and dismisses his action as against those not found, as allowed by 2 Gav. & H. St. p. 593, § 63, he may, at any time thereafter, proceed against the defendants not found.—Root v. Dill, 38 Ind. 169.

[b] (Ind. 1872) In an action before a justice against joint defendants, it is not a dismissal of the suit against one of the defendants if he is not served and the action be prosecuted to judgment against his codefendants; but the plaintiff may at any time bring his new action against such defendant.—Kettering v. Norville, 39 Ind. 183.

[c] (Ind. 1881) An entry by a justice, on his docket, of the finding in the case, is not an announcement thereof within Code, § 363, so as to deprive plaintiff of his right to dismiss. Such announcement must be made orally in open court, or by means of a public record which will bring the ruling to the knowledge of the parties.—Cohn v. Rumely, 74 Ind. 120.

[d] (Iowa, 1860) The plaintiffs in a suit brought before a justice may dismiss the same without the defendant's consent, at any time before a set-off is claimed, either orally, with an entry on the justice's docket, or by a written answer.—Kuhn v. Bone, 10 Iowa, 392.

[dd] (Iowa, 1860) In an action in justice's court, the attorneys for the respective parties met in the justice's office before the hour set for trial, and defendant's attorney informed the attorney for plaintiff that he intended to plead certain matter in set-off. When the hour of trial came plaintiff's attorney dismissed the suit, paying all costs that had accrued up to that time. *Held*, that an entry in the justice's docket of the statements made by the defendant's attorney prior to the time of trial was unauthorized and insufficient to entitle defendant to proceed to judgment on his set-off.—Kuhn v. Bone, 10 Iowa, 392.

[e] (Kan. 1887) In an action commenced in justice's court against T. and other defendants, the plaintiff may dismiss as to any or all of the defendants.—Sawyer v. Forbes, 36 Kan. 612, 14 Pac. 148.

[f] (Neb. 1884) If, after a set-off is filed, plaintiff dismisses his action and pays the costs, the justice, after entry of dismissal, should docket the set-off under its proper title,—the claimant as plaintiff, and the adverse party as defendant.—Rawalt v. Brewer, 16 Neb. 444, 20 N. W. 391.

[g] (Neb. 1886) An action of replevin was commenced before a justice of the peace, and a return made by the sheriff, showing the value of the goods to be $821.44. The justice then prepared a transcript of the proceedings for the district court, but whether it was filed or not did not appear. Soon afterwards the plaintiff and defendant appeared before the justice, and caused the following entry to be made in his docket: "By agreement of both parties, this suit is dismissed, and the sheriff is ordered to return said goods to defendant, from whose possession they were taken." *Held* that, independently of the question of the jurisdiction of the justice, it was a valid agreement to dismiss the action, and that, if the property was

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in possession of the sheriff, it was his duty to return it to the party from whom he had taken it.—Wilcox v. Brown, 20 Neb. 355, 30 N. W. 264.

[h] (N. Y. 1809) A plaintiff in a justice's court may withdraw and be nonsuited, before the jury give in their verdict.—Platt v. Storer, 5 Johns. 346.

[i] (N. Y. 1814) On the trial of a cause before a justice without a jury, the plaintiff may elect to become nonsuit any time before it is finally submitted.—Hess v. Beekman, 11 Johns. 457.

[j] (N. Y. 1858) Before an action in a justice's court is finally submitted, the plaintiff has a right to discontinue; and this even where damages are claimed by way of recoupment.—Bidwell v. Weeks, 2 Hilt. 106.

[k] (Pa. 1844) Where two suits had been brought before an alderman on defendant's two promissory notes, and the plaintiff was nonsuited in each case on failing to prove the defendant's signature, and the suits were again brought before the same alderman, and the plaintiff, being yet unable to prove the signature, discontinued the suits in the absence of the defendant, and after there had been a hearing and an adjournment, and then brought suit on the two notes in the district court, so as to oblige the defendant by the rule of court to admit his signature, or deny it under oath, it was *held* that the discontinuance before the alderman was binding on the court, and that the plaintiff was entitled to judgment, notwithstanding defendant alleged in an affidavit that the discontinuance was greatly to his annoyance.—Lancaster Bank v. McCall, 4 Pa. Law J. 287.

[l] (Pa. 1855) In a suit before a justice, where the parties have appeared and submitted their proofs and allegations, the plaintiff may become nonsuit on his own motion, or discontinue or withdraw his action.—Blair v. McLean, 25 Pa. (1 Casey) 77.

[m] (Pa. 1885) Where a justice has had hearing of a cause of action, and fixed a time for rendering his decision, and at the plaintiff's request the justice renders his decision before such time, such decision becomes a final decision as to such party, and he cannot thereafter discontinue the action.—Raber v. Laubach, 2 Del. Co. R. 355.

[n] (Tenn. 1842) In an action before a justice of the peace where the defendant pleads a set-off which exhibits a balance in the defendant's favor, the plaintiff cannot dismiss his action without the consent of the defendant.—Utley v. Carter, 22 Tenn. (3 Humph.) 230.

[o] (Utah, 1890) In an action before a justice of the peace to recover possession from a tenant at will who has been given notice to quit, an answer alleging that defendant was in under a verbal lease for more than a year, but that he had made lasting improvements, expecting to hold possession until a certain time, and praying affirmative relief, does not constitute a counterclaim or prayer for affirmative relief, and hence the action may be dismissed by plaintiff at any time before trial, as provided by Comp. Laws 1888, § 3943, subd. 1.—Flygare v. Maloney, 12 Utah, 497, 23 Pac. 879.

[p] (Vt. 1856) A justice, after deciding to continue a case on defendant's motion, may, on plaintiff's motion, at the same sitting enter a discontinuance on the record.—Flint v. Whitton, 28 Vt. (2 Williams) 557.

§ 350. Involuntary.

Dismissal of actions involving title to land in general, see ante, §§ 83 [i, j, q], 85 [uu, vv], 89 [a, e, i, j], 90 [c], 91 [p, x].

Appearance as conferring jurisdiction after discontinuance, see ante, § 268 [o].

Defects in parties as ground for nonsuit, see ante, § 249 [l, m, q, r, u].

Expiration of term of justice as effecting discontinuance, see ante, § 204 [g].

Motion to nonsuit as general appearance, see ante, § 266 [c].

On rehearing, see post, § 369 [l].

Taking case or question from jury, see post, § 364.

Tender of costs as condition precedent to dismissal of action involving title, see ante, § 222 [v].

[a] (Ala. 1838) An entry of "Judgment v. plaintiff by default for costs," and signed by the justice of the peace, is not void for want of form, but is a judgment of nonsuit.—Wyatt v. Judge, 7 Port. 37.

[b] (Ark. 1846) An entry by a justice of the peace that "this case, for the want of proof to sustain the plaintiff's demand, was dismissed at the plaintiff's costs," was *held* to be a judgment on the merits, and not of nonsuit.—Parsell v. Smyers, 7 Ark. (2 Eng.) 55.

[c] (Cal. 1856) Where the complaint in action to recover possession of a mining claim, in a justice's court, improperly contains an allegation of an injury done and a prayer for damages, the action should not be dismissed, but the allegation should be disregarded or stricken out, and the plaintiff be allowed to try his right to the claim.—Van Etten v. Jilson, 6 Cal. 19.

[d] (Cal. 1861) Suit was begun before a justice in township No. 5; service was returned as made in township No. 3, by a constable of the same; before answer was filed, defendant moved to dismiss for want of jurisdiction in the court over his person, and for insufficiency of the constable's return to confer jurisdiction. *Held*, that the motion was properly refused; though a showing that the facts were such that the record could not be amended would have entitled defendant to a dismissal.—Hamilton v. McDonald, 18 Cal. 128.

[e] (Ga. 1843) Proving an account in a justice's court, previous to a nonsuit, will not dispense with proof of the same account in a subsequent action founded on it in the same court.—Mann v. Crombie, Ga. Dec. 133, pt. 2.

[f] (Ga. 1887) Under Code, § 4154, providing that cases before justices shall be tried at the time and place mentioned in the summons, a justice cannot refused to dismiss such case on motion made in due time, where the constable's return fails to show valid service.—Western & A. R. Co. v. Pitts, 79 Ga. 532, 4 S. E. 921.

[g] (Ga. 1895) A motion to dismiss which fails to point out the defect for which a dismissal is asked is insufficient.—Southern Ry. Co. v. Johnson, 96 Ga. 655, 23 S. E. 836.

[h] (Ga. 1896) Where a case is on trial before a jury in a magistrate's court, the presiding justice has no power to grant a nonsuit.—Gunn v. Wood, 99 Ga. 70, 24 S. E. 407.

[i] (Ill. 1888) Rev. St. c. 79, § 33, providing that if, in an action before a justice, the plaintiff or his agent does not appear, the justice must dismiss the suit unless defendant consent to a continuance, is imperative, and it is immaterial that defendant claims a set-off.—Cunningham v. Wright, 27 Ill. App. 334.

[j] (Ind.) An action in justice court against a railroad corporation whose principal office is out of the state will not be dismissed because the summons was not served 30 days prior to the day of trial, as required by Acts 1853, c.

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102, the justice having the right, under 2 Rev. St. p. 454, § 22, to continue cause where the want of sufficient service is not waived by consent.—(1859) Michigan S. & N. I. R. Co. v. Shannon, 13 Ind. 171; (1861) Ohio & M. R. Co. v. Quier, 16 Ind. 440.

[k] (Iowa, 1856) Though, if it appear at the trial of a case before a justice of the peace that the title to real estate is in question, the cause may be transferred to the district court, it should not be, even then, dismissed.—Cox v. Graham, 3 Iowa (3 Clarke) 347.

[l] (Iowa, 1856) The nonappearance of the plaintiff before a justice within an hour after the time fixed for trial will not justify a nonsuit, where the suit is founded on an instrument in writing, purporting to have been executed by the defendant, and the signature not denied on oath.—Jewett v. McLelland, 3 G. Greene, 568.

[m] (Iowa, 1866) A cause should not be dismissed because the justice before whom it is brought, thinking himself disqualified by interest, called on a justice, who had no jurisdiction to try cases in that township, to hear the cause, and he did so; but such acts as are void should be disregarded, and the cause should be legally tried.—Ely v. Dillon, 21 Iowa, 47.

[n] (Kan. 1886) A cause pending before a justice of the peace was continued upon the application of one of the parties until January 16th, but by mistake the justice made an entry upon his docket that it had been continued until January 15th, and, as the plaintiff did not appear on that day, he made an order dismissing the cause. On January 16th the plaintiff appeared, and, after notice to the defendant, procured an order setting aside the judgment of dismissal. *Held*, that the rulings of the justice in correcting his record, and setting aside the order of dismissal, made before the case was triable, and proceeding with its trial upon the day to which it had been adjourned, was not error.—Petrie v. Karsch, 35 Kan. 357, 11 Pac. 154.

[nn] (Me. 1866) A justice of the peace has no power, unless by statutory authority, to set aside an involuntary nonsuit on a day subsequent to that on which the entry was made.—Pratt v. Roberts, 53 Me. 399.

[o] (Mich. 1890) How. Ann. St. § 6817, provides that each justice court "is hereby vested with all such powers, for the purpose of exercising jurisdiction by this chapter conferred, as are usual in courts of record, except the power of setting aside a verdict and arresting judgment thereon." *Held*, that it was competent for a justice, after announcing the dismissal of a case for nonappearance of the plaintiff, but before any minute or record thereof had been made, to recall the announcement, and reinstate the case for trial, upon learning, a few moments later, that plaintiff's attorney had appeared, but, finding the court room locked, had gone to the clerk's office across the way, and was waiting there at the time of the announcement.—Hodges v. Bagg, 81 Mich. 243, 45 N. W. 841.

[oo] (N. J. 1839) A justice of the court for the trial of small causes cannot dismiss a suit of which he has jurisdiction, after a trial on the merits, but must give judgment for one or the other of the parties.—Miller v. Miller, 18 N. J. Law (1 J. S. Green) 165.

[p] (N. J. 1879) If the justice in a suit for rent finds that, incidental to a conveyance to a third party, the right of action was not in the plaintiff, the suit should be dismissed, and the defendant not required to plead title or give bond.—Messler v. Fleming, 41 N. J. Law (12 Vroom) 108.

[pp] (N. Y. 1810) In an action before a justice, the defendant is not entitled to a nonsuit because the venire is not returned at the time appointed for trial, but another venire may be issued.—Blanchard v. Richly, 7 Johns. 198.

[q] (N. Y. 1813) A justice has no power to stay proceedings in a cause, or to dismiss the suit, because plaintiff had been nonsuited in a former suit, or the costs of the suit were unpaid in which he had been nonsuited.—Youle v. Brotherton, 10 Johns. 363.

[qq] (N. Y. 1829) Where the plaintiff in a justice's court neglects to appear on the coming in of the verdict, judgment of discontinuance may be entered.—Relyea v. Ramsay, 2 Wend. 602.

[r] (N. Y. 1833) A justice may refuse to enter a judgment of nonsuit against a plaintiff who fails to appear on the return of the process "within one hour" after the same is returnable, if a reasonable cause exists for such refusal.—Barber v. Parker, 11 Wend. 51.

[rr] (N. Y. 1840) If a defendant in a justice's court makes affidavit that the justice is a material and necessary witness for him, the suit must be discontinued, though the justice says that he has no recollection of the facts which the defendant expects to prove by him.—Hopkins v. Cabrey, 24 Wend. 264.

[s] (N. Y. 1842) The affidavit required by Laws 1838, p. 232, § 1, for dismissal of the action on the ground that the justice is a material witness, should be such that the justice can judicially pronounce it relevant or irrelevant, and should show that the justice is a necessary, as well as material, witness.—Young v. Scott, 3 Hill, 32.

[ss] (N. Y. 1842) After issue joined on the merits and a trial before a justice of the peace, the justice held the cause for advisement four days, and then nonsuited the plaintiff on the ground of a variance between the declaration and proof, though no motion of nonsuit for this reason had been made at the trial. *Held*, that this was irregular.—Shall v. Lathrop, 3 Hill, 237.

[t] (N. Y. 1847) A defendant, in a justice's court, is entitled to judgment of nonsuit if the plaintiff do not appear within one hour after the time for appearance mentioned in the summons; and where the justice required a defendant to wait five minutes longer, which he refused to do, and the plaintiff appeared within that time, and after the defendant had left, it was *held* that it was erroneous for the justice to proceed in the cause.—Wilcox v. Clement, 4 Denio, 160.

[tt] (N. Y. 1849) To authorize a justice of the peace to order a discontinuance of a suit pending before him because he is himself a material witness in the cause, it must appear that the defendant cannot safely proceed to trial without him.—Murtha v. Walters, 4 N. Y. Super. Ct. (2 Sandf.) 517.

[u] (N. Y. 1868) As the defendant in an action to recover possession for chattels has a constitutional right to trial by a jury of 12 men, and a justice of the peace has only power to impanel a jury of 6 men, it follows that when, on the return of a justice's summons in such an action, the defendant demands a jury of 12, the justice must dismiss the suit.—Baxter v. Putney, 37 How. Prac. 140.

[uu] (N. Y. 1891) On motion to dismiss an action on the ground that the mandate was issued by the justice in blank, it was error to exclude the testimony of the managing clerk of plaintiff's attorneys that before bringing the action they received such a mandate from the justice.—Hannaman v. Muckle (Co. Ct.) 15 N. Y. Supp. 961, 20 Civ. Proc. R. 296.

[v] (Ohio, 1885) Where defendant's motion to dismiss an action before a justice of the peace involves the merits, it is properly overruled.—Bruder v. Biehl, 1 Ohio Cir. Ct. R. 85.

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[vv] (Pa. 1831) A defendant in a justice court who conceives himself entitled to a nonsuit because of the absence of the plaintiff at the time of hearing should claim it at the time.—Cornish v. Young, 1 Ashm. 153.

[w] (Tenn. 1865) A warrant obtained from a justice of the peace November 22d was not placed in an officer's hands for service until the 10th of the following November. On the defendant's motion, the suit should be discontinued on account of the laches of the plaintiff.—Maynard v. May, 42 Tenn. (2 Cold.) 44.

[ww] (Vt. 1824) The objection that the action before a justice of the peace is not seasonably entered cannot be reached by a motion to dismiss the action.—Stone v. Proctor, 2 D. Chip. 108.

[x] (Vt. 1840) A justice of the peace cannot render a judgment of nonsuit against a plaintiff, when he appears, without his consent.—Smith v. Crane, 12 Vt. 487.

[xx] (Vt. 1847) Where an action is commenced before a justice of the peace, a motion to dismiss, on the ground that the magistrate had not entered on the writ a minute of the day, month, and year it was issued, as required by Rev. St. c. 57, § 9, must be made at the return day of the writ.—Wheelock v. Sears, 19 Vt. 559.

[y] (Wash. 1890) In an action against a corporation, before a justice of the peace, defendant, on showing that its chief office is in another county, is prima facie entitled to a dismissal of the suit, under Code, § 1780 (justice's practice act), providing that an action may be dismissed without prejudice where it appears that it is brought in the wrong county.—Knoff v. Puget Sound Co-op. Colony, 1 Wash. St. 57, 24 Pac. 27.

[yy] (W. Va. 1891) With reference to procedure in justice's courts, Code 1887, c. 50, § 66, provides that, "saving the right of a defendant, who has filed a set-off or counterclaim, to proceed to trial though the plaintiff fail to appear or dismiss his action, judgment may be rendered against plaintiff, dismissing his action, with costs, but without prejudice," if he fails to appear and prosecute his action within one hour after the time for appearance mentioned in the summons or last order of continuance. *Held* that, where plaintiff has failed to appear within the hour as prescribed by statute, and defendant has filed no set-off or counterclaim, though he has filed a plea, it is error to allow a jury trial, and render final judgment for defendant. The proper judgment is one dismissing the action without prejudice to a new action.—Buena Vista Freestone Co. v. Parrish, 34 W. Va. 652, 12 S. E. 817.

[z] (Wis. 1843) A justice trying a case without a jury has no power to grant a peremptory nonsuit after evidence has been given on the part of the plaintiff pertinent to the issue.—Hyde v. Barker, 1 Pin. 305.

[zz] (Wis. 1891) Plaintiff brought trespass in the justice's court, in which issue was joined, and an adjournment granted. He afterwards filed an amended complaint, which was allowed on condition that he should pay costs, and an adjournment was granted defendant. Plaintiff objected to the order and adjournment, and asked to withdraw his amended complaint, to which defendant successfully objected, and the cause was continued to a later hour of the same day, when defendant announced himself ready for trial. Plaintiff refused to proceed, whereupon judgment of nonsuit and for costs was rendered against him. *Held*, that the judgment was proper.—Duffy v. Ryan, 79 Wis. 242, 48 N. W. 374.

(K) CONTINUANCE AND ADJOURNMENT.

IN GENERAL, § 351.
RIGHT TO CONTINUANCE AND DISCRETION OF COURT, § 352.
CONDITION OF CAUSE, § 353.
GROUNDS, § 354.
APPLICATION AND PROCEDURE, § 355.
SECURITY, § 356.
TIME AND PLACE FOR ADJOURNMENT, § 357.
SECOND OR FURTHER CONTINUANCE, § 358.
RENEWAL OF PROCEEDINGS AFTER ADJOURNMENT, § 359.
OPERATION AND EFFECT, § 360.
OBJECTIONS AND EXCEPTIONS, § 361.

On trial by referees, see post, § 368.
Presumption on certiorari as to adjournments, see post, §§ 812, 813.
Record entries of continuance, see post, § 457.
Stipulations as to continuances, see ante, § 343 [a–c, h].
Unauthorized continuances as ousting jurisdiction, see ante, §§ 193–197.
Right of justice to adjourn preliminary examination of prisoner on bailable offense, see "Criminal Law," vol. 14, c. 1118, § 478 [a].

§ 351. In general.

[a] (Mich. 1891) In the village of Vicksburg, whose charter contains no provision for the adjournment of causes commenced by warrant, an action commenced by warrant before a justice for breach of the peace will be governed as to adjournment by the general laws of the state relating to criminal proceedings.—Village of Vicksburg v. Briggs, 85 Mich. 502, 48 N. W. 625.

[b] (Minn. 1861) Pub. St. c. 59, § 37, which provides that a justice of the peace may, upon the application of either party, if sufficient cause be shown upon oath, adjourn the case, etc., does not authorize an adjournment by a justice on his own motion.—School Dist. No. 7 v. Thompson, 5 Minn. 280 (Gil. 221).

[c] (Mo. 1892) Rev. St. § 6235, authorizing a justice, neither party appearing, to give judgment by default on a written instrument, and section 6236, requiring him in other cases to enter a nonsuit, are mandatory, and, in a case to be established by parol, a justice cannot, plaintiff not appearing, pass it down, continue, or postpone it.—Bohle v. Kingsley, 51 Mo. App. 389.

[d] (N. J. 1809) A justice may, on his own convenience, adjourn the trial of a case for a period not exceeding 15 days.—Pierson v. Millan, 3 N. J. Law (2 Penning.) 564.

[e] (N. Y. 1804) A justice may continue his court from day to day when the exigencies of the case require it.—Day v. Wilber, 2 Caines, 134.

[f] (N. Y. 1847) A justice of the peace cannot hold a cause open for any number of days from the return of the summons, where the defendant does not appear and there is no issue joined, though he might, perhaps, adjourn the cause to a day certain; and where a cause was held open four days and then tried, the defendant not appearing, the proceedings were adjudged erroneous.—Wilcox v. Clement, 4 Denio, 160.

[g] (N. Y. 1861) On the return day a justice may adjourn the case of his own motion for a time not exceeding eight days.—Nellis v. McCarn, 35 Barb. 115.

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§ 352. Right to continuance and discretion of court.

Discretion as to admission of affidavit of third person on application for continuance, see post, § 355 [k].

[a] (Kan. 1868) A justice of the peace has no discretion to refuse a continuance to a party on his oath "that he cannot, for the want of material testimony which resides out of said county and which he has been unable to procure, safely proceed to trial, at this time, but that he expects to have said testimony at the expiration of 30 days"; no counter showing having been made.—West v. Rice, 4 Kan. 563.

[b] (Mich. 1874) In an action commenced by attachment before a justice of the peace, where an adjournment against defendant's protest was made to the same day and hour for which the hearing of a motion to dissolve the attachment before a commissioner at a considerable distance in another township had been fixed, the refusal, on the adjourned day, to grant a further adjournment, on a showing that both defendant and other material and necessary witnesses were also necessary and material witnesses on the rehearing before the commissioner, was an abuse of judicial discretion.—Mercer v. Lowell Nat. Bank, 29 Mich. 243.

[c] (Mich. 1896) The record of the justice showed that on the return day defendant demanded security for costs and a bill of particulars, and the cause was adjourned two weeks on an agreement that it should then be tried; that on the adjournment day defendant's counsel asked for a further adjournment, to which plaintiff objected, as he had several witnesses from a distance; that security for costs was entered on the adjournment day; that defendant was not prevented from preparing his defense from the delay in filing such security; that the bill of particulars was filed and served before the adjournment day, defendant knowing before such service who were his witnesses; and that no affidavit of merit was filed. *Held*, that the refusal of a further adjournment was not an abuse of discretion.—Walter A. Wood Mowing & Reaping Mach. Co. v. Vanderbilt, 109 Mich. 489, 67 N. W. 691.

[d] (N. Y. 1811) The discretion given to a justice by Acts 31st Sess. c. 204, § 2, to adjourn a cause, ought not to be exercised arbitrarily, but with sound discretion.—Rose v. Stuyvesant, 8 Johns. 426.

[e] (N. Y. 1811) A person was sued by warrant before a justice; but it did not appear, from the return to the certiorari, whether the defendant was in fact a freeholder, or person having a family, and that the requisite evidence was given to authorize the issuing of a warrant; and the defendant prayed for an adjournment for want of a material witness, and offered security to appear and stand trial; but the justice refused to grant an adjournment unless the defendant would make oath that the witness was material, which being refused, the justice proceeded, and gave judgment for the plaintiff. *Held*, that the defendant was entitled to an adjournment under Acts 31st Sess. c. 204, § 4, and the judgment was reversed.—Sebring v. Wheedon, 8 Johns. 458.

[f] (N. Y. 1812) A justice, on the return of a summons, may adjourn the cause for six days, at the plaintiff's request, without requiring an oath of the absence of at material witness.—Kittle v. Baker, 9 Johns. 354.

[g] (N. Y. 1817) If, on an application before a justice for a continuance, the opposite party will admit the matters expected to be proved by the absent witness, and such admission has been accepted, movant is precluded from asking for a second adjournment to enable him to prove the testimony of the same witness.—Brill v. Lord, 14 Johns. 341.

[h] (N. Y. 1818) Where a defendant is sued in a justice's court by warrant, he is entitled to an adjournment, on giving good security for his appearance, without making oath of the want of a material witness.—Cross v. Moulton, 15 Johns. 469.

[i] (N. Y. 1823) The defendant is entitled to one adjournment of course, on making oath and giving security.—Smith v. Fenton, 2 Cow. 425.

[j] (N. Y. 1845) An adjournment of a cause in a justice's court cannot be claimed as a matter of right, after a jury has been impaneled.—Parmelee v. Thompson, 7 Hill, 77.

[k] (N. Y. 1854) Where issue has been joined in a justice court, and the cause adjourned for trial, the defendant is not entitled, as a matter of right, to a further adjournment on the ground that his counsel is engaged in another court.—Ranney v. Gwynne, 3 E. D. Smith, 59.

[l] (N. Y. 1855) A defendant is not entitled to an adjournment in justices' courts, as a matter of right, and without showing any sufficient reason therefor.—Rawson v. Grow, 4 E. D. Smith, 18.

[m] (N. Y. 1887) A party to an action in a justice court is not entitled, as a matter of right, to an adjournment for the want of a material witness, without proof thereof; but the application lies within the discretion of the justice.—Penoyer v. Phillips, 10 N. Y. St. Rep. 783.

[n] (Vt. 1876) Gen. St. c. 31, § 50, requiring a justice, in an action commenced without service on defendant, to continue the cause for notice to him, is mandatory.—Rollins v. Clement, 49 Vt. 98.

§ 353. Condition of cause.

[a] (Ill. 1870) Justices' and Constables' Act 1857, § 27 (Gross' Comp. Laws, p. 405, §§ 105, 106), authorizing service by copy, construed to imply that a cause cannot be continued by a justice without such service.—Bell v. Dart, 54 Ill. 526.

[b] (Me. 1840) St. 1834, c. 101, gives power to a justice of the peace to continue a cause to be tried by another justice, before whom the writ was made returnable, only on the return day of the writ.—Spencer v. Perry, 17 Me. (5 Shep.) 413.

[c] (Me. 1840) The justice has no power to continue a cause before the time at which the writ is returnable, notwithstanding apprehended violence in case he attempts to hold court.—Martin v. Fales, 18 Me. (6 Shep.) 23, 36 Am. Dec. 693.

[d] (Me. 1850) By Rev. St. c. 16, § 14, a justice of the peace is authorized to continue once a cause brought before another justice. *Held*, that this continuance may be ordered on the return day of the writ, or any day of adjournment, when the original justice is unable to attend.—Tyler v. Beal, 31 Me. 336.

[e] (Mich. 1861) The right expressly given to a justice by Comp. Laws, § 90, to adjourn a cause of his own motion, on the return day, cuts off all implication of an intent to give him the like power in any other stage of the case.—Stadler v. Moors, 9 Mich. 264.

[f] (Mich. 1895) Under 2 How. Ann. St. § 6903, authorizing a justice, under certain conditions, "at the time of the return" of a summons in replevin, to adjourn the cause, an adjournment by him on the return day of the writ, without any return of the writ, is unauthorized, and proceedings had under the ad-

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journment would be void.—Harbour v. Eldred, 107 Mich. 95, 64 N. W. 1054.

[g] (N. J.) A justice cannot adjourn a trial without consent of the parties after it is actually commenced by going into evidence on the merits.—(1807) Andrews v. Wright, 2 N. J. Law (1 Penning.) 280; (1810) Stretch v. Forsyth, 3 N. J. Law (2 Penning.) 713.

[h] (N. J. 1811) Before an adjournment can take place in the justice's court, a summons must be returned and the parties in court, or at least the plaintiff must appear.—Halsey v. Whitlock, 3 N. J. Law (2 Penning.) 869.

[i] (N. Y. 1811) The right of a justice to adjourn a cause on his own motion must be claimed and exercised at the return of process.—Kilmore v. Sudam, 7 Johns. 529.

[j] (N. Y. 1811) In an action before a justice it is too late to ask for an adjournment after the jury are sworn.—Fink v. Hall, 8 Johns. 437.

[k] (N. Y. 1845) Where, on the return of a summons or attachment, defendant refuses to plead, the justice may, on his own motion, or on the application of the plaintiff, adjourn the cause not exceeding eight days, notwithstanding no issue has been joined.—Thompson v. Sayre, 1 Denio, 175.

[l] (N. Y. 1855) A justice has no power to adjourn a cause after the trial has commenced, without the consent of the parties, unless it is found impossible to finish the trial within a reasonable time for holding court.—Story v. Bishop, 4 E. D. Smith, 423.

[m] (N. Y. 1891) Code Civ. Proc. § 2959, provides that at the time of the return of a summons, or of the joinder of issue without process, but at no other time, the justice may on his own motion adjourn the trial not more than eight days. Section 2960 provides that at such time an adjournment may be had at plaintiff's instance if he shows on oath that he cannot safely proceed to trial for want of material evidence. *Held*, that after a trial has been had, at which the jury disagreed, it is error, on the return of the new venire, to allow plaintiff an adjournment on the ground of absent witnesses against defendant's objection.—Hannaman v. Muckle (Co. Ct.) 15 N. Y. Supp. 961, 20 Civ. Proc. R. 296.

[n] (N. Y. 1895) Where attachments were issued in a justice's court to compel the attendance of witnesses after the court had decided to adjourn until next day, the fact that it did adjourn before the return of the writs was not error.—Fish's Eddy Chemical Co. v. Stevens, 92 Hun, 179, 36 N. Y. Supp. 397.

[o] (Vt. 1834) A justice may adjourn after a jury has been drawn which the officer is proceeding to summon; the statute confining the power to no particular stage of the proceeding.—Griffin v. Spaulding, 6 Vt. 60.

§ 354. Grounds.

Entering grounds on record, see post, § 457.

[a] (Ga. 1887) Under Code, § 4154, providing that cases before justices shall be tried at the time and place mentioned in the summons, a justice cannot continue a case to perfect service.—Western & A. R. Co. v. Pitts, 79 Ga. 532, 4 S. E. 921.

[b] (Mich. 1861) Where a justice was a few moments late at the hour set for the hearing of an adjourned case, being employed on a coroner's inquest, and defendant left the office at the end of the hour, ignorant of the cause of the justice's absence, dismissing his witnesses, he was entitled to the necessary time to procure their attendance again.—Stadler v. Moors, 9 Mich. 264.

[c] (Mich. 1885) A justice of the peace should not grant a continuance to allow a party to procure the assistance of counsel.—Warner v. Comstock, 55 Mich. 615, 22 N. W. 64.

[d] (N. Y. 1851) To entitle defendant in a justice's court to demand an adjournment, he must make oath that he cannot safely proceed to trial for want of some material testimony or witness.—Lynsky v. Pendegrast, 2 E. D. Smith, 43.

[e] (N. Y. 1861) A justice of the peace may adjourn a case on the return day, if plaintiff makes oath that he cannot safely proceed to trial on account of the absence of material witnesses.—Nellis v. McCarn, 35 Barb. 115.

[f] (N. Y. 1871) A defendant on joining issue before a justice of the peace pleaded a general denial, and desired to plead payment, but the justice, with the plaintiff's knowledge, declined to receive the plea, on the ground that the defense of payment was covered by the general issue. *Held*, that this was notice to the plaintiff that the defendant relied on payment as a defense, and that the refusal of the justice on the trial to allow an adjournment to the plaintiff on an affidavit of surprise, absence of witnesses, etc., after permitting the defendant to amend his answer by pleading payment, was not error for which the judgment would be reversed.—Sherar v. Willis, 5 Lans. 329.

[g] (N. Y. 1885) A justice has no power to adjourn summary proceedings, except under Code, § 2248, for the purpose of enabling a party to procure his necessary witnesses.—Kiernan v. Reming, 2 How. Prac. (N. S.) 89, 7 Civ. Proc. R. 311.

[h] (N. Y. 1887) The Code of Civil Procedure, authorizing the adjournment of summary proceedings in the discretion of the judge or justice before whom they are pending for the purpose of procuring necessary witnesses, does not prohibit an adjournment for any other cause satisfactory to the court.—Goff v. Vedder, 12 Civ. Proc. R. 358.

[i] (Pa. 1831) A party who neglects, up to the day of hearing before a justice, to take the proper legal steps to procure the attendance of his witnesses, is not entitled to a continuance.—Knight v. Parry, 1 Ashm. 221.

[j] (W. Va. 1889) Code, c. 50, § 58, provides that a defendant in an action before a justice, upon making oath that he has a just defense to the action, may demand a continuance as of right. Section 60 provides that either party may have a continuance on showing that he cannot safely proceed to trial for want of some material evidence, and that he has used due diligence to procure the same. *Held*, that a defendant who does not make the oath prescribed by section 58, but moves for a continuance on the ground of want of counsel and absence of a witness, must show that he has used due diligence to secure such witness.—Mullinax v. Waybright, 33 W. Va. 84, 10 S. E. 25.

§ 355. Application and procedure.

Application as constituting appearance, see ante, § 266.

[a] (Ind. 1871) In an action against joint defendants before a justice of the peace, an order for a continuance of the cause as to a part of the defendants is void.—Root v. Dill, 38 Ind. 169.

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[b] (Iowa, 1894) An affidavit for a continuance in a justice's court which alleges that defendant's attorney knew that there were a number of cases assigned for hearing before his, and that he was informed that such cases would be ready for trial, and, not thinking his case would be called, had left town on business, does not show due diligence, as it does not show of whom he inquired, or that he had sufficient reason to rely upon the information.—Cox v. Allen, 91 Iowa, 462, 59 N. W. 335.

[c] (Me. 1873) When a trial justice is unable to attend at the time and place appointed for trial, the continuance by another justice, as provided by Rev. St. c. 83, § 12, must be within and not without the office appointed as the place of trial.—Belcher v. Treat, 61 Me. 577.

[d] (Mich. 1872) A cause may be adjourned by a justice of the peace on the written stipulation of counsel, without the presence of the parties.—Parmalee v. Loomis, 24 Mich. 242.

[e] (Mich. 1877) Where, on return day of a summons issued from a justice's court, an affidavit is filed showing that defendant is too unwell to leave his house, and plaintiff's counsel admits that defendant was ill the day previous, it is error to refuse a continuance.—Locke v. Leonard Silk Co., 37 Mich. 479.

[f] (Mich. 1883) An application for adjournment on affidavits is properly refused by a justice on refusal of the party to submit to a cross-examination.—Boatz v. Berg, 51 Mich. 8, 16 N. W. 184.

[g] (Mich. 1887) The authority of a justice of the peace to adjourn a cause on account of the absence of material witnesses must, by How. Ann. St. § 6899, be on showing made upon oath; and it is error to adjourn a cause in absence thereof.—Scullen v. George, 65 Mich. 215, 31 N. W. 841.

[h] (Minn. 1861) On the return day of a summons in a justice's court, plaintiff appeared and filed his complaint, but defendant did not appear. An adjournment was granted on affidavit of plaintiff's attorney that he "had a subpœna for, but was unable to procure the attendance of, a material witness, and could not safely proceed to trial without such witness." *Held*, that such affidavit was insufficient to authorize an adjournment.—School-Dist. No. 7 v. Thompson, 5 Minn. 280 (Gil. 221).

[i] (Minn. 1875) Where the opposite party consents to an adjournment of a case in a justice's court for more than a week, the affidavit required by Gen. St. c. 65, § 34, to obtain an adjournment to a day later than one week, may be dispensed with.—O'Brien v. Pomroy, 22 Minn. 130.

[j] (N. Y. 1806) If the defendant's attorney offer to make affidavit of the absence of a material witness, and request an adjournment, his affidavit should be received, unless some special objection be shown.—Seers v. Grandy, 1 Johns. 514.

[k] (N. Y. 1816) The admission of an affidavit of any other person than the party himself, for the purpose of obtaining a second adjournment on account of the absence of material witnesses, rests in the sound discretion of the justice.—Killmer v. Crary, 13 Johns. 228.

[l] (N. Y. 1833) An adjournment by agreement of parties, in the absence of the justice, is not regularly made, though afterwards entered by him on his docket.—Kimball v. Mack, 10 Wend. 497.

[m] (N. Y. 1854) After the parties had pleaded, a justice of the peace adjourned the cause to the 20th of May, and then left his office. When he returned a short time afterwards, he found lying on his desk a written consent, signed by the counsel for both parties, that the cause should stand adjourned to the 18th of May, and thereupon did so adjourn it, neither the counsel nor the parties being present. *Held*, that the latter adjournment, in the absence of parties and counsel, was void.—Weeks v. Lyon, 18 Barb. 530.

[n] (N. Y. 1855) A motion to adjourn for the want of material evidence cannot properly be granted when founded on an affidavit which is defective in not being entitled, or in not stating in the body of it, the action in which the witness is required.—Irroy v. Nathan, 4 E. D. Smith, 68.

[o] (N. Y. 1858) An affidavit for a continuance in a justice court, alleging that a material witness was not within reach of process on the day the affidavit was made, is insufficient, since it may still be true that he was within reach until that day, and that no effort had been made to secure his attendance.—Cristman v. Paul, 16 How. Prac. 17.

[p] (N. Y. 1861) Where plaintiff testified that he could not safely proceed to trial on account of the absence of witnesses, the justice was authorized to grant an adjournment, notwithstanding he did not swear that the witnesses were material; his language plainly implying such fact.—Nellis v. McCarn, 35 Barb. 115.

[q] (N. Y. 1868) A justice may allow a plaintiff to introduce evidence showing that the defendant's application for adjournment was not made in good faith and was groundless.—Weed v. Lee, 50 Barb. 354.

[r] (N. Y. 1870) The refusal of an application before a justice of the peace for an adjournment, under 2 Rev. St. p. 239, § 75, providing for such adjournment where the justice is satisfied that the applicant cannot safely proceed to trial for the want of material testimony, is proper, where the applicant does not allege that he cannot safely go to trial without the witness, and where the materiality of the witness was based on the advice of counsel, without proof that the counsel had knowledge as to the materiality.—Burgett v. Edwards, 4 Lans. 193.

[s] (Pa. 1881) Where a material witness in an action before a justice of the peace is absent, and after due diligence by the party desiring him he cannot be produced at the trial, the justice should grant a continuance, though the party does not make the affidavit of facts required by Act March 20, 1810.—Dunfee v. Vargason, 3 Pa. Co. Ct. R. 207.

[t] (Tex. 1883) On application for a continuance in a county court, previous applications for continuance of the cause in justice court, made before the appeal was taken, will be considered in determining its sufficiency.—Heidenheimer v. Bledsoe, 1 White & W. Civ. Cas. Ct. App. § 318.

[u] (Vt. 1846) If the justice of the peace before whom a writ is made returnable is absent at the return day, another justice, in order regularly to continue the suit, must be present at the place of return, within the two hours from the time appointed for the return, and there, having the writ in his possession, continue the case.—Hinman v. Swift, 18 Vt. 315.

[v] (Vt. 1850) Where the justice's office at which the writ is made returnable is closed, it is sufficient if another magistrate go to the door within two hours after the time specified for the trial, having the writ in his possession, and decide to continue the case, though he do not

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go within the office, and do not make an audible call of the suit and the parties, nor audibly declare the case continued, and do not make the entry of the continuance on the writ at the door of the office, nor within the two hours.—Knight v. Berry, 22 Vt. 246.

[w] (Vt. 1854) If the entry of a continuance is in the handwriting of the plaintiff's attorney, it is no ground of objection if the continuance was granted, and the entry assented to and adopted by the justice, by his official signature.—Eastman v. Waterman, 26 Vt. 494.

§ 356. Security.

[a] (Nev. 1893) Where, by consent of parties, a case in a justice's court is adjourned for more than 10 days, the undertaking to pay the judgment that may be required, provided for by section 3565, Gen. St., is not required, and a dismissal of the action for the reason that such undertaking has not been given is error.—Nevada Cent. R. Co. v. District Court of Lander County, 21 Nev. 409, 32 Pac. 673.

[b] (N. Y. 1810) The security to be taken by a justice for the defendant's appearance at an adjournment must be either a recognizance, or a written engagement, of the bail. Oral security is void by the statute of frauds.—McNutt v. Johnson, 7 Johns. 18.

[c] (N. Y. 1823) In an action against the surety for an adjournment, under section 4 of the $25 act, the original judgment is the measure of the damages. To bring the security within section 5, the adjournment must be on oath.—Stewart v. McGuin, 1 Cow. 99.

[d] (N. Y. 1823) The object of the act providing that if the adjournment is required by the defendant he shall give sufficient security to appear on the day to which the cause is adjourned, and in default of such appearance to pay the debt adjudicated against him, is to place the plaintiff in the same situation at the adjourned day as he was in on the return of process.—Cornell v. Reynolds, 1 Cow. 241.

[e] (N. Y. 1823) A cause being adjourned, under section 4 of the $25 act, on giving security, the defendant appeared at the adjourned day, and on verdict against him, his bail immediately tendered him to the justice, who called for a constable to take charge of him, but finding none, he said he had nothing to do with the defendant. *Held*, that the bail was discharged, though the principal was not to be found, on entering judgment and issuing execution.—Cornell v. Reynolds, 1 Cow. 241.

[f] (N. Y. 1823) Where the plaintiff proceeds as a nonresident, the defendant need not give security for an adjournment.—Row v. Pulver, 1 Cow. 246.

[g] (N. Y. 1823) Under the fifth section of the $25 act, the security for an adjournment is not satisfied by the mere appearance of the defendant at the adjourned day, but the debt must be paid, or the body surrendered in execution.—Sarles v. Hyatt, 1 Cow. 253.

[h] (N. Y. 1847) Where a defendant in a justice's court executed a bond, with surety, under Act 1831, p. 405, § 40, reciting that the defendant had applied for an adjournment of the cause, and conditioned to be void if he should not dispose of his property until after the expiration of 10 days after the plaintiff should be entitled to execution on the judgment, it was *held* that the bond was only to become effective in case an adjournment was granted, and that, if no adjournment took place after the execution of the bond, the surety incurred no liability; also, that it made no difference in this respect that the bond was executed and dated on the day the cause was tried, as a substitute for a similar bond executed by the defendant with another surety, on an actual adjournment of the cause on a prior day, the substitution being made to enable the former surety to testify.—Mosier v. McKay, 4 Denio, 116.

[i] (N. Y. 1849) A bond given on an adjournment of a case in a justice court is not affected by 2 Rev. St. (2d Ed.) p. 214, § 60, forbidding a sheriff or other officer to take any bonds or other security by color of his office, in any case or manner than such as are provided by law.—Williams v. Hubbard, 2 Code Rep. 52.

[j] (N. Y. 1849) A bond given on an adjournment of a case in justice court in the sum of $200, instead of $100 as prescribed by statute, is valid.—Williams v. Hubbard, 2 Code Rep. 52.

[k] (N. Y. 1849) In a justice court, an adjournment bond was given at the joining of issue and the case was adjourned, from time to time, beyond 90 days from the joining of issue by consent of the parties to the suit, but without the consent or knowledge of the sureties. *Held*, that such adjournment and agreement of the parties did not discharge the sureties, since the adjournment was regular, and by 2 Rev. St. (2d Ed.) p. 170, § 86, it was not necessary to give a new bond on an adjournment subsequent to the one at which the bond was given, unless required by the justice or the bail of defendant in the prior bond.—Williams v. Hubbard, 2 Code Rep. 52.

[l] (N. Y. 1851) A defendant in a justice's court is not entitled to a long adjournment, without giving, in addition to a proper affidavit, security for his appearance and for payment of damages and costs.—Belshaw v. Colie, 1 E. D. Smith, 213.

[m] (N. Y. 1860) On motion of the defendant, the justice adjourned the case for eight days without requiring the oath and bail demanded by the plaintiff as a condition of the adjournment. The plaintiff had his old subpœna renewed. On the adjourned day the plaintiff did not appear, and on motion of the defendant the justice ordered a nonsuit and judgment for costs. *Held*, that the justice had power at his discretion to adjourn without bail, but that his return showed in this case that he adjourned on the defendant's motion, and not of his own accord, and that he had no power to adjourn on the defendant's motion without ordering bail as demanded.—Peck v. Andrews, 32 Barb. 445.

§ 357. Time and place for adjournment.

[a] (Conn. 1841) A justice of the peace, being a county officer, may properly adjourn his court to an adjoining town in his county for the purpose of examination of witnesses.—Town of Lyme v. Town of East Haddam, 14 Conn. 394.

[b] (Del. 1842) A justice of the peace cannot adjourn a cause indefinitely, but only to a day certain.—Barr v. Chaytor, 3 Har. 492.

[c] (Ga. 1884) Under Code, § 4130, requiring "all continuances in justice's courts to be from term to term," the consent of parties to a continuance out of term will not validate it.—White v. Mandeville, 72 Ga. 705.

[d] (Iowa, 1883) An agreement by a justice of the peace to hold a case open till the agent of defendant could telegraph to his principal in another state for information as to the defense is mere matter of grace, and is reasonably complied with by an adjournment from Saturday till 8 o'clock Monday morning.—Olim v. Chicago, M. & St. P. Ry. Co., 61 Iowa, 250, 16 N. W. 124.

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[e] (Kan. 1888) It is error for a justice to continue an action more than eight days without the consent of a party who is present in court.—Covart v. Haskins, 39 Kan. 571, 18 Pac. 522.

[f] (Mich. 1888) Suit was brought before a justice October 28th; the writ being returnable November 8th. On the return day the cause was continued to January 28th. *Held*, that the continuance dates from the return day, and under How. Ann. St. § 6899, providing that a justice may continue a case for three months, it was not beyond the lawful time.—Hatch v. Christmas, 68 Mich. 84, 35 N. W. 833.

[g] (N. J. 1807) Where on the adjourned day the parties appear, but the witnesses do not appear, it was error for the justice to adjourn the cause for more than 15 days from the date of summons.—White v. Lippincot, 2 N. J. Law (1 Penning.) 266.

[h] (N. J. 1837) A justice of the peace cannot adjourn a cause on his own motion and for his own convenience for a longer time than he has power to do for the convenience of the parties.—Lloyd v. Hance, 16 N. J. Law (1 Har.) 127.

[i] (N. Y. 1799) A justice of the peace cannot adjourn a cause for a longer time than six days without consent of parties.—Palmer v. Green, 1 Johns. Cas. 101.

[j] (N. Y. 1804) Under the £10 act, where a nonresident sues by warrant before a justice, the justice cannot adjourn the cause for more than three days, without the plaintiff's consent.—Candee v. Goodspeed, 2 Caines, 245.

[k] (N. Y. 1805) If on the return day of the summons defendant pleads, and the justice without his consent adjourns on a prayer of the plaintiff for more than six days, it is error.—Colden v. Dopkin, 3 Caines, 171.

[l] (N. Y. 1807) A justice of the peace cannot, on his own motion, adjourn a case for a time exceeding six days after the return of the process.—Gamage v. Law, 2 Johns. 192.

[m] (N. Y. 1812) The justice may, at defendant's request, adjourn the cause for one day, or for a less time than three days, where the defendant is brought up on a warrant, and issue is joined between the parties.—Bowditch v. Salisbury, 9 Johns. 366.

[n] (N. Y. 1816) It is an abuse of discretion for a justice of the peace to suspend the trial of a cause, after it has been commenced, for 20 hours, in order to allow one of the parties to produce further proof.—Green v. Angel, 13 Johns. 469.

[o] (N. Y. 1823) A justice may, without consent of parties, adjourn to a convenient place different from that where the process is returnable; the process being returned, and both parties being present.—Morrell v. Near, 1 Cow. 112.

[p] (N. Y. 1823) A justice of the peace may, on plaintiff's request, adjourn seven days, exclusive from the return of summons, when the sixth day is Sunday.—Speidell v. Fash, 1 Cow. 234.

[q] (N. Y. 1842) Prior to the act of 1841, and under the act of 1838, a plaintiff in a justice's court, suing out a commission to examine a witness, could not have an adjournment for more than eight days.—Allen v. Edwards, 3 Hill, 499.

[r] (N. Y. 1842) A justice cannot postpone a cause indefinitely.—Allen v. Edwards, 3 Hill, 499.

[s] (N. C. 1834) Under the act of 1803, a justice may postpone a cause for 30 days, excluding Sundays.—Shipman v. Mears, 15 N. C. 484.

[t] (Vt. 1829) The nineteenth section of the act defining the powers of justices of the peace provides "that every justice of the peace shall have power to adjourn the trial of any civil action brought before him to such future time as may be proper, not exceeding three months." *Held*, that the word "months" means calendar, not lunar, months.—Kimball v. Lamson, 2 Vt. 138.

[u] (Vt. 1834) A justice may adjourn his court to any part of the town in which its original place of sitting was fixed.—Griffin v. Spaulding, 6 Vt. 60.

[v] (Vt. 1857) The continuance of a suit before a justice for one day only, for the reason that the defendant is out of the state and has had no notice of the suit, is, as matter of law, on the face of the record, a sufficient compliance with the statute requiring a continuance in such cases for a time not exceeding one month, in the absence of any evidence of fraud aliunde.—Stevens v. Fisher, 30 Vt. 200.

[w] (Wis. 1851) A justice of the peace may continue a cause 90 days for trial.—Caughey v. Vance, 3 Chand. 308, 3 Pin. 275.

[x] (Wis. 1854) In all cases before justices of the peace, a particular hour of a day certain must be fixed for parties to appear, not only on the return day of the summons, but on all adjournments during the cause. Rev. St. c. 88, § 11.—Roberts v. Warren, 3 Wis. 736.

[y] (Wis. 1854) The place designated for appearance on an adjourned day may be the office of the justice, and if he keeps no place or room as his office, his place of residence would be deemed such.—Roberts v. Warren, 3 Wis. 736.

§ 358. Second or further continuance.

Discretion of court, see ante, § 352 [b, c, k].

[a] (Del.) There may be a second adjournment of a cause before a justice of the peace, without application from either party.—(1843) Mousely v. Allmond, 4 Har. 92; (1846) Deputy v. Betts, Id. 352.

[b] (Del. 1845) A justice of the peace may make a second adjournment of a cause of his own motion, without affidavit.—Kinniken v. Kinney, 4 Har. 313.

[c] (Me. 1840) Where a justice has ordered a continuance of an action, he cannot order a further continuance prior to the day appointed.—Spencer v. Perry, 17 Me. (5 Shep.) 413.

[d] (N. J. 1825) Under the act of November 17, 1820, a justice may, on reasonable cause being assigned, grant a second adjournment within the period of 30 days from the return of the process, and is not restricted in granting such adjournment to the single cause of the absence of a material witness shown by affidavit.—Horner v. Hewlings, 8 N. J. Law (3 Halst.) 227.

[e] (N. J. 1833) A party applying for a second adjournment in the justice's court must make affidavit of the want of a material witness, whom he shall name, and whom he thinks he can produce at a future period, and then the justice may adjourn the trial for not more than 30, nor less than 5, days.—Midler v. Lazadder, 14 N. J. Law (2 J. S. Green) 34.

[f] (N. J. 1886) Revision, p. 545, § 30, provides that where on the return day a party makes affidavit that a material witness is absent from the state the justice may postpone the trial to a time not exceeding three months.

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Held, that where, on filing such affidavit, the justice adjourns to a time less than 30 days from the return day, a second adjournment cannot be granted the party to a time exceeding 30 days from the return day; a further affidavit of continuing absence of witness not being filed.—Savage v. Collins, 49 N. J. Law (20 Vroom) 107, 6 Atl. 502.

[g] (N. Y. 1807) A justice cannot on his own motion adjourn a cause more than once.—Gamage v. Law, 2 Johns. 192.

[h] (N. Y. 1807) Where a defendant was brought before a justice under the £10 act, on a warrant and at the request of the defendant, with the consent of the plaintiff, the cause was adjourned to another day, when the parties appeared, and the defendant requested a second adjournment on account of the absence of a material witness, it was *held* that the justice was bound, on the defendant's offering to give security, to grant a further adjournment, and that the time might extend to three months, as this was not a case within section 4 of the act, allowing an adjournment for 12 days only.—Easton v. Coe, 2 Johns. 383.

[i] (N. Y. 1808) Where the justice has once adjourned the cause for three months, at defendant's request, he cannot grant a second adjournment at his request.—Townsend v. Lee, 3 Johns. 435.

[j] (N. Y. 1811) Where the first adjournment is made by consent of parties, the justice cannot adjourn the cause a second time on his own motion, but the plaintiff, having consented to a second adjournment, and defendant making no objection, the adjournment will be *held* to have been made by consent of both parties.—Kilmore v. Sudam, 7 Johns. 529.

[k] (N. Y. 1812) Where a party has had one adjournment after issue joined, he cannot have a second, though he tender security, unless he shows that he has used due diligence to procure his witnesses, or that there is some special cause for their nonattendance, or for an adjournment.—Powers v. Lockwood, 9 Johns. 133.

[l] (N. Y. 1812) Where the parties joined issue on the return of the summons, and a venire was awarded at the plaintiff's instance, and the justice adjourned the cause for six days, when the defendant appeared and demanded an adjournment, which the justice refused unless the defendant would pay the costs of the venire, it was *held* that the justice had no right to refuse an adjournment on that ground.—Hemstract v. Youngs, 9 Johns. 364.

[m] (N. Y. 1814) After issue joined, the cause was adjourned at the request of the defendant, for more than 30 days, upon giving security, etc. At the day fixed by the adjournment, the parties appeared, and the defendant showed due diligence in subpœnaing his witnesses, and made oath that a material witness who had been subpœnaed did not attend, and prayed a second adjournment, which the justice refused unless the defendant would pay extra costs; which not being done, the cause was heard ex parte and decided. *Held*, that the defendant, having given security and shown due diligence in procuring the attendance of witnesses, etc., was entitled to a second adjournment.—Beekman v. Wright, 11 Johns. 442.

[n] (N. Y. 1815) A justice may refuse a second adjournment for the purpose of procuring witnesses where he shows no excuse for not having procured them after the first adjournment.—St. John v. Benedict, 12 Johns. 418.

[o] (N. Y. 1816) Where an adjournment has been granted at the plaintiff's request, and a day for trial agreed on by the parties, the defendant is not precluded from asking a further adjournment, on showing good cause.—Annin v. Chase, 13 Johns. 462.

[p] (N. Y.) A defendant in a justice's court, applying for a second adjournment because of the absence of a witness, must bring himself within the statute, and show affirmatively and satisfactorily that he has used due diligence to obtain the attendance of the absent witness.—(1818) Farrington v. Payne, 15 Johns. 432; (1858) Cristman v. Paul, 16 How. Prac. 17.

[q] (N. Y. 1818) Where a cause has been once adjourned by consent of parties, a second adjournment cannot be granted at the instance of the plaintiff.—Payne v. Wheeler, 15 Johns. 492.

[r] (N. Y. 1823) The 12 days' adjournment on a warrant is not satisfied by an adjournment for less than 12 days; but the justice may adjourn from time to time, at shorter periods, till the several adjournments reach 12 days.—Richardson v. Brown, 1 Cow. 255.

[s] (N. Y. 1823) A defendant may be entitled to more than one adjournment, on showing sufficient cause, provided the three months have not expired.—Smith v. Fenton, 2 Cow. 425.

[t] (N. Y. 1823) Though a cause has been twice adjourned by consent, and the last adjournment was under a stipulation of the defendant that he would delay the cause no further but will come to trial on the adjourned day, yet the justice is bound to adjourn again, on the defendant's showing, on oath, the absence of material testimony and due diligence used to obtain it, and giving security.—Smith v. Fenton, 2 Cow. 425.

[u] (N. Y. 1847) Where a cause in a justice's court stands adjourned to a particular day, the justice cannot, before the day arrives, on information given on oath by a person that both parties have consented, adjourn the cause to a later day.—Deland v. Richardson, 4 Denio, 95.

[v] (N. Y. 1896) Under Code Civ. Proc. § 2060, authorizing an adjournment at plaintiff's instance only on the return day of the summons, a second adjournment at plaintiff's instance is unauthorized.—Newman v. Woodcock (Co. Ct.) 16 Misc. Rep. 142, 38 N. Y. Supp. 957.

[w] (Vt. 1847) The words "whenever, at the time and place appointed for the trial of any civil suit before a justice, such justice shall be unable to attend, any other justice may continue the cause," etc., in Rev. St. c. 26, § 19, apply only to the time and place appointed in the writ for trial, and do not authorize such other justice to continue the suit after it has been once continued by the justice who signed the writ.—Whitcomb v. Rood, 20 Vt. 49.

[x] (Vt. 1871) Gen. St. c. 31, § 41, providing that "a justice may adjourn his court at any stage of the proceeding in any cause, to any time not exceeding three months," *held* to import a limitation of each adjournment, and not of the aggregate time of all the adjournments.—Bryant v. Pember, 43 Vt. 599.

§ 359. Renewal of proceedings after adjournment.

Absence of justice at time set for hearing as ousting jurisdiction, see ante, § 191.

—— *of plaintiff, see* ante, § 192.

[a] (Kan. 1891) Where an action before a justice of the peace is continued to a certain day by the agreement of both parties, defendant's attorney has no right to rely on a promise of the justice that the case should not be called for trial until he (the attorney) had

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been notified.—Snively v. Hill, 46 Kan. 494, 26 Pac. 1024.

[b] (Neb. 1883) Where an action in a justice's court was adjourned to 1 o'clock of a future day, defendant was entitled to one hour in which to appear at the adjourned session of the court.—Andrews v. Mullin, 14 Neb. 248, 15 N. W. 216.

[c] (N. Y. 1822) After issue joined in a justice's court, the cause was adjourned to another day, and the justice waited a full hour after the time appointed for the appearance of the parties. *Held*, that this was a reasonable delay, and that he might proceed to call the parties, and give judgment against the one who neglected to appear.—Shufelt v. Cramer, 20 Johns. 309.

[d] (N. Y. 1833) If a justice of the peace adjourns a cause till 1 o'clock p. m., and is occupied officially till 5 p. m., he can then resume the cause, though the defendant be absent.—Hunt v. Wickwire, 10 Wend. 102, 25 Am. Dec. 545.

[e] (N. Y. 1848) Where a cause before a justice of the peace is held open to a particular hour on a subsequent day, the justice should wait an hour after the time specified for the parties to appear; and it is erroneous for him to call the cause, in the absence of one of the parties, and proceed to the hearing thereof, before the expiration of that time.—Clark v. Garrison, 3 Barb. 372.

[f] (N. Y. 1893) The rule requiring justices of the peace to wait one hour before proceeding to trial, unless the parties sooner appear, applies to an adjourned day as well as to the return day of the summons.—Nichols v. Place (Co. Ct.) 23 N. Y. Supp. 134, 1 Misc. Rep. 497.

[g] (N. Y. 1895) Where a cause in a justice court has been adjourned by consent, judgment cannot be entered on the adjourned day until the lapse of one hour from the time set, unless the parties agree to waive the practice of waiting one hour.—Freeborn v. Badgley (Co. Ct.) 15 Misc. Rep. 173, 37 N. Y. Supp. 17.

[h] (Vt. 1829) Act 1803, § 5, requiring justices of the peace not to default an action until two hours after the time set for trial, applies exclusively to the return day of the writ, and not to adjourned cases.—Steel v. Bates, 2 Vt. 320.

§ 360. Operation and effect.

Unauthorized adjournment as ousting jurisdiction, see ante, §§ 193–197.

[a] (Iowa, 1891) After replevying liquors seized under a search warrant, the owner entered an appearance in the seizure case. The justice continued the case pending the replevin suit, and finally rendered judgment against the owner in such case. *Held*, that the question as to the right of the court to grant such continuance could not be raised in the replevin suit.—Lemp v. Fullerton, 83 Iowa, 192, 48 N. W. 1034, 13 L. R. A. 408.

[b] (Minn. 1859) Where a justice has adjourned a cause, and entered the adjournment in his docket, he cannot afterwards, without the consent of parties, change the day of adjournment.—Wardlow v. Besser, 3 Minn. 317 (Gil. 223).

[c] (Minn.) A consent to an adjournment of a cause in a justice's court does not carry with it a consent to file pleadings therein after the expiration of a week from the time of the return of the summons.—(1863) Holgate v. Broome, 8 Minn. 243 (Gil. 209); (1869) Mattice v. Litcherding, 14 Minn. 142 (Gil. 110).

[d] (Minn. 1878) Neither request for, nor consent to, an adjournment in a justice's court is an implied recognition of the validity of an unverified pleading.—Thompson v. Killian, 25 Minn. 111.

[e] (N. J. 1854) Where a case in a justice's court is adjourned to no certain day, but the time is left to the agreement of counsel, the justice has no authority afterwards to appoint a time and place for the trial, without the consent of both parties.—Woodworth v. Wolverton, 24 N. J. Law (4 Zab.) 419.

[f] (Vt. 1836) The question of continuance, in case of mere absence of the justice before whom the writ is returnable, is to be determined on the sufficiency of the reason for such absence; and the adjudication of the other justice is final.—Holland v. Osgood, 8 Vt. 276.

[g] (Vt. 1850) If the justice of the peace before whom a writ is made returnable be absent at the return day from the place set for trial, a regular continuance of the suit by another magistrate, pursuant to the statute, constitutes a sufficient entry of the action.—Knight v. Berry, 22 Vt. 246.

[h] (Vt. 1853) A justice continuing a case for a week or more may require the same jury to attend again, though the better course might be to summon a new jury at the continued term, as is done in the county court.—Ex parte Tracy, 25 Vt. 93.

[i] (Wis. 1861) Where a justice has adjourned a case for 90 days, he has no power afterwards to change the time to a shorter period.—Mahr v. Young, 13 Wis. 634.

§ 361. Objections and exceptions.

[a] (Kan. 1871) A party on whose motion a case in the justice's court has been continued for more than 90 days, in violation of Gen. St. c. 81, § 82, cannot ask a dismissal because of the delay.—Jennerson v. Garvin, 7 Kan. 136.

[b] (Md. 1876) One at whose instance an irregularity in a judgment occurred, as in case of a postponement at his instance by a justice of the peace for a longer time than that fixed by statute, will not be allowed to take advantage of the irregularity.—Ewing v. Nickle, 45 Md. 413.

[c] (Mich. 1882) An objection that a case had been illegally adjourned in justice's court is unavailable if not taken before the trial.—Erie Preserving Co. v. Kane, 49 Mich. 377, 13 N. W. 781.

[d] (Minn. 1875) Defects in respect to adjournment in a justice's court may, as to parties, be waived.—Burt v. Bailey, 21 Minn. 403.

[e] (N. J. 1891) Upon a mistrial before a justice of the peace, by reason of a disagreement of the jury, the record showed that an adjournment was had by consent, and that at the time of the second trial both parties appeared and entered upon a trial on the merits. *Held*, that an objection that the adjournment was not made in the presence of the parties is without merit.—Frost v. Chandler, 54 N. J. Law (25 Vroom) 128, 22 Atl. 1084.

[f] (N. Y. 1805) An adjournment for more than six days cannot be objected to, as erroneous, by the party at whose instance it was granted.—Peck v. McAlpine, 3 Caines, 166.

[g] (N. Y. 1806) A defense on the merits is no waiver of defendant's right to an adjournment before a justice.—Seers v. Grandy, 1 Johns. 514.

[h] (N. Y. 1814) If a justice improperly refuse to adjourn a cause at the defendant's request, and the defendant afterwards volun-

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tarily confess judgment, he waives the previous irregularity.—Hill v. Downer, 11 Johns. 461.

[i] (N. Y. 1860) Where a justice without authority granted an adjournment on motion of defendant, and plaintiff had his old subpœna renewed, it is not a waiver of the unauthorized adjournment.—Peck v. Andrews, 32 Barb. 445.

[j] (N. Y. 1861) Consent of the parties to an adjournment of a cause by a justice will operate as a waiver of all objection thereto.—Nellis v. McCarn, 35 Barb. 115.

[k] (N. Y. 1896) Irregularity in granting a second adjournment is not waived because a condition that plaintiff pay defendant's witness fees was imposed and complied with.—Newman v. Woodcock, 16 Misc. Rep. 142, 38 N. Y. Supp. 957.

[l] (Wis. 1863) Whatever might be the effect of a failure on the part of a justice to state the place to which the trial of a cause is adjourned, a party who appears at the time to which such adjournment is made, and applies for a further adjournment, cannot thereafter take advantage of the defect.—Cron v. Krones, 17 Wis. 401.

(L) TRIAL, NEW TRIAL, AND APPEAL TO JURY.

PRELIMINARY PROCEEDINGS AND CONDUCT OF TRIAL IN GENERAL, § 362.
RECEPTION OF EVIDENCE, § 363.
TAKING CASE OR QUESTION FROM JURY, AND INSTRUCTIONS, § 364.
CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY, § 365.
VERDICT AND FINDINGS, § 366.
TRIAL BY JUSTICE WITHOUT JURY, § 367.
REFERENCE, § 368.
NEW TRIAL, § 369.
—— GROUNDS, § 370.
—— PROCEEDINGS TO PROCURE, § 371.
APPEAL TO JURY, § 372.

Trial of action on judgment, see post, § 425.
Time for justice to issue venire, see "Jury," vol. 31, c. 485, § 294 [d].

§ 362. Preliminary proceedings and conduct of trial in general.

Commencement of proceedings in general, see ante, § 231.
Presumptions on certiorari as to conduct of trial by justice, see post, §§ 812, 813.
Time for taking proceedings or holding court, see ante, § 232.

[a] (Ala. 1841) A justice of the peace has the same power to supply the loss of any paper, relating to a cause pending before him as other courts have.—Cunningham v. Green, 3 Ala. 127.

[b] (Cal. 1893) Under Code Civ. Proc. § 873, providing that a trial in a justice's court must commence at the expiration of one hour from the time specified in the notice which section 850 requires to be given by the justice, the notice must be given in writing.—Jones v. Justice's Court of City of Los Angeles, 97 Cal. 523, 32 Pac. 575.

[c] (Cal. 1893) Code Civ. Proc. § 850, provides "that when all the parties to an action in a justice's court served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix a day for the trial of said cause, and notify the plaintiff and the defendants who have appeared thereof." *Held*, that the provision requiring such notice of the day of trial is imperative, and a judgment entered without it will be vacated on a writ of review.—Jones v. Justice's Court of City of Los Angeles, 97 Cal. 523, 32 Pac. 575.

[d] (Ga. 1885) A remark of a justice of the peace, in ruling on the admissibility of evidence, as to its effect, if true, will not require a new trial, though made in the hearing of the jury.—Burruss v. Smith, 75 Ga. 710.

[e] (Ind. 1860) Where, in an action before a justice of the peace, on a promissory note, the defendant answers, admitting the execution of the note and setting up a counterclaim, the general issue is in by law, in addition to the special defense pleaded; and, the burden of the issue being on the plaintiff, he is entitled to open and close.—Howard v. Kisling, 15 Ind. 83.

[f] (Ind. 1861) A defendant, who, in a suit before a justice, waives the general denial given him by statute, and pleads affirmative matter in avoidance, is entitled to open and close.—Cross v. Pearson, 17 Ind. 612.

[g] (Md. 1894) Under Code 1860, art. 51, § 19, providing that, a summons having been returned as served, and defendant having failed to appear on the return day, the justice shall fix a day of trial not less than 6 nor more than 14 days from the return day, and proceed to try the case ex parte, it is not necessary that the record show an order in writing fixing a day, but it is enough that it appears by a trial being had within the specified time that a day was fixed.—Mottu v. Fahey, 78 Md. 389, 28 Atl. 387.

[h] (Mich. 1893) Both parties consenting, it is no error to consult, on a matter of practice, another justice of the peace, who happens to be present as a witness.—Chivers v. Lytle, 97 Mich. 477, 56 N. W. 862.

[i] (N. H. 1844) A justice of the peace, in the progress of a trial before him, has the power to cause any person to be removed from the court room whose presence, in the exercise of a sound judicial discretion, he deems prejudicial to the interests of justice.—State v. Copp, 15 N. H. 212.

[j] (N. Y. 1856) Where, in a justice's court, after the justice has called his cases, a defendant who was in waiting asked his cause to be called, and was informed that there was no such cause, whereupon he left the court, *held*, that the justice could not afterwards proceed with the cause in defendant's absence.—Murling v. Grote, 3 Abb. Prac. 109.

[k] (N. Y. 1893) In an action before a justice of the peace for goods sold and delivered, where the answer contains a general denial, putting in issue the questions of sale and delivery, and of price and payment, plaintiff has the right to open and close.—Felts v. Clapper, 69 Hun, 373, 23 N. Y. Supp. 508.

[l] (Ohio, 1894) Though a justice of the peace has power in a proper case to send a jury to view premises, he should not do so in an action to recover penalty for excavating in a street, where the place excavated has been filled up.—Sell v. Ernsberger, 8 Ohio Cir. Ct. R. 499.

[m] (Vt. 1856) The act of 1851 does not make it the duty of one party, more than of the other, to call a second justice, where the term of the first expires before the action is finished.—Johnson v. Kingsbury, 28 Vt. (2 Williams) 486.

§ 363. Reception of evidence.

Entry in docket of rulings on evidence, see post, § 456 [c].
Reception of evidence on trial without jury, see post, § 367 [f, k].

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[a] (Ga. 1891) On a trial in a justice's court it is not error in the magistrate to allow a note, the foundation of the action, to be read in evidence pending the argument to the jury, and the opposite party, if desirous of doing so, would be permitted to introduce evidence also.—Davis v. Mobley, 87 Ga. 481, 13 S. E. 596.

[b] (Mo. 1830) In a trial in a justice's court, evidence may be given to support a plea in abatement after the cause has proceeded in suit.—Henry v. Lane, 2 Mo. 201.

[c] (N. J. 1810) A justice may not, after the trial, examine a witness in the absence of the defendant.—Sloan v. Holland, 3 N. J. Law (2 Penning.) 997.

[d] (N. Y. 1851) On the trial of a cause in a justice's court, and after the parties had rested, and while the counsel were summing up, a witness was permitted to be recalled, notwithstanding the defendant's objection, to state how he swore in relation to a particular fact as to which he had been examined. *Held*, that it rests in the discretion of the court whether a witness shall be recalled, or not, after the parties have closed their proofs, and the judgment will not be disturbed for that cause.—Dunckle v. Kocker, 11 Barb. 387.

[e] (N. Y. 1851) It is a matter entirely in the discretion of the justice whether he will allow a plaintiff to give additional evidence after a motion for a nonsuit.—Reed v. Barber, 3 Code Rep. 160.

[f] (N. Y. 1859) Where a justice continues a case for argument, whether on the day of the argument he will receive further evidence is a matter within his discretion, and will not be reviewed.—Heidenheimer v. Wilson, 31 Barb. 636.

[g] (Pa. 1852) An offer of a transcript of a judgment against plaintiff and in favor of defendant on the trial before an alderman does not preclude its use as a set-off when thereafter offered as such before the hearing of testimony was closed.—O'Niel v. Whitecar, 1 Phila. 446.

[h] (Wis. 1857) A justice cannot decide on the account of plaintiff, verified by his account book and note, without giving the defendant an opportunity to rebut the same by proof on his part.—Betts v. Stevens, 6 Wis. 400.

§ 364. Taking case or question from jury, and instructions.

Instructions to or communication with jury after retirement, see post, § 365.

Waiver of error in refusing dismissal on trial by court, see post, § 448 [u].

[a] Where there is no evidence to support the plaintiff's case, the defendant is entitled to a nonsuit; and if the justice in such case refuses to nonsuit, and lets the case go to the jury, the judgment will be reversed.

—(Me. 1822) Inhabitants of Sanford v. Emery, 2 Me. (2 Greenl.) 5;

(N. J. 1820) Mead v. Crane, 5 N. J. Law (2 Southard) 852;

(N. Y. 1828) Stuart v. Simpson, 1 Wend. 376.

[b] (Ga. 1857) In appeal cases, justices of the peace are not bound to charge juries on matters of law.—Johnson v. Nelms, 21 Ga. 192.

[c] (Ga. 1880) A justice of the peace, though not bound to charge the jury, may do so; and, if he charges correctly, there is no ground for a new trial.—Adams v. Clark, 64 Ga. 648.

[d] (Ga. 1884) If a justice of the peace, who need not charge the jury, attempts to do so, he must charge in accordance with law. He may not say that he has tried the case before and decided in defendant's favor.—Bendheim v. Baldwin, 73 Ga. 594.

[e] (Ga. 1891) A justice of the peace cannot instruct the jury.—Freeman v. Exchange Bank, 87 Ga. 45, 13 S. E. 160.

[f] (Ill. 1883) On an issue as to the existence of a special contract to pay a stated amount for services, in a suit in the justice's court, where no written pleadings are required, plaintiff may by instructions urge his right to recover on the theory both of a special and an implied contract, and they will not be open to the objection of inconsistency.—Phillips v. Roberts, 90 Ill. 492.

[g] (Iowa, 1858) In an action before a justice of the peace against the defendant as indorser, instructions which treat him as the assignor are not improper.—Hall v. Monohan, 6 Iowa (6 Clarke) 216, 71 Am. Dec. 404.

[h] (Iowa, 1880) Code 1873, § 3516, declaring that all "proceedings" prescribed for the circuit court shall be pursued in justices' courts, but that the powers of such courts shall be such only as are therein enumerated, does not, in the absence of an express provision, confer authority to instruct the jury in a case.—St. Joseph Mfg. Co. v. Harrington, 53 Iowa, 380, 5 N. W. 568.

[i] (Neb.) There is no provision in the laws authorizing a justice of the peace to charge a jury on the law of a case, and it is error for him so to do.—(1882) Ives v. Norris, 13 Neb. 252, 13 N. W. 276; (1884) Wilson v. Young, 15 Neb. 627, 19 N. W. 497.

[j] (N. J. 1817) A justice is bound to charge the jury on the construction of a statute, where the rights of parties depend on it.—Broadwell v. Nixon, 4 N. J. Law (1 Southard) 362.

[k] (N. J. 1818) It was not error for a justice, instead of charging the jury, to read a statute and give it to the foreman.—Pullen v. Boney, 4 N. J. Law (1 Southard) 125.

[l] (N. Y. 1808) Where a cause has once been submitted to a jury by a justice of the peace, he cannot afterwards take it from them and nonsuit the plaintiff.—Young v. Hubbell, 3 Johns. 430.

[m] (N. Y. 1808) In cases before justices of the peace, the jury decide both the law and the fact.—McNeil v. Scoffield, 3 Johns. 436.

[n] (N. Y. 1815) A justice of the peace may nonsuit the plaintiff, when, in his opinion, the testimony offered by him does not support the action.—Clements v. Benjamin, 12 Johns. 299.

[o] (N. Y. 1833) Where the cause is submitted to a justice, and he takes time to make up his judgment, it is not then in his power to nonsuit the plaintiff for insufficiency or incompetency of evidence.—Elwell v. McQueen, 10 Wend. 519.

[p] (N. Y. 1833) A justice at the trial has a right to nonsuit plaintiff, if in his judgment he fails on his own showing to make out a case, either on the ground of incompetency or insufficiency of the evidence.—Elwell v. McQueen, 10 Wend. 519.

[q] (N. Y. 1847) In a court of record, where an error is committed by improperly admitting evidence when objected to, the court may cure the error, and render the exception nugatory, by instructing the jury to disregard such evidence. The rule is different in the courts of justices of the peace.—People v. Parish, 4 Denio, 153.

[r] (N. Y. 1850) In an action brought before a justice of the peace against a sheriff for an escape, where it becomes material to inquire at

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the trial at what time the summons by which the suit was commenced was issued, and there is evidence tending to show that the summons was illegal and void, by reason of its not having been issued by the justice in person, but by his clerk in pursuance of his directions, the defendant has a right to have submitted to the jury the questions, what were the instructions given by the justice to his clerk, and whether they were complete, so as to enable the clerk to issue the summons without the exercise of any discretion on his part, or directions from any other person.—Borrodaile v. Leek, 9 Barb. 611.

[s] (N. Y. 1850) If the court take those questions from the jury, and decide that the summons was lawfully issued, the judgment will be reversed, and a new trial granted.—Borrodaile v. Leek, 9 Barb. 611.

[t] (N. Y. 1852) A justice is not bound to give instructions to a jury. If he gives wrong instructions, it is error.—Delancy v. Nagle, 16 Barb. 96.

[tt] (N. Y. 1860) Where the justice in his charge assumed in favor of the defendant a material question on which the evidence was conflicting, by instructing the jury that another question was the only point to be passed on, *held*, that judgment for the defendant should be reversed.—Pettit v. Ide, 12 Abb. Prac. 44.

[u] (N. Y. 1860) The omission or refusal of the justice to charge the jury is not error.—Pettit v. Ide, 12 Abb. Prac. 44.

[uu] (N. Y. 1860) The justice has a right to charge the jury, though it is usual to omit to do so.—Pettit v. Ide, 12 Abb. Prac. 44.

[v] (N. Y. 1887) A justice of the peace has no power to direct a verdict when the jury has once been impaneled to try the cause.—Blumburg v. Briggs, 10 N. Y. St. Rep. 242.

[vv] (N. Y. 1887) A justice of the peace may charge a jury on the law, subject to the same strict rule applicable to courts of record, but if he omits to charge the jury, the jury become the judges of the law as well as of the facts.—Blumburg v. Briggs, 10 N. Y. St. Rep. 242.

[w] (N. Y. 1887) At the close of plaintiff's case, the justice may nonsuit him if there be no evidence tending to establish a cause of action; but if there is the slightest proof on which a verdict could properly be founded, a nonsuit is error.—Blumburg v. Briggs, 10 N. Y. St. Rep. 242.

[x] (Ohio, 1877) A judgment of the mayor's court, dismissing a suit without prejudice, on the ground that the testimony does not sustain the action, is unauthorized and erroneous.—Ferrall v. Bluffton Lodge, No. 371, I. O. O. F., 31 Ohio St. 463.

[y] (Ohio, 1883) Where it does not appear from the record that any questions of law arose in an action before a justice of the peace requiring an instruction to the jury, the refusal to give such instruction was not error.—Dougherty v. O'Connell (Dist. Ct.) 12 Wkly. Law Bul. 261.

[z] (Pa. 1851) A justice of the peace, after an appearance by plaintiff, has no authority to nonsuit him on the ground that he was unable to substantiate his claim.—Lawver v. Walls, 17 Pa. (5 Harris) 75.

[zz] (Tex. 1852) After a case has been submitted to a jury on the merits, a justice has no authority to withdraw it from them and dismiss the case, unless it appear to be done by consent of parties. If he do, his judgment will be a nullity.—Baily v. Knight, 8 Tex. 58.

§ 365. Custody, conduct, and deliberations of jury.

Discharge on failure to agree as ousting jurisdiction, see ante, § 190 [e, f].

Instructions to jury, see ante, § 364.

Waiver of failure to swear jury, see post, § 448 [j, uu].

[a] (Ga. 1891) The verdict of a jury in a justice's court is not vitiated because the jury, after deliberating for some hours, came into court, announced that they could not agree unless they could have before them a certain cash book, and, upon being informed by the presiding justice that the book was not legal evidence, returned to their room, under the direction of the justice, to resume their deliberations, and in a few minutes brought in a verdict. Though it was irregular for the jury to call for more evidence, it was not such misconduct as to render their subsequent finding illegal.—Nolen v. Heard, 87 Ga. 293, 13 S. E. 554.

[b] (Ind. 1874) When a jury is sent out by a justice of the peace to consult upon their verdict, the justice must determine when they have consulted together for a reasonable time; the jury cannot determine this for themselves, and separate without leave of the justice.—Murphy v. Wilson, 46 Ind. 537.

[c] (Kan. 1882) In a case tried before a justice and a jury, it is error for the justice to enter the jury room while they are deliberating.—Stager v. Harrington, 27 Kan. 414.

[d] (Mich. 1884) The entry by a justice into a jury room after the retirement of the jury, though highly improper, is not reversible error, where it did not prejudice the rights of the unsuccessful party.—Corbett v. Galloway, 52 Mich. 460, 18 N. W. 218.

[e] (Mich. 1887) In a case before a justice of the peace, after the jury had retired, the officer in charge reported to the justice that they wanted to see him, but he refused to see them, and the officer then said they desired to know whether they should consider a certain judgment between the parties, to which the justice replied that he might tell them that he had been directed to discharge such judgment. The jury then rendered a judgment for the defendants for $99 damages, and costs. By request of attorneys for both parties, the justice went with the jury to consult as to a different verdict, and a second verdict for one of the defendants was arrived at. *Held*, that sending the message to the jury was error, but that both parties having, by consent, set the verdict aside, and allowed the justice and jury to consult together, and render another verdict, the court had jurisdiction to render judgment thereon.—Snyder v. Wilson, 65 Mich. 336, 32 N. W. 642.

[f] (Minn. 1884) At the trial of a cause before a justice of the peace, after the jury had retired and were deliberating on their verdict, the justice entered their room, and remained in it about one minute, without consent of the parties. *Held* that, as it did not appear that any communication was made by him to the jury, or that there was any injury suffered by the unsuccessful party, and as the prevailing party was without fault, the verdict should not be set aside for this cause alone.—Helmbrecht v. Helmbrecht, 31 Minn. 504, 18 N. W. 449.

[g] (Minn. 1893) Under Gen. St. 1878, c. 65, § 60, and Id. c. 84, § 10, authorizing a justice to discharge a jury because of its inability to agree, there was no abuse of discretion in discharging a jury which had failed to agree after being out 14 hours and all night.—Rollins v. Nolting, 53 Minn. 232, 54 N. W. 1118.

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[h] (N. J. 1810) It is irregular for the justice to go to the jurors' room, after they have retired, and give them further instructions; if such are required, it must be done in open court.—Hance v. Deklyne, 3 N. J. Law (2 Penning.) 659.

[hh] (N. J. 1812) Where, on the affidavit of a juror, it appears that a part of the jurors obtained food and publicly ate it in an adjoining room to the jury room, and refused to admit those disagreeing with them, and that he agreed for fear of being starved out, the justice's judgment will be reversed.—Morrow v. McLennen, 3 N. J. Law (2 Penning.) 918.

[i] (N. J. 1838) Two or three hours' consultation is not sufficient to justify a justice of the peace in discharging a jury because they cannot agree upon a verdict.—Gulick v. Van Tilburgh, 16 N. J. Law (1 Har.) 417.

[j] (N. J. 1838) A justice of the peace ought not to discharge a jury until every reasonable hope of their agreement in a verdict has vanished.—Gulick v. Van Tilburgh, 16 N. J. Law (1 Har.) 417.

[k] (N. Y. 1807) In a suit before a justice under the £10 act, where a constable who was counsel for plaintiff served a venire and was sworn to attend the jury after the trial, and defendant knew of his being counsel for plaintiff and made no objection, and no abuse is shown, the court will infer, in support of the judgment, that the parties consented to his attending the jury.—Tallman v. Woodworth, 2 Johns. 385.

[l] (N. Y. 1809) After the jury in a justice's court had retired, they sent for the justice and asked if they could add anything to the charge of the plaintiff, and he answered "No," nothing further being said. This is not an irregularity for which the verdict will be set aside.—Thayer v. Van Vleet, 5 Johns. 111.

[m] (N. Y. 1813) In an action before a justice of the peace, after the jury had retired to deliberate on their verdict, they requested the justice to inform them whether a certain point of evidence had been given, and he answered the inquiry. *Held*, that this was erroneous, and the judgment was reversed; it not appearing that it was done with the consent, or in the presence, of the parties.—Bunn v. Croul, 10 Johns. 239.

[n] (N. Y. 1816) If a justice deliberates with the jury, privately and apart from the parties, and without their consent, in a trial before him, his judgment will be reversed as erroneous.—Taylor v. Betsford, 13 Johns. 487.

[o] (N. Y. 1816) A justice cannot deliberate privately and apart with the jury, in a trial before him, unless with the consent of the parties, and this consent cannot be inferred from the silence of the parties, but must be made to appear affirmatively.—Taylor v. Betsford, 13 Johns. 487.

[p] (N. Y. 1818) It is improper for a justice of the peace, during a trial before him, to permit the party to treat the jury with spirituous liquor.—Kellogg v. Wilder, 15 Johns. 455.

[q] (N. Y. 1823) Where a juror was, without the knowledge of the justice or parties, absent while a witness was under examination, but as soon as his absence was discovered the examination was suspended, and the witness was re-examined upon his return, so that the juror heard all the evidence, the judgment will not be reversed therefor.—Eastman v. Tuttle, 1 Cow. 248.

[r] (N. Y. 1823) It is error for a justice to hold any intercourse with the jury at their room, or send them papers, without the consent of the parties.—Benson v. Clark, 1 Cow. 258.

[rr] (N. Y. 1825) It is cause for reversing a justice's judgment that spirituous liquors were circulated among the jury while sitting as such, even though by consent.—Rose v. Smith, 4 Cow. 17, 15 Am. Dec. 331.

[s] (N. Y. 1835) After a cause tried in a justice's court has been submitted to the jury, and they have retired to consider of their verdict, it is not irregular in the justice, at the request of the jury, to give them further instructions upon the law of the case, if the parties are, or have an opportunity of being, present.—Rogers v. Moulthrop, 13 Wend. 274.

[t] (N. Y. 1840) A justice of the peace, without the consent of the parties, cannot, at the request of the jury, give them his minutes of the trial.—Neil v. Abel, 24 Wend. 185.

[u] (N. Y. 1843) After a jury in a suit before a justice had retired, they sent for the justice, who notified the parties, and, supposing that they would follow, passed into the jury room alone. Finding that they did not, he refused to hold any communication with the jury and withdrew, when all parties returned with him into the room and it was agreed that the jury might examine witnesses further, which they did. *Held* no irregularity which would invalidate the judgment.—Keeler v. Lockwood, Hill & D. Supp. 137.

[uu] (N. Y. 1847) It is error for a justice of the peace before whom a cause has been tried by a jury to go into the jury room, while the jury are deliberating, and give them instructions on the evidence, without the express consent of the parties; and it is not enough that they know he is going in and do not object.—Moody v. Pomeroy, 4 Denio, 115.

[v] (N. Y. 1850) Where, on a trial in a justice's court, the jury, during their deliberations, had in their possession the minutes of the testimony taken by the counsel for the successful party, that fact is sufficient cause for reversing the judgment. If, under any circumstances, a judgment thus obtained can be permitted to stand, it must affirmatively appear that the losing party could not have been prejudiced by such proceeding.—Durfee v. Eveland, 8 Barb. 46.

[w] (N. Y. 1850) Where a justice of the peace, while the jury are deliberating on their verdict, enters the jury room at their request, with the knowledge and consent of one of the parties, a consent by such party, that the justice may read to the jury the testimony of a witness, will be implied.—Hancock v. Salmon, 8 Barb. 564.

[x] (N. Y. 1857) The verdict of a jury in a justice's court will not be set aside on the sole ground that the constable, who had charge of the jury after they had retired to their room to deliberate on their verdict, urged the jury to give a verdict for the plaintiff, who prevailed.—Baker v. Simmons, 29 Barb. 198.

[y] (N. Y. 1889) In a civil action tried before a justice of the peace, after the jury had retired, the justice entered their room and said to them, "It takes a good deal of time and expense to try these lawsuits, and it seems as though you ought to agree." One juror said they stood two to four, and the justice replied, "You are so near together that you had better agree." A verdict was soon after returned. *Held* that, however honest the motives of the justice, his interference with the deliberations of the jury was unwarrantable, and the judgment must be reversed.—Valentine v. Kelly, 54 Hun, 78, 7 N. Y. Supp. 184, 17 Civ. Proc. R. 367.

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[yy] (N. Y. 1890) The presence of the justice in the jury room, while the jury were deliberating, without consent of the parties, is reversible error.—Gibbons v. Van Alstyne, 56 Hun, 639, 9 N. Y. Supp. 156.

[z] (N. Y. 1891) After the jury in an action before a justice of the peace had retired, the justice stepped to the door of the jury room, and asked the constable in charge for a paper belonging to the justice. The foreman of the jury asked the justice if he could see the evidence, to which the justice answered, "No." Several questions were then asked him by the jurors, to which he replied that he could answer no questions, unless the parties were present and agreed. *Held*, that the irregularity was harmless.—Kerr v. Hammer, 61 Hun, 619, 15 N. Y. Supp. 605; Id., 61 Hun, 622, 15 N. Y. Supp. 970.

[zz] (N. Y. 1894) It is error for a justice of the peace to enter the jury room, and, without the knowledge or consent of plaintiff, read to the jury defendant's original answer, which had not been read to them before.—Seeley v. Bisgrove, 83 Hun, 293, 31 N. Y. Supp. 914.

§ 366. Verdict and findings.

Findings on trial by justice without jury, see post, § 367.

[a] (Ga. 1856) A verdict in a justice's court for the "principal," and interest and costs, the jury replying to a question by the court, from what time interest should be calculated, that it should be from the delivery of certain pork sued for, the time of which was proved, is not too uncertain.—Mitchell v. Addison, 20 Ga. 50.

[b] (Ga. 1889) The jury in a justice's court may correct their verdict at the time of returning it, and before they have dispersed or been discharged, when they have made a mistake in writing it out.—Almand v. Scott, 83 Ga. 402, 11 S. E. 653.

[c] (Ga. 1892) Before the jury have dispersed, the presiding magistrate in a justice's court may send them out to correct their verdict by expressing therein the date from which interest on the principal sum found for plaintiff is to be computed, this addition to the verdict being requisite to give proper certainty to the original finding.—Baker v. Thompson, 89 Ga. 486, 15 S. E. 644.

[d] (Ill. 1856) In actions for debt before justices, the debt and damages need not be distinguished in the verdict.—Horton v. Critchfield, 18 Ill. (8 Peck) 133, 65 Am. Dec. 701.

[e] (Iowa, 1885) Where defendant, in a suit before a justice, denies all indebtedness, and the verdict for plaintiff fails to state how much plaintiff should recover, judgment for the amount claimed cannot be entered on the verdict.—Bartle v. Planee, 68 Iowa, 227, 26 N. W. 88.

[f] (Kan. 1877) In an action before a justice of the peace, the verdict of the jury should be in writing and signed by the foreman of the jury. It is not necessary that all the jurors should sign their names to the verdict.—Hanson v. Lawson, 19 Kan. 201.

[g] (Mich. 1843) On a plea of not guilty to a declaration in replevin, an issue was tried by a jury in a justice's court, who returned a verdict as follows, "This jury find for the plaintiff." *Held*, that this verdict, though not a formal one, sufficiently indicated for which party the jury had found the issue, and that it was the duty of the justice to enter the verdict in the proper form, according to the substantial finding, and to render judgment thereon.—People v. Foote, 1 Doug. 102.

[h] (Mo. 1831) In a suit before a justice, the effect of a judgment will be given to the verdict of a jury so soon as the verdict is entered on the justice's docket.—Rutherford v. Wim, 3 Mo. 14.

[i] (Mo. 1882) A judgment of a justice of the peace will not be reversed because there was no special finding upon a counterclaim, if the general finding was necessarily decisive against it.—Flesh v. Christopher, 11 Mo. App. 483.

[j] (Neb. 1888) Where a judgment is based on a verdict of the jury, it is unnecessary for the justice to make findings of fact.—Dye v. Russell, 24 Neb. 829, 40 N. W. 416.

[k] (N. J. 1818) In a trial before a justice, the jury may render a special verdict.—Springer v. Reeves, 4 N. J. Law (1 Southard) 207.

[l] (N. Y. 1809) If the jury find a verdict of damages for the defendant, in a case in which he is not entitled to damages, the justice of the peace may enter a remittitur damna, and give judgment for the defendant generally.—Burger v. Kortright, 4 Johns. 414.

[m] (N. Y. 1816) The jury in the justice's court cannot find a special verdict, nor can the justice render any judgment on such verdict.—Wylie v. Hyde, 13 Johns. 249.

[n] (N. Y. 1852) A justice of the peace cannot receive a verdict, unless plaintiff is present or some one appears for him, and if it is fairly to be inferred from the justice's return that he received a verdict in the absence of plaintiff, a judgment thereon will be reversed.—Douglass v. Blackman, 14 Barb. 381.

[o] (N. Y. 1873) The only verdict a jury in a justice court can render is for the plaintiff or for the defendant, and any other facts that they may find cannot prejudice the other party.—Marcellus v. Countryman, 65 Barb. 201.

[p] (N. Y. 1873) It is error for a justice of the peace to receive and enter a verdict of the jury in favor of plaintiff, in his absence.—Board of Excise v. Turk, 2 Thomp. & C. 367.

[q] (N. Y. 1891) In an action in a justice's court, for penalties for violation of the excise laws, a verdict was rendered in the following form, "We finde the defende $100 dollars"; and subsequently verbally explained by the jury to the court, and then expressed in writing, "We fiude the defende of two offenses, $50 each." *Held*, that the verdict should not be set aside, on appeal, as too uncertain and irregular to support a judgment.—Morehead v. Brown, 59 Hun, 617, 13 N. Y. Supp. 197.

[r] (Or. 1887) Where a jury in a justice's court presented a paper purporting to contain their verdict, but which failed to express their real meaning, and the justice continued the case till next day, and allowed the jury to separate, and next day received their verdict, *held*, that such verdict was irregular, and must be set aside, and a new trial granted.—Nickelson v. Smith, 15 Or. 200, 14 Pac. 40.

[s] (Tex. 1857) In a suit on open account, or for an unliquidated demand, a general verdict is of doubtful validity, especially in suits before a justice of the peace, and such a verdict will not support a judgment for the amount claimed.—Harrell v. Babb, 19 Tex. 148.

[t] (Wis. 1878) In an action to recover $160, alleged to be the contract price of a machine sold to the defendant, the jury found generally for the plaintiffs, without expressing the amount of damages, and the justice rendered judgment for them for $160. *Held*, that this, if irregular, was not jurisdictional, and the judgment should be affirmed.—Barnes v. Schmitz, 44 Wis. 482.

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§ 367. Trial by justice without jury.

[a] (Mich. 1869) The neglect to demand a jury within the time prescribed by law is a waiver only of the right. It does not deprive the justice of the power to order a jury in his discretion. Such is one of the "powers usual in courts of record," conferred by the justices' act.—Van Sickle v. Kellogg, 19 Mich. 49.

[b] (Neb. 1882) Under Code Civ. Proc. § 297, which provides that upon trial of questions of fact by the court without a jury there must be a general finding, and under section 1085, which makes the provisions of the Code generally applicable to proceedings before justices of the peace, there must be a finding of facts in all cases tried before a justice of the peace where a jury is waived.—Crossley v. Steele, 13 Neb. 219, 13 N. W. 175.

[c] (Neb. 1884) The justice trying a case without a jury is not required to make his findings any more specific than if made by a jury, and he may find for the plaintiff a certain sum and assess his damages, without making any finding as to a counterclaim filed by defendant.—Ransdell v. Putnam, 15 Neb. 642, 19 N. W. 611.

[d] (Neb. 1891) When an action at law is tried to a court without a jury, the finding of fact by such court is a substitute for and stands in lieu of a verdict of a jury, and need be no more specific than the verdict of a jury upon the same pleadings and evidence, and a finding by a justice, in the words "After hearing the evidence, it is therefore considered by me that the plaintiff have and recover from the defendant the sum of $69.15, together with costs taxed, $49.15," is a sufficient compliance with Civ. Code, § 297, which provides that there must be a general finding in all actions tried by a justice, and a special finding, if requested by one of the parties.—Rhodes v. Thomas, 31 Neb. 848, 48 N. W. 886; Same v. Havelik, Id.

[e] (N. J. 1819) Where a justice of the peace has erroneously summoned a jury before the defendant has appeared, but the defendant makes default in appearing, the jury may be dismissed, and the case tried by the justice.—Wills v. McDole, 5 N. J. Law (2 Southard) 501.

[f] (N. Y. 1873) Where a justice of the peace erroneously receives evidence, under a general denial of the making of a payment since the commencement of the action, and joining issue therein, without an amendment, he cannot afterwards, and after the case has been submitted to him, correct the error by rejecting the evidence.—Hall v. Olney, 65 Barb. 27.

[g] (N. Y. 1895) Where defendant, in an action in a justice's court, demanded a jury trial, but failed to appear on the day set for trial, the justice may discharge the jury and hear plaintiff's proofs.—Helmick v. Churchill, 92 Hun, 524, 36 N. Y. Supp. 1028.

[h] (N. Y. 1896) On a trial before a justice without a jury, where the only issue was whether defendant had made a certain payment, the exclusion of a receipt which defendant swore that plaintiff signed with his mark, but which plaintiff and his son denied, was without prejudice, as the ruling in effect determined the question of fact at issue.—Dreyer v. Meyer, 3 App. Div. 619, 38 N. Y. Supp. 902.

[i] (N. C. 1819) Where the trial by jury is dispensed with, the justice must, nevertheless, observe the course of the common law in trials.—State v. Barrow, 7 N. C. 121.

[j] (Ohio, 1876) A justice of the peace is not bound to state his conclusions of law and of fact separately.—Hartman v. White, 7 Ohio Dec. 45, 1 Wkly. Law Bul. 79.

[k] (Pa. 1880) After a hearing before a justice of the peace without a jury is concluded, additional testimony cannot properly be received in the absence of the opposite party, without a reopening of the proceedings, and notice.—Commonwealth v. King, 1 Chest. Co. Rep. 203.

§ 368. Reference.

See post, § 389.

Reference after judgment on vacating same, see post, § 401 [b].

Showing adjournment of reference on record, see post, § 457.

[a] (Del. 1838) On a trial by referees appointed in justices' courts, they, and not the justices, are the judges of the competency, as well as the credibility, of testimony, and have the general regulation of the trial.—Kinney v. Short, 2 Har. 357.

[aa] (Del. 1846) Referees appointed in justice's court may adjourn a cause to a day certain, for consideration or award; and they may do so without the application of either party.—Deputy v. Betts, 4 Har. 352.

[aaa] (Mass. 1807) On a submission to referees before a justice of the peace, under St. 1786, c. 21, a demand must be annexed to the submission.—Bullard v. Coolidge, 3 Mass. 324.

[b] (Mass. 1807) On a submission to referees before a justice, pursuant to St. 1786, c. 21, the demand annexed to the submission must be subscribed by the person making it.—Bullard v. Coolidge, 3 Mass. 324.

[c] (N. J. 1791) A justice by consent of parties may enter a rule of reference.—Schooley v. Thorne, 1 N. J. Law (Coxe) 71.

[d] (N. J.) The parties in a justice's court must be before the court, and the cause actually depending, before it can be referred.—(1806) Burroughs v. Genung, 2 N. J. Law (1 Penning.) 103; (1808) Prosser v. Richards, Id. 377; (1808) Ogden v. Dildine, 3 N. J. Law (2 Penning.) 413.

[e] (N. J. 1811) An account or state of demand may be delivered to the referees in the presence of both parties, instead of before the justice.—Ayres v. Burt, 3 N. J. Law (2 Penning.) 739.

[f] (N. J. 1812) In a reference from a justice's court, the referees reported a sum due to the plaintiff, and also that a certain promissory note belonged to one of the parties. *Held* that this would not destroy the report.—Burr v. Fairholme, 3 N. J. Law (2 Penning.) 965.

[g] (Pa. 1830) Where, in an action before a justice of the peace for trover or trespass, the demand of plaintiff exceeds $10, the justice can, at the request of either party, refer the decision of the cost to referees.—Knight v. Vandergrift, 1 Ashm. 245.

[h] (Pa. 1882) A justice of the peace is bound to hear and pass on allegations of misconduct of a referee in a case before him, and his refusal to do so is ground for reversal on certiorari.—Yetter v. Carpenter, 1 Chest. Co. Rep. 523.

[i] (Vt. 1860) The enlargement of a rule of reference by a justice of the peace cannot be shown by a statement in the referee's report, but a record or certificate to that effect from the justice is necessary.—Lazell v. Houghton, 32 Vt. 579.

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§ 369. New trial.

After appeal by consent of parties, see post, § 638.

Appearance at new trial as conferring jurisdiction, see ante, § 268 [m].

Power of appellate court to grant new trial in justice's court, see post, § 734.

Waiver of delay in determining motion for new trial, see post, § 448 [d].

Allowance after docket of judgment in court of record, see "New Trial," III.

Prohibition against unauthorized new trial, see "Prohibition."

[a] A justice of the peace cannot set aside a verdict and grant a new trial.
—(Ark. 1854) McDaniel v. Coleman, 14 Ark. 545;
(Ga. 1875) Dalton City Co. v. Haddock, 54 Ga. 584; (1875) Doughty v. Walker, Id. 595;
(Iowa, 1841) Helmich v. Johnson, Morris, 89;
(Miss. 1874) Morris v. Shryock, 50 Miss. 590;
(N. J. 1813) Foreman v. Murphy, 3 N. J. Law (2 Penning.) 1024;
(N. Y. 1834) Van Valkenburgh v. Evertson, 13 Wend. 76.

[b] (Ga. 1887) A justice has no power to grant a new trial; and, even if he could set aside a verdict and grant a new trial by consent of all parties, there is no law which compels him to do so.—McCook v. Moore, 78 Ga. 322, 2 S. E. 473.

[c] (Ky. 1836) A new trial cannot be granted by a justice after the judgment has been satisfied or replevied.—Holton v. Greenwell, 34 Ky. (4 Dana) 633.

[d] (Ky. 1836) A justice of the peace may grant a new trial in any civil cases in which he has rendered judgment.—Holton v. Greenwell, 34 Ky. (4 Dana) 633.

[e] (Mich. 1843) After verdict, a justice has no power to award a venire de novo.—People v. Foote, 1 Doug. 102.

[f] (Mo. 1827) A justice of the peace has no power to grant a new trial except in cases of nonsuit, or of judgment by default.—Downing v. Garner, 1 Mo. 751.

[g] (Mo. 1843) A justice of the peace cannot grant a new trial after verdict by a jury.—Cason v. Tate, 8 Mo. 45.

[h] (N. Y. 1863) The mayor's court of the city of Albany can grant a new trial.—People v. Austin, 43 Barb. 313.

[i] (N. C. 1872) Where both parties to an action are present at the trial in a justice court, and the case is heard and judgment rendered, a new trial cannot be allowed, but the parties dissatisfied therewith must appeal to the superior court.—Froneburger v. Lee, 66 N. C. 333.

[j] (N. C. 1872) Under Code Civ. Prov. § 508, a justice of the peace had the right to grant a new trial where a judgment was rendered against an absent party, if proper application is made within 10 days from its rendition.—Froneburger v. Lee, 66 N. C. 333.

[k] (N. C. 1883) A new trial will not be allowed in an action before a justice of the peace when both parties to the action are present at the trial; the only remedy of the party dissatisfied with the judgment is by appeal.—Gambill v. Gambill, 89 N. C. 201.

[l] (Pa. 1883) Where the plaintiff's proof and allegations were heard at the first hearing, a judgment of nonsuit cannot be entered against him on a rehearing of the action before a justice of the peace.—Cole v. Bishop, 2 C. P. Rep. 225.

[m] (R. I. 1888) A petition for a new trial in the justice court is properly denied; the only power given to grant a trial in justice courts being given by Pub. St. c. 221, § 8, and being expressly limited to cases where no trial has been had.—Brayton v. Dexter, 16 R. I. 70, 12 Atl. 132.

§ 370. —— Grounds.

[a] (Ga. 1857) Juries in justices' courts must judge according to law and equity, or their verdicts will be set aside and a new trial granted.—Johnson v. Nelms, 21 Ga. 193.

[b] (Kan. 1882) Comp. Laws 1879, p. 718, § 110, providing that a justice on being satisfied that the verdict was obtained by fraud, partiality, or undue means, or that the verdict is not sustained by the evidence or is contrary to law, may grant a new trial, does authorize him to grant a new trial for errors of law occurring at the trial.—Theilen v. Hann, 27 Kan. 778.

[c] (Mich. 1884) A justice of the peace cannot grant a new trial because of the presence of the sheriff in the jury room, and the rendition of a compromise verdict, where he had no knowledge thereof, but merely heard of such facts afterwards.—Alt v. Lalone, 54 Mich. 302, 20 N. W. 52.

[d] (Neb. 1877) It is only on proof that the verdict was obtained by fraud, partiality, or undue means, that a justice of the peace has jurisdiction to grant a new trial.—Templin v. Synder, 6 Neb. 491.

[e] (Neb. 1888) Under Code Dak. § 983, providing that a justice cannot grant a new trial except for fraud, partiality, or undue means, a new trial will not be granted where an adjournment was had from Monday, December 26th, to the 27th, the justice being in doubt whether the 26th was a legal holiday.—State v. King, 23 Neb. 540, 37 N. W. 310.

[f] (N. J. 1809) Whether a justice of the peace may grant a new trial for malpractice in the jurors or party, quære.—Keath v. Sergeant, 3 N. J. Law (2 Penning.) 524.

[g] (Tex. 1894) Where, in an action in a justice's court to foreclose a mortgage on property over the value of $200, the attention of the court is called to such fact for the first time by affidavit for a new trial, the new trial should be granted to determine that question.—Cox v. Wright (Civ. App.) 27 S. W. 294.

§ 371. —— Proceedings to procure.

[a] (Ind. 1841) A judgment of a justice of the peace is set aside by his granting a new trial in the cause within the time limited by law for that purpose.—Robideau v. Ewing, 5 Blackf. 552.

[b] (Ind. 1851) A justice can grant a new trial for cause shown within four days after the day on which judgment was rendered.—Hathaway v. Hathaway, 2 Ind. (2 Cart.) 513.

[c] (Ind. 1858) A justice cannot, after judgment, grant a new trial without notice, and in the party's absence.—Erskine v. Ouyett, 11 Ind. 335.

[d] (Ind. 1874) Under the statutes, a new trial cannot be granted by a justice of the peace, on account of newly-discovered evidence, after the expiration of four days from the entering of judgment.—Vogel v. Lawrenceburgh Tobacco Mfg. Co., 49 Ind. 218.

[e] (Kan. 1881) A justice of the peace cannot, five days after judgment rendered in a suit tried before him, hear a motion for, and grant, a new trial.—Kerner v. Petigo, 25 Kan. 652.

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[f] (Kan. 1887) Where an action is continued by consent to 1 o'clock p. m. of a certain day, but through the mistake of the justice, taken advantage of by the plaintiff, is tried, and judgment rendered against defendant in his absence, at 10 o'clock a. m. of the same day; and after judgment has been rendered, and before the hour of 1 o'clock p. m. of the same day, the attorney for the defendant tells an attorney for plaintiff that he will be at the justice's court at 1 o'clock p. m., and does go there, makes a motion to vacate the said judgment, and for a new trial; and, while so doing, the partner of one of the attorneys for plaintiff comes to the justice's office, and is notified what is being done, *held*, these facts constitute a reasonable notice to plaintiff of the motion for a new trial.—Barons v. Anderson, 37 Kan. 399, 15 Pac. 226.

[g] (Kan. 1887) Sess. Laws 1885, c. 152, § 3, provides that a justice before whom a cause has been tried, may, at any time within five days after the decison or verdict, vacate the same and grant a new trial, etc. *Held*, that where a motion for a new trial was made before the justice in proper time, his order granting a new trial after the expiration of the five days was not void.—Scott v. Kreamer, 37 Kan. 753, 16 Pac. 123.

[h] (Ky. 1836) A new trial may be granted by a justice on a day subsequent to that on which the first trial was had, provided the time allowed for appeal has not expired.—Holton v. Greenwell, 34 Ky. (4 Dana) 633.

[i] (Ky. 1836) A new trial may be granted by a justice without notice to the adverse party.—Holton v. Greenwell, 34 Ky. (4 Dana) 633.

[j] (La. 1888) Where a justice's judgment was not rendered in the presence of the parties or notified to defendant, as required by Code Civ. Proc. art. 1139, defendant is always in time to ask for a new trial; act No. 24 of 1876, dispensing with notice where an answer was filed or citation served, not applying to justices.—State ex rel. Henderson v. McCrea, 40 La. Ann. 20, 3 South. 380.

[k] (Mont. 1895) Code Civ. Proc. § 820, providing that in certain cases a new trial may be granted by a justice of the peace, on motion, within 10 days after the entry of judgment, requires the motion to be made within such 10 days, and the mere giving of notice of the motion within that time is insufficient.—State v. Votaw, 16 Mont. 308, 40 Pac. 597.

[l] (Pa. 1883) A justice of the peace has power to grant a rehearing after the time for the appeal or hearing allowed by Act March 20, 1810, § 7, has elapsed, where the defendant has been prevented by the mistake of the justice, or sickness, from being present at the hearing or entering an appeal.—Cole v. Bishop, 2 C. P. Rep. 225.

[m] (S. C. 1883) The powers of a trial justice being derived from the statute, he cannot entertain a motion for a new trial made more than five days after rendition of judgment, under Code, § 88, subd. 18, declaring that "no motion for a new trial shall be heard unless made within five days from the rendering of the judgment."—Doty v. Duvall, 19 S. C. 143.

[n] (S. C. 1894) Under a statute allowing the losing party to a case in justice court to move the justice for a new trial at any time within five days of the entry of judgment, notice to the other party of the motion must specify the time and place of hearing.—Ashe v. State, 41 S. C. 92, 19 S. E. 297.

[o] (Tex. 1883) Where the grounds set forth for a new trial in justice court are verified by the affidavit of the party, and the same are not controverted, the statements in the motion are to be considered as prima facie true, and if the grounds are sufficient, the motion should be granted.—Durham v. Flannagan, 2 Willson, Civ. Cas. Ct. App. § 22.

[p] (Tex. 1883) Under Rev. St. art. 1623, requiring that the grounds of a motion for a new trial in a justice's court, other than that the judgment is contrary to the law or the evidence, should be supported by affidavit, a motion for new trial on the grounds that the judgment is contrary to the law or the evidence need not be supported by affidavit.—Mills v. Hackett, 1 White & W. Civ. Cas. Ct. App. § 845.

[q] (Tex. 1886) The disposition of a motion for a new trial must be made within 10 days after the rendition of the judgment.—Grant v. Fowzes, 3 Willson, Civ. Cas. Ct. App. § 105.

[r] (Tex. 1889) Under Rev. St. art. 1622, authorizing a justice, within 10 days after rendering judgment, to grant a new trial on motion in writing, he cannot grant a new trial at the next term of his court, held after the 10 days, though the motion is filed in time, and an order is made continuing it to the next term.—Carter v. Van Zandt County Com'rs, 75 Tex. 286, 12 S. W. 985.

[s] (Tex. 1894) Since a justice can grant a new trial within 10 days after judgment, a motion for a new trial filed within such time may be considered, though Rev. St. art. 1624, provides that such motions shall be made within five days after judgment.—Texas & P. Ry. Co. v. Gill, 9 Tex. Civ. App. 139, 28 S. W. 911.

[t] (Va. 1893) Where more than 30 days have elapsed since the rendition of judgment, a justice cannot grant a new trial.—Burroughs v. Taylor, 90 Va. 55, 17 S. E. 745.

§ 372. Appeal to jury.

In garnishment proceeding, see ante, § 299 [a].

[a] (Ala. 1884) Code 1876, § 3619, providing that any person dissatisfied with a justice's judgment may, within five days, appeal to a jury, applies to all cases of which the justice has jurisdiction, and not simply those for recovery of specific property referred to in section 3618.—East Tennessee, V. & G. R. Co. v. Hughes, 76 Ala. 590.

[aa] (Ga. 1883) In all cases in justice's court, the party dissatisfied may appeal to a jury, though the amount exceeds $50.—Candler v. Mann, 70 Ga. 726.

[b] (Ga. 1884) An appeal to a jury, after notice, but before entry of appeal by the other party to the superior court, holds the action in the justice's court.—East Tennessee, V. & G. R. Co. v. Miles, 72 Ga. 252.

[c] (Ga. 1884) A suit in justice's court, for triple damages for killing a cow in an inclosure where the fence was not lawful, cannot, after appeal to the jury, be converted into an action for the value of the cow.—Vaughan v. McDaniel, 73 Ga. 97.

[d] (Ga. 1886) By Const. 1877, and Acts 1882-83, p. 96, appeals are allowed from the decision of a justice to a jury in all cases where the amount is within the jurisdiction of that court.—Jackson v. Lewis, 76 Ga. 92.

[e] (Ga. 1887) On trials of appeals to a jury, the presiding magistrate has no power to order a nonsuit because he deems the evidence insufficient to warrant a finding for plaintiff.—Favors v. Johnson, 79 Ga. 553, 4 S. E. 925.

[f] (Ga. 1890) Act Sept. 26, 1883, provides that "whenever the defendant in any civil suit in the justice's courts, in an unconditional contract in writing, makes defense, he shall make such defense at the first term of said court."

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Plaintiff sued on three promissory notes, and, defendant filing no plea and making no appearance, judgment was entered by default. *Held* that, on defendant's appeal to a jury, it was proper to strike his pleas filed after the judgment.—McCall v. Tufts, 85 Ga. 619, 11 S. E. 886.

[g] (Ga. 1894) Though a judgment in the justice's court be rendered on a confession of judgment, the party making the confession may appeal therefrom to a jury.—Southern Exp. Co. v. Hilton, 94 Ga. 450, 20 S. E. 126.

[h] (Ga. 1894) A decision by a presiding justice of the peace that plaintiff's evidence was insufficient to sustain the action, though the judgment was one dismissing the suit, was an adjudication on the merits within Code, § 4157a, providing for appeals to a jury from such a judgment.—Savannah, F. & W. Ry. Co. v. McMillan, 95 Ga. 504, 22 S. E. 273.

[i] (Ga. 1895) Under Code, § 3619, providing that one of several coparties may appeal, though the others refuse, a judgment defendant in a bail trover suit in a justice's court may appeal in forma pauperis to a jury in that court, though the surety on the appeal bond, also a judgment defendant, refuses to join in the appeal.—Barnett v. Travis, 96 Ga. 760, 22 S. E. 314.

[j] (Ga. 1896) Where, on the trial of a claim case, the justice rendered judgment in these words: "After hearing the evidence, it is ordered that the claim be dismissed at claimant's cost, and property found subject, and the fi. fa. proceed against said property,"—there was an adjudication on the merits, so that claimant could appeal to a jury.—Reed v. De Laperiere, 99 Ga. 93, 24 S. E. 855.

(M) JUDGMENT.

1. IN GENERAL, §§ 373-376.
2. BY CONFESSION AND ON CONSENT, OFFER, OR ADMISSION, §§ 377-381.
3. BY DEFAULT, §§ 382-388.
4. ON TRIAL OF ISSUES, §§ 389-394.
5. ENTRY, RECORD, AND DOCKETING, §§ 395-399.
6. AMENDMENT OR CORRECTION, OPENING OR VACATING, AND EQUITABLE RELIEF, §§ 400-407.
7. COLLATERAL ATTACK, §§ 408-411.
8. LIEN, SUSPENSION, ENFORCEMENT AND REVIVAL, AND SATISFACTION, §§ 412-417.
9. ACTIONS ON JUDGMENTS, §§ 418-425.

Agreement to purchase judgment constituting lien on realty as involving title and not enforceable before justice, see ante, § 83 [w].
As property subject to execution, see post, § 427 [b].
—— *to garnishment, see* ante, § 295 [h].
Assignment of judgment as authorizing assignee to sue on justice's bond for money collected thereon, see ante, § 60.
Confession before justice disqualified by relationship, see ante, § 200 [c].
Effect of appeal on judgment, see post, § 603.
Foreign judgment, see "Judgment," vol. 30, cc. 2542-2659, §§ 1443-1509.
Judgment against garnishee, see ante, §§ 300-304.
—— *in action on judgment, see* post, § 425.
—— *in attachment proceedings, see* ante, § 288.
Verdict and findings, see ante, § 366.
Void judgment as ousting jurisdiction of justice, see ante, § 190 [h, i].
Acquittal before justice as bar to prosecution on indictment, see "Criminal Law," vol. 14, cc. 999, 1000, §§ 347, 350.
Conviction under defective complaint as constituting former jeopardy, see "Criminal Law," vol. 14, c. 1005, § 363.
Merger, bar, and conclusiveness, see "Judgment," vol. 30, cc. 1492-2349, §§ 987-1310.
Referee's award as merged in justice's judgment, see "Judgment," vol. 30, cc. 1492-1676, §§ 987-1078.

1. IN GENERAL.

NATURE AND ESSENTIALS IN GENERAL, § 373.
JURISDICTION TO SUSTAIN JUDGMENT, § 374.
PROCESS AND APPEARANCE TO SUSTAIN JUDGMENT, § 375.
EFFECT OF INVALIDITY, § 376.

§ 373. Nature and essentials in general.

Form and requisites, see post, § 393.

[a] (Ga. 1857) The verbal order of a plaintiff in a suit before a justice, that a judgment in his favor should be dismissed, which was not complied with, does not in any way affect the validity of the judgment.—Jordan v. Mayo, 22 Ga. 588.

[b] (Kan. 1880) Where a justice having jurisdiction renders a judgment in favor of the plaintiff, the fact that his bill of particulars was defective renders the judgment erroneous, not void.—Hodgin v. Barton, 23 Kan. 740.

[c] (Mich. 1895) Under 2 How. Ann. St. § 7046, providing that no justice's judgment shall be reversed on account of any fees having been improperly allowed by the justice, a justice's judgment is not invalidated because an attorney's fee is improperly included therein.—Backus v. Barber, 107 Mich. 468, 65 N. W. 379.

[d] (N. J. 1828) A judgment in a justice's court in New York cannot be pleaded as a debt of record.—Sherwood v. Johnson, 1 Wend. 443.

[e] (N. Y. 1847) A judgment in a justice's court is in the nature of a debt of record.—Mitchell v. Hawley, 4 Denio, 414, 47 Am. Dec. 260.

[f] (N. Y. 1864) Where a justice of the peace has acquired jurisdiction of the person of a defendant by the personal service of process on him in the manner required by law, with power to proceed therein to judgment, though there is an error in the appearance of the party who served the writ, as attorney, yet, until reversed, the judgment, renewed, is valid and effectual, and good authority for the issuing of an execution.—Wilkinson v. Vorce, 41 Barb. 370.

[g] (N. Y. 1865) Justices' courts are limited by the statute to a certain course of proceedings; and unless those proceedings are strictly adhered to, or waived by the party who has a right to insist upon them, any judgment of such court is irregular and void.—Brisbane v. Macomber, 56 Barb. 375.

[h] (N. C. 1846) Judgments rendered by justices are not records, but they are muniments of the rights of both parties by judicial determination.—Cobb v. Cornegay, 28 N. C. 358, 45 Am. Dec. 497.

[i] (Pa. 1846) The judgment of a justice or alderman is a record.—Oliver v. Foster, 5 Pa. Law J. 335.

[j] (Pa. 1873) A married woman not being liable on her contract where it is not alleged and proved that the debt was for necessaries

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for herself and family, a justice's judgment in any other instance is void and will not make her estate liable.—Igham v. Sickler, 2 Luz. Leg. Reg. 105.

[k] (Pa. 1889) The existence of irregularities for which a judgment of a justice should have been refused does not render it void, but voidable merely, where he has jurisdiction.—Kramer v. Wellendorf, 129 Pa. 547, 18 Atl. 525.

[l] (Tenn. 1881) A clerical error in a judgment by a justice of the peace does not render the judgment invalid.—Cowan v. Lowry, 75 Tenn. (7 Lea) 620.

[m] (Tex. 1895) The test of the validity of a judgment of a justice is its intelligibility.—Davis v. Bargas, 12 Tex. Civ. App. 59, 33 S. W. 548.

[n] (Tex. 1896) Under Rev. St. 1879, art. 1623, providing that a justice may at any time within 10 days after judgment in a suit tried before him grant a new trial therein, where a justice grants a new trial after more than 10 days have expired, on motion of the unsuccessful party, the judgment rendered on another trial is void.—Odle v. Davis (Civ. App.) 35 S. W. 721.

§ 374. Jurisdiction to sustain judgment.

Collateral attack for want of jurisdiction, see post, § 410.

Showing jurisdiction on record, see ante, §§ 207–216.

[a] A judgment of a magistrate for a sum above his jurisdiction is void.

—(Ala. 1831) Witherspoon v. Barber, 3 Stew. 335;

(N. C. 1832) Jones v. Jones, 14 N. C. 360.

[b] (U. S. 1825) A justice's judgment in an action of debt for an amount within his jurisdiction, against the surety on a constable's official bond, is not absolutely void, though the proper remedy was by action on the bond, which was for an amount beyond the jurisdiction.—Mickum v. Edds, Fed. Cas. No. 9,531 [2 Cranch, C. C. 568].

[c] (U. S. 1837) A judgment of a justice of the peace being in part for a matter not within his jurisdiction is void in toto.—Foy v. Talburt, Fed. Cas. No. 5,020 [5 Cranch, C. C. 124].

[d] (Cal. 1860) Where suit before a justice was brought in one township, and the summons was served by the constable of that township in another township, and it nowhere appeared in the record that the defendant was a resident in the first township, or a nonresident of the county, and the case was not brought within the other exceptions of the statutes (Wood's Dig. pp. 232, 233), the judgment rendered was void.—Lowe v. Alexander, 15 Cal. 296.

[e] (Dak. 1889) Where, in forcible entry and unlawful detainer, defendant pleads ownership of the premises, and offers evidence to prove that fact, the justice being thereupon bound to cease all proceedings and certify the case to the district court, his subsequent judgment, on failure to certify the case, is coram non judice.—Murry v. Burris, 6 Dak. 170, 42 N. W. 25.

[f] (Ind. 1852) Where a justice was disqualified by relationship to the plaintiff, his judgment is coram non judice and void.—Dawson v. Wells, 3 Ind. 398.

[g] (Ind. 1857) A judgment for $109.22 exclusive of costs is not void as beyond the jurisdiction of a justice of the peace, by Rev. St. 1843, p. 864, though jurisdiction is limited to $100.—Inhabitants of Congressional Tp. No. 11 v. Weir, 9 Ind. 224.

[h] (Ind. 1875) A judgment rendered by a justice of the peace of one township against a sole defendant who is a resident of another township where there is a justice, there being no legal reason that the action could not be brought in such other township, is void.—Hampton v. Warren, 51 Ind. 288.

[i] (Ind. 1878) The jurisdiction of justices of the peace is limited, in contested cases, to $200, and where a complaint before a justice demanded the return of personal property valued at $50, and $50 additional as damages for its detention, and also demanded judgment for $106 additional for moneys alleged to have been embezzled by the defendant, and judgment was given for the plaintiff, by default, for $156, it was *held* that the judgment was void, as the amount claimed exceeded the justice's jurisdiction.—State v. Forry, 64 Ind. 260.

[j] (Ind. 1888) Under Rev. St. § 1450, providing that suits may be instituted before justices by agreement or process, "and the delivery of the process to the officer authorized to serve the same, if by process, and the entry of the fact upon the docket, if by agreement, shall be deemed such commencement," where a judgment fails to show that the suit was instituted by agreement, by an entry on the docket, and shows that the summons was delivered by the justice to plaintiff's attorney, who was not an officer authorized to serve the same, and that such summons was served outside the state, contrary to the provisions of section 1431, limiting the jurisdiction of justices in civil cases to their respective townships, such judgment is void.—Penrose v. McKenzie, 116 Ind. 35, 18 N. E. 384.

[k] (Ind. 1893) A justice's judgment in an action for forcible entry and detainer is not void because of his certification to the circuit court that the title to the land came in issue.—Bridges v. Branam, 133 Ind. 488, 33 N. E. 271.

[l] (Kan. 1873) A judgment rendered by a justice of the peace without jurisdiction of the subject-matter is void.—Neal v. Keller, 12 Kan. 247.

[m] (Mo. 1886) A judgment rendered by a justice of the peace against a husband is not void because the action was against husband and wife, and a justice may not entertain a suit to charge a married woman's separate property.—Lindenschmidt v. Vallee, 23 Mo. App. 594.

[n] (N. Y. 1843) The judgment of a justice, given in a case where the title to land plainly comes in question, is not void for want of jurisdiction, but voidable for error.—Koon v. Mazuzan, 6 Hill, 44.

[o] (N. Y. 1847) Where, in a justice's court, the plaintiff's claim and the defendant's set-off together exceed $400, and the justice, instead of entering a discontinuance, proceeds with the cause, and gives judgment for the balance, such judgment, though erroneous, is not void for want of jurisdiction.—Lamoure v. Caryl, 4 Denio, 370.

[p] (Pa. 1807) A justice of the peace rendered judgment for an amount exceeding his jurisdiction. *Held*, on appeal, that, it appearing on the face of the record that the justice had no jurisdiction, it was the duty of the court to arrest judgment, though the jurisdiction was not pleaded.—Moore v. Wait, 1 Bin. 219.

[q] (Pa. 1859) A judgment rendered by a justice of the peace, on an award of referees, for a sum exceeding $100, is void for want of jurisdiction.—Appeal of Phillips, 34 Pa. (10 Casey) 489.

[r] (Tenn. 1881) A judgment by a justice of the peace for an amount in excess of his juris-

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diction will be quashed upon certiorari.—Harris v. Hadden, 75 Tenn. (7 Lea) 214.

[s] (Tenn. 1882) A judgment rendered without objection by a justice of the peace related within the prohibited degrees to a party to the suit is not void, but voidable.—Holmes v. Eason, 76 Tenn. (8 Lea) 754.

[t] (Tex. 1857) The judgment of a justice of the peace in a case in which he had no jurisdiction is a nullity.—McFaddin v. Spencer, 18 Tex. 440.

[u] (Tex. 1858) The record of a judgment of a justice of the peace upon title to land is inadmissible in evidence; such judgment being a nullity.—Hillman v. Baumbach, 21 Tex. 203.

§ 375. Process and appearance to sustain judgment.

Appearance to sustain judgment by confession, see post, § 380.

Collateral attack for defects in process, see post, § 411.

Showing process or appearance on record, see ante, § 214.

To sustain default judgment, see post, § 383.

[a] A summons to the defendant is indispensable to give jurisdiction in a justice's court, and without it the judgment is void.
—(Ga. 1883) Jeffers v. Ware, 72 Ga. 135;
(Kan. 1864) Case v. Hannahs, 2 Kan. 490.

[b] (Cal. 1863) Where a return to a summons was made in the name of a deputy sheriff, instead of in the name of the sheriff himself, a judgment rendered in the suit in which the summons was issued, by a justices' court, was *held* void for want of jurisdiction.—Rowley v. Howard, 23 Cal. 401.

[c, d] (Ga. 1875) A justice of the peace had in his hands certain notes for suit, and defendant wrote on the back of the notes, "I acknowledge service on the within notes." *Held*, that the fact that defendant made payments on a part of the note, after judgment was rendered on such notes, without any summons being issued, and obtained an agreement that execution should be stayed for 12 months, did not estop him from denying the validity of the judgment.—Gunnels v. Deavours, 54 Ga. 496.

[e] (Ga. 1877) If a justice tries a case within less than the period provided by law after the summons, the judgment is void, even if the parties interpleaded and did not object at the time of trial.—Mitchell v. Braswell, 59 Ga. 532; Warfield v. Ivey, Id. 603.

[f] (Ill. 1853) Where the appearance of defendant in justice court was entered by a third party without authority, the judgment is void for want of jurisdiction.—Nelson v. Rockwell, 14 Ill. (4 Peck) 375

[g] (Ind. 1883) A judgment rendered by a justice of the peace on a summons against a resident of another county, there having been neither notice nor appearance, though the record shows service, is void.—Johnson v. Ramsay, 91 Ind. 189.

[h] (Kan. 1891) A summons issued by a justice of the peace was served by a constable by leaving a copy, which was a correct copy of the original, except that the name of the constable was signed to the copy in place of the name of the justice; but an indorsement on the copy was signed by the latter as justice. *Held* that, though such service might have been set aside on motion, it was not absolutely void, and the judgment entered on it was voidable only, and not void.—Stewart v. Bodley, 46 Kan. 397, 26 Pac. 719, 26 Am. St. Rep. 105.

[i] (Mich. 1875) Comp. Laws, § 5264, authorizing the issuance of a short summons when the plaintiff is a nonresident, is permissive only, and the use of a long summons in a case before a justice does not render the judgment void for want of jurisdiction.—Moore v. Vrooman, 32 Mich. 526.

[j] (Mich. 1892) Where a justice's summons, issued March 2, 1888, returnable March 10, 1888, was served within the proper time, a judgment entered thereon is not void because the officer by mistake returned that it was served March 3, "1886."—Evans v. Calman, 92 Mich. 427, 52 N. W. 787, 31 Am. St. Rep. 606.

[k] (Mich. 1893) A justice's judgment cannot be sustained where his docket shows that the summons was issued on the 12th of the month, returnable on the 20th, and the judgment rendered on the 10th.—Holmes v. Cole, 95 Mich. 272, 54 N. W. 761.

[l] (Miss. 1890) Where in an action before a justice of the peace the record shows that the original summons was not served before the return day, but that afterwards, the case being continued, a summons was served, the return on which does not show that it was an alias, nor is that fact shown by any entry on the docket or recital in the record, a judgment founded on such service is void, as the presumption is that the original summons was executed after it was functus officio.—Raiford v. Weems, 68 Miss. 138, 8 South. 260.

[m] (N. Y. 1859) Laws 1831, c. 300, directing a justice to issue a short summons against a nonresident, and declaring that if he is otherwise proceeded against "the justice shall have no jurisdiction in the case," renders void a judgment against a nonresident, being served with a summons returnable in more than 4 days, the same not being a short summons, though he made no appearance objecting to the jurisdiction.—Willins v. Wheeler, 28 Barb. 669, 8 Abb. Prac. 116, 17 How. Prac. 93.

[n] (N. Y. 1863) Where a summons had been issued by a justice of the peace November 28, 1856, returnable December 5th, then next, at 1 o'clock p. m., and had been duly served and returned, and on the return day the justice, by mistake and in the belief that the summons was returnable at 9 o'clock a. m., called the action at 10 a. m., and tried it on testimony, and rendered a judgment for the plaintiff, the judgment was *held* to be a nullity, for want of jurisdiction.—Sagendorph v. Shult, 41 Barb. 102.

[o] (N. Y. 1871) A short summons, authorized by 3 Rev. St. (5th Ed.) p. 462, §§ 212–215, to be issued against defendants who come within that class, and who by the nonimprisonment act of 1831 cannot be proceeded against by long summons or warrant, being an extraordinary process, can only issue on preliminary proof, and plaintiff must bring himself within that provision by affidavit before the justice, and without such proof a judgment in the justice court will be presumed to be void until that proof is supplied.—Rue v. Perry, 63 Barb. 40.

[p] (N. Y. 1880) Where a justice certified that he issued and delivered a summons to a constable on the 23d day of January, and the constable in his return certified that he served it on the "3d" day of January, on affidavits that the constable inadvertently omitted the figure "2," *held*, that the mistake was not fatal to the judgment.—Snyder v. Schram, 59 How. Prac. 404.

[q] (Pa. 1872) Where a nonresident defendant was sued before a justice of the peace by a "long" instead of a "short" summons, the judgment was void; the justice having no juris-

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diction.—Klugh v. Rouse, 4 Lanc. Bar, No. 14, p. 1.

[r] (Pa. 1889) In trespass before a justice against persons residing out of the county, the provisions of Act July 12, 1842, that in cases where "no capias can issue, and the defendant shall reside out of the county, he shall be proceeded against by summons or attachment returnable not less than two nor more than four days from the date thereof," are imperative, and where six days intervene between issue and return the judgment is void.—Pantall v. Dickey, 123 Pa. 431, 16 Atl. 789.

[s] (Tenn. 1844) A judgment rendered by a justice of the peace is not void because the warrant does not specify before what particular justice of the peace it was returnable.—Jarrell v. White, 24 Tenn. (5 Humph.) 306.

[t] (Tenn. 1871) A judgment rendered by a justice of the peace before return day of the writ is not void, but erroneous.—Glover v. Holman, 50 Tenn. (3 Heisk.) 519.

[u] (Tenn. 1874) The failure of a magistrate to note on the back of his warrant the fact of its issuance will not render the magistrate's judgment void.—Elliott v. Jordan, 66 Tenn. (7 Baxt.) 376.

[v] (Tenn. 1874) A justice's judgment is not void because the summons commanded the defendant to appear immediately before the justice.—Elliott v. Jordan, 66 Tenn. (7 Baxt.) 376.

[w] (Wis. 1881) Where a justice's summons was dated November 23d, and the copy served specified, by mistake, the 2d day of the same month as return day, a judgment rendered in pursuance thereof will not be set aside.—Mabbett v. Vick, 53 Wis. 158, 10 N. W. 84.

§ 376. Effect of invalidity.

Effect on execution, see post, § 426.

[a] (Ga.) Though a justice's court has no power to set aside its void judgment, it may disregard such judgment, and treat it as a nullity whenever it comes in question.—(1875) Fontaine v. Bergen, 55 Ga. 410; (1882) Chapman v. Floyd, 68 Ga. 455.

[b] (Mo. 1894) A void judgment rendered by a justice of the peace without jurisdiction is not aided by the subsequent taking and dismissing of an appeal from such judgment.—Jones v. Pharis, 59 Mo. App. 254.

[c] (Tenn. 1872) A judgment of a justice of the peace for a sum beyond his jurisdiction, being void, is not remedied by a judgment of the circuit court for a sum within the jurisdiction of the justice.—Houser v. McKennon, 60 Tenn. (1 Baxt.) 287.

2. BY CONFESSION AND ON CONSENT, OFFER, OR ADMISSION.

BY CONFESSION, § 377.
—— PARTIES, DEBTS, AND AMOUNTS FOR WHICH JUDGMENT MAY BE CONFESSED, § 378.
—— NECESSITY FOR AND SUFFICIENCY OF OATH OR AFFIDAVIT AND SPECIFICATION OF ITEMS, § 379.
—— APPEARANCE AND CONSENT TO SUSTAIN JUDGMENT, § 380.
ON CONSENT, OFFER, OR ADMISSION, § 381.

§ 377. By confession.

As precluding appeal to jury, see ante, § 372 [g].

[a] (Ala. 1881) Code, § 3945, declaring a judgment by confession to be a release of errors, applies to judgments by a justice of the peace.—Murphree v. Whitley, 70 Ala. 554.

[b] (Del. 1842) In a suit pending before a justice of the peace, he may render judgment by confession.—Dickinson v. Horn, 3 Har. 496.

[c] (Del. 1845) Judgment cannot be entered by a justice of the peace on a judgment note, after the death of the maker of the note.—Lynch's Ex'x v. Tunnell, 4 Har. 284.

[d, e] (Ill. 1850) A justice of the peace has authority to render a judgment by confession when the party to the suit is before him and acknowledges an indebtedness to an amount within his jurisdiction.—Hopkins v. Walter, 11 Ill. (1 Peck) 543.

[f] (Ill. 1867) An admission by a defendant before a justice, that "he could not deny the plaintiff's demand," does not amount to a confession of judgment.—Elliott v. Daiber, 42 Ill. 467.

[g] (Ill. 1874) A recital in the docket of a justice of the peace, that defendant agreed that plaintiff have judgment for a certain sum, and that plaintiff accepted the judgment so tendered, sufficiently shows a judgment by confession.—Boettcher v. Bock, 74 Ill. 332.

[h] (Ill. 1887) A judgment by a justice of the peace on an admission by defendant that the amount is due is not a judgment by confession.—Goddard v. Fischer, 23 Ill. App. 365.

[i] (Ind. 1880) On a judgment taken before a justice of the peace, where the amount is "over $40 and under $75," an undertaking for stay of execution "for 180 days from the rendition thereof" has the effect of a judgment confessed by such replevin bail.—Hawes v. Pritchard, 71 Ind. 166.

[j] (Kan. 1886) Where a justice of the peace left his office and went to the defendant's residence, which was in the same township, and there the defendant waived summons, confessed judgment, and swore to the necessary affidavit therefor, and the justice then returned to his office, where he made the proper entries of the proceedings, judgment is neither void nor voidable. The defendant, when she waived the summons, confessed the judgment, etc., waived the irregularity of the justice's taking the confession of the judgment at a place other than his office.—Krueger v. Beckham, 35 Kan. 400, 11 Pac. 158.

[k] (Mass. 1879) Under Comp. St. Vt. c. 29, § 22, authorizing a justice of the peace to accept and record a confession of a debt to a creditor made by the debtor personally, "either with or without antecedent process, as the parties may agree," and to render judgment on such confession, a record of a judgment, which shows that the debtor appeared before the justice, without antecedent process, and acknowledged the debt to be due, and does not state that he agreed that such acknowledgment should be taken as a confession of judgment, or that the judgment should be rendered thereon without antecedent process, is insufficient.—Henry v. Estes, 127 Mass. 474.

[l] (Mich. 1843) A judgment by confession under Rev. St. p. 389, § 2, must "be signed by the person making the same in the presence of the justice and of one or more competent witnesses," and the witnesses must sign their names as such.—Beach v. Botsford, 1 Doug. 199, 40 Am. Dec. 45.

[m] (Mich. 1847) A justice can render judgment by confession only in those actions which he has jurisdiction to try.—Spear v. Carter, 1 Mich. (Man.) 19, 48 Am. Dec. 688.

[n] (Mich. 1862) Where an action is commenced by process, and the parties come before

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the justice, where complainant declares, and defendant orally confesses, the action, the justice may properly render a judgment for defendant without further formalities. — Crouse v. Derbyshire, 10 Mich. 479, 82 Am. Dec. 51.

[nn] (Mo. 1841) Article 6, § 2, of the statute concerning justices of the peace, prescribing the manner of confessing judgments, does not apply where there is process. Rev. Code 1835, p. 362.—Davis v. Wood, 7 Mo. 162.

[o] (Mo. 1849) A judgment confessed before a justice on a day not his court day, and where the confession was not in writing, was *held* to be void.—Oyster v. Shumate, 12 Mo. 580.

[oo] (Mo. 1850) A judgment confessed before a justice of the peace on a day not his law day is void.—Hunter v. Reinhard, 13 Mo. 23.

[p] (Mo. 1853) A justice of the peace may take a confession of judgment on a day other than a regular law day.—Huff v. Knapp, 17 Mo. 414.

[pp] (Mo. 1857) In justices' courts, a confession of judgment need not be in writing signed by the defendant, and filed by the justice; and the appearance and confession of the defendant are sufficient ground whereon to issue an execution.—Franse v. Owens, 25 Mo. 329.

[q] (Mo. 1886) A mere written acknowledgment of indebtedness, filed by a debtor with a justice, which contains neither a formal confession of judgment, nor written authority to the justice to enter judgment, is not sufficient as the basis of a judgment, where there is no antecedent process, and no voluntary appearance of the parties.—Loth v. Faconesowich, 22 Mo. App. 68.

[qq] (Mo. 1892) Since, at common law, confession judgments require service of process, and, by Rev. St. § 6274, if made before a justice of the peace without service, must be in writing, a judgment orally confessed without service before a justice is a nullity.—Burr v. Mathers, 51 Mo. App. 470.

[r] (Mont. 1891) On a justice's docket appeared the following entry: "Defendant appeared in court, and confessed judgment for the amount sued for and costs of suit. Judgment is therefore herein entered for the plaintiff." Action had been commenced, but no valid summons had been served on defendant, and no written answer had been filed, and there was nothing else to show an oral answer; neither was there writing authorizing entry of judgment. *Held* that, though Code Civ. Proc. § 740, provides that a justice shall have jurisdiction on the voluntary appearance and pleading of the parties without summons, still, it being provided by sections 770, 806, that where the pleadings are oral the substance of them shall be entered by the justice in his docket, there was nothing to show authority for the entry of judgment, as "confessed judgment" could not be taken to be the substance of an oral answer, but must be considered to be used with reference to section 465 et seq., which authorize entry of judgment by confession where no action has been commenced, on the filing of a certain written statement signed by defendant.—Hunter v. Eddy, 11 Mont. 251, 28 Pac. 296.

[rr] (Nev. 1865) A justice of the peace does not acquire jurisdiction in a proceeding, under Prac. Act, § 651, by a landlord against a tenant under a written lease, in which the latter waives summons and notice in all legal proceedings against himself, and authorizes a third party to confess judgment for him, when no demand of possession is made and no summons issued, though said party confesses judgment. —Paul v. Armstrong, 1 Nev. 82.

[s] (N. J. 1813) Judgment may be rendered by a justice on the confession of the defendant. —Vandergriff v. Pierson, 3 N. J. Law (2 Penning.) 992.

[ss] (N. J. 1844) A justice of the peace, by virtue of a power of attorney directed to him to confess judgment, cannot enter up a judgment before himself.—Wright v. Wood, 20 N. J. Law (Spencer) 308.

[t] (N. Y. 1810) A justice of the peace cannot enter judgment by confession against a party on a written request, on his own knowledge that such writing was the handwriting of the party, and without any process or further proof.—Martin v. Moss, 6 Johns. 126.

[tt] (N. Y. 1863) A justice has the same power to receive a confession of judgment at the defendant's house, in the town of the justice's residence, as at his own house.—Stone v. Williams, 40 Barb. 322.

[u] (N. Y. 1863) If a defendant appear before a justice of the peace and sign a confession of judgment in his presence, the presence or absence of the docket will not affect the jurisdiction of the justice.—Stone v. Williams, 40 Barb. 322.

[uu] (N. Y. 1888) In replevin before a justice neither party appeared. The justice had met defendant, who had told him and plaintiff he would not appear, but would pay the costs, and to deliver the property to plaintiff. The justice entered judgment on his minutes, June 21, 1882. August 1, 1883, at the request of defendant's attorney, he entered judgment on his docket, and August 24, 1883, defendant appealed. Code Civ. Proc. § 3013, provides that where plaintiff does not appear within one hour of the time of trial the justice shall enter a nonsuit. Section 3015 provides that on judgment confessed the justice shall enter judgment forthwith. *Held*, that the justice treated the conversation as a confession of judgment, and made an entry carrying out the agreement; and, after an acquiescence of over a year, defendant would not be heard to complain.—Traffarn v. Getman, 49 Hun, 611, 3 N. Y. Supp. 807.

[v] (Pa. 1804) A justice of the peace cannot enter judgment on a warrant of attorney. —Alberty v. Dawson, 1 Bin. 105.

[w] (Pa. 1845) The offer to confess judgment after the appeal is taken, and before the justice has made out his transcript of the appeal, is too late.—Bogart v. Rathbone, 1 Pa. (1 Barr) 188.

[ww] (Pa. 1851) A judgment rendered in a justice's court on confession of an agent of defendant is valid, though rendered before the return days.—Barber v. Chandler, 17 Pa. (5 Harris) 48, 55 Am. Dec. 533.

[x] (Pa. 1880) A justice of the peace has no power to enter judgment or issue execution on a note with warrant of attorney to confess judgment.—Wilson v. Jay, 1 Chest. Co. Rep. 65.

[xx] (Pa. 1888) A judgment confessed before a justice for a certain sum, "and for the crops," will be reversed on certiorari, as it could not be enforced, and the latter part cannot be treated as surplusage.—Eavenson v. Zoelers, 6 Pa. Co. Ct. R. 138.

[y] (Tenn. 1881) The judgment of a justice of the peace recited that defendant had confessed judgment for a specified sum, and added, "I therefore give for the above amount, for which execution may issue." The word "judgment" was inadvertently omitted after "give," and the word "notes" was written "note."

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Held immaterial.—Cowan v. Lowry, 75 Tenn. (7 Lea) 620.

[z] (Tenn. 1881) A justice's judgment on a warrant of attorney contained in notes, service of which is acknowledged by defendant by confession of liability for the cause of action, is not a judgment by confession under Code, §§ 2977-2979.—Cowan v. Lowry, 75 Tenn. (7 Lea) 620.

[zz] (Vt. 1824) A judicial proceeding before a justice of the peace who is a party in interest is coram non judice, so that a judgment therein, though taken by confession, is void.—Bates v. Thompson, 2 D. Chip. 96.

§ 378. —— Parties, debts, and amounts for which judgment may be confessed.

[a] (N. H. 1830) Under the statute of December 20, 1808, a justice of the peace may render judgment upon a confession for a sum exceeding four pounds.—Perry v. Page, 5 N. H. 172.

[b] (N. Y. 1805) Confessing a judgment in favor of an executor in a justice court will not give the court jurisdiction; it having none in suits by executors.—Coffin v. Tracy, 3 Caines, 129.

[c] (N. Y. 1850) Under Code 1848, a justice had no power to take judgment by confession for a sum greater than $100.—Daniels v. Hinkston, 5 How. Prac. 322.

[d] (N. Y. 1851) Under 2 Rev. St. p. 245, § 113, authorizing a justice to enter a judgment by confession of defendant in any case where the debt or damages do not exceed $250, a public officer, who is liable to be sued for services rendered for the public, at his request, may confess judgment for the amount.—Gere v. Cayuga County Sup'rs, 7 How. Prac. 255.

[dd] (N. Y. 1890) A justice of the peace having no authority to enter judgment by confession on a contingent liability, judgments based principally on such a liability are not valid as to minor items, covered thereby, which were actually due at the time confession was made.—Adams v. Tator, 57 Hun, 302, 10 N. Y. Supp. 617, 19 Civ. Proc. R. 114.

[e] (N. Y. 1890) Code Civ. Proc. § 2864, giving jurisdiction to justices of the peace to enter confessions of judgments, does not confer authority to confess for a contingent liability. Section 3011 provides that, on the confession of judgment before a justice, there must be an affidavit stating that the defendant is honestly indebted to plaintiff in the sum specified, over and above all just demands which defendant has against plaintiff. *Held*, that a justice of the peace had no authority to enter a confession of judgment in favor of a surety on certain notes against the principal maker, where the surety had not paid the notes at the time of the entry of judgment, though before such entry he had agreed with the principal to make such payment.—Adams v. Tator, 57 Hun, 302, 10 N. Y. Supp. 617, 19 Civ. Proc. R. 114.

[f] (Pa. 1858) If parties appear before a justice, with or without a summons, and agree on the state of accounts between them, and one confesses judgment in favor of the other for a sum exceeding $100, the justice has jurisdiction to enter and enforce it.—Butler v. Urch, 2 Grant, Cas. 247.

[ff] (Tenn. 1875) Under Code, §§ 2977-2979, 4125, subsec. 2, limiting the power of a justice of the peace to enter judgment by confession by his jurisdiction of the amount, and providing that "the written evidence" on which the confession is taken is to be "filed and constitute a part of the record of the cause," and defining the power of a justice to be "to enter up judgment by confession of a defendant to any amount within his jurisdiction in the particular case," a judgment by confession entered by a justice on an open account for a sum in excess of his jurisdiction is void.—Alley v. Myers, 2 Tenn. Ch. 206.

[g] (Vt. 1853) Where judgment is rendered by confession of the debtor before a justice of the peace, the amount will make no difference as far as the question of jurisdiction is concerned.—Hubbard v. Fisher, 25 Vt. 539.

§ 379. —— Necessity for and sufficiency of oath or affidavit and specification of items.

[a] Though the omission of the oath or affidavit, required by statute, from a judgment by confession in a justice's court, renders the judgment void as to creditors, it is valid and binding between the parties.
—(Ind. 1843) Campbell v. Baldwin, 6 Blackf. 364; (1871) Barnett v. Juday, 38 Ind. 86; (1878) Kennard v. Carter, 64 Ind. 31; (1879) Mavity v. Eastridge, 67 Ind. 211; (1882) Hopper v. Lucas, 86 Ind. 43; (1885) Chapin v. McLaren, 105 Ind. 563, 5 N. E. 688;
(N. Y. 1824) Griffin v. Mitchell, 2 Cow. 548; (1829) Germon v. Swartwout, 3 Wend. 282; (1863) Stone v. Williams, 40 Barb. 322.

[b] (Ind. 1836) Under the statute of 1831, a judgment by confession, rendered by a justice of the peace, should show that the oath prescribed by that statute relative to the fairness of the proceedings was taken by the defendant, or the judgment is of no validity.—Ex parte Knight, 4 Blackf. 220; Mann v. Perkins, Id. 271.

[c] (N. J. 1818) The act requiring affidavits in cases of judgment by confession, before justices of the peace, does not extend to actions commenced by summons served and returned.—Budd v. Marvin, 4 N. J. Law (1 Southard) 248.

[d] (N. J. 1836) An affidavit for confession of judgment, as prescribed by Act Feb. 19, 1829 (Har. Comp. Laws, p. 248), must in every respect accord with the directions given in that act, and must state the consideration of the debt; and the act embraces the court for the trial of small causes, and virtually repeals section 18 of the act constituting that court.—English v. Sharpe, 15 N. J. Law (3 J. S. Green) 457.

[e] (N. Y. 1824) A judgment by confession, before a justice, for $50 or less, is good, without the oath and specification required by section 7 of the $50 act.—Snyder v. Warren, 2 Cow. 518, 14 Am. Dec. 519; Griffin v. Mitchell, 2 Cow. 548.

[f] (N. Y. 1829) The specification of items for which a judgment is confessed, under the act to extend the jurisdiction of justices of the peace, as well as the oath, must be in writing.—Germon v. Swartwout, 3 Wend. 282.

§ 380. —— Appearance and consent to sustain judgment.

[a] (Ark. 1889) Mansf. Dig. § 5185, provides that any person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction and confess judgment therefor. *Held*, that a judgment confessed before a justice, the record of which fails to show, except by inference, that defendant personally appeared, is void.—Smith v. Finley, 52 Ark. 373, 12 S. W. 782.

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[b] (Ind. 1878) The consent of plaintiff is necessary to a judgment by confession before a justice of the peace, but such consent may be presumed from the record unless the contrary appears.—Kennard v. Brough, 64 Ind. 23.

[c] (Kan. 1884) Where a defendant appeared within five days after judgment by default, and, in absence of the justice, left papers offering to confess judgment for costs, etc., and another justice made entry of same, and on his return, the former justice ratified such entry, and, in absence of defendant, entered judgment against him for costs on his confession, the judgment, though irregular, is not void.—Bates v. McConnell, 3 Pac. 515.

[d] (N. J. 1829) To authorize a justice to enter an action "by agreement of the parties without process," under the act for the trial of small causes, the plaintiff and defendant should appear before the justice to manifest their consent or some person on behalf of the plaintiff having competent authority, verified on oath before the justice.—Young's Adm'r v. Stout, 10 N. J. Law (5 Halst.) 302.

[e] (N. J. 1836) If the plaintiff be not present either by attorney or in person when judgment is confessed in a justice's court on affidavit, it is ground for reversal; but his presence will be presumed unless the contrary appear of record.—English v. Sharpe, 15 N. J. Law (3 J. S. Green) 457.

[f] (N. Y. 1818) A justice of the peace cannot enter a judgment by confession against a defendant, unless on his appearance in court, either in person or by attorney, or where he has been duly summoned.—Bromaghin v. Throop, 15 Johns. 476.

[g] (N. Y. 1828) Under the $50 act (Acts 47th Sess. c. 238), requiring that in all cases where a warrant shall issue the constable shall be commanded to take the defendant and bring him or her forthwith before the justice, etc., the confession of a judgment on the authority of a defendant as upon a warrant, where he is not in fact arrested and brought before the court, is void.—Colvin v. Luther, 9 Cow. 61.

[h] (N. Y. 1832) A judgment in a justice's court cannot legally be entered on confession, unless the defendant is brought in by summons, or voluntarily appears in court and confesses judgment; authority given to the justice to enter judgment, at an accidental meeting in the street, is not sufficient.—Tenny v. Filer, 8 Wend. 569.

[i, j] (Ohio, 1850) Under Swan & C. St. p. 506, § 1, declaring that a justice shall have jurisdiction to enter judgment for any sum not exceeding $200, when the debtor shall "appear" before him without process, a justice may enter judgment where the debtor appears by attorney to confess judgment.—Staner v. Stom, 1 Ohio Dec. 344.

[k] (Ohio, 1860) Under Swan & C. St. p. 332, § 327, providing that, if any debtor shall appear before a justice without process and confess that he is indebted to another, the justice may render judgment against him, to authorize the justice to render judgment in such case, the defendant must specially appear and confess that he is indebted to the plaintiff in a named sum, and plaintiff must appear personally and apply for judgment on such confession; no judgment can be rendered against a person or confession made by an agent or attorney.—Murdock v. Cooper, 2 Ohio Dec. 306.

[l] (Pa. 1852) Where all the parties plaintiff in an action before a justice of the peace did not appear at the time confession of judgment for a sum exceeding $100 was taken, such judgment is invalid.—Boon v. Collins, 1 Phila. 438.

[m] (Pa. 1855) In an amicable action before a justice of the peace for a sum over $100, the confession of judgment is good without the personal appearance of the plaintiff. It is sufficient if he appear by agent.—Truitt v. Ludwig, 25 Pa. (1 Casey) 145.

[n] (Pa. 1891) Act 1810 limited the jurisdiction of justices of the peace to $100, but provided that they might entertain an amicable action for an amount exceeding that sum, when the parties appeared and judgment was confessed before the magistrate. The act of 1814 provided that justices might entertain amicable actions for sums less than $100 on subjects within their jurisdiction, under the act of 1810. By the act of 1870 justices of the peace of Crawford county were authorized to entertain suits in actions on contract when the sum in controversy did not exceed $300. *Held*, that where the defendant appeared before a justice of Crawford county, agreed to the entry of an amicable action, and confessed judgment on a contract for an amount less than $300, the justice had jurisdiction to enter the judgment without an appearance on the part of the plaintiff.—Tarr v. Eddy, 142 Pa. 410, 21 Atl. 993.

§ 381. On consent, offer, or admission.

[a] (Ill. 1840) One cannot authorize a justice to render judgment against him by sending a letter to the justice requesting him to enter judgment against defendant, in favor of plaintiff, for an amount named therein, though he expressly state that he waived service of process and authorized the judgment. Such a judgment is absolutely void.—Evans v. Pierce, 3 Ill. (2 Scam.) 468.

[aa] (Ind. 1851) A justice of the peace has no authority to render a judgment bearing more than legal interest, though the parties consent.—Berry v. Makepeace, 3 Ind. 154.

[b] (Ind. 1871) A recital in the record of a justice, that "B., the defendant, appeared and confessed the following note, * * * and said that he was justly indebted for the same," shows a sufficient consent on the defendant's part to warrant entry of judgment.—Barnett v. Juday, 38 Ind. 86.

[c] (Minn. 1859) A judgment based on a verdict rendered in a justice's court, on consent of the parties, by a majority of the jury, cannot be sustained where the defeated party's consent was given in ignorance of the fact, known to his opponent, that the majority was against him.—Snow v. Hardy, 3 Minn. 77 (Gil. 35).

[d] (N. J. 1833) In an action by the payee of a promissory note against the indorser, an admission of the plaintiff's demand by the defendant to the justice on a day preceding a return of the summons will not authorize the justice to enter judgment in favor of the plaintiff.—Outcalt v. Rankin, 14 N. J. Law (2 J. S. Green) 33.

[e] (N. Y. 1854) Where a suit on a promissory note is commenced before a justice of the peace by personal service of the summons, and both parties appear, and the defendant consents that judgment may be rendered against him for the amount of the note, the judgment is valid without an affidavit as to the amount due, or a written confession, or proof.—Gates v. Ward, 17 Barb. 424.

[f] (N. Y. 1888) The return by a justice showed that plaintiff objected to the introduction, as a counterclaim, of a note which, taken with plaintiff's demand, exceeded the justice's jurisdiction but that he would "allow" it. No proof of the execution of the note was given. The return also showed that defendant consented "to the whole thing." *Held*, that judgment was properly given for plaintiff for the

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amount of his demand, less the note, and for costs.—Hearman v. Snyder, 50 Hun, 605, 3 N. Y. Supp. 94.

[g] (Pa. 1879) Where it appears from the record of a justice of the peace that defendant admitted the claim of plaintiff, such admission is a sufficient hearing of proofs and allegations on which to base a judgment.—Griffin v. Koch, 1 Leg. Rec. Rep. 47.

[h] (Tex. 1878) A judgment of a justice of the peace as follows: "H. Sewell v. A. C. Beasley and S. M. Brown. Note $67.50; due Dec. 1st, 1859. Citation issued January 4th, 1860, F. H. Patrick, deputy sheriff. Executed by copy January 7th. Defendants appeared and acknowledged judgment for principal, interest, and costs of suit. C. P. Campbell, J. P.,"—is not invalid for uncertainty.—Davis v. Rankin, 50 Tex. 279.

3. BY DEFAULT.

IN GENERAL, § 382.
PROCESS AND APPEARANCE TO SUSTAIN JUDGMENT, § 383.
DEFAULT OF APPEARANCE OR PLEADING AND ABSENCE AT TRIAL, § 384.
TAKING DEFAULT, TIME, AND RELIEF AWARDED, § 385.
—— PROOF OF CAUSE OF ACTION, § 386.
OPENING OR SETTING ASIDE DEFAULT, § 387.
—— PROCEDURE, § 388.

Against garnishee, see ante, § 300 [a, d–f, n].
—— *one defendant as ousting jurisdiction over others, see* ante, § 190 [k].

§ 382. In general.

[a] (Del. 1857) Where the parties to an action before a justice of the peace have appeared, and the defendant has filed a set-off, judgment by default on the set-off should not be rendered against the plaintiff on his failure to attend at the trial, but only a judgment of nonsuit.—Adkins v. Jester, 1 Houst. 352.

[b] (Ind. 1856) One was sued before a justice in another town from that in which he resided, though there was at the time in his own town a justice competent to act. The party was defaulted, and execution issued. *Held*, in a proceeding to vacate the judgment and set aside the execution, that the judgment was void.—Brickley v. Heilbruner, 7 Ind. 488.

[c] (La. 1888) A justice's judgment in favor of plaintiff was set aside and judgment on the merits given against plaintiff, though he was not present at the new trial, and no reconvention was claimed by defendant. *Held*, that in rendering such judgment the justice exceeded his jurisdiction; the only proper judgment being one of nonsuit.—State ex rel. Henderson v. McCrea, 40 La. Ann. 20, 3 South. 380.

[d] (Mich.) A default judgment of a justice of the peace is void where the docket entry shows that the cause was adjourned, without stating the place to which the same was adjourned.—(1895) Waldron v. Palmer, 104 Mich. 556, 62 N. W. 731; (1896) Fitzhugh v. Rivard, 109 Mich. 154, 66 N. W. 947.

[e] (Minn. 1861) In an action before a justice of the peace, a defendant waives nothing by failure to appear; and plaintiff must show strict compliance with the statute in obtaining an adjournment in order to sustain a judgment by default.—School-Dist. No. 7 v. Thompson, 5 Minn. 280 (Gil. 221).

[f] (Mo. 1878) A judgment rendered by a justice of the peace when the defendant is present by attorney, who, however, takes no part in the trial, is not a "judgment by default," within 2 Wag. St. p. 846, §§ 1, 2, which provides for appeals from a justice of the peace to the circuit court.—Borgwald v. Fleming, 69 Mo. 212.

[g] (Mo. 1882) A judgment of a justice rendered by default on a cause of which the justice had no jurisdiction is void.—Bornschein v. Finck, 13 Mo. App. 120.

[h] (N. J.) A justice cannot enter judgment on the mere default of the defendant.—(1806) Torrence v. Van Emburgh, 2 N. J. Law (1 Penning.) 106; (1807) Shinn v. Earnest, Id. 155; (1807) Hendrickson v. Code, Id. 322; (1808) Crane v. Crane, 3 N. J. Law (2 Penning.) 412; (1809) Cooper v. Madara, Id. 531; (1809) Keen v. Scull, Id. 544; (1810) Pearson v. Briggs, Id. 621; (1810) Clarke v. Clarke, Id. 724.

[i] (N. J. 1818) Under the statute, judgment by default cannot be entered by a justice.—Hevener v. Kerr, 4 N. J. Law (1 Southard) 58.

[j] (N. J. 1822) A judgment rendered against a plaintiff in his absence by a justice of the peace is erroneous, and will be reversed.—Cavalier v. Doughty, 6 N. J. Law (1 Halst.) 227.

[k] (N. Y. 1856) After defendant, in an action in justice's court, had commenced his proofs, the case was adjourned by consent. On the adjourned day plaintiff failed to appear. *Held*, that the justice erred in proceeding with the case and rendering judgment in favor of defendant on his counterclaim, since the only judgment proper in such case would be nonsuit or dismissal.—McCullum v. McClare, 3 Abb. Prac. 106.

[l] (Ohio, 1858) Act March 5, 1858, § 105, providing that, if either party fail to appear before a justice of the peace before the return day of the summons, the case may proceed at the request of the adverse party, does not enable the justice to try a plaintiff's cause of action where he fails to appear; he has power simply to enter a judgment of nonsuit or dismissal.—Sharp v. Liddle, 3 Ohio Dec. 64.

[m] (Ohio, 1858) Act March 5, 1858, § 105, providing that, if either party fail to appear before a justice of the peace before the return day of the summons, the case may proceed at the request of the adverse party, does not enable the justice to try the merits of a defendant's counterclaim, filed after the hour fixed for trial, where plaintiff fails to appear.—Sharp v. Liddle, 3 Ohio Dec. 64.

[n] (Tex. 1857) In a suit against several defendants in a justice's court, the original citation was returned as served on all the defendants but one, and there was a continuance for service on the remaining defendant, and a citation issued for him was returned, "executed by serving copy April 5, 1855"; and in the justice's docket followed these entries: "April 28th, offset proven and allowed, $20.50. Decree for balance, $70.50." *Held*, that the judgment did not appear to be by default as to any of the defendants, but on appearance and trial as to all.—Howerton v. Luckie, 18 Tex. 237.

[o] (Wis. 1888) Where a counterclaim is set up in a justice's court, and plaintiff fails to appear, it is error to hear evidence in support of the counterclaim, and enter judgment for defendant thereon by default. The judgment should be a nonsuit, with costs, as provided by Rev. St. § 3685.—Hartel v. Kite, 70 Wis. 396, 36 N. W. 7.

§ 383. Process and appearance to sustain judgment.

Showing process or appearance on record, see ante, § 214.

[a] (Ala. 1893) Where, in an action in justice court against a corporation, the return of

the constable is "executed by summons," a judgment by default against the defendant, without independent proof that the person served was authorized to receive service, is void.—Independent Pub. Co. v. American Press Ass'n, 102 Ala. 475, 15 South. 947.

[b] (Ark. 1881) A justice's summons, erroneously directed to the coroner for service, if duly served by him, will nevertheless support a verdict by default.—McCabe v. Payne, 37 Ark. 450.

[c] (Cal. 1885) Where a summons in a justice court stated that, in case of default, "plaintiff would take judgment for the amount claimed," instead of that "plaintiff would apply to the court for the relief demanded," as required by Code Civ. Proc. § 844, a judgment by default thereon is voidable only.—Keybers v. McComber, 67 Cal. 395, 7 Pac. 838.

[d] (Colo. 1893) Under Gen. St. 1883, § 1936, providing that a suit before a justice shall be commenced by summons, in which the justice shall specify a certain day for the trial, not less than 5 nor more than 15 days from the date of such summons, a justice's judgment entered August 1, 1891, by default, against plaintiffs, in an action commenced by summons dated July 27, 1891, citing plaintiffs to appear July 1, 1891, is void.—Rice v. American Nat. Bank, 3 Colo. App. 81, 31 Pac. 1024.

[e] (Conn. 1843) Defendant appeared at the hour designated in the writ, and waited until its expiration, during which time neither the justice nor the plaintiff appeared, and then departed, after which the justice appeared and adjourned the cause to a future day, without giving the defendant any notice, and without his having any knowledge of such adjournment. *Held*, that judgment by default rendered against him on the adjourned day was erroneous; he having had a right to depart when he did, and the law implying no notice to him of the adjournment.—Burgess v. Tweedy, 16 Conn. 39.

[f] (Ind. 1861) A summons was issued by a justice of the peace on February 13th, returnable on the 20th; it was served on the 18th, and on the 20th judgment was rendered by default, which on the 27th was set aside on plaintiff's motion, and the trial set for the 9th of March, following, on which day judgment was again rendered by default. In December, suit was instituted in the circuit court to set aside this judgment. *Held*, that on the 20th of February there was not such jurisdiction of the person of the defendant as authorized the rendition of the judgment of that date.—Jamieson v. Caster, 16 Ind. 426.

[g] (Iowa, 1870) A judgment by default rendered by a justice of the peace on a notice served only four days before, being on notice which is merely defective, is not void for want of jurisdiction.—Shea v. Quintin, 30 Iowa, 58.

[h] (Iowa, 1872) Where an action in a mayor's court had by consent been indefinitely continued "until after the then next ensuing term of the district court," a judgment rendered at a trial fixed on request of the plaintiff, without notice to the defendant, is irregular and void.—Rowley v. Baugh, 33 Iowa, 201.

[i] (Kan. 1888) Where a defendant fails to appear in a justice court and judgment is rendered against him for an amount larger than that indorsed on the copy of the summons, such judgment is void.—Basset v. Mitchell, 19 Pac. 671.

[j] (Mo. 1886) Judgment by default, entered by a justice of the peace, is void, if the summons was not served 10 days before the date of rendition.—France v. Evans, 90 Mo. 74, 2 S. W. 141.

[k] (Neb.) Under Code Civ. Proc. § 1100a, requiring a defendant, when sued on an instrument purporting to have been made by him, but who controverts the making of the same, to "make and file an affidavit with the justice of the peace before whom the suit is pending that such instrument was not made, given, subscribed, accepted, or indorsed by him," where the justice has in his possession the instrument on which the action is brought, and there is no such affidavit of the defendant made and filed with him, denying its execution, nor any defense made to the action, the justice may render judgment on such instrument though the plaintiff fail to appear.—(1883) Wells v. Turner, 14 Neb. 445, 16 N. W. 484; (1885) Phœnix Ins. Co. v. Lemke, 18 Neb. 184, 24 N. W. 727.

[l] (N. J. 1827) Where the justice adjourned the cause in the absence of defendant, the summons not having been duly served, and gave no notice thereof, and tried the cause in defendant's absence, the judgment will be reversed.—Camman v. Perrine, 9 N. J. Law (4 Halst.) 253.

[m] (N. J. 1828) Defendant in an action before a justice appeared on the adjourned day to make application for a further continuance for two weeks. The justice's partner said that as plaintiff had written making the same request, it would undoubtedly be granted, and that defendant need not wait as he would inform the justice of his application. The justice subsequently adjourned the cause one, instead of two, weeks, and plaintiff appearing, and defendant, who had had no notice of the adjourned date of trial, being absent, judgment went by default against defendant, though he had a good defense. *Held*, that the judgment should be reversed.—Probasco v. Hartough, 10 N. J. Law (5 Halst.) 55.

[n] (N. Y. 1833) If the defendant in an action before a justice willfully abandons his defense by availing himself of the momentary omission of plaintiff to appear within the time limited, and judgment by default is rendered against him, he is remediless.—Barber v. Parker, 11 Wend. 51.

[nn] (N. Y. 1862) The return of a summons, with the constable's indorsement thereon of due personal service upon defendant, confers jurisdiction on the magistrate issuing the summons, and authorizes him to proceed with the trial and render judgment, though defendant does not appear.—Wavel v. Wiles, 24 N. Y. 635.

[o] (N. C. 1877) Error in one of the initials of defendant's name in a justice's summons, if the right man is served, will not vitiate a default judgment.—Clawson v. Wolfe, 77 N. C. 100.

[p] (Pa. 1848) A copy of the summons left at the dwelling house of defendant, in the presence of one or more of his family or neighbors, is sufficient service to sustain a judgment by default.—Commonwealth v. Dalling, 2 Pars. Eq. Cas. 285.

[q] (Pa. 1848) The only personal service known to the law is where the original summons is produced to the defendant, and the contents thereof made known to him by the officer making the service, and hence the return of a constable, "Copy of the within served personally," is insufficient to sustain a judgment by default.—Commonwealth v. Dalling, 2 Pars. Eq. Cas. 285.

[qq] (Pa. 1848) In cases of judgment by default before a magistrate, it must appear that defendant has actually had notice of the suit by service of process in the manner prescribed by Act March 20, 1810, otherwise the judg-

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ment will be reversed.—Commonwealth v. Dalling, 2 Pars. Eq. Cas. 285.

[r] (Pa. 1851) The court will reverse a judgment rendered by default before a magistrate, unless it clearly appear on the face of the officer's return that the summons has been served in the manner prescribed by law.—Buchanan v. Specht, 8 Leg. Int. 162, 1 Phila. 252.

[rr] (Pa. 1851) To sustain a justice's judgment by default on a sci. fa. against bail, the officer's return should show that the constable produced the original writ to the defendant, as is required by law on the service of other writs of summons.—Buchanan v. Specht, 8 Leg. Int. 162, 1 Phila. 252.

[s] (Pa. 1862) Where the summons was made returnable nearly nine months after its issuance, probably by mistake, error in rendering judgment by default was fatal.—Hunter v. Weidner, 1 Woodw. Dec. 6.

[ss] (Pa. 1868) A summons stating plaintiff's demand to be $10.44 is insufficient to sustain a judgment by default for $30.55; no evidence appearing to have been heard by the magistrate.—Heffner v. Hoch, 1 Woodw. Dec. 453.

[t] (Pa. 1873) Where a summons sets an incorrect date for the hearing before a justice of the peace, a judgment rendered on default of appearance will be reversed on certiorari.—Sauser v. Werntz, 1 Leg. Chron. 249.

[tt] (Pa. 1873) To sustain a default judgment in a justice's court, there must be a service of summons by oath or affirmation.—Sauser v. Werntz, 1 Leg. Chron. 227.

[u] (Pa. 1879) Service of a justice's summons by leaving a copy at "defendant's house with an adult member of the family" is insufficient to sustain a judgment by default, the act of the assembly requiring service, when not personal, to be by "leaving a copy of it at his dwelling house in the presence of one or more of his family or neighbors."—Smith v. Noone, 1 Leg. Rec. Rep. 165.

[uu] (Pa. 1879) The return of service of summons, in an action before a justice, stated that it was "served by making known within contents to within named defendants." The justice's record showed that the return was made on oath, but the original return on the summons showed that it was "acknowledged" before another justice, but did not show that it was sworn to. *Held* not to sustain a judgment by default.—Starch v. Snyder, 1 Leg. Rec. Rep. 172.

[v] (Pa. 1884) To sustain a judgment by default, plaintiff or some one in his behalf must appear before the justice.—Karche v. Bach, 1 Lehigh Val. Law Rep. 118.

[vv] (Pa. 1893) A judgment by default in an action before a justice of the peace is invalid when proof of service of the summons is not made by affidavit, as Purd. Dig. pl. 55, expressly so requires.—Hoary v. McHale (Com. Pl.) 2 Pa. Dist. R. 686.

[w] (Pa. 1893) A judgment by default entered by a justice is void where the return day in the summons is December 5th, and in the copy thereof December 7th.—Hoary v. McHale (Com. Pl.) 13 Pa. Co. Ct. R. 256.

[ww] (Pa. 1894) Where a special deputation to serve a justice's process does not show that it was made by the constable of the proper county, and the record does not identify his official character, the service is irregular, and insufficient to sustain a judgment by default.—Metropolitan Life Ins. Co. v. Cook (Com. Pl.) 7 Kulp, 257, 14 Pa. Co. Ct. R. 434.

[x] (Pa. 1895) Act 1879 (P. L. 194; Purd. Dig. p. 982) pl. 49, provides that, if the plaintiff shall file an affidavit stating the amount due from defendant, the justice shall cause a certified copy thereof to be served at the time and in the manner that service is made of the summons in the case. *Held*, that service of a paper which is not certified, and not an exact copy of the affidavit, is insufficient to sustain a judgment by default.—Elwood Paper Co. v. Radziewicz (Com. Pl.) 16 Pa. Co. Ct. R. 81.

[xx] (Pa. 1896) In an action before a justice, wherein judgment was rendered by default, the record recited: "Summons returned on oath. Served a true copy of the within summons on the daughter of" defendant, "at his residence." The constable's return recited, after averring service, "So answers on oath," but did not show that the constable was sworn to his return of service. *Held*, that the judgment should be reversed for neglect of the justice to swear the constable to his return as required by Act March 20, 1810, § 6.—Bell v. Borough of Oakdale (Com. Pl.) 17 Pa. Co. Ct. R. 298, 5 Pa. Dist. R. 198, 26 Pittsb. Leg. J. (N. S.) 317.

[y] (Tenn. 1850) A suit before a justice of the peace was set for trial for September 4, 1849, and continued, but to no day certain, on the application of the defendant. On December 22d following, the justice indorsed on the warrant, "Judgment $37," and issued an execution; on the 24th he entered a formal judgment, and dated it September 4, 1849. The defendant was not notified to appear, and did not appear after September 4th. *Held*, that the formal judgment was void for want of notice to the defendant.—Hubbard v. Birdwell, 30 Tenn. (11 Humph.) 220.

[yy] (Tex. 1881) A justice's judgment by default, based on a citation by publication, made on an affidavit that defendant's residence was unknown to the affiant, is void on the face of the record.—Stegall v. Huff, 54 Tex. 193.

[z] (Tex. 1894) Under Rev. St. art. 1570, requiring a citation from a justice to cite defendant to some regular term of his court, a judgment by default on a citation, which notified defendant to appear on the first Monday, instead of the fourth Monday (the term as fixed by the commissioners' court), in October, is void.—Whitney v. Krapf, 8 Tex. Civ. App. 304, 27 S. W. 843.

[zz] (Wis. 1890) Where one of several defendants to an action in a justice's court is not served with process and does not appear, a default judgment against him is a nullity.—French v. Ferguson, 77 Wis. 121, 45 N. W. 817.

§ 384. Default of appearance or pleading and absence at trial.

[a] (U. S. 1824) A woman, against whom a justice of the peace of Washington county, D. C., has issued a warrant for a small debt, and who is notified by the officer to appear before the justice at a certain time and place named in the warrant, is bound to appear and answer; and if she does not, the justice may proceed ex parte and render judgment against her by default.—Oneil v. Hogan, Fed. Cas. No. 10,529 [2 Cranch, C. C. 524].

[b] (Ark. 1874) A default judgment may properly be rendered by a justice of the peace against a defendant who has appeared to the action, but interposed no answer or defense.—Page v. Sutton, 29 Ark. 304.

[c] (Cal. 1887) Where defendants were served and filed an answer, in a suit before a justice, but were not present on the day of trial, not having received notice from the justice, and judgment was rendered against them, such

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judgment was not a judgment by default.—Weimmer v. Sutherland, 74 Cal. 341, 15 Pac. 849.

[d] (Cal. 1887) Code Civ. Proc. § 859, provides that justices' courts can set aside judgments by default within 10 days. Defendants were served, and filed an answer, in a suit before a justice, but were not present on the day of trial, not having received notice from the justice, and judgment was rendered against them. *Held*, that this not being a judgment by default, an order setting it aside was error.—Weimmer v. Sutherland, 74 Cal. 341, 15 Pac. 849.

[e] (Cal. 1895) Under Code Civ. Proc. § 872, providing that if a demurrer to the complaint is overruled, and defendant fails to answer at once, the justice may render judgment against him, it is proper, on the overruling of a demurrer and a failure to answer forthwith, to immediately enter judgment against defendant, who had notice of the time of hearing, but did not appear; and section 850, requiring the justice to fix a day for the trial of the cause after an appearance, is thus complied with, as the issue presented was one of law, for which a hearing was fixed.—Stewart v. Justice's Court of Los Angeles Tp., 109 Cal. 616, 42 Pac. 158.

[f] (Dak. 1888) In an action before a justice, defendant appeared on the return day of the summons, and obtained a continuance. On the day to which the case was continued, defendant's attorney appeared and filed an answer, but defendant did not appear, and judgment was given against him. *Held* not a judgment by default.—Harris v. Watkins, 5 Dak. 374, 40 N. W. 536.

[g] (Iowa, 1857) Where, in an action before a justice of the peace, on the day set for trial, defendant demanded a jury, which was impaneled and sworn, and, after plaintiff's witnesses had been sworn, moved for judgment for the amount claimed by him, for want of an answer or denial of the plaintiff's claim, which motion was sustained, and judgment rendered against the defendant, such judgment was not a judgment by default.—Rhodes v. De Bow, 5 Iowa (5 Clarke) 260.

[h] (Iowa, 1870) Where, in an action before a justice, defendant appeared and answered, his subsequent failure to appear on a day to which the case was continued is not a "default" within Revision, § 3886, providing that a justice may set aside a default judgment within 6 days of its rendition.—Douglas v. Langdon, 29 Iowa, 245.

[i] (Iowa, 1875) Where defendant fails to plead, judgment entered against him is taken as by default, though he appeared to the action.—McFarland v. Lowry, 40 Iowa, 467.

[j] (Iowa, 1875) Where the defendant in an action before a justice of the peace has applied for and obtained a change of venue before the notice is returnable, but fails to plead or to appear at the trial, judgment by default may be entered against him.—Park v. Ratcliffe, 42 Iowa, 42.

[k] (Mo. 1886) Though a party to an action before a justice appears before it is finally submitted for trial, he may thereafter abandon it and suffer it to go by default.—Smith v. Wineland, 21 Mo. App. 387.

[l] (N. J. 1823) If a plaintiff discharges the defendant from arrest on a warrant, on the defendant's promising to appear before the justice, and the defendant does not appear, and the plaintiff takes judgment in his absence, the judgment will be reversed.—Anonymous, 7 N. J. Law (2 Halst.) 120.

[m] (N. J. 1824) Under the small cause act, if a defendant, arrested on a warrant, give bond to appear before the justice, and fail to appear at the day, the justice cannot proceed to trial, nor render judgment against him. Plaintiff's remedy is on the bond.—Camman v. Randolph, 7 N. J. Law (2 Halst.) 136.

[n] (N. Y. 1818) Where defendant appears at the hour set for the trial and consents to a short delay to accommodate the justice, and then voluntarily absents himself, he cannot complain of a judgment against him, on an ex parte trial.—Myer v. Fisher, 15 Johns. 504.

[o] (N. Y. 1856) Where a justice adjourned a cause, with provision that if defendant filed security meantime he should then have a further adjournment, and defendant filed the security, but failed to appear on the adjourned day, *held* that the justice was right in proceeding to judgment.—Muber v. Held, 3 Abb. Prac. 110.

§ 385. Taking default, time, and relief awarded.

Waiting hour before taking default, see ante, § 232.

[a] (Colo. 1887) A judgment by default in justice's court, rendered, in the absence of defendant or his counsel, prior to the hour set out in the citation, is a void judgment, and is not sufficient to support a plea in abatement on the ground of a former suit pending, filed in a second suit on the same cause of action.—Yentzer v. Thayer, 10 Colo. 63, 14 Pac. 53, 3 Am. St. Rep. 563.

[b] (Kan. 1876) A judgment rendered by a justice of the peace against the defendant in the action four days before the return day of the summons, and four days before the defendant is notified to appear, is void.—Briggs v. Tye, 16 Kan. 285.

[c] (Kan. 1888) Where defendant fails to appear in a justice court, judgment cannot be rendered against him for an amount larger than that indorsed on the copy of the summons served on him.—Basset v. Mitchell, 19 Pac. 671.

[d] (La. 1891) Defaults need not be taken and confirmed before the justice of the peace court in Louisiana, as is done before the district courts.—State ex rel. Houston Cent., A. & N. R. Co. v. Riley, 43 La. Ann. 177, 8 South. 598.

[e] (Me. 1851) A judgment obtained against a defendant before a justice of the peace is erroneous and reversible, if it was rendered before the day at which the defendant was summoned to attend.—Crosby v. Boyden, 33 Me. 368.

[f] (Mich. 1877) It appeared by a justices' docket that, on default of defendants, one of whom the declaration alleged to be the maker, the other the indorser of the note sued on, the justice heard the cause on a return of service "on the within named defendant," and entered judgment as follows: "Judgment is this day rendered for $300 damages, and $3 costs." *Held*, that the judgment was indefinite and void on its face.—Sherman v. Palmer, 37 Mich. 509.

[g] (Miss. 1880) Though a justice of the peace may render judgment on default after a constructive service, yet such judgment rendered at the return term is void.—Betts v. Baxter, 58 Miss. 329.

[h] (Neb. 1881) The record showed that defendant made a special appearance, and objected to the jurisdiction of the justice by motion which was overruled. *Held*, that a judgment

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against defendant, without showing an entry of default against him, was valid.—McPherson v. First Nat. Bank, 12 Neb. 202, 10 N. W. 707.

[i] (N. J. 1836) An entry by a justice of the peace in the record, that "the plaintiff filed his demand for $30. The defendant not appearing, the plaintiff proved his demand, and I gave judgment for the same."—is not a judgment.—Polhemus v. Perkins, 15 N. J. Law (3 J. S. Green) 435.

[j] (N. Y. 1828) A justice, having regularly heard a cause ex parte in the defendant's absence, cannot afterwards open the matter and proceed to a rehearing, without the plaintiff's consent, but must enter judgment according to the proof.—People v. Lynde, 8 Cow. 133.

[k] (Utah, 1886) Under Laws 1884, p. 288, § 718, requiring defendant in justice's court to appear within five days after the service of summons, defendant is entitled to five days after the day of the issue of the summons in which to answer, and a judgment by default entered before the five days have expired is invalid, though the justice fixes an hour for defendant's appearance.—Ducheneau v. House, 4 Utah, 303, 10 Pac. 427.

[l] (Vt. 1848) The statute in reference to supreme and county courts (Rev. St. c. 25, § 32) which gives the court power to cause damages to be assessed by a jury, after default, does not extend to justices of the peace; but if it did, it confers on them only a discretionary power, the refusal to exercise which is no ground of error.—Brown v. Irwin, 21 Vt. 68.

[m] (Vt. 1848) And if the common law, in reference to the assessment of damages by a jury, is in force as to justices of the peace, which may be doubted, that makes the exercise of the power to call a jury discretionary with the court.—Brown v. Irwin, 21 Vt. 68.

[n] (Wash. 1889) Code, § 1781, provides that when a defendant who has been served with a true copy of the complaint and notice fails to appear and plead within the time specified in the notice, or within an hour thereafter, judgment shall be given without further evidence. *Held*, that where, at the end of an hour from the time set for trial, no appearance having been entered for defendant, plaintiff demands judgment, and shortly afterwards persons present object, as agents for defendant, but the justice says, "I will have to render judgment," and refers such agents to section 1781, judgment is rendered for plaintiff, though after plaintiff and his attorney depart the justice grants defendant a continuance, but enters up the judgment for the plaintiff several hours thereafter.—McCoy v. Bell, 1 Wash. St. 504, 20 Pac. 595.

[o] (Wis. 1861) Where a justice having adjourned a case for 90 days afterwards changes the time to a shorter period, and plaintiff appears at the time fixed and takes judgment, it is a nullity.—Mahr v. Young, 13 Wis. 634.

§ 386. —— Proof of cause of action.

Entry of proof in docket, see post, § 456.

[a] (Del. 1835) A justice of the peace must try the cause on the allegations and proof of plaintiff before rendering judgment by default.—Coulter v. Layton, 1 Har. 494.

[b] (Del. 1852) On a hearing in defendant's absence, though after an appearance, a magistrate must hear proof as well as allegations before giving judgment.—Phillips v. Cannon, 5 Har. 366.

[c] (N. J. 1811) A justice of the peace cannot render judgment in defendant's absence without a trial.—Cowperthwait v. Horner, 3 N. J. Law (2 Penning.) 850; Flemings v. Newman, Id. 852.

[d] (N. Y.) A plaintiff must prove his case in a justice's court, though defendant neglects to appear.—(1804) Stocking v. Driggs, 2 Caines, 96; (1848) Muscott v. Miller, 1 Code Rep. 53.

[e] (N. Y. 1813) If the defendant makes default on return of a summons personally served, in an action before a justice of the peace, the justice cannot give judgment for the plaintiff without proof of his demand, made in the same manner as if the defendant appeared and denied it.—Cudner v. Dixon, 10 Johns. 106.

[f] (N. Y. 1849) In justice court plaintiff must prove his case before he is entitled to judgment, even though the defendant makes no defense.—Smith v. Falconer, 1 Code Rep. 120.

[g] (N. Y. 1849) In the assistant justice's court a plaintiff must prove his claim, though the defendant does not make any defense. In such case a default does not admit the plaintiff's claim.—Swift v. Falconer, 4 N. Y. Super. Ct. (2 Sandf.) 640.

[h] (N. Y. 1853) The court of common pleas will reverse a judgment rendered in a justice's court where the evidence is insufficient to support it, whether defendant appeared in the court below or not, as plaintiff is bound to prove his case whether defendant appeared or not, under Code, § 64, subd. 8, providing that on default of defendant plaintiff cannot recover without proving his case.—Howard v. Brown, 2 E. D. Smith, 247.

[i] (N. Y. 1859) The judgment of a justice of the peace cannot be sustained unless the plaintiff established his cause of action by legal evidence, though defendant was not present at the trial.—Perkins v. Stebbins, 29 Barb. 523.

[j] (N. Y. 1861) In an action in a justice's court for trespass on real property, defendant answered simply that a former suit was a bar. On the trial the justice denied an application for leave to amend, and defendant declined to produce any evidence, whereupon the justice, without any proof from plaintiff, gave judgment for the amount demanded in the complaint. *Held* error for which the judgment should be reversed. Code, § 168, which entitles the plaintiff to judgment where the answer does not deny the cause of action, is not applicable to justices' courts.—Raymond v. Traffarn, 12 Abb. Prac. 52.

[k] (N. Y. 1891) In an action before a justice of the peace for money due for services rendered, etc., testimony by plaintiff that he had a claim against defendants for labor performed at their request during a certain time, that they had paid him for some of the work, and that a certain sum remained due, no part of which had been paid and which plaintiff had demanded, is sufficient to sustain a judgment for plaintiff on defendants' default, within Code Civ. Proc. § 2891, which provides that, "if a defendant fails to appear and answer, the plaintiff cannot recover without proving his case."—Griffin v. Jackson, 59 Hun, 620, 13 N. Y. Supp. 321.

[l] (Pa. 1868) Where the action is against four, two of whom, not legally served with process, do not appear, if from the record it appear that there was no testimony given before the justice, a judgment against all the defendants will be reversed on certiorari.—Wagenhorst v. Smith, 1 Woodw. Dec. 421.

[m] (Pa. 1873) A justice of the peace cannot render a default judgment without hearing plaintiff's evidence.—Sauser v. Wernts, 1 Leg. Chron. 249.

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[n] (Pa. 1880) Where a defendant in an action before a justice of the peace has appeared and filed an affidavit of defense, the justice cannot enter judgment for the plaintiff without having proofs of the claim, notwithstanding the defendant failed to appear at the hearing.—Wissler v. Becker, 2 Pa. Co. Ct. R. 103, 11 Lanc. Bar, 187.

[o] (Pa. 1884) To sustain a justice's default judgment some evidence must be heard in support of plaintiff's claim.—Karche v. Bach, 1 Lehigh Val. Law Rep. 118.

[p] (Pa. 1891) Judgment by default cannot be rendered by a justice, without proof of plaintiff's claim.—Barney v. Fahs (Com. Pl.) 10 Pa. Co. Ct. R. 424.

[q] (Pa. 1893) A judgment cannot be rendered by a justice against a defendant on his refusal to make any defense, where plaintiff has not produced any evidence to support his claim.—Chambers v. Reynolds (Com. Pl.) 2 Pa. Dist. R. 402.

[r] (Wis. 1854) A justice of the peace should not render judgment on default without requiring full and competent proof of the plaintiff's demand.—Roberts v. Warren, 3 Wis. 736.

§ 387. Opening or setting aside default.

In garnishment proceeding, see ante, § 300 [d, n].

[a] (Ga. 1895) The fact that plaintiff's attorney, after a case was continued in a justice's court, informed defendants that the case would not be tried until the next month, was no cause for setting aside a judgment rendered against defendants by default at the next term, though defendants were ignorant and supposed that they would be resummoned.—Eady v. Napier, 96 Ga. 736, 22 S. E. 684.

[b] (Iowa, 1857) In an action before a justice of the peace, on the day set for the trial, defendant demanded a jury, which was impaneled and sworn. After plaintiff's witnesses had been sworn, plaintiff moved for judgment for the amount claimed by him, for want of an answer or denial of the plaintiff's claim, which motion was sustained, and a judgment rendered against the defendant. Defendant, four days afterwards, made oath that he had orally denied the plaintiff's claim on the trial, and that the justice had failed to enter the denial in his docket, on which affidavit the justice set aside the judgment, and appointed another day for the trial. *Held*, that the judgment rendered by the justice was not a judgment by default within section 2296 of the Code, and that the justice had no power to set it aside.—Rhodes v. De Bow, 5 Iowa (5 Clarke) 260.

[c] (Iowa, 1863) The discretion exercised by a justice of the peace in judging of an excuse for a default, and setting it aside, will not be interfered with upon appeal, unless it has been clearly abused.—Stivers v. Thompson, 15 Iowa, 1.

[d] (Iowa, 1881) The provision of Code 1873, § 2877, for the retrial of an action on application within two years, where judgment has been rendered on service by publication only, and the defendant has not appeared, is also applicable, under section 3516, to judgments in a justice's court, in the absence of any provision for such cases. The provision of section 3543, for setting aside judgments in a justice's court, applies only where there has been personal service.—Taylor & Farley Organ Co. v. Plumb, 57 Iowa, 33, 10 N. W. 282.

[e] (Iowa, 1894) Code 1873, § 3543, permitting a justice to set aside a default within six days, if the applicant can show a satisfactory excuse, gives him no discretion to open a default because, in the copy of the notice of suit left with defendant by the constable, defendant's name was spelled "Huhn" instead of "Kuhn," the notice itself being correct, and the service regular.—Breen v. Kuhn, 91 Iowa, 325, 59 N. W. 344.

[f] (Iowa, 1896) Whether the fact that a notice to defendant in an action of forcible entry and detainer was not signed by plaintiff, or by the justice of the peace before whom the proceeding was returnable, as required by Code 1873, § 3519, but was signed by plaintiff's attorney, is a "satisfactory excuse," within Code 1873, § 3543, providing that the justice of the peace may set aside a judgment by default within six days after its rendition, on a showing of a "satisfactory excuse," is a question to be determined by the justice, the defect not being jurisdictional.—Arts v. Rocksien, 98 Iowa, 536, 67 N. W. 409.

[g] (Kan. 1887) Where an action pending in justice's court is continued by consent to 1 o'clock p. m. of a certain day, but the justice makes an entry of the continuance in his docket which may read 10 o'clock a. m. of the same day, instead of 1 o'clock p. m., and the justice, through his mistaken belief that the cause does stand for hearing at 10 o'clock a. m., at the request of the plaintiff, and in the absence of the defendant, tries the action, and renders judgment against the defendant, such judgment, on motion of the defendant, may be vacated, because of its rendition before the action stood regularly for trial, and a new trial granted, on reasonable notice of such motion being given to the plaintiff.—Barons v. Anderson, 37 Kan. 399, 15 Pac. 226.

[h] (Kan. 1888) Judgment rendered in justice's court against defendants in their absence, may be set aside under Comp. Laws 1879, c. 81, § 114.—Covart v. Haskins, 39 Kan. 571, 18 Pac. 522.

[i] (Mo. 1876) The fact that defendant in a justice's court was prevented on account of sickness from attending at the trial, and that he had diligently tried to be represented, will justify the justice in setting aside a default judgment on the day after its rendition.—State ex rel. McCann v. Smyth, 1 Mo. App. 571.

[j] (Mont. 1893) Under Comp. St. div. 1, § 804, providing that the provisions of the General Code of Civil Procedure relative to practice, pleading, and trial shall, so far as applicable, and not in conflict with the provisions of the Justices' Code, be observed in justices' courts, a justice may open a default, and allow a defense to be interposed, in accordance with the provisions of Code Civ. Proc. § 116.—Schwabe v. Lissner, 13 Mont. 215, 33 Pac. 1012.

[k] (Neb. 1884) A defendant who has voluntarily permitted judgment to be entered against him by default before a justice, after having had a previous default against him set aside and an opportunity to make his defense, cannot have the second default set aside.—Smythe v. Kastler, 16 Neb. 264, 20 N. W. 208.

[l] (Neb. 1894) Where judgment has been rendered by default against a defendant in his absence, it is the duty of the justice to set aside the same on the defendant's moving therefor within 10 days, paying the costs, and notifying plaintiff of the day of trial, in compliance with Code Civ. Proc. § 1001.—Smith v. Riverside Park Ass'n, 42 Neb. 372, 60 N. W. 599.

[m] (N. Y. 1852) Where a justice was without jurisdiction by reason of proceeding by a short summons against defendant as a nonresident, without proof thereof, an offer by him, on the appearance of defendant a few minutes after judgment on default was rendered, to open the case, if defendant would state his defense,

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so that the justice could see if it was a valid one, was without authority.—Sperry v. Major, 1 E. D. Smith, 361.

[n] (N. Y. 1854) Where a justice proceeded with a case and rendered judgment therein immediately on the expiration of the time named in the summons, he has no power to open up the judgment on the defendant's coming immediately after and asking to be let in to defend. —Appleby v. Strang, 1 Abb. Prac. 143.

[o] (N. Y. 1890) Under Laws 1882, c. 410, § 1367 (Consolidation Act), providing that any justice may upon motion set aside any default made in any action tried before him, a plaintiff who has offered proof of personal service of summons on defendant, and obtained a judgment by default in a justice's court, cannot object to the vacation of the judgment by the justice, on proof that personal service was not had, on the ground that the justice had never acquired jurisdiction of the action.—Edel v. McCone, 10 N. Y. Supp. 538, 16 Daly, 216.

[p] (Ohio, 1886) The provision of Rev. St. § 6578, that a judgment by default entered against a defendant in his absence may be set aside by the magistrate where an affidavit is filed setting forth a good and sufficient reason for defendant's absence, and otherwise complying with the statute, is imperative, the word "may" therein being construed to read "shall." —Pope v. Pollock, 1 Ohio Cir. Ct. R. 347, 1 O. C. D. 193.

[q] (Or. 1892) In the absence of statutory authority, a justice of the peace has no power to set aside a judgment against defendant, rendered by default after personal service of the summons.—American Building & Loan Ass'n v. Fulton, 21 Or. 492, 28 Pac. 636.

[r] (Pa. 1854) Act July 12, 1842, § 31, making it the duty of an alderman who has entered judgment by default "where the attachment or summons shall not have been personally served" on affidavit of defense, in part or in whole, made by defendant or some person for him, to open the judgment and rehear the case, refers exclusively to attachments and summonses issued under the several provisions of that act, and does not apply to suit, under Act March 20, 1810, as for work and labor done.—Whitehead v. Gillespy, 1 Phila. 515.

§ 388. —— Procedure.

[a] (Ark. 1881) On application to set aside a justice's judgment rendered on default, no notice to plaintiff is necessary.—Frizzell v. Willard, 37 Ark. 478.

[b] (Cal. 1895) A motion to open a justice's judgment on default cannot be made by simply filing a written motion within the 10 days prescribed by Code Civ. Proc. § 859, and giving notice of a hearing at a time after the period has expired.—Spencer v. Branham, 109 Cal. 336, 41 Pac. 1095.

[c] (Ind. 1884) Where a judgment by default before a justice of the peace is granted on a partnership note against both parties, and one of them thereafter moves to set aside such judgment, which is done, the fact that the justice recites in his entry that the motion is granted "to him" does not control the presumption that such partner in making the motion acted in behalf of the firm, and that the judgment was set aside as to both defendants.—Robinson v. Snyder, 97 Ind. 56.

[d] (Ind. 1884) Where a judgment is entered on default in attachment before a justice against a resident on an affidavit of nonresidence, it cannot be set aside after the statutory time by an affidavit of residence and want of notice.—Brown v. Goble, 97 Ind. 86.

[e] (Me. 1862) Under Rev. St. 1841, a justice, having on the return day defaulted an action, cannot on the next day take off the default; there having been no continuance of the action.—State v. Hall, 49 Me. 412.

[f] (Me. 1866) A justice of the peace has no power, except by the provisions of some statute conferring the authority, to set aside a default on a day subsequent to that on which the entry was made.—Pratt v. Roberts, 53 Me. 399.

[g] (Mo. 1862) A motion by a nonresident to set aside a judgment which has been rendered against him on default before a justice must be made within 10 days from its rendition.—Blanchard v. Hatch, 32 Mo. 261.

[h] (Mo. 1876) In computing the 10 days' time within which a motion to set aside a default before a justice of the peace may be made, under Wag. St. p. 847, § 2, the first day after the rendition of the judgment should be excluded, and the last included. Thus, the judgment being rendered October 28th, motion filed November 7th was *held* to be in time.—Reynolds v. Missouri, K. & T. Ry. Co., 64 Mo. 70.

[i] (Mo. 1880) A motion to set aside a default judgment of a justice must be filed within 10 days.—Roach v. Montserratt Coal Co., 71 Mo. 398.

[j] (Neb. 1887) A judgment was rendered by a justice of the peace against defendants. Within 10 days, R., attorney for defendants, appeared before the justice, and, under Code Civ. Proc. § 1001, "offered to confess judgment for the costs in the case, and moved the court to set aside the default heretofore rendered in this case, and set said cause for trial," which offer and motion were made in writing, and signed by attorney for defendants, whereupon the justice made the following entry in the docket of the case: "Motion sustained, default set aside, and trial set for the eighth day of May, 1886, at 1 o'clock in the afternoon of said day;" signed officially by the justice, notice being given thereof as provided by statute. *Held*, that the offer to confess judgment made by the attorney was sufficient, under the statute, and the fact that the order was not conditional was not material, and it was error to subsequently refuse a new trial.—Stanton v. Spence, 22 Neb. 191, 34 N. W. 359.

[k] (Neb. 1890) On motion to set aside a judgment given by a justice of the peace in the absence of the defendant, the order should be conditional; but if it is absolute, and a day set for another trial, the error is in form only, and is harmless.—Tyler v. Baxter, 29 Neb. 688, 46 N. W. 153.

[l] (Neb. 1894) Code Civ. Proc. § 1001, provides that when judgment shall have been rendered against a defendant, in his absence, in a justice's court, the same may be set aside on the conditions (1) that his motion be made within 10 days; (2) that he pay or confess judgment for the costs; (3) that he notify the opposite party of the opening of said judgment, and of the time and place of trial, at least 5 days before the time. *Held*, that the third condition need not be complied with until after the default is opened.—Smith v. Riverside Park Ass'n, 42 Neb. 372, 60 N. W. 599.

[m] (N. C. 1851) Where a judgment is rendered by a justice of the peace against an absent party, and the party within 10 days thereafter applies for relief, under Rev. St. c. 62, § 15, the justice has no right summarily to vacate the judgment. He must issue a notice to the opposite party and an order to summon witnesses, and produce all the papers before him, or some other justice, within 30 days, directing a forbearance of proceedings in the

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meantime, on which appointed day the case should be reconsidered.—Sloan v. McLean, 84 N. C. 260.

[n] (N. C. 1851) Where a justice on such application made an order at once vacating the judgment, and no further proceedings were had thereon, it was *held* that, the order not being warranted by law, the original judgment remained in full force.—Sloan v. McLean, 84 N. C. 260.

[o] (Ohio, 1859) Under Swan's St. p. 516, § 106, providing that a judgment rendered against defendant in his absence by a justice of the peace may be set aside on a motion made within 10 days after such judgment was entered, upon his paying or confessing judgment for the costs awarded against him, and notifying, in writing, the opposite party of the opening of such judgment and of the time and place of retrial, in order to open a judgment, the statute must be complied with.—McCann v. Duffy, 2 Ohio Dec. 114.

[p] (Ohio, 1859) Where a party moving to set aside a judgment rendered against him in his absence by a justice of the peace fails to give notice to the other party of the opening of such judgment and of the time and place of retrial, as required by Swan's St. p. 516, § 106, the judgment remains unaffected and in full force.—McCann v. Duffy, 2 Ohio Dec. 114.

[q] (Pa. 1864) Where a judgment by default has been rendered against defendant who has not been summoned, the justice has authority to grant a rehearing after the expiration of 30 days from the rendition of the judgment.—Dicks v. Carter, 21 Leg. Int. 340.

[r] (Pa. 1895) Act March 29, 1810, § 7, authorizes a justice to open a default judgment on application made within 30 days, averring a set-off, etc. *Held*, that a justice has no power to open a judgment after the expiration of 30 days, for the purpose of allowing a set-off, however unjust the judgment.—McNamara v. McIntosh (Com. Pl.) 17 Pa. Co. Ct. R. 135, 5 Pa. Dist. R. 123.

[s] (R. I. 1878) A justice court, by rendering final judgment in an action and adjourning, exhausts its jurisdiction over the action, and cannot, after having given judgment by default for defendant and adjourned, remove the default and continue the case.—Hamill v. Bosworth, 12 R. I. 124.

4. ON TRIAL OF ISSUES.

IN GENERAL, § 389.
TIME AND PLACE FOR RENDITION OF JUDGMENT, § 390.
—— CONDITIONS PRECEDENT, § 391.
RENDITION OF JUDGMENT AT UNAUTHORIZED TIME OR PLACE, § 392.
FORM AND REQUISITES, § 393.
PARTIES, § 394.

On demurrer, see ante, § 327 [j, k].
On overruling plea in abatement, see ante, § 325 [d].

§ 389. In general.

[a] (Colo. 1894) A justice of the peace has no authority to grant a motion for arrest of judgment.—Corthell v. Mead, 19 Colo. 386, 35 Pac. 741.

[b] (Conn. 1794) If the judgment of a justice does not answer the issue, it will be reversed.—Thomas v. Dorchester, 2 Root, 124.

[bb] (Del. 1844) A judgment entered by a justice on a report of referees for a greater sum than that mentioned in the award was reversed.—Jones v. Morris, 4 Har. 104.

[c] (Ill.) In actions before a justice of the peace, the plaintiff is limited in his recovery to the amount indorsed on the summons.—(1847) Badgley v. Heald, 9 Ill. (4 Gilman) 64; (1850) Eaton v. Graham, 11 Ill. (1 Peck) 619; (1873) Toledo, P. & W. Ry. Co. v. Pence, 71 Ill. 174; (1878) Bullock v. Carpenter, 3 Ill. App. (3 Bradw.) 462.

[d] (Ind. 1837) It is no objection to the judgment of a justice of the peace that another justice sat and consulted with him on the trial of the cause.—Dougherty v. Mason, 4 Blackf. 432.

[e] (Mo. 1886) A justice's judgment against a husband generally for antenuptial debts of his wife, instead of a special judgment to be satisfied out of property acquired by her, is erroneous.—Babb v. Bruere, 23 Mo. App. 604.

[f] (Neb. 1890) Where a bill of particulars in a case before a justice states a cause of action, and a written answer is filed thereto, and the case is submitted on the pleadings, and the answer is insufficient, the justice can enter judgment for plaintiff.—Simons v. Sowards, 29 Neb. 487, 45 N. W. 779.

[g] (Neb. 1896) A general finding for plaintiff of a justice of the peace is sufficient to sustain a judgment for plaintiff, as against an attempt to set the same aside in the district court on error.—Coad v. Read, 48 Neb. 40, 66 N. W. 1002.

[h] (Neb. 1896) Code Civ. Proc. § 1002, relating to the rendition of judgment on a trial before a justice of the peace, applies to a county judge exercising the ordinary powers and jurisdiction of a justice.—Best v. Stewart, 48 Neb. 859, 67 N. W. 881.

[i] (N. H. 1827) A justice's judgment, rendered on a report of referees, made in pursuance of a submission of a controversy of less than $200 value, but which submission was not acknowledged before him, is erroneous.—Atwood v. York, 4 N. H. 50.

[j] (N. Y. 1807) A justice of the peace is bound to give judgment on a verdict, for he cannot arrest judgment nor award a new trial.—Felter v. Mulliner, 2 Johns. 181.

[k] (N. Y. 1846) Where a verdict, before a justice, exceeds in amount the justice's jurisdiction, the plaintiff may remit the excess, and a judgment for the residue will be valid.—Clark v. Demure, 3 Denio, 319.

[l] (N. Y. 1855) Where the defendant, in a justice's court, did not deny the plaintiff's claim, but merely alleged a set-off which was not proven on the trial, *held*, that judgment should have been rendered for the plaintiff.—Gregory v. Trainer, 1 Abb. Prac. 209.

[m] (N. C. 1877) If a proceeding before a justice of the peace, under the landlord and tenant act (Battle's Revisal, c. 64, § 19), wherein the defendant denied the alleged tenancy, is determined in favor of the plaintiff, such a judgment must be rendered as he is entitled to.—Foster v. Penry, 77 N. C. 160.

[n] (Tenn. 1857) Where the justice, before whom a warrant was returnable, called in three other justices to preside with him, and the three justices rendered one judgment, and the first justice a different one, it was *held* that his judgment should stand as the decision of the cause.—Crouch v. Martin, 36 Tenn. (4 Sneed) 569.

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§ 390. Time and place for rendition of judgment.

For entry of judgment, see post, § 396.

Stipulations as to time for rendering judgment, see ante, § 343 [e, f, g].

[a] (Conn. 1843) No judgment can be rendered in a justice's court against a party who has appeared in time, except at the hour designated, or in a reasonable time thereafter; and what is a reasonable time will be, in all other cases, a question depending upon circumstances, and governed by sound discretion.—Burgess v. Tweedy, 16 Conn. 39.

[b] (Del. 1845) A justice of the peace can render judgment only on a day to which the case stands adjourned.—Lynch v. Hill, 4 Har. 312.

[c] (Ga. 1893) A judgment by a justice of the peace at the regular time and place of holding his court, but which was written out and signed at some other time and place in the district, is rendered within sufficient time, since the word "rendered," as used in Code, § 462, refers to the making up and announcement of the judgment, and not to the clerical act of reducing it to writing.—Ryals v. McArthur, 92 Ga. 378, 17 S. E. 350.

[d] (Ill. 1861) A justice of the peace, after the evidence has been heard in a case, has no authority to order a continuance, or to postpone the case for advisement, but must render judgment. Such postponement will work a discontinuance, even though it be had with the consent of the parties.—Harrison v. Chipp, 25 Ill. (15 Peck) 471.

[e] (Ill. 1865) A justice of the peace can, like any other court, after the evidence and arguments are closed, adjourn the case for a definite and reasonable time, before giving his decision, without losing jurisdiction.—Hall v. Reber, 36 Ill. 483.

[f] (Iowa, 1858) A justice has but three days after verdict in which to render judgment.—Guthrie v. Humphrey, 7 Iowa (7 Clarke) 23.

[g] (Iowa, 1860) In case of a jury trial before a justice, judgment should be rendered on the verdict forthwith. The justice having failed in this case to enter it for nearly 60 days afterwards, it was *held* that he had lost the right so to do.—Harper v. Albee, 10 Iowa, 389.

[h] (Kan. 1877) In computing the four days allowed, under Gen. St. p. 799, § 115, for a justice to render judgment, both the day of trial and the day of entering judgment must be counted. For a justice to render judgment after the four days so computed, is error, which may be corrected by petition in error.—Stewart v. Waite, 19 Kan. 218.

[i] (Mich. 1874) An adjournment of a cause in a justice's court for more than four days after the trial is completed, for the purpose of rendering judgment, deprives the justice of jurisdiction.—Brady v. Taber, 29 Mich. 199.

[j] (Minn. 1893) In a justice court a verdict was returned between noon and 1 p. m. on Saturday, while the justice was hearing other cases, and he did not render judgment on the verdict until Monday. *Held*, that the judgment was rendered in due time, under Gen. St. 1878, c. 65, § 68, requiring a judgment to be rendered "forthwith" on return of a verdict, since the time was reasonable, having regard to the circumstances.—Sorenson v. Swensen, 55 Minn. 58, 56 N. W. 350, 43 Am. St. Rep. 472.

[k] (Mo. 1880) The three days within which a justice must render judgment are exclusive of Sunday.—Hodgson v. Banking House of Bartholow, 9 Mo. App. 24.

[l] (Mo. 1890) Rev. St. 1889, § 6279, requiring a justice of the peace to enter judgment within three days after the cause has been submitted to him, means a submission for final decision, and does not require a judgment on the merits to be rendered within three days from the submission of issues under a plea in abatement.—Cella v. Schnairs, 42 Mo. App. 316.

[m] (Neb. 1882) Under Code Civ. Proc. § 1002, and Comp. St. c. 19, § 38, which provides that a court may be opened on Sunday "to receive a verdict," a justice of the peace must render judgment immediately on a verdict returned on Sunday.—Thompson v. Church, 13 Neb. 287, 13 N. W. 626.

[n] (Neb. 1884) Under Code Civ. Proc. § 1002, which provides that "upon a verdict the justice must immediately render judgment accordingly," he has no right to delay until the next day.—Austin v. Brok, 16 Neb. 642, 21 N. W. 437.

[nn] (N. J. 1819) Judgment must be given in open court, where parties have an opportunity to be present, as well by justices of the peace as by any other judges.—Clark v. Read, 5 N. J. Law (2 Southard) 486.

[o] (N. Y. 1838) A justice must render judgment within four days after the cause is submitted to him for final decision.—Watson v. Davis, 19 Wend. 371.

[oo] (N. Y. 1846) A justice of the peace must render judgment on the jury's verdict immediately, and cannot wait until the next day.—Sibley v. Howard, 3 Denio, 72, 45 Am. Dec. 448.

[p] (N. Y. 1846) Taxing the costs is parcel of the act of rendering judgment; therefore, where a justice entered the verdict in his docket immediately on its being rendered, but omitted to complete the taxation of costs until eight days afterwards, the judgment was erroneous.—Sibley v. Howard, 3 Denio, 72, 45 Am. Dec. 448.

[pp] (N. Y. 1851) Under the statute requiring judgments before justices of the peace, to be rendered within four days after the submission of the cause, a cause being submitted to a justice on the 28th of June, a judgment rendered on Monday, the 3rd day of July following, was not entered in season.—Bissell v. Bissell, 11 Barb. 96.

[q] (N. Y. 1852) Where the record of a justice states that the trial was had on the 11th, and the judgment was rendered on the 12th, it will be presumed that the verdict was not rendered until the 12th, and that therefore judgment was given in time.—Beattie v. Qua, 15 Barb. 132.

[qq] (N. Y. 1857) It is error for a justice to give judgment while one counsel is yet arguing.—Prentiss v. Sprague, 1 Hilt. 428.

[r] (N. Y. 1859) Where a cause before a justice is submitted at the close of the evidence, with an agreement that within the four days in which the court is to render judgment by statute, the case shall be argued, the final hearing is in effect postponed to the day of the argument, four days; and the justice has a right, with or without the consent of the parties, to take four days from that time for the decision of the cause.—Heidenheimer v. Wilson, 31 Barb. 636.

[rr] (N. Y. 1865) If a justice fails to render his decision within the time limited by law, he loses jurisdiction of the case, and the plaintiff's only remedy is to sue again.—Bloomer v. Merrill, 29 How. Prac. 259, 1 Daly, 485.

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[s] (N. Y. 1871) A statute regulating justices' courts, which directs that in all cases where a verdict is rendered the justice "shall forthwith render judgment," should be so construed as to harmonize with another general statute for the observance of the Sabbath, which authorizes courts to receive a verdict on Sunday, but forbids the transaction of any other business on that day. The effect is that if a jury render a verdict on Sunday the justice may receive it, wait till Monday before proceeding further, and on Monday render the judgment. —Allen v. Godfrey, 44 N. Y. 433.

[ss] (N. Y. 1873) Where a justice of the peace renders judgment on the verdict of a jury, he must do so immediately on the verdict being received; and, if he omits to include the costs, he cannot thereafter render a judgment including such costs.—Schneider v. Armstrong, Sheld. 379.

[t] (N. Y. 1887) Code Civ. Proc. § 3015, requires a justice to render judgment forthwith after the trial of an action, and to enter it on his docket. An action was tried before a jury, and, at once, after verdict for defendant was rendered, the justice made a memorandum on his minutes of testimony of the various items of costs, and the amount thereof, and indorsed "Verdict for defendant" and "Judgment for costs against plaintiff rendered." It being suggested that the costs were in excess of the legal limit, he determined on the amount allowable, announced his conclusion to the attorneys, and wrote the items in his minutes, and informed counsel that certain witness fees were included, but did not enter them in the minutes, nor did he then write judgment opposite the total amount. Four days later he wrote down the amount of the witness fees, entered and signed judgment, dating it back as of the day of trial. *Held*, that the judgment was not rendered until the later date, and was void under the statute.—Putman v. Van Allen, 46 Hun, 492, 13 Civ. Proc. R. 246.

[tt] (N. Y. 1895) Rendition of judgment within 24 hours after verdict is a rendition "forthwith," as required by Code Civ. Proc. § 3015. —Tousley v. Mowers (Co. Ct.) 14 Misc. Rep. 125, 35 N. Y. Supp. 855.

[u] (N. Y. 1896) Where the jury in a justice's court returned a verdict after 10 o'clock at night, and the justice, who was tired and unable to see well, made a memorandum of the verdict, and on the following morning adjusted the costs, rendered the judgment, and entered it in his docket, the judgment was rendered "forthwith," within Code Civ. Proc. § 3015.—Sweet v. Marvin, 2 App. Div. 1, 37 N. Y. Supp. 442.

[uu] (Ohio, 1861) Where a justice of the peace fails to render judgment, or take any other action, for a period of 10 months, on the verdict of a jury rendered in a cause on trial before him, such neglect of duty, on the part of the justice, works a discontinuance of the action.—Dunlap v. Robinson, 12 Ohio St. 530.

[v] (Ohio, 1866) Where the docket of a justice shows a trial, but no notice of any continuance, the date on which judgment was rendered will be held to be the same as that of the trial.—Hoagland v. Schnorr, 17 Ohio St. 30.

[vv] (Ohio, 1884) Where, in an action before a justice of the peace, a jury is waived, and the cause is submitted to the justice, he should give judgment within four days of the trial and submission.—Sanderson v. Pullman (Dist. Ct.) 11 Wkly. Law Bul. 145.

[w] (Vt. 1860) When the trial of a suit before a justice of the peace is commenced on the return day of the writ, or on a subsequent day to which it has been continued, and is pursued to judgment without an intervening adjournment, all the proceedings after the commencement of the trial, including the rendition of the judgment, must in law be treated as perfected on the day when the trial commenced. Therefore, where it appeared from the justice's record that the trial lasted, without an adjournment, into the next day after it was commenced, when the jury returned their verdict and the justice rendered judgment thereon; it was *held* that, notwithstanding the judgment appeared by the justice's record to have been rendered as of the last day of the trial, the law would refer it to the day on which the trial commenced, and treat it as rendered on that day.—Oakes v. School Dist. No. 9, 33 Vt. 155.

[ww] (Wis. 1851) A justice of the peace has the right to take three days in which to render judgment.—Caughey v. Vance, 3 Chand. 308, 3 Pin. 275.

[x] (Wis. 1861) A justice of the peace, before whom an action is tried without a jury, may take time to consider on the cause, and to that end may continue it not longer than 72 hours from the time of submission.—Gallup v. Johnson, 14 Wis. 197.

[xx] (Wis. 1870) Under Rev. St. c. 120, § 160, which requires a justice of the peace to render judgment forthwith, on receiving the verdict, when the defendant is in custody at the hearing of the cause, where the justice received a verdict on Saturday night, and did not render judgment until Monday morning, *held*, that he thereby lost jurisdiction of the cause.—McNamara v. Spees, 25 Wis. 539.

[y] (Wis. 1871) The statute (Laws 1861, c. 58) which declares that no court shall transact any business on February 22d, "unless it be for the purpose of instructing or discharging a jury, or receiving a verdict," and Rev. St. c. 120, § 160, which requires that in all cases where a verdict shall be rendered in a justice's court the justice shall "forthwith render judgment," must be construed together, so as to prevent a failure of justice, and must be held to authorize an immediate rendition of judgment, where the verdict is received on February 22d.—Perkins v. Jones, 28 Wis. 243.

[yy] (Wis. 1877) A justice of the peace, before whom a cause is tried without a jury, having power to reserve his decision for not more than 72 hours (Rev. St. c. 120, § 96), may do this by several successive continuances, without consent of parties, if the judgment is finally entered within the time limited.—Wheeler v. Hall, 42 Wis. 573.

[z] (Wis. 1882) Under Rev. St. § 3662, directing a justice to render judgment "forthwith" on a verdict, he cannot render judgment after a delay of 14 days.—Hull v. Mallory, 56 Wis. 355, 14 N. W. 374.

[zz] (Wis. 1885) Under Rev. St. §§ 3662, 3742, requiring a justice of the peace to render a judgment instanter on a verdict returned by a jury in replevin, simply reading the verdict aloud to the parties to the suit, and entering an order of continuance until the next day, and then rendering judgment, is not sufficient, though the verdict is returned on a legal holiday.—Smith v. Bahr, 62 Wis. 244, 22 N. W. 438.

§ 391. —— Conditions precedent.

[a] (N. H. 1827) A justice's judgment on a report of referees, made in pursuance of a submission of a controversy of less than $200 value, is erroneous, if the parties have no day before the justice to be heard on the report, or if it does not appear that the party

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against whom the judgment was rendered had notice of the time when it was rendered.—Atwood v. York, 4 N. H. 50.

[b] (N. H. 1830) Where a rule of reference is made returnable to a justice of the peace, the parties have a right to be heard before judgment is rendered by the justice on the report.—French v. Shackford, 5 N. H. 143.

[c] (N. J. 1813) Since the principle of rendering judgment on a report of a referee in a justice court in the absence of the defendant, and without notice to him, has been established by long practice, the court will not disturb it.—Fairholme v. Forker, 3 N. J. Law (2 Penning.) 995.

[d] (N. J. 1823) A judgment by a justice on a report of referees, in absence of defendant, and without notice, is erroneous.—Pierson v. Pierson, 7 N. J. Law (2 Halst.) 125.

[e] (N. J. 1830) If a justice, after hearing a cause, takes time to consider the same, but does not make a regular adjournment to a particular day and hour, he must give notice to the parties of the day and hour when the judgment will be rendered.—Edwards v. Hance, 12 N. J. Law (7 Halst.) 108.

[f] (Ohio, 1855) Section 92 of the Justice's Code (Swan's St. p. 514), does not render the payment of jury fees a condition precedent to the rendition of judgment.—Robinson v. Kious, 4 Ohio St. 593.

[g] (Pa. 1844) Where, after a final hearing of a case before a justice, he postpones his decision, without fixing any day, the judgment rendered by him afterwards can only be regarded as a judgment from the day notice shall be given to the party to whom the judgment is entered.—Taylor v. Smith, 4 Pa. Law J. 105.

[h] (Pa. 1883) Where a justice of the peace, after a hearing, postponed his decision, without fixing a day certain on which he would render his decision, and, without notice to the defendant, entered judgment against him, such judgment was void, and an execution issued upon it must fall with it.—Bower v. Stum, 1 Lanc. Law Rev. 19.

[i] (Pa. 1894) Where a justice reserves his decision, and adjourns court without day, a judgment afterwards rendered without notice to the parties is void.—Leslie v. Innes (Com. Pl.) 15 Pa. Co. Ct. R. 178, 3 Pa. Dist. R. 689.

[j] (Pa. 1894) The fact that a justice of the peace mailed a notice to a party fails to show notice, in the absence of evidence that such party received it.—Leslie v. Innes (Com. Pl.) 15 Pa. Co. Ct. R. 178, 3 Pa. Dist. R. 689.

§ 392. Rendition of judgment at unauthorized time or place.

Waiver of delay in rendering judgment, see post, § 448 [c].

[a] Compliance with the statute directing that a justice of the peace render judgment within four days after the cause has been submitted to him may be waived by the parties, as this limitation of time is intended for their convenience and protection.
—(N. Y. 1857) Barnes v. Badger, 41 Barb. 98;
(Ohio, 1884) Sanderson v. Pullman, 9 Ohio Dec. 175, 11 Wkly. Law Bul. 145.

[b] (Cal. 1891) Code Civ. Proc. § 892, relative to justices' courts, provides that "when the trial is by the court judgment must be rendered at the close of the trial," but attaches no penalty or consequence to a violation thereof. *Held*, that such provision is merely directory, and that a judgment rendered by a justice six weeks after trial is valid.—Heinlen v. Phillips, 88 Cal. 557, 26 Pac. 366.

[c] (Ga. 1881) A judgment on a note, rendered by a justice at his house, instead of at the regular court room, is void.—Reed v. Thomas, 66 Ga. 595.

[d] (Ga. 1884) Under Code, § 4130, requiring "all continuances in justice courts to be from term to term," a judgment rendered at a continuance out of term is void.—White v. Mandeville, 72 Ga. 705.

[e] (Ga. 1886) Const. art. 6, § 7, par. 2, and the act of July 21, 1879, carrying it into effect, provide that justice's courts shall be held at certain fixed times and places. *Held*, that a judgment rendered by a notary public, ex officio justice of the peace, at a time and place not fixed or stated as a place and time for holding justice's court in the district for which he is notary, is void.—Freeman v. Gaither, 76 Ga. 741.

[f] (Ga. 1892) A judgment rendered by a justice of the peace on a day when the court was not authorized to sit and transact business is a nullity, and leaves the case still pending, to be afterwards tried and disposed of.—Baker v. Thompson, 89 Ga. 486, 15 S. E. 644.

[g] (Mich. 1873) Under Comp. Laws 1871, § 5380, providing that when a cause is tried by a justice without a jury he must "render judgment within 4 days after the same shall have been submitted to him for his final decision," a judgment rendered on the 5th day after the trial is void, though an intermediate day was Sunday.—Harrison v. Sager, 27 Mich. 476.

[h] (Mich. 1884) A judgment of a justice of the peace is not invalid because not rendered immediately on the finding of a verdict by the jury.—Alt v. Lalone, 54 Mich. 302, 20 N. W. 52.

[i] (Mo. 1896) A judgment rendered by a justice three days after the cause is submitted is invalid.—Stroeh v. Doggett Dry Goods Co., 65 Mo. App. 103, 2 Mo. App. Rep'r, 1302.

[j] (N. Y. 1846) A justice's judgment not rendered until the day after the verdict of the jury is void.—Sibley v. Howard, 3 Denio, 72, 45 Am. Dec. 448.

[k] (N. Y. 1895) Where a justice, within the four days limited by Code Civ. Proc. § 3015, for rendering judgment after trial of an action without a jury, entered on his minutes, "Judgment is hereby rendered in favor of defendant, and against plaintiff, for $40.66 damages, besides costs of the action," and figured up the costs except certain items which he could not then determine, and did not determine, until after the four days had expired, such judgment was valid as to the damages, and the unauthorized addition of costs after the four days could not affect its validity.—Rich v. Markham, 92 Hun, 78, 37 N. Y. Supp. 602.

[l] (N. Y. 1895) Under Code Civ. Proc. § 3015, providing that a justice of the peace "must render judgment and enter it in his docket book within four days after the cause of action has been finally submitted to him," a judgment rendered after such time is void, where the party against whom it was rendered did not consent to the extension of time.—Beardsley v. Pope (Co. Ct.) 11 Misc. Rep. 117, 32 N. Y. Supp. 926.

[m] (N. Y. 1896) A judgment of a justice of the peace, not rendered within four days after the trial and submission of the case to him, is void. Code Civ. Proc. § 3015.—Catlin v. Rundle, 1 App. Div. 157, 37 N. Y. Supp. 979.

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[n] (Ohio, 1855) Delay in a justice in delivering a judgment on the verdict of a jury, because the successful party has not paid the jury fees, invalidates the judgment.—Robinson v. Kious, 4 Ohio St. 593.

[o] (Wis. 1873) Under Rev. St. c. 120, § 160, providing that a justice of the peace on receiving a verdict shall render judgment forthwith, where a verdict in justice's court was received at 11 p. m., and the court then adjourned on account of the lateness of the hour, and at 9 a. m. the next day rendered and entered a judgment in accordance with the verdict, jurisdiction was lost by such adjournment, and the judgment was invalid.—Wearne v. Smith, 32 Wis. 412.

§ 393. Form and requisites.

Signature, see post, § 398.

[a] (U. S. 1827) In Arkansas, the expression, in a judgment of a justice of the peace, "I give judgment," includes the technical and formal words of a judgment, and is sufficient.—Deadrick v. Harrington, Fed. Cas. No. 3,694b [Hemp. 50].

[b] (Ala. 1852) A judgment, rendered by a justice of the peace, "for $37.30, on note due 25th December, 1840, bearing interest from that date, and cost of suit," though informal, is not void for uncertainty. It is, in legal effect, a judgment for $37.30.—Lightsey v. Harris, 20 Ala. 409.

[c] (Ill. 1856) In actions of debt before justices, the debt and damages need not be distinguished in the judgment.—Horton v. Critchfield, 18 Ill. (8 Peck) 133, 65 Am. Dec. 701.

[d] (Ill. 1859) The fact that a justice of the peace renders a judgment in debt, in an action of trespass, is no ground for a reversal.—Chicago & R. I. R. Co. v. Whipple, 22 Ill. (12 Peck) 105.

[e] (Ill. 1859) A judgment in debt by a justice of the peace, for a gross amount of debt and damages, will not for that reason be reversed.—Chicago & R. I. R. Co. v. Whipple, 22 Ill. (12 Peck) 337.

[f] (Ill. 1890) An entry of judgment in a court not of record of New York, in the following form, "Judgment for the plaintiff for $81.99 damages, besides $2.50 cost, and $7.00 extra costs," is sufficiently certain.—Kopperl v. Nagy, 37 Ill. App. 23.

[g] (Ill. 1891) Where it appears that the excess of a judgment over the amount indorsed on the justice's summons may be made up by interest from such date, the judgment is not erroneous.—Redner v. Davern, 41 Ill. App. 245.

[h] (Ind. 1878) A judgment before a justice is not rendered void by mere informality in its terms.—Kennard v. Carter, 64 Ind. 31.

[i] (Mich. 1881) Excessive costs inserted in a justice's judgment will not render the whole recovery illegal.—Whelpley v. Nash, 46 Mich. 25, 8 N. W. 570.

[j] (Miss. 1886) Where the record of proceedings before a justice of the peace shows that plaintiff sued defendant in assumpsit for $81, and defendant appeared and contested the claim, a judgment entered as follows: "It is therefore ordered and considered by the court that the plaintiff, C. L., recover of and from the defendant, E. L., the sum as claimed in the above case, together with all costs of suit, for which let execution issue," etc.,—will be sustained, notwithstanding its informality.—Ladnier v. Ladnier, 64 Miss. 368, 1 South. 492.

[k] (Neb. 1896) A judgment of a justice of the peace for $125, with interest from an anterior date, is sustainable, as to $125, as a judgment for a present, definite amount.—Coad v. Read, 48 Neb. 40, 66 N. W. 1002.

[l] (N. J.) "I give judgment with the jury" is not a sufficient rendition of judgment by a justice of the peace.—(1811) Green v. Lawrence, 3 N. J. Law (2 Penning.) 848; (1812) Van Houten v. Beam, Id. 944.

[m] (N. J. 1825) A judgment of a justice is erroneous, where rendered "with legal costs," without specifying the amount of the costs in words at length, but only in figures.—Smith v. Miller, 8 N. J. Law (3 Halst.) 175, 14 Am. Dec. 418.

[n] (N. C. 1871) When a suit before a justice is for a money demand, it is erroneous for him, after giving judgment for the amount claimed, to specify in what kind of money it shall be paid. When the plaintiff is entitled to a judgment, the law determines how it shall be satisfied.—Swain v. Smith, 65 N. C. 211.

[o] (Ohio, 1818) A judgment for plaintiff, without stating for what amount of debt or damages and costs, is void for uncertainty.—Means v. Stephenson, Tapp. 283.

[p] (Pa. 1852) A judgment of an alderman, reciting "three months rent, or security for the same, found to be in arrears, is claimed; notice to be correct and judgment of rendition,"—is an absurdity, and will be reversed.—Gault v. Lowry, 1 Phila. 394.

[q] (Pa. 1879) A judgment of an alderman must be for a definite sum.—Carr v. Lewten, 1 Lack. Leg. Rec. 396.

[r] (Pa. 1880) Where an action before a justice of the peace was for trover and conversion, it was error for the magistrate to render a judgment in a fixed sum for "debt."—Hildebrand v. Bowman, 12 Lanc. Bar, 30.

[s] (Pa. 1896) A judgment entered by a justice on the award of referees in favor of plaintiff for a certain sum, with a proviso that if a certain order described, given by plaintiff to defendant, was not collectible, then the amount of the order to be credited on the judgment is not void for uncertainty.—Grube v. Getz, 8 Pa. Co. Ct. R. 124.

[t] (Pa. 1896) The judgment of an alderman, in an action to recover the penalty for violation of an act of assembly, should find the fact of violation in express words.—Nash v. Commonwealth, 2 C. P. Rep. 239.

[u] (Pa. 1888) Where the record, in an action before a justice of the peace for damages for trespass, failed to show that plaintiff had such property and right of possession as would entitle him to maintain an action for conversion, but indicated that the action was on a contract, under which the defendant rightfully came into possession of the property, the justice had no jurisdiction to enter judgment in trespass.—Manufacturing Co. v. Dougherty, 5 Pa. Co. Ct. R. 399.

[v] (Tenn. 1850) A memorandum indorsed on the warrant, "Judgment, $37," is void for uncertainty.—Hubbard v. Birdwell, 30 Tenn. (11 Humph.) 220.

[w] (Tenn. 1876) A justice's judgment rendered after a continuance and due notice is not void merely because antedated as of the day first set for trial.—Austin v. Ramsey, 8 Tenn. Ch. 118.

[x] (Wis. 1865) Where the docket entry in replevin before a justice is merely that "a trial was had, and judgment was rendered against the defendant for * * * the property claimed," the judgment is void for uncertainty.—Beemis v. Wylie, 19 Wis. 318.

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§ 394. Parties.

Misnomer in judgment as affecting execution, see post, § 426 [g].

Authority to render judgment against codefendants as principal and surety, see "Principal and Surety," IV.

[a] (Ala. 1833) In proceedings before a justice of the peace against an officer for failure to return an execution, it is not error that judgment is rendered in favor of the plaintiffs in their company name.—Condry v. Henley, 4 Stew. & P. 9.

[b] (Ill. 1845) Where an action on a contract is brought before a justice against four defendants, and but two of them are served with process, judgment cannot be rendered against those two, without showing that all the four were liable, notwithstanding the statute provides that where there are several joint debtors the justice may render judgment against such as are served with process.—Kerr v. Boyer, 7 Ill. (2 Gilman) 417.

[c] (Ill. 1863) In actions before a justice of the peace, not sounding in tort, where two or more are sued, judgment must be rendered against all who are served, or, if that cannot be, against none.—Briggs v. Adams, 31 Ill. 486.

[d] (Ill. 1872) A justice's judgment for $99.99 "against the defendant" is sufficient, without stating that it is in favor of plaintiff.—Madison County Court v. Rutz, 63 Ill. 65.

[e] (Ill. 1892) Where, in an action ex contractu before a justice of the peace, a verdict is rendered against one defendant, and in favor of the other two defendants, and the court enters judgment against the first defendant, its failure to render judgment in favor of the other two defendants for costs is not an error of which plaintiff can complain.—Hellman v. Schwartz, 44 Ill. App. 84.

[f] (Ill. 1892) In an action ex contractu before justices of the peace, judgment may be had against a part of defendants only.—Hellman v. Schwartz, 44 Ill. App. 84.

[g] (Ind. 1866) Section 368 of the Code, which provides that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, etc., is adopted by section 75 of the justice's act, and governs the practice before justices.—Fitzgerald v. Genter, 26 Ind. 238.

[h] (Ind. 1869) Where a judgment is rendered before a justice of the peace against a defendant by a name in which an initial letter is used, instead of his Christian name, the proceedings and judgment are thereby rendered irregular, but not void.—Bridges v. Layman, 31 Ind. 384.

[i] (Ind. 1885) Rev. St. §§ 568, 569, authorize a separate judgment, in proper cases, against one of several joint defendants; and this rule is applicable to proceedings before a justice of the peace.—Terwilliger v. Murphy, 104 Ind. 82, 3 N. E. 404.

[j] (Mich. 1878) In actions on bills or notes judgment cannot be taken against part of the defendants in justices' courts, no statute permitting such practice.—Berend v. Avery, 39 Mich. 132.

[k] (N. J. 1837) Judgment for the plaintiff generally, without stating against whom, is sufficient in the justice's court.—Titus v. Whitney, 16 N. J. Law (1 Har.) 85, 31 Am. Dec. 228.

[l] (N. Y. 1852) In a suit against several in a justice's court, a valid service of the summons on one, and a proper return of the service, are sufficient to authorize the justice to proceed and render judgment in form against all.—Fogg v. Child, 13 Barb. 246.

[m] (N. Y. 1854) A justice's judgment against two defendants cannot be permitted to stand on appeal, where the return of the justice shows that plaintiff discontinued against one of the defendants at the close of the evidence.—Fanning v. Lent, 3 E. D. Smith, 206.

[n] (N. Y. 1858) Under Code Civ. Proc. § 8, providing that the first part of the Code shall relate to courts of justices, and the second to civil actions commenced in the courts of the state, section 136 providing that where an action is against two or more defendants, all of whom are not served, the plaintiff may proceed, though the action be on a joint debt or where defendants are severally liable, does not apply to justice's courts; hence, in an action in justice's court against several defendants on a joint and several contract, plaintiff must recover against all defendants, or fail as to all.—Perkins v. Richmond, 17 How. Prac. 309.

[o] (N. C. 1847) Where a justice's warrant issued against three, and was returned executed generally, and judgment was rendered against the "defendant," without naming him, it was *held* that it could not be determined against whom the judgment was rendered.—Thomas v. Holcombe, 29 N. C. 445.

[p] (Pa. 1854) Judgment by an alderman in favor of one not a party to the record is unwarranted.—Wilson v. Walton, 1 Phila. 517.

[q] (Pa. 1881) A justice's judgment against copartners in the firm name, without stating the names of the persons composing the firm, *held* good.—McDonald v. Simcox, 98 Pa. 619.

[r] (Tenn. 1833) Where a warrant issues, returnable before a justice of the peace, against two, and is served on one only, a judgment against the one served may be taken, without any notice of the one not served.—Moon v. Harmon, 12 Tenn. (4 Yerg.) 21.

[s] (Tenn. 1839) A judgment entered up by a justice of the peace, in an action against two, in the following words: "Judgment in favor of the plaintiff for 61 dollars and 83 cents, and costs," is not void for uncertainty.—Parker v. Swan, 20 Tenn. (1 Humph.) 80, 34 Am. Dec. 619.

5. ENTRY, RECORD, AND DOCKETING.

ENTRY OF JUDGMENT, § 395.
—— TIME AND PLACE FOR ENTRY, § 396.
RECORD AND DOCKET OF JUDGMENT, § 397.
—— SIGNATURE, § 398.
FILING TRANSCRIPT IN OTHER COUNTY, § 399.

§ 395. Entry of Judgment.

Actions against justice for maliciously entering judgment, see ante, §§ 48–55.

Liability of justice for corruptly entering judgment for too little, see ante, §§ 45–47.

—— *for entry of wrong judgment by mistake, see* ante, §§ 41, 42.

—— *for failure to enter judgment, see* ante, § 44.

Liability of sureties on justice's bonds for failure to enter judgment, see ante, § 58.

Pleading in action on justice's bond for wrongful entry of judgment, see ante, § 63.

Mandamus to compel alteration of entry, see "Mandamus," II. (A).

[a] (Cal. 1871) The laws provide that a justice of the peace shall, upon receiving the ver-

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dict from the jury, immediately render judgment accordingly; but the formal entry of judgment is a mere clerical duty, and an execution issued by him, which recites the judgment, is not void by reason of his failure to enter the judgment.—Lynch v. Kelley, 41 Cal. 282.

[b] (Colo. 1894) When a verdict is rendered by a jury, if it be within the jurisdiction of the justice, it is his duty to enter judgment upon it; and this duty is ministerial, not judicial.—Corthell v. Mead, 19 Colo. 386, 35 Pac. 741.

[c] (Del. 1841) The entry of a judgment of a justice may be aided by reference to the margin; so, also, by reference to the report of referees.—Elliott v. Morgan, 3 Har. 316.

[d] (Del. 1846) A justice's entry of a judgment may be aided by reference to the marginal entry of the amount.—Clothier v. Clark, 4 Har. 365.

[e] (Mich. 1845) A justice's return to a certiorari showed a verdict rendered by a jury in the cause, its amount, and the amount of costs taxed, but it did not appear therefrom that the justice had formally entered judgment on the verdict. *Held* sufficient; the finding of a verdict in a justice's court being, in legal effect, a judgment.—Gaines v. Betts, 2 Doug. 98.

[f] (Minn. 1867) The entry of judgment in a justice's docket showed the amount of costs as "30.65," without any dollar mark. The items in the margin footed up to the amount of $30.65. *Held* sufficient to sustain the judgment.—Payson v. Everett, 12 Minn. 216 (Gil. 137).

[ff] (Miss. 1884) A justice's judgment, if shown to have been duly applied for by the plaintiff, is not invalidated by any want of formality in its entry.—Swain v. Gilder, 61 Miss. 667.

[g] (Mo. 1874) A verdict rendered in a justice's court will be held as a judgment, without any formal entry of judgment.—Stemmons v. Carey, 57 Mo. 222.

[h] (Mo. 1883) An entry of a judgment by a justice's clerk is good if made in the name and by the direction of the justice.—Cabanne v. Spaulding, 14 Mo. App. 312.

[i] (N. H. 1831) Where, under the statute of June 10, 1791, the records of a deceased justice of the peace have been lodged with a clerk of a court of common pleas, such clerk may, from the minutes made by the judge in his docket, enter up judgment in the same manner that judgments in the common pleas are entered up from minutes kept by the clerk of that court.—Carlisle v. Thompson, 5 N. H. 411.

[j] (N. J. 1828) The common pleas cannot, on an appeal, reverse the judgment of the justice because it is not entered according to legal form.—Martin v. Thompson, 10 N. J. Law (5 Halst.) 142.

[k] (N. J. 1829) A judgment of a justice of the peace, entered in figures, will be reversed for that cause.—Robinson v. Applegate, 11 N. J. Law (6 Halst.) 178.

[l] (N. Y. 1893) Where a justice indorsed on his minutes of the trial a memorandum rendering judgment in a specific sum, and stating the amount of damages and costs separately, the judgment is not invalidated by failure of the justice to enter it on his docket.—O'Reilly v. Block (Co. Ct.) 23 N. Y. Supp. 670.

[m] (N. C. 1828) A justice's judgment must be evidenced by a written memorial made at the time of its rendition.—Hamilton v. Parrish, 12 N. C. 415.

[n] (Pa. 1893) Where a justice renders a judgment by default, the record should show that the entry of judgment was at the hour fixed in the summons, or, if at a later hour, that defendant did not appear at the proper time.—Clarke v. Vielkoonis (Com. Pl.) 7 Kulp, 61.

[o] (S. C. 1833) A magistrate's execution is sufficient evidence that a judgment has been rendered, as there is no law requiring magistrates to enter their judgments.—Maybin v. Virgin, 1 Hill, 420.

[p] (Tex. 1851) Where, in a case of forcible entry and detainer before a justice, the jury returned a verdict for the plaintiff, and the justice made an entry on his docket, opposite to the verdict, of "judgment rendered 17th April, 1849," it was *held* that there was a sufficient entry of judgment.—Clay v. Clay, 7 Tex. 250.

[q] (Tex. 1857) It seems that the entry of a verdict on the docket of a justice is a sufficient entry of judgment.—Davis v. Pinckney, 20 Tex. 340.

[r] (Wis. 1850) Though the judgment rendered by a justice need not be in precise legal form in order to be valid, yet it must be entered on paper, and the evidence of it on paper be preserved, in order to constitute a subsisting judgment.—Benaway v. Bond, 2 Chand. 110, 2 Pin. 449, 54 Am. Dec. 147.

[s] (Wis. 1850) Where a cause is tried before a justice, and he hears and decides the matter in dispute, and makes a memorandum on a piece of paper of what the judgment was which he had concluded on, and gave such a memorandum to his clerk or friend, to be made out and entered on his docket in form, but which was never so entered, nor the memorandum preserved, there is no valid judgment.—Benaway v. Bond, 2 Chand, 110, 2 Pin. 449, 54 Am. Dec. 147.

[t] (Wis. 1866) In an action of unlawful detainer against a tenant holding over after expiration of his term, the jury in a justice's court found "in favor of the plaintiff," and the justice merely made an entry that "the court renders judgment according to the verdict." *Held*, that there was no judgment.—Swift v. Cornes, 20 Wis. 397.

§ 396. —— Time and place for entry.

Entry after expiration of term, see ante, § 204 [f].

—— *by successor of justice rendering judgment, see* ante, § 205 [a, c].

Time and place for rendition of judgment, see ante, §§ 390, 391, 392.

[a] (Ark. 1852) A justice of the peace may enter up judgment nunc pro tunc at any time after verdict, on motion.—Adams v. Thompson, 12 Ark. (7 Eng.) 670.

[b] (Ga. 1888) A justice rendering judgment should write out the entry of judgment before adjournment.—Bowden v. Taylor, 81 Ga. 199, 6 S. E. 277.

[c] (Ind. 1884) Under Rev. St. 1881, § 1489, providing that when a suit is dismissed, judgment confessed, or jury verdict returned, judgment by a justice of the peace "shall be entered and signed immediately," a delay for six days, though in violation of the statute, did not avoid the judgment.—Martin v. Pifer, 96 Ind. 245.

[d] (Iowa, 1862) Where a verdict was rendered at half past 10 o'clock p. m., and judgment not entered until 11 a. m. on the next day, the justice being unable to attend, *held* a sufficient compliance with the provision of the

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statute that a judgment on the verdict of the jury shall be entered on the docket forthwith.—Davis v. Simma, 14 Iowa, 154, 81 Am. Dec. 462.

[e] (Iowa, 1891) Code 1873, § 3552, provides that, where a verdict is rendered by a jury in a justice's court, the justice shall enter judgment thereon "forthwith." *Held*, a judgment entered by a justice more than 90 days after the return of the verdict was void for want of jurisdiction.—Tomlinson v. Litze, 82 Iowa, 32, 47 N. W. 1015, 31 Am. St. Rep. 458.

[f] (Iowa, 1896) Under Code 1873, § 3552, requiring judgment before a justice to be entered "forthwith," a judgment on a verdict returned at 9 o'clock at night may properly be entered the next morning.—Knox v. Nicoll, 97 Iowa, 687, 66 N. W. 876.

[g] (Kan. 1883) Where the judgment of a justice of the peace is rendered and publicly announced by the fourth day after the trial, it is immaterial that the clerical work of entering the judgment on the docket is not completed for a few days afterwards.—Conwell v. Kuykendall, 29 Kan. 707.

[h] (Minn. 1892) In a trial by jury before a justice of the peace, a verdict was duly rendered on Saturday night, and at the instance and by the consent of defendant, the defeated party, judgment was not formally entered for the amount of the verdict and costs until Tuesday following. *Held*, that it was competent for defendant to waive strict conformity with the statute as to the time of entering the judgment.—Rucker v. Miller, 50 Minn. 360, 52 N. W. 958.

[i] (Neb. 1892) Under Code, § 1002, requiring a justice to enter judgment "immediately" after the rendition of the verdict, where the verdict is rendered at 8:25 p. m., a judgment entered the next day is void.—Worley v. Shong, 35 Neb. 311, 53 N. W. 72.

[j] (Nev. 1866) A justice of the peace who fails to enter judgment on a verdict on the day it is rendered may do so as soon as his attention is called to his omission.—Fugitt v. Cox, 2 Nev. 370.

[k] (N. Y. 1838) A justice must enter up judgment in his docket within four days after the cause is submitted to him for final decision.—Watson v. Davis, 19 Wend. 371.

[l] (N. Y. 1843) Where a justice of the peace renders judgment immediately after verdict, and notes it in his minutes of trial, it is no cause for reversal, on certiorari, that he did not enter the judgment upon his docket for two or three days afterwards.—Hall v. Tuttle, 6 Hill, 38, 40 Am. Dec. 382.

[m] (N. Y. 1848) Where a justice of the peace decided a cause before him, and made upon the papers in the suit a memorandum of his judgment within four days after the final submission to him, it was *held* that the judgment was regular and valid, though no entry thereof was made in his docket until after the lapse of four days.—Walrod v. Shuler, 2 N. Y. (2 Comst.) 134.

[n] (N. Y. 1857) Compliance with the statute directing that a justice of the peace shall enter judgment in his docket within four days after the cause has been submitted to him may be waived by the parties, as this limitation of time was intended for their convenience and the protection of their rights.—Barnes v. Badger, 41 Barb. 98.

[o] (N. Y. 1871) The act of rendering judgment by a justice is judicial, that of entering it in his docket is ministerial; hence, while the former duty is imperatively to be performed within four days, the statute directing the entry in the docket also to be made in four days is directory only, and that duty may be validly performed afterwards.—Fish v. Emerson, 44 N. Y. 376.

[p] (N. Y. 1873) In a trial before a justice of the peace the jury returned with their verdict "about midnight." The justice entered the verdict in his minutes, but did not enter it in his docket "until daylight" the next morning. *Held*, that the judgment was valid, being entered within 24 hours.—Goodrich v. Sullivan, 1 Thomp. & C. 191.

[q] (N. Y. 1888) Under Code Civ. Proc. § 3015, providing that when plaintiff is nonsuited, or discontinues or withdraws his action, the justice must forthwith enter judgment, he has no power to enter judgment 10 days after the withdrawal of an action.—Kuklo v. Kleis, 50 Hun, 600, 2 N. Y. Supp. 358, 15 Civ. Proc. R. 431.

[r] (N. D. 1891) Comp. Laws, § 6104, requiring a justice of the peace, in a case tried before a jury, to enter judgment "at once" on the verdict, is mandatory.—In re Evingson, 2 N. D. 184, 49 N. W. 733.

[s] (S. C. 1891) A trial justice need not enter judgment immediately after the rendition of a verdict.—Thomson v. Dillinger, 35 S. C. 608, 14 S. E. 776.

[t] (Tenn. 1871) A justice of the peace, having entered judgment as to one defendant and made no entry as to another, cannot, on his memory alone, be allowed afterwards to enter a judgment by way of amendment. The presumption is that the case was dismissed as to the one against whom no entry was made.—Trevathan v. Caldwell, 51 Tenn. (4 Heisk.) 535.

[u] (Tex. 1895) Where the justice court fails to enter such a judgment as will dispose of the case as to all the parties, it may at a subsequent term enter a judgment so disposing of the case.—Young v. Pfeiffer (Civ. App.) 30 S. W. 94.

§ 397. Record and docket of judgment.

Mandamus to compel true record, see "Mandamus," II. (A).

[a] (Mass. 1808) Where it appeared that the record of a justice's judgment was extremely defective, but the writ on file with the justice contained a declaration sufficiently formal, the court said that if the judgment had referred to the writ for the declaration, according to a very irregular practice which formerly prevailed in the common pleas, the writ would have been considered as a part of the judgment, so far as it contained the declaration, and thus the judgment would have been saved.—Clap v. Clap, 4 Mass. 520.

[b] (Mass. 1849) A justice of the peace made an entry of a civil action upon his memorandum book, and of the proceedings therein, as follows: "1842, Dec. 3. Daniel Darling v. Horace Park. Entered and defaulted, and judgment for plaintiff for damages, 9.69, cost 3.11—12.80,"—and issued execution accordingly; but neither the writ nor the evidence of the plaintiff's demand was then filed in the case, or in the possession of the justice. *Held* that, if these papers were before the justice when the execution was issued, the proceedings were not irregular, and that, on being subsequently produced before him and verified, he would thereupon be authorized to make a record of the judgment at large.—Park v. Darling, 58 Mass. (4 Cush.) 197.

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[c] (Mich. 1844) Under the proper entitling of a cause with the names of the parties, a justice of the peace entered on his docket an award of judgment in the following form: "It is therefore considered that the said P. do recover of the said D. the sum," etc. *Held*, that the docket entry did not show, with sufficient certainty, in whose favor, and against whom, the judgment was rendered.—Rood v. School Dist. No. 7 of Town of Bloomfield, 1 Doug. 502.

[d] (Mich. 1844) The docket entry of a justice's judgment must be as certain, in matters of substance, as the judgment of a court of record.—Rood v. School Dist. No. 7 of Town of Bloomfield, 1 Doug. 502.

[e] (Mich. 1859) Where an issue in justice's court was tried by jury, and the justice entered the proceedings thereon in his docket as follows: "After hearing all the evidence, the jurors returned a verdict for plaintiff for the sum of $48.05, and costs of suit; damages, $48.05; costs, $7.63,"—it was *held* that this entry was valid as a judgment, and sufficient to authorize the issue of an execution thereon.—Overall v. Pero, 7 Mich. 315.

[f] (Mich. 1860) The statute requiring a justice to keep a docket, and to enter therein the judgments rendered by him, is directory only.—Hickey v. Hinsdale, 8 Mich. 267, 77 Am. Dec. 450.

[g] (Miss. 1852) Judgments of justices of the peace must be enrolled and recorded, justices' courts being courts of record.—Brian v. Davidson, 25 Miss. (3 Cushm.) 213.

[h] (N. C. 1879) A justice's judgment is admissible in evidence, though not written out in his own hand.—Reeves v. Davis, 80 N. C. 209.

[i] (Tenn. 1859) A judgment rendered by a justice of the peace need not, necessarily, be written on the warrant. The judgment is valid if written upon the docket of the justice rendering the judgment.—Hollins v. Johnson, 40 Tenn. (3 Head) 346.

[j] (Tenn. 1865) A justice's docket contained these entries, viz.:

NO.	DATE.	PARTIES' NAMES.	AM'T OF JUDGM'T.
45	23	June 13, 1842. J. C. Williams v. William Jones.	For Plaintiff, $8.87½.
46	23	Same v. Elias Reese, Cordy Reese.	For Plaintiff, $100.46¼.

Held, that the second entry of judgment was not sufficient to sustain an execution against Elias and Cordy Reese.—McClellan v. Cornwell, 42 Tenn. (2 Cold.) 298.

[k] (Tenn. 1874) An entry on a justice's docket, "Elliott & Co. v. W. B. Jordan, judgt., 846.82," constitutes a valid judgment.—Elliott v. Jordan, 66 Tenn. (7 Baxt.) 376.

[l] (Tenn. 1878) In the absence of other equities, a court of chancery has no jurisdiction to supply the record of a justice's judgment destroyed by fire.—Scott v. Watson, 3 Tenn. Ch. 652.

[m] (Tex. 1856) The following was the record of a judgment on the docket of a justice of the peace:

"(Title of the suit.) Debt on note, $68,67
Credit by cash, 22,17
$46,50

Summons issued 11th day of November, A. D. 1846, returnable the 21st day of November, 1846. November 21st, 1846. The defendant came forward and acknowledged payment. Appeal taken by defendant to district court." *Held* a sufficient entry to show a valid judgment.—Wahrenberger v. Horan, 18 Tex. 57.

[n] (Tex. 1883) It is not necessary that a justice's judgment should be recorded to render it admissible when offered in evidence solely for the purpose of showing the justice's authority for issuing execution thereon.—Burrow v. Brown, 59 Tex. 457.

[o] (Vt. 1849) The statute requiring justices of the peace to make full records of their judgments must be held to be positive and peremptory, so long as the justice can comply with it, but must be deemed as only directory when compliance has become impossible, and then the minutes of the justice, in connection with the files and papers upon which they are entered, will furnish sufficient evidence of a valid judgment.—Ellsworth v. Learned, 21 Vt. 535.

§ 398. —— Signature.

[a] (Ga. 1881) The signature of a justice of the peace need not be affixed to a judgment entered by him on his docket.—Gunn v. Tackett, 67 Ga. 725.

[b] (Ind. 1864) A paper purporting to be the record of a judgment before a justice of the peace, but not signed by the justice, is inadmissible, as 2 Gav. & H. St. p. 592, § 58, requires such a judgment to be entered and signed.—Ringle v. Weston, 23 Ind. 588.

[c] (Mich. 1854) A justice's judgment not signed by him is bad.—Howard v. People, 3 Mich. 207.

[d] (Mich. 1872) Where an entry of judgment was followed immediately by stay of execution on the justice's docket, and the justice's signature was appended but once and below them both, each having the same date, though dated separately, it was inferable from the docket that the entry of the judgment and of the stay was all done at one time and as all one transaction, and the signature was a good signing of the judgment.—Hollister v. Giddings, 24 Mich. 501.

[e] (N. C. 1879) A justice's judgment is admissible in evidence, though not signed by his own hand.—Reeves v. Davis, 80 N. C. 209.

§ 399. Filing transcript in other county.

Filing transcript in court of record, see "Judgment," vol. 30, cc. 772–780, §§ 573–577.

[a] (Pa. 1885) A judgment on a sci. fa. on a transcript from a justice of the peace of another county will not be reversed on certiorari, because the record of the second justice does not show the cause of action, or that a summons was issued or return made, in the original judgment.—Grube v. Getz, 3 Pa. Co. Ct. R. 124.

[b] (Pa. 1886) Act April 15, 1845, § 1, conferring authority on justices to issue attachment executions, does not enlarge their jurisdiction, under Act March 20, 1810, providing for the docketing of justices' judgments in other counties than that in which they were rendered.—Collins v. Brower, 1 Pa. Co. Ct. R. 261.

[c] (Pa. 1887) A judgment on the transcript of a judgment before a justice in another county cannot be entered by another justice in a county in which the defendant is not a resident nor found therein.—Mowry v. Thomas, 1 Wilcox, 106.

6. AMENDMENT OR CORRECTION, OPENING OR VACATING, AND EQUITABLE RELIEF.

AMENDMENT, CORRECTION, OR REVIEW IN SAME COURT, § 400.
OPENING OR VACATING, § 401.

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EQUITABLE RELIEF, § 402.
— FRAUD, ACCIDENT, OR MISTAKE, § 403.
— GROUNDS FOR REFUSING RELIEF IN GENERAL, § 404.
— EXISTENCE OF OTHER ADEQUATE REMEDY, § 405.
— LACHES OR DELAY, § 406.
— PROCEDURE, § 407.

§ 400. Amendment, correction, or review in same court.

After appeal, see post, § 600.

By successor of justice rendering judgment, see ante, § 205 [b].

Of judgments entered on transcripts from justices' courts, see "Judgment," vol. 30, c. 796, § 592.

[a] (Cal. 1868) A justice of the peace cannot review his own judgment, except on motion for a new trial.—Winter v. Fitzpatrick, 35 Cal. 269.

[b] (Ga. 1889) A judgment of a justice which is offered in evidence in the superior court cannot be amended nunc pro tunc at that time by the justice rendering the judgment, who is then in court.—Ramsey v. Cole, 84 Ga. 147, 10 S. E. 598.

[c] (Ind. 1871) A justice of the peace has no power to change, or in any manner interfere with, a judgment he has rendered, except to grant a new trial, or to enter satisfaction where the judgment is subsequently paid.—Foist v. Coppin, 35 Ind. 471.

[d] (Iowa, 1873) Correction by a justice of the peace of an erroneously assessed judgment, if made before hearing on a writ of error, will prevent a reversal.—Rahn v. Greer, 37 Iowa, 627.

[e] (Ky. 1847) Justices of the peace have jurisdiction to issue writs of error coram nobis, when that is the appropriate remedy to correct errors in their own courts, and this jurisdiction is not taken away by the statute of 1820, giving authority to certain justices in a county to grant such writs in certain cases.—Breckinridge v. Coleman, 46 Ky. (7 B. Mon.) 331.

[f] (Ky. 1847) The statute of 1802, requiring writs of error coram nobis to be tried at the first term, does not apply to trials of such writs before justices of the peace.—Breckinridge v. Coleman, 46 Ky. (7 B. Mon.) 331.

[g] (Neb. 1877) After entering judgment, a justice's judicial function ceases; and he has no authority afterwards to modify it.—Fox v. Meacham, 6 Neb. 530.

[h] (N. Y. 1863) Where a justice of the peace tried a cause and rendered a judgment for the plaintiff for $98 damages and $4.65 costs, in all $102.65, and duly entered it in his docket, and afterwards discovered that he had, by mistake, made his costs 69 cents less than he was entitled to, and then undertook to correct the error by setting that sum underneath the original footing, and adding them together, without erasing or altering any part of the original docket, but afterwards, finding that it was illegal to alter a judgment, erased the addition, and thus restored the docket to its original form, *held*, that these alterations did not make the judgment void, as they were made after the time limited by statute for the justice to render judgment and enter it in his docket. They were clearly void acts, as much so as if they had been done by a stranger; and, being void, they could not affect the judgment.—Dauchy v. Brown, 41 Barb. 555.

[i] (N. Y. 1873) The alteration, by a justice of the peace, of a judgment already entered on his docket, does not defeat the judgment; but it remains a judgment for the amount originally entered.—Rose v. Depue, 1 Thomp. & C. 16.

[j] (Pa. 1871) Aldermen of Philadelphia cannot alter judgments entered by them, except in the mode prescribed by acts of assembly.—Nippes v. Kirk, 8 Phila. 299.

[k] (Tenn. 1871) A justice of the peace, having entered judgment in an action against one of two defendants, cannot afterward amend it by making an entry, as to the other defendant, on his memory alone.—Trevathan v. Caldwell, 51 Tenn. (4 Heisk.) 535.

[l] (Tenn. 1872) A justice's alteration of a judgment, two weeks after stay of execution, by striking out the words "to be discharged in Tennessee and Kentucky bank notes," was not erroneous.—Womack v. Walling, 60 Tenn. (1 Baxt.) 425.

[m] (Vt. 1847) The fact that the authority of a justice is temporary, subject to be terminated by his death or removal or the end of his term of office, precludes him from exercising that supervisory power over judgments rendered by him which is possessed by courts of a more permanent character.—Mosseaux v. Brigham, 19 Vt. 457.

[n] (Wis. 1859) A justice of the peace can alter his judgment, after entry, by consent of all parties.—Steckmesser v. Graham, 10 Wis. 37.

§ 401. Opening or vacating.

After appeal, see post, § 600.

In attachment suit, see ante, § 288 [u].

In garnishment proceeding, see ante, § 300 [x].

Motion to vacate as general appearance, see ante, § 266 [b].

By county judge in cases within jurisdiction of justice of the peace, see "Judgment," vol. 30, c. 899, § 666 [e].

Judgments entered on transcripts from justices' courts, see "Judgment," vol. 30, cc. 915–917, § 676.

[a] (Cal. 1891) A justice of the peace has no power to annul a judgment rendered in his court after a regular trial.—Heinlen v. Phillips, 88 Cal. 557, 26 Pac. 366.

[b] (Del. 1872) A justice of the peace, having rendered judgment in a cause, may open the same by consent of the parties, and refer the case to referees.—Sinex v. Cooper, 4 Houst. 447.

[c] (Ga. 1875) Justices' courts cannot set aside judgments.—Dalton City Co. v. Haddock, 54 Ga. 584.

[d] (Ind. 1859) A justice of the peace, before he can vacate a judgment rendered by him at the request of one, must give notice to the other, party.—Smith v. Chandler, 13 Ind. 513.

[e] (Ind. 1861) A justice having assumed to render judgment on February 20th, defendant is for all purposes out of court. Consequently, a motion on February 27th to set aside the judgment, and the subsequent proceedings, in the absence of notice to the opposite party, are wrongfully entertained.—Jamieson v. Caster, 16 Ind. 426.

[f] (Ind. 1871) A justice of the peace has no authority to vacate a judgment.—Foist v. Coppin, 35 Ind. 471.

[g] (Kan. 1884) A justice of the peace has no power to vacate his own judgment, and proceedings before him for such purpose are void.—Shaw v. Rowland, 32 Kan. 154, 4 Pac. 146.

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[h] (Kan. 1891) Where a justice of the peace sets aside a judgment and grants a new trial the judgment ceases to exist, and cannot be resuscitated by a subsequent order of the justice, vacating his order setting it aside and granting the new trial, on the ground that defendant's motion to set the judgment aside was not in writing, as agreed upon.—Olson v. Nunnally, 47 Kan. 391, 28 Pac. 149, 27 Am. St. Rep. 296.

[i] (Md. 1855) A magistrate's court has no power to set aside a judgment rendered at a preceding term.—Frazier v. Griffie, 8 Md. 50.

[j] (Miss. 1889) A justice of the peace may proceed to vacate a void judgment and enter a valid one without issuing another summons.—Moore v. Hoskins, 66 Miss. 496, 6 South. 500.

[k] (Mo. 1890) A justice's judgment for plaintiff showed on its face an appearance of defendants and a trial, after which defendants appeared and filed an affidavit to set aside the judgment, and thereupon judgment was set aside, and a new trial granted. Both parties appeared on a new trial, and judgment was rendered for defendants, and on appeal to the circuit court defendants again had judgment. *Held* that, as the record on appeal did not show that the first judgment was by default, it must be held that the justice had no power to set it aside, and that of the subsequent proceedings the court had no jurisdiction.—Leith v. Shingleton, 42 Mo. App. 449.

[l] (Mo. 1895) A justice has no power to vacate a judgment unless it be one by default or nonsuit.—Langford v. City of Doniphan, 61 Mo. App. 288, 1 Mo. App. Rep'r, 381.

[m] (Neb. 1881) Defendant need not state his defense as a condition precedent to setting aside the judgment, and it is error for the justice to overrule his motion to set the judgment aside, where he has complied with the conditions of the statute.—Strine v. Kingsbaker, 12 Neb. 52, 10 N. W. 534.

[n] (N. Y. 1863) The mayor's court in the city of Albany can set aside a judgment on the merits entered on the report of a referee.—People v. Austin, 43 Barb. 313.

[o] (N. Y. 1883) The absence of authority in the Code of Civil Procedure for one justice to reconsider or vacate an order made by another indicates it to have been the intention of the legislators that it should not be exercised.—In re National Trust Co., 4 Civ. Proc. R. 203.

[p] (N. Y. 1883) Where the justice, by whom orders passing the account of a receiver of a corporation and allowing him commission for his services were made, had jurisdiction to entertain the proceedings before him, and make the allowance for commission, but the sums allowed were erroneous, a motion before another justice to vacate and set aside and resettle the orders is properly denied, since such application should be made to the justice who made the orders, or an appeal taken for the purpose of reviewing the propriety of the orders made.—In re National Trust Co., 4 Civ. Proc. R. 203.

[q] (N. C. 1844) Where a magistrate gives a judgment against defendant for a sum beyond his jurisdiction, the defendant may resort to a writ of false judgment to have it set aside.—Morgan v. Allen, 27 N. C. 156.

[r] (N. C. 1885) As a justice of the peace cannot grant a new trial, if a judgment is rendered by him notwithstanding his assurance that it should not be, the remedy is not by motion to set aside the judgment, but by appeal or recordari.—Navassa Guano Co. v. Bridgers, 98 N. C. 439.

[s] (N. C. 1893) A final judgment entered in justice's court can be set aside, on the ground of fraud and collusion between the justice and others, only in an independent action.—King v. Wilmington & W. R. Co., 112 N. C. 318, 16 S. E. 929.

[t] (Ohio, 1885) A justice of the peace may set aside a judgment void for want of service of summons on defendants, issue a new summons in the same action, and, on due service thereof, proceed again to judgment.—Wehlen v. Macke (Super. Ct. Cin.) 15 Wkly. Law Bul. 125.

[u] (Ohio, 1896) The statutory provisions requiring that a motion before a justice, to open a judgment, be in writing, stating the grounds, and that it be verified, may be waived by the adverse party; and an oral motion consented to is good.—Forest City Stone Co. v. French, 4 Ohio Dec. 141, 1 Cleve. Law Rep. 69.

[v] (Pa. 1828) Justices of the peace have power to open a judgment if it is apparent that the process has been wrongfully and fraudulently abused.—Galley v. Davenport, 1 Ashm. 149.

[w] (Pa.) Under the provisions of Act 1810, §§ 4, 7, authorizing a justice to set aside a judgment within 20 or 30 days after its rendition, for certain causes, the justice has no authority to grant a hearing after the expiration of 6 months from the rendition of the judgment.—(1854) Stockdale v. Campbell, 1 Phila. 520; (1871) Long v. Caffrey, 8 Phila. 546.

[ww] (Pa. 1864) A justice or alderman has no power to open a judgment 20 days after it was entered by him.—Gregg v. Ashenfelder, 5 Phila. 468.

[x] (Pa. 1864) On application to open a judgment, notice of the rule should be given the adverse party.—Larie v. Hagerty, 5 Phila. 530.

[xx] (Pa. 1871) After a judgment entered by an alderman, and the payment to him of the amount and costs, he cannot open the judgment and rehear the cause, on the ground that there was a clerical error in entering it.—Nippes v. Kirk, 1 Leg. Gaz. R. 387.

[y] (Pa. 1892) A judgment of a justice entered on a constable's return, failing to show legal service of process on defendant company, must be vacated.—Albert Lewis Lumber & Mfg. Co. v. Lewis (Com. Pl.) 6 Kulp, 422.

[yy] (Pa. 1892) The action of a justice of the peace in opening a judgment without notice to defendant, and entering another judgment for a larger sum claimed by plaintiff, is unauthorized, and will be reversed on certiorari.—Carlin v. Holland (Com. Pl.) 11 Pa. Co. Ct. R. 20.

[z] (S. C. 1883) The provision of Code, § 195, authorizing the court in certain specified cases, at any time within a year, to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, does not embrace or apply to trial justices' courts.—Doty v. Duvall, 19 S. C. 143.

[zz] (Tex. 1882) Rev. St. art. 1623, directing a motion to set aside a justice's judgment, on grounds other than that the judgment is contrary to law and evidence, to be supported by affidavit, makes it incumbent on one moving to set aside a judgment on such other grounds to swear to his motion.—International & G. N. R. Co. v. Pape, 1 White & W. Civ. Cas. Ct. App. § 241.

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§ 402. Equitable relief.

Against judgment in garnishment proceeding, see ante, § 300 [j, l, m, o, p, r].

Prohibition, see "Prohibition."

[a] Injunction will lie to restrain the collection of a void justice's judgment.
—(Kan. 1891) Olson v. Nunnally, 47 Kan. 391, 28 Pac. 149, 27 Am. St. Rep. 296;
(Mo. 1822) Bornschein v. Finck, 13 Mo. App. 120.

CONTRA, see
(Cal. 1874) Gates v. Lane, 49 Cal. 266;
(Tex. 1857) McFaddin v. Spencer, 18 Tex. 440;
(Wis. 1866) Crandall v. Bacon, 20 Wis. 639, 91 Am. Dec. 451.

[b] (Ala. 1895) Where a landlord, in an action before a justice of the peace against his tenant for unlawful detainer, recovers judgment, and is awarded damages for the detention, notwithstanding the tenant had a good legal defense, which he was only prevented from pleading because it involved the merits of the landlord's title, equity will not enjoin the enforcement of such judgment, though the judgment creditor is insolvent.—Davis v. Pou, 108 Ala. 443, 19 South. 362.

[c] (Ariz. 1894) Injunction lies to an execution on the judgment of a justice to whom the case has been transferred, rendered in the absence of the certified transcript of the transferring justice's docket required by Rev. St. par. 1409.—Dial v. Olsen, 36 Pac. 175.

[d] (Ark. 1841) A supersedeas will issue from the supreme court to restrain an execution issued by a justice on a judgment obtained without process or notice.—Ex parte Woods, 3 Ark. (3 Pike) 532.

[e] (Cal. 1895) Where a justice of the peace refuses to vacate a judgment obtained in his court through fraud, and no right of appeal lies, the judgment debtor is entitled to relief in equity.—Merriman v. Walton, 105 Cal. 403, 38 Pac. 1108.

[f] (Ga. 1843) A judgment in a justice's court cannot be set aside by bill in equity, on the application of other creditors, on the ground of want of jurisdiction.—Brisco v. Brewer, Ga. Dec. 105, pt. 2.

[g] (Ill. 1867) Under the statute providing that no writ of injunction can be granted to stay proceedings on a judgment obtained before a justice of the peace for a sum not exceeding $20, a court of equity will not enjoin the collection of a balance alleged to be due on such judgment, where the balance attempted to be collected is less than $20, even though the original judgment was rendered for $62.—Breckenridge v. McCormick, 43 Ill. 491.

[h] (Ill. 1887) Where defendant tenders money into a justice's court, and the court, after giving judgment for plaintiff, wrongfully applies such money in payment of costs and part payment of plaintiff's judgment, and the plaintiff so receives it, defendant is not entitled to an injunction against proceedings by the plaintiff to enforce his judgment.—Chicago & E. I. R. Co. v. Kamman, 119 Ill. 362, 10 N. E. 217.

[i] (Ind. 1871) An injunction will lie to stay proceedings on a judgment of a justice of the peace against a defendant sued and served with summons out of his county and without an appearance.—Grass v. Hess, 37 Ind. 193.

[j] (Ind. 1884) A justice of the peace has no equity jurisdiction to relieve from a judgment valid on its face, though void in fact.—Brown v. Goble, 97 Ind. 86.

[k] (Ind. 1893) In an action to enjoin a judgment in justice's court in an action of replevin, of which the justice had jurisdiction, it is immaterial whether a verdict for damages in favor of defendant therein was erroneous, or even void, as errors in the proceedings leading up to the judgment do not affect the question of jurisdiction.—Rhodes-Burford Furniture Co. v. Mattox, 135 Ind. 372, 35 N. E. 11.

[l] (Ind. 1893) The fact that a party to an action objected to trying it in justice's court to a jury of 12, instead of a legal jury of 6, does not entitle him to enjoin the judgment.—Rhodes-Burford Furniture Co. v. Mattox, 135 Ind. 372, 35 N. E. 11, affirmed (1893) 34 N. E. 326.

[m] (Iowa, 1892) Equity will cancel and enjoin the enforcement of a judgment by default rendered by a justice after he had lost jurisdiction by an unlawful adjournment.—Iowa Union Tel. Co. v. Boylan, 86 Iowa, 90, 52 N. W. 1122.

[n] (Kan. 1888) When a defendant fails to appear in a justice's court, and judgment is rendered against him for an amount larger than that indorsed on the copy of the summons, such judgment may be enjoined.—Basset v. Mitchell (Sup.) 19 Pac. 671.

[o] (Kan. 1889) Comp. Laws, c. 81, § 11, provides that summons issued from justice's court shall be indorsed with the amount for which plaintiff will take judgment if defendant fail to appear, and if defendant so fail judgment shall not be rendered for a larger amount and costs. *Held*, that where the constable serving the summons by mistake indorsed on the copy served a less amount than the original bore, a judgment for the latter amount was not void as to the excess over the former, but only voidable, and so could not be enjoined.—Bassett v. Mitchell, 40 Kan. 549, 20 Pac. 192.

[p] (Md. 1883) Over 1,000 judgments were rendered by two magistrates in favor of a single plaintiff against a number of different defendants; all except 2 being for the exact sum of $100 or $98. It appeared that in most, if not all, the cases, there was no debt due. In some of them the evidence showed that there was no service of summons on defendant, in spite of the officer's return of service. In others, judgment was rendered by the magistrate, after siguing a paper saying that the suits were dismissed. In others, no trial, even ex parte, was had. In one case a judgment against "S. F. Thomas" was changed by the plaintiff so as to read "Sam. F. Thomas." The defendants had no notice of the existence of the judgments until after the time for appeal had passed. *Held*, that the judgments would be canceled and their enforcement enjoined by a court of equity.—Wagner v. Shank, 59 Md. 313.

[q] (Mich. 1879) Where a justice had jurisdiction in a case, irregularities and errors in the course of his proceedings cannot be reviewed by a bill in chancery to set aside the judgment entered upon a transcript from such justice.—Wilson v. Coolidge, 42 Mich. 112, 3 N. W. 285.

[r] (Minn. 1892) Where the rights of third parties have not intervened, an action will lie to set aside the judgment of a justice of the peace, rendered by default, on a constable's certificate of service of the summons, if in fact such summons was not served.—Knutson v. Davies, 51 Minn. 363, 53 N. W. 646.

[s] (Mo. 1891) Where a judgment is void because the summons was issued by a justice of the peace beyond the county wherein he was elected, injunction will lie to restrain an execution on the judgment.—United States Mut. Acc. Ins. Co. v. Reisinger, 43 Mo. App. 571.

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[t] (Neb. 1875) H. commenced an action in the district court to enjoin the collection of a judgment obtained against him before a justice of the peace, and praying for a new trial of the cause, alleging that he was called away on account of the dangerous illness of his son, during which time service of summons was made by leaving a copy at his residence; that he returned home on the day of the trial, but was too sick to attend on that day and for 20 days after, when it was too late for the court in which judgment was rendered to grant any relief; and that he had a good defense to the action, which was fully set forth. *Held*, on demurrer, that a new trial should be granted.—Horn v. Queen, 4 Neb. 108.

[u] (Neb. 1891) An injunction will not lie to restrain a justice's judgment, rendered after he had lost jurisdiction by improperly continuing the suit for an indefinite period.—Lininger v. Glenn, 33 Neb. 187, 49 N. W. 1128.

[uu] (Tenn. 1848) Where defendant agreed that the justice should render a conditional judgment against him, and the justice entered an absolute judgment by confession, chancery had jurisdiction to relieve against the judgment.—Gwinn v. Newton, 27 Tenn. (8 Humph.) 710.

[v] (Tenn. 1872) A court of chancery has no jurisdiction to correct a mistake in the amount of a judgment rendered by a justice of the peace.—Wagstaff v. Braden, 60 Tenn. (1 Baxt.) 304.

[vv] (Tenn. 1873) Code, § 4098, providing that no justice related to the parties within a certain degree shall sit in any cause, is mandatory; and chancery will enjoin a judgment rendered by a justice incompetent to sit, by reason of consanguinity, etc., unless the parties have waived the same in writing.—Smith v. Pearce, 65 Tenn. (6 Baxt.) 72.

[w] (Tex. 1857) Where a justice of the peace grants a new trial without notice to the adverse party, who does not appear at the second trial, the latter may enjoin the collection of the judgment thus rendered.—Aycock v. Williams, 18 Tex. 392.

[ww] (Tex. 1858) That a debt was divided and suits brought on each portion in a justice's court, which would have no jurisdiction over one suit for the whole amount, is no reason for enjoining the judgment in one suit, unless it also appears that by means of the division the defendant was deprived of some right or remedy and that he had not consented to the division.—Pryor v. Emerson, 22 Tex. 162.

[x] (Tex. 1881) An execution for an excess above $200 of a judgment in a justice's court in a suit of forcible entry and detainer will be perpetually enjoined, where $200 has been paid, as the justice has no jurisdiction to render judgment for more than $200.—Boaz v. Graham, 1 White & W. Civ. Cas. Ct. App. § 159.

[xx] (Tex. 1882) Complainant, seeking an injunction, alleged that, in a suit against him for $10 in a justice's court, the jury ignored a $40 note which he pleaded as a set-off, and, judgment being rendered against him, his appeal was dismissed, because the judgment, from its amount, was not appealable. *Held*, that no ground for an injunction appeared.—Halcomb v. Kelly, 57 Tex. 618.

[y] (Tex. 1884) The fact that the court of appeals has no jurisdiction to enter an appeal from a justice's judgment, where the amount involved is less than $100, does not enable such court to reopen the matters thereby adjudicated, in an action to enjoin the collection of the judgment.—Bullard v. White, 2 Willson, Civ. Cas. Ct. App. § 286.

[yy] (Tex. 1891) When a void judgment in justice's court is for less than $20, no appeal or certiorari can be prosecuted to set it aside, and injunction is the only remedy, and this the district court has jurisdiction to grant, though the supervision of justices' courts by appeal or certiorari must be in the county court.—Gulf, C. & S. F. Ry. Co. v. Rawlins, 80 Tex. 579, 16 S. W. 430.

[z] (Tex. 1891) An injunction will issue to restrain the enforcement of a judgment rendered in justice's court by default, in violation of an agreement between the parties that the case should not be called for trial except by consent, where it appears that no new trial can be had, that the amount in controversy is such that no appeal can be taken, and that there is a valid defense to the action.—Gulf, C. & S. F. Ry. Co. v. King, 80 Tex. 681, 16 S. W. 641.

[zz] (W. Va. 1887) Under Const. art. 3, § 13, providing that no fact tried by a jury shall be retried except as at common law; and Code, c. 50, § 91, declaring that no more than one new trial shall be granted by a justice in any case,—equity cannot enjoin and reverse a judgment rendered on a verdict in the second trial of a cause in a justice's court, the issue being one of law and fact, namely, whether a judgment pleaded by defendant as a set-off was assigned to him only colorably, to defeat plaintiff's exemptions.—Ensign Mfg. Co. v. McGinnis, 30 W. Va. 582, 4 S. E. 782.

§ 403. —— Fraud, accident, or mistake.

[a] (Ala. 1846) If a confession of judgment before a justice of the peace was by mistake, or procured by fraud, it seems a court of chancery would afford relief.—Wilson v. Collins, 9 Ala. 127.

[b] (Cal. 1859) If the plaintiff in some way gets hold of the justice's docket after entry of judgment, and alters the record so as to include a defendant not originally named in it, and not served, equity will vacate the judgment.—Chester v. Miller, 13 Cal. 558.

[c] (Ga. 1890) A petition to vacate a judgment rendered in a justice's court alleged that the defendant had been prevented from defending by the fraud of the plaintiff and his counsel in stating to him that the case would be dismissed. Defendant testified that the plaintiff's counsel told him that the case would not be tried at the April term. The judgment was dated April 4th, but was in fact rendered at the May term, at which the defendant did not appear to defend. The judgment was entered on the summons issued by the justice, but not on his docket. *Held*, that the defendant had not proved the case stated in his petition, and that the judgment could not be enjoined for failure of the justice to enter it on his docket.—Lee v. Arnsdorff, 86 Ga. 264, 12 S. E. 352.

[d] (Ind. 1891) Where a defendant in a suit before a justice of the peace pays the claim, and enters into a stipulation for a dismissal at the costs of plaintiff, and subsequently causes witnesses to be subpœnaed, and costs to be taxed against plaintiff, a judgment therefor is invalid, as obtained by fraud, and, since a justice has no jurisdiction to review his own judgment, there is no remedy at law, and equity will enjoin its collection.—Greenwalt v. May, 127 Ind. 511, 27 N. E. 158, 22 Am. St. Rep. 660.

[e] (Iowa, 1889) Where, after a trial before a justice and a jury, and a verdict against one defendant, the justice enters judgment against both defendants, which is docketed in the district court, and execution issued thereon, equity will, in an action brought for that purpose by the defendant against whom the jury failed to

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return a verdict, set aside such judgment as fraudulently entered.—Dady v. Brown, 76 Iowa, 528, 41 N. W. 209.

[f] (Kan. 1896) Where defendant in justice court was induced to confess judgment by the fraudulent representations of plaintiff and the justice that to do so was the quickest mode of getting the case into the district court, he is entitled to an injunction staying the judgment.—Kimble v. Short, 2 Kan. App. 130, 43 Pac. 317.

[g] (Mich. 1843) An execution on a judgment of a justice will be restrained, where defendant lost his defense, not by any neglect, but through the fraudulent conduct of plaintiff, by which he was lulled into security and did not appear at the trial.—Burpee v. Smith, 1 Walk. Ch. 327.

[h] (Mo. 1892) Where parties to an action set for trial before a justice of the peace have orally agreed that plaintiff shall have a continuance entered, but plaintiff, instead, procures judgment in his own favor, defendant is not in laches for failure to attend the trial, or look after the cause in time to appeal, and may have relief in equity for plaintiff's fraud.—Sanderson v. Voelcker, 51 Mo. App. 328.

[i] (N. J. 1866) Suit was brought against the complainant before a justice of the peace, to which the complainant, with his counsel, appeared, and the result was a nonsuit. On the following day another summons was served, which the complainant took to the office of his counsel, and left with the clerk, who promised him that the business should be promptly attended to. Owing to the illness of the counsel, no appearance was made, and judgment was rendered against the complainant on dedefault. *Held* that, as complainant's rights were lost by unavoidable accident, equity will interfere to restore those rights.—Brown v. Elliott, 17 N. J. Eq. (2 C. E. Green) 353.

[j] (N. Y. 1878) The collection of a justice's judgment may be restrained because of a fraudulent representation to the defendant that the purpose of the action was merely to collect of him an unpaid note, when in fact a paid note was intentionally included.—Hinckley v. Miles, 15 Hun, 170.

[k] (Or. 1882) At the hour when defendant's case was called for trial before a justice, defendant was engaged with plaintiff and one of his attorneys in trying to come to a settlement. Plaintiff's other attorney, knowing this, procured a default and judgment. *Held*, that the judgment was obtained by fraud, and should be set aside and its enforcement enjoined.—Marsh v. Perrin, 10 Or. 364.

[l] (Tex. 1894) When defendant agreed with plaintiff's attorney that defendant's agent should be notified by said attorney or the justice when the case would be called for trial, that he might present the affirmative defenses alleged, and a trial was had without notice to, or knowledge of, defendant or his agent, defendant has a good excuse for failing to support his answer, and can enjoin the judgment rendered ignoring it.—Gulf, C. & S. F. Ry. Co. v. Stephenson (Civ. App.) 26 S. W. 236.

[m] (Vt. 1853) On petition to set aside a judgment for fraud, accident, or mistake, where it appeared that the attorney forgot the day of the court, and consequently the defendant was defaulted, his negligence must be regarded as the negligence of the party, and the statute authorizing the county court to grant a new trial, where a justice of the peace has rendered judgment against a party, and he has been deprived of his day in court by fraud, accident, or mistake, does not apply.—Babcock v. Brown, 25 Vt. 550, 60 Am. Dec. 290.

[n] (Vt. 1853) On petition to set aside a judgment before a justice, it appeared that there was an omission in the copy of the writ left with the petitioner as to the place of holding the court. The service of the writ by the return of the officer was complete, so that the writ could not have been abated. It was not claimed that this omission was the reason why the petitioner did not appear before the justice. *Held*, that there was no omission, accident or mistake depriving the party of his day in court, so as to authorize the setting aside of the judgment.—Babcock v. Brown, 25 Vt. 550, 60 Am. Dec. 290.

[o] (Vt. 1859) On petition to set aside the judgment of a justice of the peace because the petitioner was deprived of his day in court by fraud, accident, or mistake, and was therefore defaulted, it appeared that the petitioner's attorney, being suddenly called away on the day of the trial, requested another person to attend to the suit for him, who promised, but neglected, to do so. *Held*, that this did not bring the case within the statute, so as to authorize the county court to set aside the judgment.—Davison v. Heffron, 31 Vt. 687.

§ 404. —— Grounds for refusing relief in general.

[a] (Ala. 1833) Since the statute authorizes the trial of controversies for sums under $50 originating before a justice of the peace to be had on the justice and equity of the case, equity will not interfere with a judgment in such a case where the matter in dispute does not exceed $20.—Williams v. Berry, 3 Stew. & P. 284.

[b] (Iowa, 1896) A party who sues in equity to set aside a judgment by default rendered by a justice of the peace without jurisdiction need not show that he is not indebted to the party who obtained such judgment.—Henkle v. Holmes, 97 Iowa, 695, 66 N. W. 910.

[c] (Kan. 1881) In an action to enjoin the collection of a justice's judgment, it appeared from the record of the justice that there was service on the defendant, appearance, and a continuance by consent until he should return from certain business, when the case should be called at once, and that there was a trial and judgment against such defendant at a day appointed by the justice; but such record failed to show that defendant had returned, that he had notice of the day appointed for trial, or that he was present at such trial. There was evidence that such defendant had been back several times between the day of adjournment and the day of trial; that his attorney was duly notified by the justice of the time fixed for trial; that such attorney told the justice that his client had no defense, and to go ahead and render judgment; and that in fact there was no defense, and the debt was a just one, and ought to be paid. *Held*, that an injunction was properly refused.—Devinney v. Mann, 24 Kan. 682.

[d] (Kan. 1894) The attorneys for the parties stipulated to continue the case, and mailed same to the justice. The stipulation not having arrived when the case was called, plaintiff took judgment by default. *Held* that, in the absence of allegations showing a valid defense to the action, execution of the judgment should not be restrained.—Poor v. Tuston, 53 Kan. 86, 35 Pac. 792.

[e] (N. H. 1849) The court will not proceed summarily on petition to vacate a judgment irregularly entered by a justice of the peace, if there be no evidence that the petitioner might have prevailed on the merits and that substantial injustice has been done by the irregularity complained of; nor will a new trial be granted under a general prayer for relief in the peti-

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tion under the same circumstances.—Ela v. Goss, 20 N. H. 52.

[f] (Ohio, 1889) A judgment of a justice of the peace, the record of which shows service on the defendant, will not be enjoined because there was no service, where the judgment plaintiff was not guilty of fraud and the debt was in fact due, so that another trial would not result differently.—Dixon v. Bird Varnish Co., 10 Ohio Dec. 481, 21 Wkly. Law Bul. 258.

[g] (Tex. 1881) In an action to enjoin or set aside a justice's judgment, plaintiff must show that he had a good legal or equitable defense to the original demand or cause of action.—Masterson v. Ashcom, 54 Tex. 324.

§ 405. —— Existence of other adequate remedy.

[a] The court will not relieve against the decision of a justice, on the ground of irregularity in the proceedings, where there is no obstacle to prevent a decision of the question at law.

—(Ga. 1842) Stites v. Knapp, Ga. Dec. 36, pt. 2;

(N. Y. 1818) Shottenkirk v. Wheeler, 3 Johns. Ch. 275; (1834) Gorman v. Low, 2 Edw. Ch. 324;

(N. C. 1831) Bissell v. Bozman, 17 N. C. 154;

(S. C. 1831) McDowall v. McDowall, Bailey, Eq. 324.

[b] (Cal. 1861) A defendant who has never been served with a summons in a case before a justice, in which execution has issued against him, has an effectual remedy by motion to the justice to set the same aside. Upon denial of this motion, he may appeal to the county court, if the time for appeal has not elapsed; and, if it has elapsed, he may obtain a review by certiorari, and he is not entitled to an injunction.—Comstock v. Clemens, 19 Cal. 77.

[c] (Cal. 1887) An injunction will not issue to restrain a levy of execution on a justice's judgment docketed in the superior court, when the relief sought is based on the ground that the judgment is void because the summons was fatally defective. Under the law of that state the judgment debtor has ample remedy at law, by motion in the justice's court, to arrest the execution.—Luco v. Brown, 73 Cal. 3, 14 Pac. 366, 2 Am. St. Rep. 814; Same v. Bushyhead, 14 Pac. 368.

[d] (Cal. 1888) In an action to annul a judgment in justice's court by default, regular on its face, and for an injunction restraining its collection, where the complaint showed that a motion, made under Code Civ. Proc. § 859, giving to justices power to relieve from judgments by default, on good cause shown, was denied, it appearing that plaintiff had pursued an adequate remedy at law, a demurrer to the complaint is properly sustained, and, on refusal to amend, the injunction should be dismissed.—Reagan v. Fitzgerald, 75 Cal. 230, 17 Pac. 198.

[e] (Conn. 1876) M. brought an action against B. before a justice of the peace; the only service upon B. being by leaving a copy at his place of residence. B. was at that time confined in an insane asylum in another part of the state, and neither he nor any one in his behalf had any notice of the suit, and M. got judgment by default. B. obtained a decree for a perpetual injunction against collection thereof. *Held*, that the decree was not erroneous, on the ground that there was adequate remedy at law by a writ of error, as the writ might not be so served as to operate as a supersedeas.—Blakeslee v. Murphy, 44 Conn. 488.

[f] (Ill. 1892) Equity will not restrain defendants from collecting a judgment obtained by them in a justice's court, where complainant has an adequate remedy at law by appeal.—Geraty v. Druiding, 44 Ill. App. 440.

[g] (Ind. 1843) Where a party is aggrieved by a decision of the circuit court dismissing an appeal from a justice's judgment, the amount in controversy not being less than $20, exclusive of interest and costs, his only remedy is by appeal or writ of error to the supreme court, and not by bill to enjoin the judgment.—Pichon v. McHenry, 6 Blackf. 517.

[h] (Ind. 1861) The circuit court cannot entertain an action to set aside a judgment of a justice of the peace for want of jurisdiction; but an application must be made to the justice to vacate the judgment, and an appeal taken from his refusal.—Jamieson v. Caster, 16 Ind. 426.

[i] (Ind. 1870) Proceedings on a judgment rendered by a justice of the peace will not be enjoined in favor of one who has had an opportunity to appeal therefrom, or where by an application to the circuit court or court of common pleas an appeal may be authorized after the lapse of time limited therefor under 2 Gav. & H. St. p. 597, § 68.—Baragree v. Cronkhite, 33 Ind. 192.

[j] (Ind. 1891) Injunction will not lie to restrain the collection of a judgment rendered by a justice of the peace on the ground of irregularities occurring at the trial, since an adequate legal remedy may be had by appeal.—Parsons v. Pierson, 128 Ind. 479, 28 N. E. 97.

[k] (Iowa, 1885) In an action before a justice of the peace, before the time for entering an appearance had elapsed, defendant came in, found no one present, and after expiration of the time went away, and paid no further attention to the case. Later, on the same day, the justice entered judgment by default. *Held*, that defendant's remedy was by appeal or writ of error, and that he could not obtain an injunction to restrain the enforcement of the judgment, which was, at most, erroneous, but not void.—Central Iowa Ry. Co. v. Piersol, 65 Iowa, 498, 22 N. W. 648.

[l] (Md. 1852) Two judgments were rendered on confession before a justice of the peace, no warrants having been issued or served on the defendants. On a bill for injunction to restrain executions, it was *held* that relief for such an objection to the judgments should be sought at law by appeal to the county court, and that equity could furnish no relief.—Brumbaugh v. Schnebly, 2 Md. 320.

[m] (Mo. 1894) An execution issued on a void judgment of a justice of the peace will not be enjoined, as plaintiff's remedy at law is ample and adequate.—St. Louis & S. F. Ry. Co. v. Lowder, 59 Mo. App. 3.

[n] (Neb. 1886) Where a justice of the peace has jurisdiction of the subject-matter and the parties, a judgment rendered by him after the expiration of the time fixed by statute must be corrected by a direct proceeding for that purpose, and will not be enjoined upon that ground alone.—Gould v. Loughran, 19 Neb. 392, 27 N. W. 397.

[o] (Neb. 1888) On commencement of an action before a justice he designated a time for trial, and on issuing the summons he designated an earlier time, of which the plaintiff had no notice, until after a judgment had been rendered against her. *Held*, that such judgment must be corrected by a direct proceeding for that purpose, and will not be enjoined

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upon that ground alone.—Proctor v. Pettit, 25 Neb. 96, 41 N. W. 131.

[p] (Nev. 1873) The court will not enjoin the execution of an erroneous judgment of a justice, since defendant's remedy is by appeal.—Connery v. Swift, 9 Nev. 39.

[q] (Nev. 1873) The court will not enjoin the execution of a void justice's judgment, if the defendant's remedy by motion to set aside the execution has not been lost.—Connery v. Swift, 9 Nev. 39.

[r] (N. C. 1893) A judgment rendered by a justice of the peace without due notice to defendant of the time and place of hearing cannot be set aside by suit in the superior court. The remedies are a motion before the justice, or a writ of recordari in the superior court.—Gallop v. Allen, 113 N. C. 24, 18 S. E. 55.

[s] (Tenn. 1842) A bill alleged that complainant applied to an agent of defendant, and made to him several notes within the jurisdiction of a justice, amounting to several hundred dollars, and the agent indorsed them, and defendant discounted them at 15 per cent. Judgment was got, and to satisfy them new notes were given, which were again discounted at 15 per cent.; and new judgments were taken and new notes were given, in a constantly recurring series, until within two years the aggregate of the notes amounted to $2,500 and the judgments to $1,300. *Held* that, as the judgments were obtained before a justice of the peace, whose jurisdiction was limited to $200, and as to do justice the court would have had to consider the whole transaction and the entire amount involved, plaintiff had no adequate remedy at law, and the enforcement of the judgments would be enjoined.—Frierson v. Moody, 22 Tenn. (3 Humph.) 561.

[t] (Tex.) A judgment of a justice of the peace will not be enjoined for error of the court, where the judgment defendant has any other adequate remedy at law.—(1854) Fitzhugh v. Orton, 12 Tex. 4; (1882) Halcomb v. Kelly, 57 Tex. 618.

[u] (Tex. 1856) On a petition for an injunction, it appeared that the petitioner, against whom a judgment had been rendered in justice court, had at the time a claim against the plaintiff in such action which exceeded $100, and which he could not, therefore, plead in set-off in the justice court. The petition prayed that injunction be issued restraining execution upon such judgment until he could bring suit upon his claim and get judgment to set off against the judgment rendered against him. *Held*, that the petitioner's proper remedy was to have brought suit on his claim and pray an injunction thereon, thus avoiding a multiplicity of suits.—Brady v. Hancock, 17 Tex. 361.

[v] (Tex. 1858) That a justice's judgment was erroneous, because based on evidence legally insufficient, is no ground for an injunction at the suit of a party. His remedy is by certiorari.—Rotzein v. Cox, 22 Tex. 62.

[w] (Tex. 1876) A justice's judgment, which directs a forced sale of articles for its satisfaction which are exempt under law from forced sale, is not a nullity, however erroneous; and its conclusive force cannot be evaded by a resort to injunction. The remedy is by appeal.—Rountree v. Walker, 46 Tex. 200.

[x] (Tex. 1881) Where a justice's judgment is void, and the time has elapsed for appeal therefrom, or for certiorari, the proper remedy of the party affected by the judgment is to move in the justice court that rendered it to set aside any execution that may have been issued on it, and from the judgment of the justice upon that motion an appeal will lie. Injunction is not the proper remedy.—Lackie v. Bramlett, 1 White & W. Civ. Cas. Ct. App. § 1130.

[y] (Tex. 1881) Injunction will not lie to enjoin a judgment recovered in a justice court, where the defendants had a complete legal remedy by appeal or certiorari, and the judgment was not void.—Long v. Anderson, 1 White & W. Civ. Cas. Ct. App. § 1161.

[z] (Vt. 1874) Where a party is unjustly deprived of his day in court before a justice of the peace, by reason of fraud, accident, or mistake, the county court has power, under Gen. St. c. 38, to afford him an adequate remedy, and hence he cannot apply for relief to a court of chancery.—Sleeper v. Croker, 48 Vt. 9.

[zz] (W. Va. 1888) A judgment by a justice, without service of process on or notice to the defendant, is void. But as it may be set aside by the circuit court on certiorari, no relief can be had against it in a court of equity.—Kanawha & O. Ry. Co. v. Ryan, 31 W. Va. 364, 6 S. E. 924.

§ 406. —— Laches or delay.

[a] (Ill. 1825) The remedy of a party aggrieved by the judgment of a justice of the peace is by appeal, and, if he does not appeal in time, equity will not relieve him by enjoining the judgment.—Reynolds v. Mitchell, 1 Ill. (Breese) 177.

[b] (Ill. 1889) A defendant who is misinformed by the justice of the peace before whom the suit is pending that the suit has been dismissed, when in fact a judgment was rendered against him, and then relies on the assurance of the justice that he will set the judgment aside, cannot enjoin the levy of an execution issued on that judgment by the succeeding justice, into whose possession the docket has come.—Carr v. Trainor, 36 Ill. App. 587.

[c] (Ind. 1893) In an action to restrain the levy of an execution upon a justice's judgment, a complaint which alleges that an appeal bond was tendered to the justice, which he refused to approve, and which does not allege that there is any valid defense to the cause of action sued on, is insufficient, since the justice's failure to approve the bond did not prevent the appellant from perfecting his appeal, either by having the justice compelled by mandate to approve the bond, or by obtaining an appeal on application to the circuit court, as allowed by Rev. St. 1881, § 1503.—Boyd v. Weaver, 134 Ind. 266, 33 N. E. 1027.

[d] (Iowa, 1891) Where defendant does not know of the entry of a void judgment by a justice until too late to have it reviewed by appeal or certiorari, he may have the judgment set aside by suit in equity.—Tomlinson v. Litze, 82 Iowa, 32, 47 N. W. 1015, 31 Am. St. Rep. 458.

[e] (Mo. 1895) A judgment will not be enjoined because the justice who rendered it said that he would not render judgment until the 4th of the month, but rendered it on the 2d, where the judgment defendant did not go to the justice until the 14th of the month to see what judgment, if any, had been rendered.—Herweck v. Koken Barber Supply Co., 61 Mo. App. 454, 1 Mo. App. Rep'r, 606.

[f] (Or. 1891) In a suit to enjoin a judgment the bill alleged that, by reason of the resignation of the justice by whom it was rendered, plaintiff was prevented from perfecting his appeal; but it appeared that, of the 30 days allowed within which to perfect the appeal, 18 were allowed to elapse before any steps were taken to do so. *Held*, that this alone was not sufficient to confer jurisdiction on a court of

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equity to interfere with the judgment.—Galbraith v. Barnard, 21 Or. 67, 26 Pac. 1110.

[g] (Tenn. 1871) A bill by defendants at law, alleging a suit before a justice of the peace and judgment for defendants, and that plaintiffs in such suit appealed, but failed to give bond, or have papers carried up, or enter cause on docket, or prosecute the appeal, until eight years afterwards, where judgment was taken without knowledge of complainant, is demurrable, as the defendant could have taken up the papers on failure of the appellant to do so.—Gunn v. Neal, 49 Tenn. (2 Heisk.) 318.

[h] (Tex. 1854) An injunction will not be granted to restrain the execution of a justice for error in the decision, when the petitioner has been negligent.—Fitzhugh v. Orton, 12 Tex. 4.

[i] (Tex. 1854) An injunction to restrain the execution of a judgment of a justice of the peace, and to remove the same for errors to the district court for new trial, will not be granted, where the party, through negligence, has failed to prosecute a certiorari within the time prescribed by law.—Musgrove v. Chambers, 12 Tex. 32.

[j] (Tex. 1855) At a certain time the ordinary method of removing a case from a justice's court was by certiorari, grantable by a judge, to be applied for within 90 days after judgment. An act was passed authorizing the clerks of the district courts to issue writs of certiorari, and a party obtained one from the clerk. The law was decided to be unconstitutional. *Held*, that the mistake of the law was sufficient excuse of the party for not having obtained a certiorari in due time from the district judge, and that, on a showing of merits, he was entitled to the interposition of equity by injunction.—Cobbs v. Coleman, 14 Tex. 594.

[jj] (Tex. 1881) An action will not lie to set aside a judgment of a justice's court having jurisdiction of the subject-matter, eight years after its rendition; the record showing defendant's appearance by attorney, and showing no plea to the jurisdiction, and the application not denying the fact of notice of the judgment, nor explaining the reason for the delay in seeking relief.—Masterson v. Ashcom, 54 Tex. 324.

[k] (Tex. 1882) A judgment of a justice of the peace will not be enjoined for error of the court, where the judgment defendant, by negligence, fails to prosecute a certiorari.—Halcomb v. Kelly, 57 Tex. 618.

[l] (Tex. 1887) Under a statute which makes the judgment of a justice of the peace final where the amount in controversy is less than $20, such a judgment cannot be reviewed by means of an application to a superior court for an injunction restraining the enforcement of the judgment, when it appears that every defense which the applicant for the injunction had the right to urge might have been proved in the suit in the justice's court.—Odom v. McMahan, 67 Tex. 292, 3 S. W. 286.

[m] (Tex. 1892) Where, in an action on a note in justice's court, defendant pleaded the statute of limitation, but did not appear at the trial, execution of the default judgment will not be restrained.—Ivey v. McConnell (Civ. App.) 21 S. W. 403.

§ 407. —— Procedure.

Retroactive operation of statute extending limitation of time in which to petition for vacation of judgment, see "Limitation of Actions," I. (A).

[a] (Ill. 1873) Under section 8 of the act entitled "Ne Exeat and Injunctions" (Rev. St. 1845, c. 72), expressly providing that no writ of injunction shall be granted to stay proceedings under a judgment obtained before a justice of the peace for a sum not exceeding $20, besides the costs, where such judgment is under that sum, it is not error to dissolve the injunction granted on the filing of the bill.—York v. Kile, 67 Ill. 233.

[b] (Ind. 1859) In a suit to enjoin the collection of a justice's judgment, after demurrer for want of verification of the complaint and of bond filed overruled, trial by the court and motion for new trial overruled, it is not error to allow the affidavit to be made and the bond to be filed, where no steps have been taken by the defendant to obtain a stay of proceedings or to have the complaint set aside.—Denny v. Moore, 13 Ind. 418.

[c] (Ind. 1864) A complaint to enjoin the collection of a judgment rendered by a justice of the peace should show that the judgment was rendered without the defendant's consent, where the alleged error consists in the residence of the defendant in another township, and should contain a transcript of the proceedings before the justice, or at least a full statement of them.—Gage v. Clark, 22 Ind. 163.

[d] (Ind. 1874) A complaint to enjoin the collection of a judgment of a justice of the peace alleged that there was no service of process and set out the entry of judgment, which entry did not show any service of process, and also alleged facts showing that there was no real party plaintiff. *Held*, that the complaint was good.—Nicholson v. Stephens, 47 Ind. 185.

[e] (Ind. 1881) In a suit to enjoin a justice's judgment, copies of the proceedings before the justice do not constitute such exhibits as to become a part of the complaint by being filed therewith, and do not add to or detract from the direct averments of the complaint.—Matheney v. Earl, 75 Ind. 531.

[f] (Ind. 1884) A complaint to have declared void a judgment of a justice of the peace, which merely alleges that the defendant was never a resident of the county where the judgment was rendered, is bad on demurrer, in not showing that the case was not one of which the justice would have had jurisdiction, notwithstanding the defendant's nonresidence.—Leary v. Dyson, 98 Ind. 317.

[g] (Mich. 1843) A magistrate before whom a judgment was rendered is not a proper party defendant to a suit brought in chancery to restrain proceedings on it.—Burpee v. Smith, Walk. Ch. 327.

[h] (Mo. 1835) A bill in equity to stay proceedings at law before a justice of the peace and to obtain an appeal, alleging that part of the judgment rendered was unjust, is insufficient, without alleging how much was unjust.—Smith v. De Lashmutt, 4 Mo. 103.

[i] (Mo. 1835) A bill in equity to stay proceedings at law before a justice of the peace and to obtain an appeal, alleging that taking an appeal within three days was prevented by the absence of the justice, is insufficient, without alleging that complainant was unapprised of the intended absence.—Smith v. De Lashmutt, 4 Mo. 103.

[j] (Neb. 1893) A petition in equity to enjoin the enforcement of a judgment of a justice of the peace, which does not aver facts from which it appears that the plaintiff has a meritorious defense to the cause of action on which the judgment is based, and that his failure to interpose such defense in the justice court, and to avail himself of an appeal or proceedings in error, was not due to any neglect or default on his part, does not state a cause of action.—Langley v. Ashe, 38 Neb. 53, 56 N. W. 720.

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[k] (N. C. 1889) In claim and delivery proceedings before a justice of the peace the property was delivered to plaintiff, but afterwards the justice dismissed the proceeding for want of jurisdiction, and gave judgment of restitution against plaintiff, with an alternative judgment for $150. *Held*, that it was proper for the superior court to refuse a preliminary injunction, to restrain the collection of an execution issued on the alternative judgment, on the ground that the property belonged to plaintiff, and if he paid the money he would be unable to recover it.—Powell v. Allen, 103 N. C. 46, 9 S. E. 138.

[l] (N. C. 1895) Defendant having made an assignment for the benefit of creditors, plaintiff, through its attorney, who was also acting as trustee under the deed of assignment, split up its account against the insolvent corporation so as to bring it within the jurisdiction of a justice's court, and obtained judgments thereon; defendant making no defense thereto by reason of representations made to it by such trustee. *Held* that, in its answer to a creditors' bill brought by plaintiff, defendant could by counterclaim impeach such judgments for fraud and demand that they be vacated.—Wilson Cotton Mills v. C. C. Randleman Cotton Mills, 116 N. C. 647, 21 S. E. 431.

[m] (Tex. 1857) The judgment of a justice of the peace in a case in which he had no jurisdiction being void, it is immaterial whether the application for an injunction is within 90 days.—McFaddin v. Spencer, 18 Tex. 440.

[n] (Tex. 1858) A justice's judgment was enjoined on proof that it was had without service; but on the admission of the party that he really owed the debt, the court, having acquired jurisdiction of the controversy, terminated it by continuing the injunction as to the justice's costs, but giving judgment to the respondent for the debt.—Willis v. Gordon, 22 Tex. 241.

[o] (Tex. 1860) A petition for an injunction against a justice's judgments on the ground that he had no jurisdiction, and that the plaintiff had split his one cause of action into several, is fatally defective, unless it alleges of what the one, and of what the several, accounts consisted.—Brundage v. Candle, 25 Tex. Supp. 387.

[p] (Tex. 1873) Where injunction has issued to prevent the collection of a justice's judgment alleged to have been satisfied by a payment in Confederate money, and the judgment creditor has been cited to show cause why the injunction should not be made perpetual, he should by his answer and proof clearly show that he in no wise consented to the payment of the judgment in illegal currency.—Buie v. Crouch, 37 Tex. 53.

[q] (Tex. 1878) In an action in the county court to enjoin a judgment rendered by a justice of the peace without jurisdiction, the court should determine the merits of the controversy.—Smith v. Woods, 1 White & W. Civ. Cas. Ct. App. § 680.

[r] (Tex. 1896) In an action to enjoin the enforcement of a judgment rendered by a justice of the peace, neither the justice, nor the officer about to levy execution, is a proper party; notice to them of the injunction being sufficient.—Gulf, C. & S. F. Ry. Co. v. Blankenbeckler, 13 Tex. Civ. App. 249, 35 S. W. 331.

7. COLLATERAL ATTACK.

IN GENERAL, § 408.
GROUNDS, § 409.
— WANT OF JURISDICTION AND DISQUALIFICATION OF JUSTICE, § 410.
— DEFECTS IN PROCESS, § 411.

Equitable relief, see ante, §§ 402–407.
On judgment against garnishee, see ante, § 300 [k].
— *in attachment suit, see* ante, § 288 [f, g, y].
Merger, bar, and conclusiveness in general, see "Judgment," vol. 30, cc. 1491–2349, §§ 987–1310.

§ 408. In general.

[a] (Ind. 1884) A judgment of forfeiture of a recognizance entered by a justice of the peace is not subject to collateral attack.—Friedline v. State, 93 Ind. 366.

[b] (Kan. 1895) A judgment of a justice of the peace in a proceeding of the subject-matter and parties to which his record shows that he had jurisdiction cannot be questioned collaterally.—Vincent v. Davidson, 1 Kan. App. 606, 42 Pac. 390.

[c, d] (Mich. 1882) Where a plaintiff has actually sued a defendant in a justice's court, and recovered judgment, such judgment cannot be collaterally attacked.—Somers v. Losey, 48 Mich. 294, 12 N. W. 188.

[e] (Mo. 1893) A domestic judgment of a justice of the peace is not obnoxious to collateral attack, where the facts necessary to confer jurisdiction appear affirmatively on the face of the proceeding in question.—Wise v. Loring, 54 Mo. App. 258.

[f] (N. Y. 1850) The judgment of a justice, having jurisdiction of the person of the defendant, and of the subject-matter of the suit, cannot be questioned upon its merits in a collateral action.—Wesson v. Chamberlain, 3 N. Y. (3 Comst.) 331.

[g] (N. Y. 1878) Where defendant in an action before a justice of the peace was served with summons, neglected to appear, allowed judgment by default to be entered against him, and failed to appeal, the judgment cannot be collaterally attacked in an action for malicious prosecution.—Sailesbury v. Creswell, 14 Hun, 460.

[h] (N. C.) A judgment of a justice's court, regularly docketed on the judgment docket of the superior court, is within the rule that judgments cannot be attacked collaterally.—(1872) Reid v. Spoon, 66 N. C. 416; (1885) Moore v. Edwards, 92 N. C. 43.

[i] (Ohio, 1885) In order to render a valid judgment, a justice of the peace must have jurisdiction of the subject-matter and parties, as prescribed by statute, and this must fairly appear by his record; but, jurisdiction appearing, his judgments are as impregnable against collateral attack as those of any other tribunal.—McCurdy v. Baughman, 43 Ohio St. 78, 1 N. E. 93.

[j] (Pa. 1861) A plaintiff whose cause of action is set out on the docket of a justice is concluded by it. He cannot impeach it collaterally.—Warner v. Scott, 39 Pa. (3 Wright) 274.

[k] (Tenn. 1846) A justice's judgment, not void on its face, cannot be attacked collaterally.—Hall v. Heffly, 25 Tenn. (6 Humph.) 444.

[l] (Tex. 1880) A voidable judgment of a justice's court can only be inquired into on appeal, or by certiorari, in accordance with the statute.—Fendrick v. Shea, 1 White & W. Civ. Cas. Ct. App. § 914.

[m] (Tex. 1885) A justice's court is regarded as a court of general jurisdiction as respects a collateral attack on a judgment rendered therein.—Wakefield v. King, 2 Willson, Civ. Cas. Ct. App. § 697.

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[n] (Vt. 1854) Where justices of the peace have jurisdiction in trespass on the freehold, and authority in questions of title, the security of parties relative to title is in their right of appeal. Their judgment cannot be collaterally attacked.—Small v. Haskins, 26 Vt. 209.

§ 409. Grounds.

Collateral attack on acts of de facto justice, see ante, § 18.

[a] A justice's judgment in a case of which he has jurisdiction cannot be collaterally assailed for irregularities.

—(Ark. 1855) Boothe v. Estes, 16 Ark. 104;
(Ind. 1881) Wilkinson v. Moore, 79 Ind. 397;
(Kan. 1884) Roby v. Verner, 31 Kan. 306, 1 Pac. 538;
(S. D. 1894) Jewett v. Sundback, 5 S. D. 111, 58 N. W. 20.

[b] A judgment of a justice of the peace, after a change of venue has been applied for, though erroneous, cannot be impeached in a collateral proceeding.

—(Ill. 1872) Bryant v. Ballance, 66 Ill. 188;
(Mo. 1883) Colvin v. Six, 79 Mo. 198; (1883) State ex rel. Colvin v. Six, 80 Mo. 61.

CONTRA, see
(Mo. 1894) Jones v. Pharis, 59 Mo. App. 254.

[c] (Ark. 1863) Where a justice of the peace has jurisdiction of the subject-matter of the suit and of the person of the defendant, the judgment cannot be regarded as null and void, when presented to the circuit court collaterally in a case of garnishment founded thereon, on account of error of the justice in rendering judgment on default without evidence to establish an account on which the action was founded.—Shaver v. Shell, 24 Ark. 122.

[d] (Ark. 1886) A justice of the peace has the right to determine every question that arises in a cause pending in his court that a superior court has under like circumstances; and, where he errs in his conclusions upon the law, the judgments of his court are no more open to attack than those of the circuit court.—Carolan v. Carolan, 47 Ark. 511, 2 S. W. 105.

[e] (Cal. 1888) A justice's judgment cannot be collaterally attacked by showing that the debt on which it is based was merged in a former judgment rendered in another township.—Gregory v. Bovier, 77 Cal. 121, 19 Pac. 232; Gregory v. Allison, 19 Pac. 233.

[f] (Ill. 1880) Only upon jurisdictional facts can a justice's judgment be impeached collaterally. Parol evidence is not admissible to show that an alteration in his docket record thereof was improperly made.—Thatcher v. Maack, 7 Ill. App. (7 Bradw.) 635.

[g] (Ind. 1881) After service of process on defendant, and two days before the return day of the writ, the justice gave judgment against defendant, falsely reciting on his docket an appearance by defendant, a waiver of the usual notice, and an admission by defendant that "plaintiff's claim was correct, just, and due, and that judgment might be rendered thereon." *Held* that, as between the parties, the judgment was binding until set aside by the justice or reversed by the supreme court, on appeal; and, defendant having acquiesced in such judgment, it could not be collaterally impeached by other creditors who had taken judgment on the return day.—McAlpine v. Sweetser, 76 Ind. 78.

[gg] (La. 1833) The lessor, under Act March 3, 1819, No. 25, having a right to sue for possession of his property under the jurisdiction of a justice, the regularity of the judgment under which possession is obtained cannot be examined collaterally. It is enough that the justice have jurisdiction ratione materiæ.—Richardson v. Scott, 6 La. 54.

[h] (Mich. 1859) A justice's judgment, which appears to have been rendered on a note, cannot be attacked collaterally on the ground that the docket does not show to whom the note was payable or whether it was negotiable.—Van Kleek v. Eggleston, 7 Mich. 511.

[i] (Mich. 1872) A justice's judgment, while it remains unreversed, cannot be collaterally attacked, in an action founded on it, for an error which does not go to the jurisdiction.—Allen v. Mills, 26 Mich. 123.

[j] (Mich. 1876) A failure to make proof of the authority of plaintiff's attorney, as required by Comp. Laws 1871, § 5305, in case of defendant's nonappearance, does not render a justice's judgment subject to collateral attack.—Reed v. Gage, 33 Mich. 179.

[k] (Mich. 1876) In the absence of any statutory requirement, failure of a justice of the peace to wait an hour after the time specified in the process for the defendant to appear is at most but an irregularity, and not a jurisdictional defect, for which his judgment can be impeached collaterally.—Smith v. Brown, 34 Mich. 455.

[l] (Mich. 1889) The fact that the justice's docket shows that he proceeded to the trial of attachment proceedings to enforce a laborer's lien on logs, without waiting one hour for the owner to appear, will not avail to affect the judgment in a collateral attack, by replevin for the logs, where it appears that the owner was not prejudiced by the failure to wait, and that if he had waited the owner would not have appeared.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006.

[m] (Mich. 1892) Where the docket entry of a judgment of a justice's court does not show affirmatively that the justice on the adjourned day of the cause waited one hour for defendant to appear, the defect cannot be raised in a collateral proceeding attacking the judgment, since the defect is not jurisdictional.—Chaddock v. Barry, 93 Mich. 542, 53 N. W. 785.

[n] (Mo. 1893) In a suit on a money judgment, rendered by a justice of the peace against the defendant on five days' service in a proceeding on a landlord's summons, it must affirmatively appear that the verified statement required by the statute was filed by the plaintiff.—Wise v. Loring, 54 Mo. App. 258.

[o] (Mo. 1894) A judgment of a justice of the peace enforcing a mechanic's lien cannot be collaterally attacked on the ground that the person making affidavit to the account filed was not the agent of the contractor.—McLaughlin v. Schultz, 125 Mo. 469, 28 S. W. 755.

[p] (N. Y. 1829) A judgment by a justice, on a verdict received in the absence of the plaintiff, is not void, but voidable only, and its validity is not inquirable into collaterally.—Relyea v. Ramsay, 2 Wend. 602.

[q] (N. Y. 1887) Where the summons in a justice's court is served as required by Code Civ. Proc. § 2878, the fact that the complaint was not sufficiently served to authorize the justice to enter judgment by default without further proof, does not prevent the justice from taking proof and entering judgment accordingly; and whether he proceeded properly, or entered judgment without proper proof, can only be considered in a direct proceeding to review the judgment.—Strickland v. Laraway, 55 Hun, 612, 9 N. Y. Supp. 761.

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[r] (N. C. 1851) When a justice of the peace renders a judgment in a case where he has jurisdiction, everything is presumed to have been done, on collateral attack, which it was necessary to do, in order to make the judgment regular; and his judgment, like a judgment given in a court of record, is in full force until reversed.—Hiatt v. Simpson, 35 N. C. 72.

[s] (Or. 1894) A judgment rendered in justice's court on default cannot be collaterally attacked on the ground that the complaint on which it was based did not state a cause of action.—North Pacific Cycle Co. v. Thomas, 26 Or. 381, 38 Pac. 307, 46 Am. St. Rep. 636.

[t] (Pa. 1837) The validity of the judgment or judicial act of a justice of the peace cannot be attacked collaterally.—Tarbox v. Hays, 6 Watts, 398, 31 Am. Dec. 478; Thompson v. O'Hanlen, Id. 492.

[u] (Pa. 1840) A stranger to a judgment of a justice of the peace cannot controvert it for irregularities in collateral proceedings.—Hazelett v. Ford, 10 Watts, 101.

[v] (Pa. 1886) The regularity of a judgment of a justice of the peace, in a matter over which he has jurisdiction, cannot be impeached in a collateral proceeding.—Cumberland County v. Boyd, 113 Pa. 52, 4 Atl. 346.

[w] (Tex. 1888) In a suit to enjoin an execution issued from justice's court, it appeared that judgment had been rendered against plaintiff for $13, disallowing his counterclaim for $22, and that the county court had dismissed an appeal on the ground that the judgment was for less than $20. *Held*, that the judgment of the county court, though erroneous, was conclusive until set aside, and could not be collaterally attacked.—Roberts v. McCamant, 70 Tex. 743, 8 S. W. 543.

[x] (Tex. 1889) Rev. St. art. 1547, formerly provided that the justices residing at the county seats should hold regular terms on the last Monday in each month. In 1876 the commissioners' court of a county prescribed the second Monday as the time for holding court in precinct 1 of said county. In 1881 the article was amended to require justices to hold their regular terms at such times as should be prescribed by the commissioners' courts of their counties; but no new order was made as to precinct 1, and a judgment was rendered by a justice thereof on the last Monday of a month. *Held*, on collateral attack, that, in the absence of proof of the contrary, it would be presumed in favor of the validity of the judgment that the county seat was in the precinct in which the justice who rendered the judgment resided.—Galveston, H. & S. A. Ry. Co. v. Ware (Sup.) 11 S. W. 554.

§ 410. —— Want of jurisdiction and disqualification of justice.

[a] A judgment rendered by a justice cannot be impeached collaterally on the ground of his relationship to the parties.

—(N. H. 1887) Fowler v. Brooks, 64 N. H. 423, 13 Atl. 417, 10 Am. St. Rep. 425.

CONTRA, see

(Tenn. 1875) Pierce v. Bowers, 67 Tenn. (8 Baxt.) 353.

[b] (Cal. 1860) In a suit before a justice, the summons was served in the township where the suit was commenced, and this was certified upon the summons by the officer who made the service. The defendant resided in the county, but in another township than the one in which he was served. *Held*, that the judgment rendered on default could not be impeached collaterally on the ground of want of jurisdiction.—Fagg v. Clements, 16 Cal. 389.

[c] (Cal. 1888) A justice's judgment cannot be attacked by showing that defendant did not reside in the township in which it was rendered, where the return on the summons in the action shows that the proper officer served it on defendant in that township.—Gregory v. Bovier, 77 Cal. 121, 19 Pac. 232.

[d] (Ind. 1892) Complaint against a tenant, for the possession of land, was made before a justice. Defendant filed his answer denying plaintiffs' title, and claiming title in himself. The justice sustained a demurrer to the answer, and judgment for possession was given plaintiffs. *Held*, in an action against the justice and officers who executed the judgment, based on the want of jurisdiction in the justice to try title, that, as the justice had jurisdiction of the parties and the subject-matter up to the time the answer was filed, the judgment, though erroneous, could not be assailed collaterally.—Alexander v. Gill, 130 Ind. 485, 30 N. E. 525.

[e] (Mich. 1872) Where the statutes do not require the fact of residence to be proved before the justice or entered on his docket, it will not be presumed, on collateral attack, in the absence of proof, for the purpose of defeating jurisdiction, that the parties thereto were residents of the county.—Allen v. Mills, 26 Mich. 123.

[f] (Mich. 1884) The validity of a judgment, rendered by a justice on a claim within his jurisdiction, cannot be collaterally attacked, because such claim constituted a mechanic's lien, to enforce which the justice had no jurisdiction.—Smith v. Pearce, 52 Mich. 370, 18 N. W. 111.

[g] (Mo. 1879) A justice's judgment, regular on its face, cannot be impeached in a collateral proceeding by showing that the suit was not brought in a township in or adjoining one in which the defendant resided.—Fulkerson v. Davenport, 70 Mo. 541.

[h] (Mo. 1887) In ejectment to recover the possession of certain real estate, defendant claimed title under a sheriff's deed, given at a sale under two special executions issued upon special judgments rendered by a justice of the peace upon special tax bills for the doing of certain grading in Kansas City. Section 4 of the Kansas City charter provides: "Where the amount due on any tax bill does not exceed three hundred dollars, suit may be brought thereon before the recorder of the city, or any justice of the peace of said city," etc. The executions only recited that the justice who rendered the judgments was a justice of the peace of Kaw township, and omitted the words "in Kansas City." It was admitted that it appeared from the proceedings held before the justice that he was a justice of the peace in Kansas City. *Held*, that the judgments were not subject to collateral attack.—Karnes v. Alexander, 92 Mo. 660, 4 S. W. 518.

[i] (N. C. 1826) In defense to an action on a judgment of a justice, it is competent to show ab extra that it was rendered out of the county of his jurisdiction.—Hamilton v. Wright, 11 N. C. 283.

[j] (Pa. 1872) Where a justice has general jurisdiction, his judgment cannot be impeached collaterally because he had no jurisdiction in the form adopted,—as here, proceeding upon the transcript of another justice whose term of office had expired.—Spade v. Bruner, 72 Pa. (22 P. F. Smith) 57.

[k] (Pa. 1873) Judgments which are void, as for want of authority in the justice to pronounce them, may be inquired into collaterally.—Sharpless v. Lansing, 1 Chest. Co. Rep. 562.

[l] (Tenn. 1858) Where a justice renders judgment for an amount beyond his jurisdiction, advantage should be taken by appeal, or by

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certiorari for a new trial, asked for at the next term of court; and, this not having been done, the judgment cannot be collaterally attacked in a proceeding by certiorari and supersedeas to quash the judgment and execution.—Mason v. Westmoreland, 38 Tenn. (1 Head) 555.

[m] (Tenn. 1872) Defendant in replevin may assail a justice's judgment against him as an indorser on a note for over $250 on which demand and notice had not been made; plaintiff claiming the property under an execution issued thereon.—Wolf v. Eakerly, 57 Tenn. (10 Heisk.) 124.

[n] (Tenn. 1873) Want of the justice's jurisdiction, if appearing on the face of the judgment, may be attacked collaterally.—Summar v. Jarrett, 62 Tenn. (3 Baxt.) 23.

[o] (Tex.) Justices' courts, being created by the constitution, exercise, within their defined limits, general jurisdiction; and their judgments cannot be collaterally attacked as void for not showing all the facts necessary to give a court jurisdiction.—(1879) Williams v. Ball, 52 Tex. 603, 36 Am. Rep. 730; (1886) Holmes v. Buckner, 67 Tex. 107, 2 S. W. 452.

[p] (Tex. 1883) The judgment of a justice of the peace cannot be attacked collaterally by an inquiry into plaintiff's motive in giving a credit which reduced the amount claimed to an amount within the justice's jurisdiction.—Odle v. Frost, 59 Tex. 684.

[q] (Tex. 1890) A judgment of a justice of the peace, which recites that the plaintiff against whom it was rendered appeared, is good as against collateral attack, though such plaintiff did not in fact appear or submit to the jurisdiction.—Williams v. Haynes, 77 Tex. 283, 13 S. W. 1029, 19 Am. St. Rep. 752.

§ 411. —— Defects in process.

[a] (Ala. 1852) A judgment rendered by a justice of the peace cannot be impeached, in a collateral proceeding, by proof that the warrant was not served on one of the defendants.—Lightsey v. Harris, 20 Ala. 409.

[b] (Ark. 1886) A judgment rendered by a justice of the peace cannot be attacked collaterally for mere irregularities in process.—Webster v. Daniel, 47 Ark. 131, 14 S. W. 550.

[c] (Cal. 1863) A judgment by default rendered by a justice of the peace may be impeached in a collateral action for want of jurisdiction, as shown by a failure of a deputy sheriff who made the service to make his return in the name of the sheriff.—Rowley v. Howard, 23 Cal. 401.

[d] (Cal. 1887) Whether an alias summons was regularly issued or not is not a jurisdictional question, and a judgment of a justice of the peace, rendered on such summons, will be held sufficient as against a collateral attack.—Dore v. Dougherty, 72 Cal. 232, 13 Pac. 621.

[e] (Ill. 1865) Where it appeared that a trial was had in a justice's court on shorter notice to the defendant than prescribed by the statute, and there was no appearance of the defendant, it was *held* that there was no jurisdiction over him, and that a judgment rendered in the case was absolutely void, and could be questioned in any proceeding.—Johnson v. Baker, 38 Ill. 98, 87 Am. Dec. 293.

[f] (Ind. 1881) The judgment of a justice of the peace is not void by reason of defective service of the summons, and cannot be collaterally attacked.—Hume v. Conduitt, 76 Ind. 598.

[g] (Kan. 1875) A judgment of a justice of the peace, rendered on a service of summons made only two days prior to the rendering of the judgment, is not void, but only voidable, and is valid and binding, on collateral attack, until reversed, vacated, or set aside by some direct proceeding instituted for that purpose.—Nelson v. Becker, 14 Kan. 509.

[h] (Md. 1887) Judgments rendered by justices of the peace will not be allowed to stand where the record fails to show affirmatively that a summons had been issued and served upon defendant. Such defect may be called in question even in a collateral action founded upon such judgments; as in an action of ejectment, where defendant seeks to rest his title upon alleged sales made under executions issued under such judgments.—Fahey v. Mottu, 67 Md. 250, 10 Atl. 68.

[i] (Mo. 1873) A judgment of a justice of the peace is not subject to collateral attack for defects as to process, when the facts necessary to confer jurisdiction appear affirmatively on the face of the proceedings.—Jeffries v. Wright, 51 Mo. 215.

[j] (N. Y. 1859) The statute requirement that the return of process to a justice's court shall be signed by the constable serving the same is satisfied, for the purposes of supporting a judgment attacked collaterally, by a return made out in the presence of the constable by the justice.—Reno v. Pinder, 20 N. Y. 298.

[k] (Ohio, 1893) A judgment of a justice of the peace cannot be collaterally attacked, though summons was not served three days before rendition, as required by Rev. St. § 6476.—Righter v. Thornton (Com. Pl.) 30 Wkly. Law Bul. 32.

[l] (Or. 1894) Summons and complaint in an action in justice's court, duly served on defendant, which advise him that a certain action has been there commenced against him for a certain sum as damages for breach of contract, and warn him to appear at a specified time and place, are sufficient to sustain a judgment in default against collateral attack.—North Pac. Cycle Co. v. Thomas, 26 Or. 381, 38 Pac. 307, 46 Am. St. Rep. 636.

[m] (Pa. 1893) A justice's docket showed that summons had been served "by leaving copy at place of business." The return merely was, "Served by copy." *Held* an irregularity only, and the judgment was voidable, not void, and not subject to collateral attack.—Sweeney v. Girolo, 154 Pa. 609, 26 Atl. 600, 32 Wkly. Notes Cas. 404.

[n] (Tex. 1869) In the absence of evidence to the contrary, the judgment of a justice's court, attacked for want of service, will be presumed to be correct on collateral attack.—Carter v. Griffin, 32 Tex. 212.

[o] (Tex. 1881) Under the law in force in 1869, a justice's judgment by default, based on a citation by publication, made on an affidavit that defendant's residence was unknown to the affiant, is void on the face of the record, and may be attacked collaterally.—Stegall v. Huff, 54 Tex. 193.

[p] (Tex. 1883) The judgment of a justice of the peace, which recites that defendant was duly cited, cannot be attacked collaterally on the ground of a defective service, and, consequently, a want of jurisdiction.—Long v. Brenneman, 59 Tex. 210.

[q] (Tex. 1894) Where the judgment of a justice of the peace shows that citation was served on defendant, it cannot be collaterally attacked on the ground that no service was made and that the record showing service was false.—Watkins v. Davis, 61 Tex. 414.

[r] (Tex. 1887) Under Act Aug. 7, 1848, three weeks are required for publication of citation in a justice's court. An order of publication

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was made on January 25th, and judgment was rendered on February 22d. On collateral attack, *held* that the service must be considered properly made.—Traylor v. Lide (Sup.) 7 S. W. 58.

[s] (Tex. 1895) On collateral attack on a justice's judgment, the presumption of its validity, though it is silent as to service of citation, is not overcome by proof that a citation issued in the proceedings was defective, if there was time for the service of another and valid citation, and no affirmative showing that such other citation was not served.—Hambel v. Davis (Civ. App.) 33 S. W. 251.

8. LIEN, SUSPENSION, ENFORCEMENT AND REVIVAL, AND SATISFACTION.

LIEN, § 412.
SUSPENSION, § 413.
ENFORCEMENT IN GENERAL, § 414.
REVIVAL, § 415.
—— TIME TO SUE AND LIMITATIONS, § 416.
PAYMENT, SET-OFF, AND SATISFACTION, § 417.

Power of other justice than one rendering judgment to enforce or revive same, see ante, § 206 [c, i, j, n, o, r].

§ 412. Lien.

[a] (Miss. 1854) A judgment of a justice of the peace is within the statute providing that judgment liens shall operate only from the date of the enrollment of the judgment.—Stevens v. Mangum, 27 Miss. (5 Cushm.) 481.

[b] (Miss. 1882) A judgment debtor's conveyance of land is void as against a judgment of a justice of the peace duly enrolled before the conveyance is filed for record.—Heirmann v. Stricklin, 60 Miss. 234.

[c] (N. C. 1799) A judgment of a justice of the peace does not bind the land.—Cressman v. Geoge, 1 N. C. 115.

[d] (N. C. 1872) A judgment in a justice's court does not create a lien on the property of the defendant.—Ledbetter v. Osborne, 66 N. C. 379.

[e] (N. C. 1895) Since under Code, § 1754, a judgment for rent is a lien on the crops, a judgment of a justice's court for rent, also adjudging the judgment a lien on the crops, is not invalid as being in excess of his jurisdiction, as the portion of the judgment adjudging the lien will be treated as surplusage.—Hargrove v. Harris, 116 N. C. 418, 21 S. E. 916.

§ 413. Suspension.

Stay of execution, see post, §§ 436–439.

[a] (Ala. 1851) An execution, issued by a justice of the peace after the lapse of 10 years from the issuance of the last previous execution, is not sufficiently regular to authorize a sale of the land on which it may be levied for want of personal property, since the judgment has become dormant.—Brown v. Higginbottom, 19 Ala. 207.

[b] (Cal. 1857) Judgments by a justice expire absolutely five years after entry, and execution cannot issue after such time. Prac. Act, § 214, applies only to courts of record.—White v. Clark, 8 Cal. 512.

[c] (Cal. 1857) The loss of the docket of a justice will not prevent the five years within which a judgment expires (Prac. Act, §§ 200, 214) from running.—White v. Clark, 8 Cal. 512.

[d] (Cal. 1857) Under Prac. Act, § 600, providing that an execution for the enforcement of a judgment in a justice's court may be issued, on the application of the party entitled thereto, at any time within five years of the entry of judgment, an execution issued after such time is void, though the docket of the justice has been lost during a period of three years within the time.—White v. Clark, 8 Cal. 512.

[e] (Del. 1839) Execution may issue on judgments before a justice of the peace at any time within three years, without scire facias, and may be extended beyond that time, if followed up regularly; but, if not, there must be a scire facias.—Messick v. Russel, 3 Har. 13.

[f] (Ga. 1888) The indorsement by a justice of a receipt for his costs, on executions placed in the sheriff's hands, is such an entry as is contemplated by Code, § 2914, declaring that judgments shall become dormant after seven years from the last entry on an execution issued thereon by an officer authorized to execute it.—Gholston v. O'Kelley, 81 Ga. 19, 7 S. E. 107.

[g] (Ga. 1890) On appeal from a justice's judgment, the judge of the superior court entered judgment against defendants in their absence, without the intervention of a jury. Afterwards such judgment was declared void, and the appeal reinstated, and then dismissed on plaintiff's motion. *Held*, that the appeal would be considered as pending from the time it was first entered until it was dismissed, and, under Code, § 3628, providing that the effect of an appeal is to suspend the judgment, the justice's judgment was not dormant, though more than the time prescribed by Code, § 2914, had elapsed.—Twitty v. Bower, 84 Ga. 751, 11 S. E. 354.

[h] (Ga. 1891) Since an execution on a justice's judgment is directed to any constable of the county, an entry thereon by a constable is legal, though he is not an officer of the militia district in which the execution issued, and will keep the judgment alive.—Neal v. Brockhan, 87 Ga. 130, 13 S. E. 283.

[i] (Ga. 1891) A return of nulla bona as to personal property made on a justice's fi. fa. will keep the judgment from becoming dormant, if made by a constable of the county, though not of the district, in which the judgment was rendered and the defendant resides; and every such return will be presumed to be based on a search for property.—Bennett v. McConnell, 88 Ga. 177, 14 S. E. 208.

[j] (Iowa, 1865) An execution from a justice's judgment (not docketed in the clerk's office) cannot be issued by the justice after the lapse of five years from the entry of the judgment.—Givens v. Campbell, 20 Iowa, 79.

[k] (Mo. 1882) After three years from the rendition of a justice's judgment, no execution can be issued on it until revived.—Pears v. Goff, 76 Mo. 92.

[kk] (N. C. 1896) A justice's judgment is not dormant because execution thereon was not issued, where an appeal has been taken, and security given to stay execution.—Dysart v. Branderth, 118 N. C. 968, 23 S. E. 966.

[l] (Pa. 1847) Execution issued on a justice's judgment seven years after its rendition, without a revivor by sci. fa., is regular and valid.—Heebner v. Chave, 5 Pa. (5 Barr) 115.

[m] (Pa. 1868) Under St. Westm. II., giving a judgment creditor the right to issue a writ of scire facias post annum et diem, an execution on a justice's judgment, 10 years and 6 months after its rendition, without a scire facias, was void, since at common law no execution could

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be issued after a year and a day from the rendition of the judgment, and the statute applies to judgments rendered by a justice of the peace.—Ford v. Salisbury, 2 Clark, 401.

[n] (Pa. 1893) Act May 9, 1889, which dispenses with execution before the justice on judgments of $100 and upwards as a condition precedent to the right to issue execution out of the court of common pleas after a transcript has been docketed in the prothonotary's office does not affect the act of 1854, which requires a justice's judgment more than five years old to be revived by scire facias before execution can be issued thereon.—Smith v. Wehrly, 157 Pa. 407, 27 Atl. 700, 33 Wkly. Notes Cas. 327; Inquirer Print. & Pub. Co. v. Same, 157 Pa. 415, 27 Atl. 703, 33 Wkly. Notes Cas. 330.

[o] (Tenn. 1879) An execution issued on the judgment of a justice of the peace, nearly 20 years after it was rendered, should be quashed, as an action on said judgment is barred by Code. § 2776.—McGrew v. Reasons, 71 Tenn. (3 Lea) 485.

§ 414. Enforcement in general.

Actions on judgments, see post, §§ 418–425.

Enforcement against security for stay of execution, see post, § 439.

Execution, see post, §§ 426–447.

Jurisdiction of justice in creditors' suit, see ante, § 186 [a].

—— *against executor or administrator, see* ante, § 138 [k].

Sci. fa. against administrator, see ante, § 138 [b].

[a] (Del. 1832) Where the defendant in an action before a justice of the peace died after judgment had been rendered, and an execution was issued against his property without a scire facias to make his representative a party having been issued, such execution was irregular, and should be set aside on certiorari.—Cooper v. May, 1 Har. 18.

[b] (Ill.) A creditors' bill will lie to enforce a justice's judgment, if large enough to give the court jurisdiction.—(1841) Ballentine v. Beall, 4 Ill. (3 Scam.) 203; (1866) Steere v. Bigelow, 39 Ill. 264.

[c, d] (Ill. 1847) Where suit was instituted before a justice of the peace against two as makers of a note, and judgment rendered against one of them, and the justice afterwards issued process against the other to show cause why judgment should not be entered against him, such process could not be sustained as a scire facias.—Orr v. Thompson, 9 Ill. (4 Gilman) 451.

[e] (Ind. 1835) On scire facias by a justice of the peace to show cause why an execution should not issue on a judgment rendered by his predecessor in office, the defendant, on plea of payment, may prove by parol that he paid the amount of the judgment to the justice by whom the judgment was rendered; it being proved that at the time of the payment the justice was in office and had the docket in his possession, but neglected to make the entry of payment.—Morrison v. King, 4 Blackf. 125.

[f] (Ky. 1837) Equity will enforce the sale of a debtor's lands to satisfy justice's judgments against him, where a sale of the lands on execution issued by a justice is not permitted.—Harlan v. Barnes' Adm'rs, 35 Ky. (5 Dana) 219.

[g] (Ky. 1839) Act 1821, § 6, providing that on the return nulla bona of an execution the creditor may file a bill in equity to subject any interest, legal or equitable, in any estate of the debtor, real or personal, applies to justices' judgments.—Newdigate v. Jacobs, 39 Ky. (9 Dana) 17.

[h] (N. J. 1827) On scire facias to show cause why a new execution should not issue, the only judgment which the justice could render against the defendant was that a new execution issue.—Woolston v. Gale, 9 N. J. Law (4 Halst.) 32.

[i] (N. J. 1848) Rev. St. p. 921, providing that, on the return unsatisfied of an execution, a bill may be filed for the discovery of any property belonging to the debtor and to subject it to the judgment, applies to justices' judgments.—Lore v. Getsinger, 7 N. J. Eq. (3 Halst. Ch.) 191.

[j] (N. Y. 1831) Chancery will lend its aid to enforce the judgment of a justice's court, though not a court of record.—Bailey v. Burton, 8 Wend. 339.

[k] (N. Y. 1874) A creditors' suit cannot be maintained on a justice's judgment.—Henderson v. Brooks, 3 Thomp. & C. 445.

[l] (Ohio, 1833) A scire facias to subject real estate to a justice's judgment must issue in the county where the judgment is.—Heath v. Tyson, Wright, 442.

[m] (Pa. 1895) In an action against a husband alone, the justice cannot, after entry of judgment, bring in the wife by scire facias, and substitute for the original a judgment against the husband and wife jointly.—Naylor v. Carrell (Com. Pl.) 8 Kulp, 208.

[n] (Vt. 1819) Scire facias on a judgment of a justice of the peace to the county court is given by statute, and it must set forth facts showing a case within the statute.—Phelps v. Mott, Brayt. 191.

§ 415. Revival.

Jurisdiction of justice, see ante, § 166 [uu].

New promise as reviving right of action on judgment barred by limitations, see post, § 420 [p].

Retroactive operation of statute extending limitations on barred justice's judgment as reviving right to sue, see post, § 420 [t].

[a] (Ala. 1856) A judgment rendered before the adoption of the Code by a justice of the peace may be revived on scire facias, in a case where there is no other proof than the rendition of a regular judgment, the issue of an execution on it within a year, the return of the execution with the indorsement of "Nulla bona," and the failure to issue another execution for a period of more than 10 years.—Shelley v. Graves, 29 Ala. 385.

[b] (Ala. 1893) The revival of a justice's judgment by scire facias does not entitle the judgment creditor to sue thereon after the expiration of six years from its rendition, since the order of revival merely confers on the judgment creditor the statutory right to issue executions on the judgment after it has become dormant for that purpose, and does not enlarge his common-law right to sue thereon.—Marx v. Sanders, 98 Ala. 500, 11 South. 764.

[c] (Ark. 1889) As Mansf. Dig. § 4103, expressly prohibits the issue of execution on the judgment of a justice of the peace after five years from the date of its rendition, the power to issue it cannot be revived by scire facias, or other proceeding peculiar to courts of superior jurisdiction.—Trammell v. Anderson, 52 Ark. 176, 12 S. W. 328.

[d] (Ga. 1854) The judgments of justices' courts may be revived to the same extent that

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judgments of higher courts may be.—Wilcher v. Hamilton, 15 Ga. 435.

[e] (Ind. 1853) A proceeding by scire facias to revive a judgment falls within the cases in which the statute fixes the time for the rendition of judgment, and failure of the justice to enter it within the period required works a discontinuance of the suit.—Burton v. McGregor, 4 Ind. 550.

[f] (Ind. 1871) Although, under 2 Gav. & H. St. p. 528, § 155, it is unnecessary to revive a judgment in favor of a deceased person before execution can issue, yet that statute does not take away the right to have such judgment revived, and, in actions before justices of the peace, 2 Gav. & H. St. p. 610, § 120, makes express provisions for such revivor.—Wyant v. Wyant, 38 Ind. 48.

[g] (Kan. 1887) The provisions of the Civil Code for the revival of judgments apply to a judgment rendered before a justice of the peace, where such judgment has not been transferred to the district court by appeal or otherwise.—Israel v. Nichols, 37 Kan. 68, 14 Pac. 438; Id., 37 Kan. 69, 14 Pac. 439.

[h] (Kan. 1888) A justice can revive a dormant judgment rendered by him, either by an action brought for that purpose and commenced by summons, or by a motion and notice under Civ. Code, art. 19.—Schultz v. Hine, 39 Kan. 334, 18 Pac. 221.

[i] (Miss. 1877) On sci. fa. to revive a justice's judgment in replevin, it will be presumed that the justice, in compliance with Code, § 1448, judicially ascertained that the value of the property exceeded the debt, though he did not make a separate entry of such finding.—Roberts v. Weiler, 55 Miss. 249.

[j] (Mo. 1871) When a debtor in a justice's judgment has left the county, the creditor may revive his claim by a direct suit on the judgment itself.—Wood v. Newberry, 48 Mo. 322.

[k] (Mo. 1873) On sci. fa. to revive a justice's judgment, defendant cannot plead anything contrary to the sheriff's return, or anything else which he might have pleaded in the original suit.—Jeffries v. Wright, 51 Mo. 215.

[l] (Mo. 1876) Execution cannot issue on a justice's judgment by reason of its revival in the name of an executrix, as provided by Wag. St. p. 830, § 5, after three years from the date of the rendition of the judgment against the testator. In order to have execution in such case, the judgment must be revived as provided by Id. pp. 830, 831, §§ 7-9.—Corby v. Tracy, 62 Mo. 511.

[m] (Mo. 1893) Rev. St. 1889, § 6570, which provides that "the time within which an act is to be done shall be computed by excluding the first day and including the last" applies to sections 6292 and 6297, which require the return of a citation to revive a justice's judgment not less than 10 days from the date of issue.—Sappington v. Lenz, 53 Mo. App. 44.

[n] (Mo. 1896) An affidavit to revive a judgment under Rev. St. 1889, § 6291, must show that the judgment was rendered by the justice before whom the proceeding to revive is pending, or by his predecessor in office.—Kincaid v. Griffith, 64 Mo. App. 673, 2 Mo. App. Rep'r, 1135.

[o] (Neb. 1885) The provisions of the Code for the revival of judgments apply to actions before justices of the peace.—Miller v. Curry, 17 Neb. 321, 22 N. W. 559.

[p] (Pa. 1894) An appeal from a judgment of an alderman reviving a judgment on a scire facias is not an action ex contractu within Practice Act 1887, and need not be replied to by affidavit of defense.—Stewart v. Eisenhower (Com. Pl.) 15 Pa. Co. Ct. R. 529, 3 Pa. Dist. R. 619.

[q] (Tenn. 1833) It is not necessary to issue a notice on scire facias to revive a judgment rendered before a justice of the peace which has remained dormant for one year.—Gunn v. Benson, 13 Tenn. (5 Yerg.) 221.

[r] (Tenn. 1835) If a sci. fa., issued by the clerk of a county court to revive a judgment rendered by a justice of the peace who has died or resigned, be made returnable to the court, instead of the clerk thereof, as is required by statute, it confers no jurisdiction on the court.—White v. Davenport, 15 Tenn. (7 Yerg.) 475.

[s] (Tenn. 1869) The circuit courts have no authority to issue an original scire facias to revive a judgment which was rendered by a justice of the peace.—Bryant v. Smith, 47 Tenn. (7 Cold.) 113.

[t] (Tenn. 1874) Where the record of a judgment is lost, and supplied by affidavit after the decease of the magistrate, it may be revived and proceeded upon, without the affirmative proof of the succession, etc., required by Code, § 3070a; the presumption under section 4138 being that the magistrate issuing the execution is the proper successor.—Anderson v. Moore, 63 Tenn. (4 Baxt.) 15.

[u] (Tex. 1873) The district court has no jurisdiction to revive a dormant judgment of a justice of the peace.—Buie v. Crouch, 37 Tex. 53.

§ 416. —— Time to sue and limitations.

[a] (Mo. 1866) A sci. fa. to revive a justice's judgment is not barred in five years by Rev. Code 1855, p. 1047, § 1, limiting actions on a "contract, express or implied."—Humphreys v. Lundy, 37 Mo. 320.

[b] (Mo. 1866) A scire facias to revive the judgment of a justice of the peace, brought more than 10 years after the rendition of the judgment, was not barred by Act Dec. 1, 1855, which limits to 10 years actions on judgments of courts of record, which are liens on real estate.—Humphreys v. Lundy, 37 Mo. 320.

[c] (Mo. 1876) A scire facias may issue to revive a justice's judgment after the lapse of 10 years. The statute of limitations applies only to judgments of courts of record.—Corby v. Tracy, 62 Mo. 511.

[d] (N. J. 1820) A scire facias to revive a judgment cannot lawfully issue after the term of office of the justice has expired who rendered the judgment.—Swisher v. Hibler, 5 N. J. Law (2 Southard) 808.

[e] (N. Y. 1842) A scire facias to revive a justice's judgment must be brought within six years after its rendition.—Johnson v. Burrell, 2 Hill, 238.

[f] (Pa. 1845) A justice may issue a scire facias post annum et diem after the expiration of a year and a day, and such proceedings would be highly proper and convenient.—Ford v. Salisbury, 4 Pa. Law J. 187.

§ 417. Payment, set-off, and satisfaction.

Actions on justice's bond for failure to pay over money collected on judgment, see ante, §§ 63, 64.

Jurisdiction of action for failure to enter satisfaction, see ante, § 78 [s].

Liability of justice for loss of money received in satisfaction of judgment, see ante, § 44.

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—— *for wrongful satisfaction of judgment, see* ante, § 41.

Liability of sureties on justice's bond for money collected on judgments, see ante, §§ 57, 59.

Of execution, see post, § 444.

Recovery of payment made under duress, see "Payment," V.

[a] A justice of the peace is not authorized, in the absence of special instructions, to receive anything but gold or silver coin of the United States in satisfaction of a judgment rendered before him.
—(Ind. 1844) Hooker v. State, 7 Blackf. 272; (Mich. 1844) Heald v. Bennett, 1 Doug. 513.

[b] (Ala. 1857) In a case not governed by the provisions of the Code, a judgment rendered by a justice of the peace is not presumed satisfied until the expiration of 20 years from the time of its rendition.—McMahan v. Crabtree, 30 Ala. 470.

[c] (Del. 1839) In an action before a magistrate for refusing and neglecting to enter satisfaction of a judgment which the defendants had paid, the record on certiorari must show that the original judgment was before a magistrate, and the amount thereof.—Smith v. Early, 3 Har. 5.

[d] (Ga. 1858) A transfer of a justice court execution was not a satisfaction of the debt prior to the act of 1829.—Hollingsworth v. Dickey, 24 Ga. 434.

[e] (Ind. 1866) A justice of the peace may, on proper motion, enter an order that mutual judgments, rendered before him, shall be set off the one against the other.—Howk v. Meloy, 26 Ind. 176.

[f] (Ind. 1869) Where a motion is made to set off against each other mutual judgments obtained before the same justice, it is not sufficient answer that the execution on the judgment against the party has been stayed, and that the time for such stay has not expired.—Meloy v. Howk, 32 Ind. 94.

[g] (Ind. 1887) It is no answer to a complaint for satisfaction of a judgment on the docket of a justice of the peace, pursuant to section 1497, Rev. St. 1881, that the satisfaction was made more than six years before the commencement of the action.—Palmer v. Hayes, 112 Ind. 289, 13 N. E. 882.

[h] (Mich. 1843) A justice of the peace entered a cross judgment on his docket that it was paid, stating the day, and signed the entry in his official capacity. *Held*, that such entry was prima facie evidence that the judgment was satisfied, and that this evidence was not rebutted by proof, unaccompanied by any explanatory testimony, of another entry immediately below the former, on the same docket, without date, signed by the justice in his individual capacity, stating, in effect, that the judgment had not been paid, according to the import of the former entry.—Beach v. Botsford, 1 Doug. 199, 40 Am. Dec. 45.

[i] (Mich. 1879) A judgment recovered before one justice of the peace can be ascertained and applied by another in satisfaction of a counterclaim recovered before him by the other party.—McEwen v. Bigelow, 40 Mich. 215.

[j] (Mich. 1879) An entry by a justice on the face of a judgment of the words, "Judgment discharged," is only prima facie evidence of payment, and can be proved to be incorrect.—Dane v. Holmes, 41 Mich. 661, 3 N. W. 169.

[k] (Mo. 1892) Under Rev. St. 1889, § 6316, providing that no payment on a judgment, made to a justice, either before or after execution, shall be valid unless made with the consent of the judgment creditors, a payment to the justice's clerk after execution issued, of which the creditor did not know at the time, and which he refused to accept, is invalid.—Medart v. Baker's Eureka Hot Air & Stove Burner Mfg. Co., 51 Mo. App. 19.

[l] (N. Y. 1821) In an action before a justice of the peace, the defendant cannot set off a judgment recovered by him against the plaintiff before another justice, which judgment had been removed into the supreme court by certiorari.—Willard v. Fox, 18 Johns. 497.

[m] (N. Y. 1830) The imprisonment of the defendant on a justice's execution is a satisfaction of the judgment while the imprisonment continues.—Sunderland v. Loder, 5 Wend. 58.

[n] (N. Y. 1856) A levy under a justice's execution on sufficient personal property to satisfy the judgment is not per se a satisfaction of the judgment.—Denvrey v. Fox, 22 Barb. 522.

[o] (N. Y.) The provision of the Code that no action on a judgment rendered by a justice of the peace shall be brought in the same county within five years after its rendition, does not prevent parties thereto, and especially an assignee thereof, from using such judgment as set-off or counterclaim against another justice's judgment.—(1859) Clark v. Story, 29 Barb. 295. CONTRA, see (1849) Smith v. Jones, 2 Code Rep. 78.

[p] (N. C. 1888) A motion to have satisfaction entered of a justice's judgment on which execution has improvidently issued after payment may be entertained by the justice.—Bailey v. Hester, 101 N. C. 538, 8 S. E. 164.

[q] (Ohio, 1833) Where money is paid to a justice of the peace on a judgment on his docket while an execution on the judgment is in the hands of an officer, the justice receives the money as bailee of the debtor, without priority between the justice and creditor, so as to entitle the creditor to recover from the justice.—Montieth v. Bissell's Adm'r, Wright, 411.

[r] (Pa. 1854) Where the defendant in an action before an alderman offered a judgment in a former action in bar of plaintiff's action, but no action was taken on it, it was error, upon a hearing after the continuance, to refuse to allow defendant to file such judgment as a set-off.—O'Niel v. Whitecar, 1 Phila. 446.

[s] (Pa. 1856) Where parties having mutual accounts each commenced a separate action before a justice, and each recovered judgment, and one appealed, the latter cannot set off his judgment, and thus secure costs; his suit having been begun after the institution of the other.—Groff v. Ressler's Adm'r, 27 Pa. (3 Casey) 71.

[t] (Pa. 1858) A notice to a plaintiff in an action before a justice to enter satisfaction on the judgment may be properly served by leaving a copy with his wife at his dwelling house.—Cunningham v. McCue, 31 Pa. (7 Casey) 469.

[u] (Pa. 1864) A justice of the peace has no jurisdiction of a cause of action founded on the judgment of another justice, except as prescribed by the act of 1810. He cannot, therefore, set off a judgment of another justice against one on his own docket, and enter judgment for the balance.—Kline v. McKee, 46 Pa. (10 Wright) 519.

[v] (Tenn. 1878) An action may be maintained in the circuit court on a justice's judgment, though execution has been levied on land and returned into the circuit court for condemna-

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tion; the judgment not being satisfied thereby. —Boyd v. Mann, 68 Tenn. (9 Baxt.) 349.

[w] (Tex. 1873) Where a payment on a justice's judgment in Confederate money was made by and with the consent or approval of the owner of the judgment, it was a satisfaction so far as he was concerned, and it was wholly immaterial whether Confederate money was an unlawful or treasonable currency.—Buie v. Crouch, 37 Tex. 53.

9. ACTIONS ON JUDGMENTS.

IN GENERAL, § 418.
TIME TO SUE, § 419.
LIMITATIONS, § 420.
LEAVE OF COURT, § 421.
PROCESS, § 422.
PLEADING, § 423.
EVIDENCE, § 424.
TRIAL AND JUDGMENT, § 425.

Enforcement of judgment in general, see ante, § 414.
Set-off of judgment, see ante, § 417
Foreign judgments, see "Judgment," vol. 30, cc. 3050–3095, §§ 1755–1786.
New defense in appellate court, see "Appeal and Error," vol. 2, c. 1622, § 1118.

§ 418. In general.

[a] Assumpsit will not lie on a judgment of a justice of the peace.
—(N. Y. 1819) James v. Henry, 16 Johns. 233; (N. C. 1825) Bain v. Hunt, 10 N. C. 572.

[aa] No action will lie on a judgment of a justice of the peace, where the record thereof does not show that the defendant was served with process, and there is no proof of such service.
—(Me. 1857) Waterville Iron Mfg. Co. v. Goodwin, 43 Me. 431;
(Mass. 1855) Rossiter v. Peck, 69 Mass. (3 Gray) 538.

[b] (U. S. 1803) Indebitatus assumpsit lies on the judgment of a justice of the peace.—Green v. Fry, Fed. Cas. No. 5,758 [1 Cranch, C. C. 137].

[c] (Ala. 1835) It is a good defense to an action on a justice's judgment to show that execution is still available.—White v. Hadnot, 1 Port. 419.

[d] (Ark. 1878) When the record of a justice's judgment has been lost or destroyed, the remedy given in Gantt's Dig. § 3774, providing that in such case the justice may, on motion of the judgment creditor and after five days' notice, render a new judgment, is cumulative to that of the common law.—Garibaldi v. Carroll, 33 Ark. 568.

[e] (Del. 1842) An action of debt will not lie before a justice of the peace of one county on a judgment recovered before a justice in another county.—Johnson v. Hayes, 3 Har. 486.

[f] (Ill. 1859) A justice of the peace has jurisdiction to render a judgment in an action on the judgment of another, where the amount is less than $100.—Chicago & R. I. R. Co. v. Whipple, 22 Ill. (12 Peck) 337.

[g, h] (Ind. 1882) A suit predicated on a judgment of a justice of the peace, which, as set forth, is void for uncertainty and for want of a definite statement of the amount for which it was rendered, cannot be maintained.—Hopper v. Lucas, 86 Ind. 43.

[i, j] (N. Y. 1835) The suing out of a certiorari to remove a justice's judgment may be pleaded to an action of debt on such judgment, though not sued out till after the commencement of such action.—Wemple v. Johnson, 13 Wend. 515.

[k] (N. Y. 1838) In a suit on a justice's judgment, the docket must show the issuing of summons, and a return of personal service in the cause in which judgment was rendered. —Brown v. Cady, 19 Wend. 477.

[l] (N. Y. 1849) Under Code, § 64, providing that a justice shall have jurisdiction in an action arising on contract for the recovery of money only, he has no jurisdiction of a suit on a judgment rendered before the Code went into effect.—Maguire v. Gallaghan, 1 Code Rep. 127.

[m] (N. Y. 1849) Code, § 64, providing that a justice shall have jurisdiction in an action arising on contract for the recovery of money, gives him jurisdiction to try an action on a judgment, since it is a contract.—Maguire v. Gallaghan, 1 Code Rep. 127.

[n] (N. Y. 1857) The jurisdiction conferred by the Code on justices of the peace, in cases founded on judgments recovered before a justice, is general, and not limited to $100, and a justice has jurisdiction to give a plaintiff judgment in such case for more than that amount. —Humphrey v. Persons, 23 Barb. 313.

[o] (N. Y. 1892) Code Civ. Proc. § 2862, subd. 6, provides that the court of a justice of the peace is not a court of record. Section 3017 provides that a judgment rendered by a justice of the peace, on being docketed in the county clerk's office, "is deemed a judgment of the county court, * * * and must be enforced accordingly." *Held*, that a judgment for damages obtained by plaintiff in a justice's court, and docketed under section 3017, remained in fact the judgment of a court "not of record," and an action thereon was not inhibited by section 1913, providing that an action on a judgment for money rendered by a court of record cannot be maintained by the original parties.—Harris v. Clark, 65 Hun, 361, 20 N. Y. Supp. 232.

[p] (N. C. 1844) A single magistrate has jurisdiction of debt, though above $60, founded on a former justice's judgment.—Morgan v. Allen, 27 N. C. 156.

[q] (N. C. 1853) A justice's judgment on a warrant against an administrator, ascertaining the amount due, and having indorsed thereon a suggestion of the defendant's intention to plead "No assets," according to statute, is not a final judgment, and an action will not lie on it.—Anderson v. Young, 44 N. C. 408.

[r] (N. C. 1873) Code Civ. Proc. § 63, authorizing the maker and indorser of bills or notes to be joined as defendants, does not authorize the joinder of the indorser of a note after it has been merged into judgment in an action on the judgment; and hence, where such indorser and judgment creditor reside in different counties, a justice of the county wherein the indorser resides has no jurisdiction of the judgment debtor, under Acts 1871–72, p. 100, c. 60, authorizing a justice, where defendants reside in different counties, to issue process to both counties.—Wooten v. Maultsby, 69 N. C. 462.

[s] (Pa. 1844) In an action of debt upon a judgment confessed before a justice of the peace, the defendant may defend on the ground of infancy when judgment was confessed.—Etter v. Curtis, 7 Watts & S. 170.

[t] (Pa. 1892) Assumpsit lies in the common pleas on a judgment of a justice of the peace for the same county.—Alexander v. Arters (Com.

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Pl.) 11 Pa. Co. Ct. R. 211, 17 Pa. Co. Ct. R. 379.

[u] (Vt. 1819) In an action of debt on a judgment, brought before a justice, his jurisdiction must be ascertained by the amount due on the judgment, as appears on the record and proceedings under the judgment. Extrinsic evidence cannot be considered.—Brush v. Torrey, Brayt. 141.

[v] (Vt. 1849) The ad damnum, in a writ returnable before a justice of the peace, is taken as a test of apparent jurisdiction only in cases where the declaration does not otherwise limit the extent of the plaintiffs' claim. In an action of debt on judgment, the plaintiffs' demand is limited to the amount of the judgment described in the declaration and the interest upon it; and, if that amount be within the limit of the justice's jurisdiction, the excess of the ad damnum beyond that amount will be treated as unmeaning, for any purpose of affecting jurisdiction.—Bishop v. Warner, 22 Vt. 591.

[w] (Vt. 1853) A suit commenced before a justice of the peace was, in absence of the justice who signed the writ, continued by another justice, and defendant, at the day to which it was so continued, moved to dismiss, which was granted, and judgment rendered for defendant for costs. *Held*, that such judgment, being regular, was sufficient to support an action of debt.—Ames v. Hilliard, 25 Vt. 222.

§ 419. Time to sue.

[a] (Ala. 1835) An action will lie on a judgment rendered by a justice of the peace after the expiration of a year and a day from the time said judgment was rendered; no execution having issued within that time.—White v. Hadnot, 1 Port. 419.

[b] (Ala. 1893) Code, § 2615, provides that actions on justice's court judgments must be brought within six years from their rendition. Sections 3363, 3364, provide that, if an execution is issued within six months after such judgment is rendered, and is returned unsatisfied, another execution may be issued thereon at any time within three years, without a revival of the judgment; that the right to revive such judgment by scire facias is barred after five years from the rendition thereof, or from the issuance of the last execution thereon. *Held*, that the sections relating to executions and revival of judgments were cumulative, and independent of the common-law right to sue on the judgment, and hence the issuance of an execution thereunder did not suspend the common-law right to sue.—Field v. Sims, 96 Ala. 540, 11 South. 763.

[c] (Cal. 1860) An action will lie in a justice's court on a justice's judgment, either before or after the time for the issuance of execution has expired.—Stuart v. Lander, 16 Cal. 372, 76 Am. Dec. 538.

[d] (Ill. 1895) The superior court of Cook county is not a court of like jurisdiction with that of a justice of the peace, within the meaning of Act 1891, § 2 (Laws 1891, p. 151), providing that no suit shall be brought on a judgment of a justice of the peace in a court of like jurisdiction within the same county where such judgment was rendered until the expiration of seven years next after its rendition.—Barbee Wire & Iron Works v. Malinowski, 58 Ill. App. 395.

[e] (Ind. 1870) Under 2 Gav. & H. St. p. 593, which provides that a judgment by default before a justice "may be set aside, on motion, at any time within 10 days thereafter, on payment of all costs, and, when so set aside, the justice shall set a day for trial and" give notice, etc., a judgment rendered by a justice against a defendant on default can be made the foundation of an action commenced thereon within 10 days after the rendition thereof.—Fravel v. Springfield Tp., 34 Ind. 296.

[f] (Mich. 1855) Debt will lie on a justice's judgment immediately on its rendition, though execution has been stayed.—McDonald v. Butler, 3 Mich. 558.

[g] (N. Y. 1823) Where an execution issued on a judgment in a justice's court was not returned at all by the constable, it was *held* that plaintiff might bring an action of debt on the judgment, notwithstanding the statute providing that, if the execution be returned unsatisfied, the action may lie (1 N. R. L. 387).—Hale v. Angel, 20 Johns. 342.

[h] (N. Y. 1828) An action lies on a justice's judgment immediately on its rendition, though execution be stayed by statute.—Smith v. Mumford, 9 Cow. 26.

[i] (N. Y. 1849) The provision in the Code of Procedure that no action shall be brought on a judgment within two years after its rendition does not apply to a justice's judgment recovered before the Code went into effect.—McGuire v. Gallagher, 4 N. Y. Super. Ct. (2 Sandf.) 402.

[j] (S. C. 1830) A new action cannot be brought on a judgment in a magistrate's court within a year and a day.—Lee v. Giles, 1 Bailey, 449, 21 Am. Dec. 476.

[k] (S. C. 1853) Judgment was rendered in a magistrate's court, and execution issued, and, while this execution was in full life and force, a suit was brought on the judgment. *Held*, that the suit was premature.—Ligon v. McNeil, 6 Rich. Law, 377.

[l] (Wis. 1873) Rev. St. c. 122, § 10, which declares that "no action on a judgment rendered by a justice of the peace shall be brought in the same county within two years after its rendition," except in certain specified cases, forbids the bringing of such actions in justices' courts, as well as in any other. Said section applies to a judgment for less than $10 damages, as well as to one for a greater sum, a transcript of which can be filed with the clerk of the circuit court.—Diederich v. Nachtsheim, 33 Wis. 225.

§ 420. Limitations.

Effect of revival, see ante, § 415 [b].
Proceedings to revive judgments, see ante, § 416.

[a] (Ala. 1893) A complaint which alleges that the amount sued for is "due by judgment rendered" on a specified date by a justice of the peace, construed most strongly against the pleader, predicates the recovery on the judgment as originally rendered, though it further alleges that such judgment was thereafter revived against defendant by said justice; and hence the action is barred if six years have elapsed since the judgment was rendered, though not since its revival.—Marx v. Sanders, 98 Ala. 500, 11 South. 764.

[b] (Cal. 1860) In a suit on a justice's judgment, the court properly refused to allow the defendant to set up the statute of limitations after he had pleaded to the merits.—Stuart v. Lander, 16 Cal. 372, 76 Am. Dec. 538.

[c] (Ill. 1885) A suit on a justice's judgment, not being that of a court of record, is barred by the statute of limitation of 10 years.—Eaton v. Henagan, 17 Ill. App. (17 Bradw.) 156.

[d] (Ill. 1890) An action on a judgment of a justice of the peace does not fall within Rev. St. c. 83, § 16, providing that actions on bonds,

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notes, etc., and "other evidences of indebtedness in writing," shall be commenced within 10 years, but is barred in 5 years, under section 15, providing such limitation for actions on "all civil actions not otherwise provided for."—American Ins. Co. v. Arbuckle, 32 Ill. App. 369.

[e] (Iowa, 1854) Act 1843, § 5, requiring actions of debt on judgments of courts of record to be brought within 20 years, applies to a justice's judgment rendered in this state.—Danemuller v. Burton, 4 G. Greene, 445.

[f] (Iowa, 1854) Limitations provided by Act 1843, § 4, providing that actions for rent, on account, on a single or penal bond, note, or writing obligatory, or for the payment of money, delivery of property, or performance of covenants, on awards of arbitrators, and all actions of assumpsit, must be brought within six years, cannot be pleaded in bar to an action on a judgment rendered by a justice of the peace in this state.—Danemuller v. Burton, 4 G. Greene, 445.

[g] (Mass. 1839) Rev. St. c. 120, § 1, providing that all actions on judgments rendered in any court, not being a court of record, shall be barred unless commenced within six years next after the causes of action shall accrue, applies, as explained by St. 1839, c. 73, to an action on the judgment of a justice of the peace.—Smith v. Morrison, 39 Mass. (22 Pick.) 430.

[h] (Mass. 1839) A justice's court is not a court of record, within Rev. St. c. 120, § 1, limiting actions on judgments "rendered in any court, not being a court of record."—Smith v. Morrison, 39 Mass. (22 Pick.) 430.

[i] (Mass. 1852) A justice's judgment was rendered in 1827, and the defendant soon after left the commonwealth and resided elsewhere from that time till 1852, when an action of debt on the judgment was instituted. *Held*, that the action was not barred by any statute of limitations.—Seymour v. Deming, 63 Mass. (9 Cush.) 527.

[j] (Mo. 1866) Judgments in a justice's court are not barred by the statute of 1855.—Sublett v. Nelson, 38 Mo. 487.

[k] (N. Y. 1817) A suit on a judgment in a justice's court is not barred by the statute of limitations as to debts on simple contract; the judgment being a debt by speciality.—Pease v. Howard, 14 Johns. 479.

[l] (N. Y. 1837) Rev. St. p. 295, art. 2, § 18, providing that all actions on judgments rendered in any court, not being a court of record, shall be commenced within six years after the cause of action accrued, and declaring that all cases where the right of action had accrued before the statute took effect should remain subject to the laws in force at the time of its enactment, does not apply to justices' judgments rendered before the Revised Statutes took effect in suits brought within six years thereafter.—Fairbanks v. Wood, 17 Wend. 329.

[m] (N. Y. 1837) The statute does not attach on justices' judgments rendered previous to the Revised Statutes taking effect, until six years after they went into operation, excluding the day on which they took effect.—Fairbanks v. Wood, 17 Wend. 329.

[n] (N. Y. 1842) 2 Rev. St. p. 224, § 18, providing that all actions on judgments rendered in any court, not being a court of record, shall be commenced within six years after the cause of action accrued, does not apply to justices' judgments rendered before 1830.—Johnson v. Burrell, 2 Hill, 238.

[o] (N. Y. 1843) An action on a justice's judgment, rendered before 1830, is not barred until 20 years from its rendition.—Millard v. Whitaker, 5 Hill, 408.

[p] (N. Y. 1849) After a justice's judgment has become barred by the statute of limitations, it will be so revived by a new promise of payment as that an action of debt may be maintained on it, with the same effect as before the statute had attached.—Carshore v. Huyck, 6 Barb. 583.

[q] (N. Y. 1857) Code, tit. 2, § 90, providing for limitations against a judgment of any state court, includes judgments rendered before justices of the peace of this state; section 9 enumerating courts of justices of the peace among courts of justice of the state.—Nicholls v. Atwood, 16 How. Prac. 475.

[r] (N. Y. 1865) Under the Code, the period limited for the commencement of actions upon a judgment or decree in any court is 20 years, and this includes judgments in justices' courts. The Code of Procedure does not preserve the distinction made by the Revised Statutes.—Conger v. Vandewater, 1 Abb. Prac. (N. S.) 126.

[s] (N. Y. 1890) Code Civ. Proc. § 382, subd. 7, provides that an action on a judgment rendered in a court not of record must be commenced within six years. Section 376 provides that judgments of courts of record are "presumed to be paid and satisfied after the expiration of 20 years." Section 413 provides that "the objection that the action was not commenced within the time limited can be taken only by answer." *Held*, that the defense of limitation in an action on a justice's judgment must be set up in the answer.—Green v. Hauser (Super. Buff.) 18 Civ. Proc. R. 354, 9 N. Y. Supp. 660.

[t] (N. C. 1830) Actions on judgments by a justice of the peace, which are barred by the act of 1820, are not revived by the act of 1825, extending the time of limitation to seven years.—Taylor v. Harrison, 13 N. C. 374.

[u] (N. C. 1882) An action on a justice's judgment is barred after the lapse of seven years from its rendition, and the death of the debtor within that period will not arrest the running of the statute.—Daniel v. Laughlin, 87 N. C. 433.

[v] (N. C. 1888) Under Code, § 153, providing that a judgment by a justice against a debtor's personal representative shall be barred in seven years after its rendition, where the administrator has given notice, within 20 days after its appointment, to creditors to present their claims on a day 12 months after the date of the notice, judgments obtained against a former administrator, more than seven years before the institution of a suit by the administrator de bonis non, to sell decedent's lands for the payment of debts, cannot be enforced.—Smith v. Brown, 99 N. C. 377, 6 S. E. 667.

[w] (N. C. 1895) A judgment rendered by a justice of the peace is vacated by a subsequent judgment granted on rehearing in the same court, and the statute of limitations begins to run from the date of such second judgment.—Salmon v. McLean, 116 N. C. 209, 21 S. E. 178.

[x] (S. C. 1830) A judgment in a justice's court, not being matter of record, is within the operation of the statute of limitations.—Griffin v. Heaton, 2 Bailey, 58.

[y] (S. C. 1851) An action on a magistrate's judgment cannot be brought so long as it can be enforced by execution a year and a day from its date. Therefore the statute does not begin to run until the expiration of that time.—Vandiver v. Hammet, 4 Rich. Law, 509.

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[z] (Tex. 1856) The judgment of a justice's court is barred in 10 years.—Wahrenberger v. Horan, 18 Tex. 57.

[zz] (W. Va. 1890) Code, c. 139, § 10, providing that an action may be brought on a judgment, on which no execution has issued within 2 years, at any time within 10 years next after the date of the judgment, applies to judgments rendered by a justice; and their judgments are not barred where 10 years has not elapsed.—Livesay v. Dunn, 33 W. Va. 453, 10 S. E. 808.

§ 421. Leave of court.

[a] (N. Y. 1858) Where the parties are the same, an action cannot be brought on a judgment of a justice's court without leave of court first obtained. Code, § 41. Leave is necessary only for a suit between the original parties, and not where the judgment is held by an assignee.—Kopper v. Howe, 2 Hilt. 69.

§ 422. Process.

[a] (N. Y. 1857) In an action on a justice's judgment, it is not necessary that the summons should state that the complaint will be on such judgment.—Humphrey v. Persons, 23 Barb. 313.

§ 423. Pleading.

Pleading limitations, see ante, § 420 [b, s].

[a] (Conn. 1843) Defendant, in an action of debt on a judgment rendered by a justice of the peace, pleaded that, on the rendering of said judgment against him, he moved an appeal to the county court, which was allowed. The plaintiff replied that the defendant moved an appeal to the county court, which said appeal was allowed, but the appeal was never entered, etc. *Held*, that the replication amounted to an admission that a valid appeal was taken and allowed.—Curtiss v. Beardsley, 15 Conn. 518.

[b] (Conn. 1843) The defendant, in an action of debt on a judgment rendered by a justice of the peace, pleaded that, upon the rendering of said judgment against him, he moved an appeal to the county court, which was allowed. *Held*, that the plea was not bad for want of an averment that a bond or recognizance was given on the appeal, as this fact was necessarily implied in the allowance of the appeal.—Curtiss v. Beardsley, 15 Conn. 518.

[c] (Ind. 1857) A declaration on the judgment of a justice of the peace should show that the justice had jurisdiction of the cause.—Willey v. Strickland, 8 Ind. 453.

[d] (Ind. 1862) In a suit on a judgment of a justice of the peace, the complaint must either aver the facts showing jurisdiction, or allege, as a substitute, that the judgment was duly given.—Crake v. Crake, 18 Ind. 156.

[e] (Ind. 1875) In an action on a judgment rendered by a justice of the peace of one township, against a defendant, who is a resident of another township, the recovery of the judgment and the residence of the defendant are facts to be pleaded in bar, and not in abatement.—Hampton v. Warren, 51 Ind. 288.

[f] (Ind. 1895) A complaint in an action on a judgment rendered by a justice of the peace, not alleging that the summons was issued, nor that there was an appearance, nor that defendant resided in the township, nor (as is permitted by statute) that the judgment was duly rendered, is fatally defective.—Shockney v. Smiley, 13 Ind. App. 181, 41 N. E. 348.

[g] (Mich. 1871) A declaration on a justice's judgment requires no further allegation in regard to jurisdiction than is required in a suit upon a judgment of a court of record.—Goodsell v. Leonard, 23 Mich. 374.

[h] (Mich. 1889) In an action on a judgment taken before a justice by default, defendant cannot be allowed to show, under a plea of set-off, that before the original suit was begun he had paid plaintiff's claim in full.—Peterson v. Ringelberg, 76 Mich. 107, 42 N. W. 1080.

[i] (N. Y. 1815) In an action of debt on a judgment in a justice's court, it is not necessary to show that the person or justice before whom the judgment was obtained was a magistrate, or that he had not been superseded at the time the judgment was rendered. If the record is proved by the testimony of the justice, not on oath, without objection at the time, it is sufficient.—Reed v. Gillet, 12 Johns. 296.

[j] (N. Y. 1827) In debt upon a justice's judgment, the plea of nul tiel record may be joined with a plea of payment; a justice's judgment ranking as a specialty, and being triable by the jury.—Witherwax v. Averill, 6 Cow. 589.

[k] (N. Y. 1828) A declaration on a justice's judgment averred a recovery of a certain debt of $50, as also 93 cents for the party's damages, as well by reason of detaining the debt as for his costs, etc. Proof of $50 debt, and 93 cents costs. *Held* no variance, as the terms, "93 cents damages and costs," imported costs only.—Smith v. Mumford, 9 Cow. 26.

[l] (N. Y. 1834) A declaration on a justice's judgment, alleging that the judgment was rendered in a justice's court in a certain county in the state in an action of which justices of the peace have civil jurisdiction, sufficiently shows the jurisdiction of the justice; the declaration stating, in addition, the amount of the judgment, the time and place of its rendition, etc.—Stiles v. Stewart, 12 Wend. 473, 27 Am. Dec. 142.

[m] (N. Y. 1845) The return of a justice to a certiorari stated that the plaintiff "declared on a judgment rendered before me on" a day named "in favor of the plaintiff and against the defendants for" a sum of debt and costs mentioned, without any further statement of the proceedings in the suit in which said judgment was obtained. *Held*, the question arising in a case where the defendant did not appear before the justice or object, that the declaration was sufficient.—Groff v. Griswold, 1 Denio, 432.

[n] (N. Y. 1848) In declaring upon a judgment rendered by a justice of the peace, the facts giving the justice jurisdiction must be specifically stated, and a mere averment of jurisdiction is not sufficient.—Barnes v. Harris, 3 Barb. 603.

[o] (N. Y. 1848) In an action on a judgment rendered by a justice of the peace, a declaration which omits to state any of the proceedings before the justice between the return of process and the rendering of the judgment is bad on special demurrer; but the imperfection would be cured by a verdict.—Barnes v. Harris, 3 Barb. 603.

[p] (N. Y. 1850) In declaring on a judgment rendered by a justice in a suit commenced by long summons, it is not necessary to allege that the defendant was a resident of the county. The summons having been duly issued and served by a constable of the county, the defendant is prima facie amenable to the jurisdiction. If, in point of fact, the defendant is not a resident of the county, and therefore not amenable to that process, it seems that he should appear and take the objection.—Barnes v. Harris, 4 N. Y. (4 Comst.) 374.

[q] (N. Y. 1850) In declaring on a justice's judgment rendered in a suit commenced by summons alleged to be duly issued and served,

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it is not necessary to aver that the summons was returned to the justice, or that the constable made a return thereon, or that any time of day was specified in the process, or that a court was held at the time and place specified, or that the sum claimed was less than $100.—Barnes v. Harris, 4 N. Y. (4 Comst.) 374, affirming (1848) 3 Barb. 603.

[r] (Ohio, 1833) In an action of debt on a judgment of a justice of the peace, nul tiel record and nil debet cannot be pleaded together.—Adair's Adm'r v. Rogers' Adm'r, Wright 428.

[s] (Pa. 1876) In a suit on a transcript of a judgment obtained before a justice of the peace which did not show any record of service on the defendant, the affidavit of defense set forth that the instrument sued on was not such an instrument as entitled the plaintiff to judgment. The defendant having failed to allege the want of service, a supplemental affidavit was allowed.—Veite v. McFadden, 3 Wkly. Notes Cas. 63.

[t] (Wis. 1870) In an action on a judgment rendered in a justice's court, the complaint must show that the defendant or defendants in the judgment were served with process in the original suit, unless the complaint states the original cause of action.—Warner v. Simpson, 27 Wis. 115.

§ 424. Evidence.

[a] (Ind. 1857) The provisions of 2 Rev. St. p. 45, § 83, declaring that where the existence of a judgment of a court of special jurisdiction, sued on or pleaded, is denied, the facts conferring jurisdiction on the tribunal must be proved, apply to judgments of courts of justices of the peace.—Draggoo v. Graham, 9 Ind. 212.

[b] (Ind. 1882) A transcript of a judgment of a justice of the peace which, while setting out figures apparently intended to state the amount of the judgment, contains no mark or character to show what such figures represent, whether dollars, cents, or commodities, is defective and insufficient to sustain an action.—Hopper v. Lucas, 86 Ind. 43.

[c] (Iowa, 1847) In an action on the judgment of a court of limited and special jurisdiction, such as a justice of the peace, the plaintiff will be required to show the law conferring the jurisdiction.—Gay v. Lloyd, 1 G. Greene, 78, 46 Am. Dec. 499.

[d] (Me. 1855) In debt on the judgment of a justice whose commission had expired more than two years, if the minutes on his docket, though incomplete, are such as to show that the record of a regular judgment would be authorized, they will sustain the suit.—Grosvenor v. Tarbox, 39 Me. 129.

[e] (Me. 1886) An action of debt on judgment for $14.95 debt, and $3.48 costs, is not sustained where the only record given in evidence is the word "Defaulted," in the handwriting of the justice on the back of the original writ, and the execution reciting a judgment of $14 debt, and $3.48 costs.—Bunker v. Forsaith, 4 Atl. 557.

[f] (Mich. 1844) In an action of debt on a judgment rendered by a justice of the peace, plaintiff proved the judgment by the docket of the justice, and defendant gave in evidence an entry of the same docket, showing that the cause was on a day named removed to the supreme court by certiorari. In rebuttal the plaintiffs showed an order of the supreme court, made about the same time, dismissing from the docket of that court a cause of the same title. *Held*, that the evidence was sufficient to show that the cause had not been, in fact, removed from the justice into that court and that the judgment of the justice was in full force.—Howard v. Rockwell, 1 Doug. 315.

[g] (Mich. 1870) In an action on a justice's judgment, stated in his docket to have been rendered on confession, recital of that fact in the docket not being necessary, and not conclusive, it was competent to introduce the files of the case to show the character of the writing, alleged to be the confession, on which the judgment was founded.—Dodge v. Bird, 19 Mich. 518.

[h] (Mich. 1883) Where a justice's docket recites that plaintiff declared "orally in assumpsit on the common counts, and specially in writing," it cannot, in an action on the judgment, be assumed that, in declaring specially, he added a count upon a cause of action not cognizable by the justice, or that, even if he did, the judgment was rendered upon the bad count.—Schlatterer v. Nickodemus, 50 Mich. 315, 15 N. W. 489.

[i] (Mich. 1889) In assumpsit on a judgment rendered by a justice, where it is shown that the summons and return in the suit before the justice have been lost, the entries in the justice's docket showing that the summons had been returned, and "that the same had been personally served on said defendant by reading the same, and giving a copy on the * * * day of * * * by * * *, constable," corroborated by oral proof of service on the defendant in the county, are sufficient evidence of the jurisdiction of the justice to render the judgment.—Ziegler v. Henry, 77 Mich. 480, 43 N. W. 1018.

[j] (Pa. 1831) Under the act of assembly, providing that a certified transcript of a judgment against a resident of another county may be delivered to the plaintiff for recovery of the amount before a justice of the peace in the county where defendant resides, "as in cases originally brought before him," a certified transcript of the judgment of a justice of another county is prima facie evidence on which plaintiff may recover in an action thereon before a justice of the county of defendant's residence.—Keck v. Appleback, 2 Pen. & W. 465.

[k] (Vt. 1849) Where a justice of the peace dies without leaving a record, in the form required by law, of a judgment rendered by him, a copy of the original writ in the suit, with the officer's return thereon, with a copy of the memoranda made by the justice thereon, showing that the defendant was defaulted, and the amount of damages and costs, and the issue of execution, with a copy of the execution, all certified by the clerk of the county court of the county in which the justice resided, will constitute sufficient evidence to sustain a declaration in debt on the judgment, notwithstanding it does not appear from the officer's return on the writ in the suit in which the judgment was rendered that the defendant had notice of the suit, and it does not appear from the justice's memoranda that either party appeared before him at the return day.—Ellsworth v. Learned, 21 Vt. 535.

§ 425. Trial and judgment.

[a] (Mich. 1884) Since Comp. Laws, §§ 5377, 5378, provide that a judgment for plaintiff in a justice's court in an action against joint debtors shall be against all of the defendants, and that it shall be conclusive evidence of the liability of the defendant who was personally served with process, but that against every other defendant "it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence," an action on such judgment was properly discontinued as to a defendant who was not served in the first action, and judgment rendered against him only

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on whom service was had.—Holcomb v. Tift, 54 Mich. 647, 20 N. W. 627.

[b] (Mich. 1889) How. Ann. St. § 8960, provides that, when a debtor is imprisoned on execution, his creditor shall advance his board, in default of which the sheriff shall not be required to retain him in jail. In an action on a justice's judgment it appeared that plaintiff's attorney delivered an execution against the debtor's person to the sheriff, and, after paying part of defendant's board on demand, refused to pay more. *Held*, that it was properly charged that if plaintiff's "agent" refused to pay the expenses, and defendant was discharged, no recovery could be had; it being apparent that by the word "agent" the jury understood that the attorney was meant.—Strawsine v. Salisbury, 75 Mich. 542, 42 N. W. 966.

(N) EXECUTION.

IN GENERAL, § 426.
PROPERTY SUBJECT TO EXECUTION, § 427.
ISSUANCE IN GENERAL, § 428.
ISSUANCE IN OR TO COUNTY OTHER THAN WHERE JUDGMENT WAS RENDERED, § 429.
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RETURN, § 443.
PAYMENT, SATISFACTION, AND DISCHARGE, § 444.
SUPPLEMENTARY PROCEEDINGS, § 445.
EXECUTION AGAINST THE PERSON, § 446.
WRONGFUL EXECUTION, § 447.

Attachment execution, see ante, §§ 295–305.
Enforcement of judgment against garnishee, see ante, § 301.
—— *in general, see* ante, § 414.
In support of attachment, see ante, § 288 [d].
Admissibility in evidence, see "Evidence," vol. 20, c. 2151, § 1522½ [a, c].
Against principal and surety, see "Principal and Surety," IV., V.
Executions for fines imposed by military courts, see "Militia."

§ 426. In general.

[a] (Ga. 1882) On trial of a claim under a justice's fi. fa., if the docket shows no return of service, and there be no other proof of service or acknowledgment thereof, the levy should be dismissed.—Benson v. Dyer, 69 Ga. 190.

[b] (Ga. 1894) An execution by a justice, founded on a judgment, is prima facie valid if it conforms in all respects to the docket, though the judgment entry may be ambiguous as to the party in whose favor, or the party against whom, the judgment was rendered.—Collins v. Camp, 94 Ga. 460, 20 S. E. 356.

[c] (Ill. 1872) An execution is void which is issued on a judgment obtained in a suit brought by a town before a justice of the peace within the town, contrary to Township Organization Law, art. 12, § 6, prohibiting the town where a suit is brought for its benefit from suing before a justice of the peace within the same.—Heagle v. Wheeland, 64 Ill. 423.

[d] (Kan. 1891) Where there is no valid judgment of the justice of the peace in existence to uphold an execution, it may be attacked collaterally, as well as directly.—Olson v. Nunally, 47 Kan. 391, 28 Pac. 149, 27 Am. St. Rep. 296.

[e] (Md. 1800) An execution issued by a justice of the peace on a judgment recovered on warrant was *held* to be void for want of a return day.—West's Lessee v. Hughes, 1 Har. & J. 6.

[f] (Mo. 1863) Act 1855, §§ 65, 66, regulating executions, apply only to execution issued from the court of record, and not to those issued by the justice's court.—Bennett v. Vinyard, 34 Mo. 216.

[g] (N. Y. 1829) The omission of the Christian names of the plaintiffs, in a judgment rendered by a justice of the peace, will not render void an execution in which the names of the parties are fully set forth.—Jennings v. Carter, 2 Wend. 446, 20 Am. Dec. 635.

[h] (N. Y. 1844) A justice's execution, founded on a judgment rendered without jurisdiction, cannot be deemed valid in favor of the party who procured it to be issued.—Cornell v. Barnes, 7 Hill, 35.

[i] (N. Y. 1870) Though a judgment of a justice of the peace is irregular, and could be reversed on appeal, an execution issued thereon is valid; the irregularity not rendering the judgment void.—Hodge v. Adee, 2 Lans. 314.

[j] (Tenn. 1872) Execution may issue, though the copy of the judgment from the justice's docket be defective.—White v. Patterson, 60 Tenn. (1 Baxt.) 450.

[k] (Tex. 1888) Rev. St. art. 1613, requiring a judgment of a justice to direct the issuance of such process as may be necessary to carry it into execution, does not apply to a judgment rendered before the statute was enacted, though the execution was issued after its enactment.—Roberts v. Connellee, 71 Tex. 11, 8 S. W. 626.

[l] (Tex. 1888) Under Act 1870 (Pasch. Dig. art. 6340), providing that a justice shall, when required by a party having a judgment in his court, issue execution to enforce such judgment, an execution may properly issue on a judgment which did not specifically direct the issuance of execution.—Roberts v. Connellee, 71 Tex. 11, 8 S. W. 626.

[m] (Tex. 1895) On judgment by default in attachment before a justice, it was proper, under Sayles' Civ. St. art. 180a, to issue execution instead of an order for the sale of the property attached.—Milburn v. Smith, 11 Tex. Civ. App. 678, 33 S. W. 910.

[n] (W. Va. 1889) Code, c. 50, § 131, provides that executions for the enforcement of the judgment of a justice in a civil action may be issued, etc. Section 135 declares that the execution must describe the judgment upon which it is issued, etc. *Held*, that an execution, purporting to be issued upon the judgment of a justice, when there is in fact no such judgment, but simply the verdict of a jury, is void.—Lowther v. Davis, 33 W. Va. 132, 10 S. E. 20.

§ 427. Property subject to execution.

Issue as to exemption of land from levy as involving title and not determinable by justice, see ante, § 83 [h].
Property subject to attachment, see ante, § 281.
—— *to garnishment, see* ante, § 295.

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[a] A term for years in real estate may be sold on an execution from a justice's court.—(Ind. 1842) Barr v. Binford, 6 Blackf. 335, 38 Am. Dec. 146;
(N. C. 1853) Glenn v. Peters, 44 N. C. 457, 59 Am. Dec. 563.

[b] (U. S. 1837) A judgment of a justice of the peace cannot be seized and sold under a fieri facias issued by a justice of the peace.—Bowen v. Howard, Fed. Cas. No. 1,723 [5 Cranch, C. C. 308].

[c] (Ill. 1827) A constable cannot, under an execution from a justice of the peace, enter on land and sell fruit trees there standing and growing; such trees are a part and parcel of the land, and cannot be considered as goods and chattels.—Adams v. Smith, 1 Ill. (Breese) 283.

[d] (Ill. 1891) Rev. St. c. 79, § 87, which makes "the personal property" of every defendant in a judgment before a justice of the peace bound for the payment of such judgment, does not, when construed with section 85, Id., which provides that justices' executions shall run against the "goods and chattels" of the defendant, make the defendant's choses in action subject to such execution.—Crawford v. Schmits, 139 Ill. 564, 29 N. E. 40, affirming (1891) 41 Ill. App. 357.

[e] (Ind. 1832) A carding machine, situated in a building, erected for the purpose of carding wool, ready to be put in operation, standing on the floor in its usual place, but not fastened to the building, is personal property, and subject to be taken on an execution issued by a justice of the peace.—Taffe v. Warnick, 3 Blackf. 111, 23 Am. Dec. 383.

[f] (Ky. 1857) Slaves may be sold on executions issued by a justice of the peace.—Kyler v. Dunlap, 57 Ky. (18 B. Mon.) 561.

[g] (La.) Immovable property or slaves cannot be sold in execution under a judgment by a justice for less than $50. Code Prac. arts. 1140, 1147.—(1829) Thompson v. Chauveau, 7 Mart. (N. S.) 331, 18 Am. Dec. 246; (1840) Freeman v. Watts, 15 La. 476.

[h] (Mo. 1848) A boat cannot be sold by virtue of a justice's execution, under Act March 26, 1845, concerning boats and vessels.—Markham v. Dozier, 12 Mo. 288.

[i] (N. Y. 1821) Leasehold property is not goods and chattels, within the act for the recovery of debts of the value of $25, so that an execution on such a judgment can be levied on it.—Putnam v. Westcott, 19 Johns. 73.

[j] (N. Y. 1851) A constable levied on a horse and advertised it for sale. Prior to the sale, an attachment came into his hand against the property of the execution debtor, by virtue of which he attached the same horse. The horse was sold on the first execution and sufficient was realized to pay it, leaving a surplus to pay the amount due in the attachment. Judgment was obtained in the attachment, and execution issued thereon to the constable, who levied on this surplus, sold the money, and applied the avails to satisfy the execution. *Held*, that such surplus in his hands was the money of the debtor and was liable to levy and sale on the subsequent execution.—Wheeler v. Smith, 11 Barb. 345.

[k] (Pa. 1887) A leasehold interest may be sold by a constable on an execution issued by a justice of the peace, since leasehold estates are, like movables, subject to such seizure and sale.—Lerew v. Rinehart, 3 Pa. Co. Ct. R. 50.

§ 428. Issuance in general.

By justice other than one rendering judgment, see ante, § 206 [a, m].

Damages for failure of justice to issue execution, see ante, § 65.

Dormancy of judgment as affecting issuance, see ante, § 413.

Effect on right to issue of failure to give bond on appeal, see post, § 550.

Issuance as affecting action on judgment, see ante, § 419 [b, g, k].

Liability for wrongful issuance in general, see post, § 447.

—— *of justice for failure to issue execution, see* ante, § 44.

—— *of surety on justice's bond for failure to issue execution, see* ante, § 58.

Pleading in action on justice's bond for failure to issue execution, see ante, § 63.

Issuance on transcript of judgment in superior court, see "Execution," vol. 21, cc. 301–303, §§ 25–27; cc. 452–462, §§ 148–150.

[a] (Ala. 1842) A justice of the peace may delegate his power to issue an execution on a judgment rendered, and the power need not be in writing.—Kyle v. Evans, 3 Ala. 481, 37 Am. Dec. 705.

[b] (Ala. 1884) An execution issued on a justice's judgment after the time limited by statute is voidable only, and not void.—Sandlin v. Anderson, 76 Ala. 403.

[c] (Conn. 1786) A justice of the peace may issue his execution through the state, and the debtor or his property is liable to be taken, wherever found.—Gilbert v. Rider, Kirby, 180.

[d] (Ga. 1889) Under Code, § 4172, providing that in all cases where no appeal lies or none is entered a justice of the peace shall issue execution on a judgment after the expiration of four days (Sundays excepted), the issuance of an execution within the four days is only an irregularity, and cannot be taken advantage of in a collateral proceeding or by any one except the judgment debtor.—Knoxville City Mills Co. v. Lovinger, 83 Ga. 563, 10 S. E. 230.

[e] (Ill. 1893) An execution on a justice's judgment, issued before the time to appeal from the judgment has expired, is effective, except that no property can be sold thereunder within 20 days from the date of the judgment.—Dawson v. Cunning, 50 Ill. App. 286.

[f] (Ind. 1837) A justice, having rendered judgment for the plaintiff, was directed by him not to issue execution until the time for taking an appeal had expired. *Held* that, in such case, the justice was not bound to issue an execution until the plaintiff requested it.—Tingle v. Pullum, 4 Blackf. 442.

[g] (Ind. 1841) A justice of the peace is bound to issue execution within a reasonable time after judgment, whether requested to do so or not. A delay of 45 days was *held* to be unreasonable.—State v. Brown, 5 Blackf. 494.

[h] (Iowa, 1882) Code 1873, § 3569, which extends the time within which execution may issue on the judgment of a justice of the peace to 10 years from the rendition thereof, applies to existing judgments on which the time to issue execution had not expired when the Code took effect, and the right to issue execution on those judgments is kept alive for 10 years after they were rendered.—Woods v. Haviland, 59 Iowa, 476, 13 N. W. 636.

[i] (Md. 1882) A judgment of a justice of the peace is not a judgment rendered in a "court of law" within Acts 1874, c. 320, providing that an execution may issue on such judgment at any time within 12 years from its date.—Weikel v. Cate, 58 Md. 105.

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[j] (Mich. 1857) An application to a justice to issue execution within five days may be by parol.—Rash v. Whitney, 4 Mich. 495.

[k] (Mich. 1857) What is competent evidence in support of an application for the issue of an execution within five days the justice must determine. If he awards execution on improper, though colorable, evidence, it would be mere error of judgment, and not excess of jurisdiction.—Rash v. Whitney, 4 Mich. 495.

[l] (Mich. 1889) A failure by the justice to note on his docket the time of issuing execution, and to whom it was delivered, or the fact that it was issued, as required by How. Ann. St. § 7053, subds. 12, 13, does not necessarily vitiate an execution actually and properly issued and delivered.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006.

[m] (Mo. 1886) The statute, which requires that, before any execution shall be issued by a justice, he shall state in his docket an account of debt, damages, and costs, is mandatory, and a compliance with it is essential to the issuance of a valid execution.—Loth v. Faconesowich, 22 Mo. App. 68.

[n] (Mo. 1895) Under Rev. St. 1889, § 6305, providing that before an execution shall be delivered the justice shall enter on his docket the amount of debt, damages, and costs, an execution issued by a justice prior to the entry of the prescribed facts on his docket is void.—Huffman v. Sisk, 62 Mo. App. 398.

[o] (N. Y. 1822) Under the proviso to section 11, of the $25 act (1 N. R. L. p. 387), the party in whose favor judgment is given, if he intends to have execution against the defendant, being a freeholder or inhabitant having a family, before the expiration of the 30 days, must take the oath required for that purpose, at the time the judgment is rendered by the justice, so as to give the other party the full benefit of a stay of execution for 30 days on giving security.—Sellick v. Brown, 19 Johns. 271.

[p] (N. Y. 1838) A justice's execution against a party, an inhabitant having a family, issued before the expiration of the time limited by statute, is good, if applied for at the rendition of judgment, though judgment was not rendered until four days after the trial, and the execution was obtained without notice of an intention to apply for it.—Cogswell v. Cole, 21 Wend. 34.

[q] (N. Y. 1839) Notice by the plaintiff, in a justice's court, at the close of the trial, and before judgment, in the hearing of the defendant's counsel, that he will apply for an immediate execution should judgment pass in his favor, is sufficient to authorize the issuing of the execution on the oath of danger.—Moulton v. Kavana, 21 Wend. 648.

[r] (N. Y. 1854) Authority is not given to justices of the peace to issue execution after two years from the rendition of judgment.—Morse v. Goold, 11 N. Y. (1 Kern.) 281, 62 Am. Dec. 103.

[s] (N. Y. 1856) 2 Rev. St. p. 295, § 18, providing that "actions" on justices' judgments shall be commenced within six years after the cause of action accrued, does not limit the time within which execution may be issued on such judgments, as they are liens "in the same manner and with like effect" as judgments of the court of common pleas (2 Rev. St. p. 247, § 128), the lien of which continues as against the execution debtor, for 20 years.—Waltermire v. Westover, 14 N. Y. (4 Kern.) 16.

[t] (N. Y. 1894) Code Civ. Proc. § 1380, provides that execution may be issued on a judgment after expiration of one year from death of the judgment debtor, except that, where the lien of the judgment was created as prescribed in section 1251, execution cannot be issued until three years after letters testamentary or of administration have been granted. *Held*, that execution on a justice's judgment may be issued after one year from the judgment debtor's death, as justices' judgments are made liens by section 3017, and not by section 1251.—In re Wallace's Estate (Sur.) 6 Misc. Rep. 397, 26 N. Y. Supp. 774; In re Phelps, Id.

[u] (Ohio, 1843) A justice of the peace may issue execution within the time allowed for putting in a plea for stay of execution, if specially directed. After that time he must issue execution without special direction.—Sharpless v. Taylor, 12 Ohio, 243.

[v] (Ohio, 1843) A justice of the peace is not bound to issue execution, without special order of the judgment creditor, until the time allowed for putting in bail for stay of execution has expired.—Sharpless v. Taylor, 12 Ohio, 243.

[w] (Pa. 1881) An alderman or justice has a right to issue execution, where the same is demanded, at any time after the rendition and entry of judgment, and need not wait until the time for appeal has expired.—Knapp v. Stoner, 18 Lanc. Bar, 67.

[x] (Wis. 1865) A judgment was rendered by a justice of the peace in February, 1859, and execution issued and levied in October, 1861. By the statute in 1859 (Rev. St. c. 120, § 175), execution upon a judgment rendered in a justice's court could not issue after two years from its entry. *Held*, that though chapter 140, Laws 1861, allowing the issue of execution within five years after judgment rendered, was probably intended to apply only to courts of record, yet under chapter 286, Laws 1863, the levy of the execution in this case can be sustained.—Selsby v. Redlon, 19 Wis. 17.

§ 429. Issuance in or to county other than where judgment was rendered.

[a] (Ala. 1847) An execution issued by a justice of the peace from one county to another may be certified, either by the clerk of the county to which it is sent, or by any justice of that county, who is satisfied of the genuineness of the signature of the justice issuing it.—Jordan v. Mead, 12 Ala. 247.

[b] (Del. 1841) An execution cannot be issued by a justice of the peace in one county on a transcript of a judgment before a justice of another county. The proper course is by scire facias.—Lofland v. Carnnon, 3 Har. 320.

[c] (Pa.) A judgment may be transferred from the docket of a justice in one county to the docket of a justice in another county for the purpose of issuing execution in such county.—(1866) Saul v. Geist, 1 Woodw. Dec. 306; (1880) McKinney v. Lingley, 2 Kulp, 454.

[d] (Pa. 1886) A transcript of a judgment from a justice's docket cannot be entered, under Act March 20, 1810, § 17, for purposes of execution, on the docket of a justice of another county, in which defendant does not reside or cannot be found, that act expressly limiting entry to counties in which defendant may reside; and the fact that he may have property therein, and that jurisdiction is given justices by Act April 15, 1845, to issue attachment executions, does not enlarge their jurisdiction in the respect referred to.—Hintermeister v. Organ Co., 1 Pa. Co. Ct. R. 268.

[e] (Tenn. 1834) Where a justice of the peace of one county issues an execution on a judgment rendered by a justice for another county, the execution must be certified according to Act 1805, c. 66.—Gibbs v. Bourland, 14 Tenn. (6 Yerg.) 481.

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[f] (Tenn. 1836) A justice of the peace rendered judgment in one county, and an execution thereon, properly certified, was taken to another county, on which a justice of the peace in the latter county rendered another judgment. *Held*, that the justice had no authority, under Act 1805, c. 66, § 4, to render the latter judgment.—Perry v. Royle, 17 Tenn. (9 Yerg.) 18.

[g] (Tenn. 1836) A justice of the peace of one county rendered a judgment on an execution sent from another county, on which an execution issued, reciting the first judgment. *Held* that, though the justice had no power to render the last judgment, yet he had power, under Acts 1805, c. 66, § 4, to issue the execution founded on the first judgment, and that the execution so issued was regular.—Perry v. Royle, 17 Tenn. (9 Yerg.) 18.

[h] (Tenn. 1872) A certificate to an execution, so as to justify its reissue in another county, must show that the person who rendered the judgment was an acting justice of the county at the time of the rendition of such judgment.—State v. Bettick, 60 Tenn. (1 Baxt.) 209.

[i] (Tenn. 1874) Code, § 3073, provides that on the production of an execution on a justice's judgment from another county, accompanied by a certificate of the clerk of the county court of that county that the justice by whom such judgment was rendered and the execution issued was at the time an acting justice of the peace in his county, any justice of the peace may issue an execution for the original judgment and costs. *Held*, that an execution issued by a justice on the production of an execution from the justice's judgment from another county, in which the certificate of the county clerk did not state that the justice rendering the judgment was an acting justice of the peace at the time of its rendition, is void, since the statutory proceedings must be strictly pursued.—Moore v. Lynch, 63 Tenn. (4 Baxt.) 287.

[j] (Tenn. 1886) Under New Code, § 3786, requiring that, in order for execution to issue on a justice's judgment in a county other than where judgment was rendered, the judgment shall be accompanied by the certificate of the clerk of the county court that the justice by whom the judgment was rendered and the execution issued was at the time an acting justice of the peace of his county, a certificate which stated that the person who rendered the judgment was an acting justice of the peace at the time of the rendition of the same was sufficient, as the context fairly implied that he was then "justice of the county in which the judgment was rendered," and was therefore a substantial compliance with the statute.—State v. Hood, 84 Tenn. (16 Lea) 235.

§ 430. Form, requisites, and validity.

[a] (Ala. 1886) Where an execution issued by a justice of the peace fails to show in whose favor it was issued, it is void on its face, and an indorsement on the back of such an execution, being no part of it, cannot be looked to in aid of the defect.—Cooper v. Jacobs, 82 Ala. 411, 2 South. 832.

[b] (Ala. 1890) Under Code 1886, § 3345, providing that a justice must, unless otherwise directed, after the lapse of five days from rendition of judgment, issue a writ of fieri facias for the satisfaction of the judgment, the fact that the writ is issued before the lapse of the five days does not render the writ void, and is of no avail in a collateral impeachment of the proceedings under it.—Waldrup v. Friedman, 90 Ala. 157, 7 South. 510, 24 Am. St. Rep. 775.

[c] (Ala. 1893) Entries on the docket of a justice of the peace, and his indorsements on the back of an execution issued by him, are not admissible in collateral proceedings in a chancery court, founded on such execution, to show that the execution, though bearing a certain date, was in fact issued at another date.—Friedman v. Waldrop, 97 Ala. 434, 12 South. 427.

[d] (Ga. 1854) An execution issued by a justice need not show on its face all that may be necessary to give a justice's court jurisdiction.—Hamilton v. Moreland, 15 Ga. 343.

[e] (Ga. 1892) On certiorari to a justice of the peace, where it appears that the judgment was rendered at the December term of the justice's court, and the execution shows that it was rendered on the 20th of December, there is no variance between the execution and the judgment.—Steele v. Cochran, 88 Ga. 296, 14 S. E. 617.

[f] (Ind. 1844) An execution issued by a justice of the peace, reciting a judgment for $102.36, without showing how much was for debt and how much for interest thereon, was *held* not to be void, as it will be presumed that the justice, in rendering such judgment, was acting within his jurisdiction.—State v. Westbrook, 7 Blackf. 138.

[g] (Ind. 1845) An execution issued by a justice of the peace, reciting a judgment rendered by him for $102, with interest and costs, was *held* to be valid.—State v. Burnside, 7 Blackf. 577.

[h] (Ky. 1827) An execution issued by a justice of the peace, with his signature affixed to an indorsement that no security would be taken, there being no signature at the foot of the writ, was *held* to be a sufficient signing.—Nichols v. Taylor, 22 Ky. (6 T. B. Mon.) 325.

[i] (Ky. 1887) The presumption is in favor of the regularity of an execution issued by a justice of the peace.—Black v. Steele, 6 S. W. 23.

[j] (Me. 1834) An execution issued by a justice of the peace, without having a seal affixed to it, does not authorize an officer to seize on or dispose of goods seized by virtue thereof.—Porter v. Haskell, 11 Me. (2 Fairf.) 177.

[k] (Mass. 1811) A justice of the peace, in taking a recognizance for the payment of a debt, pursuant to St. 1782, c. 21, and in issuing execution thereon, exercises no judicial power, but acts as a ministerial officer merely. If, therefore, there be any material variation between the execution and recognizance on which it is awarded, as if the execution misrecite the date of the recognizance or the time of payment, or issue for a different sum than that acknowledged to be due by the recognizance, the execution will be void.—Albee v. Ward, 8 Mass. 79.

[l] (Mass. 1858) An execution issued on a judgment of a justice of the peace, which is signed by him as justice of the peace, but recites that the judgment was recovered before him as "trial justice" (when there is no statute in force creating such an office), and accidentally omits the initial of the debtor's middle name, is void.—Palmer v. Crosby, 77 Mass. (11 Gray) 46.

[m] (Mich. 1851) The omission in a justice's execution of the year in which the judgment was rendered will not vitiate the execution, it being in all other respects regular.—Perkins v. Spalding, 2 Mich. 157.

[n] (Mich. 1867) Where the entry of a justice of the peace on his docket as to the issuance of an execution complies with the statute, it will be presumed that the execution was

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issued at the request of the plaintiff.—Peck v. Cavell, 16 Mich. 9.

[o] (Mo. 1860) The officer receiving an execution from a justice of the peace should indorse thereon the time of its receipt.—Gott v. Williams, 29 Mo. 461.

[p] (Mo. 1895) Rev. St. 1889, § 6305, provides that before any execution shall be delivered by a justice he shall state in his docket, and on the back of the execution, an account of the debt, damages, and costs, and the rate of interest on the judgment. *Held*, that a failure to so indorse the execution does not render it void.—Buis v. Cooper, 63 Mo. App. 196, 1 Mo. App. Rep'r, 746.

[q] (N. Y. 1816) A refusal of a justice to indorse the defendant's exemption from imprisonment on the execution against him is no ground for reversing the judgment.—Spafford v. Griffen, 13 Johns. 328.

[r] (N. Y. 1870) Though Acts 1865, c. 616, expressly provides for the form of an execution to be issued in replevin in a justice court, where the judgment is for the delivery of the possession of the property, neither such statute nor any other provides for the form, nor expressly authorizes an execution, where the property has been delivered to plaintiff and the judgment is merely that he is entitled to possession and for costs. Hence the justice has authority in such case to issue an execution commanding the officer to levy the costs on the goods and chattels of defendant, which is the form prescribed generally by 2 Rev. St. 1836, § 131, for execution on judgments in justice courts.—Connors v. Joyce, 3 Lans. 315.

[s] (N. Y. 1875) An execution issued by a justice of the peace, who has general jurisdiction to issue executions in his court, need not state facts necessary to give the justice jurisdiction of the action in which the judgment upon which it is issued is entered.—Field v. Parker, 4 Hun, 342.

[t] (N. C. 1844) Where the execution of a justice of the peace is on the same paper with the judgment, it must be considered as referring to the judgment, and is made certain as to the debt, interest, and costs, and the person who recovered the same.—McLean v. Paul, 27 N. C. 22.

[u] (Pa. 1805) On a joint judgment before a justice of the peace, the execution must be joint.—Saul v. Geist, 1 Woodw. Dec. 306.

[v] (Vt. 1838) An execution issued on a judgment rendered by a justice of the peace for the county of A., dated in a town in said county, is not void because a different venue is laid in the margin.—Avery v. Lewis, 10 Vt. 332, 33 Am. Dec. 203.

[w] (Vt. 1865) The justice by whom judgment was rendered died before execution issued, and the execution was signed by D. as justice of the peace, when he was in fact county clerk. *Held*, that a levy on real estate by virtue of such execution was void.—Perry v. Whipple, 38 Vt. 278.

[x] (Va. 1845) An execution issued by a justice of the peace of one county is valid, though it purports to be issued in another county, if in fact it was issued in the proper county.—Davis v. Davis, 2 Grat. 363.

[y] (Wis. 1852) An execution issued by a justice of the peace must strictly conform to the form prescribed by the statute.—Streeter v. Frank, 4 Chand. 93, 3 Pin. 386.

§ 431. —— Directions for levy and return.

[a] (Ala. 1886) An execution on a justice's judgment is not void because addressed, "To the sheriff of said county" and levied by him.—Sandlin v. Anderson, 82 Ala. 330, 3 South. 28.

[b] (Ala. 1890) Though an execution issued by a justice of the peace is made returnable at a date beyond the 60 days prescribed by statute, it may be enforced within the time in which it should properly have been made returnable.—Mitchell v. Corbin, 91 Ala. 599, 8 South. 810.

[c] (Ind. 1872) A paper issued by a justice of the peace to a constable, reciting the rendition of a judgment, as appears of record on his docket, and adding the words "by levy and sale of the goods" of defendant, "and make return thereof within six months from date," without other words of command or direction, will not justify a levy by the constable.—Gaskill v. Aldrich, 41 Ind. 338.

[d] (N. J. 1846) The command in an execution issued in a justice's court, requiring the officer executing it, "for the want of sufficient goods to * * * make the sum," to receive an inventory of all of defendant's goods, is unauthorized and unlawful, as it departs from the command prescribed in the act constituting such court.—Kipp v. Chamberlin, 20 N. J. Law (Spencer) 656.

[e] (N. Y. 1830) An execution on a justice's judgment for a sum not exceeding $50 cannot be made returnable in 60, instead of 90, days.—Toof v. Bently, 5 Wend. 276.

[f] (N. Y. 1853) Executions issued by justices of the peace, as well as by courts of record, are required to be made returnable in 60 days.—Bander v. Burley, 15 Barb. 604.

[g] (N. Y. 1853) Code 1852, § 64, rule 12, providing that an execution issued by a justice of the peace shall be returnable in 60 days, repeals inconsistent statutory provisions, as especially provided by section 468.—Bander v. Burley, 15 Barb. 604.

[h] (N. C. 1821) Where a magistrate issues an execution in the first instance against goods and chattels, lands and tenements, though irregular, under the act of 1794, it is cured by the constable's return that, in default of chattels, he had levied on land.—Lanier v. Stone, 8 N. C. 329.

[i] (N. C. 1825) Where a justice of the peace enters a judgment on the back of a warrant, and writes, "Execute and sell according to law," these words will be deemed an execution.—Armstrong v. Bailey, 10 N. C. 463.

[j] (Pa. 1825) A justice issued an execution, directed to the constable of the town of B., distant four miles from the township of N., where the defendant resided, there being another township of B. between that and the town of B. *Held* that, though there was an acting constable in the township of N., and also of B., yet the execution was not for that reason void. The provisions of the statute on this head are only directory, and the justice is to judge who is the constable most convenient to the defendant.—Smith v. Schell, 13 Serg. & R. 336.

[k] (Pa.) It is not necessary that a day should be mentioned in the execution issued by a justice of the peace on which return is to be made by the constable.—(1831) Lewis v. Jones, 1 Ashm. 53; (1888) Evans v. Howell, 5 Lanc. Law Rev. 285.

[l] (Pa. 1831) An execution directed to "any constable of the county," instead of being directed to the constable of the "ward, district, or township where the defendant resides, or the next most convenient constable to defendant," is not void, but may be legally executed by the

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proper constable of the district.—Garrigues v. Jackson, 1 Ashm. 218.

[m, n] (Pa. 1888) An execution issued by a justice of the peace, returnable on a day named, being 30 days after date of issuance, instead of 20 days, will not be set aside on certiorari, where the justice makes affidavit, attached to the transcript, that naming a date 30 days after issuance of the writ, in place of 20 days, was a clerical error.—Evans v. Howell, 5 Lanc. Law Rev. 285, 5 Pa. Co. Ct. R. 313.

[o] (Tenn. 1835) When a justice of the peace dies or resigns, and his papers are turned over to the clerk of the county court, an execution issued by the clerk on a judgment rendered by such justice must be made returnable to the clerk of the county court, and not to the county court.—White v. Davenport, 15 Tenn. (7 Yerg.) 475.

[p] (Tenn. 1848) A justice of the peace indorsed the following on an execution: "For want of an officer, I do hereby deputize A. B. to execute the within process, and return it according to law." *Held*, that this was a valid deputation, and conferred on A. B. the power to execute the precept.—Hampton v. Allison, 28 Tenn. (9 Humph.) 113.

[q] (Vt. 1827) Under St. 1797, p. 130, c. 9, § 21, conferring on the justices of the peace jurisdiction to render judgment on confession, all executions issued on such judgments must be made returnable within 60 days from date.—Ex parte Hatch, 2 Aikens, 28.

[r] (Vt. 1837) An execution issued by a justice of the peace, on a judgment in which the damages do not exceed the sum of $53, should be made returnable in 60 days, though the damages and costs together exceed that sum.—Allen v. Warren, 9 Vt. 203.

[s] (Vt. 1842) A debtor in an appealed suit tendered a judgment by confession, in pursuance of the act in addition to the justice act passed in 1821, for more than $53 damages. *Held*, that the execution issued on such judgment should have been made returnable in 120 days.—Jameson v. Paddock, 14 Vt. 491.

[t] (Vt. 1869) Under Rev. St. p. 174, § 44, a justice's execution, exceeding $53 damages, should be made returnable in 120 days, even though on a judgment rendered on confession.—Spaulding v. Robbins, 42 Vt. 90.

§ 432. —— Amendment or alteration.

[a] (Ark. 1861) An amendment made by order of the justice issuing an execution, changing its direction to another township and to another constable, though irregular, does not render the process null and void.—Atkinson v. Gatcher, 23 Ark. 101.

[b] (Ind. 1850) Justices of the peace have power to correct clerical mistakes in executions.—Silner v. Butterfield, 2 Ind. (2 Cart.) 24.

[c] (Me. 1834) A justice of the peace has no authority, after a sale of goods seized on an execution issued by him, and a return of the execution, and action commenced against the officer, to amend the execution by affixing a seal which was originally wanting.—Porter v. Haskell, 11 Me. (2 Fairf.) 177.

[d] (N. Y. 1813) Though process issued by a justice may be altered by his direction, yet a general authority by him to a constable to alter the dates of executions, instead of renewing them, or to fill up or alter process, is void.—Pierce v. Hubbard, 10 Johns. 405.

[e] (N. Y. 1830) A justice of the peace has no power to make an amendment in an execution issued by him after it had been executed.—Toof v. Bently, 5 Wend. 276.

§ 433. Renewal and reissue, and alias and pluries writs.

Power to renew execution after expiration of term, see ante, § 204 [e].

[a] (Ala. 1847) An alias execution, issued by a justice of the peace, after the death of the defendant, is an absolute nullity, and no rights can be acquired under it.—Henderson v. Gandy's Adm'r, 11 Ala. 431.

[b] (Del. 1859) Where there has been a fi. fa., and a levy thereon to the amount of the debt and costs, a justice cannot issue a fi. fa., with a clause of attachment on the judgment, until after the former levy and execution is disposed of.—Jacquett v. Lowber, 2 Houst. 203.

[c] (Del. 1861) Where a fi. fa. has been issued on a judgment of a justice of the peace, and not returned, another fi. fa. and venditioni exponas cannot be issued on it without first resorting to a writ of sci. fa. to enable defendant to show that the debt has been levied and collected on the former writ.—Purnell v. Semans, 2 Houst. 399.

[d] (Ill. 1862) There is no lawful mode of renewing an execution, except there has been a return to that already issued by the officer, of his doings thereon. A justice of the peace cannot renew an execution by any indorsement of his upon it.—Calhoun County Court v. Buck, 27 Ill. (17 Peck) 440.

[e] (Ill. 1876) Where an affidavit is filed by a plaintiff, and an execution issued thereon by a justice of the peace inside of 20 days after the date of the judgment, and the execution is returned inside of the 20 days, the same affidavit will be sufficient to authorize the issuing of an alias execution.—Johnson v. Holloway, 82 Ill. 334.

[f] (Ill. 1890) A justice of the peace is not bound to issue an alias execution on the mere return to him of an execution with no indorsement thereon, which he had delivered to the plaintiff's attorneys 19 months prior thereto. It must be shown either that the execution had during the life thereof been delivered to an officer, or that the judgment had not been in whole or in part paid.—People v. Brayton, 37 Ill. App. 319.

[g] (Ind. 1864) Where a constable levies on property to satisfy an execution from a justice's court, and advertises it for sale, but fails to sell, and returns the writ, with his proceedings indorsed thereon, and the justice issues another execution, and fails to append to it a copy of the return made to the first, his failure so to do will not render the second execution void, but only voidable, and it may be set aside on motion before the justice; but, if no such motion was made, all acts done under it will be valid.—Culbertson v. Milhollin, 22 Ind. 362, 85 Am. Dec. 428.

[h] (Mich. 1845) A justice's execution issued before Act 1841 (S. L. 1841, p. 81) took effect, could not be renewed after that time.—Jackson v. Shelden, 2 Doug. 154.

[i] (Mich. 1874) Under the statute (Comp. Laws, § 5410) an execution on a justice's judgment may be renewed, after having been returned unsatisfied, at any time when a new one could be lawfully issued; and the renewal writ will have the same force for 60 days succeeding the renewal that a new writ would have.—Bigalow v. Barre, 30 Mich. 1.

[j] (Mich. 1896) Under 2 How. Ann. St. § 6975, relating to the issuance of execution by justices of the peace, and authorizing a second execution only in case the first is returned unsatisfied, a second execution issued by a justice before a prior execution had been re-

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turned unsatisfied is void.—Friver v. McNaughton, 110 Mich. 22, 67 N. W. 978.

[k] (Mo. 1890) Rev. St. 1879, § 3018, providing that "if any execution be not satisfied it may, at the request of the plaintiff, be renewed from time to time by the justice," by indorsement to that effect, does not authorize the justice to renew an execution which has been returned unsatisfied, at the expiration of the time allowed therefor by statute.—State v. Boettger, 39 Mo. App. 684.

[l] (N. Y. 1815) A justice may renew an execution issued by him, without a return of nulla bona indorsed thereon. An indorsement on the original writ, "This execution renewed," is all that is necessary, and is evidence that the constable had satisfied the justice that there were no goods on which he could levy.—Wickham v. Miller, 12 Johns. 320.

[m] (N. Y. 1828) A justice's execution may be renewed without a formal return of nulla bona, and it may be renewed after the return day, from time to time, at the option of the plaintiff.—Visger v. Ward, 1 Wend. 551.

[n] (N. Y. 1830) The six months allowed for the renewal of an execution by a justice of the peace after his removal from office are *held* to be calendar, and not lunar, months.—Parsons v. Chamberlin, 4 Wend. 512.

[o] (N. Y. 1830) The expiration of the time for which a justice is appointed is considered a removal, within the meaning of the act in respect to the renewal of executions.—Parsons v. Chamberlin, 4 Wend. 512.

[p] (N. Y. 1831) A renewal of an execution need not be signed by a justice. Any memorandum in the handwriting of the justice, on any part of the execution, indicating his intention, and a redelivery to the constable, is sufficient.—Preston v. Leavitt, 6 Wend. 663.

[q] (N. Y. 1845) An execution from the justice's court may be renewed by the justice while it remains unsatisfied, even though sufficient property to satisfy it has been levied on, and is held under the levy, where there is not time enough remaining to advertise and sell.—People v. Hopson, 1 Denio, 574.

[r] (N. Y. 1853) Under Rev. St. tit. 4, c. 2, § 145, providing that, if an execution issued by a justice be not satisfied, it may from time to time be renewed by the justice issuing the same, by an indorsement thereon, which shall renew the execution, where issued on a judgment for less than $25, for 30 days, "and no longer," a levy by the constable more than 30 days after such a renewal is without authority.—Bander v. Burley, 15 Barb. 604.

[s] (N. Y. 1853) Executions issued by justices of the peace may be renewed, if issued on a judgment for more than $25, exclusive of costs, for 90 days, and for 30 days in all other cases, and no longer.—Bander v. Burley, 15 Barb. 604.

[t] (N. Y. 1854) Though a justice of the peace cannot issue execution after two years from the rendition of judgment, an execution having been issued and returned unsatisfied, he may renew it after the two years have elapsed.—Morse v. Goold, 11 N. Y. (1 Kern.) 281, 62 Am. Dec. 103.

[u] (N. Y. 1870) Where an execution issued by a justice of the peace is levied on property of which defendant has possession, but in which he has no leviable interest, and defendant, before expiration of the execution, purchases the property, the lien attaching to the defendant's interest acquired by the purchase is kept good by a renewal of the execution, under 2 Rev. St. pp. 251, 252, § 145, providing that a renewal of an execution issued by a justice of the peace shall be deemed to renew it in full force in all respects.—Hodge v. Adee, 2 Lans. 314.

[v] (N. Y. 1895) Under Code Civ. Proc. §§ 3025, 3027, providing that an execution issued by a justice of the peace must be made returnable in 60 days, and that, on return unsatisfied, the justice may issue a new execution, or, by indorsement, may renew the original execution for 60 days, a renewal for 30 days is void.—Winne v. Houghtaling, 84 Hun, 168, 32 N. Y. Supp. 450.

[w] (N. C. 1839) The signature of a justice is absolutely necessary to an alias, as well as to an original, execution on a justice's judgment. Hence an entry of "Execution renewed," without the signature of a justice, at the foot of a dormant justice's execution, gives no authority to the acts of an officer under it.—Huggins v. Ketchum, 20 N. C. 550.

[ww] (Ohio, 1854) Where a justice of the peace altered the date of the first execution on a judgment before him, for the purpose of converting it into an alias, though such proceeding may be irregular, the alias writ is not void, and a constable may lawfully proceed to execute the precept.—Faris v. State, 3 Ohio St. 159.

[x] (Ohio, 1857) Where a return has been made on an execution issued by a justice of the peace of "No goods in the township" where the justice resides, with a suggestion that there are goods of the "judgment debtor," in another township of the same county, an execution issued to any constable of either of the two townships, though not strictly in accordance with the statute, is not therefore void.—Lyon v. Fish, 20 Ohio, 100.

[xx] (Pa. 1846) Where the transcript of an alderman does not show that the first execution has been returned, it is error for another alderman to issue an alias execution thereon.—Moore v. Risden, 3 Clark, 409, 5 Pa. Law J. 430.

[y] (S. C. 1837) A magistrate's execution, after the lapse of a year and a day from the time it issued, must be revived, in order to give authority to levy and sell.—Bird v. Stone, 3 Hill, Law, 282.

[yy] (Tenn. 1872) Where, after levy on lands of an execution issued by a justice, the court, on a showing that defendant owned certain personal property which might be reached by execution, ordered a stay of proceedings on the levy, and remanded the case for issuance of an alias writ by the justice, such justice may by a writ of procedendo be required to issue the alias execution.—McGavock v. Schneider, 54 Tenn. (7 Heisk.) 467.

[z] (Vt. 1802) It is, it seems, an unauthorized proceeding for a justice of the peace to indorse an execution as renewed, so as to run beyond its original term.—State v. Campbell, 2 Tyler, 181.

[zz] (Vt. 1847) An execution issued by a justice of the peace, which is renewed by erasing the date and inserting a new date, after it has been delivered to an officer for collection, but before service has been made, and within its life, is not thereby rendered absolutely void, so that it may be set aside on audita querela.—Sawyer v. Doane, 19 Vt. 598.

§ 434. Lien and levy or extent.

Jurisdiction of justice in action against officer for neglect in collecting execution, see ante, § 126 [o].

Levy as satisfaction of judgment, see ante, § 417 [n, v].

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Liability of officer for wrongful levy, see "Sheriffs and Constables," III., IV.

Necessity for levying on property of principal in preference to that of surety, see "Principal and Surety," V.

Right of levying officer to require indemnity, see "Sheriffs and Constables," III.

[a] (Ala. 1890) Under Code 1886, § 3345, providing that an execution issued by a justice shall be returnable not more than 60 days from the date of its issue, a levy thereafter made, and all subsequent proceedings founded on it, are void.—Waldrup v. Friedman, 90 Ala. 157, 7 South. 510, 24 Am. St. Rep. 775.

[b] (Ala. 1895) Since the passage of Act Feb. 26, 1875 (Code, § 811), authorizing sheriffs to execute all mesne and final process which is required of constables, a sheriff may levy on lands an execution issued by a justice of the peace.—Mickle v. Montgomery, 111 Ala. 415, 20 South. 441.

[c] (Ark. 1872) An execution on a judgment rendered by a justice of the peace is a lien on all goods and chattels of the defendant in the execution, within the limits of the township to which the execution was directed, from the time of its delivery to the constable.—Isbell v. Epps, 28 Ark. 35.

[d] (Ga. 1847) It is necessary to the validity of a sale of land or negroes by a constable on a magistrate's execution that it should appear by the entries on the execution that there was no other property of defendant subject to execution, or that defendant, being in possession, pointed out such property to the officer.—Hopkins v. Burch, 3 Ga. (3 Kelly) 222.

[e] (Ga. 1858) Where a judgment obtained in one county is afterwards levied on real estate in another county, a return having previously been made by a constable, other than the one making the final levy, that no personal property on which to levy could be found in the first county, it will be presumed, in support of the second levy, that the first return was made by a constable of the county in which the judgment was recovered.—Hollingsworth v. Dickey, 24 Ga. 434.

[f] (Ga. 1883) Land cannot be sold under the execution of a justice's court on which there was no entry of "No personal property to be found," since Code, § 4172, so provides.—Robinson v. Burge, 71 Ga. 526.

[g] (Ga. 1891) Where the plaintiff in fi. fa. has filed a deed to his debtor, under section 1969 et seq. of the Code, for the purpose of having land levied upon, which had been conveyed to him by his debtor as security for the debt, the sheriff, though the fi. fa. issued from a justice's court, may make the levy, by virtue of the act of October 17, 1885, allowing sheriffs to execute executions issuing out of justices' courts, etc., without making a search for personal property, or making an entry upon the fi. fa. that no such property can be found, since, the object being to enforce the fi. fa. against the specific land pledged to secure the debt, the general rule as to the collection of fi. fas. issued from justices' courts does not apply.—Bennett v. McConnell, 88 Ga. 177, 14 S. E. 208.

[h] (Ga. 1894) Until an execution issued from a justice's court has been indorsed "Nulla bona," a constable of another county has no authority to make any levy or return thereunder.—Formby v. Shackleford, 94 Ga. 670, 21 S. E. 711.

[i] (Ind. 1845) Where an execution is levied by a constable, he may, when informed of the invalidity of the writ, abandon the levy.—Ezra v. Manlove, 7 Blackf. 389.

[j] (Ind. 1845) If, after the issuing of a fi. fa. by a justice of the peace and before its execution, plaintiff dies, the writ may still be executed.—Murray v. Buchanan, 7 Blackf. 549.

[k] (Ky. 1833) A constable is not bound to execute or return an execution issued by one justice on the judgment of another.—Clifford v. Cabiness, 31 Ky. (1 Dana) 384.

[l] (La. 1840) The pointing out by a defendant in a justice's execution of immovables to the sheriff will, perhaps, authorize him to distrain without first seizing movables, but not to sell. They should be hired out under the justice's direction for a sufficient amount to pay the judgment creditor.—Freeman v. Watts, 15 La. 476.

[m] (Mo. 1845) A person specially appointed constable under Rev. Code 1835, p. 352, art. 2, § 20, is to be regarded as deputy of the proper constable, in respect to the lien of executions in the hands of the proper constable, and can gain no advantage over the latter by taking a prior possession of goods in the latter's township.—Jones v. Hoppie, 9 Mo. 173.

[n] (Mo. 1876) Under present laws a justice of the peace cannot deputize a private person to execute final process.—Huff v. Alsup, 64 Mo. 51.

[o] (N. J. 1831) Executions issued from justices' courts are liens only on the personal property, and where they are sought to be enforced against a trust fund arising in part from the sale of personalty and in part from the sale of realty, and the fund created from the sale of personalty is exhausted, they will stand, as to the fund created by the sale of the realty, on the footing of the general debts.—State Bank v. Marsh, 1 N. J. Eq. (Saxt.) 288.

[p] (N. J. 1888) Section 67 of the justice's court act (Revision, p. 552), requiring a constable to take a written inventory of property levied on, is directory only, and if, under an execution out of a justice's court, he takes actual possession of a chattel, or places a keeper in possession, it will amount to a valid levy, though no inventory be taken.—State v. Martin, 51 N. J. Law (22 Vroom) 148, 16 Atl. 189.

[q] (N. J. 1888) An inventory made as required by section 67 of the justice's court act is necessary to support a levy resting on a constructive seizure only.—State v. Martin, 51 N. J. Law (22 Vroom) 148, 16 Atl. 189.

[r] (N. J. 1889) Justice's Court Act, § 67, provides, with reference to the levy of executions, that the constable shall take an inventory in writing of so much of the property of defendants as he means and intends to levy on, which inventory and levy shall be annexed to the said execution, and shall at all times be received as evidence of the levy, and that the property so levied upon shall be bound from the time of such levy. *Held*, that the object of the act was to make an inventory essential to a valid levy when the property was left in defendant's hands as bailee, but not to render the levy sufficient without an actual or constructive seizure of the goods; and that where a constable, having in his hands an execution issued by a justice of the peace against the goods of an insolvent corporation, before decree of insolvency actually made, went to the factory of defendant, where the goods were locked up, and, without effecting an entrance, made an incomplete inventory of them by partial view through a small opening in a window, the attempt to make a levy was a failure, and created no lien on the goods, as against the official receiver.—Nelson v. Van Gazelle Valve Mfg. Co., 45 N. J. Eq. (18 Stew.) 594, 17 Atl. 943.

[s] (N. Y. 1816) If a constable levy under an execution in favor of A., and advertise for sale within 20 days after he has received the execution, but sell after the expiration of the 20 days, the sale will be valid against an intermediate

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levy and sale on another execution, if the sale on A.'s execution were made before the return day of the writ.—Wylie v. Hyde, 13 Johns. 249.

[ss] (N. Y. 1816) And the advertisement may be made on a day subsequent to the levy, provided both were within the 20 days.—Wylie v. Hyde, 13 Johns. 249.

[t] (N. Y. 1816) The priority of executions in the justice's court depends on the time of the actual levy, and not on the time of delivering the execution to the constable.—Wylie v. Hyde, 13 Johns. 249.

[tt] (N. Y. 1823) The same rules of law which govern sheriffs in the levy of executions from the higher courts govern constables in the levy of executions of a justice, except where some statute intervenes.—Pixley v. Butts, 2 Cow. 421.

[u] (N. Y. 1875) Omission of the constable to indorse on the execution issued on a judgment recovered before a justice a levy made under it is not fatal to the levy.—Havens v. Harrison, 5 Hun, 178.

[uu] (N. C. 1824) A justice's execution binds chattels from its teste.—Beckerdite v. Arnold, 10 N. C. 296.

[v] (N. C. 1828) A levy cannot be made on land under a justice's judgment more than three months after the date of the execution.—McEachin v. McFarland, 12 N. C. 444.

[vv] (N. C. 1836) A justice of the peace is not authorized by Rev. St. c. 24, § 10, to appoint a special constable to execute a fieri facias.—Garlick v. Jones, 48 N. C. 404.

[w] (N. C. 1863) As an agreement by A. that B. might put a sawmill, etc., on his land, for the purpose of carrying on the business of sawing lumber, "as long as B. wished," gave B. a life interest in the land necessary to the business, determinable at his option, this interest, and the mills erected according to the privilege, were not liable to be sold by virtue of an execution under a justice's judgment, without an order of court.—Stancel v. Calvert, 60 N. C. 104.

[ww] (Pa. 1861) Where executions issued on two judgments before a justice of the peace were returned the day after the levy, in consequence of appeals taken in each case, their lien on the goods levied on was destroyed, and they were not entitled to be paid out of the proceeds of the same property, subsequently sold by the sheriff on the execution of another creditor, though the appeals taken by defendant were not entered up by the first return day of the ensuing term, as required by law.—Appeal of Cope, 39 Pa. (3 Wright) 284.

[x] (Pa. 1891) Under Act March 20, 1810, when an execution has been issued by a justice of the peace, the constable should levy and sell whenever practicable within 20 days from the teste of the writ; but, if he levy on any day within the 20, the lien will continue for 20 days from the date of levy, and during the lien he may sell without an alias writ, though the return day have passed, subject, however, to liability to be charged with the debts and costs under section 12, unless he can show satisfactory reasons why he did not proceed earlier.—Page v. Gardner (Com. Pl.) 11 Pa. Co. Ct. R. 577.

[xx] (S. C. 1837) Unless revived, a magistrate's execution gives no authority to levy and sell after a year and a day from the time it issued.—Bird v. Stone, 3 Hill, Law, 282.

[y] (Tenn. 1870) Though it may not be essential to the validity of a condemnation and sale of land on a justice's judgment that the papers be returned and the condemnation had at the next term of the circuit court, unless they are returned within a reasonable time, the lien acquired by the levy is lost, and a bona fide purchaser from the debtor by sale made and deed registered after levy, and before execution, will acquire a good title.—Anderson v. Talbot, 48 Tenn. (1 Heisk.) 407.

[yy] (Tenn. 1883) A justice of the peace has no authority to appoint a special constable to execute a fi. fa., except in case of a suit pending.—State v. McKittrick, 79 Tenn. (11 Lea) 476.

[z] (Vt. 1842) St. 1821, providing that an execution issued on a justice's judgment for more than $53 should be made returnable within 120 days, is not merely directory; and, where an execution on such a judgment is made returnable in 60 days, the lien on the property attached on the writ is lost.—Jameson v. Paddock, 14 Vt. 491.

[zz] (Va. 1826) An execution issued by a justice of the peace from the court of a county or corporation in Virginia cannot be served by a constable, except in the city of Richmond.—Stokes v. Perkins, 4 Rand. 356.

§ 435. Custody and disposition of property.

Liability of officer for abuse of property, see "Sheriffs and Constables," III., IV.

[a] (Ala. 1842) Where judgment was rendered against a defendant, and the justice entered in his docket: "Stayed 60 days. H. N. W., Security," but no stay bond was given, and execution issued against the defendant and security, which was levied on property of the defendant, the "security" becoming surety in a forthcoming bond, and afterwards execution issued on the bond, which was levied on the property of the security, it was *held* that though the first execution was void as to the security, it was valid as to the defendant, and that the execution issued on the forthcoming bond was valid.—Gilleland v. Ware, 4 Ala. 414.

[b] (Ill. 1885) A constable having an execution in his hands which may be a lien on property has no right thereunder to replevy the property.—Persels v. McConnell, 16 Ill. App. (16 Bradw.) 526.

[c] (Ind. 1829) Though the condition of the delivery bond be to deliver the property to the person to whom the execution was directed, without mentioning his name, yet the bond is valid, and the ambiguity may be explained by extrinsic evidence.—Evans v. Shoemaker, 2 Blackf. 237.

[d] (Ind. 1829) Where the forthcoming bond is conditioned to return the property in as good order as it was when the bond was given, the only question, on executing a writ of inquiry, is the amount of the plaintiff's damages; and in the absence of evidence as to the value of the property, the amount of the execution is the rule of damages.—Chinn v. Perry, 2 Blackf. 268.

[e] (Ind. 1829) In a suit on such bond, the officer is a competent witness.—Chinn v. Perry, 2 Blackf. 268.

[f] (N. Y. 1812) If a constable, after taking goods in execution, deliver them to A. on his giving a receipt promising to redeliver them on demand, and the constable does not demand and sell them within 30 days, he loses all claim and title to the possession thereof.—Brown v. Cook, 9 Johns. 361.

[g] (N. Y. 1871) A constable has such an interest on property upon which he has levied by virtue of executions as will enable him to maintain an action to recover the possession thereof from one who has purchased the same of the defendant in the executions, after levy.—Rue v. Perry, 63 Barb. 40.

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§ 436. Stay of execution.

As barring action on judgment, see ante, § 419 [f, h].

Supersedeas or stay of execution on appeal, see post, § 606.

[a] (Ark. 1887) After a justice has issued a supersedeas staying an execution against property claimed as exempt, he has no power to recall it, and the execution plaintiff, if aggrieved, must appeal to the circuit court, as provided by Mansf. Dig. § 3006.—Cox v. Lee, 50 Ark. 456, 8 S. W. 400.

[b] (Del. 1844) If a suit before a justice should be commenced by summons, the justice should allow the freeholder's stay of execution, unless oath be made, etc.—Elligood v. Cannon, 4 Har. 176.

[c] (Ind. 1842) A judgment of a justice of the peace, rendered prior to December 1, 1839, and which had been replevied, is not within the act of 1840, authorizing an additional replevy as to judgments rendered previous to its enactment, and which had not been replevied under the law then in force, and as to judgments rendered by a justice subsequent to December 1, 1839, which has been replevied.—McIntosh v. Shotwell, 6 Blackf. 281.

[d] (Ohio, 1844) A bail may be put in for a stay of execution on a judgment before a justice of the peace, after the 10 days have expired, with the consent of plaintiff.—Whalon's Adm'r v. Glenn, 1 Ohio Dec. 57, 1 West. Law J. 396.

[e] (Pa. 1831) A freeholder defendant, after judgment against him before a justice, is entitled to a stay of execution upon the security of his real estate, and no time is prescribed at or before which the allegation of freehold must be made; he can show that he owns real estate, at any time, either before or after execution has issued. If he neglects to suggest his privilege, an execution may be issued against him; but on the payment of the costs which have accrued on the execution, the magistrate should supersede it, and grant to the defendant his lawful privilege.—Stiles v. Powers, 1 Ashm. 407.

[f] (Pa. 1879) Though the fact that the defendant in an action before a justice of the peace has been attached in an attachment execution by a creditor of the plaintiff for the money owing to plaintiff is not sufficient to stay the action against him, the execution will be stayed until the determination of the attachment execution.—Dorsel v. Hamilton, 1 Leg. Rec. Rep. 123.

[g] (Tenn. 1837) Two justices of the peace had no authority to suspend an execution on the ground that the judgment has been paid after its rendition.—Rogers v. Ferrell, 18 Tenn. (10 Yerg.) 254.

[gg] (Tenn. 1848) The staying of a judgment before a justice of the peace is a judicial act which can be done only by the justice.—Davis v. Tyree, 28 Tenn. (9 Humph.) 473.

[h] (Tenn. 1858) After the issuance of an execution on a justice's judgment, the two days allowed for staying having expired, the justice has no authority, under Act 1842, c. 136, § 4, to receive a stay on the judgment, and no consent or agreement of the parties can give him such power.—Apperson v. Smith, 37 Tenn. (5 Sneed) 372.

[i] (Tenn. 1858) Though a constable, by giving his receipt for the collection of a note, becomes individually the agent of the owner, and incurs sundry obligations as such, he has no authority to dispense with the stay of execution on the judgment before a justice, so as to prevent the owner from taking his execution immediately, if the judgment is not legally stayed.—Mallett v. Hutchinson, 38 Tenn. (1 Head) 558.

[j] (Tenn. 1873) Where a judgment is rendered against a principal and surety, and the latter procures a stayor, the justice in such case is not required to act on the personal application of the surety, or on his written assent, to have the judgment stayed, but may act on such evidence as satisfies him that the surety has either procured or assented to the stay.—Gaut v. White, 62 Tenn. (3 Baxt.) 196.

[k] (Tenn. 1881) Under Code, § 3059, providing that in all judgments before justices of the peace the defendant is entitled to stay of execution on proper security, defendant in a suit for rent is entitled to a stay, notwithstanding the plaintiff's lien on the crop.—Spradlin v. Bratton, 74 Tenn. (6 Lea) 685.

§ 437. —— Security in general.

[a] (Ind. 1881) The doctrine that an entry of replevin bail, after the judgment has ceased to be repleviable, does not constitute a judgment on which an execution can be issued, applies as well to entries of replevin bail on the dockets of justices of the peace as to similar entries on the records of judgments in the circuit courts.—Eltzroth v. Voris, 74 Ind. 459.

[b] (Ky. 1822) A justice of the peace has the same authority to quash an illegal or irregular bond, given to replevy an execution issued by him, as courts have.—Thomas v. Clarke, 11 Ky. (1 Litt.) 287.

[c] (N. C. 1849) The surety for the stay of an execution is not bound where the justice who stays the execution signs the name of the surety in his absence, though the surety may afterwards ratify the signature and pay the judgment; but to bind the surety, he must sign his own name, or some one must sign it for him in his presence.—Rickman v. Williams, 32 N. C. 126.

[d] (Ohio, 1864) An undertaking for stay of execution on a judgment of a justice of the peace, taken and signed after the period fixed by the statute for entering the same, when based upon a sufficient consideration, is valid as a common-law contract, though it may not be available under the statute.—Duckwall v. Rogers, 15 Ohio St. 544.

[e] (Pa. 1841) "I become special bail for $90," signed by the bail, in an action before an alderman, upon the alderman's docket, was *held* a sufficient recognizance for a stay of execution under Act 1810, § 9, there being no entry of appeal.—Frost v. Roatch, 6 Whart. 359.

[f] (Pa. 1848) B. appeared before a justice of the peace, with a defendant in an execution which was issued within 20 days after judgment recovered, and offered that, if the plaintiff therein would wait 6 months, he would pay it, which was acceded to by the plaintiff; and some time after the justice made the following entry in his docket: "B. appears Nov. 19th, and acknowledges himself as bail, to be paid at the expiration of six months." *Held* that, though this was not a recognizance under the statute, it constituted, as a consideration for forbearance and not to levy an execution, a sufficient promise to support assumpsit.—Brice v. Clark, 8 Pa. (8 Barr) 301.

[g] (Pa. 1849) A recognizance entered into before the justice of the peace for stay of execution, in which no sum is mentioned, or condition set out, is void.—Caldwell v. Brindle, 2 Am. Law J. (N. S.) 95.

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[h] (Tenn. 1827) The stay of an execution on a justice's judgment is in the nature of a judgment confessed by the security for the stay, and, to bind him, he must be present when the justice officially enters his name as security, or must sign his own name as such. If he be not present, a written authority to the justice, or some other person, is necessary.—Hickman v. Williams, 8 Tenn. (Mart. & Y.) 116.

[i] (Tenn. 1834) In order to bind the security for stay of execution, he should either appear in person and make the acknowledgment before the justice, or should give written authority to someone to appear for him.—Patrick v. Driskill, 15 Tenn. (7 Yerg.) 140.

[j] (Tenn. 1842) A. recovered judgment for $62.50 on the 19th of September, 1840, against B. and C. before a justice of the peace. D. addressed this letter to the justice: "You may enter me as stay of a judgment that A. recovered against B. on the 19th of September, for the sum of $62.50. This 21st day of September, 1840." There was no other judgment rendered against B. on that day. *Held*, that it was sufficiently apparent that D. intended to communicate authority to stay the execution in that case, and that it was sufficient authority to authorize the entry of D.'s name as security for stay of execution.—Dilliard v. Askew, 22 Tenn. (3 Humph.) 536.

[k, l] (Tenn. 1851) A written authority to a justice to enter the name of an absent person as stayor to an execution must contain such a description of the judgment in one or more particulars as will identify the judgment intended, without the aid of extrinsic evidence.—Barr v. McGregor, 30 Tenn. (11 Humph.) 518.

[m] (Tenn. 1851) D. addressed a letter to a justice of the peace in the following words: "You are authorized to enter my name as stay or to a judgment given against A. and B., in favor of C., on the 22d of January, 1849." *Held*, that this was insufficient because the amount of the judgment was not mentioned.—Rhodes v Chappell, 30 Tenn. (11 Humph.) 527.

[n] (Tenn. 1854) Where a party, in the absence of the justice of the peace, wrote his name as a stayor of execution opposite the judgment in the docket, and the justice afterwards allowed the stay, the party so pledging himself cannot escape liability on account of the informality, as his clearly manifested intention to become bound, and the acceptance of him as surety by the justice, was sufficient.—Carmichael v. Hawkins, 34 Tenn. (2 Sneed) 405.

[o] (Tenn. 1857) Where a justice has received a stayor of execution under Act 1835, c. 17, § 10, its jurisdiction is gone, and if thereafter he receives another stayor, such stayor is not bound thereby.—Howard v. Brownlow, 36 Tenn. (4 Sneed) 548.

[p] (Tenn. 1858) Judgment having been obtained by the plaintiff against M., the defendant executed a written instrument directed to the justice, reciting, "You may set my name as stayor to a debt against M. for about $400, in favor of C., in the hands of W." *Held*, that on the proper identification of the judgment by parol evidence, the defendant was bound as stayor.—Cannon v. Trail, 38 Tenn. (1 Head) 282.

[q] (Tenn. 1858) "Sir: You will enter my name as stay of execution on five judgments that Morgan & Co. obtained before you on the 1st day of July, against Wood & Hart, for some eight or nine hundred dollars and costs of suits. This 3d day of July, 1857. J. L. Cooper. [Seal.]" *Held*, that the foregoing instrument, addressed to a justice of the peace, was not a sufficient authority to him to enter the signer's name as stayor.—Morgan v. Cooper, 38 Tenn. (1 Head) 430.

[r] (Tenn. 1859) Where it is said that the agreement to become stayor must be made before the justice of the peace at his office, nothing more is intended than that it must be made at the place where the justice performs the official act of rendering or accepting the confession of the judgment which is to be stayed. That is his office for that purpose and occasion, as much as is his ordinary place of doing business.—Morgan v. Coleman, 40 Tenn. (3 Head) 352.

[s] (Tenn. 1859) Since the place where a justice of the peace performs an official act is his office for that purpose, though it is without the territorial limits of his district, if a justice renders a judgment and receives stay surety at a place different from his usual place of business, the stayor is bound.—Cheatham v. Brien, 40 Tenn. (3 Head) 552.

[t] (Tenn. 1859) Where a party went to the magistrate's office and entered his name as stayor, after the expiration of the two days allowed by law, in the absence of the magistrate and plaintiff, it was *held* that the subsequent assent of the judgment creditor to the stay of execution, after the lapse of two days, and of the justice to accept the party as stayor, manifested by their acquiescence, was as effectual to bind him as if their previous assent to the act had been expressly given.—Neil v. Beaumont, 40 Tenn. (3 Head) 627.

[u] (Tenn. 1872) One who directed a justice of the peace to put his name down as stayor to a judgment, at a time when the justice was on his way home, and was about 300 yards from his office, is liable as stayor, though the name was signed in the absence of the papers in the cause, and in the absence of the justice's docket.—Skelton v. Baker, 54 Tenn. (7 Heisk.) 292.

[v] (Tenn. 1873) An agreement to become a stayor may be made before a justice outside of his office and be subsequently entered on his docket by him.—Smith v. Hart, 57 Tenn. (10 Heisk.) 468.

[w] (Tenn. 1884) One cannot be charged as stayor of a judgment against A. where, there being two suits, one against A., the other against A. and B., and the order specifying a judgment against A. and B., the judgment against A. was marked stayed by the justice, though at the time no judgment had been rendered in the suit against A. and B.—Shipley v. Goodwin, 81 Tenn. (13 Lea) 666.

[x] (Tenn. 1884) A stayor of execution issued on a justice's judgment may be liable, though the authority to enter his name as stayor was given verbally to the justice at a place other than his office or where the judgment was rendered.—Keeling v. Stokes, 82 Tenn. (14 Lea) 419.

§ 438. —— Entry, attestation, and approval.

[a] (Ind. 1841) Bail for the stay of execution of a judgment rendered by a justice of the peace must be entered on his docket, and is a matter which may be proved by a transcript, at least where the entry is not denied on oath.—Remington v. Henry, 6 Blackf. 63.

[b] (Ind. 1861) 2 Rev. St. 1852, p. 467, §§ 84, 87, provide that an execution defendant shall be entitled to a stay of 120 days by entering bail on the docket of the justice. *Held*, that an agreement with a constable levying execution, indorsed on the execution, but not entered on the justice's docket, without the plaintiff agreeing to stay execution, is without consideration, and void, though the plaintiff did

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not in fact stay execution.—McCormick v. Cassell, 16 Ind. 408.

[c] (Ind. 1873) An undertaking of replevin bail on a judgment rendered by a justice of the peace is void, if not attested by the justice.—Hougland v. State, 43 Ind. 537.

[d] (Ind. 1877) Under Act June 9, 1852, § 84, providing that execution may be stayed on a judgment by a justice of the peace on the entry of a recognizance in "substantially" the form therein provided, and setting forth the form showing that the recognizance should be attested by the justice, an entry of bail was not void, though not so attested.—Miller v. McAllister, 59 Ind. 491.

[e] (Ind. 1881) Where an undertaking of replevin bail is written on a separate piece of paper, and pinned to the leaf in the justice's docket on which the judgment appears, this is not "entering" such undertaking upon the docket within the meaning of 2 Rev. St. 1876, p. 632, and it is therefore, invalid.—Lockwood v. Dills, 74 Ind. 56.

[f] (Ind. 1881) The entry of a contract of replevin bail is not invalidated by the failure of the justice of the peace to note the required attestation.—Stone v. State, 75 Ind. 235; State v. Trout, Id. 563.

[g] (Mich. 1865) Under Comp. Laws, § 3804, allowing execution to be stayed by entering security on the docket of the justice, the attestation of the justice is indispensable to the validity of the undertaking, and an entry on the docket of the justice's approval of the surety is not a sufficient attestation.—Cox v. Crippen, 13 Mich. 502.

[h] (Mich. 1872) Where an entry of judgment was followed immediately by stay of execution on the justice's docket, and the justice's signature was appended but once and below them both, each having the same date, though dated separately, it was inferable from the docket that both entries were made as one transaction, and the signature was a good attestation of the stay.—Hollister v. Giddings, 24 Mich. 501.

[i] (Ohio, 1872) In case of an undertaking for the stay of execution, the right of the judgment creditor to an execution is not suspended till the entry thereof on the justice's docket.—Gaylor v. Hunt, 23 Ohio St. 255.

[j] (Tenn. 1859) The fact that the name of the stayor is not written in the most appropriate place on the justice's docket, or that the docket is not made out with all the formality prescribed by the act of 1835, will not vitiate the security, or discharge the stayor from his liability.—Lownes v. Hunter, 39 Tenn. (2 Head) 343.

[k] (Tenn. 1868) The justices' docket, after entry of a judgment, contained the words, "Stayed by N. M. Kimbrough." *Held*, that it sufficiently showed who the stayor of the execution was.—Anderson v. Kimbrough, 45 Tenn. (5 Cold.) 260.

§ 439. —— Liabilities on bonds.

[a] (U. S. 1835) Special bail for the stay of execution before a justice of the peace become liable to pay the debt in case it is not paid by the principal, or made out of his property, on the issuing of execution at the expiration of the stay, and nothing can discharge the bail except payment of the judgment.—Wilson v. Eads, Fed. Cas. No. 17,801a [Hemp. 284].

[b] (U. S. 1838) A justice of the peace cannot issue an execution, as on a supersedeas, on the mere indorsement on the back of the original judgment, that it was superseded.—Thomas v. Summers, Fed. Cas. No. 13,912 [5 Cranch, C. C. 434].

[c] (Ark. 1883) Notwithstanding Gantt's Dig. § 3782, providing that on stay of execution on a justice's judgment "such judgment shall be a lien upon all the personal property subject to execution," *held* that it could not have been the purpose of the legislature to make the stay bond more far reaching than the execution originally, and that, therefore, the lien of the bond would be confined to defendant's personalty in the township where the judgment was rendered.—Carroll v. Gillespie, 41 Ark. 468.

[d] (Ind. 1840) On sci. fa. against bail to stay execution, in which the form prescribed by statute is pursued, it cannot be objected that there was not an allegation against whom the judgment stayed was rendered.—May v. State, 5 Blackf. 442.

[e] (Ind. 1841) In a scire facias against bail for the stay of execution, he is not permitted to show that the officer's return to the execution against the principal debtor is false.—Remington v. Henry, 6 Blackf. 63.

[f] (Ind. 1841) A scire facias against a bail, which was issued by a justice of the peace in April, 1840, recited a judgment rendered by the justice against the original debtor in November, 1839, and alleged that the defendant, in November, 1840, entered himself as bail for the stay of execution on said judgment for 150 days, which period had long since elapsed. *Held*, that the scire facias could not be objected to on general demurrer, on account of the repugnant allegation as to the time of the entry of bail; and also, that a transcript of an entry of bail, of a different date from the objectionable time when the scire facias alleged the entry to have been made, could not be objected to as evidence on the ground of variance.—Remington v. Henry, 6 Blackf. 63.

[g] (Ind. 1842) In scire facias issued by a justice of the peace against bail entered on the justice's docket for the stay of execution, the plea was that the defendant did not become docket bail for the stay of execution, etc., as alleged in the scire facias. *Held*, that the plea was substantially a plea of non est factum, and, if sworn to, was admissible; but that, if not sworn to, it should be rejected on motion, under the statutes.—Merkle v. Bolles, 6 Blackf. 288.

[h] (Ind. 1843) The taking of a delivery bond of an execution debtor, and proceeding on it to judgment and execution, without obtaining satisfaction, are no bar to a scire facias against the replevin bail in the case.—Young v. Peery, 6 Blackf. 399.

[i] (Ind. 1844) It is not a sufficient objection for the bail to stay a justice's execution, that the judgment and execution against the principals were in their partnership name.—Elliott v. Doughty, 7 Blackf. 199.

[j] (Ind. 1844) To support a scire facias against bail entered for the stay of execution on a judgment of a justice of the peace, it must appear by the return of a fieri facias against the principal, that sufficient goods and chattels could not be found to satisfy the execution.—Elliott v. Doughty, 7 Blackf. 199.

[k] (Ind. 1844) A statute provided that after stay of execution the first process should be an execution against the goods and chattels of the defendant, and, if sufficient be not found and the writ be so returned, sci. fa. may issue against the bail. To a venditioni exponas, the constable returned, "$17.60 made by sale, and no more property on which to levy." *Held* that, as the venditioni exponas gave no authority to make a further levy, the latter part of the re-

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turn, viz., "and no more property on which to levy," was a nullity, and not sufficient to authorize the sci. fa.—Elliott v. Doughty, 7 Blackf. 199.

[l] (Ind. 1845) In scire facias issued by a justice of the peace for execution against replevin bail, the writ recited a judgment recovered by the plaintiff against A. before the justice in 1840; the defendant's entering himself as bail; the death of A. in 1840; the granting of administration of his estate to B.; the issuing of a scire facias by the justice against B., as administrator, and the revival of the judgment against him in 1844; the issuing of a fieri facias against B., and the return thereon of nulla bona, etc. *Held*, that the writ was sufficient.—Thompson v. Harbison, 7 Blackf. 495.

[m] (Ind. 1847) On a sci. fa. to have execution against bail for the stay of execution on a justice's judgment for $56.25, it appeared that a fi. fa. against the principal debtor had been returned, levied on certain goods which remained unsold, and that afterwards, in March, 1838, a venditioni exponas had been returned that the goods levied on were sold for $20, and that no other property could be found. It also appeared that an alias fi. fa. had issued and had been returned, "No property given upon which to levy." *Held*, that these facts did not show due diligence against the principal debtor.—Doughty v. Elliott, 8 Blackf. 405.

[n] (Ind. 1850) It is a fatal objection to a scire facias, issued by a justice of the peace against bail to stay an execution, that it does not show that the debt could not have been collected under the execution which issued against the principal.—Varner v. Crabb, 2 Ind. (2 Cart.) 168.

[o] (Ind. 1881) Mere delay in issuing execution from a justice's court will not release a replevin bail for the stay.—Eltzroth v. Voris, 74 Ind. 459.

[p] (N. Y. 1821) According to the true construction of the eighth section of the act extending the jurisdiction of justices of the peace (2 Rev. St. p. 225), the creditor who has recovered judgment in the justices' court, and taken a bond with security, according to the provisions of the act, must sue out execution after the expiration of three calendar months from the date of the judgment, and have a return of non est inventus thereon, before he can maintain an action on the bond; for the surety has no mode of complying with the alternative in the condition of the bond but by surrendering the debtor to the constable having an execution against him.—Tuttle v. Kip, 19 Johns. 194.

[q] (N. Y. 1830) The imprisonment of the defendant on a justice's execution may be pleaded in bar to an action on a bond given by the defendant and a surety to stay the execution for 90 days.—Sunderland v. Loder, 5 Wend. 58.

[r] (N. C. 1828) In an action against a surety for stay of execution, the want of the seal of a justice to the warrant, or the judgment thereon, cannot be objected to after verdict.—Humphreys v. Buie, 12 N. C. 378.

[s] (Ohio, 1833) Bail for stay of execution on a justice's docket will be subjected to execution unless he show good cause to the contrary.—Hall v. Kerr, Wright, 446.

[t] (Ohio, 1845) Where the plaintiff in execution on the return of a vendi with the property in it sold sends instructions to the justice that he need not issue another execution until further orders, it does not discharge the bail for stay of execution, though the execution debtor before the issue of another execution became insolvent.—Whiton v. Ripley, 1 Ohio Dec. 133.

[u] (Ohio, 1864) The remedy given by the statute (Swan & C. St. p. 800, § 172) on undertakings for stay of execution from a justice court is not exclusive, but cumulative only.—Duckwall v. Rogers, 15 Ohio St. 544.

[v] (Ohio, 1875) In a petition on an undertaking for stay before a justice, it is necessary to aver execution issued after stay expired, notwithstanding other executions may have been issued before such expiration, under proceedings to obtain additional security by virtue of Justices' Code, § 164.—Murphy v. Flowers, 27 Ohio St. 468.

[w] (Pa. 1831) Bail entered before a justice for stay of execution are entitled to 10 days, after service of the sci. fa., and before judgment, to surrender the principal.—Daly v. Dobson, 1 Ashm. 74.

[x] (Pa. 1836) The recognizance before a justice for stay of execution is one of technical special bail, and therefore sci. fa. cannot issue thereon until a ca. sa. has issued and been returned non est.—Spalding v. Nolcott, 5 Watts, 335.

[y] (Pa. 1846) Where bail for stay of execution, in a suit before a justice of the peace, reside in another county or city, the sci. fa. against such bail must be issued by an alderman or justice having jurisdiction within the city or county where the bailor himself resides.—Howell v. Cozens, 3 Clark, 410, 5 Pa. Law J. 431.

[z] (Tenn. 1873) The acceptance by a judgment creditor of the benefits of a deed of trust made by the judgment debtor does not release the stayor on the judgment recovered in justice court, though the time given the trustee to wind up the trust extends beyond the stay.—Wood v. McFerrin, 61 Tenn. (2 Baxt.) 493.

§ 440. Quashing, vacating, and other relief.

Equitable relief against execution on account of defects in judgment, see ante, §§ 402–407.
Stay of execution, see ante, §§ 436–439.

[a] (Ark. 1879) Equity will not enjoin further proceedings on an execution issued by a justice of the peace, after an appeal has been taken from his judgment to the circuit court.—Scanland v. Mixer, 34 Ark. 354.

[b] (Ga. 1886) A justice of the peace having no jurisdiction of an action for suing out a garnishment maliciously and without probable cause, his judgment in such action may be arrested and set aside on an affidavit of illegality to the execution issuing thereon.—Williams v. Sulter, 76 Ga. 355.

[c] (Ga. 1886) Where a justice is disqualified unless the parties consent to his acting, a judgment rendered by him is only voidable, and an affidavit of illegality will not lie.—Rogers v. Felker, 77 Ga. 46.

[d] (Ga. 1891) Code, § 3666, provides that where an execution is levied and an affidavit of illegality is filed thereto, the officer shall return the execution, affidavit, and bond to "the court from which the execution issued," and the issue of illegality shall be tried in that court. *Held*, that an execution issued from a justice court should be returned to such court, and not to the superior court, for trial of the issue of exemption of the land as a homestead.—Moore v. O'Barr, 87 Ga. 205, 13 S. E. 464.

[e] (Ind. 1895) An action will lie to enjoin a sale under execution, based on the mere finding of a justice of the peace, without any judgment having been rendered thereon.—Sare v. Butcher, 141 Ind. 146, 40 N. E. 749.

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[f] (La. 1846) Where the value of property seized under a fi. fa. from a parish court exceeds the amount to which its jurisdiction is limited, an injunction may be obtained by one claiming to be the owner of the property, from a district court.—Stroud v. Humble, 1 La. Ann. 310.

[g] (Mo. 1894) The judgment of a justice having jurisdiction of the parties and the subject-matter cannot be collaterally attacked on motion to quash the execution on the ground that the interest allowed in the judgment was excessive, the remedy for such error being by appeal.—Kansas City ex rel. Pryor v. Winner, 58 Mo. App. 299.

[h] (N. Y. 1856) Where plaintiff was endeavoring by execution to enforce a justice's judgment which had been paid and satisfied, and, from the want of a transcript of the record, the county court had no jurisdiction of a motion for relief, or power to issue a judge's order, and plaintiff in the execution being insolvent, the defendant, if compelled to pay the same, would have no adequate remedy, and could have no action against the officer making service of the execution, the same being regular on its face, and issued on a judgment obtained in due form, equity might interfere to restrain, by injunction, further proceedings on the part of the plaintiff in the execution, and set aside the execution, and decree the judgment satisfied.—Mallory v. Norton, 21 Barb. 424.

[i] (Pa. 1866) Where a fi. fa. was issued against one defendant on a joint judgment, the execution will be set aside as the execution must follow the judgment.—Saul v. Geist, 1 Woodw. Dec. 306.

[j] (Pa. 1873) Under Act Assem. Feb. 26, 1855, prohibiting the sale of intoxicating liquors on Sundays, declaring that the penalty for a violation of its provisions shall be recovered as debts of a like amount are recoverable, an execution was issued against defendant for the recovery of the amount of such a penalty, not by or in the name of the commonwealth, but reciting that P. had obtained a judgment against the defendant for the amount of such penalty. The record returned by the magistrate showed no such judgment in favor of P. *Held*, on certiorari to set aside the execution, that no reasonable presumption in favor of the justice would be violated in setting the same aside.—Commonwealth v. Myers, 5 Lanc. Bar, No. 2, p. 1.

[k] (Pa. 1887) An execution issued against the separate estate of a married woman upon the finding of a justice of the peace will not be summarily stricken off, nor the collection thereof enjoined; the proper remedy being by appeal.—Fenstermacher v. Xander, 116 Pa. 41, 10 Atl. 128.

[l] (Tex. 1856) A. recovered a judgment against B., in a justice's court, on a store account for $75. B., alleging that A. was indebted to him in the sum of $180 on a promissory note which he could not have pleaded in offset in a justice's court, applied for an injunction to restrain him from levying his execution until he could recover a judgment on the note, when it could be set off. *Held*, that the petition did not state sufficient cause for an injunction. Insolvency, or special circumstances of hardship, should appear.—Brady v. Hancock, 17 Tex. 361.

§ 441. Claims by third persons.

Disqualification of justice as affecting right of other justice to take jurisdiction of claim, see ante, § 206 [g].

Jurisdiction of claims involving title to land, see ante, § 84 [a].

[a] (Ala. 1840) On trials of the right of property levied on under a justice's execution, no bond is required to be given by the claimant.—Powell v. Gray, 1 Ala. 77.

[b] (Ala. 1890) Upon the levy of a justice's execution on personal property claimed by one not a party to the writ, Code 1886, §§ 3365, 3368, provide that said claimant may try the title, upon making affidavit of title, and executing a bond with sufficient sureties. If judgment is against him, and he fails to deliver the property within 10 days, the bond is returned "forfeited." *Held* that, before judgment can be rendered and execution issued against claimant and his surety, there must have been a trial of right to the property, and then a return of the bond indorsed "Forfeited."—Foust v. Letson, 90 Ala. 539, 8 South. 59.

[c] (Ala. 1891) The issuance of execution against sureties on a forfeited claim bond by a justice of the peace does not operate as a judgment.—Weedon v. Clark, 94 Ala. 505, 10 South. 307.

[d] (Ga. 1858) The statute requires that claims of slaves levied on by fi. fa. issued by a justice shall be returned to the next term of the superior or inferior court, whichever may first occur.—Cottle v. Dodson, 25 Ga. 633.

[e] (Ga. 1886) Two executions on different judgments rendered by a justice of the peace were levied on different property, which was claimed by one claimant, who executed one bond for the property held under both executions. The amount of the judgments and the value of the property, when aggregated, was beyond the jurisdiction of the justice. *Held*, that the judgment of the justice in the claim proceeding was absolutely void, nor was it made valid by an appeal, which was dismissed.—Yon v. Baldwin, 76 Ga. 769.

[f] (Ga. 1886) Under Act Oct. 16, 1879, providing that a chattel mortgage may be foreclosed by any justice of the peace or notary public who is ex officio justice of the peace in the county were the mortgagor resides, if a resident of the state, a claim of property levied on, under a mortgage fi. fa. issued by a justice, must be heard in the court that rendered the judgment.—Ridling v. Stewart, 77 Ga. 539.

[g] (Ill. 1894) A case for the trial of "right of property" before a justice, under Rev. St. c. 79, §§ 98–103, should be docketed as a proceeding between the claimant and the plaintiff in the judgment on which the execution issued, and not so docketed as to make the constable defendant.—Aldridge v. Glover, 53 Ill. App. 137.

[h] (Ind. 1840) The day fixed by a justice of the peace for the trial of the right of property in goods taken in execution must be within five days after the claim to the goods is filed. In reckoning the time, the day on which the claim was filed must be counted.—Long v. McClure, 5 Blackf. 319.

[i] (Ind. 1843) Under Rev. St. 1838, p. 490, providing that whenever an execution is levied on personal property of a third person he may file with any justice a claim in writing, a justice of the peace is authorized to try the right of property on which an execution has been levied, though the value of the property exceeds $100.—Hanna v. Steinberger, 6 Blackf. 520.

[j] (Ind. 1856) The trial of the right of property, authorized by 2 Rev. St. p. 493, can only be had where a justice has issued the execution; and the claimant must file his complaint before the same justice.—Matlock v. Strange, 8 Ind. 57.

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[k] (Ind. 1859) The right of property taken on an execution issued by a justice of the peace may be tried before another justice, irrespective of the question of its value.—Griffin v. Malony, 13 Ind. 402.

[l] (N. J. 1891) Revision, p. 550, § 59, provides that when a constable, under execution out of a justice's court, shall levy upon property, and any person other than defendant shall file with him a claim in writing, he shall delay sale for 10 days, and within that period the claimant may apply to a justice of the peace for a venire to summon a jury to try the right of the claimant to the property. *Held*, that the claimant must file with the justice a claim describing the property levied upon, and the facts which confer jurisdiction on the justice to issue a venire; and if the plaintiff in execution, on the return day of the venire, does not challenge the existence of the jurisdictional facts, but obtains an adjournment, and afterwards permits the jury to be sworn, and the trial to proceed, he will be presumed to have admitted such jurisdictional facts.—Folwell v. Fuller, 53 N. J. Law (24 Vroom) 572, 22 Atl. 345.

[m] (N. J. 1891) Revision, p. 550, § 59, provides that when a constable, under an execution out of a justice's court, shall levy upon property, and any person other than defendant shall file with him a claim in writing, he shall delay sale for 10 days, and within that period the claimant may apply to a justice of the peace for a venire to summon a jury to try the right of the claimant to the property. *Held*, that the claimant on trial before the jury need not prove the execution and levy, the only question to be considered by the jury being the title to the property.—Folwell v. Fuller, 53 N. J. Law (24 Vroom) 572, 22 Atl. 345.

[n] (N. Y. 1831) A constable may summon a jury to try the right of property seized by him on execution, before he makes his return.—Platt v. Sherry, 7 Wend. 236.

[o] (Ohio. 1860) The provisions of the Code for trials of the right to property seized in execution do not apply to seizures by a constable on executions issued upon judgments of justices of the peace, which are to be regulated by sections 101–103 of the act prescribing the jurisdiction and procedure of justices of the peace, etc. (Swan & C. St. p. 787).—Armstrong v. Harvey, 11 Ohio St. 527.

[p] (Ohio. 1860) A sale by a constable of property seized in execution, pending a trial under the statute of the right thereto, before a justice of the peace, will not oust the jurisdiction acquired by such justice, but he may proceed to a final hearing as if such sale had not been made.—B'Hymer v. Sargent, 11 Ohio St. 682.

[q] (Tex. 1854) A claimant of property levied on by virtue of an execution from a justice cannot institute an inquiry into the merits of the judgment, on a trial of the right of property.—Haley v. Villeneuve, 11 Tex. 617.

[r] (Tex. 1881) A claimant in the trial of right of property levied upon under an execution issued from a justice court of one county to another county, without the certificate of the county clerk, as provided by Rev. St. art. 1633, cannot take advantage of such omission in such proceedings.—Seligson v. Staples, 1 White & W. Civ. Cas. Ct. App. § 1070.

§ 442. Sale.

Enjoining sale, see ante, § 440 [e].

Jurisdiction of justice in action against officer for failure to sell, see ante, § 126 [a].

—— *in action against purchaser, see* ante, § 111 [b].

—— *of proceeding by purchaser to obtain possession, see* ante, § 90 [g].

Liability of justice for issuance of order of sale on void judgment rendered in good faith, see ante, § 40.

[a] (Ala. 1841) Where a constable, in the absence of fraud on the part of the purchaser, sells more property than is necessary to satisfy an execution, the sale as to the excess is not absolutely void, though under some circumstances it may be set aside.—Jones v. Davis, 2 Ala. 730.

[b] (Ala. 1876) Describing a town lot by name of street and street number is a sufficient description for an order of sale under a justice's execution.—McConnaughy v. Baxter, 55 Ala. 379.

[c] (Ala. 1890) Under Code, § 3364, providing that a justice's judgment cannot be revived by scire facias after five years from its rendition, and section 2615, subd. 9, declaring that no action can be brought on such judgments after six years, an execution issued more than five and less than six years from the rendition of the judgment is irregular, but not void, and the holder of a chattel mortgage cannot attack collaterally a sale thereunder to a stranger.—Draper v. Nixon, 93 Ala. 436, 8 South. 489.

[d] (Ark. 1886) A justice of the peace has no authority to set aside a sale made under execution.—Dunnagan v. Shaffer, 48 Ark. 476, 3 S. W. 522.

[e] (Cal. 1893) Where execution is issued on a judgment in justice's court after an appeal has been taken therefrom to the superior court, a purchaser at constable's sale under such execution acquires no title to the property purchased.—Bullard v. McArdle, 98 Cal. 355, 33 Pac. 193, 35 Am. St. Rep. 176.

[f] (Cal. 1893) The facts that such appeal was dismissed by the superior court, and the order of dismissal filed in the justice's court, and that a subsequent order of the superior court vacating the order of dismissal was not filed in the justice's court, will not afford such purchaser protection, since he purchased at his peril.—Bullard v. McArdle, 98 Cal. 355, 33 Pac. 193, 35 Am. St. Rep. 176.

[g] (Fla. 1885) Where a judgment of a justice's court is against the "Florida Central Railroad," and real estate belonging to the "Florida Central Railroad Company" is sold under an execution issued on said judgment, such sale is invalid to devest title of the "Florida Central Railroad Company," in the absence of proof showing that the last-named company was the real defendant meant in said judgment.—L'Engle v. Florida Cent. & W. R. Co., 21 Fla. 353.

[h] (Ga. 1849) Where a constable levies a justice's court fi. fa. upon land, and delivers the same to the sheriff for the purpose of sale, as provided by law, such sheriff is lawfully seised of the land, to sell the same and convey title to the purchaser thereof.—Fretwell v. Morrow, 7 Ga. 264.

[i] (Ga. 1884) It will be presumed that a justice who ordered a sale of property levied on under execution required proof of notice to the defendant.—Wilson v. Garrick, 72 Ga. 660.

[j] (Ill. 1887) An order denying a petition claiming priority of lien, under a justice's judgment, on the proceeds of a sale under execution, will be affirmed when no valid execution in favor of the petitioner is described or set out in the petition, or appears in the record.—Mackey v. McCaffrey, 23 Ill. App. 595.

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[k] (Ind. 1860) That the defendant in a justice's execution was not a resident of the county, and did not appear to the action, does not affect the title of the sheriff's vendee where it does not appear but that he was duly served with process.—Easterday v. Joy, 14 Ind. 371.

[l] (Ind. 1864) Where the record of a constable's sale under a justice's execution is silent as to whether due notice was given of the sale or not, the court will presume that the constable did his duty.—Culbertson v. Milhollin, 22 Ind. 362, 85 Am. Dec. 428.

[m] (Iowa, 1880) The rule that a valid sale may be made under a lifeless execution, which was levied in its lifetime, is the same in case of executions issued by a justice of the peace, required by Code 1873, § 3572, to be renewed from time to time, as in case of executions issued from courts of record, returnable within a specified time.—Walton v. Wray, 54 Iowa, 531, 6 N. W. 742.

[n] (Kan. 1864) Service of summons in an action in a justice's court is necessary to a valid judgment, and a sale of property under an execution issued on judgment without such service could not confer title.—Case v. Hannahs, 2 Kan. 490.

[o] (Ky. 1836) An execution from a justice of the peace does not authorize a sale of land. A sale by the sheriff, under such authority, is void.—Griffith v. Dicken, 34 Ky. (4 Dana) 561.

[p] (La. 1874) A justice of the peace has no authority to appoint an appraiser in behalf of the defendant under execution at a forced sale.—Gallagher v. Abadie, 26 La. Ann. 343.

[q] (Md. 1800) Where an execution issued by a justice of the peace on a judgment recovered on warrant was void for want of a return day, a sale of land made in pursuance thereof passed no title.—West's Lessee v. Hughes, 1 Har. & J. 6.

[r] (Md. 1868) Where land is sold under execution issued by a justice of the peace, in which case, under the statute, title does not pass until the sale is ratified, a description of the land in the writ, return, and schedules of the officer, which is void for uncertainty, is not cured by the officer's deed to the purchaser.—Dorsey's Lessee v. Dorsey, 28 Md. 388.

[s] (Mo. 1879) Where title to property purchased under an execution sale under a justice's judgment is attacked, it is for the purchaser to show the jurisdiction.—York v. Roberts, 8 Mo. App. 140.

[t] (Neb. 1888) An execution issued on a judgment rendered in a nonterm case in the county court falls within the provisions of Code Civ. Proc. § 1067 et seq., relating to executions issued by justices, and the sale need only be advertised at "four of the most public places within the precinct where such property is seized."—Johnson v. Walker, 23 Neb. 736, 37 N. W. 639.

[u] (N. Y. 1821) Where the plaintiff purchased of an officer, at a sale under an execution issued by a justice of the peace, all the title and interest in a lease for five years, and the officer refused to execute a conveyance of the premises, or to return the money paid, there was a failure of consideration, as such interest could not be sold under a justice's execution, and the plaintiff was entitled to recover back the money.—Putnam v. Westcott, 19 Johns. 73.

[v] (N. Y. 1830) A slight variance between the execution and the judgment, as to the amount rendered before a justice of the peace, will not affect the right of a purchaser of property sold by virtue of such execution.—Jackson v. Page, 4 Wend. 585.

[w] (N. Y. 1831) In a suit for the recovery of property purchased at a constable's sale under an execution on a justice's judgment, rendered in a cause commenced by attachment, evidence that a copy of the attachment was not left at the last place of abode of the defendant is not admissible.—Case v. Redfield, 7 Wend. 398.

[ww] (N. Y. 1831) A plaintiff in a judgment in a justice's court, which judgment is void for want of a sufficient specification, becoming a purchaser under an execution issued on such judgment, is not entitled to be considered as a bona fide purchaser.—Case v. Redfield, 7 Wend. 398.

[x] (N. Y. 1887) One cannot acquire an interest in land under a constable's sale on a justice's execution that would make him a necessary or proper party to an action of foreclosure.—Batterman v. Albright, 6 N. Y. St. Rep. 334.

[xx] (N. C. 1842) When an officer has levied a justice's execution on land, and returned it to his court with his return of a copy of the notice given to defendant together with his official certificate that he has served it, it is not necessary that the court, in an order for the sale of lands so returned levied by the constable, should set forth that the notice had been proved to them to have been previously given.—Davis v. Abbott, 25 N. C. 137.

[y] (Pa. 1889) The title of a purchaser at execution sale under a judgment rendered by a justice of the peace is not affected by a previous appeal taken by defendants, where he has no notice thereof, and the justice refuses to stay the execution, in which refusal defendants acquiesce until after the sale.—Wellendorf v. Kramer, 129 Pa. 547, 18 Atl. 525.

[yy] (S. C. 1878) A constable's sale under a junior execution issued by a trial justice will not devest the lien of a senior execution from the court of common pleas.—Carrier v. Thompson, 11 S. C. 79.

[z] (Tenn. 1844) A sale is not invalid where made on execution issued the same day judgments were rendered before a justice of the peace, though the affidavit authorizing the issuance of the execution at such time was not sufficient.—Stanley v. Nelson, 23 Tenn. (4 Humph.) 484.

[zz] (Tex. 1881) A justice judgment by default, based on a citation by publication made on an affidavit that defendant's residence was unknown to the affiant, being void on the face of the record, an execution sale thereunder conveyed no title.—Stegall v. Huff, 54 Tex. 193.

§ 443. Return.

Jurisdiction of justice in action against officer for false return, see ante, § 126 [a].

Liability of justice to constable for failure to enter return, see ante, § 44.

[a] (Ark. 1886) Failure to make return of nulla bona on an execution from a justice's court before transcript is filed in circuit clerk's office, as required by statute, is an irregularity which can be taken advantage of only in a direct proceeding.—Webster v. Daniel, 47 Ark. 131, 14 S. W. 550.

[b] (Ark. 1895) Mansf. Dig. § 5316 (Sand. & H. Dig. § 6003), requires every officer, to whom a writ is delivered, to make return thereof in writing, and sign his name to such return. *Held*, that the filing by a constable of an execution with the justice who issued it, with an oral report that it was still unsatisfied, which report the justice entered in his docket,

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was not a return of the execution.—Jones v. Goodbar, 60 Ark. 182, 29 S. W. 462.

[c] (Ga. 1851) Where a constable, who did not write a good hand, requested a justice of the peace, in his presence, to make a return of "No property" on two justices' court fi. fas., he showing the return to be true of his own personal knowledge, it was *held* that the return was to be considered as the act of the constable himself, and valid in law.—Ellis v. Francis, 9 Ga. 325.

[d] (Ga. 1896) An execution, signed by a justice of the peace, commanding the levying officers addressed to have the money "at our next justice court," was returnable to the justice's court of the district in which that magistrate resided.—Adams v. Goodwin, 99 Ga. 138, 25 S. E. 24.

[e] (Ill. 1862) A constable must, within the time appointed by law, return an execution with an indorsement of his doings thereon, for the truth of which he is responsible; but no particular form of indorsement is required.—Calhoun County Court v. Buck, 27 Ill. (17 Peck) 440.

[f] (Ind. 1837) The day on which an execution issues is included in the time which it has to run.—Ryman v. Clark, 4 Blackf. 329.

[g] (Ind. 1843) A constable having in his hands a justice's fi. fa. issued under the statute of 1842 may, on finding no goods on which to levy, return the execution before the return day.—Middlewood v. Nevitt, 7 Blackf. 51.

[h] (Ind. 1873) When property has been levied on, but not sold, and the time for completing the return on an execution has not arrived, and the constable still retains such execution, no objection can be taken to the validity of the levy on account of the return not being signed by the constable.—Thurston v. Boardman, 1 Wils. 433.

[i] (Mich. 1867) A justice's execution may be lawfully returned by the officer on the sixtieth day from its date, that being the return day, unless such day is Sunday, in which case a return would be void.—Peck v. Cavell, 16 Mich. 9.

[j] (Mo. 1865) A justice of the peace before whom a constable and his sureties are sued for not returning an execution within 90 days may permit said officer to amend his return.—Corby v. Burns, 36 Mo. 194.

[k] (Mo. 1894) Under Rev. St. 1889, § 6302, making executions issued by a justice returnable in 90 days, a prior return is premature.—Huhn v. Lang, 122 Mo. 600, 27 S. W. 345.

[l] (N. J. 1885) The return of a constable on an execution issued out of the court for the trial of small causes, "No property found whereon to levy," does not meet the requirement of the statute to make docketing proceedings valid.—Matthews v. Miller, 47 N. J. Law (18 Vroom) 414, 1 Atl. 464.

[m] (N. J. 1889) The return of a constable on an execution issued out of the court for the trial of small causes, "No property found whereon to levy," is sufficient compliance with the statute requiring a return that he "could not find any personal property of the defendant on which to levy."—Dumas v. Matthews, 51 N. J. Law (22 Vroom) 562, 19 Atl. 265, following Pioneer v. Bagnall (1886) 49 N. J. Law (20 Vroom) 226, 7 Atl. 858.

[n] (N. C. 1824) Under the act of 1803, an officer cannot return an execution issued by a justice of the peace, unexecuted, in less than three months.—Nesbitt v. Ballew, 10 N. C. (3 Hawks) 57.

[o] (N. C. 1838) Justices' executions are by law made returnable in three months from their date, but it is not necessary that they should be returned on the last day of the three months. They may be returned sooner, and aliases taken out and acted upon.—Islay v. Stewart, 20 N. C. 297.

[p] (N. C. 1842) Where an officer has levied a justice's execution on land and returned it to court, his return of a copy of the notice given to the defendant, with his official certificate that he has served it, is sufficient prima facie evidence of such service.—Davis v. Abbott, 25 N. C. 137.

[q] (N. C. 1854) The county court cannot authorize an amendment of the return of a levy of a justice's execution on land, after its sale.—Gibbs v. Brooks, 46 N. C. 448.

[r] (Ohio, 1829) A constable has a right to make a return on an execution issued by a justice of the peace, any time before the expiration of 30 days.—Hill v. Kling, 4 Ohio (4 Ham.) 135.

[s] (Pa. 1843) A constable's return to an execution must be in writing.—Shover v. Funk, 5 Watts & S. 457.

[t] (Pa. 1845) A return of "Served," by a constable, to an execution, is insufficient, under Act 1810, § 12; and on a scire facias against the constable, under the act, and a plea of nul tiel record, judgment was entered for the plaintiff.—Burkholder v. Keller, 2 Pa. (2 Barr) 51.

§ 444. Payment, satisfaction, and discharge.

Liability of justice for refusal to pay over amount received on execution, see ante, § 41.

—— *of sureties on justice's bond for money paid him on execution sale under a void judgment, see* ante, § 57.

Of judgment, see ante, § 417.

Opening fi. fa. satisfied by sale of land as involving title, see ante, § 84 [e].

[a] (Conn. 1872) Money paid on an execution erroneously issued by a justice of the peace may be recovered in an action brought therefor.—Lewis v. Hull, 39 Conn. 116.

[b] (Ohio, 1864) By virtue of the provisions of Code Civ. Proc. § 463, as applied under the authority contained in Justices' Code, § 202, after the issuing of an execution against property, on a judgment before a justice of the peace, any person indebted to the judgment debtor may pay to the constable the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the constable's receipt will be a sufficient discharge for the amount so paid, or directed to be credited by the judgment creditor on the execution.—Hallanan v. Crow, 15 Ohio St. 176.

[c] (Pa. 1848) An execution issued by a justice and returned levied, but not sold for want of time, and alias stayed, and a pluries issued nine years afterwards, returned "No goods," are no evidence for the defendant of the payment of the debt.—Davids v. Harris, 9 Pa. (9 Barr) 501.

[d] (S. D. 1896) Comp. Laws, pt. 2, c. 13, § 5124, provides that after the rendition of a judgment, any person indebted to defendant in execution may pay to the "sheriff" the amount of such indebtedness, or so much as is necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge therefor. Section 6117 makes the provisions of part 2, c. 13, relating to the levy and sale or delivery

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of personal property, so far as the same are applicable, apply to executions issued by a justice of the peace. *Held*, that section 5124 applies to payments made to a constable on an execution issued by a justice of the peace.—Bedford v. Kissick, 8 S. D. 586, 67 N. W. 609.

§ 445. Supplementary proceedings.

[a] (Mich. 1879) In proceedings before a justice under the fraudulent debtor's act (Comp. Laws, § 7180), where the debtor is examined in his own behalf, it is not necessary that he subscribe such testimony, the statute requiring such subscription only where he is examined by the complainant.—Willison v. Desenberg, 41 Mich. 156, 2 N. W. 201.

[b] (N. Y. 1860) As a justice's judgment for less than $25 cannot become a lien on realty, it does not afford foundation for supplementary proceedings.—Vulte v. Whitehead, 2 Hilt. 596.

[c] (N. Y. 1890) Supplementary proceedings on a judgment rendered by a justice of the peace are not an action within the meaning of Code Civ. Proc. § 382, subd. 7, which provides that an action on a judgment rendered in a court not of record must be commenced within six years after its rendition.—Bolt v. Hauser (Co. Ct.) 19 Civ. Proc. R. 7, 10 N. Y. Supp. 397.

§ 446. Execution against the person.

As satisfaction of judgment, see ante, § 417 [m].

Against body of juror to collect fine for non-attendance, see "Jury," vol. 31, cc. 568, 569, § 383.

Issuance after prohibition from court, see "Prohibition," II.

[a] (Ga. 1859) A ca. sa. having issued from a justice's court, and defendant having been arrested thereon, he gave a bond returnable to the next term of the inferior court to take the benefit of the insolvent debtor's act. At that term he was surrendered by his bail, who tendered a receipt for the original note on which the judgment was rendered, and moved that the principal be discharged. The judgment had been sold as the property of the estate of the payee by his administrator, and bought by a third person. *Held*, that the inferior court had no jurisdiction to try the title to the judgment.—Culberson v. Gray, 27 Ga. 520.

[b] (Ill. 1851) Except in cases of judgments in actions of trespass or trover, a justice of the peace cannot issue an execution against the body of a defendant before an execution against the property has been issued and returned unsatisfied.—McDonald v. Wilkie, 13 Ill. (3 Peck) 22, 54 Am. Dec. 423.

[c] (Ill. 1861) Where a justice issues a capias on oath, an affidavit is not necessary.—Outlaw v. Davis, 27 Ill. (17 Peck) 467.

[d] (Ill. 1882) Under Const. art. 6, § 21, providing that the jurisdiction of justices of the peace and police magistrates shall be uniform, and Rev. St. 1874, c. 79, §§ 14, 83, giving justices of the peace jurisdiction of cases for the violation of the ordinances of towns, and authorizing them to issue execution against the body of defendant on judgments in actions of tort, the police magistrate of a town may issue process against the body of a defendant to satisfy a judgment against him for the violation of an ordinance.—Brown v. Jerome, 102 Ill. 371.

[e] (Ind. 1832) A justice of the peace, having rendered judgment for a certain sum against a defendant, issued an execution thereon, commanding the constable to levy the amount of the defendant's goods, and, for want of goods, to take his body, etc. *Held*, that this writ gave no authority to the constable to arrest the defendant, nor to the sheriff to receive or detain him in custody.—Gwinn v. Hubbard, 3 Blackf. 14.

[f] (Ind. 1836) An insolvent debtor, imprisoned on an execution issued by a justice of the peace, must make his application for relief from imprisonment to two justices of the peace.—Hutchen v. Niblo, 4 Blackf. 148.

[g] (Ind. 1842) A debtor arrested on writ of capias ad satisfaciendum could not, under the statute of 1838, be discharged from custody by delivering to the constable a schedule of property situate out of the state, and swearing that he had no other property subject to execution.—Webster v. Farley, 6 Blackf. 163.

[h] (Ind. 1842) It is the magistrate's duty, before whom the debtor makes oath in order to be discharged under the statute of 1838, to reduce the oath to writing, to cause the debtor to sign it, and to hand it over to the officer making the arrest, who should make it a part of his return, and append it to the writ.—Webster v. Farley, 6 Blackf. 163.

[i] (Ind. 1842) A capias ad satisfaciendum commenced as follows: "State of Indiana, Henry County, ss. To Wm. O. Webster, Constable," etc. *Held*, that this commencement of the writ was sufficient.—Webster v. Farley, 6 Blackf. 163.

[j] (Ind. 1845) A ca. sa. issued under the statute of 1838 on a justice's judgment, without a previous return of nulla bona to a fi. fa., or an affidavit filed as prescribed by the statute, is illegal.—Ezra v. Manlove, 7 Blackf. 389; Gresham v. Bowen, Id. 423.

[k] (N. H. 1832) Where a judgment has been rendered by a justice of the peace against any person for neglect of military duty, no execution is to be issued against his person until the expiration of two days after the day of rendering the judgment, exclusive of Sunday. Such execution is not, however, void; and if not executed until after the expiration of the two days, and then the person against whom it issued is arrested on the execution, the arrest is lawful.—Scribner v. Whitcher, 6 N. H. 63, 23 Am. Dec. 708.

[l] (N. J. 1816) A bond taken by a constable after the defendant is in custody on execution, for his delivering himself up at a future time, is void.—Fanshor v. Stout, 4 N. J. Law (1 Southard) 319.

[m] (N. Y. 1814) Where a prisoner, in execution or final process issued from a justice's court, makes and produces to the sheriff an affidavit, under 1 N. R. L. p. 394, that he has a family, is not a freeholder, and has been in prison for more than 30 days, the sheriff is bound to discharge him, without inquiring into the truth of the affidavit.—Lohnis v. Jones, 11 Johns. 174.

[n] (N. Y. 1814) And if the prisoner in execution has given a bond for the jail limits, his discharge as a poor debtor having a family and being imprisoned more than 30 days is not a breach of the condition.—Lohnis v. Jones, 11 Johns. 174.

[o] (N. Y. 1816) Under 1 N. R. L. p. 391, § 11, providing that if defendant shall have a family for which he provides, and is not a freeholder, the justice shall indorse such fact on the execution, which shall exempt the defendant from imprisonment on payment in monthly installments, a defendant is entitled to such an indorsement, though he resides in a different county from that in which the judgment was rendered.—Spafford v. Griffen, 13 Johns. 328.

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[p] (N. Y. 1817) Where a defendant in an action in a justice court claims exemption from imprisonment, under the provisions of 1 N. R. L. p. 393, on the ground that he has a family, and is not a freeholder, he must offer proof of the fact at the hearing of the cause; it is too late after judgment.—Degear v. Nellis, 14 Johns. 382.

[q] (N. Y. 1822) A prisoner in execution on a judgment in a justice's court, under the act "to extend the jurisdiction of justices of the peace" above $25, is entitled to a discharge, on making an affidavit, in the manner directed by the act for the recovery of debts to the value of $25, that he is not a freeholder, and has a family within the state, and has remained in prison for more than 30 days. The affidavit is sufficient if it states that he had a family at the time, without stating that he had a family when the judgment was rendered against him. —Coman v. Merrill, 19 Johns. 277.

[r] (N. Y. 1829) A justice's execution may be against the goods and person of the party against whom it issues, in the same process, in cases where the party is subject to imprisonment.—Taylor v. Fuller, 3 Wend. 403.

[s] (N. Y. 1829) An oath is not necessary to justify the issuing of an execution against a person who is neither a freeholder nor has a family.—Taylor v. Fuller, 3 Wend. 403.

[t] (N. Y. 1829) The oath enabling a party to demand an execution against the person within the period fixed by statute must be made while the parties are still before the justice, so that security may be given.—Taylor v. Fuller, 3 Wend. 403.

[u] (N. Y.) It is the duty of the constable, to whom an execution is delivered, in all cases to search for property before he takes the body of the defendant.—(1830) Hollister v. Johnson, 4 Wend. 639; (1834) Barhydt v. Valk, 12 Wend. 145, 27 Am. Dec. 124.

[v] (N. Y. 1834) A party against whom a judgment for costs is rendered, on the reversal of a justice's judgment, is entitled to the protection of the act abolishing imprisonment for debt, and is not subject to arrest if the action, in which the judgment in his favor was rendered, was founded on contract.—Phelps v. Barton, 13 Wend. 68.

[w] (N. Y. 1896) Under Code Civ. Proc. § 3026, authorizing execution against a male person on a justice's judgment against him in an action (Id. § 2895, subd. 2) for injury to property, "including the wrongful taking, detention, or conversion of personal property," execution may issue against the person, in supplementary proceedings on a justice's judgment, for money which defendant received for plaintiff, with his authority, but failed to pay over to him as he had covenanted.—Farrelly v. Hubbard, 148 N. Y. 592, 43 N. E. 65, reversing (1895) 84 Hun, 391, 32 N. Y. Supp. 440.

[ww] (N. C. 1839) A precept from a single justice of the peace, indorsed on a magistrate's judgment, and directed to the sheriff, commanding him "to take the body" of the defendant, 'and him safely keep until he is discharged as the law directs," though an informal, is yet a valid, ca. sa., and will justify the sheriff in making an arrest under it.—State v. Reeves, 20 N. C. 327.

[x] (N. C. 1850) A ca. sa. issued by a justice of the peace in Buncombe county should be returnable to the county court for that county, and not to the superior court.—Fox v. Wood, 33 N. C. 213.

[xx] (Pa. 1871) Where the record of a justice shows that an action was begun in tort, but ended in debt or assumpsit, an execution against the body of the defendant is improper. —Weissbrod v. Gelder, 3 Leg. Gaz. 260.

[y] (S. C. 1840) A justice of the peace, having jurisdiction only of actions under £20, has no authority to issue a capias ad satisfaciendum, under Act 1747 (Pub. Laws, p. 214), providing that no such writ or execution against the body of a defendant shall issue out of any court for any debt or damages under £20.— State v. Cureton, Cheves, 235.

[yy] (Tenn. 1834) A ca. sa. issued by a justice of the peace for a sum within his jurisdiction, returnable to the county court, is void.—Buford v. Crook, 14 Tenn. (6 Yerg.) 523.

[z] (Tenn. 1836) A ca. sa. issued from a justice of the peace need not command the officer to have the defendant before the justice on a day to be named in the writ.—Sharp v. Nelson, 17 Tenn. (9 Yerg.) 34.

[zz] (Tenn. 1843) Where a justice of the peace renders a judgment and another justice in the same county issues a ca. sa. thereon, in the absence of a showing to the contrary, it will be presumed, on a motion to quash such writ, that it was regularly issued under the circumstances authorizing a justice other than the one before whom the judgment was rendered to issue the same.—Hart v. Fizer, 23 Tenn. (4 Humph.) 48.

§ 447. Wrongful execution.

Damages in action against justice for wrongful execution, see ante, § 55.

Jurisdiction of justice, see ante, § 151 [a].

—— *in action against officer, see* ante, § 126.

Liability of justice for misconduct of constable under an execution, see ante, § 42.

—— *in general, see* ante, §§ 34, 37, 42.

Issuance after prohibition from court, see "Prohibition," II.

Liability of officer, see "Sheriffs and Constables," III., IV.

[a] (Mass. 1813) The issuing an execution by a justice is a ministerial act; and, in case it be issued contrary to the provisions of the statute, the party issuing it is liable to the party injured.—Briggs v. Wardwell, 10 Mass. 356.

[b] (Mass. 1854) An attorney who procures a justice's execution to be issued containing a command to arrest the body of a judgment debtor, and who causes him to be arrested thereon in a case where he knows that the law prohibits such execution, is liable to the debtor in trespass.—Sullivan v. Jones, 68 Mass. (2 Gray) 570.

[c] (N. Y. 1830) A variance between a judgment and the execution issued thereon, in a justice's court, will not deprive a party of a justification under such judgment and execution, when the variance happens by mistake; such mistake may be shown by the justice.—Borland v. Stewart, 4 Wend. 568.

[d] (N. Y. 1830) Where, in a plea of justification, in an action for wrongful execution, a justice's execution is described as returnable in 90 days, and the execution produced is returnable in 60 days, the variance is fatal, and the execution will not be received in evidence.—Toof v. Bently, 5 Wend. 276.

(O) OBJECTIONS AND EXCEPTIONS, WAIVER AND CURE.

Defects as to parties, see ante, § 249.

—— *in pleadings, see* ante, § 342.

—— *in process, see* ante, §§ 264, 272–274.

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—— *in respect to adjournments, see* ante, § 361.
Effect of appearance, see ante, §§ 266–279.
Misjoinder of causes of action, see ante, § 229.
Objections to jurisdiction, see ante, §§ 218–221.
Review of objections on appeal as dependent on presentation before justice, see post, §§ 508–515.
—— *on certiorari, see* post, § 776.

§ 448. In general.

[a] (U. S. 1826) Defects in proceedings before a justice cannot be availed of after judgment.—Davis v. Pitman, Fed. Cas. No. 3,647a [1 Hemp. 44].

[b] (Iowa, 1849) By proceeding to trial on the merits, without exception to the cause of action, any defect in that particular is waived.—Taylor v. Barber, 2 G. Greene, 350.

[c] (Kan. 1887) Where a justice of the peace renders a judgment on a verdict of a jury five days after the verdict, contrary to the provision of Gen. St. 1881, c. 81, § 115, which requires the judgment to be entered immediately, but in the presence of the parties, and the successful party accepts a modified judgment, and remits the excess found by the justice, he thereby waives the irregularity and delay in rendering and entering the judgment.—Stillman v. McConnell, 36 Kan. 398, 13 Pac. 571.

[d] (Kan.) Where a motion for a new trial before a justice is filed the day after verdict rendered and due notice is given, holding the motion under consideration for decision by the justice until the ninth day after the verdict exceeding the statutory limit of five days is only an irregularity, which may be waived.—(1887) Scott v. Kreamer, 37 Kan. 753, 16 Pac. 123; (1888) Woodward v. Trask Fish Co., 38 Kan. 283, 16 Pac. 456.

[e] (Ky. 1832) After traverse it is too late to object to any irregularity in the previous proceedings.—Williamson v. Boucher, 30 Ky. (7 J. J. Marsh.) 252.

[f] (Ky. 1847) Where a defendant consents to a trial in vacation before a justice of the peace, without an affidavit that defendant is about to remove his property from the state, he cannot afterwards take advantage of the want of it.—Rogers v. Hall, 46 Ky. (7 B. Mon.) 349.

[g] (Mich. 1864) A defendant who does not appear in a justice's court waives nothing, as the plaintiff is in all cases bound to prove his cause of action, as on appearance.—Gilbert v. Hanford, 13 Mich. 40.

[h] (Mich. 1881) After a disagreement of the jury in a justice's court the parties submitted the case to the justice himself on the same testimony. *Held*, that they could not afterwards complain of his previous rulings on the trial before the jury.—Hollenburg v. Schuffert, 47 Mich. 126, 10 N. W. 137.

[hh] (Mich. 1890) A defect in the affidavit upon which an action of trespass in a justice court is based, is waived by defendant's pleading and proceeding to trial, and a motion to quash the proceedings then on account of such defect comes too late.—Jacklin v. Soutier, 82 Mich. 648, 46 N. W. 1027.

[i] (Minn. 1859) Under Rev. St. c. 69, art. 1, § 65, providing for the transfer of a cause from a justice's court, on application before the commencement of the trial, a party excepting to a denial of his application does not waive his right to avail himself of the justice's error by proceeding to trial.—Curtis v. Moore, 3 Minn. 29 (Gil. 7).

[j] (Minn. 1876) The oath required by Gen. St. 1866, c. 65, § 56, to be administered to the officer in whose charge a jury in a justice's court retires, may be waived for the parties, and will be deemed waived if omitted, and no objection is made at the time.—Robert v. Brooks, 23 Minn. 138.

[k, l] (Miss. 1880) Where, in case of a contested election for the office of sheriff, under Act March 5, 1878, before a justice of the peace, the contestant and the justice acquiesce in the hearing of a motion by defendant for an absolute writ of prohibition, returnable to the circuit court for want of an answer to his petition for an alternative writ, they waive a prior motion made by them to compel defendant to file a declaration against the justice.—Crisler v. Morrison, 57 Miss. 791.

[m] (Mo. 1884) An error of a justice of the peace, in including accrued interest in reviving a judgment, not having been taken advantage of by appeal, will be *held* to have been waived, and cannot be rectified on application to quash the execution issued thereon by the circuit court.—Bauer v. Miller, 16 Mo. App. 252.

[n] (Mo. 1890) Where one of the defendants was subsequently brought into the suit by service of summons, he cannot complain that the justice's docket fails to show a continuance from a return day to the day of actual return, five days later.—Building & Planing Mill Co. v. Huber, 42 Mo. App. 432.

[nn] (N. Y. 1813) If a justice of the peace examines a party as a witness de bene esse in a cause, it is error, though it is stated in the return that he afterwards disregarded the evidence as improper.—Haswell v. Bussing, 10 Johns. 128.

[o] (N. Y. 1839) A plea in a justice's court is not a waiver of objections previously taken and decided against the defendant.—Shannon v. Comstock, 21 Wend. 457, 34 Am. Dec. 262.

[p] (N. Y. 1842) If inadmissible testimony in a justice's court be objected to on untenable grounds, and the true grounds be not stated, they will be *held* to be waived.—Dunham v. Simmons, 3 Hill, 609.

[q] (N. Y. 1845) The plaintiff in a justice court declared for the breach of a "verbal contract" in a case where the statute of frauds required a contract in writing, and defendant pleaded specially instead of demurring. *Held*, that a motion in arrest of judgment not being allowed in that court, defendant could take advantage of the invalidity of the contract on the trial.—Green v. Armstrong, 1 Denio, 550.

[qq] (N. Y. 1847) Where a witness, after giving some testimony, discloses that he is interested in favor of the party who called him, the opposite party, in order to avail himself of the objection, must move to strike out the testimony so given; and if he omit to do this, in a suit before a justice of the peace, the justice cannot, in giving judgment, reject or disregard the evidence of the interested witness.—Heely v. Barnes, 4 Denio, 73.

[r] (N. Y. 1847) Where a declaration in a justice's court set forth no cause of action, and the evidence made out no cause, judgment against defendant could not be sustained, notwithstanding his motion to nonsuit on an untenable ground.—Tifft v. Tifft, 4 Denio, 175.

[s] (N. Y. 1857) When any act is deferred beyond the time limited in the justices' act by the consent of the parties, it is no error that the act is done after the time specified in the act, if done within the agreed time.—Barnes v. Badger, 41 Barb. 98.

[t] (N. Y. 1886) In a justice's court, a party may object to a proceeding, and, on the overruling of his objection, file his answer and

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proceed with the trial, and not waive any question raised by such objection.—Coatsworth v. Thompson, 5 N. Y. St. Rep. 809.

[u] (N. Y. 1896) Where defendant's motion to dismiss the complaint for insufficiency of the evidence to sustain the cause of action was denied by the justice, and the cause was submitted to him for decision on the merits, plaintiff's acquiescence in the submission was a waiver of his right, under Consolidation Act (Laws 1882, c. 410) § 1382, to have the action "dismissed, with costs, without prejudice to a new action.—Allen v. Rector, etc., of Church of Beloved Disciple (Sup.) 16 Misc. Rep. 584, 38 N. Y. Supp. 805.

[uu] (Or. 1880) An objection, that the jury in an action before a justice were not sworn, comes too late, if made in the first instance after judgment on the verdict.—Griffin v. Pitman, 8 Or. 342.

[v] (Pa. 1845) Though trespass for cutting timber on plaintiff's land is regularly triable in the county where the land is situated, the objection is formal, the proceeding not being in rem, and error in that respect is cured after verdict by the statute of jeofails.—Brown v. Fruit, 3 Clark, 295, 5 Pa. Law J. 222.

[w] (Pa. 1867) A formal judgment for rent, in an action to recover possession of demised premises before an alderman, cures any error in "assessing" the damages for the detention of the premises, instead of giving judgment therefor, as required by the act of December 14, 1863 (Brightly, Dig. p. 1341, § 1).—Schulte v. McCormick, 6 Phila. 313.

[x] (Vt. 1824) An objection that an action before a justice was not entered or called within two hours after the time set in the writ for trial is waived by a pleading to the merits.—Stone v. Proctor, 2 D. Chip. 108.

[y] (Vt. 1836) In proceedings before a justice, a dilatory objection may be waived by consent as well after nonsuit as after judgment sustaining it.—Egerton v. Hart, 8 Vt. 207.

(P) RECORDS AND DOCKETS.

IN GENERAL, § 449.
TIME FOR ENTRIES, PUBLICITY AND NOTICE, § 450.
MATTER TO BE ENTERED AND SUFFICIENCY OF ENTRIES, § 451.
—— CAUSE OF ACTION, § 452.
—— TIME AND PUBLICITY OF PROCEEDINGS, § 453.
—— PROCESS, § 454.
—— PLEADINGS AND AFFIDAVITS, § 455.
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RIGHT OF EXAMINATION, § 461.
OPERATION AND EFFECT, § 462.
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AMENDMENT, § 464.

Entry, record, and docketing of judgment, see ante, §§ 395–399.

Jurisdiction to be shown by record, see ante, §§ 207–216.

Power to perfect records after expiration of term of justice, see ante, § 204 [b].

Presumptions on certiorari as to keeping records, see post, §§ 812, 813.

Authentication of docket as evidence, see "Evidence," vol. 20, c. 2153, § 1522½ [o, p, r, v, w].

§ 449. In general.

[a] (Ill. 1878) Technical precision and accuracy in the form of entries in a proceeding commenced before a justice of the peace are not indispensable.—Brennan v. Shinkle, 89 Ill. 604.

[b] (Ind. 1878) A justice of the peace can lawfully keep and use at one and the same time more than one "docket" of the proper description, in which he may lawfully record the proceedings and judgments in all or any suits before him.—State v. Mallory, 65 Ind. 43.

[c] (Iowa, 1857) Entries made by a justice of the peace, not officially, nor constituting a part of the record, required by Code, § 2269, to be kept by him, are of no validity.—Kimpson v. Hunt, 4 Iowa (4 Clarke) 340.

[d] (Mich. 1862) Technicalities, imperfections, etc., in the entry of proceedings and judgment before a justice of the peace are of no account, provided the action and judgment can be clearly ascertained from the necessary files and docket entries.—Kinyon v. Fowler, 10 Mich. 16.

[e] (Mich. 1883) The docket record of a justice of the peace must receive a fair and reasonable interpretation, and due allowance must be made for what is practically unavoidable, a justice not being expected to be a legal expert; and it is sufficient that the language shows to a reasonable certainty jurisdiction and a compliance with the law.—Vroman v. Thompson, 51 Mich. 452, 16 N. W. 808.

[f] (Minn. 1871) Informalities and inaccuracies in the dockets of justices of the peace are to be disregarded if the meaning is ascertainable, and conformable to law.—McGinty v. Warner, 17 Minn. 41 (Gil. 23).

[g] (N. J. 1819) Original papers cannot be taken from the files of a justice to be used in the supreme court, without a rule, regularly entered, showing when and why they were taken.—Miller v. Carhart, 5 N. J. Law (2 Southard) 720.

[h] (N. Y. 1857) The omission of a justice of the peace to deposit his docket with the clerk of the town when he removed therefrom will not affect the validity of the judgments in the docket, or vary the same as evidence, though the justice might have been punished for neglect of duty in this respect, prescribed by the directory statute.—Humphrey v. Persons, 23 Barb. 313.

§ 450. Time for entries, publicity and notice.

Time for entry of judgment, see ante, § 396.

[a] (Ind. 1856) If a justice of the peace appoint a special constable, but has omitted to make an entry thereof in his docket, he may make the entry at any time, without a rule of the court above to that effect.—McLain v. Matlock, 7 Ind. 525, 65 Am. Dec. 746.

[b] (Ind. 1890) In an action for malicious prosecution, the justice before whom the prosecution was brought testified that he made no record of the proceedings, and, his testimony as to the trial and discharge of plaintiff being objected to, he was permitted to make such a record in his docket, which was then admitted in evidence. *Held* not error, the making of such entry being a mere ministerial act, which the justice might perform at any time.—Cottrell v. Cottrell, 126 Ind. 181, 25 N. E. 905.

[c] (Mich. 1884) How. Ann. St. § 8035, providing that garnishment suits in justices' courts "may be entered on the docket as suits in other cases," is permissive, not mandatory; and the judgment may be valid where garnishment proceedings had after judgment are entered

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separate from the principal suit, and a complete record made and entitled.—Fasquelle v. Kennedy, 55 Mich. 305, 21 N. W. 347.

[d] (N. J. 1826) At the time or on the day of the commencement of an action by a common informer to recover a penalty, the justice should make a special note in his docket of the day, month, and year of its institution, and if he omit to make the entry until the return of summons, the judgment will be reversed.—Griffith v. West, 10 N. J. Law (3 Halst.) 301.

[e] (Pa. 1883) Under Act March 20, 1810, a justice of the peace should make the entries in his docket contemporaneous with the act done, but a neglect to do so is only a matter of form, and is not ground for reversal.—Schoendman v. Glanz, 2 Lanc. Law Rev. 358.

[f] (Pa. 1893) Judgment in an action before a justice for a penalty must be entered publicly, or after notice to defendant.—Pittsburgh v. Madden (Com. Pl.) 14 Pa. Co. Ct. R. 120, 24 Pittsb. Leg. J. (N. S.) 283.

§ 451. Matter to be entered and sufficiency of entries.

Bail for stay of execution, see ante, § 438.

Showing jurisdiction on record, see ante, §§ 207-216.

Name of prosecuting witness in criminal proceeding, see "Criminal Law," vol. 14, c. 2188, § 1430 [d].

[a] (Mich. 1857) Where a parol application is made for the issue of an execution within five days, it is not necessary that the justice should enter in his docket the facts stated.—Rash v. Whitney, 4 Mich. 495.

[b] (Mich. 1867) It is not necessary that the justice's docket show that an execution was issued at the plaintiff's request, as that is always presumed.—Peck v. Cavell, 16 Mich. 9.

[c] (Minn. 1871) The affidavit for change of venue in a justice's court need not be set forth in the docket, either verbatim, or in substance.—McGinty v. Warner, 17 Minn. 41 (Gil. 23).

[d] (Miss. 1850) The docket of a justice of the peace in Alabama is required to contain the names of the parties in suits instituted before him, and the debt adjudged.—Scott v. Loomis, 21 Miss. (13 Smedes & M.) 635.

[e] (Neb. 1884) A justice's docket stated that "the defendant did not appear in person, and his attorney departed before the trial was had," etc. *Held*, under Code Civ. Proc. § 1086, which provides what such docket shall contain, and requires as to the appearance of parties a bare statement of "which of the parties, if either of them, appeared at the trial," that so much of the docket as related to the departure of defendant's attorney was surplusage and irrelevant.—Cleghorn v. Waterman, 16 Neb. 226, 20 N. W. 636.

[f] (N. J. 1808) The report of the referees need not be entered at large on the justice docket.—Chance v. Chambers, 2 N. J. Law (1 Penning.) 384.

[g] (N. J. 1809) If a justice of the peace has power to grant a new trial for misconduct in the jurors or party, the cause must be set out in the record.—Keath v. Sergeant, 3 N. J. Law (2 Penning.) 524.

[h] (N. J. 1810) The report of referees must be entered on the justice's docket.—Moreton v. Scroggy, 3 N. J. Law (2 Penning.) 676; Little v. Silverthorne, Id. 680.

[i] (N. J. 1827) A justice must enter in his docket the names of the plaintiff and defendant; entering the initials only of the plaintiff's name is insufficient.—Clayton v. Tonkin, 9 N. J. Law (4 Halst.) 252.

[j] (N. J. 1831) In forcible entry and detainer, the justice must enter on his docket the return of the sheriff to the venire.—Prickett v. Prickett, 12 N. J. Law (7 Halst.) 186.

[k] (Pa. 1853) If a suit before a justice of the peace or an alderman be terminated by an agreement of parties amounting to a discontinuance, it is his duty to enter the agreement on his docket.—Cope v. Risk, 21 Pa. (9 Harris) 59.

[l] (Pa. 1868) Where the record of a justice, in a landlord and tenant proceeding under Act 1863, discloses nothing to connect the lessor with plaintiff, who sues as administrator, except that the lessor's surname was identical with that of decedent's, and action appears to have been brought by the administrator nearly 40 years from the probate of the will, the judgment must be reversed on certiorari.—Holder v. Hill, 1 Woodw. Dec. 451.

[m] (Pa. 1871) Where an action before a justice of the peace has been referred to referees, the record must show that the referees as well as the justice acted in conformity with the statute.—Weissbrod v. Gelder, 3 Leg. Gaz. 260.

[n] (Pa. 1883) When an alderman, in a suit for violation of a city ordinance, gives judgment for the amount of the penalty for violation thereof, his docket should set forth the ordinance, if not in haec verba, by number, section, or date of passage.—Lemon v. Reidel, 1 Lanc. Law Rev. 3.

[o] (Pa. 1884) Where an action is brought before an alderman to recover the penalty for violation of a municipal ordinance, the record of the magistrate must show the exact ordinance on which the action is based.—City of Lancaster v. Hirsh, 1 Lanc. Law Rev. 209.

[p] (Pa. 1886) The record of an alderman in an action to recover the penalty for violation of an act of assembly should cite the act verbatim, or refer to it by title and date.—Nash v. Commonwealth, 2 C. P. Rep. 239.

[q] (Pa. 1894) Under Act 1810, providing for the reference of actions pending before a justice where plaintiff's claim exceeds $5.33, and either party refuses to submit to the justice, the justice's docket must show the existence of these conditions, before he is authorized to proceed as on a statutory submission.—Climenson v. Climenson, 163 Pa. 451, 30 Atl. 148, 35 Wkly. Notes Cas. 471.

[r] (Pa. 1895) In an action against a town, the justice's docket need not show that plaintiff demanded the amount due him before suit.—Shea v. Plains Tp. (Quart. Sess.) 7 Kulp, 554.

[s] (Wis. 1865) A justice is not required to enter in his docket the name of the county or town in which his court was held.—Bacon v. Bassett, 19 Wis. 45.

[t] (Wis. 1885) The failure of a justice of the peace to enter in his docket his findings in a case tried without a jury is, at most, only an irregularity, there being no statute requiring such entry.—Paulson v. Ingersoll, 62 Wis. 312, 22 N. W. 477.

§ 452. —— Cause of action.

[a] (Del. 1842) The statement by a justice of the peace, that the plaintiff's claim was "a demand on account, $15," is a sufficient statement of the cause of action.—Thompson v. Pearce, 3 Har. 497.

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[b] (Del. 1871) A set-off, to be pleadable before a justice of the peace, must not only be an account, demand, or cause of action cognizable before him, but both its nature and amount should be entered on his docket.—Huggins v. Lemmon, 4 Houst. 304.

[c] (Del. 1873) The statement of the cause of action on the docket of a justice of the peace was: "Action of debt on record. Demand, $5.30. Summons issued," etc. *Held* insufficient, as it did not clearly show where the record referred to was, or whether the debt demanded was on a judgment, a recognizance, or a mortgage.—Ralph v. Pennell, 4 Houst. 542.

[d] (Ill. 1845) A justice of the peace should note in his docket the grounds of defense.—Bates v. Bulkley, 7 Ill. (2 Gilman) 389.

[e] (Ind. 1881) The omission of a justice of the peace to enter in his docket "a copy of the cause of action," as required by Rev. St. 1881, § 1437, *held* not to avoid the judgment.—Reed v. Whitton, 78 Ind. 579.

[f] (Ind. 1882) A judgment rendered by a justice is not void because the cause of action was not copied in full in the justice's record.—Hopper v. Lucas, 86 Ind. 43.

[g] (Iowa, 1856) The original notice informed the defendant that the plaintiff claimed "$100 as justly due him on attorney's lien secured by bond, made by you December 30, 1854, and filed in," etc., which statement was substantially entered by the justice on his docket. *Held*, that this was a sufficient statement of the cause of action by him.—Stone v. Murphy, 2 Iowa (2 Clarke) 35.

[h] (Iowa, 1856) In an action on a bond the docket need not specify the breaches.—Stone v. Murphy, 2 Iowa (2 Clarke) 35.

[i] (Minn. 1869) The statement in a justice's docket, that judgment "was rendered for the sum of thirty-one dollars and five cents debt, balance due on lot sold by plaintiff to defendants," is not a sufficient "brief statement of the nature of plaintiff's demand and the amount claimed," within Gen. St. p. 422, c. 65, § 7, as it does not tend to show that the action was brought for that sum, or on a liability of that nature. Barnes v. Holton, 14 Minn. 357 (Gil. 276).

[j] (N. J. 1823) If a justice before whom an action is tried in Pennsylvania does not enter the true style of the action in his docket, the judgment will be reversed as erroneous.—Bilderback v. Pounor, 7 N. J. Law (2 Halst.) 64.

[k] (Pa. 1863) The statement of a cause of action on a justice's record as follows, "Plea for assumpsit. Amount $8,"—is sufficient.—Goodman v. Moyer, 1 Woodw. Dec. 92.

[l] (Pa. 1865) Where the court record of a magistrate shows the cause of action merely as "demand for $3," and nothing else appears on it to specify the nature of the demand, the judgment will be reversed on certiorari.—Goodman v. Mogel, 1 Woodw. Dec. 286.

[m] (Pa. 1866) The record of justices of the peace, in proceedings under the act of March 25, 1825, to obtain possession of premises from which the tenant had been removed, must set out the facts necessary to establish the right of plaintiff with particularity, either in the complaint, or the findings of the justices.—Uber v. Hickson, 6 Phila. 182.

[n] (Pa. 1868) In penal actions, it is requisite that the substance at least of the acts committed by accused should be alleged somewhere in the proceedings of the justice.—Adams v. Commonwealth, 1 Woodw. Dec. 417.

[o] (Pa. 1872) The docket of a justice must show the nature of plaintiff's demand.—Paine v. Godshall, 29 Leg. Int. 12.

[p] (Pa. 1875) Where plaintiff sues for work done and materials furnished as a public officer, the record of the magistrate must show affirmatively the character of such work and materials.—Cloud v. Taytlow, 32 Leg. Int. 40.

[q] (Pa. 1876) A magistrate's record showing an action to be debt for money had and received, but not showing the contract, or how the demand arose, is insufficient.—Moore v. Philadelphia & R. R. Co., 11 Phila. 348, 33 Leg. Int. 148.

[r] (Pa. 1879) The record of justices of the peace must show the cause of action, the demand of the plaintiff, and the nature of the claim on which the particular action is founded.—Jervis v. McFarlan, 1 Chest. Co. Rep. 137.

[s] (Pa. 1879) The record of a justice of the peace should set out enough facts to prevent a second suit for the same cause of action.—Williams v. McCue, 1 Lack. Leg. Rec. 398.

[t] (Pa. 1887) The record of the judgment of a justice of the peace, for the penalty for violation of an act of the assembly, must disclose the cause of action.—Commonwealth v. Cochran Creamery Co., 4 Pa. Co. Ct. R. 253.

[u] (Pa. 1887) The record of a justice of the peace should show that the action was brought on a contract, express or implied, between plaintiff and defendant, and a claim, "which sum was promised and agreed to be returned to the plaintiff," is insufficient.—Shaffer v. Kelly, 4 C. P. Rep. 44.

[v] (Pa. 1887) Where the record of a justice of the peace simply shows a claim for "work and labor done," and does not state that the work was done for the plaintiff, or at his instance, it will not support a judgment for the plaintiff.—Merriam v. Myerscough, 4 C. P. Rep. 52.

[w] (Pa. 1887) In a magistrate's record, the entry, "Plaintiff's claim is trespass for personal property," does not sufficiently show the cause of action.—Zeidler v. Seischob, 4 C. P. Rep. 196.

[x] (Pa. 1889) A justice's record, in a suit by a mutual live stock insurance company, failed to show that the defendant ever insured in the company, except by inference. *Held*, that there was not enough to support the judgment, and that it should be reversed on certiorari.—Dauphin County Mut. Live Stock Ins. Co. v. Pidgeon, 7 Pa. Co. Ct. R. 448.

[y] (Pa. 1893) A judgment of a justice on a note will be reversed when the record does not even show that the note was executed by defendant, or that he promised to pay it.—Sipple v. Guldin (Com. Pl.) 7 Kulp, 100.

[z] (Pa. 1895) An entry in the justice's docket showing that the claim sued on was for "balance due for money collected, and goods received and unaccounted for, also balance on duebill," is a sufficient statement of claim to support a judgment.—Cooke v. Shoemaker (Com. Pl.) 8 Kulp, 212, 17 Pa. Co. Ct. R. 641.

[zz] (Pa. 1896) The record of a justice of the peace, though failing to show that the account claimed on was against the defendant, or that he had promised to pay it, was sufficient to support a judgment for plaintiff.—Missemer v. Trout (Com. Pl.) 17 Pa. Co. Ct. R. 317.

§ 453. —— Time and publicity of proceedings.

[a] (Mich. 1893) Docket entries showed that a cause was called August 2d at 9 o'clock a.

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m., and was held open till 9 o'clock a. m. of August 3d. The subsequent proceedings appear opposite a marginal entry of August 2d, but at the conclusion of the proceedings is the following: "Dated this third day of August, A. D. 1892. Peter W. Losby, Justice of the Peace." *Held*, that the marginal entry is a clerical error, and the docket showed that the proceedings were had August 3d.—Stoll v. Padley, 98 Mich. 13, 56 N. W. 1042.

[b] (Neb. 1895) The failure of a justice of the peace to enter on his docket the day and hour fixed in the summons for trial is fatal to a default judgment.—Muller v. Plue, 45 Neb. 701, 64 N. W. 232.

[c] (N. J. 1808) The date of the justice's judgment should be entered on the record.—De Marentille v. Oliver, 2 N. J. Law (1 Penning.) 379.

[d] (N. J. 1808) The justice's docket should show the time when the action was commenced.—De Marentille v. Oliver, 2 N. J. Law (1 Penning.) 379.

[e] (N. J. 1829) In an action by a common informer to recover a penalty, the justice must make a special note in his docket of the day, month, and year, of its institution.—Griffith v. West, 10 N. J. Law (5 Halst.) 301.

[f] (N. J. 1859) The record of proceedings on an attachment issued by a justice should show that he fixed on a day for the hearing.—Crisman v. Swisher, 28 N. J. Law (4 Dutch.) 149.

[g] (Pa. 1867) Where an alderman enters judgment by default, the hour should be named.—Lindsay v. Sweeny, 6 Phila. 309.

[h] (Pa. 1867) If the proceedings are otherwise regular, the court will not reverse an alderman's judgment because he omits to note that it was entered publicly.—Daly v. Nolan, 6 Phila. 310.

[i] (Pa.) The record of a justice's default judgment must show that the judgment was given publicly against defendant.—(1880) Hildebrand v. Bowman, 12 Lanc. Bar, 30. CONTRA, see (1873) French v. Pennsylvania & N. Y. Canal & R. Co., 1 Leg. Chron. 66.

[j] (Pa. 1883) Where the justice's record does not show that judgment was entered on the day named in the summons, and on the day to which the case had been continued, but shows that judgment was entered "on the 20th, 1882," omitting the month of the year, the proceedings will be set aside on certiorari.—Martin v. Wiggins, 1 Lanc. Law Rev. 141.

[k] (Pa. 1886) Where the record of a justice shows at what hour the parties were to appear, and a judgment was rendered by default, the proceedings will not be reversed on certiorari merely because the record does not show at what hour the judgment was rendered.—Cope v. Buck, 3 Lanc. Law Rev. 353.

[l] (Pa. 1888) There is no statute which requires an alderman to enter on his record the hour in which he entered judgment by default, if the allegations and proofs are heard at the time and hour mentioned in the summons.—Blessington v. Commonwealth, 14 Atl. 416.

[m] (Pa. 1890) A justice's docket need not show the hour of entering judgment against a garnishee on an attachment affidavit.—Weisman v. Weisman, 133 Pa. 89, 19 Atl. 300.

[n, o] (Pa. 1890) It is not necessary that the record shall show the exact hour at which a judgment by default was rendered by a justice of the peace, where it appears therefrom that, at the hour for the return of the summons, plaintiff appeared, and, defendant being in default, judgment was rendered for the plaintiff after hearing.—Robertson v. Clark (Com. Pl.) 9 Pa. Co. Ct. R. 94.

[p] (Pa. 1894) The record of a justice of the peace need not show at what hour of the day judgment was rendered in a default case, nor that it was publicly rendered.—Fronheiser v. Werner (Com. Pl.) 3 Pa. Dist. R. 515, 14 Pa. Co. Ct. R. 522.

[q] (Pa. 1896) The record of a justice of the peace, though failing to show the hour of the hearing, or of the entry of judgment, was sufficient to support a judgment for plaintiff.—Missemer v. Trout (Com. Pl.) 17 Pa. Co. Ct. R. 317.

[r] (Wis. 1865) A justice of the peace is not required to enter on his docket a statement that his court was held at the time and place appointed in the summons, or at what hour the suit was called and judgment rendered. The presumption will be that the statute was complied with in these respects.—Bacon v. Bassett, 19 Wis. 45.

§ 454. —— Process.

See ante, § 214.

[a] (Cal. 1893) The notice of trial, required to be given by the justice by Code Civ. Proc. § 850, together with proof of service, must form a part of the record.—Jones v. Justice's Court of Los Angeles City, 97 Cal. 523, 32 Pac. 575.

[b] (Conn. 1838) The record of a justice of the peace, that on the day set for trial he was absent from the town, and that the parties were "duly notified" to appear for trial on the 20th of the month, is sufficient, and need not contain a statement of facts necessary to constitute the notice required by the statute of 1833.—Fox v. Hoyt, 12 Conn. 491, 31 Am. Dec. 760.

[c] (Del. 1859) Where a statute requires that every justice of the peace shall make an entry in his docket of every action commenced before him, stating the names of the parties, the cause of action, the sum demanded, the date of issuing process and when it was returned, the entry on a docket before a justice is not sufficient where it only states the names of the parties, the action, and the sum demanded.—Crawford v. England, 2 Houst. 171.

[d] (Ga. 1882) The docket of a justice of the peace should show the return of service.—Benson v. Dyer, 69 Ga. 190.

[e] (Ind. 1864) The provision of the statute requiring the justice to note the appointment of a special constable to serve process on his docket is imperative.—Benninghoof v. Finney, 22 Ind. 101.

[f] (Ind. 1872) The provision of the statute requiring a justice of the peace to record the appointment of a special constable to serve process on his docket is imperative, and not directory.—Schaw v. Dietrichs, Wilson, 153.

[g] (Ind. 1873) The summons, and officer's return thereto, are not required to be copied at length on the justice's docket.—Strohmier v. Stumph, Wilson, 304.

[h] (Ind. 1881) It is not necessary that the justice copy the summons in the record. A copy of the constable's return or a memorandum showing service of summons is sufficient.—Reed v. Whitton, 78 Ind. 579.

[i] (Miss. 1850) The docket of a justice of the peace in Alabama is required to contain the time of the issue and return of the warrant.—Scott v. Loomis, 21 Miss. (13 Smedes & M.) 635.

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[j] (Ohio, 1885) A recital in the record of a magistrate, that "the constable has demanded his fees in advance and refuses to serve a summons for a jury because not paid," is insufficient, since it does not appear as the return of the officer, and hence does not show that the summons was ever returned, or that any reason was indorsed on it for its nonservice.—Moriarity v. Devine, 1 Ohio Cir. Dec. 49.

[k] (Pa. 1888) Where a continuance is granted without day in a justice court, the justice's record showing notice of the hearing, but not showing when the notice was given, is insufficient.—Hunt v. Laufer, 6 Pa. Co. Ct. R. 337.

[l] (Wis. 1865) Rev. St. c. 120, § 11, subd. 2, which requires a justice of the peace to enter on his docket "a statement of the return of the officer," is merely directory.—Bacon v. Bassett, 19 Wis. 45.

§ 455. —— Pleadings and affidavits.

[a] (Iowa, 1856) When pleadings before a justice are oral, he must enter the substance of them on his docket, but more than this is not required.—Stone v. Murphy, 2 Iowa (2 Clarke) 35.

[b] (Iowa, 1860) A justice should write in his docket the substance of defendant's pleas, when oral, but not his inferences therefrom.—Jordan v. Quick, 11 Iowa, 9.

[c] (Minn. 1872) Gen. St. 1866, c. 65, does not require the justice's docket to contain the verifications of the pleadings.—Tyrrell v. Jones, 18 Minn. 312 (Gil. 281).

[d] (Minn. 1875) It is not necessary that a justice's docket should show affirmatively the verification of a complaint filed in his court.—Burt v. Bailey, 21 Minn. 403.

[e] (Mo. 1889) Rev. St. § 471, relating to attachments before justices, provides that defendant may put in issue by verbal plea, in the nature of a plea in abatement, "the substance of which shall be noted by the justice on his docket, the existence of the facts alleged in the affidavit." *Held*, that a written plea in abatement, filed with the justice and transmitted to the circuit court on appeal, but not noted on the justice's docket, should not be regarded as never having been filed.—Meyers v. Boyd, 37 Mo. App. 532.

[f] (N. J. 1808) Where the general issue is pleaded with notice of special matter, under Rev. Laws, p. 348, such special matter need not be entered of record.—Stevenson v. Skank, 3 N. J. Law (2 Penning.) 434.

[g] (Ohio, 1862) A neglect on the part of a justice of the peace, in an attachment proceeding before him, to enter the affidavits at length, or to particularly state the nature thereof on his docket, does not render the subsequent proceedings illegal.—Carper v. Richards, 13 Ohio St. 219.

[h] (Tex. 1888) Where defendant in justice court makes his pleadings in writing, it is unnecessary that they should be noted on the justice's docket.—Whittington v. Eppstein, 3 Willson, Civ. Cas. Ct. App. § 369.

[i] (Tex. 1894) A justice's docket entry of, "Suit upon acc't and contracts, for $161.55. * * * Defendant pleads general denial,"—is a sufficient "brief statement" of oral pleadings, under Rev. St. art. 1573, in connection with plaintiff's account filed, and it cannot be presumed that plaintiff did not plead an assignment of the account to himself from his dissolved firm.—Davis v. Sorrenson (Civ. App.) 27 S. W. 209.

[j] (Wis. 1875) In an action in a justice's court commenced by attachment, the docket entry stated that plaintiff, on the return day of the writ, "introduced the affidavit on which the warrant of attachment was issued as the complaint in the case." *Held*, that this reference to the affidavit had the same effect as if it had been copied into the docket as the complaint.—Ruthe v. Green Bay & M. R. Co., 37 Wis. 344.

§ 456. —— Evidence and rulings thereon.

In forcible detainer, see "Forcible Entry and Detainer," vol. 23, cc. 1383, 1384, § 156 [b, f, g, h].

[a] (Del. 1844) To sustain a judgment by default, the justice's record must show that he heard the proofs of the plaintiff's claim; and it is not sufficient that he "investigates the plaintiff's demand."—Elligood v. Cannon, 4 Har. 176.

[b] (Del. 1859) A judgment of a justice of the peace, to be sustained, must show by the record that the justice heard the case, that the judgment was rendered on his hearing, and that he heard the allegations and proof of the parties.—Hoffecker v. Eaton, 2 Houst. 157.

[c] (Iowa, 1859) A justice is not required by Code, § 2269, subd. 11, to note on his docket motions to reject evidence.—Miller v. O'Neal, 9 Iowa, 446.

[d] (Mo. 1879) Under Wag. St. p. 839, § 15, providing that no justice's judgment shall be affected by any informality in the entry, a default judgment is not invalidated by a failure of the docket entry to show that the justice heard evidence before rendering it.—Baker v. Baker, 70 Mo. 134.

[e] (N. J. 1842) It is not necessary for a justice of the peace to enter on his docket the documentary evidence offered or admitted on a trial before him.—Ramsey v. Dumars, 19 N. J. Law (4 Har.) 66.

[f] (N. Y. 1804) A default judgment rendered by a justice in an action on a promissory note must show that it was rendered "on hearing the proof and allegations."—Stocking v. Driggs, 2 Caines, 96.

[g] (Ohio, 1860) Under Justices' Act, § 203, the justice is not required to state the evidence on the trial in his docket, except in jury trials.—Niven v. Smith, 2 Ohio Dec. 337.

[h] (Pa. 1846) A statement on the docket of a magistrate, that plaintiff's demand is founded on an account rendered for services rendered by plaintiff to defendant's testator in his lifetime, sufficiently satisfies the statutory requirement, that the kind of evidence on which the plaintiff's demand is founded shall be set out on the docket.—Wilson v. Wilson, 3 Clark, 419, 5 Pa. Law J. 461.

[i, j] (Pa.) The record of a justice must show the kind of evidence by which plaintiff's claim was sustained.—(1872) Paine v. Godshall, 29 Leg. Int. 12; (1887) Jermyn v. Higgins, 4 Lanc. Law Rev. 185. CONTRA, see (1895) Shea v. Plains Tp. (Quart. Sess.) 7 Kulp, 554.

[k] (Pa. 1873) A justice is not required to state the evidence on his docket, but only the demand of plaintiff and the kind of evidence.—French v. Pennsylvania & N. Y. Canal & R. Co., 1 Leg. Chron. 66.

[l] (Pa. 1873) A judgment by default will be reversed unless the record shows that the justice heard evidence before rendering the judgment.—Sauser v. Werntz, 1 Leg. Chron. 249, 21 Pittsb. Leg. J. 15.

[m] (Pa. 1879) A record of a justice stating that "defendant admits the demand" shows a

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sufficient hearing of proofs and allegations to support a judgment for plaintiff.—Griffin v. Koch, 1 Leg. Rec. Rep. 47.

[n] (Pa. 1880) The record of a justice of the peace on a judgment by default must show that the magistrate heard the evidence of the plaintiff.—Hildebrand v. Bowman, 12 Lanc. Bar, 30.

[o] (Pa. 1880) In a suit before a justice of the peace to recover a penalty imposed for violation of a borough ordinance, the record must give the essential part of the evidence upon which the decision is given.—Borough of St. Clair v. Carr, 2 Leg. Rec. Rep. 87.

[p] (Pa. 1880) The record of a justice must show that he heard evidence.—Koch v. Miller, 2 Leg. Rec. Rep. 154.

[q] (Pa. 1883) Where, in an action before a justice of the peace, both parties appear, it is not error if the record fails to show what witnesses were examined on behalf of the successful plaintiff.—Cope v. Meyers, 1 Lehigh Val. Law Rep. 55.

[r] (Pa. 1883) Where the record of a justice of the peace on a judgment by default in favor of the plaintiff does not show that there was some evidence offered and heard in support of plaintiff's claim, the judgment will be reversed.—Karche v. Bach, 1 Lehigh Val. Law Rep. 118.

[s] (Pa. 1885) Under Act 1810, § 4, a justice of the peace must set out on his docket the kind of evidence on which plaintiff's demand is founded, but need not show that evidence was produced on the trial.—Cook v. Minick, 1 Pa. Co. Ct. R. 603.

[t] (Pa. 1886) Where a justice of the peace gives judgment other than by default, the record need not show that any witnesses were examined.—Ott v. Snyder, 3 Lanc. Law Rev. 185.

[u] (Pa. 1886) An action to recover the penalty, under Act April 12, 1859, which restricts the sale of goods at auction in certain counties, is an action of debt and not a summary conviction, and hence the record need not set out the evidence.—Ott v. Snyder, 3 Lanc. Law Rev. 185.

[v] (Pa. 1887) Where the record of a justice of the peace recites that "after hearing proofs and allegations," such recital does not sufficiently show the character of the evidence offered to support the claim.—Merriam v. Myerscough, 4 C. P. Rep. 52.

[w] (Pa. 1887) The record of the judgment of a justice of the peace, for the penalty for violation of the act of the assembly, must disclose some evidence of the acts constituting the offense.—Commonwealth v. Cochran Creamery Co., 4 Pa. Co. Ct. R. 253.

[ww] (Pa. 1892) Where a justice's docket, in a case where defendant did not appear at the trial, states that the justice heard the proofs and allegations, it sufficiently shows that the judgment was founded on evidence.—Baker v. Richart (Com. Pl.) 12 Pa. Co. Ct. R. 318, 2 Pa. Dist. R. 195.

[x] (Pa. 1892) The justice's docket must show that evidence was produced to sustain the plaintiff's claim.—Ellenberger v. Bush (Com. Pl.) 2 Pa. Dist. R. 50.

[xx] (Pa. 1894) In an action of debt, for services rendered, a justice of peace is not required to set out in full the testimony, or to copy at length on his docket the documentary evidence.—Hill v. Scouton (Com. Pl.) 7 Kulp, 345.

[y] (Pa. 1895) Act March 22, 1814, giving justices of the peace jurisdiction in certain actions in tort, provides (Purd. Dig. edition 1894, p. 1149, § 4) that "the proceedings shall be made and done under and according to the provisions" of Act March 20, 1810, giving magistrates jurisdiction in actions ex contractu, and which directs (section 3) the magistrate to "hear the proofs and allegations." *Held* that, in an action before a justice based on a claim in the nature of a tort, the judgment is sufficient where the record sets forth that, "having heard the parties and their proofs and allegations," judgment was given, without showing affirmatively that some person was sworn.—York Caramel Co. v. Farez (Com. Pl.) 17 Pa. Co. Ct. R. 129.

[yy] (Pa. 1895) Where a suit is brought in a justice's court by an assiguee, the justice's record need not show affirmatively that the assignment was proved.—Shea v. Plains Tp. (Quart. Sess.) 7 Kulp, 554.

[z] (Pa. 1895) A justice need not set out the evidence at large on his docket, it being sufficient for him to state the plaintiffs' demand, and the kind of evidence, whether written or parol, produced to support it.—Evans v. Brobst (Com. Pl.) 11 Montg. Co. Law Rep'r, 133, 1 Lack. Leg. N. 300, 16 Pa. Co. Ct. R. 550, 5 Pa. Dist. R. 30.

[zz] (Pa. 1895) The record of a justice of the peace is defective when it shows that the only evidence offered on part of plaintiff was a probated copy of book account, the parties being present at the hearing by counsel, and not in person.—Munroe v. Klepser (Com. Pl.) 5 Pa. Dist. R. 60.

§ 457. —— Adjournments.

Adjournment without entering time and place as ousting jurisdiction, see ante, § 196.

[a] (Conn. 1864) Where the record of a justice recited that the parties agreed that the case be continued from day to day as security for performance of certain terms of settlement by defendant, until further action should be required by either party, and "that the case was thus continued, without the appearance in person or otherwise of either party, and without any further action or order by the court, until the 21st day of September, etc.," the record was *held* to mean that the case was actually continued from day to day, without any further action or order of the court than such continuance.—Town of New Haven v. Rogers, 32 Conn. 221.

[b] (Del.) Where there is a second adjournment of a cause before a justice, without application from either party, the record should show the cause for such adjournment.—(1843) Mousely v. Allmond, 4 Har. 92; (1845) Deputy v. Betts, Id. 352.

[bb] (Del. 1849) Though referees appointed by a justice may adjourn a cause for consideration, the record must show the adjournment.—Rickards v. Patterson, 5 Har. 235.

[c] (Minn. 1874) A justice entered in his docket: "By consent of parties, the case is adjourned till Monday, September 23, 1873, at 1 o'clock in the afternoon." *Held*, that such entry was sufficient, without showing the place of adjournment, it being presumed that proceedings would be resumed at the place from which the adjournment was made.—Anderson v. Southern M. R. Co., 21 Minn. 30.

[d] (Neb. 1890) A case pending before a justice on May 18th was, by agreement of parties, continued to May 25th, and a jury was selected to appear on the latter date. Without any further date being noted on the docket, the entry shows that the parties and jurors appeared, cause was tried, verdict rendered, and

judgment entered thereon. *Held* sufficient to show that the trial was had on the date to which the case was last adjourned.—Tuttle v. Wilson, 29 Neb. 424, 45 N. W. 688.

[e] (Vt. 1836) Though the statute provides that the second justice shall "enter on the files the reasons for the continuance," yet where the reason of the absence of the first justice cannot be certainly known to the second, except from presumption and inference, he is not bound to state such presumption, etc., in his record, but may state the absence generally.—Holland v. Osgood, 8 Vt. 276.

[f] (Wis. 1885) Where a justice of the peace fails to note in his docket the year to which a case is adjourned, the current year will be understood to have been intended, and the omission is immaterial.—Stromberg v. Esterly, 62 Wis. 632, 22 N. W. 864.

[g] (Wis. 1886) The specific causes of granting adjournments need not appear in the justice's records, the entries being that the adjournments were "for cause shown."—Bookhout v. State, 66 Wis. 415, 28 N. W. 179.

[h] (Wis. 1890) Under Rev. St. § 3574, subds. 3, 5, requiring a justice to enter in his docket every adjournment, stating at whose request it is granted, an entry that defendant "asked for an adjournment of one week until the 27th day of April, 1889, at 1 o'clock p. m., at this, my office," is sufficient to show an adjournment until that time, when it appeared that nothing more was done until then.—Johnson v. Iron Belt Min. Co., 78 Wis. 159, 47 N. W. 363.

§ 458. —— Witnesses and jurors.

[a] (N. J. 1807) A justice must enter the names of all witnesses and jurors on his docket.—Lindsly v. Boyle, 2 N. J. Law (1 Penning.) 207; Steelman v. Bolton, Id. 321.

[b] (N. J.) It must appear on the record of the justice that the jury were sworn.—(1810) Anonymous, 3 N. J. Law (2 Penning.) 632; (1811) Seward v. Chamberlain, Id. 742.

[c] (N. J. 1810) The names of the jurors in a justice's court must be entered of record.—Doughty v. Kindle, 3 N. J. Law (2 Penning.) 660.

[d] (N. J. 1838) A justice of the peace should not enter on his docket a conviction of a defaulting juror, as part of the record of the civil suit in which he was summoned.—State v. Hollinshead, 16 N. J. Law (1 Har.) 539.

§ 459. —— Fees and costs.

[a] (Minn. 1893) The omission of a justice to state in his docket the fees due to each person separately, as required by Gen. St. 1878, c. 65, § 7, subd. 8, does not render the judgment erroneous.—Meister v. Russell, 53 Minn. 54, 54 N. W. 935.

[b] (Miss. 1850) The justice's docket in Alabama must contain the costs adjudged.—Scott v. Loomis, 21 Miss. (13 Smedes & M.) 635.

[c] (Mo. 1895) The failure of a justice of the peace to state in his docket the separate items of costs, as required by Rev. St. § 6305, does not render an execution void.—Buis v. Cooper, 63 Mo. App. 196, 1 Mo. App. Rep'r, 746.

[d] (Neb. 1895) A judgment of a justice of the peace that: "It is therefore considered by me that plaintiff recover from defendant the sum of $7.48 and his costs herein expended, taxed at $37.55, as follows: See margin,"—*held* a sufficient compliance with Comp. St. 1893, c. 28, § 30, providing that in all actions, motions, and proceedings, the costs of the parties shall be taxed and entered on the record separately.—Kissinger v. Staley, 44 Neb. 783, 63 N. W. 55.

[e] (Wis. 1857) Rev. St. c. 88, § 8, as to entries on the docket of certain fees, is directory merely, and the failure to make the entry is not reversible error.—Warner v. Hart, 6 Wis. 464.

[f] (Wis. 1865) Rev. St. c. 120, § 10, which requires the costs and fees to be entered separately on the justice's docket, is directory merely.—Bacon v. Bassett, 19 Wis. 45.

[g] (Wis. 1871) A statutory provision requiring the justice to state in his docket the fees due each person separately, is directory; and the omission of such separate statement does not invalidate the judgment.—Nett v. Serwe, 28 Wis. 663.

§ 460. Signature and certification.

[a] A justice's docket need not be verified by his signature.

—(Ill. 1892) Daniels v. Thompson, 48 Ill. App. 393;

(Minn. 1865) Chapman v. Dodd, 10 Minn. 350 (Gil. 277).

[b] (N. Y. 1857) The omission of a justice of the peace to certify in his docket that the amounts appearing by such book to be due on the judgments therein had not been paid, to his knowledge, will not affect the validity of the judgments in the docket, or vary the effect of the same as evidence, though the justice might have been punished for the neglect of duty in this respect, prescribed by the directory statute.—Humphrey v. Persons, 23 Barb. 313.

[c] (Ohio, 1833) The justice act of 1831, providing that, if the office of a justice becomes vacant in any manner, his docket or transcript of unfinished business shall be certified by him to his successor or some other justice, or, in case of death, by his executor or administrator, is directory merely as to judgment already entered, and an omission to certify the same merely puts the party to proof of the judgment, as before the law was passed.—Pool v. McCullum, Wright, 432.

§ 461. Right of examination.

[a] (Pa. 1879) Where an alderman has refused to allow the parties to an action or their counsel to examine his records of the case, the proceeding will be reversed.—Carr v. Lewten, 1 Lack. Leg. Rec. 396.

[b] (Vt. 1894) Rev. Laws, § 828, which provides that every justice shall keep a record of his judicial proceedings, and his books of record shall at all times be subject to the inspection of any person interested, does not entitle an interested person to the right to inspect the files, and memoranda thereon, of a justice, kept in his office.—Perkins v. Cummings, 66 Vt. 485, 29 Atl. 675.

§ 462. Operation and effect.

Admissibility in evidence of transcript from docket in criminal case, see "Criminal Law," vol. 14, c. 1697, § 1019 [ll].

Certificate as to proceedings, contradiction by parol, see "Evidence," vol. 20, c. 2384, § 1691.

Copies of records as evidence, see "Evidence," vol. 20, cc. 1811, 1812, § 1298; cc. 1937–1939, § 1378.

Record as best evidence, see "Evidence," vol. 20, c. 836, § 565 [d, h].

—— *as evidence in general, see* "Evidence," vol. 20, cc. 1731–1734, §§ 1243, 1244; cc. 1882–1885, § 1346.

—— *of proceedings, parol evidence, see* "Evidence," vol. 20, cc. 2374–2377, § 1680.

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[a] (Ark. 1875) Under Gantt's Dig. p. 320, §§ 1196, 1197, which authorizes the circuit court to issue writs of certiorari, and which provides that the records of inferior judicial tribunals shall be conclusive so far as they extend, an entry in the records of a justice that defendant confessed judgment is conclusive on an application for certiorari.—Countz v. Markling, 30 Ark. 17.

[b] (Colo. 1896) Mills' Ann. St. § 2787, requiring justices to keep a record of their proceedings, etc., does not constitute a court of a justice of the peace a court of record importing absolute verity to the entries in the docket, but such record may be impeached by parol.—Hamill v. Ferrier, 8 Colo. App. 266, 45 Pac. 522.

[c] (Ill. 1880) The entry in the justice docket showing the amount of plaintiff's demand will, in the absence of the summons, be presumed to correspond with the amount indorsed on the summons.—Brown v. Phillips, 6 Ill. App. (6 Bradw.) 250.

[d] (Iowa, 1881) An entry by a justice of the peace in his docket that a cause was continued by agreement of parties in open court, cannot be contradicted by affidavits of a party and his attorney that no such agreement was made.—Caughlin v. Blake, 55 Iowa, 634, 8 N. W. 475.

[e] (Iowa, 1892) An entry in a justice's docket that an adjournment for more than three days, which, under Code 1873, § 3527, he had no authority to make on his own motion, was made with the consent of plaintiff and defendant's agent, is not conclusive, and a judgment by default entered after such adjournment is void when in fact no agent of defendant consented to the adjournment.—Iowa Union Tel. Co. v. Boylan, 86 Iowa, 90, 52 N. W. 1122, reversing (1891) 48 N. W. 730.

[f] (Me. 1852) When the record and proceedings show that a justice of the peace has jurisdiction, the facts disclosed by his records, within that jurisdiction, are entitled to the same credit as if contained in the record of other competent tribunals.—Paul v. Hussey, 35 Me. 97.

[g] (Mich. 1844) Plaintiff brought trespass de bonis asportatis against defendant, a justice of the peace, for having unlawfully taken his goods in execution. Defendant justified under a judgment which had been previously rendered against plaintiff. *Held*, that plaintiff might show by evidence that defendant had no jurisdiction of his person, though such evidence contradicted the minutes or docket which defendant was required to keep.—Clark v. Holmes, 1 Doug. 390.

[h] (Mich. 1860) The entry of a judgment in the docket of a justice is evidence of the judgment, but is not the judgment itself.—Hickey v. Hinsdale, 8 Mich. 267, 77 Am. Dec. 450.

[i] (Mich. 1877) A recital in a justice's docket, that there was personal service, does not establish his jurisdiction to proceed as in case of personal service, where the service was not in fact personal, and the return failed to show affirmatively that it was.—Smalley v. Lighthall, 37 Mich. 348.

[j] (Mich. 1886) The record of a justice's judgment in his docket must control, and it cannot be contradicted by his return to a writ of certiorari.—Weaver v. Lammon, 62 Mich. 366, 28 N. W. 905.

[k] (Mich. 1893) Where the entries in a justice's docket show that a judgment was entered on a day on which the justice was not within the state, such judgment is void for want of jurisdiction; the entries being conclusive.—Toliver v. Brownell, 94 Mich. 577, 54 N. W. 302.

[l] (Mich. 1893) The docket entries of a justice of the peace, showing a judgment to have been rendered before the issuance of the summons, cannot be contradicted by the return to the writ of certiorari.—Holmes v. Cole, 95 Mich. 272, 54 N. W. 761.

[m] (Mich. 1895) A docket entry by a justice that the parties appeared and adjourned the case by consent cannot be contradicted collaterally, notwithstanding a further statement that such adjournment was had without pleading.—Waldron v. Palmer, 104 Mich. 556, 62 N. W. 731.

[n] (Miss. 1850) The docket of a justice of the peace in Alabama is not a record, and on proof of its loss, by the affidavit of a party claiming under a judgment, parol evidence can be introduced to prove its contents.—Scott v. Loomis, 21 Miss. (13 Smedes & M.) 635.

[o] (Mo. 1875) Where the record of an action before a justice of the peace fails to show that the defendant was notified according to law, the defect cannot be supplied by parol proof that a summons, alleged to be lost, was issued by the justice and served by the constable, unless such proof also shows the substantial contents of the summons and of the return thereof as well as on whom and by whom it was served, and the method of such service.—Cunningham v. Pacific R. R., 61 Mo. 33.

[p] (Mo. 1880) Where the entry in a justice's docket is ambiguous, it should be so construed as to sustain, if possible, the judgment rendered.—Roach v. Montserratt Coal Co., 71 Mo. 398.

[q] (Nev. 1875) The docket of a justice of the peace is only primary evidence of those facts which it is required to contain.—Scorpion Silver Min. Co. v. Marsano, 10 Nev. 370.

[r] (N. Y. 1833) Proceedings in a cause before a justice may be proved by the production and verification of his docket, but he cannot be permitted to give parol evidence of what transpired.—Boomer v. Laine, 10 Wend. 525.

[s] (N. Y. 1848) A justice's docket of a judgment rendered by him, though it may in some cases be explained, cannot as a whole be contradicted by parol proof; and it has a verity superior to a rule entered in the minutes of the court of common pleas, but not recorded, reversing such judgment.—Niles v. Totman, 3 Barb. 594.

[t] (N. Y. 1868) Though the statute directs that every justice shall keep a docket, and directs what entries he shall make therein, proceedings by him can still be proved by his own evidence.—Baker v. Brintnall, 52 Barb. 188; Same v. Brintrall, 5 Abb. Prac. (N. S.) 253.

[u] (Ohio, 1861) The record of a justice of the peace imports absolute verity.—Howell v. Jenkins, 2 Ohio Dec. 552.

[v] (Pa. 1853) Where a suit before a justice of the peace or alderman is terminated by an agreement of parties amounting to a discontinuance, and the agreement is entered on the docket, such entry is evidence thereof, especially after an acquiescence by the parties for 39 years.—Cope v. Risk, 21 Pa. (9 Harris) 59.

[w] (S. C. 1896) In replevin of property levied on under an execution issued on a judgment in justice's court against plaintiff in favor of one of the defendants, it appeared that plaintiff appealed to the circuit court, and that the appeal was dismissed by the court. *Held* that, where the record in the circuit court was put in evidence, it was not necessary for de-

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fendant to prove the judgment by the justice's record.—Cothran v. Knight, 47 S. C. 243, 25 S. E. 142.

[x] (S. D. 1894) An entry in a justice's docket that defendant appeared, and waived "the service of summons, and admitted the allegations of the complaint to be true, and consented that judgment be entered against him by confession, in favor of the plaintiff" for the amount claimed, is prima facie evidence that the said justice had jurisdiction of the person of the defendant, as Comp. Laws, § 6050, authorizes the voluntary appearance of parties.—Jewett v. Sundback, 5 S. D. 111, 58 N. W. 20.

[y] (S. D. 1894) Under Comp. Laws, § 6124, an entry in a justice's docket that plaintiff filed a complaint in which he claimed that defendant was indebted to him in the sum of $48 for goods sold, is prima facie evidence that the justice's court had jurisdiction of the subject-matter of the action.—Jewett v. Sundback, 5 S. D. 111, 58 N. W. 20.

[z] (Vt. 1854) On the question of notice to a defendant, the record of a justice of the peace is conclusive.—Eastman v. Waterman, 26 Vt. 494.

[zz] (Wis. 1885) The record of a justice of the peace imports verity, and is conclusive as to the time when a writ of replevin was returnable.—Smith v. Bahr, 62 Wis. 244, 22 N. W. 438.

§ 463. Defects and objections.

Omission to enter conviction of defaulting juror in docket as affecting validity of conviction, see "Jury," vol. 31, c. 569, § 383 [g].

[a] (Iowa, 1855) Code, § 2269, directing the justice to make certain entries on a docket is directory, and does not affect the validity of his proceedings.—Houston v. Walcott, 1 Iowa (1 Clarke) 86.

[b] (Minn. 1867) Where written pleadings are filed in a justice's court, an omission of the justice to state in his docket the nature of plaintiff's claim, as required by statute, will not affect the validity of the judgment.—Payson v. Everett, 12 Minn. 216 (Gil. 137).

[c] (Minn. 1872) An omission by a justice of the peace to file the pleadings in the case, as required by law, is a mere irregularity not affecting jurisdiction.—Barber v. Kennedy, 18 Minn. 216 (Gil. 196).

[d] (Neb. 1888) Where a justice of the peace, in a cause tried by jury, recites in his docket that the jury rendered a verdict in favor of the plaintiff for a specified sum, instead of entering the verdict itself in his docket, it is error without prejudice.—Dye v. Russell, 24 Neb. 829, 40 N. W. 416.

[e] (Neb. 1890) Where a justice of the peace, in a case tried by a jury, enters judgment on the verdict actually returned for the amount therein stated, it will not be reversed because of a clerical error in transcribing the verdict in his docket.—Tuttle v. Wilson, 29 Neb. 424, 45 N. W. 688.

[f] (N. Y. 1868) Though the statute directs that every justice shall keep a book called a docket, and also directs what entries he shall make therein, the omission of a justice so to keep his book does not render his judgments void.—Baker v. Brintnall, 52 Barb. 188, 5 Abb. Prac. (N. S.) 253.

[g] (Pa. 1868) The omission of the magistrate to set out the fact that the lessor had been "quietly and peaceably possessed of the premises," as required by Act Dec. 14, 1863, in a landlord and tenant proceeding, cannot be supplied by intendment from any of the facts established by the record.—Greenleaf v. Haberacker, 1 Woodw. Dec. 436.

[h] (Tenn. 1842) Where the directory mandates of the statute were nearly complied with, in relation to the docket books of the justice, but a caption to the column was wanting, the proceedings were sustained on the ground of public policy, and the judgment was not void for uncertainty, when attacked by third persons.—Johnson v. Billingsley, 22 Tenn. (3 Humph.) 151.

[i] (Wis. 1881) When the summons and pleadings show the names of all the parties, the judgment of a justice will not be reversed merely because in entering the case in his docket, after giving the name of one plaintiff, he designated the others by the words "et al."—Campbell v. Babbetts, 53 Wis. 276, 10 N. W. 400.

§ 464. Amendment.

Power to amend after appeal, see post, § 600.

[a] (Ark. 1882) Erroneous entries by a justice of the peace in one case cannot be amended in collateral proceedings.—Wayte v. Wayte, 40 Ark. 163.

[b] (Ark. 1888) Act July 23, 1868, provides that, in order to enforce a laborer's lien before a justice of the peace, if defendant is a nonresident, the justice must notify him to appear and show cause why judgment should not be rendered against him, either by insertions in a newspaper, or by posting the notice in some public place in the township where the property is. *Held*, where the evidence showed that defendant was a nonresident of the state during the pendency of an action brought against him under the statute, and it did not appear from the docket that he had notice, actual or constructive, of the action, that the justice did not acquire jurisdiction by amending the docket after judgment, so as to make it appear that defendant had notice of the suit, no notice having been given to him of the proposed amendment.—Levy v. Ferguson Lumber Co., 51 Ark. 317, 11 S. W. 284.

[c] (Ga. 1882) Where the docket of a justice of the peace shows no return of service, but there is other proof or acknowledgment thereof, the justice may correct the omission.—Benson v. Dyer, 69 Ga. 190.

[d] (Ind. 1891) In an action for malicious prosecution the docket of the justice showed a trial by jury, and verdict of not guilty, followed by a judgment in favor of defendant for costs. The judgment originally read as in favor of plaintiff, but had been changed, and the record also showed that defendant pleaded guilty. *Held*, that the entry as to the plea and the original form of the judgment were mere clerical errors, which did not vitiate the record.—Stratton v. Lockhart, 1 Ind. App 380, 27 N. E. 715.

[e] (Mich. 1870) A justice of the peace has no power to amend his record of a judgment, after the day of its rendition, by a change in the name of one of the parties, even with the consent of the opposite party, and in the presence of both.—Foster v. Alden, 21 Mich. 507.

[f] (Mo. 1891) The charter of Kansas City confers jurisdiction to render judgment on a special tax bill on "the recorder of the city, or any justice of the peace of the city." *Held* that, in a suit on a special tax bill, where the docket failed to show affirmatively that the justice was a justice of the peace, it could not be amended pending proceedings in the circuit court to quash an execution on a judgment rendered by the justice.—Corrigan v. Morris, 43 Mo. App. 456.

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[g] (Neb. 1890) Where plaintiff, in an action before a justice of the peace, has recovered a judgment for $8, it is not error to allow the transcript to be amended so as to show that before trial defendant offered in writing to allow plaintiff to take judgment for $15, such amendment being allowed for the purpose of showing facts to defeat plaintiff's recovery of costs, under Code Civ. Proc. § 1004.—Elsanger v. Grovijohn, 29 Neb. 139, 45 N. W. 273.

[h] (N. J. 1832) A justice of the peace can amend his docket according to the facts, after the rendition of his judgment.—Backer's Ex'rs v. Van Fleit's Ex'rs, 13 N. J. Law (1 J. S. Green) 195.

[i] (N. Y. 1836) An error in a justice's docket in the amount for which he has rendered judgment against the defendant, after notice to the parties, can only be corrected on motion in a court of record.—People v. Delaware Common Pleas, 18 Wend. 558.

V. REVIEW OF PROCEEDINGS.

(A) APPEAL AND ERROR, §§ 465-758.
(B) CERTIORARI, §§ 759-830.

Audita querela to relieve against judgment on refusal of appeal, see "Audita Querela," vol. 5, cc. 2112, 2113, § 13.
—— *to review judgment, see* "Audita Querela," vol. 5, c. 2104, § 3.
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Review of proceedings in forcible entry and detainer, see "Forcible Entry and Detainer," vol. 23, cc. 1402-1422, §§ 169-187.
—— *in justice's court under landlord and tenants' acts, by appeal, see* "Landlord and Tenant," vol. 32, §§ 1256-1265, 1328-1335.
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(A) APPEAL AND ERROR.

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13. REVIEW, §§ 705-720.
14. DETERMINATION AND DISPOSITION OF CAUSE, §§ 721-734.
15. LIABILITIES ON BONDS OR OTHER SECURITIES, §§ 735-750.
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1. NATURE OF REMEDY AND APPELLATE JURISDICTION.

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—— ACTIONS INVOLVING TITLE TO REAL PROPERTY, § 474.
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Appeal from justice to court of record as constituting certification of the cause, see ante, § 243 [c, d, w].
—— *to jury, see* ante, § 372.
Certification to court of record of cause without justice's jurisdiction, see ante, §§ 243-245.
—— *of record of cause without justice's jurisdiction, see* ante, §§ 243-245.
Liability of justice for concealing rendition of judgment until too late to appeal, see ante, § 45.
—— *for giving erroneous information whereby an appeal was lost, see* ante, § 44.
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—— *from justice of the peace, see* "Costs," vol. 13, cc. 779, 780, § 841; cc. 786-809, §§ 848-861.
—— *in garnishment proceedings, see* "Garnishment," vol. 24, cc. 2337-2340, § 373; cc. 2389, 2390, § 420.
—— *to abide event, see* "Costs," vol. 13, c. 875, § 939.
Costs on decisions of arbitrators on appeal from justice, see "Costs," vol. 13, cc. 783-786, § 847.
Costs on dismissal of appeal for failure to prosecute, see "Costs," vol. 13, c. 827, § 879.
—— *for want of jurisdiction, see* "Costs," vol. 13, cc. 827-829, § 880.
Liability for security for costs on appeal from justice, see "Costs," vol. 13, cc. 888, 889, § 949.
Right to costs affected by reversal of judgment on appeal from justice's court, see "Costs," vol. 13, cc. 850, 851, § 907.

§ 465. Nature and form of remedy.

[a] (Cal. 1895) Code Civ. Proc. § 890, subd. 4, providing that, if an objection that the action before a justice is brought in the wrong county is overruled, it is cause for reversal on appeal, does not prevent defendant, on such objection being erroneously overruled, from appealing both on questions of law and fact, so as to enable the appellate court to dismiss the case.—Holbrook, Merrill & Stetson v. Superior Court of Sacramento County, 106 Cal. 589, 39 Pac. 936.

[b] (Ga. 1875) When a question of fact is involved in the judgment of a justice of the peace, and the amount in controversy exceeds $50, the proper mode of having his decision re-

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viewed is by appeal.—Reedy v. Helms, 54 Ga. 121.

[c] (Iowa, 1856) Though a writ of error will bring up errors of law in the judgment of a justice, yet, if the judgment is final, whether the errors be of law or fact, the party at his election may bring error, or may appeal, under Code, § 2328.—Griffin v. Moss, 3 Iowa (3 Clarke) 261.

[d] (Iowa, 1859) A writ of error does not lie to review the decision of a justice on the facts. —Miller v. O'Neal, 9 Iowa, 446.

[e] (Iowa, 1864) An erroneous decision by a justice of the peace upon a demurrer should be made the subject of a writ of error and not of an appeal, the latter operating as a waiver of all irregularities, errors, and illegalities, and bringing up the case on its merits.—Leftwick v. Thornton, 18 Iowa, 56.

[f] (Iowa, 1867) Under Rev. St. §§ 3917, 3938, a writ of error will not lie to the final decision of a justice upon the evidence, though erroneous; the proper remedy is by appeal.—Lane v. Goldsmith, 23 Iowa, 240.

[g] (Iowa, 1874) A writ of error, and not an appeal, is the proper remedy of a party aggrieved by the dismissal of a cause by a justice of the peace for want of jurisdiction.—Belding v. Torrence, 39 Iowa, 516.

[h] (La. 1875) It was never contemplated that one sued before a justice of the peace could bring his case to be revised before the district or parish court, and before the supreme court also. The right of double appeals is not conferred by the constitution.—State ex rel. Leahy v. Third Justice of the Peace, 27 La. Ann. 639.

[i] (La. 1893) Where a justice of the peace illegally assumes to act as a police magistrate, and imposes a penalty for a violation of an ordinance, the remedy is to invoke the supervisory jurisdiction of the supreme court, and not by appeal.—State v. Carrau, 45 La. Ann. 1446, 14 South. 292.

[j] (Mich. 1869) An objection to a justice's jurisdiction may be brought in the first instance before the circuit court by special appeal as well as by certiorari.—Wright v. Russell, 19 Mich. 346.

[k] (Mich. 1882) Under Comp. Laws, § 5432, which provides that a special appeal shall bring up for review objections "to the process, pleadings, or other proceedings, and the decision of the justices thereon, which would not be allowed to be made on the trial of the appeal," the question of the justice's jurisdiction may be brought up on a special appeal.—Fowler v. Hyland, 48 Mich. 179, 12 N. W. 26.

[l] (Mich. 1882) It is ground for reversing a justice's judgment rendered in the absence of both parties that plaintiff's attorney did not prove his authority, and the objection is properly taken by special appeal.—Woodbridge v. Robinson, 49 Mich. 228, 13 N. W. 527.

[m] (Minn. 1864) The justice of the peace for the city of St. Paul is an officer of limited jurisdiction, created by special enactment, and his acts are subject to review in such mode as the legislature may prescribe. — Tierney v. Dodge, 9 Minn. 166 (Gil. 153).

[n] (N. J. 1890) If the justice has jurisdiction over the subject-matter of the action, but has lost jurisdiction over the party by irregular adjournments, the party appealing cannot raise this objection upon appeal, but his remedy is by certiorari.—Steinlein v. Folwell, 53 N. J. Law (24 Vroom) 176, 20 Atl. 1079.

[o] (N. Y. 1829) Where an error occurs before a justice on the trial of a cause, whether with or without a jury, the remedy is by appeal. In all other cases the remedy is by certiorari.—People v. Schoharie, 2 Wend. 260.

[p] (Or. 1860) Appeals lie in all cases from the final decisions of justices of the peace, and the remedy by certiorari is concurrent.—Blanchard v. Bennett, 1 Or. 328.

[q] (Pa. 1831) Where a judgment is rendered by a justice for an amount beyond his jurisdiction, the remedy is by motion to strike it off, or by writ of error.—Walker v. Lyon, 3 Pen. & W. 98.

[r] (Pa. 1846) An agreement of 30 years' standing among members of the bar, and filed of record, relating to the form of proceeding in all cases of appeals from justices, and by which the practice had been regulated during that period, is binding on their successors, who have not given previous notice of their dissent. —Hallowell v. Williams, 4 Pa. (4 Barr) 339.

[s] (Pa. 1886) The party aggrieved with the judgment of the justice cannot have both an appeal and a writ of certiorari.—Teter v. Cook, 2 Pa. Co. Ct. R. 171.

[t] (Tex. 1884) A party may resort at the same time to both the remedies of appeal and certiorari, but if he does so, he can be compelled in the appellate court to elect which remedy he will rely on, and the remedy abandoned will be dismissed at his costs.—Lindheim v. Davis, 2 Willson, Civ. Cas. Ct. App. § 108.

[u] (Wis. 1852) To determine whether the remedy of a defeated party to an action before a justice is by appeal or certiorari, the amount of the recovery, exclusive of costs, is to be looked to; in replevin it is the value of the property and damages found, exclusive of costs. —Kirby v. Martin, 4 Chand. 91, 3 Pin. 385.

[v] (Wis. 1854) Judgment was rendered by a justice for costs, there having been nothing in the case showing that the claim of either party as proved at the trial exceeded the sum of $50, as contemplated by Rev. St. c. 88, § 227. *Held*, that the county court acquired no jurisdiction by appeal; certiorari being the proper remedy.—Adler v. Gee, 3 Wis. 742.

§ 466. Statutory provisions.

Constitutionality of statutes relating to appeals from justices of the peace, see "Constitutional Law," vol. 10, cc. 1210–2368.

[a] (Ill. 1888) Police magistrates are only one kind of justices of the peace, and the statute allowing appeals from justices to the circuit court applied equally to them. Nor does the act of June 13, 1887, amending the statute regarding such appeals by making it apply in terms to police magistrates, authorize a different construction of the statute as it stood.—Newberry v. Bowen, 26 Ill. App. 645.

[b] (Mich. 1880) Comp. Laws, § 5479, forbidding reversal of a justice's judgment for an improper allowance of fees, does not cover a case expressly governed by a statute regulating costs generally, and where the question is not as to particular allowances, which the justice has failed to consider.—Wilcox v. Laflin & Rand Powder Co., 44 Mich. 35, 5 N. W. 1091.

[c] (Mich. 1891) Judgment was rendered in justice court October 29, 1890. On May 11, 1891, the circuit judge granted an appeal, which was set aside on the ground that no proper notice of the application was served on the other party. October 6, 1891, the circuit judge made an order to show cause why the appeal should not be granted, and the order

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was served on the attorneys of the other party in justice court. October 12, 1891, appeal was granted. *Held*, that the order granting an appeal should be set aside, as Act Oct. 2, 1891 (Pub. Acts 1891, No. 73), providing that, where the party obtaining judgment appeared by attorney or agent, it would be sufficient to serve notice of subsequent proceedings in the cause on such attorney or agent, was not retroactive.—Danville Stove & Mfg. Co. v. Adsit, 88 Mich. 244, 50 N. W. 140.

[d] (Miss. 1852) The act of 1842 (Hutch. Code, p. 705, art. 17), providing for appeals from the decisions of justices of the peace to the circuit courts, repealed the prior act authorizing an appeal to a jury of five men.—Pollard v. Parish, 23 Miss. (1 Cushm.) 573.

[e] (Neb. 1871) Appeals under the town site act of February 10, 1857, conferring jurisdiction on the mayor of an incorporated town to hear and determine certain questions of title, and providing that notice of appeal from his decision shall be given on the day when the judgment is rendered, are not affected by the act of February 13, 1857, regulating appeals in justices' courts.—Newcomb v. Boulware, 1 Neb. 428.

[f] (Neb. 1879) The practice in an appeal from a justice's judgment is governed by the laws in force at the time of taking the appeal.—Roesink v. Barnett, 8 Neb. 146.

[g] (Nev. 1866) Const. art. 6, §§ 6, 8, declaring that the district court shall have final appellate jurisdiction in cases arising in justices' court, and the legislature shall prescribe by law the manner of determining cases in which appeals may be taken from the justices' courts, are not violated by an act providing that a trial on appeal from justices' court shall be de novo.—Cavanaugh v. Wright, 2 Nev. 166.

[h] (N. Y. 1851) Where an appeal to the county court was perfected by the service of the necessary papers upon the justice on the 3d of June, 1848, it was *held* that it was a suit pending on the 1st day of July, 1848, and was not affected by the Code of 1848, but was to be governed throughout by the judiciary act of 1847.—Teall v. Van Wyck, 10 Barb. 376.

[i] (N. Y. 1872) Section 371 of the Code, regulating appeals from justice's judgments, is to be construed liberally.—Younghause v. Fingar, 63 Barb. 299.

[j] (Ohio, 1846) The act of March 4, 1845, respecting appeals from a justice of the peace, does not apply to cases appealed before the passage of the act.—Barker v. Cory, 15 Ohio, 9.

[k] (Ohio, 1875) Act March 30, 1875 (72 Ohio Laws, p. 161), which takes away the right to appeal from judgments of a justice of the peace where the sum is less than $100, does not apply to or affect cases where the judgment had already been rendered, and the 10 days allowed by law for giving the appeal bond had not expired at the time the act was passed and took effect; and appeals in such cases might be perfected after the date of the act.—Bode v. Welch, 29 Ohio St. 19.

[l] (Or. 1881) Where a municipal charter made its recorder ex officio justice of the peace, and gave him jurisdiction over all violations of city ordinances, but made no provision for appeals from his judgments as to such violations, *held* that the statute regulating appeals from justices did not apply to the recorder while sitting as town magistrate, and no appeal would lie therefrom.—Town of La Fayette v. Clark, 9 Or. 225.

[m] (Pa. 1866) The court will give a liberal construction to a statute in favor of the right of appeal.—Devanna v. Crane, 8 Leg. & Ins. Rep. 205.

[n] (Pa. 1887) Article 5, § 14, of the new constitution, providing that in all cases of summary conviction, or of judgment in suit for a penalty before a magistrate or court not of record, either party may appeal to such court of record as may be prescribed by law, upon allowance of the appellate court, or judge thereof, upon cause shown, and Act April 17, 1876, prescribing the appellate court to which such appeal may be taken, enlarge, instead of restrain, the right of appeal; and, as to judgments in suits for penalties, the object was, not to limit the right of appeal as it then existed, but to secure it, within certain restrictions, against infraction by the legislature for all future time.—Commonwealth v. Brunner, 2 Lehigh Val. Law Rep. 377.

[o] (Pa. 1896) Const. art. 5, § 14, provides that, in a suit for a penalty before a magistrate, either party may appeal when allowed by the appellate court. Act April 17, 1876, provides that such an appeal shall be taken to the court of common pleas. *Held* not restricted to cases in which, prior to their adoption, there was no right of appeal.—Commonwealth v. McCann, 174 Pa. 19, 34 Atl. 299, 38 Wkly. Notes Cas. 1; Same v. Courtney, 174 Pa. 23, 34 Atl. 300, 38 Wkly. Notes Cas. 2.

[p] (Utah, 1875) The act of congress of June 23, 1873, known as the "Poland Law" (18 Stat. 254, c. 469), does not change the mode and manner of taking appeals from a justice's court of Utah, either in civil or criminal cases. It simply changes the forum to which the appeal must be taken.—City of Salt Lake City v. Reed, 1 Utah, 183.

[q] (Wis. 1870) The principle, that rights of property once vested, or want of liability once established by judicial default, then final between parties, shall not be disturbed, or the controversy opened by mere legislative enactment, applies as well to a judgment of a justice having full jurisdiction of the parties and the subject-matter as to a judgment of any other court, and where an appeal from a judgment was not allowed at the time of its rendition, it could not be authorized by subsequent statute.—Town of Lancaster v. Barr, 25 Wis. 560.

§ 467. Appellate jurisdiction in general.

Appearance as giving jurisdiction where court has no jurisdiction of subject-matter, see post, § 597.

—— in appellate court as conferring jurisdiction where that court alone has original jurisdiction, see post, § 597.

Conferring jurisdiction on appellate court by amending pleadings to bring the action within justice's jurisdiction, see post, § 684.

[a] (Ill. 1881) Where one party to a judgment of a justice of the peace appeals to the circuit court, another party wishing to appeal must take his appeal to the same court, and the cause will be stricken from the docket of any other court.—Aldrich v. City of Polo, 8 Ill. App. (8 Bradw.) 45.

[b] (Miss. 1874) Appeals and writs of certiorari are only different modes of getting cases from the justice's court to the circuit court, and do not affect the question of jurisdiction.—O'Leary v. Harris, 50 Miss. 18.

[c] (Mo. 1895) While there is no presumption that a justice of the peace had jurisdiction of an action, still, it having been appealed to a

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court of superior jurisdiction, there is a presumption that it had jurisdiction, though it had none if the justice had none.—Kellogg v. Linger, 60 Mo. App. 571, 1 Mo. App. Rep'r, 235.

§ 468. —— Particular courts.

[a] (Cal. 1882) Under the constitution, and prior to any act of the legislature relating to appeals from justices' courts, the superior court had jurisdiction of such appeals.—California Fruit & Meat Shipping Co. v. San Francisco Superior Court, 60 Cal. 305.

[b] (Fla. 1855) The supreme court has no jurisdiction of appeals from a justice of the peace.—Otoway v. Devall, 6 Fla. 302.

[c] (Mass. 1854) The appeal from the judgment of a justice of the peace in a civil action, which by Rev. St. c. 85, § 13, may be taken "at any time within 24 hours after the entry of the judgment to the court of common pleas then next to be held in the same county," must be to the court held next after the entry of the judgment, although before the taking of the appeal.—McIniffe v. Wheelock, 67 Mass. (1 Gray) 600.

[d] (Mo. 1848) In the county of St. Louis, appeals from justices' courts should be taken to that court in which it can be first tried, and not necessarily to that court where sittings commence next after the appeal.—Patten v. Nelson, 12 Mo. 292.

[e] (Mo. 1873) The acts relating to the Lafayette court of common pleas does not require that an appeal from a justice should be taken to that court instead of the circuit court, when the term of the former court began soonest after the date of granting the appeal.—Smith v. Shore, 53 Mo. 273.

[f] (N. Y. 1865) When an appeal is taken from a justice court it is not to the general term of the court, but to the court of common pleas, and although the argument on the appeal is to be heard at the general term, yet any branch of this court might entertain a motion to dismiss; but where the appeal is to the general term, that alone has the power to decide upon the appealability of the order.—People v. Murphy, 1 Daly, 462.

[g] (N. C. 1853) A party against whom a judgment has been rendered by a justice of the peace may appeal to the next county court, or to the next superior court, at his option.—Plummer v. Wheeler, 44 N. C. 472.

[h] (Pa. 1848) Where there is no statute giving appellate jurisdiction to the supreme court, and its common-law jurisdiction, if it had any, could be exercised only on certiorari, an appeal will be quashed.—Haines Tp. v. Penn Tp., 1 Am. Law J. (N. S.) 26.

[i] (Pa. 1879) Where a judgment was rendered before a justice of the peace in a county, and before appeal therefrom the county was divided, and the justice resided in the part forming the new county, the appeal was properly taken to the common pleas of the new county.—Wells v. Morse, 1 Lack. Leg. Rec. 391.

§ 469. —— District and circuit courts.

[a] (U. S. 1835) The circuit courts of the territory of Arkansas alone have jurisdiction of appeals from justices of the peace.—Carr v. Tweedy, Fed. Cas. No. 2,440a [1 Hemp. 287].

[b] (Ala. 1845) Act Feb. 14, 1843, providing that all appeals from justices of the peace, and all cases pending on certiorari in the circuit court of Mobile county, should be returned into the county court of said county, did not deprive the circuit court of all jurisdiction over such cases, so as to require the court of its own motion to repudiate an appeal cause then pending, and hence it was not ground for reversal that such a cause was retained and decided.—Vaughan v. Seed, 7 Ala. 740.

[c] (Ark. 1844) Const. art. 6, § 5, provides that the circuit courts shall exercise a certain control over the county courts, and over justices of the peace in each county in their respective circuits, and shall have power to issue all necessary writs to carry into effect their general and specific powers. *Held* not to confer appellate jurisdiction on the circuit courts over cases adjudicated by justices of the peace.—Ex parte Anthony, 5 Ark. (5 Pike) 358.

[d] (Fla. 1855) Circuit courts of this state have power to hear and adjudicate appeals from courts of justices of the peace.—Ex parte Henderson, 6 Fla. 279.

[e] (Iowa, 1862) No appeal lies from the city court of Dubuque to the district court.—State v. Hodnutt, 13 Iowa, 437.

[f] (Iowa, 1877) An appeal lies to the district court from the judgment of the mayor of a town incorporated under the general law, for the violation of an ordinance.—State v. Hoag, 46 Iowa, 337.

[g] (Iowa, 1880) Under Laws 1876, c. 143, organizing the superior court of the city of Cedar Rapids, that court and the circuit court exercise concurrent jurisdiction in the matter of appeals from justices of the peace within the township or townships in which the city is situated.—Hickox v. Nutting, 55 Iowa, 403, 7 N. W. 645; Same v. Burlington, C. R. & N. Ry. Co., 55 Iowa, 431, 7 N. W. 645.

[h] (Iowa, 1883) Under Code 1873, §§ 162, 3575, requiring appeals from a justice's court to the circuit court in civil actions, no appeal lies to the district court except in criminal cases.—State v. Knapf, 61 Iowa, 522, 16 N. W. 590.

[i] (Ky.) From a judgment of a justice, on a motion against a constable for failing to return an execution, where the amount exceeds £5, an appeal lies only to the circuit court, unless the case has arisen since the act of 1835.—(1824) Craddock v. Patterson, 17 Ky. (1 T. B. Mon.) 8; (1838) Howard v. Jones, 41 Ky. (2 B. Mon.) 526.

[j] (Ky. 1876) The circuit court has no jurisdiction of an appeal taken directly from the judgment of a justice of the peace.—Jones v. Thompson's Ex'r, 75 Ky. (12 Bush) 394.

[k] (Ky. 1895) Under Acts 1891–93, c. 221, § 34, providing for appeals to the quarterly court from "justices', fiscal, city, or police courts," when the value in controversy is over $10, an appeal does not lie to the circuit court from a justice's judgment.—Jackson v. Wernert, 30 S. W. 412.

[l] (Minn. 1895) Where the territory of a city lies in two counties, to any constable in either of which process may issue, under the law, from the city justice, an appeal will lie to the district court of either county from a judgment of the justice.—Minneapolis Threshing Co. v. Voigt, 63 Minn. 145, 65 N. W. 261.

[m] (Miss. 1847) The charter of Natches of 1825 provided that the selectmen should be commissioned as justices of the peace for one year, and that a right of appeal should be had from their judgments, in relation to or arising out of a city ordinance, to the board of selectmen. In 1832, the constitution, then adopted, provided that justices of the peace should be elected by districts for two years, and for a right of appeal from their judgments; and the law passed thereunder provided for an appeal to the circuit courts. *Held*, that the constitu-

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tion and charter did not seem to harmonize, but that, where there was an appeal to the circuit court from a judgment on process, signed by "J. R. S., City Magistrate and Justice of the Peace," the court would consider the judgment to have been rendered by the magistrate as justice of the peace, and that it would be error to dismiss such appeal.—Agnew v. City of Natchez, 17 Miss. (9 Smedes & M.) 104.

[n] (Mo. 1852) The superintending control vested by the constitution in the circuit court over justices of the peace is not diminished by the power conferred upon the St. Louis law commissioner.—Ladue v. Spalding, 17 Mo. 159.

[o] (N. J. 1883) P. L. 1882, p. 137, providing for appeals to the district court from judgments of justices of the peace in civil proceedings, confers exclusive jurisdiction on the district court in such cases in cities where they are established.—Jackson v. Kelly, 6 N. J. Law J. 55.

[p] (Wis. 1855) Previous to the passage of Sess. Laws 1855, c. 34, authorizing an appeal from a justice of the peace to the circuit court, the circuit court had no jurisdiction to entertain such appeal.—Asher v. Hill, 4 Wis. 214.

§ 470. —— County courts.

[a] (Cal. 1858) The power to hear appeals from the justices' courts is vested exclusively in county courts.—People v. Fowler, 9 Cal. 85.

[b] (Colo. 1879) Though the provisions of Rev. St. establishing the mode of procedure in taking and prosecuting appeals from judgments of justices of the peace remain in force, such appeals, under the act of March 14, 1877, lie to the county court, instead of the district court.—Wike v. Campbell, 5 Colo. 126.

[c] (Ill. 1857) Const. art. 5, § 8, providing that the circuit courts shall have jurisdiction "in all cases of appeals from inferior courts," does not disable the legislature from allowing appeals in civil cases from justices of the peace to the county courts.—Jackson v. Kemble, 18 Ill. (8 Peck) 580.

[d] (Ky. 1835) An appeal from a justice's judgment for more than five pounds cannot be heard by the county court, but must go to the circuit court.—Parks v. Hulme, 33 Ky. (3 Dana) 499.

[e] (Ky. 1837) Where the amount claimed in an action before a justice exceeds five pounds, an appeal from the justice's judgment lies to the circuit and not to the county court, though the amount of the judgment is less than that sum.—Williams v. Wilson, 35 Ky. (5 Dana) 596.

[f] (Ky. 1852) 2 St. Laws 1796, p. 887, 2 St. Laws 1800, p. 889, 3 St. Laws 1838, p. 376, and 3 St. Laws 1839, p. 377, give justices of the peace exclusive jurisdiction of causes in equity or law, where the amount in controversy was under £5, and authorize an appeal from their decisions to the county courts, where the judgment is of the amount of 25 shillings or over, and under £5; Act Jan. 23, 1840 (3 St. Laws, p. 378), provides that the first section of the act entitled "An act to regulate equitable proceedings under five pounds before justices of the peace" (3 St. Laws 1838, p. 376) be so amended as to increase the jurisdiction of justices of the peace to all sums under $50, and above £5, under the same regulations as specified in said act, provided that the party against whom such order or judgment is entered by the justice may have the right to appeal to the next circuit court to be holden for the county, on his executing bond, as in other cases of appeal. *Held*, that an appeal lies to the county court from the judgment or decision of a justice of peace, in all cases in equity where the amount in controversy is under £5.—Searcy v. Switzer, 52 Ky. (13 B. Mon.) 352.

[g] (Mass. 1855) An appeal from the judgment of two justices of the peace and of the quorum, upon charges of fraud filed by a creditor against a debtor on his application to be admitted to take the poor debtors' oath, must be entered at a civil term of the court of common pleas, in a county where distinct terms are established for the transaction of civil and criminal business.—Parker v. Page, 70 Mass. (4 Gray) 533.

§ 471. —— Municipal courts and courts of special jurisdiction.

[a] (Colo. 1877) Under Act 1874, p. 67, making Act 1870, p. 69, apply to Rio Grande county, all appeals from justices of the peace therein must be taken to the probate court.—Foote v. Walker, 3 Colo. 339.

[b] (Colo. 1887) Under the statutes, the superior court of Denver has jurisdiction in appeals from decisions of justices of the peace in garnishment causes.—Welsh v. Noyes, 10 Colo. 133, 14 Pac. 317.

[c] (Colo. 1888) Gen. St. § 3222, provides that appeals from any decision of a justice of the peace in the city or incorporated town where a superior court is held, or from the decision of any police magistrate of said city or town, in any case involving the violation of a city ordinance, may be allowed to the superior court of such city or town. *Held*, that the superior court has jurisdiction of appeals from justices in cases not involving the violation of an ordinance.—Cochrane v. Cowan, 11 Colo. 610, 19 Pac. 764.

[d] (Minn. 1879) Sp. Laws 1875, c. 2, establishing the municipal court of the city of St. Paul, provided (section 28) that "all appeals hereafter taken from the judgment of any justice of the peace now existing in said city shall be taken to the said municipal court, and not to the district court." Section 26 took away the jurisdiction in any action, civil or criminal, from any justice thereafter elected or appointed. Sp. Laws 1876, c. 211, amending the act of 1875, provided for the election of two justices in said city, and vested them with all the jurisdiction and powers and authorized them to discharge all the duties required by the General Statutes, with certain exceptions. *Held*, that appeals from justices elected under the act of 1876 lay to the district court, and not to the municipal court.—McClung v. Manson, 25 Minn. 374; State v. Hanft, 26 Minn. 264, 3 N. W. 343.

[e] (Mo. 1855) An appeal from the decision of a justice of the peace in St. Louis county, in an action for trespass on land, should be to the St. Louis land court.—Meier v. Eichelberger, 21 Mo. 148.

[f] (Mo. 1856) An appeal from a justice of the peace, when the suit is for trespass on real estate, must be taken to the land court, although consequential damages are also claimed. the law commissioner's court has no jurisdiction, and rightly dismissed the appeal.—Watkins v. Finney, 23 Mo. 48.

[g] (Pa. 1892) The court of quarter sessions has no jurisdiction of an appeal from a conviction before a justice of the peace of a violation of a regulation of the board of health of a borough.—Cumberland County v. Deckman (Quart. Sess.) 12 Pa. Co. Ct. R. 340.

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§ 472. Jurisdiction dependent on jurisdiction of lower court.

Amount of judgment on appeal limited to jurisdiction of justice, see post, § 724.

Jurisdiction of appellate court to allow a new cause of action not within justice's jurisdiction to be pleaded, see post, § 673.

[a] On appeal from a justice of the peace, in an action over which he had no jurisdiction, the circuit court has no jurisdiction.
—(Ark. 1849) Collins v. Woodruff, 9 Ark. (4 Eng.) 463;
(Ill. 1851) People v. Skinner, 13 Ill. (3 Peck) 287, 54 Am. Dec. 432;
(Ind. 1891) Goodwine v. Barnett, 2 Ind. App. 16, 28 N. E. 115;
(Ky. 1829) Stephens v. Boswell, 25 Ky. (2 J. J. Marsh.) 29;
(Tex. 1881) Erwin v. City of Austin, 1 White & W. Civ. Cas. Ct. App. § 1038;
(Wis. 1844) Barker v. Baxter, 1 Pin. 407; (1875) Cooban v. Bryant, 36 Wis. 605.

[b] On appeal from a justice of the peace, the appellate court has only such jurisdiction as the justice had, and if the justice had not jurisdiction of the case, the suit should be dismissed; and it makes no difference that such appellate court has original jurisdiction of the subject-matter of the suit.
—(Ark. 1847) Fitzgerald v. Beebe, 7 Ark. (2 Eng.) 305, 46 Am. Dec. 285;
(Ohio, 1829) Nichol v. Patterson, 4 Ohio (4 Ham.) 200.

[c] (Ala. 1853) The want of jurisdiction, apparent on the face of the proceedings before the justice, may be pleaded in abatement, or the appellate court may, ex mero motu, declare the judgment coram non judice and void.—Crabtree v. Cliatt, 22 Ala. 181.

[d] (Ark.) Where a justice of the peace had no jurisdiction because the action on which the suit was founded was not filed with him until after the summons had been issued, the circuit court could acquire none by appeal, and should dismiss the cause for want of jurisdiction.—(1845) Pendleton v. Fowler, 6 Ark. (1 Eng.) 41; (1845) Levy v. Shurman, Id. 182, 42 Am. Dec. 690; (1846) Latham v. Jones, 6 Ark. (1 Eng.) 871; (1846) Dickey v. Pettigrew, Id. 424.

[e] (Ark. 1849) Where in one of three suits before a justice of the peace the cause of action was filed with the justice before the issuance of the writ, and in the other two this was not done, and defendant moved for the consolidation of the three suits, and pleaded to and defended the consolidated suit, the jurisdiction of the justice being nevertheless restricted to the cause of action filed, so also was that of the circuit court, on appeal from the judgment of the justice.—Everett v. Clements, 9 Ark. (4 Eng.) 478.

[f] (Ark. 1884) The jurisdiction of the circuit court, on appeal from a justice, is derived from the appeal.—Whitesides v. Kershaw, 44 Ark. 377.

[g] (Ark. 1884) The circuit court cannot, on appeal from a justice court, consider an equitable issue not passed on in the justice court, and of which such court would not have had jurisdiction.—Whitesides v. Kershaw, 44 Ark. 377.

[h] (Del. 1848) The superior court will not try, on appeal from a justice of the peace, a case not within his jurisdiction, though within theirs. The transcript must show jurisdiction.—Barr v. Logan, 5 Har. 52.

[i] (Ill. 1851) A circuit court should dismiss a suit on appeal, if it appears that the justice of the peace had not jurisdiction of the subject-matter.—Hough v. Leonard, 12 Ill. (2 Peck) 456.

[j] (Ill. 1858) The circuit court acquires no jurisdiction on appeal from an award of arbitrators appointed by a justice, where no suit was pending before the justice.—Shirk v. Trainer, 20 Ill. (10 Peck) 301.

[k] (Iowa, 1878) Code 1873, § 3590, relative to appeals from justices of the peace to the circuit court, providing that "an appeal brings up a cause for trial on the merits, and for no other purpose. All errors, irregularities, and illegalities are to be disregarded under such circumstances if the cause might have been prosecuted in the circuit court,"—does not authorize the circuit court to entertain an appeal where the justice had no jurisdiction of the subject-matter.—McMeans v. Cameron, 51 Iowa, 691, 49 N. W. 856.

[l] (Kan. 1889) Plaintiff sued for a partnership accounting before a justice who rendered judgment for plaintiff, and defendant appealed to the district court, and moved to dismiss the action because neither the justice nor the district court had jurisdiction of the subject-matter. No pleading was filed in either court, except plaintiff's bill of particulars filed in the justice's court, and nothing was done by defendant in either court to waive any want of jurisdiction, except to appeal from the justice to the district court. The district court dismissed the action. *Held* proper, as a justice cannot take jurisdiction of a purely equitable action; and the district court took jurisdiction of only such matters as were within the jurisdiction of the justice.—Berroth v. McElvain, 41 Kan. 269, 20 Pac. 850.

[m] (Ky.) On appeal from a justice's judgment, the appellate court should abate the suit when it appears that the justice was without jurisdiction.—(1837) McKitrick v. Peter, 35 Ky. (5 Dana) 587; (1859) Fleming v. Limebaugh, 59 Ky. (2 Metc.) 265.

[n] (Mass. 1844) A justice of the peace having no jurisdiction in replevin except replevin for beasts distrained for going at large, or impounded for doing damage the court of common pleas has no appellate jurisdiction of any other action of replevin.—Jordan v. Dennis, 48 Mass. (7 Metc.) 590.

[o] (Miss. 1848) On appeal from a justice of the peace, the appellate court has only such jurisdiction as the justice had, and the action will be tried by the same rules which should have governed the trial below.—Crapoo v. Town of Grand Gulf, 17 Miss. (9 Smedes & M.) 205; Stier v. Surget, 18 Miss. (10 Smedes & M.) 154.

[p] (Mo. 1894) On appeal from a justice of the peace, the jurisdiction of the appellate court depends on the jurisdiction of the justice.—Mitchell Planing Mill Co. v. Short, 58 Mo. App. 320.

[q] (Ohio, 1829) The appellate jurisdiction of the common pleas is based upon the jurisdiction of the justice whose transcript is brought up. If it appears from that that the justice had no jurisdiction, the superior court is left to create the cause or dismiss it.—Nichol v. Patterson, 4 Ohio (4 Ham.) 200.

[r] (Ohio, 1846) Where a cause over which a justice had no jurisdiction is appealed, judgment may be entered in the common pleas, if it has jurisdiction of the subject-matter.—Harrington v. Heath, 15 Ohio, 483.

[s] (Pa. 1823) A justice of the peace having no jurisdiction in an action of account render, the court of common pleas cannot try such ac-

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tion on appeal from a justice.—Wright v. Guy, 10 Serg. & R. 227.

[t] (Pa. 1856) The court of common pleas has jurisdiction of an appeal from a judgment by a justice of the peace, where part of the demand passed upon by the justice was without his jurisdiction.—Bunce v. Stanford, 27 Pa. (3 Casey) 265.

[u] (Vt. 1847) Where a suit had been once continued by the justice who signed the writ, and afterwards, in the absence of the justice, it was continued by another justice, and the defendant appeared at the day to which it was so continued, and moved to dismiss the suit, and the motion was overruled and judgment rendered against him, from which he appealed, it was *held*, upon the motion to dismiss being renewed in the county court, that the action should be dismissed.—Whitcomb v. Rood, 20 Vt. 49.

[v] (Wis. 1865) An appeal from a judgment of a justice of the peace who was without jurisdiction will be dismissed by the circuit court.—Felt v. Felt, 19 Wis. 193.

§ 473. —— Amount in controversy.

Consent to jurisdiction where the amount was beyond justice's jurisdiction, see post, § 475.

Jurisdiction of appellate court to allow amount in controversy to be increased beyond jurisdiction of justice, see post, § 674.

—— *of particular courts determined by amount in controversy, see* ante, §§ 469, 470.

[a] An appeal from the judgment of a justice of the peace may be dismissed, even after trial and verdict in court, where it appears that the amount in controversy exceeded the jurisdiction of the justice. Neither the laches of the defendant, nor his consent, could give jurisdiction.
—(Minn. 1856) Dodd v. Cady, 1 Minn. 289 (Gil. 223);
(Pa. 1861) Collins v. Collins, 37 Pa. (1 Wright) 387.

[b] (Ala. 1849) The fact that, in a case before a justice of the peace, the summons was issued upon a debt of $99, when the jurisdiction of the court was limited to causes involving $50 or less, will not prejudice the trial of the case on its merits, on appeal, as the act of 1819 provides that appeals from judgments of justices of the peace shall be tried according to the justice and equity of the cause, without regarding any defect in the summons or other proceeding of the justice of the peace.—Hart v. Turk, 15 Ala. 675.

[c] (Cal. 1855) Where a justice of the peace rendered a judgment for an amount exceeding his jurisdiction, the county court should dismiss the whole case.—Ford v. Smith, 5 Cal. 331.

[d] (Cal. 1886) Where a justice's court has no jurisdiction of an action to recover specific property, because its value exceeds the limit of its jurisdiction, the superior court can take no jurisdiction of such an action, on appeal from the justice's court.—Shealor v. Amador County Superior Court, 70 Cal. 564, 11 Pac. 653.

[e] (Ga. 1885) An appeal from a justice's judgment on several notes, and consolidation of the suits on each, cannot confer jurisdiction upon the superior court if none existed in the justice's court from which the appeal was taken; owing to the amounts being in excess of the justice's jurisdiction.—Searcy v. Tillman, 75 Ga. 504.

[f] (Ind. 1877) In an action brought in a justice's court, an amended complaint, in four paragraphs, was filed, the aggregate amount demanded thereby exceeding the amount of which the justice had jurisdiction, although the sum demanded in each paragraph and by the original complaint was less than that amount. *Held*, on appeal, that the circuit court did not acquire jurisdiction.—Mays v. Dooley, 59 Ind. 287; Horton v. Sawyer, Id. 587.

[g] (Kan. 1890) Under Comp. Laws, c. 81, §§ 120–124, providing for an appeal from the judgment of a justice of the peace to the district court, the jurisdiction of the district court is exclusively appellate, and, where the justice had no jurisdiction of the action because the amount claimed exceeded $300, the district court acquires none, though it is the defendant who appeals.—Ball v. Biggam, 43 Kan. 327, 23 Pac. 565.

[h] (Minn. 1871) The jurisdiction of a justice in replevin, under Gen. St. 1866, c. 65, § 5, subd. 2, giving such jurisdiction where the value of the property "does not exceed" $100, depends upon the filing of the affidavit and bond required by sections 81–83 of the same chapter, before the writ can issue, and is not derived from the complaint, as the pleadings are made up on the return of the writ; and, where such affidavit and bond are duly filed, the value specified therein not exceeding $100, and no issue is made on the value, proof, on appeal to the district court, that the property is of greater value than $100, will not oust jurisdiction.—Hecklin v. Ess, 16 Minn. 51 (Gil. 38).

[i] (Miss. 1888) Where an action is without the jurisdiction of a justice of the peace, as to the amount involved, the circuit court will acquire no jurisdiction on appeal from his judgment.—Louisville & N. R. Co. v. McCollister, 66 Miss. 106, 5 South. 695.

[j] (N. C. 1884) Where a plaintiff splits up an account for the purpose of suing in a justice's court, and the two suits are taken to the superior court by appeal, they cannot be consolidated there for the purpose of conferring jurisdiction.—Jarrett v. Self, 90 N. C. 478.

[k] (N. C. 1885) If a justice of the peace had no jurisdiction, the amount involved being too great, the superior court does not acquire jurisdiction on an appeal by the entry of a remittitur as to the excess.—Ijames v. McClamroch, 92 N. C. 362.

[l] (Ohio, 1859) Justices of the peace having jurisdiction, under Act March 14, 1853, § 4, as amended by Act May 1, 1854, § 1, to give damages, not exceeding $300, for breaches of warranties of horses, by appeal from a judgment therefor, the common pleas takes jurisdiction, and the appeal must there be entertained.—McKibben v. Lester, 9 Ohio St. 627.

[m] (Tex. 1891) Where the amount in controversy in a justice's court is in excess of its jurisdiction, the county court, on appeal, does not acquire jurisdiction, nor does the court of appeals, further than is necessary to reverse the judgment, with a direction to dismiss the case.—Waters v. Walker (App.) 17 S. W. 1085.

[n] (Tex. 1896) A justice court has no jurisdiction to try a counterclaim the items of which, taken collectively, exceed $200, and an appeal to the county court from a judgment in such case confers no jurisdiction.—Cain v. Culbreath (Civ. App.) 35 S. W. 809.

§ 474. —— Actions involving title to real property.

[a] (U. S. 1880) Where a case of which a justice of the peace has no jurisdiction, because of the fact that the title to land is involved, is removed to the district court by ap-

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peal from the justice's judgment, it should be dismissed, because there could have been no lawful trial before the justice.—Langford v. Monteith, 102 U. S. 145, 26 L. Ed. 53.

[b] (Ala. 1880) When a cause before a justice of the peace involves the title to real estate, the circuit court should, on appeal, repudiate the cause as having been tried below without jurisdiction.—Webb v. Carlisle, 65 Ala. 313.

[c] (Ark. 1847) Where it appeared that an action before a justice of the peace involved the title to land, it should be dismissed in the circuit court, on being carried there by appeal.—Fitzgerald v. Beebe, 7 Ark. (2 Eng.) 305, 46 Am. Dec. 285.

[d] (Ill. 1859) A justice of the peace having no jurisdiction to render judgment for breach of covenant, the county court of appeal has no larger jurisdiction than had the justice.—Kennedy v. Pennick, 21 Ill. (11 Peck) 597.

[e] (Kan. 1884) The fact that it appears from the evidence in the district court, on appeal from a judgment of a justice, that title to real estate is involved, will not prevent the court from trying the case, where this fact did not appear in the justice court, though Laws 1870, c. 88, § 2 (Comp. Laws 1879, c. 81, § 7), requires a justice, where it appears, in an action commenced before him, that title is involved, to certify it to the district court for trial.—Douglass v. Easter, 32 Kan. 496, 4 Pac. 1034.

[f] (Md. 1879) On appeal from a justice court to the Baltimore city court, where the action is tried de novo, the latter court has no jurisdiction to adjudicate the question of title to land; the justice court not having such jurisdiction.—Presstman v. Silljacks, 52 Md. 647.

[g] (N. H. 1851) Where a justice of the peace enters judgment involving the title of real estate, it is unnecessary to enter an appeal from such judgment, as it is one which the justice had no jurisdiction to make, and to which, therefore, an appeal will not lie.—Morse v. Davis, 24 N. H. (4 Fost.) 159.

[h] (N. Y. 1871) Code Proc. § 59, providing for the dismissal by a justice of the peace of a case, where it appears on the trial, from the plaintiff's own showing, that the title to real property is in question, governs as well appeals to the county court in such cases.—O'Donnel v. Brown, 3 Lans. 474.

[i] (N. Y. 1892) Code Civ. Proc. § 2956, providing that if, in actions before justices of the peace, it appears "from the plaintiff's own showing that the title to real property is in question, * * * the justice must dismiss the complaint * * * and render judgment against plaintiff," does not apply where an appeal is taken in trespass from a justice to the county court, the record not showing that the title to the land was disputed in the proceedings before the justice, and it was error for the county court to dismiss the complaint on the ground that from plaintiff's showing the title to the land was involved.—Gould v. Patterson, 63 Hun, 575, 18 N. Y. Supp. 332, 28 Abb. N. C. 385, 22 Civ. Proc. R. 230.

[j] (N. Y. 1895) Code Civ. Proc. §§ 2951, 2952, 2954, provide how defendant may discontinue an action before a justice which he claims will involve a question of title to real estate. Section 2955 provides that, if defendant does not take such steps, the justice has jurisdiction, and defendant is precluded from drawing the title in question. Section 2956 provides that if, however, it appears on the trial, from plaintiff's own showing, that title is in question, and the title is disputed by defendant, the justice must dismiss the complaint. *Held* that, where defendant did not take steps for a discontinuance, failure of the justice to dismiss, though title was brought in question and disputed, did not render his judgment void for want of jurisdiction, but merely erroneous, and the county court could try the case, including the question of title, on appeal, it being provided by section 3071 that, on such appeal, all proceedings are the same as if the action had been commenced there, except as otherwise specifically provided.—Gould v. Patterson, 87 Hun, 533, 34 N. Y. Supp. 289.

[k] (Or. 1885) The question of title to real estate cannot be entertained by the circuit court on appeal from a justice's court.—Aiken v. Aiken, 12 Or. 203, 6 Pac. 682.

§ 475. Waiver of objections and consent to jurisdiction.

Waiver of objections to jurisdiction of appellate court where amount is too small, see post, § 479.

—— *or consent to jurisdiction on appeal where dependent on amount in controversy, see* post, § 486.

[a] Where the justice had no jurisdiction of the amount in controversy, consent of parties cannot give the appellate court jurisdiction.—(Minn. 1856) Dodd v. Cady, 1 Minn. 289 (Gil. 223);

(Pa. 1861) Collins v. Collins, 37 Pa. (1 Wright) 387.

[b] (Ala. 1843) Where, on appeal from a justice, the declaration is for a sum within the jurisdiction of the justice, and interest on such sum from the time it became due, and there is a verdict for a sum beyond the jurisdiction of the justice, the judgment thereupon rendered, and to which no objection was made, will not be reversed on error, as, the jurisdiction of the court on appeal not being limited by the amount in controversy, had a suit been originally brought there, it was allowable for the party whose case came up by appeal to impliedly or expressly consent to the decision of the controversy which the primary court would not have been competent to adjust.—Pruitt v. Stuart, 5 Ala. 112.

[c] (Ala. 1852) In appeal cases the defendant may waive all objections to the mode in which he is brought into court, and submit the case, though involving more than $50, to the decision of the circuit court which, by virtue of its general jurisdiction over the amount, can determine it.—Vaughan v. Robinson, 20 Ala. 229.

[d] (Ala. 1858) On appeal from a justice, where the appellate court has no jurisdiction of the subject-matter, no waiver or consent of the parties can confer jurisdiction.—Little v. Fitts, 33 Ala. 343.

[e] (Ark. 1896) The objection that the record does not show a judgment and affidavit for appeal from a justice to the circuit court cannot be urged on appeal from the circuit court, where the circuit court had original as well as appellate jurisdiction of the cause, and it exercised jurisdiction without objection.—Smith v. Maberry, 61 Ark. 515, 33 S. W. 1068.

[f] (Ind. 1862) The fact that on the trial in the circuit court the title to real estate was brought in issue cannot deprive that court of its jurisdiction, nor can it relate back and defeat the jurisdiction of the justice.—Wall v. Albertson, 18 Ind. 145.

[g] (Ind. 1877) Jurisdiction by consent of the parties cannot be given to a justice of the peace, nor to the circuit court, on appeal of the amount in controversy exceeding $200.—Horton v. Sawyer, 59 Ind. 587.

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[h] (Iowa, 1872) A justice of the peace of Wisconsin failed to render judgment on a verdict for plaintiff, returned by the jury. Both parties appeared, and entered upon a trial of the cause on appeal, without objection that no appeal lay from the verdict of the jury; and judgment was rendered against plaintiff. *Held*, in an action on the transcript of such judgment and proceedings, that the parties thereby gave the appellate court jurisdiction of their persons, and rendered its proceedings and judgment valid, as the court, under the laws of Wisconsin, would have had jurisdiction to try the cause had it been originally commenced there.—Danforth v. Thompson, 34 Iowa, 243.

[i] (Ky. 1877) Where the court has jurisdiction of the subject-matter, the right to object, because an appeal was brought directly from a justice's court to the circuit court, instead of being brought through the quarterly court, is waived by a failure to move for a dismissal, and consenting to a trial in the circuit court.—Hughes' Adm'r v. Hardesty, 76 Ky. (13 Bush) 364.

[ii] (Mich. 1853) An appellant from a justice, by pleading to the merits, waives his exceptions to the jurisdiction of the court.—Shaw v. Moser, 3 Mich. 71.

[j] (Minn. 1878) Where an appeal has been taken from a justice of the peace on questions of law and fact, and the cause tried and judgment entered in the district court without objection, the jurisdiction of that court is complete, though the amount in controversy was more than $100, and the justice, for that reason, had no jurisdiction.—Lee v. Parrett, 25 Minn. 128.

[k] (Ohio) Where the plaintiff, having failed to recover judgment in an action before a justice of the peace, has applied to the court of common pleas and there filed a petition alleging an entirely new cause of action, and the defendant, without objection, has answered to the merits, the appellate court thereby acquires original jurisdiction of the case; and the fact that it came into the court nominally by appeal is immaterial.—(1859) Bisher v. Richards, 9 Ohio St. 495; (1876) Wilson v. Wilson, 30 Ohio St. 305.

[l] (Ohio, 1877) Where, on an appeal from a judgment of a justice's court, defendant demurs generally as well as for want of jurisdiction, such demurrer is a submission to jurisdiction, since, if he desired to present the question as to jurisdiction, a motion should have been presented to dismiss for want of jurisdiction.—Miller v. Truman, 7 Ohio Dec. 374, 2 Wkly. Law Bul. 241.

[ll] (Pa. 1818) Where parties have by consent referred a matter exceeding $100 to a justice of the peace, under the arbitration act of March 20, 1810, no appeal will lie from his decision, though the opposite party acquiesces in the appeal.—Morrison v. Weaver, 4 Serg. & R. 190.

[m] (Tex. 1887) Three cases were pending in a justice's court, all instituted by the same plaintiff, but against different defendants. One of the actions was tried and appealed to the district court. A stipulation was entered into by the parties in the other cases that they would abide the result of the case appealed, and the same judgment should be rendered by the district court as had been given in the case appealed. *Held*, that the district court, having no original jurisdiction of the subject-matter, could not obtain jurisdiction by consent, but only by appeal.—Woodruff v. Bass, 67 Tex. 298, 3 S. W. 48.

§ 476. Determination of jurisdiction.

[a] (Colo. 1878) The county court cannot take cognizance, by appeal, of a cause from a justice of the peace, unless the fact of his jurisdiction appears affirmatively.—Downing v. Florer, 4 Colo. 209.

[b] (Ill. 1874) Pending an appeal in the circuit court from a justice of the peace, the question of the jurisdiction of the circuit court to entertain such appeal is one that may be determined in that suit, and is not triable upon a petition for a writ of mandamus to compel the justice, notwithstanding the appeal, to issue an execution on his judgment.—People v. Huntoon, 71 Ill. 536.

[c] (Kan. 1890) Upon an appeal from a justice of the peace to the district court, an objection by defendant, at the trial, to the introduction of any evidence for plaintiff on the ground that the court has no jurisdiction of the subject-matter of the action, is sufficient, and in apt time to raise the question of jurisdiction.—Ball v. Biggam, 43 Kan. 327, 23 Pac. 565.

[d] (N. C. 1881) On an appeal in a summary proceeding in ejectment before a justice of the peace, it is the province of the court to determine whether title to land is in controversy.—Parker v. Allen, 84 N. C. 466.

[e] (Pa.) On an appeal, the justice may prove by parol the amount of the plaintiff's demand before him, for the purpose of determining the jurisdiction of the appellate court.—(1811) Hoops v. Worthington, 1 Browne, 336; (1834) Downey v. Ferry, 2 Watts, 304.

[f] (Pa. 1895) Where a transcript on appeal by defendant from a judgment of a justice of the peace is filed in the county court, and plaintiff moves to strike off the appeal, the question of want of jurisdiction in the justice may be raised by defendant by motion to dismiss the proceedings, though certiorari is the proper and best way.—Ripple v. Keast (Com. Pl.) 8 Kulp, 109, 16 Pa. Co. Ct. R. 548, 5 Pa. Dist. R. 31, 26 Pittsb. Leg. J. (N. S.) 205.

[g] (Tex. 1883) Where an appeal bond from a justice's court does not describe the judgment with sufficient fullness to show that it was final and appealable, the court may consider the transcript in determining the question of jurisdiction.—Owens v. Levy, 1 White & W. Civ. Cas. Ct. App. § 408.

[h] (Tex. 1887) Where the question arises as to the jurisdiction of an appeal from a justice, it is proper for the appellate court to look to the entire record to determine it.—Anderson v. Beaty, 3 Willson, Civ. Cas. Ct. App. § 260.

[i] (Wis. 1865) On an appeal to the circuit court from a justice of the peace, the return of the justice stated that on the 1st of September, 1862 (the return day of the summons), the plaintiff "declared orally on a promissory note given to him by defendant, dated F———, June 9, 1862, and demanded judgment on the same for $100." The return did not further describe the note, nor was it returned with the papers and filed in the circuit court. At the trial in said court, there was offered in evidence by the plaintiff, but ruled out, a note for $600, executed by defendant to plaintiff, dated as above, and indorsed as follows: "Filed Sept. 1, 1862, B. L. P———, J. P., and demanded a judgment of $100, offering to release all of said note but said $100." *Held*, that this indorsement was sufficient evidence that said note was the one in suit, and that the justice, therefore, had no jurisdiction.—Felt v. Felt, 19 Wis. 193.

[j] (Wis. 1885) The justice's minutes of testimony cannot be referred to on an appeal for the purpose of ascertaining whether the amount in controversy exceeded his jurisdic-

tion, in a case triable de novo in the circuit court on appeal, but in such an action the justice should be required to certify what amount was proved on the trial to his satisfaction, and the amount it was reduced by credits given, or by the set-off or demand of the defendant.—Sellers v. Lampman, 63 Wis. 256, 23 N. W. 131.

[k] (Wis. 1885) Where, on appeal to the circuit court, the parties are allowed to amend their pleadings so that either party could prove an account far in excess of a justice's jurisdiction, this will not show that such proof was made on the trial before the justice, and that he had not jurisdiction.—Sellers v. Lampman, 63 Wis. 256, 23 N. W. 131.

2. DECISIONS REVIEWABLE.

(a) IN GENERAL, §§ 477, 478.
(b) AMOUNT OR VALUE IN CONTROVERSY, §§ 479-489.
(c) FINALITY OF DETERMINATION, §§ 490-492.
(d) NATURE, SCOPE, AND EFFECT OF DECISION, §§ 493-502.

(a) IN GENERAL.

IN GENERAL, § 477.
NATURE OF SUBJECT-MATTER, § 478.

Decision of justice on interplea in garnishment proceeding, see ante, § 303 [d].

Nature of action as determining what court has appellate jurisdiction, see ante, § 471.

§ 477. In general.

[a] (Ind. 1870) An appeal will lie in an action brought in the mayor's court of a city incorporated under the general law, to recover the penalty for the violation of a city ordinance.—City of Goshen v. Croxton, 34 Ind. 239.

[b] (Miss. 1847) An appeal lies from the judgment of a city magistrate, for the violation of a city ordinance, to the circuit court.—Agnew v. City of Natchez, 17 Miss. (9 Smedes & M.) 104.

[c] (N. H. 1849) The refusal of a justice of the peace to receive a plea in abatement seasonably offered, and the rendition of final judgment against the defendant, without regard to the plea, constitute such error or abuse, on the part of the inferior jurisdiction, as authorizes the interposition of the extraordinary powers of this court for its correction.—Ela v. Goss, 20 N. H. 52.

[d] (N. Y. 1887) An appeal lies from a judgment of the recorder of the village of Port Jervis, as under Laws 1873, c. 370, he is, for purposes of civil trials in the village, a justice of the peace of the town of Benpark.—Village of Port Jervis v. Barrett Bridge Co., 10 N. Y. St. Rep. 339.

[e] (Wis. 1876) A city charter providing that justices of the peace elected thereunder shall have exclusive jurisdiction of all actions arising under the act or the city ordinances, but neither referring expressly to the general justices' act, nor otherwise providing for regulating the proceedings before such city justices, is to be construed merely as giving such justices jurisdiction of the actions mentioned, to the exclusion of other justices, the proceedings before them being subject to the provisions of the general justices' act, and an appeal lying to the circuit court from their judgment as provided by the latter act.—City of Boscobel v. Bugbee, 41 Wis. 59.

§ 478. Nature of subject-matter.

Appeal from order of justice in peace proceedings, see "Breach of the Peace," vol. 8, c. 986, § 15.

[a] (U. S. 1821) No appeal will lie from a judgment of the justice of the peace, in the District of Columbia, imposing a fine for profane swearing in his presence.—Howard v. United States, Fed. Cas. No. 6,763 [2 Cranch, C. C. 259].

[b] (U. S. 1822) No appeal lies from the judgment of the justice of the peace for a penalty for violating a by-law of Georgetown.—Boothe v. Georgetown, Fed. Cas. No. 1,651 [2 Cranch, C. C. 356].

[c] (U. S. 1833) An appeal to the circuit court of the District of Columbia for the county of Washington lies from the judgment of a justice of the peace, for the penalty of a by-law of the corporation of Washington.—Washington v. Eaton, Fed. Cas. No. 17,228 [4 Cranch, C. C. 352].

[d] (Ala. 1840) The county court may revise, on appeal, the judgment of a justice of the peace, rendered against a constable and his sureties, upon a notice alleging that the former had failed to execute a ca. sa. theretofore placed in his hands.—Patterson v. Grace, 1 Ala. 264.

[e] (Cal. 1864) An appeal lies from the justice's court to the county court, in an action brought against a railroad company under the act of April 14, 1863, to recover for overcharges.—Burson v. Cowles, 25 Cal. 535.

[f] (Cal. 1864) The county court has no power as a court of appeal to review the judgment and proceedings of a justice of the peace, in a case in which he has issued a search warrant for stolen property, and ordered it to be delivered to the owner.—People v. Halloway, 26 Cal. 651.

[g] (Conn. 1854) While the statute was in force prohibiting an appeal from the judgment of a justice of the peace, except in certain specified cases, unless the sum in demand exceeded seven dollars, an action was brought by the selectmen of a town, demanding seven dollars damages, to recover the expenses incurred by them in removing a fence from the public highway, under the act to prevent and remove nuisances, to which the defendant pleaded the general issue, and also that the land from which the fence was removed was his soil and freehold. *Held*, that such action was not within the provision of the ninth section of said act, concerning appeals on plea of title, nor the provision of the seventy-second section of the act, relating to civil actions, concerning appeals where the plaintiff's right of way is in question, and, therefore, that it was not appealable.—Wildman v. Rider, 23 Conn. 172.

[h] (Ind. 1863) In a township trustee's suit against a supervisor, before a justice of the peace, an appeal lies.—Hobbs v. Cowden, 20 Ind. 310.

[i] (Ind. 1892) Where suit is brought by the school board of a city before a justice of the peace for tuition, amounting to $32, against a defendant who resides outside the corporate limits of the city, and who according to the printed rules of the board, is liable for tuition, no appeal lies from the judgment, under Rev. St. 1881, § 632, because the amount in controversy does not exceed $50, and because there is no question involving the validity of an ordinance.—State v. Wills, 4 Ind. App. 8, 30 N. E. 200.

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[j] (La. 1858) The district court has jurisdiction of an appeal from a justice's court, in a proceeding under the landlord and tenant law, to expel a contumacious tenant, although the price of the lease is under $10.—D'Armond v. Pullen, 13 La. Ann. 137.

[k] (Mass.) A writ of error will not lie from a justice's judgment in summary proceedings imposing a fine on a militiaman for neglect of military duty.—(1805) Mountfort v. Hall, 1 Mass. 443; (1808) Edgar v. Dodge, 4 Mass. 670.

[kk] (Miss. 1879) In an action before a justice, under Code 1871, § 1935, "in relation to obstructions to water courses, mills, and dams," the judgment of the justice is final, and cannot be appealed.—Lagrone v. Trice, 57 Miss. 227.

[l] (Mo. 1831) Under Acts 1826, p. 33, giving appeals in all cases within the jurisdiction of a justice, an action for a penalty for obstruction of a highway, under Rev. Code, p. 688, §§ 6, 10, providing that obstructions in a public road shall be applied, one-half to the use of the person or persons prosecuting and the other half for the use of the county, may be appealed to the circuit court.—Pearce v. Myers, 3 Mo. 31.

[m] (Neb. 1878) In an action of replevin to recover possession of specific property, commenced before a justice of the peace, and tried by a jury, an appeal may be taken from the judgment of the justice of the peace to the district court, without regard to the amount in controversy.—Edwards v. Schutt, 7 Neb. 18.

[n] (N. J. 1877) In an action for a penalty, under Laws 1873, § 13, for prevention of cruelty to animals, an appeal will lie to the court of common pleas for relief, both as to matter of law and matter of fact.—Pennsylvania R. Co. v. New Jersey Soc. for Prevention of Cruelty to Animals, 39 N. J. Law (10 Vroom) 400.

[o] (N. Y. 1854) A judgment of a justice's court, in proceedings instituted under the mechanics' lien law, is a judgment "in a civil action" within the meaning of the Code, allowing an appeal from such judgment to the county court.—People v. Rensselaer County Judge, 13 How. Prac. 398.

[p] (Ohio, 1832) An appeal lies from a justice to the common pleas, in a suit by a paymaster to recover militia fines.—Wright v. Munger, 5 Ohio (5 Ham.) 441.

[q] (Ohio, 1861) An appeal may be taken to the court of common pleas of the proper county from any judgment in replevin of property, rendered by a justice of the peace upon a verdict of the jury, under section 111 of the act regulating the "jurisdiction and procedure before justices of the peace."—Martin v. Armstrong, 12 Ohio St. 548.

[r] (Pa. 1827) An appeal lies from the judgment of a justice of the peace in a suit for the penalty incurred by neglecting to serve notice under the arbitration act of 1810.—Commonwealth v. Bennett, 16 Serg. & R. 243.

[s] (Pa. 1842) In sci. fa. against a constable to recover the amount of an execution put into his hands, the plaintiff is entitled to an appeal from the judgment of a justice of the peace.—Sott v. Kelso, 4 Watts & S. 278.

[t] (Pa. 1891) Under Act June 16, 1836, an appeal will not lie from an order of two justices approving the expenditures of a person in providing for a pauper.—Appeal of Scott Tp. Poor Dist. (Quart. Sess.) 9 Pa. Co. Ct. R. 304.

[u] (Pa. 1895) Acts April 15, 1835, and April 5, 1849, allowing appeal from a judgment of a justice of the peace for over $5.33 for a penalty for breach of a borough ordinance, are repealed by implication, so as to allow appeal without regard to the amount of the judgment, by Act April 17, 1876, authorizing appeal from the judgment of a magistrate, in a suit for a penalty, to the court of common pleas, on allowance of said court.—Carlisle Borough v. Lifter (Com. Pl.) 16 Pa. Co. Ct. R. 85, 4 Pa. Dist. R. 230.

[v] (Tex. 1846) An appeal does not lie from a decision rendered in a justice's court, under the seventeenth section of the land law of 1837.—Field v. Anderson, 1 Tex. 437.

[w] (Vt. 1833) An appeal lies from a conviction before a justice, on the statute of 1807, for punishing undue speculations.—Penniman v. Robinson, 5 Vt. 569.

[x] (Vt. 1838) An appeal may be had from a judgment rendered by a justice of the peace, on a writ of scire facias against bail on mesne process.—Gilson v. Gay, 10 Vt. 326.

[y] (Vt. 1851) The provision in the statute, authorizing the issuing of extents against delinquent collectors, was designed to furnish a summary remedy for those cases. It is a delegation of special and extraordinary powers to justices of the peace, from the exercise of which no appeal lies.—Griswold v. Rutland, 23 Vt. 324.

[z] (Vt. 1860) The provision of the statute (section 10, c. 92, p. 518, Comp. St.) by which a poundkeeper may recover of the owner of any beast impounded the sum of 17 cents a day for the time the owner suffers it to remain in pound beyond 48 hours after notice is penal in its character; and an action brought by the poundkeeper before a justice of the peace to recover this sum or penalty is therefore appealable to the county court under the statute. Comp. St. p. 239, c. 29, § 76.—Edwards v. Osgood, 33 Vt. 224.

[zz] (Vt. 1864) Section 70 of the act relating to justices of the peace allows an appeal "when the defendant shall bona fide plead in excuse or justification that he was acting as a public officer under, or by virtue of, any tax bill or military warrant." *Held*, that a town not entitled to appeal on account of the small sum sued for could not claim an appeal under this section by pleading that the money which the plaintiff was seeking to recover was collected of him by the town constable upon a legal rate bill and warrant.—May v. Town of Jamaica, 37 Vt. 23.

(b) AMOUNT OR VALUE IN CONTROVERSY.

IN GENERAL, § 479.
CASES SUBJECT TO PECUNIARY LIMITATION, § 480.
REQUISITE AMOUNT OR VALUE, § 481.
AMOUNT CLAIMED OR IN CONTROVERSY, § 482.
AMOUNT OF VERDICT OR JUDGMENT, § 483.
AMOUNT DEPENDING ON MODE OF TRIAL BELOW, § 484.
EFFECT OF SET-OFF OR COUNTERCLAIM, § 485.
WAIVER AND CONSENT TO JURISDICTION, § 486.
DETERMINATION OF AMOUNT, § 487.
—— COSTS AND INTEREST AS PART OF AMOUNT, § 488.
REDUCTIONS AND REMISSIONS OF AMOUNT AND INDORSEMENTS, § 489.

Amount claimed as requiring trial de novo on appeal, see post, § 656.

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—— *of judgment as determining what court has appellate jurisdiction, see* ante, §§ 469, 470.

Form of remedy for erroneous judgment of justice determined by amount in controversy, see ante, § 465.

Retroactive effect of statute fixing the amount of judgments appealable, see ante, § 466.

§ 479. In general.

[a] (Ga. 1875) In claim cases either party may appeal from the decision of the justice of the peace to the superior court, where either the amount of the fi. fa., or the value of the property claimed, exceeds $50. The act of 1874, regulating the right of appeal in such cases, so far as it makes either the amount of the fi. fa., or the value of the property, the test of what is "the sum claimed" in the language of the constitution, is not in conflict with Const. art. 5, § 6.—Turman v. Cargill, 54 Ga. 663.

[b] (Ga. 1878) The provisions of Const. 1877, art. 6, § 7, par. 2, in regard to justice courts, did not change existing laws, so as to allow an appeal where the amount claimed is less than $50.—Tibbs v. Williamson, 61 Ga. 74.

[c] (Ohio, 1844) Where an appeal from a judgment of a justice to the common pleas court is unauthorized because the amount recovered is less than $20, the filing of a declaration by plaintiff in the common pleas court will not confer jurisdiction on that court of the appeal.—Glover v. Moses, 13 Ohio, 321.

[d] (Pa. 1831) In an action before a justice, the sum demanded by the plaintiff gives him the right of appeal, if the decision is in whole or in part against him; and the sum adjudicated against the defendant alone determines his right of appeal.—McGonnegal v. Hopper, 1 Ashm. 195.

[e] (Tex. 1877) Rev. St. art. 1165, giving the right of appeals from the justice court to the county court "when the amount in controversy" exceeds $20, is not repugnant to Const. art. 5, § 16, giving such right where "the judgment" exceeds $20.—Miman v. Eidman, 1 White & W. Civ. Cas. Ct. App. § 629.

[f] (Tex. 1893) In a suit for damages less than $20, when the pleadings are in writing, the justice's failure to enter on his docket the amount claimed in reconvention, being more than $20, will not deprive the county court of jurisdiction of defendant's appeal.—Texas & P. Ry. Co. v. Hayes, 4 Tex. Civ. App. 88, 23 S. W. 443.

[g] (Vt. 1878) A suit on a coupon for $15, taken from a town bond for $500, brought before a justice of the peace, is appealable under V. S. 1876, No. 64, the real question being as to the validity of the bond, which thus became an "exhibit" on the trial, made by the plaintiff, of more than $20.—Town of Concord v. National Bank of Derby Line, 51 Vt. 144.

[h] (Vt. 1884) An action of assumpsit with the common counts for $50, and a special count on a promissory note for $25, brought on a writ, the ad damnum of which was $50, *held* so far an action of assumpsit on the common counts as to be appealable without affidavit of defense, under Rev. Laws, § 1061.—Northfield Sav. Bank v. Sanders, 56 Vt. 594.

[i] (Wis. 1853) An appeal from a judgment of a justice in replevin for a return of the property and for less than $15 of costs is the proper course, when, although the justice's return does not find technically that the property was worth $50, the evidence reported shows it indisputably.—Weizen v. McKinney, 2 Wis. 288.

§ 480. Cases subject to pecuniary limitation.

[a] (Conn. 1827) St. p. 52, tit. 2, § 64, authorizing an appeal from a justice of the peace where the damages does not exceed seven dollars, in actions charging the defendant with an injury done to land in which the defendant should justify by a special plea alleging a right of way, does not include an action for obstructing a right of way, although defendant pleaded freehold title to the locus in quo.—Palmer v. Palmer, 6 Conn. 409.

[b] (Ga. 1874) The constitution of 1868 provides an appeal to the superior court from the judgments of justices of the peace, in all cases where the amount in controversy between the parties was over $50, whether that controversy originated in a claim case, or in any other class of cases of which the justices of the peace had jurisdiction to hear and determine.—Burts v. Farrar, 50 Ga. 601.

[c] (Ky. 1824) An appeal lies from a judgment of a justice against a constable for money collected and not paid over, if the amount exceeds five pounds.—Craddock v. Patterson, 17 Ky. (1 T. B. Mon.) 8.

[d] (Ky. 1852) The act of 1840 allows appeals to the circuit courts only from orders and judgments in cases between an execution creditor and the defendant's debtor, upon a proceeding under that act to subject such debts to the satisfaction of such execution, where the amount involved is over five pounds.—Searcy v. Switzer, 52 Ky. (13 B. Mon.) 352.

[e] (Minn. 1866) Pub. St. c. 59, § 136, gives a right of appeal from a justice of the peace where the value of the property, as sworn to in the affidavit for a writ of replevin, shall exceed $15, "or where the amount claimed in the complaint shall exceed $30." *Held*, that this last clause does not apply exclusively to the action of replevin, and therefore gives the right of appeal in an action of trespass where the amount claimed is $45.—Shunk v. Hellmiller, 11 Minn. 164 (Gil. 104).

[f] (Ohio, 1861) The right of appeal in actions of replevin is not restricted nor qualified by subdivision 2, § 123, of an act providing "that appeals shall not be allowed in jury trials, where neither party claim in their bill of particulars a sum exceeding $20."—Martin v. Armstrong, 12 Ohio St. 548.

[g] (Ohio, 1875) No appeal lies from a justice's judgment for less, exclusive of costs, than $100, rendered on a verdict in an action for specific personal property.—Ohio & T. R. Co. v. Bates, 26 Ohio St. 32.

[h] (Vt. 1839) An action before a justice of the peace, under the second section of the act of 1817, in addition to the pauper acts, for transporting a pauper from one town to another without an order of removal, where the damages claimed do not exceed $10, is not appealable.—Calais v. Hall, 11 Vt. 494.

[i] (Vt. 1856) A claimant in a trustee case before a justice can only appeal where other parties could, not where the judgment affects him to a less amount than $20.—Cabot v. Burnham, 28 Vt. (2 Williams) 694.

[j] (Vt. 1894) Act No. 122 of 1884 declares that no appeal shall be allowed from the judgment of a justice in a case where neither the ad damnum of the writ, nor the sum demanded by the declaration, nor plaintiff's specifications on trial exceed $20, nor in assumpsit on balance of account, where the balance claimed is not more than $20. *Held*, that the account referred to is an open account, not an account stated, since the section elsewhere provides

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for appeals on accounts stated.—Scott v. Darling, 66 Vt. 510, 29 Atl. 993.

§ 481. Requisite amount or value.

[a] (U. S. 1827) No appeal lies from a judgment of a justice of the peace in the District of Columbia, unless the debt or demand exceed the sum of five dollars.—Thornton v. Washington, Fed. Cas. No. 14,001 [3 Cranch, C. C. 212].

[b] (Fla. 1855) The circuit courts have original and general jurisdiction, and are authorized by law to entertain jurisdiction of appeals from justices, on judgments exceeding $10 in amount.—Ex parte Henderson, 6 Fla. 279.

[c] (Ind. 1881) An appeal to the supreme court from a judgment in an action instituted before a justice of the peace will be dismissed where the amount in controversy is less than $50.—Pennsylvania Co. v. Trimble, 75 Ind. 378.

[d] (Mich. 1848) Under the act of 1845, a plaintiff against whom a judgment is rendered in a justice's court for costs only, amounting to less than four dollars, may appeal.—Wilson v. Davis, 1 Mich. (Man.) 156.

[e] (Mo. 1852) A circuit court cannot dismiss an appeal from a justice on account of the smallness of the amount in controversy.—Harris v. Hughes, 16 Mo. 599; Whitsett v. Gharky, 17 Mo. 325.

[f] (N. C. 1872) Section 539 of the Code of Procedure, providing that if a judgment of a justice appealed from is $25 or less it shall be reviewed in the superior court on matters of law only, should be construed to mean appeals by defendants against whom judgment is rendered for $25 or less, and who claim that it ought to be still less; and it does not apply to a judgment in favor of plaintiffs for $25 or less, and who claim that it ought to be for more, and who have an apparent, and not a sham, claim for more. The idea is that a trial in the superior court, before a jury, of facts and law, ought not to be entertained when the amount in controversy is $25 or less, and that a trial ought to be allowed when the amount is for more. There would be a grave denial of justice if such a statute were construed to apply to a judgment in favor of plaintiff, where more than $25 is fairly claimed and apparently due; so that, if the plaintiff sue on a note or an account for $100, the magistrate could deprive him of the benefits of an appeal and a trial upon the merits in the superior court, by giving him a judgment for $25 or less.—Cowles v. Hayes, 67 N. C. 128.

[g] (Ohio, 1844) An appeal will not lie from a judgment of a justice for less than $20.—Glover v. Moses, 13 Ohio, 321.

[h] (Ohio, 1881) Under the statute prescribing the jurisdiction and procedure of justices of the peace passed March 14, 1853 (Swan & C. St. p. 769), and sections 111, 123 thereof, as amended March 30, 1875 (72 Ohio Laws, p. 159), an appeal did not lie from a judgment of a justice of the peace, where the case was not tried by a jury, for a less sum than $100, exclusive of costs, either under said amended sections, or original section 90 of said act.—Perkins v. White, 36 Ohio St. 530.

[i] (Pa. 1810) Under Act 1810, §§ 3, 4, an appeal lies from a justice of the peace, where judgment is given for more than $5.33 and less than $20.—Harris v. Harrison, 1 Browne, 161.

[j] (Wis. 1856) An appeal may be taken from a justice of the peace, if the amount is over $50, and the affidavit is properly made.—Cavenaugh v. Titus, 5 Wis. 143.

§ 482. Amount claimed or in controversy.

[a] (Iowa) In an action for damages before a justice of the peace the amount in controversy is to be determined from the pleadings; and, when the amount claimed exceeds $25, the circuit court has jurisdiction, under McClain's Code, § 3575, of an appeal, though the judgment rendered is for less than $25.—(1884) Lundak v. Chicago & N. W. Ry. Co., 65 Iowa, 473, 21 N. W. 783; (1885) Perry v. Conger, 65 Iowa, 588, 22 N. W. 688; (1885) Nichols v. Wood, 66 Iowa, 225, 23 N. W. 641.

[b] (Ky. 1867) An appeal lies from the judgment of a justice of the peace to the court of common pleas, under section 5 of the act of 1866, when the amount in controversy is over $50, however small the judgment of the justice of the peace.—Donahue v. Murray, 65 Ky. (2 Bush) 194.

[c] (La. 1871) The district court has jurisdiction of an appeal from a judgment in a justice's court against a person claiming property levied on by a sheriff of a value exceeding the sum below which the district court has no jurisdiction, though the amount of the execution was less than such sum.—McFarland v. Russ, 23 La. Ann. 608.

[d] (Me. 1886) Under Rev. St. c. 83, § 3, giving to trial justices exclusive jurisdiction when "the debt or damages demanded do not exceed the sum of $20," in an action of assumpsit, the jurisdiction depends on the amount of damages demanded, and not the amount due on the note sued on; and, if the damages claimed exceed $20, the case is appealable, and not within the exclusive jurisdiction of the trial justice.—Cole v. Hayes, 78 Me. 539, 7 Atl. 391.

[e] (Minn. 1891) Defendant in a case where the complaint claims a sum in excess of $30, but in which the recovery is less than $15, is entitled to an appeal under Gen. St. 1878, c. 65, § 113, which provides that any "person aggrieved by any judgment rendered by any justice, when the amount exceeds $15, * * * or when the complaint exceeds $30," shall be entitled to an appeal, etc.—Koetke v. Ringer, 46 Minn. 259, 48 N. W. 917.

[f] (N. Y. 1867) Since Act April 29, 1865, authorizing appeals from a justice's judgment, an appeal to the county court lies whenever the pleadings before the justice demand a judgment for a sum exceeding $50, whatever may be the sum really in controversy.—Fuller v. Brierley, 36 How. Prac. 47.

[g] (Ohio, 1876) Under Act March 14, 1853 (as amended March 30, 1875), relative to actions before justices of the peace, an appeal lies from the judgment of a justice in a jury case, wherein the amount claimed in the bill of particulars exceeds $100, regardless of the amount of the judgment.—Vogel v. Haffy, 29 Ohio St. 439.

[h] (Pa. 1818) Under Act March 22, 1814, §§ 2, 3, providing that in actions before justices of the peace or aldermen, if the sum adjudged does not exceed $5.33, it shall be conclusive, but if it exceeds that amount an appeal will lie, plaintiff may maintain an appeal from a judgment of no cause of action, in an action before an alderman, where he claims $75 damages on his declaration.—Stewart v. Keemle, 4 Serg. & R. 72.

[i] (Pa. 1825) Under Act March 20, 1810, § 3, providing that a judgment of a justice of the peace, "when not exceeding $20, shall be final and conclusive on both plaintiff and defendant, without further appeal," plaintiff is entitled to an appeal when the sum demanded and set forth in his docket exceeds $20, and

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the arbitrators reduced his demand more than $20.—Soop v. Coats, 12 Serg. & R. 388.

[j] (Pa. 1846) Where it appeared on the docket of the justice that the action was trover for a mare of the value of $50, and the action was submitted by consent to referees, who awarded for the plaintiff a sum less than $20, it was *held* that the plaintiff was entitled to an appeal.—Marks v. Swearingen, 8 Pa. (3 Barr) 454.

[k] (Pa. 1880) Where in action for trespass for injury to railroad plaintiff asked and recovered $5 damages, but the injury being itemized aggregated more than $5.33, such fact did not entitle defendant to an appeal.—Wallace v. Hickey, 1 Chest. Co. Rep. 166.

[l] (Pa. 1887) The right of appeal from a judgment of a justice of the peace depends on the sum in controversy, and not on the amount of the claim as proven on the day of trial, or the amount of judgment entered.—Stollars v. East Finley Tp., 3 Pa. Co. Ct. R. 209.

[m] (Tex. 1883) The jurisdiction of the county court on an appeal from a justice's court attaches where the amount in controversy exceeds $20, though the judgment is for a less amount.—Horton v. McKeehan, 1 White & W. Civ. Cas. Ct. App. § 465.

[n] (Vt. 1840) Where the ad damnum in a writ pending in a justice's court is but $10, the action is not appealable unless the plaintiff's written exhibit, specification, or declaration clearly show that the demand is more.—Weston v. Marsh, 12 Vt. 420.

[o] (Vt. 1859) The defendant subscribed for 1 share of the plaintiff's stock, and thereby contracted to pay the plaintiffs $100 in 10 equal installments, no part to be payable till the performance of a condition precedent. In an action before a justice of the peace, the declaration set forth this contract, averred performance of the condition, and claimed to recover the first installment under an ad damnum of $10. *Held*, that the action was appealable.—Connecticut & P. R. R Co. v Bates, 32 Vt. 420.

[p] (Vt. 1860) The fact that an officer, in serving a justice's writ with an ad damnum not exceeding $10, delivers to the defendant a copy with the ad damnum stated at more than that sum, does not render the suit appealable, although the defendant appeared and had judgment against him on the supposition that he had a right ot appeal.—Downs v. Reed, 32 Vt. 785.

[q] (Vt. 1867) The allegation of value of the property sued for in a declaration in trover not being descriptive, but rather matter of form, is not a demanding of such value, nor are the evidence and claim a specification within the intent of the statute which denies appeal where "neither the ad damnum in the plaintiff's writ, nor the sum demanded by the declaration, nor the specifications or exhibits of the plaintiffs on trial, shall exceed $10."—Cole v. Goodall, 39 Vt. 400, 94 Am. Dec. 334.

[r] (Vt. 1890) Though neither the ad damnum in the writ, the sum demanded by the plaintiff, nor the judgment rendered by a justice of the peace, exceeds $20, a trustee charged in a less sum, but liable to the principal defendant in a sum exceeding that amount, is entitled to an appeal.—American Exp. Co. v. Gray, 62 Vt. 421, 20 Atl. 276.

[s] (Wis. 1857) Though the judgment for the plaintiff for damages or costs may be for less than $15, he can still appeal, if his affidavit, in addition to the other matters, states that he has a valid claim for more than $50. as set forth in his pleadings in the suit.—Berray v. Woodruff, 6 Wis. 202.

§ 483. Amount of verdict or judgment.

[a] (U. S. 1837) Appeal does not lie from a justice of the peace, in the District of Columbia, who has rendered judgment for five dollars only.—Owner v. Washington, Fed. Cas. No. 10,635 [5 Cranch, C. C. 381].

[b] (Md. 1867) On appeal, where the question of the jurisdiction of a justice of the peace over the subject-matter is called into question, its jurisdiction will depend upon the amount recovered, and that being below the jurisdiction of the circuit court, the order of the circuit court entering a judgment non. pros. was not erroneous.—Bushey v. Culler, 26 Md. 534.

[c] (N. Y. 1821) No appeal lies to the common pleas, unless the amount of the verdict or judgment exceeds $25.—In re Marsh, 19 Johns. 171.

[d] (Or. 1867) Under Code, p. 595, c. 9, § 64, a justice's judgment for a sum less than $20 is nonappealable, irrespective of the amount which may have been in controversy.—Stoll v. Hoback, 2 Or. 226.

[e] (Pa. 1825) Where the debt sued for and set forth on the docket is reduced by the judgment more than $20, an appeal lies for the plaintiff, although the judgment is for a less sum than $20.—Soop v. Coates, 12 Serg. & R. 388.

[f] (Pa. 1855) A plaintiff in trespass before a justice claimed $25; referees awarded him $11, and judgment was rendered for that sum. *Held*, that the defendant had no right to appeal under the statutes of 1814, 1845, his claim not having been reduced by the amount of $20.—Cook v. Dunkle, 25 Pa. (1 Casey) 340.

[g] (Pa.) The right of appeal from a judgment of a justice is to be determined by the amount for which judgment was rendered against appellant, and not by the amount for which suit was brought.—(1888) Garvey v. Murphy, 1 Wilcox, 137; (1891) Elliott v. Palmer (Com. Pl.) 10 Pa. Co. Ct. R. 427.

[h] (S. C. 1817) Act 1799 (1 Brev. Dig. p. 476) gives a magistrate jurisdiction in matters of contract to $20. Clause 5 (1 Brev. Dig. p. 24) provides that where the demand is above $6 there may be an appeal. *Held*, that no appeal lies from their judgments, if under $6.—Penning v. Porter, 1 Mill, Const. 396.

[i] (Tex. 1884) Under Rev. St. art. 1165, giving the county court jurisdiction when the judgment appealed from or the amount in controversy exceeds $20, an appeal lies if the judgment is for less than $20, but the matter in controversy more than $20.—Brazoria County v. Calhoun, 61 Tex. 223.

[j] (Tex. 1895) On appeal from a judgment of a justice's court, the amount in controversy, and not the amount of the judgment rendered, determines the jurisdiction of the appellate court.—Grooms v. Atascosa County (Civ. App.) 29 S. W. 73.

[k] (Wis. 1851) Where plaintiff in replevin in justice court recovers property valued at $15, and 6 cents damages, the recovery is for more than $15, so as to give defendant a right to have the judgment reviewed on appeal.—Inman v. Gower, 3 Chand. 162, 3 Pin. 152.

§ 484. Amount depending on mode of trial below.

[a] (Kan. 1891) Under Justice's Code, § 122, providing that no appeal shall be allowed "in jury trials where neither party claims in his bill of particulars a sum exceeding $20," no ap-

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peal lies in a replevin case tried by jury, in which the value of the property stated in the affidavit and the damages demanded for its detention do not exceed $20.—Nordmark v. Nystrom, 46 Kan. 117, 26 Pac. 449.

[b] (N. J. 1827) An appeal will lie to the common pleas from the judgment of a justice rendered on the verdict of a jury in a case where the debt, demand, or other matter in dispute, does not exceed three dollars.—Cruser v. Duryea, 9 N. J. Law (4 Halst.) 15.

[c] (N. C. 1873) Findings of fact by a justice of the peace, in the trial of an action in which the recovery is for less than $25, are not subject to review.—Cauble v. Boyden, 69 N. C. 434.

[d] (Ohio, 1860) Where, in a suit before a justice of the peace, the demand was less than $20, and the parties, by agreement, submitted the case to a jury of three persons, and the plaintiff having offered his evidence, the justice nonsuited him, on motion of the defendant, and discharged the jury, and the plaintiff appealed the case to the common pleas, it was *held* in the supreme court, on error, that inasmuch as the right of appeal from a justice to the common pleas is only taken away where "the case is tried by jury," and for a demand less than $20, an objection could not have been made to the jurisdiction of the common pleas, and could not prevail on error.—Bethel v. Woodworth, 11 Ohio St. 393.

[e] (Ohio, 1875) Code, § 90, regulating the civil jurisdiction of justices of the peace, provided that if either party claimed more than $20 the case might be appealed, but if neither party demanded a greater sum than $20, and the case is tried by a jury, there should be no appeal. Section 111 provided that in cases not otherwise provided for, either party might appeal, and section 123 provided that in jury trials where neither party claimed more than $20, there should be no appeal. Act March 30, 1875, does not amend section 90, but amends section 111, so as to allow appeals in all cases not specially provided for when the judgment exceeds $100, and section 123, so as to forbid appeals in jury trials where neither party claims more than $100 and the judgment is less than $100. *Held* that, if the judgment be less than $100, there is no appeal unless there was a jury, when an appeal lies if the claim was more than $100, though the judgment was less than that amount.—Leonard v. City of Cincinnati, 5 Ohio Dec. 279, reversed (1875) 26 Ohio St. 447.

[f] (Ohio, 1896) An action of replevin instituted before a justice of the peace is appealable to the court of common pleas, where the case is tried to a jury, though judgment is rendered in favor of plaintiff for only $12.—White v. Coates, 4 Ohio Dec. 119, 1 Cleve. Law Rep. 43.

[g] (Pa. 1816) Under the provisions of Act March 20, 1810, that when the cause is submitted to referees, the justice's judgment, when not exceeding $20, shall be final and conclusive on both plaintiff and defendant, without further appeal, no appeal lies when the judgment is in favor of defendant.—McKim v. Bryson, 2 Serg. & R. 402.

[h] (Pa.) Under Act 1814, § 3, where the demand is in trespass or trover for a sum above $20, and the action is submitted to referees, who award for the plaintiff a sum less than $20, the defendant has not the right of appeal.—(1820) Ulrick v. Larkey, 6 Serg. & R. 285; (1831) Zane v. Johnson, 1 Ashm. 42.

[i] (Pa. 1831) Under the act of 1810, there is no appeal from a judgment of a justice on an award of referees where the sum awarded exceeds the sum of $100.—Sleeper v. Burk, 1 Ashm. 23.

[j] (Wis. 1853) No appeal lies under the statutes of this state from the judgment of a justice of the peace, where the amount in controversy exceeds $15, if no issue of fact or law was joined before the justice.—Love v. Rockwell, 1 Wis. 382.

§ 485. Effect of set-off or counterclaim.

[a] (Conn. 1813) In book debt, the right of appeal is governed wholly by the amount of the demand laid in the declaration. If, therefore, the plaintiff demand less than seven dollars, the action is not appealable, though the defendant pleaded that the plaintiff owed him more than seven dollars.—Fowler v. Stocking, 5 Day, 539.

[b] (Ind. 1876) Where, in an action in justice's court, defendant files a set-off and appeals from a judgment in favor of plaintiff, the amount in controversy for the purposes of appeal is determined by the amount of the set-off.—Hutts v. Williams, 55 Ind. 237.

[c] (Iowa, 1885) A. brought an action before a justice of the peace to recover $24.50, as the value of property converted by B., and B. answered by general denial, and also pleaded a counterclaim for services rendered A. to the value of $30, and asked judgment for that amount. A. denied the counterclaim, and the justice rendered judgment against him for costs, from which he appealed to the circuit court. *Held*, that the circuit court had jurisdiction of the appeal, the amount involved being more than $25.—Perry v. Conger, 65 Iowa, 588, 22 N. W. 688.

[d] (Ky. 1835) Where the circuit court has jurisdiction of appeals where the amount in controversy exceeds five pounds, a party sues before a justice of the peace for a less sum, the defendant has judgment for a larger sum in set-off, and the plaintiff appeals, the circuit court has jurisdiction of the appeal.—Parks v. Hulme, 33 Ky. (3 Dana) 499.

[e] (Minn. 1883) An appeal from a judgment of a justice of the peace cannot be allowed under Gen. St. 1878, c. 65, § 113, providing for such appeal "when the amount claimed in the complaint exceeds $30," on the ground that a counterclaim in the answer is for more than $30, if the claim in the complaint is for less than that sum.—Ross v. Evans, 30 Minn. 206, 14 N. W. 897.

[f] (Ohio, 1878) Under Justice Court Act, § 90, allowing appeals only where the claim is more than $20, where an action is for the recovery of $15, and a counterclaim is presented for more than $20, but such counterclaim has no connection with the action, and is disregarded by the justice, and is not involved in the judgment, an appeal is not allowable.—State v. Linn, 7 Ohio Dec. 468, 3 Wkly. Law Bul. 428.

[g] (Ohio, 1881) Defendant in an action before a justice of the peace to recover a sum less than $20 is entitled to an appeal where he files a counterclaim in excess of $20, though the magistrate rules out the counterclaim because no evidence was offered to sustain it.—Chatfield v. Appleton, 8 Ohio Dec. 214, 6 Wkly. Law Bul. 327.

[h] (Ohio, 1881) Where a defendant in an action before a justice of the peace neglects to comply with the order of the justice to make his counterclaim more definite and certain, and such counterclaim is not considered, he is not entitled to an appeal where the judgment is below the necessary amount, though such counterclaim exceeds it.—Andrew v. Connelly (D. C.) 6 Wkly. Law Bul. 774.

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[i] (Pa. 1885) Where, in an action before a justice of the peace, a set-off is claimed exceeding in amount $5.33, the justice should allow an appeal, though the judgment is entered for less than that amount.—Schineller v. Herrman, 1 Pa. Co. Ct. R. 145.

[j] (Pa. 1885) Where an appeal was allowed from a judgment of a justice of the peace for a sum less than $5.33 because a set-off was claimed by defendant exceeding such sum, the appeal will not be dismissed because defendant thereafter abandons the set-off.—Schineller v. Herrman, 1 Pa. Co. Ct. R. 145.

[k] (Pa. 1886) Where, in an action before a justice of the peace for wages amounting to less than $5.33, the defendant introduces a set-off exceeding $5.33, an appeal may be taken from the judgment of the justice.—Rafferty v. Clark, 2 Pa. Co. Ct. R. 301.

[l] (Pa. 1887) Where a judgment before a justice of the peace is entered for less than the amount which would entitle defendant to appeal, but a set-off is claimed for more than that amount, an appeal should be allowed, unless it clearly appears that the set-off was not offered in good faith, but for the purpose of preventing a judgment from being filed.—Steele v. Walton, 3 Pa. Co. Ct. R. 211.

[m] (Pa. 1887) The fact that a set-off in a justice court was not maintainable in whole or in part, and that the justice refused to note the claim of set-off on his docket, is not sufficient proof of the bad faith of defendant in filing such set-off, and the appeal will not be dismissed on the ground that such set-off was filed merely for the purpose of enabling defendant to appeal, and not in good faith.—Baldwin v. Burgess, 1 Wilcox, 223.

[n] (Tex. 1881) The amount pleaded in a counterclaim may be considered as the amount in controversy, conferring jurisdiction on the county court on appeal from the justice's court, where the amount claimed by plaintiff is insufficient to confer such jurisdiction.—International & G. N. R. Co. v. Grant, 1 White & W. Civ. Cas. Ct. App. § 784.

[o] (Vt. 1826) An appeal lies from a judgment in an action on a note or settled account under $20, notwithstanding the proviso in the statute of 1821, where a demand exceeding $20 is pleaded in offset, in such action.—Baker v. Blodget, 1 Aikens, 342.

[p] (Vt. 1830) No appeal lies in book account where the plaintiff does not demand more than $10, though the defendant plead in offset a claim of more than $20, if it appear that such claim is fictitious, and exhibited for the sole purpose of making the case appealable.—Brush v. Hurlburt, 3 Vt. 46.

[q] (Vt. 1853) Where the account pleaded in offset exceeds the sum of $10, the case is appealable, unless the account appears to be fictitious, or filed for the purpose of obtaining the right of appeal.—Sherwin v. Colburn, 25 Vt. 613.

[r] (Vt. 1882) Where one summoned before a justice as trustee claims by way of offset an amount in excess of the ad damnum in the plaintiff's writ, the amount of the offset, not the amount of the ad damnum, determines the right of appeal.—Church v. French, 54 Vt. 420.

§ 486. Waiver and consent to jurisdiction.

[a] (Kan. 1877) Objection to appeal because the amount was under the statute minimum was *held* waived by delaying to raise it until after trial and judgment.—Miller v. Bogart, 19 Kan. 117.

[b] (Minn. 1858) Where the amount claimed and found due by the justice is less than $15, exclusive of costs, the district court has no jurisdiction of an appeal, and therefore the appellant may move to dismiss the appeal, for his consent cannot confer jurisdiction.—Dodd v. Cady, 1 Minn. 289 (Gil. 223).

§ 487. Determination of amount.

[a] (Conn. 1867) Where a plea in abatement to an appeal from a judgment of a justice of the peace, allowed only when the judgment exceeded five dollars, did not allege that the judgment rendered was less than five dollars, but "was for the sum of one dollar and costs," it was *held* not defective.—Curtis v. Gill, 34 Conn. 49.

[aa] (Iowa, 1881) Where an action is brought in a justice court for a certain sum, and a portion of the amount claimed is admitted to be due, and the amount thereof tendered, the difference between the amount claimed and that tendered is the "amount in controversy," for the purposes of appeal.—Young v. McWaid, 57 Iowa, 101, 10 N. W. 291.

[b] (Iowa, 1882) Plaintiff sued before a justice of the peace on account for $32.15, but admitted the payment of $12, and defendant denied all indebtedness, and pleaded payment of $29, but asked for no judgment. *Held*, that defendant's answer was simply a defense and not a counterclaim, and, as the amount in controversy is less than $25, an appeal to the circuit court should be dismissed.—Boyle v. Wilcox, 59 Iowa, 466, 13 N. W. 428.

[c] (Iowa, 1886) The amount in controversy in causes which have been appealed from a justice's court to the circuit court is to be determined by the pleadings in the case, and not by the evidence introduced on the trial.—Sterner v. Wilson, 68 Iowa, 714, 28 N. W. 34.

[d] (Iowa, 1891) An action was brought before a justice of the peace to recover $5.50. Defendant pleaded a counterclaim of $50. There was judgment for plaintiff, and defendant appealed to the district court. Plaintiff moved to dismiss the appeal on the ground that the amount in controversy did not exceed $25. The district court certified the case to the supreme court, and desired its opinion as to whether the district court had jurisdiction, but stated in the certificate that defendant's counterclaim stated no cause of action. Held, there being no question certified with respect to the correctness of the judgment of the court as to the validity of the counterclaim, the same must be taken as correct, and, that being so, the counterclaim presented no claim for recovery, and consequently failed to show that an amount exceeding $25 was in controversy, and that the appeal should have been dismissed.—Campbell v. Lewis, 83 Iowa, 583, 50 N. W. 208.

[e] (La. 1890) Where the plaintiff sued in a justice court for $12.40 on account, and the defendant admitted $7.28 to be due, and pleaded a tender of that amount before suit, the district court had no jurisdiction on appeal ratione materiæ.—State ex rel. Boyet v. Boone, 42 La. Ann. 982, 8 South. 468.

[f] (Pa. 1825) Where the cause of action before a justice appears in his docket to be "a balance of book debt not exceeding $100," and the arbitrators award that plaintiff has no cause of action, he cannot appeal; the docket not showing that his demand exceeded $20.—Stoy v. Yost, 12 Serg. & R. 385.

[g] (Pa. 1825) Under Act March 20, 1810, § 3, providing that a judgment of a justice of the peace, "when not exceeding $20, shall be final and conclusive on both plaintiff and defendant,

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without further appeal," to entitle plaintiff to an appeal, where the judgment on an award of referees is for the defendant, it must appear on the docket of the justice, that the plaintiff's cause of action exceeds $20.—Stoy v. Yost, 12 Serg. & R. 385.

[h] (Tex. 1886) A proceeding to establish, for a debt of less than $20, a lien on property worth more than $20, involves an amount in controversy of more than $20, and therefore an appeal lies from the judgment of the justice of the peace.—Smith v. Giles, 65 Tex. 341.

[i] (Tex. 1888) In an action in justice court to try the right of property, the value of which is alleged to be a sum sufficient to give the county court jurisdiction on appeal, it is unnecessary that the proof should show the value of the property to be exactly the amount alleged, since if it exceeds $20, the county court has jurisdiction.—Gill v. Jackson, 3 Willson, Civ. Cas. Ct. App. § 355.

[j] (Vt. 1848) It is for the party who appeals from the judgment of a justice of the peace, to show affirmatively that the county court has appellate jurisdiction. Where the declaration contains several counts, and there is nothing upon their face which shows that the sum in demand exceeds $10, but each count concludes with an ad damnum of $10, and the counts are of the same nature and describe apparently the same contract, the county court should not intend that they are for different causes of action, but rather the contrary, and should, in the absence of any proof except what is shown by the declaration, dismiss the suit.—Persons v. Centre Turnpike Co., 20 Vt. 170.

[k] (Vt. 1853) Where there was nothing in the writ, nor in the specification or exhibits produced by plaintiff, on trial of an action of book account, which made the case appealable, and defendant, on cross-examination, called out plaintiff's book, on which appeared charges exceeding $10, the book will not be regarded as plaintiff's exhibit, nor the case thereby made appealable, as the judgment, in such case, is a bar to a recovery for the items not presented.—Warren v. Town of Newfane, 25 Vt. 250.

[l] (Vt. 1873) Gen. St. c. 31, § 70, relating to appeals in assumpsit from a justice of the peace, requires a comparison of the debit and the credit side of the account, to fix, as appealable or not, the amount of the claim.—Williams v. Mason, 45 Vt. 372.

[m] (Vt. 1879) Where replevin is brought under the statute, the matter in demand is the property itself as well as damages for its taking and detention, and where the ad damnum is $20, an appeal lies to the county court, though the value of the property is less than that sum.—Fisk v. Wallace, 51 Vt. 418.

[n] (Vt. 1880) A declaration in assumpsit in a justice's court alleged an indebtedness of $20,—the ad damnum being for the same amount. The specification was for a balance of $19.69, but plaintiff's charges exceeded $20. *Held* appealable, under the statute allowing appeals when the amount in controversy is over $20.—Perry v. Gay, 52 Vt. 615.

[o] (Vt. 1887) In replevin before a justice, where the ad damnum is $20, and the property appraised at $8, an appeal will lie to the county court, under Rev. Laws, §§ 821, 1246.—Andrews v. Baker, 59 Vt. 656, 10 Atl. 465.

[p] (Vt. 1895) Where plaintiff sued in a justice's court for $9.75 damages for breach of contract, the mere fact that he proved his damages by placing in evidence his books showing that he paid $150 damages in consequence of breaches of several other contracts similar to defendant's, and that the amount claimed was defendant's proportion of such damages, did not render such books "specifications or exhibits of the plaintiff on trial" exceeding $20, so as to entitle defendant to an appeal.—Crosby v. Enterprise Cheese Co., 67 Vt. 638, 32 Atl. 494.

§ 488. —— Costs and interest as part of amount.

[a] (Conn. 1867) Where a statute allowed an appeal from the judgment of a justice of the peace when the judgment exceeded five dollars, it was *held* that the judgment must exceed five dollars, exclusive of costs of suit.—Curtis v. Gill, 34 Conn. 49.

[b] (Ga. 1879) Interest may be included to bring the amount above $50.—Dykes v. Woolsey, 62 Ga. 608.

[c] (Ga. 1889) Under Code, § 4157, giving an appeal from a judgment of a justice's court, where the amount claimed is over $50, an appeal lies from a judgment in an action before a justice for $50 for wages, claimed to be past due, as such amount bears interest from the time it becomes due.—Magarahan v. Wright, 83 Ga. 773, 10 S. E. 584.

[d] (Iowa, 1884) In determining the amount in controversy, on an appeal from a justice, the costs, as shown by the the transcript, are not to be included, but only the sum claimed as damages in the pleadings is the "amount in controversy."—Curran v. Excelsior Coal Co., 63 Iowa, 94, 18 N. W. 698.

[e] (Minn. 1858) Under Rev. St. 1851, c. 69, art. 4, § 123, which provides that an appeal cannot be taken to the district court from a judgment of a justice of the peace, which does not exceed $15, where the judgment is for less than $15, exclusive of costs, his jurisdiction is exclusive and final, and no appeal lies.—Dodd v. Cady, 1 Minn. 289 (Gil. 223).

[f] (Neb. 1894) Under Code Civ. Proc. §§ 985, 1017, forbidding appeals from judgments of justices of not more than $20, where the case is tried to the jury, defendant cannot, where the prayer is for judgment for $20, insist upon interest in addition, in order to give him the right to appeal.—Moise v. Powell, 40 Neb. 671, 59 N. W. 79.

[g] (Tex. 1894) A judgment of a justice of the peace against a garnishee for $19.65, and $3.40 costs, in the suit in which he is garnished, and all costs in the garnishment proceedings, is not less than $20, exclusive of costs, and is within the appellate jurisdiction of the district court under Rev. St. art. 1638.—Hubbard v. Vacher (Civ. App.) 26 S. W. 921.

[h] (Vt. 1843) Where the principal and interest of a note exceed $20, the case is appealable, although the principal alone may be less than $20.—Smith v. Smith, 15 Vt. 620.

[i] (Va. 1895) Code 1887, § 2947, as amended March 1, 1894, provides: "If a judgment of a justice be for a sum exceeding $10 and not exceeding $20, exclusive of interest and costs, the justice rendering it may stay execution on it 40 days. * * * From any such judgment, the justice may, within 10 days, * * * allow an appeal where the matter in controversy, exclusive of interest, is of greater amount or value than $10." *Held*, that an appeal does not lie to a judgment of $10, exclusive of costs.—Norfolk & W. R. Co. v. Clark, 92 Va. 118, 22 S. E. 867.

[j] (Va. 1895) Under Code 1887, § 2947, costs are not to be computed as a part of the matter in controversy in determining the right of appeal from a judgment of a justice of the peace.—Shafer v. Chesapeake & O. R. Co., 23 S. E. 221.

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§ 489. Reductions and remissions of amount and indorsements.

[a] (Ga. 1893) Where suit was brought in a justice's court on an account for $94.80, and at the trial plaintiff admitted that defendant should be credited with $65.78, it was error to dismiss an appeal to the superior court on the ground that the amount claimed in the court below was less than $50; since the right of appeal depends upon the amounts claimed in the pleadings, and not upon reductions which may be made at the trial. Code, § 4157.—Bell v. Davis, 93 Ga. 233, 18 S. E. 647.

[b] (Ga. 1896) The right of appeal from a justice court to the superior court, under Code, § 4157, depends upon the amounts claimed in the pleadings, and not upon reductions which may be made at the trial.—Dyar v. Scott, 99 Ga. 96, 24 S. E. 855.

[c] (Ill. 1851) A plaintiff, in appeal, cannot confer jurisdiction on the circuit court by remitting a portion of the verdict.—People v. Skinner, 13 Ill. (3 Peck) 287, 54 Am. Dec. 482.

[d] (Iowa, 1885) Plaintiff may remit a part of the amount recovered before a justice of the peace, although his purpose to deprive defendant of his right of appeal is apparent.—Milner v. Gross, 66 Iowa, 252, 23 N. W. 654.

[e] (Iowa) When the amount of a judgment recovered before a justice of the peace is reduced to less than $25 by plaintiff's filing a remittitur, the circuit court has no jurisdiction of an appeal, for McClain's Code, § 3575, requires the "amount in controversy" to be $25, or more, for that purpose.—(1885) Milner v. Gross, 66 Iowa, 252, 23 N. W. 654; (1887) Vorwald v. Marshall, 71 Iowa, 576, 32 N. W. 510.

[f] (Iowa, 1886) Plaintiff, claiming $100, in an action before a justice of the peace, recovered $20. After judgment, and before appeal by defendant, plaintiff filed a paper withdrawing his claim for $100, and claiming $20. The circuit court dismissed defendant's appeal, under McClain's Code, § 3575, on the ground that the amount in controversy was less than $25. *Held*, that the dismissal should be sustained, since the paper filed reduced plaintiff's claim to $20, and he could have recovered no more than that sum if the appeal had been sustained.—Bateman v. Sisson, 70 Iowa, 518, 30 N. W. 870.

[g] (Iowa) McClain's Code, § 3575, provides that from a justice of the peace no appeal shall be allowed in any case where the amount in controversy does not exceed $25. *Held*, that when the amount of a judgment is reduced to less than $25 by a remittitur, filed before the judgment is entered, an appeal cannot be taken; and it is immaterial that the appeal bond was filed before the remittitur, as such bond cannot take effect until the judgment is entered.—(1888) Schultz v. Chicago, R. I. & P. R. Co., 75 Iowa, 240, 39 N. W. 289; (1896) Knox v. Nicoli, 97 Iowa, 687, 66 N. W. 876.

[h] (Mo. 1856) After an action commenced in justice's court is appealed to the circuit court, plaintiff therein cannot enter a remittitur for an excess recovered beyond the justice's jurisdiction, so as to give the circuit court jurisdiction of the appeal.—Batchelor v. Bess, 22 Mo. 402.

[i] (Neb. 1894) The right, under Code Civ. Proc. § 1017, of appeal from the judgment of a justice of the peace on the verdict of a jury, must be determined by the amount claimed in the bill of particulars when the trial was had; and, after the right had been exercised, the appeal should not be dismissed because in the appellate court there has been eliminated from consideration a part of the amount claimed.—Kingsbury v. Frans, 40 Neb. 400, 58 N. W. 936.

[j] (Pa. 1840) The court of common pleas has jurisdiction, on an appeal from an alderman or justice of the peace, of a demand for a sum less than $100, although it should appear that the plaintiff had a right to recover more than $100, if he chose to reduce his demand below that sum.—Cleaden v. Yeates, 5 Whart. 94.

[k] (Pa. 1887) The plaintiff in an action before a justice of the peace may remit the whole or a part of the interest on his demand; and, if his claim for interest be reduced so that the whole sum is less than $5.33, the defendant cannot appeal.—Leighow v. Northumberland Bridge Co., 2 Pa. Co. Ct. 622.

[l] (Pa. 1887) Where the plaintiff's claim is made up of different items, sufficient, in all, to entitle the parties to an appeal, plaintiff cannot reduce his demand below the necessary amount after the suit is instituted.—Stollars v. East Finlay Tp., 3 Pa. Co. Ct. 209.

[m] (Vt. 1831) In an action on book account, plaintiff cannot prevent an appeal by setting his ad damnum lower than the debit side of his account.—Church v. Vanduzee, 4 Vt. 195.

[n] (Vt.) If the face of a note exceeds $20, an appeal lies from the justice to the county court, though by indorsements the amount due on its face is reduced below that sum.—(1832) Tyler v. Lathrop, 5 Vt. 170; (1852) Sumner v. Jones, 24 Vt. 317.

[o] (Vt. 1837) In an action before a justice of the peace, on a promissory note exceeding $20, but indorsed below $10, the ad damnum in the plaintiff's writ being $10, and there being no plea in offset, the case is not appealable.—Boardman v. Harrington, 9 Vt. 151.

[p] (Vt. 1844) Where a declaration in an action commenced before a justice of the peace counted upon two notes, both amounting to less than $20, and also contained a count for $20 for money had and received, and the plaintiff offered in evidence the notes alone, and, before the judgment, waived the count for money had and received, the action is not appealable.—Cooper v. Miles, 16 Vt. 642.

[q] (Wis. 1858) After the trial before a justice on a note, the plaintiff cannot reduce the demand, by indorsements, to less than $15, so as to deprive the defendant of his statute right of appeal.—Evans v. Head, 7 Wis. 399.

(c) FINALITY OF DETERMINATION.

NECESSITY OF FINAL JUDGMENT, § 490.
FINALITY OF DETERMINATION, § 491.
JUDGMENTS OF DISMISSAL, NONSUIT, AND FOR COSTS, § 492.

§ 490. Necessity of final judgment.

Verdicts of jury as sufficient rendition of judgment to support an appeal, see post, § 502.

[a] (Ala. 1838) Where a judgment of a justice of the peace is not decisive of the plaintiff's case, a writ of error will not lie.—Wyatt v. Judge, 7 Port. 37.

[b] (Ala. 1858) The circuit court has no jurisdiction over an appeal from the judgment of a justice's jury, the justice having rendered no judgment; the decision appealed from being a claim to a slave seized in one county by a constable under an execution issued by a justice in another county.—Little v. Fitts, 33 Ala. 343.

[c] (Ala. 1894) Under Code, §§ 3398, 3405, providing that a party aggrieved by a judg-

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ment of a justice of the peace may appeal to the circuit court, or court of like jurisdiction, and that the case on such appeal shall be tried de novo, such appellate court cannot, on appeal of a garnishee from a judgment against him, after quashing the garnishment, require him to answer another and separate garnishment, on which the justice had rendered no judgment.—Francis-Chenoweth Hardware Co. v. Bailey, 104 Ala. 566, 18 South. 10.

[d] (Ark. 1852) Until the rendition of judgment by a justice of the peace, no appeal lies to the circuit court.—Adams v. Thompson, 12 Ark. (7 Eng.) 670.

[e] (Iowa) Where, on appeal from a justice of the peace, the record does not show that a judgment was rendered, the appeal will be dismissed.—(1849) Kimble v. Riggin, 2 G. Greene, 245; (1850) Brown v. Scott, 2 G. Greene, 454.

[f] (Me. 1849) Under a statute allowing an appeal from the judgments of a justice of the peace, an appeal does not lie from a decision of the justice which is merely interlocutory, as of respondeat ouster upon a demurrer to a plea in abatement.—Waterville v. Howard, 30 Me. (17 Shep.) 103.

[g] (Miss. 1891) Where an appeal is taken to the circuit court from a judgment of a justice in an attachment suit, the fact that a claimant's issue interposed in such suit was not determined by the justice does not deprive the circuit court of jurisdiction to try such issue, since jurisdiction to try the attachment gives the court jurisdiction to try all issues subordinate thereto.—Dreyfus v. Mayer, 69 Miss. 282, 12 South. 267.

[h] (Mo. 1889) Kansas City Charter (Sess. Acts 1875) art. 7, § 6, provides that when any person is aggrieved by the verdict of a jury in the mayor's court he may appeal to the circuit court for Jackson county. The appeal shall be taken by filing an affidavit with the city clerk, and he shall within a certain time file a complete transcript with the clerk of the circuit court, which "court shall thereupon become possessed of the cause." *Held*, that the circuit court has no jurisdiction to render judgment in a case commenced in the mayor's court, where its records fail to show that any verdict was rendered in the mayor's court, or that any appeal was taken from such verdict.—City of Kansas City v. Ford, 99 Mo. 91, 12 S. W. 346.

[i] (Neb. 1896) It is only from a final judgment of a justice of the peace that an appeal lies.—Denslow v. Dodendorf, 47 Neb. 328, 66 N. W. 409.

[j] (N. Y. 1858) An appeal from the judgment of a justice will be dismissed, where the record shows that the judgment is incomplete, as in such case it can be neither reversed nor affirmed.—Haulenbeck v. Gillies, 2 Hilt. 238.

[k] (N. Y. 1883) Where an appeal was taken from a justice of the peace before entry of the judgment, the error cannot be cured by amending the notice of appeal after the time for taking the appeal has expired.—Lewis v. Hoffman, 5 Civ. Proc. R. 141.

[l] (N. Y. 1883) Under Code Civ. Proc. § 3046, requiring appeal to be taken within 20 days from entry of judgment in the justice's docket, an appeal taken in summary proceedings to recover realty before the final order was entered was prematurely brought.—Lewis v. Hoffman, 5 Civ. Proc. R. 141.

[m] (Vt. 1870) Under Gen. St. c. 30, § 31, providing that where, on appeal from a justice court to the county court, appellant fails to enter his appeal, the other party by complaint may have the county court affirm the judgment appealed from, the county court, where, at the time of the appeal from the judgment, there was a motion for a close jail certificate pending, has no power to pass on the motion, because there was no judgment in the justice's court in respect to it.—Spaulding v. Woodworth, 42 Vt. 570.

§ 491. Finality of determination.

Appeal from judgments by default, see post, § 495.

[a] (Ark. 1846) A justice of the peace, in rendering judgment, stated that "this case, for the want of proof to sustain the plaintiff's demand, was dismissed, at the plaintiff's cost." *Held* that, it being inferable from the entry that this was a final determination of the case on the merits, and not a nonsuit, an appeal would lie.—Parsell v. Smyers, 7 Ark. (2 Eng.) 55.

[b] (Iowa, 1849) Where, on an appeal to the district court from the judgment of a justice of the peace, it appears that no judgment was entered by the justice on the verdict of the jury, the district court has no jurisdiction of the cause.—Kimble v. Riggin, 2 G. Greene, 245.

[c] (Iowa, 1855) A judgment of a justice, after reciting the names of the parties, the amount claimed, the cause of action, and that the cause had come before him by change of venue, recited that the parties met by counsel before him, that the testimony was heard, and that "it is believed that the plaintiff is entitled to $75 debt, and costs taxed as follows." *Held*, that this appeared to be a final adjudication, exhibiting the parties, the matter in dispute, and the result, and therefore a good final judgment to be appealed from.—Stowers v. Milledge, 1 Iowa (1 Clarke) 150, 63 Am. Dec. 434.

[d] (Iowa, 1874) An appeal lies from a default judgment rendered by a justice of the peace, under Code, § 3575, providing that any person aggrieved by the final judgment of a justice may appeal therefrom.—Butler v. Heeb, 38 Iowa, 429.

[e] (Kan. 1863) Under Act Feb. 26, 1867 (Laws 1867, p. 78), regulating the jurisdiction and procedure before justices of the peace, a judgment in a garnishment proceeding is such a final judgment as may be appealed from to the district court.—Kayser v. Bauer, 5 Kan. 202.

[f] (Kan. 1886) A justice's order, certifying the case on the ground that the pleadings show the title to land to be in dispute, is not a final order, reviewable on petition in error.—Peyton v. Peyton, 34 Kan. 624, 9 Pac. 479.

[g] (Kan. 1887) In an action against S., M. & B., a partnership, before a justice of the peace, a finding and judgment against S., and a finding that M. and B. are not indebted to the plaintiff in any sum, but no judgment thereon, is not a final judgment, within the meaning of section 120, Justices' Act, providing for appeals from justices of the peace, and the plaintiff has no right of appeal.—Butt v. Herndon, 36 Kan. 370, 13 Pac. 580.

[h] (Kan. 1887) Where a motion is made before a justice of the peace to vacate and discharge proceedings in garnishment after final judgment, and said motion is overruled, said ruling by the justice is a final order, and may be taken to the district court on error.—Carlyle v. Smith, 36 Kan. 614, 14 Pac. 156.

[i] (Kan. 1892) Where, after execution on a judgment of a justice of the peace against a

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corporation has been returned "not satisfied," an order upon proper notice has been made by the justice, under section 32, art. 4, of the act relating to corporations, awarding an execution in favor of plaintiff against a stockholder of the corporation, an appeal will not lie from such order to the district court, since section 120 of the justice's act allows an appeal from final judgments only. The order can be reviewed in the district court only upon a petition in error under Civ. Code, §§ 540, 543, allowing a final order to be so reviewed.—Healey v. Deepwater Clay Co., 48 Kan. 617, 29 Pac. 1088.

[j] (Mass. 1854) An action, entered by the defendant in the court of common pleas on appeal from a justice of the peace, may be dismissed on the defendant's motion, if the justice never rendered any judgment on the verdict returned for the plaintiff on the trial before him, although the action is one which might have been commenced in the court of common pleas.—Bowler v. Palmer, 68 Mass. (2 Gray) 553.

[k, l] (Mo. 1841) An appeal lies from the judgment of a justice of the peace, on an issue found between the plaintiff in attachment and an interpleader, before the final determination of the cause between the plaintiff and defendant.—Weisenecker v. Kepler, 7 Mo. 52.

[m] (Mo. 1858) Technical rules are not to be applied to proceedings in justices' courts. So where, in an action tried in a justice's court, the jury returned a verdict against A., which was recorded, but judgment was not, and A. appealed, but the appeal was dismissed for the want of a judgment, it was *held* that the dismissal was erroneous.—Morse v. Brownfield, 27 Mo. 224.

[n] (Neb. 1885) The receipt and filing of the amount of damages, costs, etc., and the issuance of execution thereon, do not constitute such a judgment or final order as, under Code Civ. Proc. § 580, may be "reversed, vacated, or modified by the district court."—Holmes v. Irwin, 17 Neb. 99, 22 N. W. 124.

[o] (N. Y. 1869) Where, in a justice's court, the merits are fairly entered into, investigated, and the case is finally submitted to the justice, who gives a judgment for the defendant, though without costs, it is conclusive on the plaintiff, a bar to another action, and a final determination, from which an appeal will lie.—Blum v. Hartman, 3 Daly, 47.

[p] (Ohio, 1889) Under Rev. St. § 6583, providing that, in all cases not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace, and section 6578, declaring that, when a judgment shall have been rendered against a defendant in his absence, the same may be set aside by the justice on certain conditions named, an appeal lies from a judgment by default rendered by a justice of the peace, since section 6578 does not limit the defendant to a resort to the remedy thereby provided.—Golds borough v. Bolenbaugh, 2 O. C. D. 337.

[q] (S. D. 1896) The record in an action in justice court specified the nature of the claim, and contained a transcript of docket, concluding with a recital that, "after hearing the evidence and law, judgment was given for plaintiff for $20 against C., and costs, $13.50, making in all $33.50." *Held* to show a "final determination of the rights of the parties," within Comp. Laws, § 5024.—Hunter v. Karcher, 8 S. D. 554, 67 N. W. 621.

[r] (Tex. 1894) A judgment rendered by a justice of the peace is not final where it does not dispose of defendant's cross demand asking affirmative relief.—Clopton v. Herring (Civ. App.) 26 S. W. 1104.

[s] (Wis.) Under Rev. St. 1858, a party who has suffered judgment by default before a justice of the peace has the right of appeal.—(1861) Burnham v. Turner, 14 Wis. 622; (1862) State v. Ives, 15 Wis. 445; (1862) Shroudenbeck v. Phœnix Fire Ins. Co., 15 Wis. 632.

[t] (Wis. 1889) An order by a justice of the peace, in garnishee proceedings, directing the garnishees to pay money into court, is not a final judgment from which an appeal may be taken, under Rev. St. § 3753, providing that "any party to a final judgment rendered by a justice of the peace * * * may appeal therefrom."—Williams v. Briel, 75 Wis. 309, 43 N. W. 952; Same v. Brechler, Id.

§ 492. Judgments of dismissal, nonsuit, and for costs.

Appeal from judgments of dismissal and nonsuit, see post, § 498.

[a] (Mich. 1843) A judgment of nonsuit, rendered in a justice's court upon failure of the plaintiff to appear and prosecute his suit, is not a final judgment from which an appeal can be taken, within the meaning of Sess. Laws 1841, p. 107, § 94.—Bowne v. Johnson, 1 Doug. 185.

[b] (Mich. 1877) Under Comp. Laws, § 5431, authorizing appeal from a justice on judgment of nonsuit, or on any final judgment on issue joined, an appeal lies from a justice of the peace, when a writ of replevin has been dismissed for defects in the affidavit for the writ and judgment has been rendered for damages and costs on waiver of a return.—Stall v. Diamond, 37 Mich. 429.

[c] (Mo. 1858) A justice of the peace had no authority or power, under Rev. Code 1845, to set aside a nonsuit, except it was adjudged on account of the plaintiff's absence; and if a justice should render a judgment of nonsuit on the ground that the plaintiff had not filed the original articles of a plank road association, on which the action was founded, the plaintiff might appeal without moving to set it aside,—the act regulating proceedings in justices' courts not requiring it.—Hannibal, R. C. & P. Plank Road Co. v. Robinson, 27 Mo. 396.

[d] (Mo. 1884) A judgment of nonsuit, entered by a justice on plaintiff's request after submission of the cause, is not a final judgment from which an appeal will lie.—Schmidt v. Halle, 15 Mo. App. 36.

[e] (Neb. 1880) A judgment for costs merely, on the verdict of a jury in favor of the defendant in an action in a justice's court, is not final, and no appeal lies therefrom.—Riddle v. Yates, 10 Neb. 510, 7 N. W. 289.

[f] (N. Y. 1806) A judgment of nonsuit, without awarding costs, is incomplete, and can neither be affirmed nor reversed.—Monnell v. Weller, 2 Johns. 8.

[g] (Ohio, 1860) Where an action is dismissed by a justice for the failure of the plaintiff, a nonresident, to give security for costs, the order of dismissal is not a final judgment, from which an appeal lies.—Strausburgh v. Doran, 2 Ohio Dec. 402.

[h] (Ohio, 1677) A judgment of dismissal of an action without prejudice is not a final judgment from which an appeal will lie, under section 111 of the justices' act (Swan & C. St. p. 788).—Ferrall v. Bluffton Lodge, No. 371, I. O. O. F., 31 Ohio St. 463.

[i] (Ohio, 1878) A justice's judgment of dismissal without prejudice to a new action, if rendered on a hearing on the merits and finding for defendant, is a final judgment from which an appeal will lie.—Mix v. Crego, 5 Ohio Dec. 552.

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[j] (Ohio, 1879) No appeal lies from a dismissal of a case without prejudice, made by a justice on plaintiff's failure to appear, as it is not a final judgment.—Morgan v. Andres, 6 Ohio Dec. 823.

[k] (Tex. 1883) Under Rev. St. art. 1613, requiring a justice to record his judgment at length on the docket, stating the determination of the rights of the parties, and article 1620, making rules governing district courts in relation to judgments applicable to justices' judgments, a judgment against plaintiff for all costs is not a final judgment.—Giersa v. Yocum, 1 White & W. Civ. Cas. Ct. App. § 310.

[l] (Tex. 1883) A judgment for costs against the plaintiff in a justice's court is not a final judgment from which an appeal can be taken.—Owens v. Levy, 1 White & W. Civ. Cas. Ct. App. § 407.

[m] (Tex. 1887) A justice's docket contained, after reciting that the verdict was for the defendant for costs, this further entry: "It is considered and adjudged by the court that the defendant do have and recover of and from the plaintiff the sum of $10.50, the costs in this suit incurred." *Held*, that this was not a final judgment from which an appeal could be taken to the district court.—Figures v. Dunklin, 68 Tex. 644, 5 S. W. 503.

[n] (Tex. 1890) The judgment of a justice of the peace dismissing a suit because not brought in the precinct of defendant's residence is final, and an appeal lies therefrom.—Howeth v. Clark (App.) 16 S. W. 175.

[o] (Tex. 1890) A judgment of a justice of the peace dismissing a case, at the costs of the plaintiff, is a final judgment, from which an appeal lies to the county court.—Fuerman v. Ruhle (App.) 16 S. W. 536.

[p] (Tex. 1891) Plaintiffs sued defendants in a justice's court to set aside a constable's sale of certain property of plaintiffs, and to recover the value of the property, and for exemplary damages against defendants for instigating and procuring the sale. Defendants filed general demurrer, general denial, and a special plea alleging that the suit was vexatious. The verdict found the sale not lawful, and set it aside, and judgment was rendered that "the sale made by S., constable, be, and the same is hereby, set aside and held for naught, and that the plaintiffs herein recover of the defendant E. W. White all costs of this suit, for which execution issue." *Held* not a final judgment from which an appeal would lie.—White v. Smith (App.) 15 S. W. 1111.

[q] (Vt. 1840) Where a justice, on hearing the evidence in a cause, rendered a judgment of nonsuit against the plaintiff, it was *held* that it was a judgment on the merits, from which the plaintiff might appeal.—Smith v. Crane, 12 Vt. 487.

[r] (Wis. 1865) Judgment of dismissal by a justice, not awarding costs, is a final judgment, within the meaning of Rev. St. c. 120, § 204, and may be appealed from.—Collins v. Wagoner, 20 Wis. 48.

[s] (Wis. 1867) A judgment of dismissal in justice's court is a final judgment from which an appeal may be taken, although no costs are given against the plaintiff.—Stoppenbach v. Zohrlaut, 21 Wis. 385.

(d) NATURE, SCOPE, AND EFFECT OF DECISION.

NATURE IN GENERAL, § 493.
VOID JUDGMENTS, § 494.
JUDGMENTS ON DEFAULT, § 495.
JUDGMENTS BY CONFESSION, § 496.
JUDGMENTS AFTER APPEARANCE AND ON VERDICT OR AWARD, § 497.
JUDGMENTS OF NONSUIT OR DISMISSAL, § 498.
QUESTIONS OF FACT OR LAW, § 499.
RULINGS OTHER THAN JUDGMENTS, § 500.
ATTACHMENT AND GARNISHMENT PROCEEDINGS, § 501.
MODE OF RENDITION, FORM, AND ENTRY OF JUDGMENT OR ORDER, § 502.

§ 493. Nature in general.

[a] (U. S. 1826) The defendant, against whom a judgment has been rendered by a justice of the peace, cannot maintain an appeal from that judgment after having superseded it by confessing a new judgment, with sureties and six months' stay, under Acts Md. 1791, c. 67.—Coumbe v. Nairn, Fed. Cas. No. 3,278 [2 Cranch, C. C. 676].

[b] (Conn. 1866) An appeal will lie by a defendant from an adverse judgment of a justice of the peace on a plea in abatement.—Russell v. Monson, 33 Conn. 506.

[c] (Ind. 1869) Where, after judgment before a justice, the defendants move for a new trial, and the motion is granted, and afterwards withdraw such motion, and plaintiffs appeal, the appeal cannot be dismissed on the ground that there was no judgment from which an appeal could be taken, though defendants had replevied and paid the judgment.—White v. Griffey, 32 Ind. 97.

[d] (Ind. 1871) Where a judgment is rendered by a justice of the peace, and a new trial is granted, and afterwards, on motion, the order granting a new trial is set aside and a new judgment rendered, an appeal should be taken from the new judgment, and not from the order setting aside the granting of a new trial.—Tarpy v. Cautchfield, 38 Ind. 58.

[e] (Ky. 1827) Appeal lies to correct a judgment of a justice de bonis propriis or testatoris, where it ought to have been quando acciderint.—Bowman v. Green, 22 Ky. (6 T. B. Mon.) 339.

[f] (Mo. 1881) Where, in an action in a justice's court, the first judgment was a nullity, and, after notice to defendant, plaintiff appeared and another judgment was rendered, an appeal was properly taken therefrom.—Semple & Birge Mfg. Co. v. Thomas, 10 Mo. App. 457.

[g] (N. Y. 1829) A party has a right to appeal from a judgment rendered on an ex parte hearing after issue joined.—People v. Madison Common Pleas, 2 Wend. 628.

[h] (N. Y. 1857) An appeal may be taken, under Code, § 352, as amended in 1857, from a justice's judgment in summary proceedings to the common pleas.—Davis v. Hudson, 5 Abb. Prac. 61.

[i] (Pa. 1817) An appeal lies from the judgment of a justice upon a scire facias, on a judgment obtained before him.—Guilky v. Gillingham, 3 Serg. & R. 93.

[j] (Pa. 1831) Special bail have a right to appeal from the judgment of a justice against them, notwithstanding the act of 1810 says that on the judgment of the justice execution shall issue without stay.—Pritchett v. Moore, 1 Ashm. 26.

[k] (Pa. 1892) An appeal may be taken from a judgment of an alderman on a scire facias to revive a judgment.—Watson v. Wehrly (Com. Pl.) 2 Pa. Dist. R. 530.

[l] (Tex. 1895) Where, in a justice court, a judgment is rendered for plaintiff against both

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defendant and intervener, and also one for defendant against intervener on a counterclaim, intervener cannot appeal from the latter judgment alone, as Rev. St. §§ 1294, 1337, allow but one final judgment, and require the case on appeal to be tried de novo.—Packenius v. Petri (Civ. App.) 29 S. W. 1095.

[m] (Vt. 1864) A judgment by a justice of the peace for a plaintiff for costs only can be appealed from.—McDaniels v. Johnson, 36 Vt. 687.

§ 494. Void judgments.

[a] (Ind. 1864) An administrator, who is sued before a justice of the peace on a claim against him in his fiduciary capacity, has a right, under 2 Gav. & H. St. p. 593, § 64, to appeal from the judgment rendered, though the justice had no jurisdiction of the cause.—Palmer v. Fuller, 22 Ind. 115.

[b] (Iowa, 1858) A justice having but three days in which to enter judgment, judgment rendered after that time is a nullity, and no appeal lies therefrom.—Guthrie v. Humphrey, 7 Iowa (7 Clarke) 23.

[c] (Mich. 1873) A judgment of a justice, which was void because entered more than four days after the cause was submitted to him (Comp. Laws 1871, § 5380), is not appealable.—Harrison v. Sager, 27 Mich. 476.

[d] (N. J. 1880) Where what is a judgment in form and color is entered in a justice's court, in an action where the justice has not jurisdiction, the judgment is reviewable either by an appeal to the court of common pleas or by a writ of certiorari.—Williamson v. Middlesex County Judges, 42 N. J. Law (13 Vroom) 386.

[e] (N. J. 1887) If a court for the trial of small causes has rendered judgment on a day when the cause was not lawfully before it, the party injured has a remedy by appeal to the common pleas for a new trial, or by certiorari for a mere legal review.—Barclay v. Brabston, 49 N. J. Law (20 Vroom) 629, 9 Atl. 769.

[f] (N. Y. 1831) Though a judgment rendered by a justice in an action of trespass involving the title to lands is void, the party against whom it is rendered is entitled to seek a reversal.—Striker v. Mott, 6 Wend. 465.

[g] (N. Y. 1886) Code, § 3015, requires a justice to render judgment within four days from the time of the submission. *Held*, that a judgment rendered after four days will not support an appeal, further than for the purpose of reversing the judgment.—Gillingham v. Jenkins, 40 Hun, 594.

[h] (Or. 1862) Rev. St. p. 300, § 54, requiring a justice to cease proceedings in an action when the title to real estate comes in issue "and certify the cause to the circuit court in the same time as upon appeal," is substantially complied with by proceeding to judgment and sending up the papers and proceedings on appeal. The judgment in the lower court is not wholly void, but will support the appeal.—Gird v. Morehouse, 2 Or. 53.

[i] (Tex. 1883) On appeal from a justice's court to the county court, on which Const. art. 5, § 16, provides that there shall be a new trial de novo in the county court, the justice's judgment sustains the appeal, though the original service in the justice's court was void, and so declared by the county court in quashing it.—Galveston, H. & S. A. R. Co. v. McTiegue, 1 White & W. Civ. Cas. Ct. App. § 459.

[j] (Utah, 1893) 1 Comp. Laws, p. 104, § 3, an act of congress relating "to courts and judicial officers in the territory of Utah," provides that an appeal shall be allowed to the district courts of their respective districts from all "final judgments" of justices of the peace. 2 Comp. Laws, § 3659, a territorial act, provides that any party dissatisfied with a judgment rendered in a justice's court may appeal the same to the district court. *Held*, that an appeal would lie from the judgment of a justice of the peace rendered against defendants in an action of trespass in which he had no jurisdiction because defendants filed a verified answer putting in issue plaintiff's right of possession and title to the lands trespassed upon, and was the proper remedy.—Cereghino v. Third District Court of Utah, 8 Utah, 455, 32 Pac. 697.

[k] (Utah, 1895) The fact that a justice of the peace erroneously allows interest, which makes the total amount exceed his jurisdiction, does not deprive him of original jurisdiction, so as to render the judgment void, and therefore unappealable.—McCormick Harvesting Mach. Co. v. Marchant, 11 Utah, 68, 39 Pac. 483.

§ 495. Judgments on default.

Appeal from judgments by default as final judgments, see ante, § 491.

[a] No appeal lies from a justice's judgment rendered upon a default.
—(Conn. 1878) Smith v. French, 46 Conn. 239; (Me. 1850) Turner v. Putnam, 31 Me. 557.

[b] (Cal. 1858) If a defendant, duly served, suffer a default before the justice, he thereby conclusively admits the facts set out in the complaint, and cannot deny them on an appeal.—People v. Eldorado County Court, 10 Cal. 19; Funkenstein v. Elgutter, 11 Cal. 328.

[c] (Me. 1848) Where an action commenced before a justice of the peace has been defaulted, no appeal lies thereupon to the district court; and if, in such case, there is an entry of the action in the district court, and it is continued, it may be dismissed on motion of the plaintiff, at the second term.—Harris v. Hutchins, 28 Me. (15 Shep.) 102.

[d] (Mass. 1846) Under Rev. St. c. 85, § 13, an appeal lies from the judgment of a justice of the peace, rendered upon a default, as well as from a judgment rendered after trial on an issue joined by the parties.—Holman v. Sigourney, 52 Mass. (11 Metc.) 436.

[e] (Neb. 1881) A provision that no appeal lies in favor of defendant from a default judgment of a justice may be waived, and will be waived if plaintiff treat the appeal as valid, and without objection file the necessary pleadings on his part to make up the issues for a trial on the merits in the appellate court. It is too late to object on the trial to the validity of the appeal.—Minneapolis Harvester Works v. Hedges, 11 Neb. 46, 7 N. W. 531.

[f] (Neb. 1883) An action in a justice's court was adjourned to 1 o'clock of a future day. On that day and hour the court met, and, defendant failing to appear, the court impaneled a jury, and rendered judgment against defendant before 2 o'clock. *Held* that, defendant being entitled to one hour in which to appear at the adjourned session of the court, an appeal would lie to the district court from the judgment rendered against defendant without allowing him such time in which to appear.—Andrews v. Mullin, 14 Neb. 248, 15 N. W. 216.

[g] (Neb. 1889) On the return day of a writ of replevin all the parties came before the justice before whom the suit was tried. A motion for a continuance by plaintiff was over-

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ruled, and he withdrew, and made no further appearance. On motion of defendant, the case was tried by the court, and judgment given against plaintiff for the wrongful taking of the property replevied. *Held*, that a dismissal of an appeal by plaintiff to the district court, on the grounds that judgment was rendered against plaintiff in the court below, while he was in default, and that no petition had been filed as required by law, was error.—Sornborger v. Huffman, 27 Neb. 491, 43 N. W. 242.

[h] (Neb. 1890) An appeal from the judgment of a justice of the peace cannot be dismissed on the ground that the judgment was rendered by default, where defendant had appeared on the return day of the summons, obtained a continuance, and subpœnaed witnesses, though he was absent on the day of the trial.—Steven v. Nebraska & I. Ins. Co. 29 Neb. 187, 45 N. W. 284.

[i] (Nev. 1894) Where an unauthorized judgment by a justice is entered by default, the remedy is by certiorari, rather than by appeal.—Wiggins v. Henderson, 22 Nev. 103, 36 Pac. 459.

[j] (N. Y. 1826) An appeal lies from a judgment in favor of the plaintiff, where an issue is joined, though the defendant did not appear and take part in the trial.—Ex parte Stafford, 6 Cow. 44.

[k] (N. Y. 1854) Where a defendant has once appeared in justice's court, and afterwards suffers judgment by default, having mistaken the time to which the cause was adjourned, Code, § 366, confers no power on the appellate court to grant relief.—Williams v. McCauley, 3 E. D. Smith, 120.

[l] (N. Y. 1889) Where a defendant is present when the case is called, but refuses to answer, or to take part in the trial, on the ground that it was called too late, there is no failure to appear, within the meaning of Code Civ. Proc. § 3064, relating to appeals from justice's court, and providing that "if the appeal is taken by a defendant who failed to appear before the justice, either upon the return of the summons or at the time to which the trial of the action was adjourned," and gives a satisfactory excuse for his default, the court may, in its discretion, set aside the judgment and grant a new trial, etc.—Thomas v. Keeler, 52 Hun, 318, 5 N. Y. Supp. 359, 16 Civ. Proc. R. 408.

[m] (Or. 1866) Under the provisions of Code, p. 595, § 64, relating to appeals from judgments rendered by justices of the peace, no appeal lies from a "judgment on failure to answer."—Ryan v. Harris, 2 Or. 175.

[n] (Or. 1875) When an answer is purposely stricken out or set aside on a trial in justice's court, and, defendant failing to file any other answer, judgment is rendered against him, such judgment, upon a question of defendant's right of appeal, will be considered as a "judgment for want of answer," and not appealable.—Long v. Sharp, 5 Or. 438.

[o] (S. D. 1892) On appeal to the circuit court from a justice's judgment, the transcript sent up by the justice showed that the cause was set for trial at a certain time, that both parties appeared, and witnesses were sworn, and that a certain judgment was rendered. The transcript was silent as to whether an answer was filed, but neither did it refer to a complaint. *Held*, that the transcript did not show that the judgment in the justice's court was rendered by default, and the circuit court erred in dismissing the appeal on such ground.—Mouser v. Palmer, 2 S. D. 466, 50 N. W. 967.

[p] (Wash. 1895) In case of default judgment before a justice of the peace for want of answer, there can be no review by appeal under 2 Hill's Code, § 1630, but only a review of errors of law by certiorari proceedings under section 1621.—State v. Jefferson County Super. Ct., 12 Wash. 548, 41 Pac. 895.

§ 496. Judgments by confession.

[a] An appeal will not lie from a judgment entered in a justice's court against defendant by consent.
—(Cal. 1884) Yeazell v. Superior Court of City and County of San Francisco, 4 Pac. 503;
(Or. 1892) Rader v. Barr, 22 Or. 495, 29 Pac. 889.

[b] (Idaho, 1890) Where, in a suit before a justice for $150, being above the amount of which justices have exclusive original jurisdiction, all the allegations of the complaint were denied, but, to expedite an appeal, defendant, by agreement of both parties, consented to a "pro forma judgment" against him, "reserving all his rights under an appeal," this consent does not deprive him of his right to be heard in the circuit court, and his appeal was improperly dismissed.—Harvey v. Bunker Hill & S. Mining & Concentrating Co., 2 Idaho, 732, 24 Pac. 30.

[c] (Ill. 1852) The statutory provision that "appeals from judgments of justices of the peace to the circuit court shall be granted in all cases, except on judgments confessed," has reference to judgments in civil proceedings, where the action is brought to redress some private injury, and embraces all such cases, whether the jurisdiction is conferred by the same general act or by other statutes passed either before or since.—Edwards v. Vandemack, 13 Ill. (3 Peck) 633.

[d] (Ill. 1867) An admission by a defendant before a justice of the peace that "he could not deny the plaintiff's demand" does not amount to a confession of judgment, and the defendant's right of appealing from the judgment remains.—Elliott v. Diaber, 42 Ill. 467.

[e] (Ill. 1885) Under Rev. St. 1881, c. 79, § 62, providing that no appeal lies from a judgment of a justice of the peace on a confessed judgment, the party confessing judgment, to preclude an appeal therefrom, must acknowledge the amount, as well as the fact, of indebtedness.—Davis v. City of Joliet, 15 Ill. App. (15 Bradw.) 664.

[f] (Ill. 1894) A judgment entered by a justice of the peace, based on an admission by the defendant of the amount due, is not a judgment by confession, and may be appealed from.—Dearborn Laundry Co. v. Chicago & A. R. Co., 55 Ill. App. 438.

[g] (Ind. 1861) Plaintiff sued defendant before a justice of the peace on an account. Defendant filed a set-off, but, being personally served with a subpœna to appear at trial and testify as a witness, he failed to do so; and therefore his set-off was disallowed and plaintiff's cause of action taken as confessed, and judgment rendered accordingly. *Held*, that defendant might appeal, and that section 59 of the justices' act did not take away this right.—Mariner v. Hanna, 16 Ind. 23.

[h] (Ind. 1861) Section 59 of the justices' act (2 Rev. St. 1852, p. 459) has reference only to such judgments as are confessed in accordance with the provisions of that section, and has no reference to the cases, contemplated in section 48 of the same act, taken "as confessed" for failure to appear and testify.—Mariner v. Hanna, 16 Ind. 23.

[i] (Iowa, 1883) Where a party to a suit before a justice of the peace agrees to the entry of a judgment against him, he cannot after-

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wards claim that he was "aggrieved" thereby, within the meaning of Code 1873, § 3575, allowing appeals from justices.—Stever v. Heald, 61 Iowa, 709, 17 N. W. 145.

[j] (Miss. 1888) Code, § 2309, denying appeal from judgments by confession or consent, does not apply to justices' courts.—James v. Woods, 65 Miss. 528, 5 South. 106.

[k] (Ohio, 1833) All final judgments of justices, except those entered by confession, may be appealed from; and bail for stay of execution will not prevent an appeal.—Nealy v. Sexton, Wright, 314.

[l] (Pa. 1846) Where a defendant appears before a justice and confesses judgment, he is not entitled to an appeal.—Halliday v. Mills, 3 Clark, 394, 5 Pa. Law J. 416.

§ 497. Judgments after appearance and on verdict or award.

[a] No appeal lies from the judgment of a justice of the peace in the District of Columbia, rendered upon the verdict of a jury.

—(U. S. 1824) Davidson v. Burr, Fed. Cas. No. 3,602 [2 Cranch, C. C. 515]; Maddox v. Stewart, Fed. Cas. No. 8,964 [2 Cranch, C. C. 523];

(D. C. 1879) Fitzgerald v. Leisman, 3 MacArthur, 6.

[b] An appeal does not lie from a judgment of a justice of the peace upon the award of arbitrators.

—(Ill. 1840) Van Winkle v. Beck, 3 Ill. (2 Scam.) 488;

(Iowa, 1868) Whitis v. Culver, 25 Iowa, 30.

[c] (Ill. 1851) Under Rev. St. c. 59, § 58, allowing appeals from judgments of justices of the peace, except where judgment was confessed, an appeal lies from a judgment of a justice founded on an award of arbitrators.—Rogers v. Holden, 13 Ill. (3 Peck) 293.

[d] (Neb. 1884) A party who appears at the trial before a justice of the peace may appeal to the district court, although he did not introduce testimony.—Baier v. Humpall, 16 Neb. 127, 20 N. W. 108.

[e] (Neb. 1884) A defendant, in an action before a justice, who has appeared "at the return day of the summons," or attended "at the time to which a trial has been adjourned," while not entitled to have a judgment against him set aside under Code Civ. Proc. § 1001, which provides that a judgment rendered against a defendant in his absence may be set aside on certain conditions, will not be denied on appeal.—Cleghorn v. Waterman, 16 Neb. 226, 20 N. W. 636.

[f] (Neb.) A party who has appeared in an action before a justice of the peace, and entered into an agreement continuing the cause, may appeal from the judgment rendered against him.—(1884) Cleghorn v. Waterman, 16 Neb. 226, 20 N. W. 636, 877; (1885) Crippen v. Church, 17 Neb. 304, 22 N. W. 567; (1887) Smith v. Borden, 22 Neb. 487, 35 N. W. 218.

[g] (Neb. 1884) Upon plaintiff's dismissal of his action, a set-off that had been filed by defendant was tried, and judgment was rendered for defendant. The record did not show that said judgment was taken by default. *Held*, that plaintiff was entitled to an appeal.—Rawalt v. Brewer, 16 Neb. 444, 20 N. W. 391.

[h] (Neb. 1884) A party who in good faith contests a plaintiff's right to recover before a justice, as by the examination or cross-examination of witnesses, may appeal to the district court.—Rawalt v. Brewer, 16 Neb. 444, 20 N. W. 391.

[i] (Neb. 1886) When a transcript of a justice shows that the parties were present at the trial, and that the same was tried, both parties being sworn and examined as witnesses, the fact that the defendant was called as a witness for plaintiff only, and offered no witness in his own behalf, will not deprive the defendant of the right of appeal to the district court on the ground that he made no defense.—Broadwater v. Jacoby, 19 Neb. 77, 26 N. W. 629.

[j] (Neb. 1888) Prior to the return day before a justice, the defendants caused subpœnas to be issued for their witnesses, which were served, and the witnesses appeared. On that day the trial was adjourned for 30 days on the application of the plaintiff. On the day to which the trial was adjourned the defendants appeared and objected to the jurisdiction of the court. The objection was overruled, and upon being required to plead or be defaulted, they withdrew from court, and the trial proceeded in their absence, resulting in a judgment against them. They appealed the case to the district court, where, on motion, the appeal was dismissed as having been taken from a judgment rendered in their absence. *Held* error.—Howard v. Jay, 25 Neb. 279, 41 N. W. 148.

[k] (Neb. 1894) A defendant, who has appeared generally before a justice, may appeal from a judgment against him, though he was not present at the trial, and did not contest the case on the merits.—Crumay v. Henry, 40 Neb. 716, 59 N. W. 369.

[l] (Neb. 1894) An appeal lies from a judgment entered by a justice on an award of arbitrators, assessing damages by trespassing animals under Comp. St. 1893, c. 2, § 3, as Code Civ. Proc. §§ 991-995, making awards of arbitrators final unless attacked for fraud, etc., do not apply.—Holub v. Mitchell, 42 Neb. 389, 60 N. W. 596.

[m] (Pa. 1839) If a justice enter judgment on an award for the defendant, the plaintiff may appeal, if his claim exceed $20.—McCloskey v. McConnell, 9 Watts, 17.

[n] (Tex. 1849) Where a right to a location has been contested under Land Laws 1837, § 19, and determined by a justice of the peace and six jurors, the determination is final; the statute giving no appeal therefrom.—Cullem v. Latimer, 4 Tex. 329; Prewitt v. Farris, 5 Tex. 370.

[o] (W. Va. 1888) No appeal lies to the circuit court from the judgment of a justice on a verdict.—Barker v. Walton, 31 W. Va. 468, 7 S. E. 452; Woodford v. Hull, 31 W. Va. 470, 7 S. E. 450.

§ 498. Judgments of nonsuit or dismissal.

Appeal from judgments of nonsuit or dismissal as not being final judgments, see ante, § 492.

[a] An appeal may be taken from a judgment of a justice of the peace dismissing the action and adjudging costs against the plaintiff, on his default.

—(Ill. 1895) Cohen v. Moore, 59 Ill. App. 396; (Ind. 1875) Lauferty v. Prickett, 50 Ind. 24.

[b] An appeal lies from a judgment of nonsuit.

—(Iowa, 1857) Gilson v. Johnson, 4 Iowa (4 Clarke) 463;

(Ohio, 1832) Brackenridge v. Husted, Wright, 70.

[c] (Conn. 1789) An appeal may be taken to the county court from a justice's judgment by nil dicit.—Bugbee v. Abbot, 1 Root, 109.

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[d] (Conn. 1890) The record of a justice recited that the plaintiff and defendant appeared and joined issue, and that, no testimony having been offered, the court entered judgment of nonsuit. *Held* not a judgment upon any of the issues of the case, but strictly a judgment of nonsuit, from which an appeal did not lie under Gen. St. § 683, providing that in all civil actions, except those by summary process, brought before a justice of the peace, an appeal from any judgment rendered therein upon any issue may be had by either party.—Norton v. Petrie, 59 Conn. 200, 20 Atl. 199.

[e] (Mass. 1853) Under Rev. St. c. 85, § 13, an appeal lies from a judgment of nonsuit rendered by a justice of the peace, as well as from a judgment on the merits.—Ball v. Burke, 65 Mass. (11 Cush.) 80.

[f] (Mich. 1867) Where a suit in a justice's court was adjourned for a few days by consent of parties, but before there were any pleadings, and on the adjourned day, the justice refused to hear the cause, such refusal might be considered as a nonsuit, and an appeal laid therefrom.—Pattridge v. Lott, 15 Mich. 251.

[g] (Mich. 1874) The decision of a justice dismissing a suit on motion for want of jurisdiction for an alleged defect in the summons is equivalent in effect to a judgment of nonsuit, and is appealable.—People v. Judge of Wayne Circuit Court, 30 Mich. 98.

[h] (Mo. 1892) Rev. St. § 6327, authorizing an appeal from any judgment, except by confession, rendered by a justice of the peace, allows appeals from dismissals.—Bohle v. Kingsley, 51 Mo. App. 389.

[i] (Mo. 1894) A plaintiff in an action on account before a justice of the peace may appeal from the judgment of nonsuit or dismissal rendered for his failure to appear, though the entry of such judgment is mandatory under the statute.—Purcell v. Peyton, 58 Mo. App. 442.

[j] (Nev. 1893) Under Gen. St. § 3603, which provides that any party dissatisfied with a judgment rendered in a justice's court may appeal therefrom to the district court of that county, an appeal will lie from a judgment rendered in a justice's court on an order improperly dismissing the action.—Nevada Cent. R. Co. v. District Court of Lander County, 21 Nev. 409, 32 Pac. 673.

[k] (N. Y. 1828) A nonsuit before a justice, after hearing proofs, can be reviewed only by appeal.—Gleason v. Clark, 9 Cow. 57.

[l] (Tex.) An appeal will lie to the county court from a judgment of a justice's court dismissing a complaint for plaintiff's failure to appear at the trial.—(1894) Winston v. Masterson (Civ. App.) 27 S. W. 691. CONTRA, see (1849) Morgan v. Johnson, 4 Tex. 117.

[m] (Wis. 1885) An appeal will lie from a judgment of a justice of the peace dismissing an action because of a failure of plaintiff to appear within the hour fixed by statute.—Hewett v. Currier, 63 Wis. 386, 23 N. W. 884.

§ 499. Questions of fact or law.

[a] (Iowa, 1872) An appeal lies from an order or judgment of a justice of the peace which is in effect final, whether it be upon matter of law or of fact.—Hodge v. Ruggles, 36 Iowa, 42.

[b] (Me. 1841) St. 1835, c. 146, giving to the judge of the municipal court of the town of H. exclusive original jurisdiction within the town over all such matters as justices of the peace of the county may exercise jurisdiction over, provides that any person aggrieved at the opinion of the judge upon a question of law may file exceptions thereto. *Held* that, under the statute, there was no appeal upon questions of fact.—Jones v. Jones, 18 Me. (6 Shep.) 308, 36 Am. Dec. 723.

[c] (N. Y.) The seventeenth section of the act, which gave the party aggrieved, where the judgment was above $25, an appeal to the court of common pleas, referred only to cases in which a judgment was given after trial of an issue in fact, and not to a case of a judgment on demurrer or an issue at law.—(1820) Peters v. Parsons, 18 Johns. 140; (1822) Breese v. Williams, 20 Johns. 280.

[d] (N. Y.) An appeal lies in all cases, whether the judgment of the justice be upon an issue of law or fact.—(1825) In re Haywood, 5 Cow. 19; (1826) People v. Judges of Columbia, Id. 285; (1829) People v. Schoharie Common Pleas, 2 Wend. 260.

[e] (N. Y. 1835) Error lies where illegal evidence was adduced on a trial before a justice, though the defendant did not appear, and consequently no objection was taken to the admission of the evidence.—Squier v. Gould, 14 Wend. 159.

[f] (N. Y. 1849) A misdirection by a justice of the peace of the jury on a point of law material to the case was *held* to be ground for writ of error.—Chapman v. Fuller, 7 Barb. 70.

[g] (N. Y. 1856) If the refusal of a justice to allow an amendment of pleadings is in any case ground of appeal, it can only be so when injustice will result from the refusal of the application.—Tattersall v. Hass, 1 Hilt. 56.

[h] (Pa. 1893) An appeal to the court of common pleas from the judgment of an alderman in a suit to recover a penalty, or in a case of summary conviction, will not be allowed, where the reason assigned for the appeal is that the judgment was against the evidence.—Board of Health v. Crest Farm Dairy Co. (Com. Pl.) 3 Lack. Jur. 175, 14 Pa. Co. Ct. R. 119, 3 Pa. Dist. R. 363.

§ 500. Rulings other than judgments.

[a] (Ark.) An appeal may be taken from the refusal of a justice of the peace to allow a schedule of property as exempt, and to issue supersedeas.—(1883) Winter v. Simpson, 42 Ark. 410. CONTRA, see (1880) Smith v. Ragsdale, 36 Ark. 297.

[b] (Cal. 1881) There can be no appeal from the order of a justice's court refusing to take off a default.—Rickey v. Nevada County Superior Court, 59 Cal. 661.

[c] (Conn. 1880) Gen. St. tit. 19, c. 5, § 15, providing that, in civil actions brought before a justice of the peace, an appeal shall be allowed to either party "from any judgment rendered therein upon any issue," does not give a right of appeal from a judgment of respondeat ouster upon a demurrer overruled.—Denton v. Town of Danbury, 48 Conn. 368.

[d] (Ind. 1841) An appeal lies from the decision of a justice of the peace, on an application to enter satisfaction of a judgment on his docket, to the circuit court.—Creekpaum v. Templeton, 5 Blackf. 583.

[e] (Ind. 1858) A justice being without authority after judgment to grant a new trial without notice and in the adverse party's absence, any subsequent action in the presence of the party is void; his objection on the above ground being overruled, and therefore only the first judgment can be appealed from.—Erskine v. Onyett, 11 Ind. 335.

[f] (Mass. 1837) The supreme court has supervision of the extent to which justices of

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the peace have discretionary power to order amendments of pleadings before them.—Guilford v. Adams, 36 Mass. (19 Pick.) 376.

[g] (N. J. 1827) If a justice refuses an adjournment to which a party is legally entitled, relief may be had on appeal to the common pleas; but, if the party aggrieved omit or neglect to seek such relief on the trial of the appeal, he cannot obtain it in the supreme court.—Gould v. Brown, 9 N. J. Law (4 Halst.) 165.

[h] (N. Y. 1879) In an action before a justice of the peace by the payee of a note given on the sale of a horse, a refusal to allow the defendant to amend his answer by setting up a breach of warranty is reviewable on appeal; the proposed defense not being shown to be false or vexatious.—Walsh v. Cornett, 17 Hun, 27.

[i] (N. C. 1888) A motion to have satisfaction entered of a judgment rendered by a justice of the peace, on which execution has improvidently issued after payment, may be entertained by the justice, and an appeal will lie from his decision.—Bailey v. Hester, 101 N. C. 538, 8 S. E. 164.

[j] (Tenn. 1834) Where a justice has no authority to proceed in a case, and refuses to proceed, no appeal lies.—Gibbs v. Bourland, 14 Tenn. (6 Yerg.) 481.

[k] (Vt. 1848) When a party, sued before a justice of the peace, suffers judgment by default, and the case is continued for the assessment of damages, the refusal of the justice to allow the damages to be assessed by a jury is not the denial of a right which will entitle the party to relief by petition to the county court.—Brown v. Irwin, 21 Vt. 68.

[l] (Wis. 1853) The order of a justice in an action of replevin that the property be delivered up is part of the judgment and subject to appeal.—Weizen v. McKinney, 2 Wis. 288.

§ 501. Attachment and garnishment proceedings.

Appeal from judgment against garnishee as not being final judgment, see ante, § 491.

Decisions in garnishment proceedings as final judgments, see ante, § 491.

[a] An appeal lies in cases of garnishment from the judgment of a justice of the peace.—(Ark. 1851) Patterson v. Harland, 12 Ark. (7 Eng.) 158;

(Tenn. 1841) Clark v. Williams, 21 Tenn. (2 Humph.) 303.

[b] (Iowa, 1892) The action of a justice of the peace in overruling a motion to discharge attached property under claim of exemption is not reviewable by writ of error.—Lease v. Franklin, 84 Iowa, 413, 51 N. W. 21.

[c] (Kan. 1880) Where property has been seized on attachment, an appeal does not lie from the order and judgment of a justice of the peace in proceedings instituted under Comp. Laws 1879, pp. 725, 726, §§ 1-3, to try the right of property therein.—Dilley v. McGregor, 24 Kan. 361.

[d] (Kan. 1885) Error does not lie to the district court from a ruling of a justice of the peace refusing to vacate and discharge a garnishment process.—Miller v. Noyes, 34 Kan. 13, 7 Pac. 602.

[e] (Kan. 1896) An order of a justice of the peace discharging a garnishee is not appealable.—Fultz v. Neal, 3 Kan. App. 612, 45 Pac. 250.

[f] (Ky. 1844) An appeal lies in behalf of either party against whom a judgment may be given, on trial of an attachment before justices of the peace, since the statutes of 1838 and 1840.—Kennedy v. Aldridge, 44 Ky. (5 B. Mon.) 141.

[g] (Mich. 1859) Under Comp. Laws, § 4786, the circuit court has jurisdiction to hear and determine appeals in garnishment cases.—Newell v. Blair, 7 Mich. 103.

[h] (Minn. 1889) Under Gen. St. 1878, c. 66, § 197, and Sp. Laws 1881, c. 407, a separate appeal to the municipal court of the city of St. Paul may be taken by a garnishee from a judgment against him rendered by one of the city justices, and such right of appeal is not dependent on the removal by appeal of the judgment in the principal action.—Albachten v. Chicago, St. P. & K. C. Ry. Co., 40 Minn. 378, 42 N. W. 86; Richter v. Trask, 40 Minn. 379, 42 N. W. 87.

[i] (N. J. 1835) An appeal does not lie from the judgment of a justice of the peace against a garnishee.—Laird v. Abrahams, 15 N. J. Law (3 J. S. Green) 22.

[j] (N. J. 1889) Revision, p. 54, expressly provides for an appeal by a defendant, in attachment, issued by a justice of the peace, who has appeared and given bond. But there is no other grant of a right of appeal in the attachment acts. *Held*, that a defendant in an attachment issued by a justice of the peace, who has not so appeared, has no right of appeal to the common pleas from a judgment rendered thereon, and his appeal confers no jurisdiction on that court.—Leeds v. Mueller, 51 N. J. Law (22 Vroom) 467, 17 Atl. 954.

[k] (Ohio, 1894) Under Rev. St. § 6524, giving to a party affected by an order refusing to vacate an attachment the right to file a petition in error in the court of common pleas to reverse the order, such an order of a justice may thus be reviewed, though the principal case proceeded to judgment against defendant before the justice and defendant appealed therefrom to the common pleas; this right not being cut off by section 6506, which provides that in case of appeal by either party in the principal case the attachment shall be continued in and determined by the common pleas as though the attachment had been issued from it, as this applies only where no ruling has been made by the justice as to the validity of the attachment.—Nau v. Gobrecht, 8 Ohio Cir. Ct. R. 518.

[l] (Ohio, 1895) A petition in error by a garnishee will not lie to review the order of a justice of the peace requiring him to pay into court money of the attachment defendant, the remedy of the garnishee being to refuse to comply with the order, and have a judge adjudicate it in a civil action, pursuant to Rev. St. § 5551.—Hammock v. Commercial Nat. Bank, 9 Ohio Cir. Ct. R. 139, 6 O. C. D. 105.

[m] (Vt. 1856) Though the principal defendant be defaulted in a suit before a justice, plaintiff may well appeal concerning the trustee's liability. St. 1842.—Van Buskirk v. Martin, 28 Vt. (2 Williams) 726.

[n] (Wis. 1889) Laws 1883, c. 24, providing that in garnishee proceedings "an appeal may be taken from any order of the justice directing the delivery of the property in the garnishee's possession as if from a judgment," does not authorize an appeal from an order directing the garnishee to pay money into court.—Williams v. Briel, 75 Wis. 309, 43 N. W. 952; Williams v. Brechler, Id.

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§ 502. Mode of rendition, form, and entry of judgment or order.

Verdicts of jury as constituting sufficient judgment to support an appeal, see ante, § 491.

[a] (Ala. 1853) In appeal cases from the judgment of a justice of the peace, the rendition of judgment by default on one day against some of the defendants, and on another day against the others who made defense, is a mere irregularity, for which the proceedings should not be quashed.—White v. Blount, 22 Ala. 697.

[b] (Ark. 1884) Though no formal judgment is entered, when there has been a verdict in a trial before a justice of the peace, an appeal may be taken. The verdict in such case may be deemed equivalent to a judgment.—Turner v. Harrison, 43 Ark. 233.

[c] (Cal. 1886) If a justice of the peace fails to enter judgment in his docket in conformity with the verdict before an appeal is taken to the superior court, such failure is not fatal to the jurisdiction of the latter court.—Montgomery v. Yolo County Superior Court, 68 Cal. 407, 9 Pac. 720.

[d] (Dak. 1887) The verdict of a jury in a cause tried before a justice of the peace, which verdict is entered on the justice's docket, entitles the aggrieved party to appeal, although the justice omits to enter a formal judgment.—Porter v. Parker, 4 Dak. 397, 33 N. W. 70.

[e] (Ill. 1861) No particular form is requisite in order to constitute the finding of a justice of the peace a judgment. If it is final, and subjects the party against whom it is rendered to injury, an appeal will lie therefrom.—Kimball v. Riter, 25 Ill. (15 Peck) 276.

[f] (Ill. 1886) In a proceeding under Rev. St. c. 8, § 30, for proof of damages for injury to sheep, the justice's finding is in no sense a judgment, and no appeal lies therefrom.—Lamonte v. Town of Montebello, 21 Ill. App. 186.

[g] (Ind. 1845) An appeal lies to the circuit court from the final judgment of a justice of the peace, however informal the judgment may be.—Brewer v. Murray, 7 Blackf. 567.

[h] (Iowa, 1859) A justice's record recited the verdict of the jury, and concluded, "And judgment was rendered thereon by me accordingly." *Held* to be a judgment, within the meaning of Code, § 2328, from which an appeal would lie.—Moore v. Manser, 9 Iowa, 47.

[i] (Iowa, 1871) A judgment in an action of replevin before a justice of the peace, reciting that, "after examination of witnesses and allegations of plaintiff and defendant, it was considered to render to plaintiff peaceable possession of the property, together with damages for wrongfully detaining the same, and costs," is sufficient to support an appeal.—Lavalle v. Badgly, 33 Iowa, 155.

[j] (Mo. 1872) The failure of a justice to enter up a formal judgment on a verdict will not prevent an appeal to the circuit court. The effect of such judgment should be given to the verdict as soon as entered on the docket.—Hazeltine v. Reusch, 51 Mo. 50.

[k] (Mo. 1887) An entry in the docket of a justice of the peace in an action on a note, "Dismissed for want of consideration," though informal, is sufficient for the foundation of an appeal.—Workman v. Taylor, 24 Mo. App. 550.

[l] (N. Y. 1893) Where a justice of the peace indorses on his minutes of the trial a memorandum rendering judgment in a specified sum, and stating the amount of damages and costs separately, the judgment is not invalidated by failure of the justice to enter it on his docket, and an appeal may be taken therefrom, though Code Civ. Proc. § 3046, provides that an appeal must be taken within 20 days after entry of the judgment on the justice's docket.—O'Reilly v. Block (Co. Ct.) 23 N. Y. Supp. 670.

3. RIGHT OF REVIEW.

IN GENERAL, § 503.
PERSONS ENTITLED, § 504.
—— IN ATTACHMENT, GARNISHMENT, AND REPLEVIN PROCEEDINGS, § 505.
WAIVER OF RIGHT TO APPEAL, § 506.
LOSS OF RIGHT TO APPEAL, § 507.

§ 503. In general.

[a] (Ark. 1884) An appeal from the judgment of a justice of the peace is a matter of right.—Townsend v. Timmons, 44 Ark. 482.

[b] (Pa. 1831) The right of appeal is to be favored.—Dickinson v. McGuire, 1 Ashm. 47.

[c] (Wis. 1853) An appeal from the decree of a justice of the peace is a matter of strict statute right, and cannot exist except in accordance with statute provisions.—Mitchell v. Kennedy, 1 Wis. 511.

§ 504. Persons entitled.

Parties on appeal, see post, §§ 516–519.

[a] (Ill. 1894) Where a constable is improperly made defendant in a trial of "right of property," before a justice, and judgment is rendered against him for costs, appeal is a proper remedy, and it is error to dismiss such appeal by him on the ground that he was not the proper party defendant.—Aldridge v. Glover, 53 Ill. App. 137.

[b] (N. Y. 1888) Though Code Civ. Proc. § 3011, provides that judgments by confession must be in writing, signed by defendant, and filed with the justice, defendant cannot question the action of the justice, based on his verbal agreement with the justice, made out of court, that judgment should be entered against him; section 3063 providing that the appellate court must render judgment in accordance with justice, disregarding technical errors.—Traffarn v. Getman, 49 Hun, 611, 3 N. Y. Supp. 867.

[c] (Pa. 1814) Where judgment was rendered by an alderman in favor of the plaintiff, and the defendant entered bail for an appeal, and subsequently the plaintiff appealed to the justice, and obtained a transcript of the proceedings and certificate of the appeal, which he filed in the office of the prothonotary of the court of common pleas, the court, on the application of the defendant, dismissed the appeal.—Nicolet v. Oellers, 2 Ashm. 115.

[d] (Pa. 1849) Since Act March 20, 1845, the defendant may appeal from the judgment of a justice in all cases where, under existing laws, the plaintiff would be entitled to an appeal.—Prestly v. Ross, 11 Pa. (1 Jones) 410.

[e] (Pa. 1855) Every person against whom a justice of the peace renders a judgment is entitled of common right to an appeal and a trial by jury, whether the judgment was obtained by confession of the party or his agent, or otherwise.—Rowen v. King, 25 Pa. (1 Casey) 409.

[f] (Tex. 1881) A person filing a motion for a new trial in a justice's court does not thereby become a party to the action, entitling him to appeal from a judgment rendered therein.—Williams v. Dennis, 1 White & W. Civ. Cas. Ct. App. § 1233.

[g] (Tex. 1881) One who was not a party to a judgment rendered in a justice's court can-

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not appeal therefrom.—Williams v. Dennis, 1 White & W. Civ. Cas. Ct. App. § 1233.

[h] (Vt. 1883) Under a statute permitting one who pleads an offset in good faith before a justice of the peace to appeal, the right of appeal exists, if appellant swears to the correctness of his offset, and there is no evidence against it, notwithstanding that the justice adjudges that it was not pleaded in good faith. —Wilder v. Gilman, 55 Vt. 503.

§ 505. —— In attachment, garnishment, and replevin proceedings.

[a] (Ark. 1850) When property levied on under an attachment by a justice is claimed by a third person on interplea, and judgment rendered against him, he may appeal to the circuit court.—Mitchell v. Woods, 11 Ark. (6 Eng.) 180.

[b] (Ill. 1838) In order to enable the owner or consignee of a vessel, attached under the "Act authorizing the seizure of boats and other vessels by attachment," to take an appeal from the judgment of the justice of the peace in such case, he should make himself a party defendant to the suit before the justice. Gale's St. p. 73.—The Constitution v. Woodworth, 2 Ill. (1 Scam.) 511.

[c] (Ind. 1860) A garnishee can appeal from a judgment charging him, under the general statute allowing appeals from a justice.—Burgess v. Matlock, 14 Ind. 475.

[d] (Iowa, 1867) Rev. St. § 3917, providing that "any party aggrieved may appeal" from a justice's judgment, means parties to the action, and not those, as a surety in replevin, remotely or directly affected by the result.—Crites v. Littleton, 23 Iowa, 205.

[e] (Iowa, 1867) A surety in a replevin bond cannot in his own name prosecute an appeal to retry in the district court the issues made and determined between his principal and a defendant against whom his principal had commenced, but failed to prosecute, the replevin.—Crites v. Littleton, 23 Iowa, 205.

[f] (N. H. 1850) The claimant and holder of notes as disclosed by a garnishee in his answer in garnishment proceedings in the justice court may appeal from a judgment charging the trustee to the court of common pleas.—Barker v. Garland, 22 N. H. (2 Fost.) 103.

[g] (Pa. 1856) An assignee for the benefit of creditors may appeal from a judgment of a justice against a trustee on an attachment against his assignor.—Bletz v. Haldeman, 26 Pa. (2 Casey) 403.

[h] (Tex. 1881) A person filing an affidavit and bond for the trial of the right of property in an action other than that in which such property is sought to be reached by garnishment in a justice's court is not a party in the suit in garnishment, entitled to appeal from a judgment rendered therein.—Williams v. Dennis, 1 White & W. Civ. Cas. Ct. App. § 1233.

[i] (Vt. 1842) One summoned as trustee in a justice's court, in a suit not appealable by the principal debtor, was charged as trustee, and appealed to the county court. *Held*, on motion, that the trustee had no right to appeal, and that the appeal should be dismissed.—Earl v. Leland, 14 Vt. 328.

§ 506. Waiver of right to appeal.

[a] (Conn. 1861) Defendant in a suit before a justice pleaded in abatement, and the justice refused an appeal from the judgment against him on the plea. He then pleaded the general issue, and judgment was rendered against him. *Held*, that the fact that the justice had refused to allow him to appeal, and had required him to plead to the merits, did not affect the rule that by pleading to the merits he had waived his right to appeal from the judgment on the plea in abatement.—Prosser v. Chapman, 29 Conn. 515.

[b] (Iowa, 1844) A verbal agreement between plaintiff and defendant on a trial before a justice of the peace that a verdict in his court should be final will not be allowed to be pleaded in bar to the action when removed to the district court by appeal.—Clark v. Gibson, 1 Morris, 328.

[c] (Pa. 1821) An agreement not to appeal from an award of arbitrators in an action before a justice must be in writing and be made part of the proceedings; otherwise, it is not binding.—Dawson v. Condy, 7 Serg. & R. 366.

[d] (Pa. 1831) Where, in a suit before a justice, the parties referred the case, and agreed, by entry on the justice's docket, that the award of the referees should be final, the common pleas dismissed an appeal.—Bocleau v. Phillips, 1 Ashm. 92.

[e] (Pa. 1887) Where the right of appeal is waived in a note, and suit is brought before a justice of the peace thereon, and the defendant appears and pleads a set-off exceeding the amount of the note, and judgment is rendered for the plaintiff, the defendant cannot appeal, where part of the set-off existed at the time the note was given.—Soden v. Wheaton, 6 Pa. Co. Ct. R. 416.

[f] (Pa. 1887) A waiver of the right of appeal in a note will not prevent the appeal from the judgment of an alderman, where the defendant pleads the statute of limitation, as this defense was not in existence when the note was given.—Wells v. Wilson, 6 Pa. Co. Ct. R. 417.

[g] (Pa. 1887) Where a defendant, under arrest for a charge of obtaining goods by false pretenses, gave a note waiving the right of appeal, and it appears from the testimony that defendant admitted that he owed the money, and voluntarily gave the note, without duress or an agreement to stifle the prosecution, an appeal from a judgment of the justice of the peace on such note will be stricken off by the court.—Snyder v. Halter, 6 Pa. Co. Ct. R. 418.

[h] (Pa. 1888) Where, in an action before a justice on a judgment note containing a waiver of appeal, defendant denies the signature, but not under oath, and a continuance is granted, and on the adjourned hearing defendant does not appear, and plaintiff proves the signature, and obtains judgment, defendant cannot appeal.—Bohan v. Cawley, 14 Atl. 59.

[i] (Pa. 1893) Although a promissory note contains a waiver of appeal, such waiver will not avail to prevent an appeal from a justice of the peace, where the defense is that the note has been paid in full or in part, and the justice has entered judgment against the defendant for the full amount of the note.—Minich v. Basom (Com. Pl.) 12 Pa. Co. Ct. R. 508.

§ 507. Loss of right to appeal.

Loss of right to appeal by failure to appeal in time, see post, § 530.

[a] (Cal. 1887) The payment of the amount of the judgment into court by defendant cannot deprive plaintiff of his right to appeal to the superior court from a judgment of a justice of the peace.—Scott v. Yolo County Superior Court, 73 Cal. 11, 14 Pac. 374.

[b] (Ind. 1874) A defendant who was personally served with process in a suit before a justice of the peace, and who suffered judgment to go against him by default, procured an order

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of the court of common pleas for an appeal more than 30 days after the rendition of the judgment. His affidavit showed that he paid the costs two days after judgment, and supposed the default had been set aside, and was waiting for the justice to fix a time for the trial of the cause; that he "had no other idea than defending the suit"; that the note on which judgment was rendered had been paid; and that he was not aware that the default had not been set aside until the day of making the affidavit. *Held*, that the appeal was improperly granted, and should have been dismissed.—Sample v. Gilbert, 46 Ind. 444.

[c] (Iowa, 1883) Where a judgment has been rendered by a justice of the peace, the judgment creditor cannot deprive the debtor of the right to an appeal or writ of error by filing a transcript of his judgment in the circuit court within the time allowed for such appeal, as the judgment is still a judgment of the justice of the peace, although treated, as to its effect and mode of enforcement, as if rendered in the circuit court.—Wilson v. Robinson, 61 Iowa, 357, 16 N. W. 209.

[d] (Me. 1850) Where a party by his counsel appeared, and before judgment had permission on his own motion to withdraw, and did withdraw, his appearance, he is considered as having had an opportunity to appeal, and a writ of error will not lie.—Howard v. Hill, 31 Me. 420.

[e] (Mich. 1848) A party, having stayed execution on a judgment against him in a justice's court, cannot thereafter appeal.—People v. Judges of Macomb Circuit Court, 1 Mich. (Man.) 134.

[f] (Mo. 1890) Payment of costs by plaintiff, defeated in a justice court, does not defeat his right to appeal to the circuit court.—Brinkerhoff v. Elliott, 43 Mo. App. 185.

[g] (Pa.) A party who has prosecuted a certiorari cannot afterwards have an appeal.—(1887) Dehart v. Kerlin, 4 Pa. Co. Ct. R. 396; (1889) Finley v. Smith, 7 Pa. Co. Ct. R. 661.

[h] (Pa. 1892) The right to appeal from the judgment of an alderman on scire facias to revive a judgment is not barred by the fact that appellant had taken a certiorari to the judgment, which had been stricken by the court.—Watson v. Wehrly (Com. Pl.) 2 Pa. Dist. R. 530.

4. PRESENTATION AND RESERVATION BEFORE JUSTICE OF GROUNDS OF REVIEW.

IN GENERAL, § 508.
ACTS WITHOUT JURISDICTION, § 509.
DEFECTS AS TO PROCESS AND PARTIES, § 510.
DEFECTS IN PLEADINGS, § 511.
ERRORS OR IRREGULARITIES IN PROCEEDINGS, § 512.
OBJECTIONS TO RIGHT TO MAINTAIN ACTION, § 513.
OBJECTIONS TO EVIDENCE, § 514.
MOTIONS FOR NEW TRIAL AND TO SET ASIDE DEFAULT, § 515.

Pleading new defenses on appeal, see post, §§ 675–677.

Presentation in lower court by motion for new trial of name of witness and testimony to render it admissible on appeal, see post, § 698.

§ 508. In general.

[a] (Del. 1883) A garnishee against whom a judgment is recovered upon an execution attachment before a justice of the peace cannot appeal from it without requiring the justice in the hearing of the case to enter on his docket a plea that the attachment process was taken against him by collusion between plaintiff and defendant, etc., or upon a claim or debt divided for the purpose of bringing it within the jurisdiction of the justice, as required by Rev. Code, pp. 619, 620.—Williams v. Hawley, 6 Houst. 482.

[b] (Ga. 1842) No matter can be assigned as a ground of error, in the proceedings before a justice's court, which was not urged in that court.—Dodson v. Connally, Ga. Dec. 132, pt. 1; Chambers v. Dickson, Id. 164.

[c] (Ill. 1850) If security for costs has not been given in a penal action before a justice of the peace, a motion to dismiss for that cause must be made before the justice; and, if not so made, the objection cannot be taken in the appellate court.—Adams v. Miller, 12 Ill. (2 Peck) 27.

[d] (Iowa, 1869) Under Revision, § 3545, a motion to correct an alleged error of a justice's court must have been made before and overruled by the justice before a writ of error to the district court will lie to correct such error.—Smith v. Parker, 28 Iowa, 359.

[e] (Iowa, 1889) Code 1873, § 3516, relative to justices' courts, provides that the parties to the action may be the same as in the district court, "and all the proceedings prescribed for that court, so far as the same are applicable and not herein changed, shall be pursued in justices' courts." *Held*, that a party objecting to a decision rendered in a justice's court must in an intelligible manner, and at the time, make his objection known, in order to have the decision reivewed by proceedings in error.—Condray v. Stifel, 77 Iowa, 283, 42 N. W. 185.

[f] (Kan. 1873) Error committed by a justice of the peace pending the trial of a cause is waived, unless exception be taken.—Lee v. Loveridge, 11 Kan. 485.

[g] (Me. 1844) Exceptions to the ruling of a justice of the peace, on the trial of an action before him to recover a fine alleged to have been incurred by a soldier for nonappearance at a training company, are only authorized by what may be deemed the common law in this country, originating under St. 13 Edw. I. c. 131.—Simpson v. Wilson, 24 Me. (11 Shep.) 437.

[h] (Mass. 1839) On an appeal from a conviction before a justice of the peace for failure to perform military duties, the appellant cannot urge an objection not taken before the justice, and which, if it was taken, might have been obviated by proof.—Cousins v. Cowing, 40 Mass. (23 Pick.) 208.

[i] (Mo. 1853) It appearing from the record that the trial below was by the court without a jury, that there was a general finding for the defendant, that no objection was taken to any evidence, and no point of law was raised, the supreme court affirmed the judgment.—Haase v. Stevens, 18 Mo. 476.

[j] (N. J. 1877) On appeal to the common pleas from a justice's judgment, only objections going to form of the remedy, without questioning plaintiff's right of recovery, are waived by the failure to present them before the justice.—Burk v. Shreve, 39 N. J. Law (10 Vroom) 214.

§ 509. Acts without jurisdiction.

[a] (Ala. 1846) As a justice of the peace of one county is not authorized to issue an attachment returnable into another, it is competent for a garnishee to avail himself of the irregu-

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larity in the attachment, in an appellate court, though no objection had been made to it previous to the judgment below.—Dew v. Bank of Alabama, 9 Ala. 323.

[b] (Ala. 1849) An attachment returnable before a justice of the peace cannot be quashed in the circuit court, to which an appeal is taken from the judgment of the magistrate, because the attachment was not executed in the county in which it issued; the objection not having been taken before the justice.—Slaton v. Apperson, 15 Ala. 721.

[c] (Ala.) On appeal from the judgment of a justice of the peace, want of jurisdiction in his court cannot be availed of unless the objection was there raised.—(1852) Vaughan v. Robinson, 20 Ala. 229; (1892) Louisville & N. R. Co. v. Barker, 96 Ala. 435, 11 South. 453.

[d] (Ala. 1876) In an action for the recovery of personal property, if there be no plea to the jurisdiction in the justice's court, the question of want of jurisdiction in the justice, by reason of excess of value or amount in controversy, cannot be raised in the circuit court when the case is carried to that court by appeal, or by statutory certiorari.—Glaze v. Blake, 56 Ala. 379.

[e] (Cal. 1886) Where, in an action before a justice to recover a sum of money due on an assessment for street work in a municipality, no question of the legality of the assessment is raised before the justice, so as to oust him of jurisdiction, such question cannot be raised in the superior court on an appeal from the justice's judgment.—Williams v. Mecartney, 69 Cal. 556, 11 Pac. 186.

[f] (Ind. 1841) On appeal from a justice's court, the objection that the suit was not brought in the proper township cannot be taken in the circuit court, unless before taken in the justice's court.—Allison v. Hedges, 5 Blackf. 546.

[g] (Ind. 1854) The want of jurisdiction of a justice of the peace may be shown, either before the justice or on appeal to the circuit court.—Poyser v. Murray, 6 Ind. 35.

[h] (Ind. 1893) Where the transcript of a justice shows a want of jurisdiction on its face, it may be objected to for the first time on appeal.—Louisville, N. A. & C. Ry. Co. v. Parish, 6 Ind. App. 89, 33 N. E. 122; Same v. Creamer, 6 Ind. App. 700, 33 N. E. 238.

[i] (Mass. 1855) A motion to dismiss a case for want of jurisdiction in the justice of the peace before whom it was commenced and tried may be first made in the court of common pleas on appeal from the judgment of the justice.—Elder v. Dwight Mfg. Co., 70 Mass. (4 Gray) 201.

[j] (Mass. 1864) A defendant in an action of replevin brought before a justice of the peace was defaulted, and appealed to the superior court. After the case had been in that court several terms, he moved to dismiss it for want of jurisdiction. *Held* that, so far as the motion was founded on defects appearing on the appraisement and bond, it was an objection to the sufficiency of the service of the writ, and should have been made, at the latest, in the superior court at the first term. Not having been made so soon, it was waived.—Davenport v. Burke, 91 Mass. (9 Allen) 116.

[k] (Minn.) An appeal from a judgment of a justice of the peace upon questions of law and fact, under Gen. St. 1866, c. 65, § 104, does not waive objections to the jurisdiction, as section 107 expressly directs that, upon such an appeal, the action shall be tried in the same manner as if originally commenced in the district court, provided, that no question of law not tried or raised in the court below shall be tried or raised in the district court, "except objections to the jurisdiction of the court," etc.—(1870) Rahilly v. Lane, 15 Minn. 447 (Gil. 360); (1872) Barber v. Kennedy, 18 Minn. 216 (Gil. 196).

[l] (Miss. 1881) A defendant may object for the first time, on appeal from the justice's court to the circuit court, that plaintiff has failed to comply with the statutory prerequisite for maintaining his action.—Hope v. Hurt, 59 Miss. 174.

[m] (Miss. 1881) A case was postponed by a justice of the peace to a day fixed with the consent of the parties, and on such day a trial was had and judgment rendered for defendant. On appeal to the circuit court judgment was rendered for plaintiff. *Held*, that defendant could not then object that the justice's judgment was void, because rendered in vacation.—Rice v. Locke, 59 Miss. 189.

[n] (Mo. 1860) The objection that the justice had no jurisdiction may be taken for the first time in the circuit court on error.—Webb v. Tweedie, 30 Mo. 488.

[o] (Mo. 1868) Where judgment is rendered for an amount within the jurisdiction of a justice, it will be permitted to stand, if the plaintiff raises no objections, notwithstanding an order was made consolidating two suits of the plaintiff against the same defendant, thereby increasing the amount claimed beyond the jurisdiction of the justice.—Bridle v. Grau, 42 Mo. 359.

[p] (Mo. 1878) Where, in an action, under Railroad Act, § 43, for double damages for stock killed through the company's failure to maintain proper fences, neither the statement filed with the justice nor the transcript of the proceedings shows that the stock was killed in the township where the suit was brought, the objection of want of jurisdiction may be raised for the first time in the supreme court.—Barnett v. Atlantic & P. R. Co., 68 Mo. 56, 30 Am. Rep. 773.

[q] (Pa. 1853) The act of 1810 excepts from the jurisdiction of justices all cases of real contract where the title to land may come in question. By the act of 1814 jurisdiction was given to justices in all actions of trespass for injury to real estate, except those in which the title to land actually does come in question; and, in order to determine whether the fact be so, the defendant may interpose his oath at any time before the trial and stop the proceedings. *Held*, that the justice has authority to determine the cause, unless the defendant makes oath that the title to land will come in question, and that it is too late to make the objection after the case comes into the common pleas by appeal.—Lauchner v. Rex, 20 Pa. (8 Harris) 464.

[r] (Pa. 1884) Where the justice has no jurisdiction of a case before him, advantage thereof may be taken on appeal.—O'Connell v. Bank, 2 Chest. Co. Rep. 296.

[s] (Tex. 1882) A plea that defendant in a justice's court was sued out of his precinct cannot be first made on appeal in the county court.—Engel v. Brown, 1 White & W. Civ. Cas. Ct. App. § 803.

[t] (Tex. 1883) A plea to the jurisdiction on the ground that defendant was not sued in a justice's court in a proper justice's precinct cannot first be raised on an appeal in the county court.—Galveston, H. & S. A. R. Co. v. McTiegue, 1 White & W. Civ. Cas. Ct. App. § 460.

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[u] (Tex. 1886) Where a plea of privilege to be tried in the county of defendant's residence is filed in the justice court, it may be insisted upon in the county court on appeal, unless waived.—Walthew v. Milby, 3 Willson, Civ. Cas. Ct. App. § 121.

[v] (Tex. 1890) After the trial on the merits in a justice's court, the defendant is precluded on appeal from raising the question of jurisdiction on the ground that the complaint did not affirmatively show that the premises in question were situated in the justice's precinct.—Cahill v. Texas Mexican Ry. Co., 76 Tex. 100, 12 S. W. 1128.

[w] (Tex. 1895) On appeal from a justice to the county court, the question of the jurisdiction of the justice court over the subject-matter may for the first time be raised.—Lawson v. Lynch, 9 Tex. Civ. App. 582, 29 S. W. 1128.

§ 510. Defects as to process and parties.

[a] (Ala. 1826) An objection to the return of the process cannot be made on the appeal, unless it was made before the justice.—Needham v. Newsom, Minor, 407.

[b] (Ark. 1838) If the original process in a justice court is correct, defendant cannot, on appeal, complain of irregular service thereof, where he did not appear before the justice and make objection thereto.—Hester v. Murphy, 1 Ark. (1 Pike) 55; McKee v. Murphy, 1 Ark. (1 Pike) 55.

[c] (Ill. 1867) Where a defendant has appeared and defended his suit, and taken an appeal in the lower court, he cannot take advantage for the first time in the higher court of any defect in the process, such as the want of a revenue stamp upon the summons.—Roberts v. Formhalls, 46 Ill. 66.

[d] (Ill. 1874) Where a suit was instituted by a plaintiff by one Christian name, and judgment was rendered before the justice of the peace in his favor by another Christian name, and no objection on that account was made before the justice, and it appears from the record that he was as well known by the one name as the other, *held*, that the objection was properly overruled in the circuit court.—Scott v. White, 71 Ill. 287.

[dd] (Ill. 1874) The objection that a suit begun before a police magistrate should have been against the trustees of a church, instead of against the church itself, cannot be urged for the first time in the circuit court on a motion in arrest of judgment.—African M. E. Church v. McGruder, 73 Ill. 516.

[e] (Ill. 1877) Since there is no law making it the duty of a defendant to appear to a summons issued by a justice of the peace, his nonappearance should work him no prejudice; and, if he makes a motion questioning the jurisdiction at the earliest moment on appeal in the circuit court, he will be in time.—Evans v. Bouton, 85 Ill. 579.

[f] (Ind.) If a defendant appears to an action before a justice of the peace without objecting to the process, he cannot object to it on appeal in the circuit court.—(1844) Vermilya v. Davis, 7 Blackf. 158; (1845) Dudley v. Fisher, 7 Blackf. 553.

[g] (Iowa, 1864) A defendant who has in fact been served with notice in an action brought before a justice of the peace cannot sue out a writ of error from the district court to have a judgment by default reversed, because of a defective return of service, without first seeking to have the inferior court correct the defect.—Leonard v. Hallem, 17 Iowa, 564.

[h] (Kan. 1884) An objection that service in a case in justice's court was defective because the justice had no authority to appoint the special constable who made the service, and because the latter did not take the required oath, must first be made in the justice's court.—Brust v. Green, 32 Kan. 182, 4 Pac. 81.

[i] (Ky. 1828) On appeal from the judgment of a justice, it cannot be objected for the first time that the warrant had been returned, and the judgment rendered against defendant, out of the district where he resided.—Sturgus' Adm'r v. White's Adm'r, 46 Ky. (7 T. B. Mon.) 228.

[j] (Neb. 1896) Objection that a plaintiff has not sued in his full Christian name may be first made in the district court on appeal from justice court.—Small v. Sandall, 48 Neb. 318, 67 N. W. 156.

[k] (N. J. 1888) On appeal to the common pleas from the justice's court, an objection then made that the evidence showed that at the time of the service of the summons defendant was a nonresident is too late; defendant having appeared before the justice and defended on the merits without raising the objection.—Naye v. Noezel, 50 N. J. Law (21 Vroom) 523, 14 Atl. 750.

[l] (N. Y. 1866) It is too late, on appeal from a judgment of a justice's court, to raise the objection that the summons in the action was issued without an internal revenue stamp. The objection should be taken on the return day of the summons.—Baird v. Pridmore, 31 How. Prac. 359.

[m] (N. C. 1861) A defendant, by going to trial before a justice of the peace on the merits of his case without making objection to the want of service by a proper officer, is not at liberty to take the objection in an appellate court.—Taylor v. Marcus, 53 N. C. 402.

[n] (Tex. 1890) On appeal from justice's court, a defendant cannot plead a misjoinder of parties and actions, to which no objection was taken before the justice.—Matula v. Fitzgerald (App.) 15 S. W. 644.

[o] (Tex. 1893) A motion to quash a citation issued by a justice of the peace is too late, when made for the first time on appeal to the county court.—White v. Johnson, 5 Tex. Civ. App. 480, 24 S. W. 568.

§ 511. Defects in pleadings.

[a] (Ala. 1887) A defective affidavit, in an attachment commenced before a justice of the peace, cannot be objected to after the case has been appealed to the circuit court.—Horton v. Miller, 84 Ala. 537, 4 South. 370.

[b] (Ill. 1867) An objection to the jurisdiction of a justice of the peace for the want of a complaint in writing, signed and sworn to, and a warrant issued thereunder, cannot be made for the first time upon appeal in the circuit court.—Tisdale v. Town of Minonk, 46 Ill. 9.

[c] (Ill. 1895) An objection that the complaint in an action before a justice of the peace is defective cannot be urged for the first time in the appellate court.—Willerton v. Shoemaker, 60 Ill. App. 126.

[d] (Ind. 1834) Pleas before a justice which are objectionable must be objected to in his court. The objection, if first made in the appellate court, is too late.—McClelland v. Quarles, 3 Blackf. 459.

[e] (Ind. 1857) Objections to the certainty of a complaint before a justice cannot be taken for the first time on error, if it be certain

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enough to bar another action.—Harper v. Pound, 10 Ind. 32.

[f] (Ind. 1891) In an action before a justice, a complaint in which the plaintiff states "that on the 4th day of January, 1888, he commenced working for the defendant by the day, and that he worked 144 days, which is worth 75 cents per day, making $108, which is wholly unpaid," is sufficient, when attacked for the first time in the circuit court.—Milhollin v. Fuller, 1 Ind. App. 58, 27 N. E. 111.

[g] (Ind. 1894) Where a complaint in a justice court is defective merely in that a necessary fact is imperfectly or indefinitely stated, an objection thereto cannot be made for the first time on appeal.—Mason v. Kempf, 11 Ind. App. 311, 38 N. E. 230.

[h] (Iowa, 1886) A defendant in trespass, who raises no objection in a justice's court before verdict to a claim for exemplary damages in the petition, cannot make such objection on appeal.—Atkinson v. Chicago & N. W. Ry. Co., 70 Iowa, 68, 29 N. W. 808.

[i] (Kan. 1873) Where no question is raised in the justice's court as to the sufficiency of a bill of particulars, if by a very liberal construction said bill of particulars can be construed to state a cause of action, neither the district court nor the supreme court should disturb the judgment founded thereon.—Kaub v. Mitchell, 12 Kan. 57.

[j] (Kan. 1880) In an action brought by an attorney at law before a justice of the peace for services rendered in defending an action brought by a husband against his wife for divorce, the bill of particulars, which is sufficient in every respect, except that it does not specifically state to whom the plaintiff first gave the credit for his services, and does not state why an allowance for alimony pendente lite, including suit money, was not made, will not be held to be fatally defective, when the question is raised for the first time in the supreme court.—Gossett v. Patten, 23 Kan. 340.

[k] (Mich. 1894) The replevin case having been commenced before a justice, and the affidavit there containing a description of the property, which was not attacked for insufficiency, the circuit court had jurisdiction to award a return of the property and assess damages, though the description in the writ was defective.—Simmons v. Robinson, 101 Mich. 240, 59 N. W. 623.

[l] (Minn. 1858) In an action commenced before a justice of the peace, an objection that neither complaint nor answer was properly verified was untenable; there having been no objection made in the court below on that ground.—Taylor v. Bissell, 1 Minn. 225 (Gil. 186).

[m] (Minn. 1871) On appeal from the district court in an action of replevin commenced before a justice and appealed thereto, the supreme court will not consider defects in the affidavit upon which the justice issued the writ, where no such objection was made in the court below.—Goodell v. Ward, 17 Minn. 17 (Gil. 1).

[n] (Minn. 1878) Where a party has an opportunity in a justice's court to object to a pleading therein, but fails to do so, it will be sustained, on appeal, if by any liberal and reasonable construction of its averments it can be. —Thompson v. Killian, 25 Minn. 111.

[o] (Mo. 1885) If the objection that the statement does not state a cause of action is overruled and excepted to, and a motion in arrest of judgment is duly filed and overruled, the objection is entitled to be considered in the appellate court.—Wilson v. Wabash, St. L. & P. Ry. Co., 18 Mo. App. 258.

[p] (Mo. 1887) If it appears from the justice's transcript and from the testimony of both parties at the trial that the justice had jurisdiction, it is too late, after verdict, to object that the statement filed is jurisdictionally defective.—Kennedy v. Prueitt, 24 Mo. App. 414.

[q] (N. Y.) On appeal from a justice's judgment, defendant cannot make formal objections to the declaration of which he might have availed himself by demurrer in the court below.—(1833) Dean v. Gridley, 10 Wend. 254; (1852) Neff v. Clute, 12 Barb. 466.

[r] (N. Y. 1848) Where, on the trial of a cause before a justice of the peace, the plaintiff omits to reply to the defendant's plea, or to demur to it, he will not be permitted, on appeal to the common pleas, to object to the form of the plea.—Ross v. Hamilton, 3 Barb. 609.

[s] (N. Y. 1896) Where the pleadings are oral, and the complaint fails to disclose whether the action is in replevin or trover, and the defendant goes to trial on them without compelling plaintiff to make them more definite, he cannot object to them for the first time on appeal.—Lyngstrandh v. William Haaker Co. (Sup.) 16 Misc. Rep. 387, 38 N. Y. Supp. 129.

[t] (Pa. 1865) After appeal from a magistrate and a general plea, it is too late to object to the form of action.—Schlott v. Lower Heidelberg Tp., 1 Woodw. Dec. 280.

[u] (Wis. 1893) Where an action is brought before a justice, it is not too late to raise the question of misjoinder of issues on a demurrer ore tenus in the circuit court on appeal.—Wirth v. Bartell, 84 Wis. 200, 54 N. W. 399.

§ 512. Errors or irregularities in proceedings.

[a] (U. S. 1827) In Arkansas a judgment of a justice of the peace in a civil case will not be reversed on the ground that there was not a trial by jury, unless it appears that a jury trial was asked and refused by the justice.—Deadrick v. Harrington, Fed. Cas. No. 3,694b [Hemp. 50].

[b] (Ala. 1880) Where an attachment is commenced before a justice of the peace, and an appeal taken to the circuit court, no objection can be then for the first time raised to the regularity of the proceedings.—Reynolds v. Simpkins, 67 Ala. 378.

[c, d] (Iowa, 1880) The fact that, in a trial before a justice of the peace, neither party objects as to the power of the justice to instruct the jury, does not preclude the consideration, on appeal, as to whether he has the power.—St. Joseph Mfg. Co. v. Harrington, 53 Iowa, 380, 5 N. W. 568.

[e] (Kan. 1861) The reversal of a judgment of a justice of the peace, on petition in error in the appellate court, in a case where the justice had jurisdiction of the parties and of the subject-matter of the action, cannot be had, unless the transcript shows that the action or rulings of the justice were objected or excepted to at the time.—Garvey v. Schollkopf, McCahon, 179.

[f] (Kan. 1869) Where a party participated in proceedings before a justice of the peace, and made no objection to errors and irregularities, the judgment will not be reversed because of them, especially when they might have been corrected, had attention been called to them at the trial.—Grandstaff v. Scoffin, 5 Kan. 97.

[g] (Minn. 1865) On appeal from a judgment in a justice's court in an action on a promis-

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sory note the omission to file the note is not ground for reversal of the judgment, where it appears that the note was produced at the trial, and that the appellant did not ask that it be made part of the record.—Tune v. Sweeney, 34 Minn. 295, 25 N. W. 628.

[h] (Neb. 1895) A party to an action in justice court, who failed to object to the receiving of the verdict on the ground that one of the jurors was absent, could not raise that ground of objection on error in the district court.—Jones v. Driscoll, 46 Neb. 575, 65 N. W. 194.

[i] (N. Y. 1808) Where no objection is made to the form of the oath administered by a justice of the peace at the time of trial, it cannot afterwards be alleged for error.—Brownell v. Slocum, 3 Johns. 430.

[j] (N. C. 1858) Where, under a proceeding by a warrant, given by chapter 17, § 7, Rev. Code, upon an appeal to the superior court, a verdict was taken for the value of an animal killed on a railroad, it was *held* that it was too late to take the objection in this court that the judgment of the justice of the peace was rendered without a valuation of the animal by freeholders.—Aycock v. Wilmington & W. R. Co., 51 N. C. 231.

[k] (Wis. 1862) Where defendant in the justice's court went to trial without requiring security for costs, the circuit court, on appeal by plaintiff, cannot dismiss the case because of this omission.—Conrad v. Cole, 15 Wis. 545.

§ 513. Objections to right to maintain action.

[a] (Me. 1844) After a town has availed itself of the advantages of an appeal entered by its selectmen, it is too late at the second term to deny their right to appear and answer to the suit in the name of the town.—Strout v. Inhabitants of Durham, 23 Me. (10 Shep.) 483.

[b] (Mo. 1882) On appeal to the circuit court from the justice's court, the defense that the plaintiff had not the legal capacity to sue cannot be raised for the first time.—Compton v. Parsons, 76 Mo. 455.

[c] (N. Y. 1859) In an action in a justice's court to recover penalties for violations of the excise law, the objections that the overseers of the poor had not already sued, that security was not given before the summons was issued, or that the offense was not proved to have been committed in the town, must be taken before that court, and cannot be first raised on appeal.—Pruyn v. Tyler, 18 How. Prac. 331.

[d] (N. Y. 1863) On appeal from a justice's court to the county court, a nonsuit will not be granted, on the ground that the plaintiffs sued as individuals, and not as commissioners of highways, and that the complaint does not aver that they are commissioners. The objection should have been made in the justice's court.—Fowler v. Westervelt, 40 Barb. 374, 17 Abb. Prac. 59.

§ 514. Objections to evidence.

[a] (Ariz. 1873) A defendant in an action on a note, who permits it to be given in evidence on the trial before a justice of the peace without objection, cannot for the first time on appeal in the district court raise the question of the admissibility of the note, because it was not properly stamped, as required by the United States revenue laws.—Irvine v. Lopez, 1 Ariz. 81, 25 Pac. 799.

[b] (Mich. 1896) A judgment rendered by a justice of the peace will not be reversed because the testimony admitted was not the best evidence, if no objection was made to it on the trial.—Martin v. Smith, 108 Mich. 278, 66 N. W. 61.

§ 515. Motions for new trial and to set aside default.

[a] Where defendant in an action before a justice suffered a default, and made no motion to have the same set aside, an appeal from the justice is properly dismissed.
—(Ark. 1879) Lawrence v. Meyer, 35 Ark. 104;
(Mo. 1873) Smith v. St. Louis, K. C. & N. R. Co., 53 Mo. 338; (1884) Horton v. St. Louis, I. M. & S. Ry. Co., 83 Mo. 541.

[b] Unless the defendant, within 10 days after the rendition of a default judgment by a justice of the peace, makes application to the justice to set it aside, an appeal from such judgment cannot be granted.
—(Ark. 1874) Page v. Sutton, 29 Ark. 304;
(Mo. 1857) Burns v. Hunton, 24 Mo. 337.

[c] (Ark. 1847) Where the transcript of a justice of the peace showed that the parties came by their attorneys, and that the plaintiff's account was proved, upon which judgment was rendered for the plaintiff, it sufficiently showed that the judgment was not by default, and that an appeal would lie without a motion to set it aside.—Pryor v. Williams, 7 Ark. (2 Eng.) 295.

[d] (Ark. 1850) When judgment in a justice court is by default, and the defendant appeals without having applied to the justice to set it aside within 15 days after it is rendered, the appeal should be dismissed for want of jurisdiction.—Wynn v. Garland, 11 Ark. (6 Eng.) 302.

[e] (Kan. 1887) Before an action in a justice's court, tried with a jury, can be reviewed on petition in error in the district court, a motion for a new trial must be made in the justice's court.—Hart Pioneer Nursery Co. v. Scruggs, 13 Pac. 575.

[f] (Kan. 1894) Where the record on appeal from a justice's court to review an exclusion of evidence does not show a motion for a new trial, and notice of the time of hearing same, as required by Justice's Code, §§ 110, 111, and the action of the justice thereon, it is proper for the district court to affirm the judgment.—Hennigh v. Commercial Nat. Bank, 53 Kan. 370, 36 Pac. 711.

[g] (Mo. 1834) Sess. Acts, p. 33, § 2, providing that "in all cases" a party feeling himself aggrieved by a justice's judgment may appeal, does not repeal Rev. Code, p. 481, § 22, precluding an appeal from a judgment by default, where no motion was made to set it aside.—Barnett v. Lynch, 3 Mo. 369.

[h] (Mo. 1847) In a suit against a boat before a justice of the peace, where a judgment by default against the boat has been rendered, and a motion to set the same aside overruled, an appeal will lie from the judgment of the justice.—Hore v. The Belle, 11 Mo. 107.

[i] (Mo. 1879) An appeal from a judgment by default allowed by a justice after the 10 days granted by 2 Wag. St. p. 847, § 2, had expired without an application having been made to set aside the judgment, and without its having been refused, dismissed, though the defendant made affidavit that he applied to the justice within the 10 days, but found that he was out of the county and would not return until the time had expired.—Pearson v. Carson, 69 Mo. 569.

[j] (Mo. 1886) To give the appellate court jurisdiction of a judgment by default in a suit before a justice of the peace, it is necessary,

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under Rev. St. § 3040, first to file a motion to set it aside.—Smith v. Wineland, 21 Mo. App. 387.

[k] (Mo. 1890) It is not a necessary prerequisite to an appeal from a justice of the peace in forceable entry and detainer that the losing party should ask for a new trial, under Rev. St. 1879, § 2442.—Henry v. Lansdown, 42 Mo. App. 431.

[l] (Mont. 1890) Trial on appeal from a justice's court being, by Code Civ. Proc. § 826, de novo on the papers filed in the justice's court, judgment by default must be affirmed, on appeal, where the complaint was sufficient, and no motion was made to set aside the default, or for other relief, in the justice's court.—Gage v. Maryatt, 9 Mont. 265, 23 Pac. 337.

[m] (S. C. 1880) A motion for a new trial is not a necessary condition precedent to the right to appeal from a judgment of a trial justice to the circuit court.—Minnick v. Fort, 13 S. C. 215.

[n] (Tex.) The overruling of a motion for a new trial is a prerequisite to an appeal from a judgment of a justice of the peace.—(1873) Langbein v. State, 37 Tex. 162; (1881) Griffin v. Brown, 1 White & W. Civ. Cas. Ct. App. § 1097. CONTRA, see (1885) Masterton v. Conrad, 2 Willson, Civ. Cas. Ct. App. § 753.

[o] (Tex. 1877) A motion for new trial must be filed, as required by Acts 15th Leg. p. 16, and overruled, before a party can appeal from a judgment in the justice's court.—Ward v. Campbell, 1 White & W. Civ. Cas. Ct. App. § 648.

[p] (Tex. 1880) Gen. Laws 15th Leg. p. 172, § 3, providing for a motion for a new trial in a justice's court, precludes an appeal to the county court, where no motion for a new trial has been made and overruled in the justice's court.—Howard v. Jenkins, 1 White & W. Civ. Cas. Ct. App. § 68.

5. PARTIES.

IN GENERAL, § 516.
APPEAL BY ONE OF SEVERAL PARTIES, § 517.
—— EFFECT OF APPEAL BY ONE OF SEVERAL PARTIES, § 518.
INTERVENTION OF PARTIES, § 519.

Amendments as to parties on appeal, see post, § 679.
Dismissing action as to part of defendants on appeal, see post, §§ 649–651.
Effect of appeal by one of several parties as giving appellate court jurisdiction, see post, § 605.
—— *of appearance on appeal of necessary parties as curing defect in parties taking appeal, see* post, §§ 596, 598.
Parties entitled to allege error, see post, § 713.
—— *to appeal, see* ante, §§ 504, 505.
—— *to notice on appeal, see* post, § 581.

§ 516. In general.

[a] (Del. 1843) In an action of assumpsit commenced before a justice of the peace against two persons jointly, but where only one was taken, and judgment recovered against him alone, the court, on appeal, sustained a declaration and verdict against him, without noticing the person originally named as a co-defendant.—Jackson v. Hedges, 4 Har. 96.

[b] (Ill. 1841) In an action against three before a justice of the peace, two only are served with process, and the case is carried up on appeal by the plaintiff, and process from the appellate court is served only on such two. *Held*, that they only were before the court as defendants.—Wells v. Reynolds, 4 Ill. (3 Scam.) 191.

[c] (Ill. 1878) Only the persons who were parties to the judgment need be brought before the circuit court on appeal thereto.—Fabbri v. Cunio, 1 Ill. App. (1 Bradw.) 240.

[d] (Ky. 1868) On appeal to the circuit court, where the action must be tried de novo and the adverse parties be summoned to answer, an indorsement by attorneys, on the appeal bond, that one of the parties entered his appearance, did not make him a party to the appeal.—Wills v. McKee, 5 Ky. Law Rep. 683.

[e] (N. J. 1848) If one of two joint debtors is summoned, and he alone appears and makes defense in the names of both before the justice, he may appeal in the name of both, without summons and severance, if it does not appear positively that his codefendant refuses to join in the appeal.—Pharo v. Parker, 21 N. J. Law (1 Zab.) 332.

[f] (N. Y. 1827) If there be an issue and trial before a justice as to part only of the defendants, the remedy is by appeal by all.—Moody v. Gleason, 7 Cow. 482; People v. Judges of Onondago County, Id. 492.

[g] (Pa. 1843) Where a stakeholder in arbitration proceedings has been sued, and judgment rendered against him, in the alderman's court, he is not bound to appeal, but must allow a party interested to use his name in an appeal, upon security being given to indemnify him against loss.—Deaves v. Brightly, 4 Clark 37.

[h] (W. Va. 1893) In an action against Bert F., a judgment was rendered by a justice of the peace for the amount of plaintiff's claim. An entry in the justice's docket recited that H. H. F. appeared, filed a bond, and asked that an appeal be granted, which was done. The bond recited the appeal as asked by Bert F. His affidavit and that of H. H. F. showed that the latter asked the appeal as agent for the former. *Held*, that it sufficiently appeared that the appeal was taken by Bert F., through H. H. F.—York v. Free, 38 W. Va. 336, 18 S. E. 492.

§ 517. Appeal by one of several parties.

[a] (Ill. 1839) One of several defendants may appeal from a judgment of a justice of the peace, though the others refuse to join.—Leggett v. Chrisman, 3 Ill. (2 Scam.) 46.

[b] (Ill. 1889) Where a forcible detainer is brought against a tenant and his wife before a justice of the peace, but the wife does not appear, and judgment goes against the husband alone, on appeal the wife need not be brought into the circuit court.—Bell v. Bruhn, 30 Ill. App. 300.

[c] (Ind.) If, from the judgment of a justice of the peace against several defendants, some of them appeal to the circuit court in their own names, without joining the others, the appeal should be dismissed on motion.—(1842) Kain v. Gradon, 6 Blackf. 138; (1848) Inhabitants of Congressional Tp. No. 19 v. Clark, 1 Ind. (1 Cart.) 139; (1854) Ebert v. Ludlow, 6 Ind. 29.

[d] (Ind. 1842) The appeal from the judgment of a justice of the peace against several defendants should be taken in the names of all the defendants who are living and are aggrieved by the judgment; and, if any of those in whose names the appeal is taken afterwards refuse to unite with the others in its prosecu-

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tion, they should be summoned and severed.—Kain v. Gradon, 6 Blackf. 138.

[e] (Ind. 1854) Under Rev. St. 1843, one of several defendants could not appeal to the circuit court from the judgment of a justice of the peace.—Lawrenceburgh & U. M. R. Co. v. Smith, 5 Ind. 188.

[f] (Ind. 1859) From a judgment rendered against two defendants before a justice of the peace, one alone may appeal to the circuit or common pleas court.—Goodhue v. Palmer, 13 Ind. 457.

[g] (Ky. 1839) Under the act of 1831, providing that one or more of several persons against whom a justice has rendered a judgment may appeal, the circuit court cannot proceed against a party who has not appeared or been cited to appear.—Clagget v. Blanchard, 38 Ky. (8 Dana) 41.

[h] (Ky. 1845) In trespass, where one of three defendants appeals from a justice, and plaintiff files a declaration against him alone in the circuit court, a demurrer by such defendant will not be sustained for omission to sue the other defendants.—Blassingame v. Glaves, 45 Ky. (6 B. Mon.) 38.

[i] (Miss. 1876) Where a judgment is rendered in a justice's court against three defendants jointly, and an affidavit for appeal is made by one, and the bond executed by two, there is not such a want of proper parties to the appeal as would warrant a dismissal by the circuit court.—Roberts v. Weiler, 52 Miss. 299.

[j] (Neb. 1896) One of several defendants having separate and distinct defenses may prosecute an appeal from justice court without joining his codefendants.—Claflin v. American Nat. Bank, 46 Neb. 884, 65 N. W. 1056.

[k] (N. J. 1827) Where judgment is rendered in a justice's court against two defendants, only one of whom defended, he may appeal from such judgment, and for that purpose make use of the other defendant's name.—Sheppard v. Fenton, 9 N. J. Law (4 Halst.) 8.

[l] (N. Y. 1854) It is not ground of dismissing an appeal, brought by one of two defendants against whom judgment has been rendered in a justice's court, that both defendants do not unite in the appeal.—Mattison v. Jones, 9 How. Prac. 152.

[m] (Pa. 1815) Where judgment is given before a justice against two defendants, an appeal by one is good, notwithstanding the other comes into court and dissents.—Gallagher v. Jackson, 1 Serg. & R. 492.

[n] (Tex. 1894) Where one of three defendants who have suffered a joint judgment in justice's court appeals to the district court, he must make his codefendants parties, since the trial on such appeal is de novo.—Baldwin v. White (Civ. App.) 26 S. W. 455.

[o] (Wis.) If a justice of the peace renders a judgment against two or more parties, one or either of them may appeal without joining the others.—(1853) Edson v. Countryman, 1 Wis. 172; (1853) Kirkpatrick v. McCormick, 2 Wis. 284; (1856) Bremer v. Koenig, 5 Wis. 156.

§ 518. —— Effect of appeal by one of several parties.

[a] (Ill. 1835) Where judgment is rendered by a justice of the peace against two defendants, and one only of them appeals, the case should be docketed against the appellant only in the appellate court.—Mitcheltree v. Sparks, 2 Ill. (1 Scam.) 198.

[b] (Ky. 1832) Where a joint judgment is rendered by a justice against several defendants, any one of them has the power to appeal to the circuit court, and all defendants are thereby necessarily brought into that court.—Palmer v. Kennedy, 30 Ky. (7 J. J. Marsh.) 498.

[c] (Ky. 1839) Under the act of 1831 one or more of several persons against whom a justice has rendered judgment may appeal, with the same effect as though all had united in the appeal.—Clagget v. Blanchard, 38 Ky. (8 Dana) 41.

[d] (Neb. 1896) When the interests of several defendants in an action in justice court are inseparably connected, an appeal by one brings up the entire case.—Claflin v. American Nat. Bank, 46 Neb. 884, 65 N. W. 1056.

[e] (Tex. 1890) Judgment having been entered in a justice's court against a defendant and the sureties on a bond given by him, an appeal by the defendant inures to the benefit of the sureties, though they do not join therein.—McKay v. Irion (App.) 15 S. W. 123.

§ 519. Intervention of parties.

[a] (Ala. 1877) The action which the charter of Selma allows a purchaser of lands sold for city taxes to institute for the recovery of possession is governed by the general rules applicable to ejectment, or the corresponding statutory action, rather than that for forcible detainer; and, where judgment is rendered in the justice's court against the tenant, the landlord may intervene and appeal.—Ex parte Webb, 58 Ala. 109.

[b] (Mo. 1875) Where one not shown to have any interest in the estate files an affidavit charging another with embezzling the property of a deceased person, the administrator cannot, on appeal of the case to the circuit court, appear there for the first time and file a new affidavit, and compel the party accused to proceed to trial thereon. Such action of the administrator would be the introduction of a new party and a change in the cause of action.—Shaw v. Groomer, 60 Mo. 495.

[c] (Tenn. 1881) Where a garnishee appeals from the justice's judgment against him, it is error for the circuit court to allow the judgment debtor to intervene as a party in the garnishment proceedings. His remedy was to appeal from the judgment.—Cowan v. Lowry, 75 Tenn. (7 Lea) 620.

[d] (Tex. 1886) In an action in justice court by a tenant to recover damages for injury done to his crop, on appeal from the judgment rendered in his favor, the landlord cannot in the county court intervene and claim a portion of the damages by virtue of an undivided interest in the crop injured.—Gulf C. & S. F. Ry. Co. v. Ford, 3 Willson. Civ. Cas. Ct. App. § 147.

6. REQUISITES AND PROCEEDING FOR TRANSFER OF CAUSE.

(a) IN GENERAL, §§ 520-523.
(b) TIME FOR TAKING PROCEEDINGS, §§ 524-533.
(c) CERTIFICATE OR AFFIDAVIT, §§ 534-542.
(d) PAYMENT OF FEES OR COSTS, §§ 543-549.
(e) BONDS OR OTHER SECURITIES, §§ 550-578.
(f) NOTICE OF APPEAL, §§ 579-591.
(g) ENTRY, DOCKETING, AND APPEARANCE, §§ 592-599.

(a) IN GENERAL.

IN GENERAL, § 520.
PETITION OR PRAYER, § 521.
ALLOWANCE, § 522.
TIME FOR PRAYER OR ALLOWANCE, § 523.

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§ 520. In general.

[a] (Cal. 1881) To effectuate an appeal from the judgment of a justice of the peace, three things are necessary, viz., the filing of a notice of appeal with the justice, the service of a copy of the notice upon the adverse party, and the filing of an undertaking; and all these things must be done within 30 days after the rendition of the judgment, and are jurisdictional prerequisites, but the order in which they are done is not material.—Coker v. Colusa County Superior Court, 58 Cal. 177.

[b] (Ga. 1895) Where three cases pending in justice's court between the same parties were consolidated by consent, and tried together, and a judgment was rendered therein, a mere verbal agreement between counsel for both parties that the attorney for the losing party "might appeal by consent" all three cases did not amount to entering an appeal, nor carry the cases to trial as on appeal, though the presiding justice made an entry in his docket of such agreement.—Newman v. State, 97 Ga. 367, 23 S. E. 831.

[c] (Ill. 1840) Where, on appeal from a justice of the peace, the appeal bond was filed in the clerk's office one day before the passage of a law fixing the time of holding courts in Boone county, and the summons to the appellee and the supersedeas were issued afterwards, it was *held* that the appeal was regularly taken, as the court was in existence at the time the bond was filed, and that the circuit court had jurisdiction.—Scammon v. Cline, 3 Ill. (2 Scam.) 456.

[d] (Ill.) Under the act of 1837 "to provide for the election of probate justices of the peace," appeals from the decisions of such justices may be taken, in all cases not included in the third and fourth sections of that act, in the same manner as before the statute.—(1841) Gibbons v. Johnson, 4 Ill. (3 Scam.) 61; (1843) Scott v. Crow, 5 Ill. (4 Scam.) 183.

[e] (Ind. 1876) From the record on appeal it appeared that the cause had been commenced before a justice of the peace; but it was not shown that any judgment had been rendered by the justice, or any appeal taken from his court, nor in what manner the cause reached the circuit court; but it appeared that the parties to the action had appeared in the circuit court, and that an amended complaint and an answer were there filed. *Held*, that the appeal should be treated as if the cause had originally commenced in the circuit court.—Purdue v. Stevenson, 54 Ind. 161.

[f] (La. 1846) The jurisdiction of the supreme court over appeals from justices of the peace being limited to questions of law, such questions must be brought before the court in the usual mode of bringing questions of law before an appellate court, or the appeal will be dismissed.—Third Municipality v. Hazelbach, 1 La. Ann. 386.

[g] (Mo. 1892) It is essential to the jurisdiction of the appellate court that the appeal was taken in the manner prescribed by law, and where it was not so taken the appellate court has no jurisdiction to proceed to an examination on the merits.—Whitehead v. Cole, 49 Mo. App. 429.

[h] (N. Y. 1877) Code Civ. Proc. § 1303, providing, where the appellant serves notice of appeal on the clerk or adverse party and neglects in other respects to perfect his appeal, the court may permit the omission to be supplied, does not apply to appeals from justice courts.—Roberts v. Davids, 12 Hun, 394.

[i] (Ohio, 1859) Where a case in which the common pleas would have original jurisdiction was brought into that court by appeal from a justice, if the parties proceed to trial upon the merits without objection to the mode in which the jurisdiction was taken, it is too late after verdict to make such an objection.—Bisher v. Richards, 9 Ohio St. 495.

[j] (Ohio, 1896) Where a judgment is rendered by a justice against a defendant not present, and an appeal bond is given by defendant's attorney without authority, which is immediately repudiated by defendant, who instead moves to vacate the judgment, there is no error on the part of the justice in regarding the appeal as a nullity and in entertaining the motion.—Forest City Stone Co. v. French, 4 Ohio Dec. 141, 1 Cleve. Law Rep. 69.

[k] (Utah) 2 Comp. Laws 1888, § 5380, providing that appeals from justices of the peace shall not be effectual unless appellant cause the papers to be filed in the district court within 30 days, and section 3027, giving courts of record power to make rules, and section 5459, authorizing the collection from appellant of a jury fee, in jury cases, before his papers are filed, are valid, and within the legislative power of the territory.—(1890) City of Salt Lake City v. Redwine, 6 Utah, 335, 23 Pac. 756; (1891) Legg v. Larson, 7 Utah, 110, 25 Pac. 731.

[l] (Vt. 1858) In order to impose the duty on a justice of the peace to grant an appeal from a judgment rendered by him, it is incumbent on the party wishing an appeal to do what the law requires effectually to take an appeal.—Harriman v. Swift, 31 Vt. 385.

§ 521. Petition or prayer.

Affidavits for appeals pro forma pauperis, see post, § 551.

Effect of granting appeal as giving the appellate court jurisdiction, see post, § 605.

Prayer for appeal as notice of appeal, see post, § 589.

[a] (Ind. 1842) After an entry of judgment for the plaintiff on a justice's docket, this statement followed, viz.: "On," etc., "comes the defendant, and files an appeal bond, but does not ask an appeal until he further considers the matter." *Held* that, notwithstanding that statement, the defendant might, on appeal, show by affidavits that the appeal was prayed for when the appeal bond was filed.—Frazer v. Smith, 6 Blackf. 210.

[b] (Ind. 1891) There is no rule of practice authorizing the filing of an answer to an application for an appeal made more than 30 days after the rendition of a judgment by a justice of the peace, after such application has been granted.—Kreite v. Smith, 3 Ind. App. 64, 29 N. E. 174.

[c] (Mass. 1888) On petition to enter in the superior court an appeal from a trial justice, petitioner cannot show by parol evidence that he offered to recognize, or that he offered to deposit with the trial justice, and tender to him, a sufficient sum in lieu of a recognizance, which the justice refused, but must proceed in review.—Handy v. Tibbetts, 145 Mass. 537, 14 N. E. 645.

[d] (Mo. 1829) A party in a justice's court who does not enter his recognizance until after the day of trial does not "pray for an appeal" on such day, within Act Establishing Justices, § 23, requiring a written notice of appeal after such day, if no appeal is prayed for on the day.—Cochran v. Bird, 2 Mo. 141.

[e] (Mo. 1880) Rev. St. §§ 457, 458, do not allow service of a petition for review of a judgment in attachment, rendered by a justice

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of the peace on publication of notice without service or appearance, to be served upon the attorney of plaintiff. It must be served personally.—Allen v. Singer Mfg. Co., 72 Mo. 326.

[f] (N. J. 1827) If, on the transcript of a justice's docket, duly certified under hand and seal, the justice, on the day after the certificate bears date, makes an indorsement on the back of such transcript "that the defendant appeared, and filed an affidavit, and produced bond, and demanded an appeal," such indorsement is not evidence of the demanding of the appeal, and will not be received by the common pleas.—Bennet v. Kite, 9 N. J. Law (4 Halst.) 106.

[g] (N. Y. 1836) The affidavit for an allowance of an appeal from a justice's judgment on the ground of newly-discovered evidence must set forth, not only the testimony and proceedings before the justice, but the substance of the newly-discovered evidence.—People v. Saratoga Common Pleas, 18 Wend. 596.

§ 522. Allowance.

Allowance of appeal after time for appeal has expired, see post, §§ 531–533.

Failure to pay fees as ground for refusing to grant appeal, see post, § 545.

Liability of justice for refusal to grant appeal, see ante, § 45.

[a] (Ark. 1842) The supreme court may grant a mandamus commanding a justice of the peace to grant an appeal to the circuit court, or show cause, although a rule on the justice to send up the appeal might have been obtained from the circuit court.—Levy v. Inglish, 4 Ark. (4 Pike) 65.

[b] (Ark. 1842) The mere insufficiency of the recognizance offered is not ground for refusing an appeal, by a justice of the peace, without showing a refusal of those to be bound to enter into a sufficient recognizance. The justice is bound to take a recognizance in legal form.—Levy v. Inglish, 4 Ark. (4 Pike) 65.

[c] (Ark. 1844) A mandamus will lie to compel a justice of the peace to grant an appeal in a proper case.—Ex parte Martin, 5 Ark. (5 Pike) 371.

[d] (Ark. 1851) A writ of error was brought on an appeal from a justice of the peace. The error assigned was that no entry was made on the justice's docket and that an appeal was allowed from his judgment. *Held* that, by the statute of 1846, this was no valid objection; it appearing that the party appealing had on his part complied with all the requirements of the law.—Rapley v. Brown, 12 Ark. (7 Eng.) 80.

[e] (Ill. 1889) The filing of the transcript of the justice with the clerk of the circuit court within 20 days of the rendition of the judgment is a sufficient compliance with the statute, so far as regards the prayer for an appeal.—Hanna v. City of Kankakee, 34 Ill. App. 186.

[f] (Ind. 1838) The filing of the transcript of a record by a justice of the peace in the circuit court is prima facie evidence that an appeal was duly prayed and granted.—Humble v. Williams, 4 Blackf. 473.

[g] (Ind. 1851) A justice of the peace, not being the successor of another justice, but having in his possession the docket of another justice in the cases provided for, cannot grant an appeal from a judgment on such docket, and certify a transcript in the case, until he shall have previously transferred the judgment to his own docket.—Walker v. Prather, 3 Ind. 112.

[h] (Mo. 1895) The provision of Rev. St. § 6340, that no appeal allowed by a justice shall be dismissed for want of affidavit or recognizance, does not apply where no appeal was allowed, and the record shows that, though an appeal was prayed, the justice merely certified to the record, without allowing the appeal.—Moulder & Simpson v. Anderson, 63 Mo. App. 34, 1 Mo. App. Rep'r, 588.

[i] (N. J. 1833) In granting, or refusing to grant, an appeal, a justice acts judicially, and is to decide whether an appeal lies, whether it is claimed in due time, and as to the form of the appeal bond.—Tichenor v. Hewson, 14 N. J. Law (2 J. S. Green) 26.

[j] (N. Y. 1831) It is not necessary that an officer taking an affidavit, or allowing an appeal from a justice's judgment, should add to his signature the title of his office.—People v. Rensselaer Common Pleas, 6 Wend. 543.

[k] (N. Y. 1832) An appeal from a justice of the peace may be allowed by a commissioner, though he do not reside in the county where the judgment was rendered.—People v. Rensselaer Common Pleas, 7 Wend. 533.

[l] (Pa. 1836) If a justice refuse to permit bail to be entered for an appeal from his judgment, he thereby denies the appeal itself.—Gregor v. Slingluff, 1 Miles, 210.

[m] (Pa. 1888) The court of common pleas has no authority to compel a magistrate to grant an appeal.—Shaffer v. Dohan, 5 Pa. Co. Ct. R. 384.

[n] (Pa. 1896) A petition to the court of common pleas, under Act April 17, 1876, to allow an appeal to that court from a judgment for a penalty, stated that the petitioner was innocent of the offense charged, that the magistrate did not observe the rules of evidence in examining witnesses, and that the representative of the state officer who filed the information did not show sufficient authority; but it did not account for petitioner's nonappearance at the trial. *Held*, that the court properly refused to allow the appeal.—Commonwealth v. Menjou, 174 Pa. 25, 34 Atl. 301, 38 Wkly. Notes Cas. 3.

[o] (Tenn. 1830) Where the proceedings returned by the justice did not show that he granted the appeal, except by the recital in the appeal bond, it was *held* that the circuit court had not jurisdiction of the case.—Rogers v. Hill, 9 Tenn. (1 Yerg.) 400.

§ 523. Time for prayer or allowance.

[a] (U. S. 1831) It is proper to dismiss an appeal when it does not appear from the record that it was prayed for on the day of trial, or the requisite notice given.—Jacobs v. Jacobs, Fed. Cas. No. 7,161a [1 Hemp. 101].

[b] (Ill. 1874) The law does not require that an appeal from the judgment of a justice of the peace shall be prayed for at the time the judgment is rendered.—Fix v. Quinn, 75 Ill. 232.

[c] (Ill. 1878) Under Rev. St. 1874, p. 652, § 102, requiring that an appeal should be prayed for on the day of entering judgment on the trial of right of property before a justice, where the record shows that such appeal was not prayed for until three days after rendering judgment, the appeal will be dismissed.—Murphy v. McDonald, 3 Ill. App. (3 Bradw.) 19.

[d] (N. Y. 1849) An appeal from a judgment rendered by a justice of the peace is a nullity, unless allowed by the proper officer within 10 days after the judgment is rendered; and, where the defect is not cured by the appearance of the party against whom the appeal is brought, a court of common pleas acquires no jurisdiction to proceed with the cause, or to

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render a judgment therein, although the justice on whom the appeal is served makes a return thereto.—Seymour v. Judd, 2 N. Y. (2 Comst.) 464.

[e] (N. Y. 1860) Under the Code (Laws 1857, c. 723), the allowance of an appeal from a justice can only be made within the time limited by that statute.—Wait v. Van Allen, 22 N. Y. 319.

(b) TIME FOR TAKING PROCEEDINGS.

LIMITATIONS IN GENERAL, § 524.
COMPUTATION OF TIME LIMITED, § 525.
COMMENCEMENT OF PERIOD OF LIMITATION, § 526.
—— RENDITION OR ENTRY OF JUDGMENT AND NOTICE, § 527.
WAIVER OF OBJECTIONS TO DELAY AND CONSENT TO JURISDICTION, § 528.
EXTENSION OF TIME, § 529.
EFFECT OF DELAY OR FAILURE TO TAKE PROCEEDINGS, § 530.
RELIEF IN CASE OF FAILURE TO PROCEED IN TIME AND PROCEEDINGS THEREFOR, § 531.
—— GROUNDS IN GENERAL, § 532.
—— ABSENCE OR FAULT OF JUSTICE, § 533.

Necessity of notice of appeal where appeal is taken after the time allowed, see post, § 579.
Taking appeal before entry of final judgment, see ante, § 490.
Time for amendment of pleadings or pleading anew on appeal, see post, § 687.
—— *for amendment of transcript on appeal, see* post, § 629.
—— *for entering and docketing appeal, see* post, § 593.
—— *for entering appearance on appeal, see* post, § 595.
—— *for entering stay of execution, see* post, § 606.
—— *for filing appeal bond, see* post, §§ 558–561.
—— *for filing bill of exceptions on appeal, see* post, § 617.
—— *for filing prayer or petition for appeal, see* ante, § 523.
—— *for filing transcript on appeal, see* post, § 620.
—— *for making and filing affidavit on appeal, see* post, § 535.
—— *for payment of fees or costs for an appeal, see* post, § 545.
—— *of service of notice of appeal, see* post, § 584.

§ 524. Limitations in general.

[a, b] (Ark. 1837) An appeal from the judgment of a justice of the peace cannot be granted after the lapse of 30 days.—Goings v. Mills, 1 Ark. (1 Pike) 11.

[c] (Ark. 1860) Where, in an attachment before a justice, the defendant gave a bond to dissolve the attachment, and appeared on the day fixed for trial, and filed a set-off, and consented to a continuance, and, upon trial and hearing of testimony upon the set-off, judgment was rendered against him, defendant had 30 days within which to appeal, under Dig. c. 95, § 86, pt. 2.—Moehring v. Kayser, 21 Ark. 457.

[d] (Ark. 1875) Act April 29, 1873, reducing the time for an appeal from a judgment of a justice from 60 to 30 days, does not apply to proceedings in which judgment had been previously rendered.—O'Bannon v. Ragan, 30 Ark. 181.

[e] (Conn. 1867) The right of an appeal from the judgment of a justice's court is lost by the final adjournment of the court.—Jackson v. New Milford Toll Bridge Co., 34 Conn. 266.

[f] (Fla. 1856) Under Thomp. Dig. p. 474, providing that either party dissatisfied with the judgment of a justice of the peace may, within three days, demand an appeal to the circuit court, which shall be granted upon the appellant paying costs and giving bond, the appeal must be perfected within the three days by the actual payment of the costs and the tender of the appeal bond.—Summerlin v. Tyler, 6 Fla. 718.

[g] (Fla. 1893) Under Act June 2, 1887, limiting the time for taking appeals to the circuit court from judgments of justices of the peace to 30 days, no review of such judgments can be had by a writ of error taken after the expiration of the 30 days.—State v. Walker, 32 Fla. 431, 13 South. 928.

[h] (Ill. 1836) An appeal from a justice of the peace must be taken at the trial, and it cannot be taken after the court has dissolved.—Pearce v. Swan, 2 Ill. (1 Scam.) 266.

[i] (Iowa, 1856) No time is prescribed by law within which a writ of error must be brought to the proceedings of a justice.—Porter v. Helmick, 2 Iowa (2 Clarke) 87; Mudgett v. Park, Id. 287.

[j] (Iowa, 1858) An appeal from a justice, whether allowed by the justice or the clerk, must be perfected within 20 days from the rendition of judgment.—McBrearty v. Dyer, 6 Iowa (6 Clarke) 528.

[k] (Mass. 1892) Under Pub. St. c. 155, § 28, providing that "a party aggrieved by the judgment of a trial justice in a civil action may, within 24 hours after the entry of the judgment, appeal therefrom," an appeal after 24 hours have elapsed is too late.—Greely v. Page, 156 Mass. 47, 30 N. E. 176.

[l] (Mich. 1861) After the transcript of a justice's judgment has been legally filed in the circuit court, this court cannot allow an appeal from the judgment.—Davison v. Elliott, 9 Mich. 252.

[m] (N. J. 1825) An appeal cannot legally be demanded by the party, or granted by the justice, after the first day of the court next after the rendition of the judgment.—Miller v. Martin, 8 N. J. Law (3 Halst.) 201.

[n] (N. J. 1838) An appeal properly demanded of a justice of the peace on the first day of the term of the common pleas next after the rendering the judgment is in time.—Dyer v. Ludlum, 16 N. J. Law (1 Har.) 531.

[o] (N. C. 1881) Where one is made a party to an action in a justice court by service of process upon him, he must appeal, if at all, within 10 days after judgment.—Spaugh v. Boner, 85 N. C. 208.

[p] (Pa. 1882) An appeal must be perfected before the justice within the 20 days.—Reese v. Hetzel, 4 Law T. (N. S.) 217.

[q] (Pa. 1895) The 20-days limitation to appeal does not apply to cases where the justice of the peace had no jurisdiction of the case.—Marvel v. Jones (Com. Pl.) 7 Kulp, 508.

[r] (Tenn. 1814) An appeal from a justice must formerly have been taken on the day when judgment was rendered.—Hayes v. Kirk, 2 Tenn. (2 Overt.) 322.

§ 525. Computation of time limited.

[a] (Ark. 1850) The day on which the judgment was rendered may be excluded in computing the time within which an appeal may

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be taken from a justice of the peace.—Swisher v. Hine, 10 Ark. (5 Eng.) 497.

[b] (Ind. 1875) January 15th, a justice approved an appeal bond, in an action in which there was a judgment against defendant December 16th preceding. The transcript and appeal bond were filed in the circuit court on January 29th. *Held*, that the appeal was perfected in time.—Glasscock v. Boyer, 50 Ind. 391.

[c] (Mo. 1879) Under Wag. St. p. 850, § 20, allowing appeal from a justice of the peace 10 days before the first day of the term, an appeal allowed May 24th, the first day of the term being June 2d, is seasonably taken.—Bailey v. Lubke, 8 Mo. App. 57.

[d] (Mo. 1881) Under Rev. St. § 3041, requiring an appeal from a justice of the peace to be "made within 10 days after judgment rendered," an appeal taken May 4th from a judgment rendered April 24th was in time.—Semple & Birge Mfg. Co. v. Thomas, 10 Mo. App. 457.

[e] (N. Y. 1895) Where a justice, after entering judgment in his docket, placed the docket in his safe, and left the state without notice to the parties of such judgment, the time during which the party against whom the judgment was rendered was ignorant of its rendition, in consequence of the absence of the justice, is no part of the time within which Code Civ. Proc. § 3046, provides an appeal must be taken.—Reid v. Defendorf, 87 Hun, 40, 33 N. Y. Supp. 954.

[f] (Tenn. 1835) By statute of 1827, two days are allowed; and the day on which judgment is rendered is excluded.—Carson v. Love, 16 Tenn. (8 Yerg.) 215.

[g] (Wis. 1861) The taking an appeal from the judgment of a justice of the peace is within the provisions of Rev. St. c. 140, § 4; and, the last day of the 20 days allowed for an appeal falling on Sunday, it may be taken on Monday.—Buckstaff v. Hanville, 14 Wis. 77.

§ 526. Commencement of period of limitation.

[a] (Ala. 1848) The time within which an appeal may be taken to a judgment of a justice of the peace does not begin to run until the final action of the justice in respect to it has been had.—Moore v. Jones, 13 Ala. 296.

[b] (Ark. 1886) The pendency of a motion for a new trial does not enlarge the time within which an appeal must be taken from a judgment of a justice of the peace, under Mansf. Dig. § 4135.—Scott v. Meyer, 49 Ark. 17, 3 S. W. 883.

[c] (Miss. 1852) After a judgment by a magistrate in favor of the defendants, the plaintiffs appealed to a jury of five, from whose verdict against them they appealed to the circuit court. *Held*, that the original judgment of the magistrate, not having been appealed from within the five days allowed for that purpose, was still in full force, and that the circuit court had no jurisdiction of the appeal from the jury of five.—Pollard v. Parish, 23 Miss. (1 Cushm.) 573.

[d] (Mo. 1839) Where judgment of nonsuit is set aside and a new trial granted, an appeal may be taken within 10 days after the new trial, in a case before a justice of the peace.—Fenton v. Russell, 6 Mo. 143.

[e] (Mo. 1843) In a case before a justice of the peace, an appeal must be taken within 10 days after the verdict of a jury is entered upon the docket; that having the effect of a judgment.—Cason v. Tate, 8 Mo. 45.

[f] (Pa. 1838) Where a judgment was entered by a justice of the peace against a defendant, by default, on the 15th of April, 1838, and, on the 22d of the same month, the defendant obtained a rule to show cause why the judgment should be opened, which was returnable on the 27th, and was then, at the request of the plaintiff, adjourned over until the 4th of September, on which day the parties were heard by the justice, who on the next day discharged the rule, upon which the defendant immediately appealed to the court of common pleas, it was *held* that the appeal made by the defendant was in proper time.—Read v. Dickinson, 2 Ashm. 224.

[g] (Pa. 1846) A judgment by default was rendered by a justice of the peace against a defendant, who two days afterwards came to the office of the justice and demanded, for reasons assigned, that the judgment should be opened. The justice thereupon fixed a particular day and hour, and notified the plaintiff to appear at the time fixed "to show cause why the judgment should not be opened and a hearing given." At the time appointed the plaintiff appeared, but the defendant did not, whereupon the justice, after waiting two hours, confirmed the judgment as it was. *Held*, that the 20 days for an appeal, allowed by the statute, was to be computed from the final decision of the action, and not from the time of the rendition of the first judgment; and this, whether the original judgment was confirmed or changed.—Sleck v. King, 3 Pa. (3 Barr) 211.

[h] (Pa. 1888) Where judgment by default is entered by a justice of the peace, and a rehearing is granted, an appeal from a judgment thereon must be allowed within 20 days thereafter.—Farra v. Kelly, 3 Del. Co. Ct. R. 421.

[i] (Pa. 1888) The fact that a justice of the peace, on the rehearing of a case before him, found that a set-off, which was set up on such rehearing, did not amount to a valid set-off, did not make the former judgment a final judgment; but the defendant was entitled to the statutory time from the judgment on rehearing.—Farra v. Kelly, 3 Del. Co. Ct. R. 421.

§ 527. —— Rendition or entry of judgment and notice.

[a] (Fla. 1856) Thomp. Dig. p. 474, which prescribes the time within which appeals from justices' courts to the circuit court may be taken, has reference to the adjournment of the court, and not to the date of the rendition.—Summerlin v. Tyler, 6 Fla. 718.

[b] (Mass. 1858) When a judgment in a police court is actually rendered on the day of the trial, an appeal therefrom must, by Rev. St. c. 85, § 13, be claimed within 24 hours, although terms of the court are established by statute; and, by a rule of the court, judgments are entered as of the last day of the term, unless otherwise ordered.—Welch v. Damon, 77 Mass. (11 Gray) 383.

[c] (Mass. 1859) From a judgment upon default in the justices' court of the county of Suffolk, which, by a rule of that court, shall be entered at the adjournment of the court on the same day, unless otherwise ordered, and is in fact actually so entered, an appeal, under Rev. St. c. 85, § 13, and Id. c. 87, § 11, must be taken within 24 hours, although no judgment is entered on the docket until three days afterwards, and an appeal is then taken and allowed by the justices' court.—Gardner v. Dudley, 78 Mass. (12 Gray) 430.

[d] (N. Y. 1867) An appeal may be taken from a judgment of a district court within 20

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days after the actual rendering of judgment.—Fuchs v. Pohlman, 2 Daly, 210.

[e] (N. Y. 1890) Code Civ. Proc. § 3140, provides that a justice of the peace must keep a docket book in which he must enter the judgment, and section 3046 provides that an appeal must be taken within 20 days after the entry of judgment in the justice's docket. *Held*, that the time for taking an appeal from the judgment of a justice is to be reckoned from the entry of the judgment in his docket book, and not from the entry in his minutes.—Beuerlein v. Hodges, 57 Hun, 586, 10 N. Y. Supp. 505, 19 Civ. Proc. R. 107.

[f] (N. C. 1893) Code, § 876, providing for an appeal from a justice in 15 days after notice of judgment in cases where "the process is not personally served," applies only in cases where the service is by publication.—King v. Wilmington & W. R. Co., 112 N. C. 318, 16 S. E. 929.

[g] (Pa.) Where a case is held under advisement by a justice of the peace, and no day is fixed for entry of judgment, the right of appeal exists for 20 days after notice of entry of judgment.—(1844) Taylor v. Smith, 2 Clark, 318; (1882) Frantz v. Dehart, 1 Pa. Co. Ct. R. 5.

[h] (Pa.) Where a party has no notice of entry of judgment before a justice of the peace, the 20 days allowed for appeal will begin to run at the end of 10 days after final hearing, within which time the justice is required to enter judgment, by Act March 22, 1877.—(1881) Haines v. Townsend, 1 Chest. Co. Rep. 146, 12 Lanc. Bar 160; (1884) Imler v. Houser, 1 Pa. Co. Ct. R. 6, 2 Del. Co. Ct. R. 132.

[i] (Pa. 1882) Where the evidence as to the time when notice of the entry of a judgment in a justice's court was given appellant does not clearly and satisfactorily show that the time for appeal has elapsed since such notice, a right of appeal will not be denied.—Frantz v. Dehart, 1 Pa. Co. Ct. R. 5.

[j] (Pa. 1891) Where a justice of the peace reserved his decision until a day and hour certain, and then neglected to render it at that time, one of the parties who went to the office of the justice at the appointed time, and waited there an hour in vain, was justified in assuming that the justice had taken the 10 days allowed by law within which to render his decision, and consequently was not required to give notice of appeal until the expiration of such 10 days, or from date of actual notice of the judgment.—Boyd v. Ward (Com. Pl.) 10 Pa. Co. Ct. R. 9.

§ 528. Waiver of objections to delay and consent to jurisdiction.

[a] (Ill. 1836) Where the statute gives the circuit court power, on appeal from a justice, to retry title to property levied on by a constable, in the same manner as may be done before the justice, irregularities as to the time of perfecting the appeal are waived by the appearance by the appellee in the circuit court, without objection.—Pearce v. Swan, 2 Ill. (1 Scam.) 266.

[b] (Mich. 1882) Appellees, in an appeal from a justice of the peace, having entered their appearance generally in the circuit court, before a motion to dismiss was made, such appearance was conclusive as to jurisdiction of such court, aside from questions as to whether appeal was taken in time or proper return was made, and that judgment of dismissal should be reversed.—McCombs v. Johnson, 47 Mich. 592, 11 N. W. 400.

[c] (Mo. 1869) When the time allowed for appeal from the justice to the circuit court has expired, the appearance and consent of parties will not give the circuit court jurisdiction of the appeal.—Robinson v. Walker, 45 Mo. 117.

[d] (Pa. 1846) In case of an appeal by a defendant from the judgment of a justice of the peace, it is too late for the plaintiff, after he has filed his declaration, to move the court to dismiss the appeal, on the ground that it was not taken within 20 days.—Sleck v. King, 3 Pa. (3 Barr) 211.

[e] (Vt. 1894) The failure of plaintiff to file in the county court an appeal from a justice's judgment within the 21 days allowed by Acts 1892, No. 28, § 18, is waived by the defendant entering a general appearance after filing of the appeal, and then allowing the time allowed for dilatory motions to pass without raising the objection.—Mack v. Lewis, 67 Vt. 383, 31 Atl. 888.

§ 529. Extension of time.

Extension of time for filing appeal bond, see post, § 561.

[a] (Pa. 1853) After the expiration of the 20 days allowed for an appeal, a magistrate cannot, by granting (at the instance of defendant and without plaintiff's consent) a rule to show cause why the judgment should not be opened, secure to defendant another 20 days, from the ultimate decision on the rule, in which to appeal.—Russell v. Smith, 1 Phila. 425.

[b] (S. C. 1876) The time fixed by Code Proc. § 370, for appealing from the judgment of a trial justice, cannot be extended by the circuit judge.—Davis v. Vaughan, 7 S. C. (7 Rich.) 342.

§ 530. Effect of delay or failure to take proceedings.

[a] (Mich. 1881) Where an appeal from a justice court to the circuit court is not taken within the time prescribed by statute, the circuit court acquires no jurisdiction.—Franks v. Smith, 45 Mich. 326, 7 N. W. 906.

[b] (Miss. 1877) Where appeal is taken from the justice to the circuit court after the time prescribed by statute, judgment rendered by the latter court on such appeal is void.—Kramer v. Holster, 55 Miss. 243.

[c] (Mo. 1877) The circuit court acquires no jurisdiction of an appeal from a justice's judgment not taken in the time prescribed, and an order therein for additional security is a nullity.—Moore v. Damon, 4 Mo. App. 111.

[d] (Mo. 1881) An appeal from a justice of the peace will be dismissed, unless taken within the statutory time for so doing.—Bauer v. Cabanne, 11 Mo. App. 114.

[e] (N. J. 1894) A party who neglects to demand an appeal from a judgment in a court for the trial of small causes, on or before the first day of the term of the common pleas next ensuing, loses his right to appeal; that being the provision of Justice's Court Act, §§ 79, 82, 83.—Lear v. Budd, 56 N. J. Law (27 Vroom) 457, 28 Atl. 800.

[f] (Pa. 1882) An appeal will be stricken off if it be shown that the affidavit therefor was made subsequently to the 20 days allowed therefor.—Reese v. Hetzel, 4 Law T. (N. S.) 217.

[g] (Tenn. 1859) By Code Proc. § 3140, two entire days (exclusive of Sunday) after judgment are allowed for an appeal from a justice's judgment. *Held* that, after the expiration of the two days, the justice has no jurisdiction to grant an appeal, and the same should be dismissed.—Gilbert v. Driver, 40 Tenn. (3 Head) 463.

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[h] (Tenn. 1872) Where, from the papers, a case appears to have been appealed four days after the justice's judgment, his affidavit that, according to information and belief, the appeal was granted within the time (two days) allowed by law, will not prevent a dismissal.—Park v. Bybee, 60 Tenn. (1 Baxt.) 267.

§ 531. Relief in case of failure to proceed in time, and proceedings therefor.

[a] (Ind. 1849) An affidavit to procure an appeal from the judgment of a justice, after the expiration of 30 days, under Rev. St. 1843, p. 892, must show that the taking of the appeal in proper season was prevented by unavoidable circumstances, or by improper conduct of the justice or of the appellee.—Thomas v. Littlefield, 1 Ind. (1 Cart.) 361.

[b] (Ind. 1849) An appeal from the judgment of a justice of the peace may be taken of right within 30 days, and after that time for, among other causes, the improper conduct of the justice rendering the judgment. An affidavit for an appeal after the 30 days had expired stated that the affiant filed an appeal bond within five days after the judgment was rendered, and a few days afterwards was surprised by the issuance of an execution. *Held*, that the affidavit was insufficient, in not showing that when he filed his bond the justice informed him that it was approved.—Thomas v. Littlefield, Smith, 236.

[c] (Mich. 1870) Under the statute relating to appeals from justices' courts, and providing that such appeals may be authorized after the expiration of five days, where the party has been prevented from taking the appeal by circumstances not under his control, the affidavit for allowance of the appeal must be sworn to.—Calvert v. McNaughton, 2 Mich. N. P. 8.

[d] (Mich. 1873) Where the time has expired for appealing from a justice's judgment, an application to the circuit court for leave to appeal is a special proceeding materially affecting legal rights; and the court can obtain jurisdiction only by personal service of the notice required on the judgment creditor.—McCaslin v. Camp, 26 Mich. 390.

[e] (Mich. 1895) Local Acts 1895, Act No. 460, providing that an appeal from the judgment of a justice of the peace in Detroit may be authorized by the circuit court of Wayne county when a party has been prevented from making a defense on the merits by circumstances not under his control, does not give to the circuit court discretionary power to allow an appeal after the statutory time therefor has elapsed.—Goldhamer v. Lillibridge, 107 Mich. 259, 65 N. W. 97.

[f] (Mo. 1880) If an appeal from the judgment of a justice of the peace cannot be taken within the 10 days prescribed by law, the justice has no power to allow it after that time. The remedy is by application to the circuit court for mandamus.—Union Savings Ass'n v. Keisker, 8 Mo. App. 232.

[g] (Pa. 1884) Where judgment has been recovered against three joint trespassers before a justice of the peace, and two appealed within time, the court will allow the other to appeal nunc pro tunc, by giving bail; and the appeal of the two will inure to the benefit of the third.—Edsall v. Ford, 5 Pa. Co. Ct. R. 72.

[h] (Pa. 1887) Where an execution has been issued on a judgment of a justice of the peace, and the judgment has been paid by the sale of defendant's personal property to third persons, an appeal will not be allowed to be perfected nunc pro tunc.—Vargason v. Eldred, 4 Pa. Co. Ct. R. 93.

[i] (Pa. 1895) Where defendant appealed from a judgment against him in an action to recover the penalty imposed by Act May 21, 1885 (P. L. 20), prohibiting the sale of oleomargarine, such appeal being taken within the time allowed in actions for debt, but no motion for the allowance of the appeal being made until after such time had elapsed, the court will allow the appeal nunc pro tunc as of the day when it was taken before the magistrate.—Commonwealth v. Swift (Com. Pl.) 17 Pa. Co. Ct. R. 95.

[j] (W. Va. 1888) One who, after the expiration of 10 days after the justice has rendered a judgment, applies, under Code, c. 56, § 174, to the circuit court, or a judge thereof in vacation, for an appeal, which may be granted for good cause shown, must file his application, and the proofs with it, in writing, including his own or the affidavits of others.—Hubbard v. Yocum, 30 W. Va. 740, 5 S. E. 867.

§ 532. —— Grounds in general.

[a] (Ind. 1851) Ordinarily appeals must be taken from judgments of justices within 30 days, but the circuit court may authorize the taking of an appeal after the expiration of that period, if it be made to appear, by affidavit, that the party wishing to appeal was prevented from taking it within that time, by unavoidable circumstances, or the improper conduct of the appellee or of the justice, and that he has merits in such appeal.—Pruitt v. Shelbyville Lateral Branch R. Co., 2 Ind. (2 Cart.) 530.

[b] (Ind. 1857) An affidavit that A. went to the office of a justice to file an appeal bond, with H. as surety; that he prayed an appeal, and was told by the justice that he could not then take the bond; that he, having himself executed an appeal bond, left it with the justice, with an agreement between him, A., and H., that H. would, on the next day, go before the justice and sign the bond; that he, honestly believing that H. had done so, did not go to the justice's office until after the time prescribed by law for taking such bond had elapsed, nor did he know, until after the expiration of that time, of H.'s failure to perform his engagement,—is not sufficient to justify an order of court authorizing an appeal, after the time allowed for taking such appeal has expired.—Welch v. Watts, 9 Ind. 450.

[c] (Mich. 1867) Under Comp. Laws, c. 117, § 194, providing that five days shall be the limit of time allowed for appeal after the rendition of a judgment, and section 190, providing that appeals may be authorized after such time by the circuit court, when the party making the appeal has been prevented from taking the same by circumstances not under his control, if a justice of the peace states that he wishes time to consider the case before rendering his decision, but does not fix a day on which he will render such decision, the parties, being still in court, are bound to inquire once each day if a decision has been reached.—Draper v. Tooker, 16 Mich. 74.

[d] (Mich. 1884) Serious illness of a party's wife is sufficient ground to authorize a circuit court to allow an appeal from the decision of a justice of the peace after the expiration of the statutory period, under How. Ann. St. § 7005, permitting delay caused by circumstances not under a party's control.—Braastad v. Alexander H. Day Iron Min. Co., 54 Mich. 258, 20 N. W. 43.

[e] (Mich. 1885) An appeal from a justice's judgment may properly be allowed by the circuit court, under How. Ann. St. § 7005, where the defeated party relied on his attorneys, and they were honestly mistaken about the date of an adjournment, so that judgment was taken by default, and they did not hear of it until

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the five days' time for appealing had gone by.—Capwell v. Baxter, 58 Mich. 571, 25 N. W. 493.

[f] (Mo. 1891) Rev. St. 1889, § 6334, provides that "if in any case the justice shall allow an appeal, and certify in his certificate the cause of his failure to allow the same at the proper time, such appeal shall be sustained, when it would have been competent for the court to have or direct the same to be allowed." *Held*, that where the return of a justice shows that the affidavit and bond for the appeal were filed within the time allowed therefor, but that the justice entered the order allowing the appeal after the expiration of that time because he had failed to satisfy himself within the time as to the sufficiency of the affidavit and bond, the appeal should not be dismissed.—Jester v. McKinney, 47 Mo. App. 62.

[g] (Mo. 1892) Rev. St. § 6333, authorizing the circuit court, in certain cases, to compel a justice of the peace to allow an appeal, does not authorize a rule on the justice to allow an appeal, where it does not appear that the party desiring to appeal made the affidavit required by section 6330, or was prepared to perfect the bond required by section 6328 within the prescribed time; and the fact that he called at the justice's office within such time with the intention of appealing, but failed to find the justice, is insufficient.—Kelm v. Hunkler, 49 Mo. App. 664.

[h] (Neb. 1889) Plaintiff's petition alleged that on the 14th day of February, 1885, he commenced an action before a justice in F. county against defendant for $47 due on final settlement; that defendant appeared and obtained an adjournment until a time when plaintiff was compelled to remove from the county, and that he abandoned the suit, dismissed it, and paid costs; that afterwards defendant, in fraud of plaintiff's right, filed a counterclaim with the justice for $246, and fraudulently obtained a judgment against plaintiff for $199, plaintiff having in the mean time changed his residence to another county; that about one year and a half after rendition of the judgment he was first made aware of its existence by the levy on his property by the sheriff of the county of his residence; that he had a complete defense to the claim of the defendant, and had been damaged by the seizure of his property, and prayed for a decree setting aside the judgment, and general relief, and for judgment for $272. *Held*, that the facts would not authorize the district court to grant an appeal from the judgment of the justice of the peace four years after its rendition.—Miller v. Camp, 28 Neb. 412, 44 N. W. 486.

[i] (Ohio, 1834) High floods, and inability to find a magistrate, were *held* not to excuse a neglect to enter an appeal within the first two days of the next term of the common pleas.—Price v. Orange, Wright, 568.

[j] (Pa. 1869) Defendant, appealing from a judgment of a justice, demanded his transcript, which was made out by S. and signed by the justice, S. having promised appellant to take it to him in the country within a few days; but failed to do so, and the appeal was not entered in time. *Held* that, the justice appearing in no official default, leave to enter the appeal nunc pro tunc would be denied.—Bechtel v. Leinbach, 1 Woodw. Dec. 470.

[k] (Pa. 1871) An appeal from a judgment of an alderman will not be allowed to be filed nunc pro tunc, on the ground that defendant was not summoned, where the record shows that he appeared.—Perkins v. Ward, 1 Leg. Gaz. R. 239.

[l] (Pa. 1880) An appeal from the judgment of a justice of the peace will not be allowed after 20 days where the delay is the fault of the party appealing.—Butterworth v. Pratt, 1 Chest. Co. Rep. 53.

[m] (Pa. 1883) An appeal nunc pro tunc to the court of common pleas from a judgment of an alderman, whether in a case of summary conviction, or to recover a penalty, will not be allowed where no distinct and sufficient cause for appeal is shown.—Board of Health v. Decker (Com. Pl.) 8 Lack. Jur. 173, 14 Pa. Co. Ct. R. 117, 3 Pa. Dist. R. 362.

[n] (Pa. 1886) Where an appeal has been taken from a judgment by an alderman, and the applicant has failed to perfect it, because of sickness of his attorney, he will not be allowed to perfect the appeal after the time allowed by law.—Mason v. Reddington, 4 C. P. Rep. 147.

[o] (W. Va. 1886) Ignorance of the law requiring an appeal from a justice to be taken within 10 days affords no excuse for not taking it, and is not "good cause" for which the circuit court, under the statute, may, within 90 days, permit him to appeal.—Home Sewing Mach. Co. v. Floding, 27 W. Va. 540.

[p] (W. Va. 1888) Defendant, served with summons, though residing out of the state, wrote and mailed a letter to counsel in the state, requesting him to take an appeal if judgment were rendered against him. The letter was never received. Defendant, though living only half a day's journey from the justice, made no further inquiry about the matter. *Held*, that under Code, c. 50, § 174, permitting the circuit court to grant an appeal after the regular 10 days, for good cause shown, he should not have been granted an appeal.—Hubbard v. Yocum, 30 W. Va. 740, 5 S. E. 867.

[q] (W. Va. 1888) The fact that a party has neglected to attend to an action before a justice, or to take an appeal within 10 days after said judgment, because of his absence from home, attending to his ordinary business, is not a good cause for granting such appeal by a circuit court.—Hubbard v. Yocum, 30 W. Va. 740, 5 S. E. 867.

[r] (W. Va. 1888) The good cause for not having taken an appeal from a justice within 10 days, which is required by Code, c. 50, § 174, must be such as would authorize a court of equity, if the suit had been in the circuit court, to enjoin a judgment till a new trial of the case could be had, when a party had failed to apply to the common-law court during the term for a new trial.—Hubbard v. Yocum, 30 W. Va. 740, 5 S. E. 867.

[s] (Wis. 1885) The mere fact that the appellee in an appeal from a justice's judgment expressed a desire to settle the case, and talked to the appellant about a settlement, affords the appellant no excuse for failing to do what is necessary to the perfecting of the appeal.—Comdohr v. Coleman, 64 Wis. 413, 25 N. W. 422.

§ 533. —— Absence or fault of justice.

Time of absence of justice as part of time limited to take appeal, see ante, § 525.

[a] (Ind. 1891) On a motion asking to be allowed to appeal from a judgment rendered nine years before by a justice of the peace, defendant alleged that at the time of the rendition of the judgment she was a resident of Kentucky, and was visiting in Indiana; that while there she was served with a summons to appear before a justice of the peace; that at the hour for trial she went to his office, and said she had come in obedience to the summons, and that she wanted to get back as soon as possible to her sick baby; that the justice said

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that plaintiff had paid the costs and dropped the suit, and that she need not stay; that she believed the suit was dismissed, and did not know that a judgment had been rendered against her until the sheriff served an execution nine years after; that she was not at the time of the rendition of the judgment, or at any time, indebted to plaintiff; and that if she had known of the judgment she would have appealed within the time allowed by law. *Held*, that an appeal was properly allowed, under Rev. St. 1881, § 1503, which provides that the circuit court may, after the expiration of 30 days, grant an appeal from the judgment of a justice of the peace when a party has been prevented from taking the same by circumstances not under his control.—Kreite v. Smith, 3 Ind. App. 64, 29 N. E. 174.

[b] (Mich. 1894) The absence from his residence by the justice rendering a judgment is no ground to permit a dilatory appeal, under How. Ann. St. § 7005, authorizing such appeal where appellant has been prevented from taking it by circumstances not under his control, as section 7006 provides that in case of such absence the affidavit and bond may be served on any member of the justice's family, of suitable age, and the costs and fees paid to such member.—Combs v. Saginaw Circuit Judge, 99 Mich. 234, 58 N. W. 71.

[c] (Mo. 1838) That the absence of the justice from home during the 10 days after trial may be a good excuse for not appealing, it must appear that he was absent during the whole of the 10 days.—Holt v. Varner, 5 Mo. 386.

[d] (Pa. 1831) A party ready and willing to comply with the prerequisites to an appeal cannot be deprived of his right by the willful or accidental omission of the justice. An appeal, in such case, may be filed nunc pro tunc.—Louderback v. Boyd, 1 Ashm. 380.

[e] (Pa. 1838) Where a justice of the peace has been absent from the county, or confined by sickness, and was unable to receive an appeal tendered within the 20 days, or has refused to receive it, where the party was entitled to it an appeal nunc pro tunc will be allowed, if prompt application be made to the court, although the 20 days may have expired.—Read v. Dickinson, 2 Ashm. 224.

[f] (Pa. 1880) Where an appeal was taken from a judgment of a justice of the peace more than 20 days after the judgment, it will not be allowed if the fault is that of the appellant, though a statement of the justice may have misled him as to the time of appeal.—Butterworth v. Pratt, 12 Lanc. Bar, 71.

[g] (Pa. 1882) Where a defendant in a judgment of a justice is prevented from completing his appeal within a proper time by the action of the justice, the court will allow it to be entered nunc pro tunc.—Sollenberger v. Heisker, 2 Leg. Rec. Rep. 368.

[gg] (Pa. 1886) Where an appellant, without fault on his part, has been prevented from appealing by the act of the justice, an appeal will be allowed nunc pro tunc, if asked for in a reasonable time.—McIlhaney v. Holland, 111 Pa. 634, 5 Atl. 731.

[h] (Pa. 1890) Where a justice interferes to prevent an appeal by demanding costs, and dissuading appellant's intended surety on appeal from becoming such, an appeal will be allowed, though the time within which it might be taken has elapsed.—Horton v. Douglass (Com. Pl.) 9 Pa. Co. Ct. R. 192.

[i] (Pa. 1890) Where a party is prevented from obtaining an appeal from the judgment of a justice within the prescribed 20 days, by the absence of the justice from his office, an order may be afterwards entered nunc pro tunc, allowing the appeal.—Voorhis v. O'Malley (Com. Pl.) 9 Pa. Co. Ct. R. 193.

[j] (W. Va. 1889) The refusal of a justice to grant an appeal from his judgment in a proper case is sufficient cause for failure to take the appeal within the statutory time, and for the granting of such appeal by the judge of the circuit court upon the petition of the party aggrieved stating such refusal of the justice.—Lowther v. Davis, 33 W. Va. 132, 10 S. E. 20.

[k] (W. Va. 1895) It was no ground for granting an appeal within 90 days after date of the judgment, under the statute, that the party did not take his appeal within the prescribed 10 days, for the reason that the justice promised him to prepare a bond and bring it to his place of business for execution, and that he hence paid no further attention to the matter.—Powell v. Miller, 41 W. Va. 371, 23 S. E. 557.

(c) CERTIFICATE OR AFFIDAVIT.

NECESSITY OF CERTIFICATE OR AFFIDAVIT, § 534.
TIME FOR FILING, § 535.
SERVICE OF AFFIDAVIT, § 536.
FORMAL REQUISITES, § 537.
—— WHO MAY MAKE AND TAKE AFFIDAVIT, § 538.
ESSENTIALS AND SUFFICIENCY OF AFFIDAVIT, § 539.
—— PARTICULAR STATUTORY REQUIREMENTS, § 540.
AMENDMENT OF AFFIDAVIT AND SUPPLYING OMITTED AFFIDAVIT, § 541.
WAIVER OF WANT OF OR DEFECTS IN AFFIDAVITS, § 542.

Affidavit for appeal after expiration of time in which to appeal, see ante, § 531.
Affidavit for appeal pro forma pauperis, see post, §§ 544, 551.
Payment of costs as prerequisite to the affidavit for appeal, see post, § 543.

§ 534. Necessity of certificate or affidavit.

[a] (Ark. 1875) Under Gantt's Dig. § 3811, no appeal can be allowed by a justice unless the appellant, or some person for him, shall make and file with the justice an affidavit that the appeal is not taken for delay, but that justice may be done.—Garrison v. Nelson, 30 Ark. 394.

[b] (Conn. 1870) The act of July 30, 1868, with regard to appeals from justices of the peace to the superior court, repeals, by implication, the second section of the act of July 11, 1867, requiring the defendant, in cases appealed by him, to file an affidavit that he believes he has a good defense, and that he takes the appeal in good faith.—Werner v. Phelps, 36 Conn. 357.

[c] (Ind. 1874) The defendant in a judgment rendered upon a delivery bond before a justice of the peace cannot appeal from such judgment without first filing an affidavit, in accordance with the statute (2 Gav. & H. St. p. 604, § 90), that he has merits in such appeal; and the fact that the execution by which the property named in the bond was levied upon was improperly or illegally issued is no ground for dispensing with such affidavit.—Hughes v. Jackson, 48 Ind. 296.

[d] (Mich. 1848) Under Act 1845, § 2, on an appeal from the judgment of a justice, for costs amounting to less than $4, no affidavit is

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necessary to perfect the appeal.—Wilson v. Davis, 1 Mich. (Man.) 156.

[e] (Mo. 1884) An affidavit is essential to give to the circuit court jurisdiction of an appeal from a justice's court.—Myers v. Woolfolk, 8 Mo. 348.

[f] (Pa.) Under Act April 20, 1876, regulating appeals from a judgment of justice of the peace and alderman, in actions for wages of manual labor, a defendant must make an affidavit that such appeal was not intended for the purpose of delay.—(1878) Schneider v. Hess, 10 Lanc. Bar, 99; (1878) Rafferty v. McKeeby, 11 Lanc. Bar, 150; (1886) Davidson v. Markley, 1 Pa. Co. Ct. R. 594; (1892) Flegel v. Dotterer (Com. Pl.) 11 Pa. Co. Ct. R. 156.

[g] (Pa. 1878) To bring an appeal within the provisions of the act relating to causes for wages for manual labor, the transcript is sufficient, if it appear, taking the transcript all together, that the claim is for manual labor.—Murrey v. Todd, 1 Chest. Co. Rep. 51.

[h] (Pa. 1880) Where the transcript on an appeal from a justice of the peace showed a judgment for plaintiff for labor performed, and the defendant, in taking the appeal, did not make the affidavit or give bail, as required by the act of 1876 in cases of manual labor, and on the hearing of the motion testimony was heard which showed that the judgment was for manual labor alone, the appeal must be stricken.—Mee v. Kurtz, 2 Chest. Co. Rep. 63.

[i] (Pa. 1882) An executor or administrator, sued in his representative capacity before a justice of the peace for the wages of manual labor, may appeal without filing the affidavit and entering security required of appellants generally.—Koontz's Adm'r v. Howsare, 100 Pa. 506.

[j] (Pa. 1883) Where, on an appeal from a justice of the peace, the transcript certified that the judgment was for "work and labor don on farme," it did not appear that the claim was for "wages for manual labor," within Act 1876, in reference to appeals.—Womelsdorf v. Heifner, 104 Pa. 1.

[k] (Pa. 1885) In order to require the bail and the affidavit made necessary by Act April 26, 1876, the transcript from the justice's record must show that the action was for wages for manual labor.—Worrich v. Slate Co., 1 Lehigh Val. Law Rep. 158.

[l] (Pa. 1886) Where a defendant in a suit before a justice of the peace fails to make the affidavit for appeal required by Loc. Act Feb. 28, 1870 (P. L. 269), his appeal will be struck off.—Cressman v. Bossing, 9 Atl. 191.

[m] (Pa. 1886) Where the transcript of an alderman shows a claim for work and labor done and materials furnished, the affidavit that the appeal was not taken for delay, as required by Act March 2, 1868, and Gen. Act April 20, 1876, will not be required in order to entitle defendant to appeal.—Eastman v. O'Neill, 4 Lanc. Law Rev. 314.

[n] (Pa. 1886) Where defendant in a suit before a justice of the peace appeals, but refuses to give the affidavit and bail required by Act April 20, 1876, though his attention is called to such requirement, the appeal will be stricken off.—Davidson v. Markley, 1 Pa. Co. Ct. R. 594.

[o] (Pa. 1888) To require the affidavit and security on an appeal from a judgment of the justice of the peace, under Act April 9, 1872, and Act April 20, 1876, it must appear, either in the claim filed or from the transcript, that the judgment was rendered for the wages of manual labor.—McElrath v. Foust, 4 Pa. Co. Ct. R. 653.

[p] (Pa. 1888) Where the transcript on appeal from an alderman shows simply that plaintiffs' claim is for labor done by their son for defendant, and the kind of labor is not indicated, nor is there any allegation on the record that defendant is one of the classes of debtors enumerated in Act April 9, 1872 (Purd. Dig. pp. 1698, 1699), providing a lien for moneys due for labor and services rendered by any miner, mechanic, laborer, or clerk, from "any person or persons or chartered company employing clerks, miners," etc., "either as owners, lessees, contractors, or underowners of any works, mines, manufactory," etc., there is nothing to justify the court of common pleas in holding that the case is within that act, and in dismissing the appeal because not perfected as actions under the first section of the act are required to be.—Ely v. Stanton, 120 Pa. 532, 14 Atl. 441.

[q] (Pa. 1892) Where an appellant, having done everything else that was required, was misled by the justice to omit to file an affidavit, an appeal will be allowed.—McCarty v. Killian (Com. Pl.) 2 Pa. Dist. R. 49.

[r] (Pa. 1894) A claim described as on "a contract for work and labor done and performed as carpenter" does not appear to be "for wages of manual labor," so as to require defendant, appealing from a justice's judgment therefor, to make affidavit that his appeal is not for delay, but that he believes injustice has been done him. Act April 20, 1876, § 1 (Purd. Dig. p. 1699).—Glahn v. Peeler (Com. Pl.) 7 Kulp, 284.

[s] (Pa. 1896) To entitle an appellee to the benefits of Act Feb. 25, 1870, regulating appeals from justices in the county of Luzerne, in actions for wages for work done within the county, and requiring an affidavit that the appeal was not taken for purpose of delay, the transcript must show that the work and labor sued for were done within such county.—Reber v. Peerless Mfg. Co. (Com. Pl.) 8 Kulp, 258.

[t] (Tex. 1857) A party wishing to revise the decision of a justice overruling a motion for a continuance must file the statute affidavit, even though the justice requires a different one, which he had no right to require, and which the party could not furnish.—Bodman v. Harris, 20 Tex. 31.

[u] (Wis. 1854) In all cases of appeal from the judgment of a justice, if the requirements of the statute (Rev. St. c. 88, § 228) be not complied with, by filing the affidavit and recognizance in the manner and within the time prescribed, the appellate court should dismiss the appeal. The act of March 24, 1852, does not extend to cases of appeal from justices.—Pelton v. Town of Blooming Grove, 3 Wis. 310.

[v] (Wis. 1894) The circuit court acquires no jurisdiction of an appeal from a justice where no affidavit that it was taken in good faith was presented to the justice, as required by Rev. St. § 3754.—Knapp v. Seyler, 87 Wis. 165, 58 N. W. 248.

§ 535. Time for filing.

[a] (Kan. 1896) Both the written statement and the affidavit required by the statute for an appeal by a municipality from the judgment of a justice of the peace must be filed within 10 days after rendition of the judgment, and a failure to file either within that time will require a dismissal of the appeal.—Board of County Com'rs of Rawlins Co. v. Beals, 2 Kan. App. 313, 43 Pac. 95.

[b] (Mo. 1836) The affidavit and recognizance to prosecute an appeal must be filed before the appeal is granted.—Filley v. Walls, 4 Mo. 271.

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[c] (Mo. 1842) The affidavit required to be made by the party appealing from a judgment of a justice of the peace may be filed in the circuit court after the motion to dismiss is made.—Jamison v. Yates, 7 Mo. 571.

[d] (N. J. 1822) On an appeal from a justice's judgment it should appear on the transcript of the justice's docket that an affidavit that the appeal was not intended for delay, etc., was filed with the justice at the time of filing the appeal bond, as required by Supplement to Small Cause Act Nov. 23, 1821, § 6.—Anonymous, 6 N. J. Law (1 Halst.) 230.

[e] (N. J. 1827) On an appeal from the judgment of a justice, founded on a report of referees, the affidavit required by the statute of November, 1821, must be filed with the justice at the time of filing the appeal bond. Presenting a bond to the justice one day and affidavit at a subsequent day, though prior to the next court to which the appeal must be made, is not sufficient.—Coleman v. Warne, 9 N. J. Law (4 Halst.) 290.

[f] (N. Y. 1830) A party is not entitled to an appeal, unless the affidavit on which its allowance is asked is made within 10 days after rendition of judgment.—People v. Hayden, 4 Wend. 203.

[g] (Pa. 1872) Under Act March 2, 1868, requiring an affidavit, on an appeal from a justice of the peace, that the appeal is not taken for delay, the affidavit need not be filed at the same time as the appeal.—Morton v. Blank, 4 Lanc. Bar, No. 28, p. 2.

§ 536. Service of affidavit.

[a] (N. Y. 1853) The affidavits on appeal, which are relied on to show error in fact, should be served on the respondent.—Hurd v. Beeman, 8 How. Prac. 254.

§ 537. Formal requisites.

[a] (Ark. 1861) The omission of the affiant's signature does not invalidate the affidavit required by Gould's Dig. c. 99, § 180, which prescribes that the appellant "shall make and file with the justice an affidavit that the appeal is not taken for the purpose of delay."—Gill v. Ward, 23 Ark. 16.

[b] (Ark. 1895) Under Sand. & H. Dig. § 4438, which provides that appeals from justices shall not be dismissed "for any defect in the affidavit or obligation for the appeal," it is error to dismiss because the affidavit on appeal has no venue.—St. Louis & S. F. Ry. Co. v. Deane, 60 Ark. 524, 31 S. W. 42.

[c] (Mich. 1872) An affidavit for an appeal from a justice's court, sworn to before any other officer than the justice, is of no avail unless the jurat is signed by such officer; but, where a person desiring to appeal has sworn to the proper affidavit before the justice himself, he has done all that can be required of him in that regard, and the neglect of the justice to sign the jurat cannot prejudice the rights of the appellant.—Dickinson v. Simondson, 25 Mich. 113.

[d] (Minn. 1876) An affidavit supporting an appeal from a justice of the peace must show upon its face that it was taken before a proper officer.—Knight v. Elliott, 22 Minn. 551.

[e] (Miss. 1874) Where the statute requires an affidavit to be made by one praying an appeal from a justice's court, the certificate of the justice that the statutory affidavit was made is sufficient evidence of that fact, although the affidavit was not signed.—Brooks v. Snead, 50 Miss. 416.

[f] (N. J.) The affidavit of the appellant that the appeal was not taken for delay, and that appellants have a just and legal defense to the suit, must conform strictly to the statute; but the exact words of the statute need not be adopted.—(1830) Engle v. Blair, 11 N. J. Law (6 Halst.) 339; (1834) Schenck v. Ayers, 14 N. J. Law (2 J. S. Green) 311; (1834) New Brunswick Steamboat & Canal Transp. Co. v. Baldwin, Id. 440.

[g] (N. J.) An affidavit to support an appeal cannot be indorsed upon the bond. If it is, the appeal should not be entertained.—(1835) Freas v. Jones, 15 N. J. Law (3 J. S. Green) 20; (1836) Dilkes v. Browning, 15 N. J. Law (3 J. S. Green) 471.

[gg] (N. J. 1837) Where the affidavit made and filed in a justice's court, on appealing to the court of common pleas, in an action of trespass on the case, is entitled "In debt," the appeal must be dismissed, because there was no such action pending.—Dunham v. Rappleyea, 16 N. J. Law (1 Har.) 75.

[h] (N. J. 1837) Under a statute providing that a party demanding an appeal from a justice's judgment shall file with the justice an affidavit made by himself, stating, etc., an affidavit stating the necessary facts, sworn to and acknowledged before a notary, though not subscribed by the affiant, is sufficient.—Garrard v. Hitsman, 16 N. J. Law (1 Har.) 124.

[i] (N. Y. 1845) A party, intending to appeal to the common pleas from a judgment of a justice of the peace, procured the allowance of an appeal to be indorsed by a proper officer upon a paper purporting to be an affidavit, and served the same upon the justice who rendered the judgment, complying, at the same time, with the other requirements of the statute respecting appeals; but the jurat to the affidavit was not subscribed by any officer. *Held*, that no appeal was perfected.—Ladow v. Groom, 1 Denio, 429.

[j] (Wis. 1856) An affidavit for appeal need not be regularly entitled, of the cause and court.—Kearney v. Andrews, 5 Wis. 23; Bremer v. Kœnig, Id. 156.

[k] (Wis. 1856) The affidavit required by Rev. St. § 228, which provides that "the appellant, or some person for him, must make an affidavit stating that the appeal is made in good faith," etc., an affidavit attached to the recognizance, although not entitled in the case, is good by its relation to the recognizance.—Kearney v. Andrews, 5 Wis. 23; Bremer v. Koenig, 5 Wis. 156.

[l] (Wis. 1879) On appeal from a justice's court, a paper in the form of the statutory affidavit of appeal, purporting to be made by appellant, was returned by the justice with his certificate that it was subscribed and sworn to before him. It was not in fact subscribed, and there was nothing to show that the appellant's name in the body of it was in his own handwriting. He appeared to have signed the notice of appeal and the undertaking to stay execution on the same sheet with the affidavit. *Held*, that the affidavit was insufficient to confer jurisdiction on the circuit court.—Wright v. Fallon, 47 Wis. 488, 2 N. W. 1120.

[m] (Wis. 1881) An affidavit given under Rev. St. § 3754, requiring "an affidavit" that an appeal from a justice's court is made in good faith, is insufficient unless signed by the affiant at the foot thereof, although he may have written his own name in the body of the affidavit.—Schuster v. Haight, 53 Wis. 290, 10 N. W. 511, distinguishing Lederer v. Chicago, M. & St. P. Ry. Co. (1875) 38 Wis. 244.

[n] (Wis. 1884) An affidavit of appeal is defective which is so uncertain that perjury could not be assigned against one of the parties to it,

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because it sets up that only one of the parties was duly sworn, although the jurat certifies that both subscribed and swore to it.—Morris v. Brewster, 60 Wis. 229, 19 N. W. 50.

§ 538. —— Who may make and take affidavit.

[a] (Iowa, 1870) An attorney for plaintiff in error may properly make out the affidavit for the writ.—Dixon v. Brophey, 29 Iowa, 460.

[b] (Mich. 1883) Under Comp. Laws, § 5453, providing that "no appeal [from a justice] shall be dismissed on the ground of a defective affidavit, nor because the same does not conform to the provisions of this chapter: provided, the appellant, his agent or attorney, shall make an affidavit which shall conform to said provisions,"—an appeal should not be peremptorily dismissed on the ground that the affidavit for the appeal was sworn to before a notary who was an attorney in the case, though Pub. Acts 1877, p. 3, declares it unlawful for notaries to administer oaths in such cases.—Bradley v. Andrews, 51 Mich. 100, 16 N. W. 250.

[c] (Minn. 1870) Gen. St. 1866, c. 65, § 104, does not require, and it is not necessary, that an affidavit for appeal be sworn to before the justice from whom the appeal is taken.—Rahilly v. Lane, 15 Minn. 447 (Gil. 360).

[d] (Mo. 1841) A party appealing from the judgment of a justice of the peace, under the statute of 1839, must make the affidavit in person, and cannot do so by attorney.—Papin v. Howard, 7 Mo. 34.

[e] (N. J. 1833) The affidavit required by Act Nov. 23, 1821, § 23, providing that on appeal from a justice the appellant shall file an affidavit that the appeal is not intended for delay, must, prior to the statute of February, 1834, have been "made before the justice who tried the cause."—Munn v. Merry, 14 N. J. Law (2 J. S. Green) 183.

[f] (Pa. 1887) On an appeal by a city from the judgment of an alderman for the wages of manual labor, the city solicitor is the proper party to make the affidavit required by Act April 20, 1876.—Gamble v. City of Lebanon, 3 Pa. Co. Ct. R. 594.

[g] (Wis. 1884) An affidavit for an appeal from a justice's judgment, purporting to be made by appellant's attorney, will be presumed to have been authorized by appellant.—Smith v. Ormsby, 61 Wis. 13, 20 N. W. 656.

§ 539. Essentials and sufficiency of affidavit.

[a] (Ark. 1843) An affidavit that an appeal "is not taken for the purpose of delay, but that justice may be done," is sufficient to support an appeal from a justice of the peace.—Underwood v. Wylie, 5 Ark. (5 Pike) 248.

[b] (Cal. 1862) Appeal was taken to the supreme court from a justice's decision upon a case submitted upon an agreed statement of facts. Instead of the affidavit required by Prac. Act, § 377, the record only showed an allegation in the agreed statement on appeal that the case was heard below on an agreed statement, "and the affidavit of the defendant that the controversy was real." *Held*, that this was fatally defective, and the appeal was dismissed.—Mellois v. Chaine, 20 Cal. 679.

[c] (Ind. 1859) The affidavit, in case of an appeal from the judgment of a justice, in a suit upon a forfeited delivery bond, must set forth facts so as to show that his case has merits.—Harding v. Mansur, 13 Ind. 454.

[d] (Iowa, 1857) An affidavit of facts for appeal is sufficient, unless controverted by the return of the justice of the peace, and the appellant should be granted a new trial.—Miller v. State, 4 Iowa (4 Clarke) 505.

[e] (Iowa, 1870) An affidavit for a writ of error to reverse the judgment of a justice, setting aside a default, need not allege that plaintiff resisted the motion to set aside.—Dixon v. Brophey, 29 Iowa, 460.

[f] (Mich. 1849) An affidavit for an appeal from the judgment of a justice, under the act of 1845, made by the attorney of the party, and stating that plaintiff recovered five dollars more than was justly and honestly his due, as deponent believes from the facts and evidence in the cause, they having been fully communicated to him, was *held* sufficient.—Austin v. Strong, 1 Mich. (Man.) 259.

[g] (Mich. 1858) Where the affidavit on which an appeal from a justice is based is general, and relates only to the merits, matters connected with process, or any question arising upon it, cannot be corrected by a retrial on the merits in the appellate court. To raise those questions there, the affidavit should set them forth specially. If no motion is made below as to the warrant, the defendant can avail himself of an objection to it only by certiorari.—Chappee v. Thomas, 5 Mich. 53.

[h] (Minn. 1870) An affidavit and notice of appeal from a justice of the peace are not invalidated by a mistake in reciting the date of the judgment from which the appeal is taken. —Rahilly v. Lane, 15 Minn. 447 (Gil. 360).

[i] (Miss. 1874) An affidavit for appeal from a justice's court, sued out within the time prescribed by the statute, alleged that "the appeal prayed in the above-stated case is not made to vex, harass, or oppress the said plaintiff, but that justice may be done." *Held*, that the omission of the word "delay" from the statutory form did not defeat the object and purpose of the appeal.—White v. Shumate, 50 Miss. 130.

[j, k] (Miss. 1877) An affidavit for an appeal to the circuit court from a justice's court, averring that the appeal is prosecuted in order that justice may be done, is sufficient, although omitting to state that it is not taken for delay. —Coppock v. Smith, 54 Miss. 640.

[l] (N. J. 1842) Where the judgment was for the defendant in the small cause court, an affidavit by the plaintiff that "he has a just and legal cause of action upon the merits of the case" is sufficient to support an appeal.—Hamilton v. Pidcock, 18 N. J. Law (3 Har.) 435.

[m] (N. J. 1875) An affidavit filed for appeal from a judgment in a justice's court on the verdict of a jury in these words, "The defendant verily believes that he hath a just and legal defense to make upon the merits of the appeal," etc., is sufficient.—Snover v. Tinsman, 38 N. J. Law (9 Vroom) 210.

[n] (Wis. 1855) An affidavit on appeal from a justice of the peace that the appeal was not taken for delay is sufficient, where signed by the appellant, though it does not state in it that the affiant is the appellant.—Cady v. Anson, 4 Wis. 223.

§ 540. —— Particular statutory requirements.

[a] (Iowa, 1847) The affidavit for an appeal from a justice of the peace to the district court must be in the language prescribed by the statute; hence it is not sufficient to swear that "injustice has been done by the verdict," but the affidavit must state that it has been done by the "verdict and judgment."—Cook v. United States, 1 G. Greene, 39.

[b] (Mo. 1892) An affidavit for an appeal from a justice's court, which fails to state

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whether the appeal is from the merits, or from an order or judgment taxing costs, as required by Rev. St. 1889, § 6330, is insufficient; and, if not amended, the appeal will be dismissed.—Spencer v. Beasley, 48 Mo. App. 97; Whitehead v. Cole, 49 Mo. App. 428.

[c] (Mo.) Failure of an affidavit for appeal from a justice's court to state whether the appeal is from a judgment on the merits or from an order taxing costs is not a jurisdictional defect.—(1893) Watson v. Barbee, 55 Mo. App. 147; (1894) Welsh v. Hannibal & St. J. R. Co., Id. 599; (1894) Draper v. Farris, 56 Mo. App. 417; (1894) Crawford v. Armstrong, 58 Mo. App. 214.

[d] (Mo. 1894) Rev. St. § 6330, requires that an affidavit for an appeal from a justice of the peace shall, inter alia, state whether the "appeal is from the merits or from an order or judgment taxing costs." *Held*, that an affidavit of appeal from a justice's judgment, both on a plea in abatement and on the merits, which stated that the "appeal is taken from the judgment rendered on the plea in abatement and in the cause," was insufficient.—Greischar v. Alexander, 56 Mo. App. 56.

[e] (N. Y. 1848) On appeal the judgment must be stated in the affidavit of appellant.—Davis v. Lounsbury, 1 Code Rep. 71.

[f] (N. Y. 1848) The failure to aver in an affidavit on appeal that the affidavit contains a statement of the substance of the testimony and proceedings before the justice is not fatal to the appeal; but respondent, if dissatisfied, may serve a counter affidavit.—Mulford v. Decker, 1 Code Rep. 71.

[g] (N. Y. 1849) Under Code, § 303, on an appeal from a justice court, the affidavit of the appellant must set forth the grounds on which the appeal is founded.—Thompson v. Hopper, 1 Code Rep. 103.

[h] (N. Y. 1849) An affidavit to support an appeal from a justice must, under the Code of Procedure, point out distinctly the ground on which he alleges there is error in the judgment.—Williams v. Cunningham, 4 N. Y. Super. Ct. (2 Sandf.) 632.

[i] (N. Y. 1850) Under Code, § 303, on appeal from a justice court, the appellant's affidavit must state, or purport to state, the substance of all the testimony and proceedings of the court below, or the appeal will be dismissed.—Brown v. Stearns, 2 Code Rep. 119.

[j] (N. Y. 1885) Upon appeal from a judgment of a justice of the peace, entered on default, an affidavit of appellant "that manifest injustice has been done deponent, in this: that said judgment ought not to have been for more than $37.63 with costs, instead of the sum of $200 and costs, as it now stands,"—alleges mere conclusions, and not facts, and is insufficient to show that manifest injustice has been done.—Bates v. Gorman, 8 Civ. Proc. R. 180.

[k] (N. Y. 1885) Under Code Civ. Proc. § 3064, upon appeal from a judgment of a justice of the peace, entered on default, the appellant's affidavit for appeal must show a satisfactory excuse for his default, and also show facts from which it will appear that manifest injustice has been done.—Bates v. Gorman, 8 Civ. Proc. R. 180.

[l] (N. Y. 1885) Upon appeal from a judgment of a justice of the peace, entered on default, an affidavit of appellant that he forgot the time the summons was returnable, because he was in charge of a large number of men engaged in loading stone on canal boats and railroad cars, shows a sufficient excuse for the default.—Bates v. Gorman, 8 Civ. Proc. R. 180.

[m] (Pa. 1872) Under Act March 2, 1868, requiring an affidavit, on the appeal from a justice of the peace, that "the appeal was not taken merely for delay," the absence of the word "merely" does not render the affidavit insufficient.—Morton v. Blank, 4 Lanc. Bar, No. 28, p. 2.

[n] (Pa. 1887) Gen. Act April 20, 1876, relating to appeals from justices of the peace, does not repeal Act Feb. 28, 1870; and hence an affidavit in conformity with the act of 1876 is not sufficient, but the affidavit must comply with the provisions of the act of 1870.—Burns v. Johnson, 4 C. P. Rep. 173.

[o] (Pa. 1895) Under Act Feb. 28, 1870 (P. L. 269), providing the method of appeal from a justice of the peace in actions for labor in Luzerne county, and requiring an affidavit setting forth the amount, if any, admitted to be due plaintiff, defendant's appeal will be stricken off; such statement being omitted from his affidavit, and it not being shown that he was misled by the justice.—McGeehan v. O'Donnell (Com. Pl.) 8 Kulp, 159.

[p] (Wis.) An affidavit on appeal from a judgment of a justice, reciting that "the application for an appeal is made in good faith," is not a compliance with a statute requiring the affidavit to allege that "the appeal is made in good faith."—(1851) Brown v. Pratt, 4 Chand. 32, 3 Pin. 305; (1854) Brearley v. Warren, 3 Wis. 397.

[q] (Wis. 1885) An affidavit that "this appeal is in good faith" is a sufficient compliance with Rev. St. § 3754, requiring an affidavit that "the appeal is 'made' in good faith"; and, if the affidavit is attached to a properly entitled notice of appeal, it need not itself be entitled in the action.—Filer & Stowell Co. v. Sohns, 63 Wis. 118, 23 N. W. 135.

§ 541. Amendment of affidavit and supplying omitted affidavit.

[a] (Ark. 1879) If a justice omits to sign his name to the jurat to an affidavit for an appeal to the circuit court, he may be compelled to sign it by rule of court.—Guy v. Walker, 35 Ark. 212.

[b] (Ark. 1885) An imperfect affidavit for an appeal, made by one partner before a justice, may be amended in the circuit court by another.—Coleman v. Frauenthal, 46 Ark. 302.

[c] (Ind. 1859) The appellant, from the decision of a justice in a suit on a forfeited delivery bond, will not be allowed to amend his affidavit for appeal in the appellate court.—Harding v. Mansur, 13 Ind. 454.

[d] (Mich. 1872) Where a justice has sent up with his return an affidavit for appeal, which was duly sworn to before him, but to which he neglected to attach his jurat, the circuit court may allow the justice to attach his jurat nunc pro tunc, should he voluntarily appear and do so, or, if not, may make an order for a further return, requiring him officially to certify whether the affidavit had been duly sworn to before him.—Dickinson v. Simondson, 25 Mich. 113.

[e] (Miss. 1874) Where an affidavit for an appeal from a justice's court does not substantially comply with the statute, the court, upon application, should allow the party to amend it, provided the application to amend is made within a reasonable time.—White v. Shumate, 50 Miss. 130.

[f] (Miss. 1880) A justice of the peace, who has neglected to date and sign an affidavit for an appeal, should be permitted to affix the

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date and his signature in the circuit court, on motion to dismiss.—Green v. Boon, 57 Miss. 617.

[g] (Mo.) An affidavit for appeal from a justice's court, which does not state whether the appeal is from the merits or matter of costs, confers jurisdiction on the circuit court, and may be amended before a motion to dismiss is passed on.—(1893) Watson v. Barbee, 55 Mo. App. 147; (1894) Welsh v. Hannibal & St. J. R. Co., Id. 599.

[h] (N. J. 1830) If the appellant neglect to file with the justice, at the time of demanding the appeal, the affidavit required by the statute, and, after the appeal is returned, he obtain leave to file a new appeal bond, he will not be suffered to supply the omission of the affidavit by adding it to the new bond.—Parke v. Hunt, 12 N. J. Law (7 Halst.) 82.

[i] (Pa. 1884) Where an appeal from a judgment of a justice of the peace, on a claim for manual labor, is taken in good faith, and within the time prescribed by law, the court will, on proper and timely application, allow the requisite affidavit to be filed and a defective recognizance to be perfected.—Thomas v. Pyle, 2 Chest. Co. Rep. 295.

[j] (Pa. 1887) Where, in an appeal from a judgment of a justice of the peace, an affidavit that the appeal was not taken for delay was defective, under the provisions of the act of 1870, the applicant will be permitted to perfect his appeal by filing the required affidavit.—Burns v. Johnson, 4 C. P. Rep. 173.

[k] (Pa. 1887) Where an appeal has been taken without the filing of an oath that the appeal was not intended for delay, the appeal will not be dismissed, but the appellant will be allowed to file such affidavit.—Lesch v. Turnpike Co., 1 Wilcox, 195.

[l] (Wis. 1881) Where the affidavit for an appeal from a justice's court is insufficient because not signed by the affiant at the foot thereof, though he may have written his own name in the body of the affidavit, the circuit court has no power to authorize its amendment by adding the affiant's signature.—Schuster v. Haight, 53 Wis. 290, 10 N. W. 511.

[m] (Wyo. 1892) Code, § 2501, provides that the court may, before or after judgment, in furtherance of justice, amend any proceeding by adding the name of a party, or by correcting a mistake. Laws 1890, p. 55, § 7, provides that district courts may allow amendments to the record. *Held*, that where an affidavit for appeal from a justice's court had been sworn to, but by inadvertence the signatures of the affiant and the officer administering the oath were omitted, the district court properly allowed the affidavit to be amended by inserting such signatures.—Redman v. Union Pac. Ry. Co., 3 Wyo. 678, 29 Pac. 88.

§ 542. Waiver of want of or defects in affidavits.

[a] (Ark. 1858) An affidavit of appeal from a justice of the peace to the circuit court is a prerequisite to the granting of the appeal, which is not waived by submitting to a trial on the merits in the circuit court.—Merrill v. Manees, 19 Ark. 647.

[b] (Ark. 1894) Plaintiff, by going to trial on an appeal by defendants from a justice court, waives the failure of one of the defendants to file an appeal affidavit.—Elder v. Crabtree, 59 Ark. 177, 26 S. W. 817.

[c] (Mich. 1884) An appellant's failure to sign an affidavit for an appeal from a justice's decision may be waived by the appellee by appearing and noticing the case for trial.—Hamilton v. Wayne Circuit Judge, 52 Mich. 409, 18 N. W. 193.

[d] (Mo. 1893) Where a justice grants an appeal in an action for damages to crops, and files the papers in the circuit clerk's office, and the parties go to trial in the circuit court on the merits, objections to the appeal affidavit and to the jurisdiction are waived.—Pearson v. Gillett, 55 Mo. App. 312.

[e] (Mo. 1894) Though the affidavit for appeal from a justice's court be defective, if appellee appears and goes to trial without objection, he waives the defect, and acknowledges the jurisdiction of the circuit court.—Lowry v. Phillips, 57 Mo. App. 232.

(d) PAYMENT OF FEES OR COSTS.

NECESSITY OF PAYMENT AND EFFECT OF FAILURE TO PAY, § 543.
PARTIES REQUIRED TO PAY AND APPEALS PRO FORMA PAUPERIS, § 544.
TIME FOR PAYMENT AND EXCUSING FAILURE TO PAY IN TIME, § 545.
COSTS AND FEES INCLUDED, § 546.
—— FEES FOR TRANSCRIPT OR RETURN, § 547.
SUFFICIENCY OF PAYMENT OR TENDER AND EVIDENCE OF PAYMENT, § 548.
WAIVER OF PAYMENT, § 549.

§ 543. Necessity of payment and effect of failure to pay.

[a] (Cal. 1855) One of the conditions upon which an appeal is allowed from a justice of the peace is the payment of the costs of the action.—McDermott v. Douglass, 5 Cal. 89.

[b] (Cal. 1856) A justice of the peace may refuse to send up the transcript of a cause tried before him until his fees are paid by appellant; but, if he sends it up without receiving his fees, the fact that they are not paid is no ground for dismissing the appeal.—Bray v. Redman, 6 Cal. 287.

[c] (Cal. 1894) Under St. 1877–78, p. 134, requiring that all fees of a justice of the peace must be paid before he can be compelled to forward any papers on appeal, mandamus will not lie to compel a justice to forward papers on appeal in a civil action until his fees incurred by both parties have been paid.—Webster v. Hanna, 102 Cal. 177, 36 Pac. 421.

[d] (Iowa, 1861) In case of an appeal from the decision of a justice, the judgment below will not be affirmed, for the reason that the docket fee has not been paid by the appellant, provided it has been secured to the satisfaction of the clerk of the court.—Hess v. McConville, 12 Iowa, 190.

[e] (Iowa, 1871) The district court rule providing that, if appellant from justice court fails to pay the docket fee by noon of the second day of the term, appellee may pay the same, and have the case docketed and the judgment affirmed, does not apply where the case was docketed by the clerk without requiring the fee from either party; and in such case appellee is not entitled to an affirmance on motion.—Squires v. Millett, 31 Iowa, 169.

[f] (Md. 1877) The requirement in Act 1867, c. 164, of prepayment of costs before hearing, on appeals from a justice, is to protect the justices and other officers, and not the parties. Such payment is not a prerequisite of the appeal.—Baltimore & O. R. Co. v. Waltemyer, 47 Md. 328.

[g] (Mo. 1852) The St. Louis law commissioner cannot file the papers in a case appealed from a justice of the peace and affirm the

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judgment for the nonpayment of his fee.—Hunt v. Hernandez, 16 Mo. 170; Boyle v. Skinner, 17 Mo. 246.

[h, i] (Mo. 1856) Where a party appealing from a justice of the peace to the St. Louis land court fails to pay the jury fee and file the transcript, the court may, on appellee filing a transcript and paying the fee, affirm the judgment of the justice.—Harley v. McAuliff, 24 Mo. 85.

[j] (Mo. 1874) Under Wag. St. p. 832, § 17, authorizing a justice to set aside "a judgment of nonsuit, or by default, upon payment of all the costs then accrued," the payment of such costs is not a prerequisite to the right to appeal.—Palmer v. Kansas City, St. J. & C. B. R. R. Co., 57 Mo. 249.

[k] (Mo. 1876) Where a motion to set aside a default rendered by a justice of the peace is overruled, the moving party may appeal, though he has failed to pay the costs.—Hooker v. Atlantic & P. R. Co., 63 Mo. 449.

[l] (Pa. 1879) Where a payment of costs is a condition precedent to the right of appeal from the judgment of the justice or alderman, an appeal taken without such payment will be stricken.—White v. Martin, 11 Lanc. Bar, 55.

[m] (Pa. 1880) Under Act April 20, 1876, regulating appeals from judgments of justice of the peace for wages of manual labor, a justice of the peace has no right to demand prepayment of the costs as a prerequisite to the affidavit required.—Gainer's Appeal, 11 Lanc. Bar, 135.

[n] (Pa. 1886) On an appeal from a judgment of a justice of the peace, the justice is entitled to demand and receive from the appellant the costs in the case, before making out and delivering the transcript for the appeal.—Tiernan v. Manigle, 2 Pa. Co. Ct. R. 96.

[o] (Pa. 1886) Under Loc. Act March 2, 1868, failure to pay the costs on taking an appeal from an alderman is not fatal to the appeal.—Eastman v. O'Neill, 4 Lanc. Law Rev. 314.

[p] (Pa. 1887) The payment of costs is not a condition of the right to appeal from a decision of a justice of the peace.—Lesch v. Turnpike Co., 1 Wilcox, 195.

[q] (Pa. 1889) Under Act June 24, 1885 (P. L. 159), magistrates of Philadelphia are entitled to demand and receive from the appellant the costs in the case, before making and delivering the transcript on the appeal.—Kelly v. Royal, 6 Pa. Co. Ct. R. 495.

[r] (Pa. 1891) Act June 24, 1885 (P. L. 159), providing that justices shall have the right to demand and receive costs "before issuing a transcript of a judgment recovered before them, for entry in the court of common pleas or other purpose," does not apply where defendant in a judgment recovered before a justice applies for a transcript of the proceedings, for the purpose of taking legal advice as to whether he shall appeal or take a certiorari.—Commonwealth v. Oldfield, 6 Kulp, 272.

§ 544. Parties required to pay and appeals pro forma pauperis.

[a] (Ill. 1894) A rule of the circuit court provided that, in cases of appeals from inferior courts, the clerk should collect from appellant $5, and, in case of refusal to pay such advance fees, the clerk should perform no services, etc. *Held* that, where the appellee paid such fees, the circuit court could not order appellant to refund such sum to appellee, and, on failure of appellant to obey the order, dismiss the appeal.—Garrity v. Mallory, 53 Ill. App. 300.

[b] (Pa. 1880) Act May 2, 1868, § 1, authorizing appeals and transcripts from judgments of justices of the peace without payment of cost, does not enable municipal corporations to appeal without payment of costs.—Borough v. Heffner, 1 Leg. Rec. Rep. 250.

[c] (Pa. 1881) No appeal from a judgment of a justice or alderman will be allowed unless the party appealing shall pay all costs accrued before said justice, except where the parties reside in the county, and the appellant may show that he is unable to pay such costs.—Knapp v. Stoner, 13 Lanc. Bar, 67.

[d] (Pa. 1887) Under Loc. Act March 2, 1868, and Gen. Act June 24, 1885, municipal corporations are not required to pay costs before taking their appeal.—Gamble v. City, 3 Pa. Co. Ct. R. 594.

[e] (Pa. 1887) An appeal pro forma pauperis regular on its face will not be stricken off for falsity in the affidavit of poverty, on which it was granted.—Simrell v. Hall, 1 Wilcox, 164.

[f] (Pa. 1888) An affidavit, under Act June 24, 1885 (P. L. 159), for an appeal in forma pauperis, is not sufficient when it merely sets forth that he is unable to pay the costs accrued in the above case, but should state that his inability arises from poverty.—Miller v. Raub, 6 Pa. Co. Ct. R. 209.

[g] (Pa. 1888) A justice of the peace may determine whether the affidavit for an appeal in forma pauperis is true or false, as the appeal is not a matter of right.—Miller v. Raub, 6 Pa. Co. Ct. R. 209.

§ 545. Time for payment and excusing failure to pay in time.

[a] (Ark. 1842) A justice of the peace has no right to refuse to enter a prayer for an appeal from his decision, to take a recognizance, and grant the appeal, because his fees for such services are not first paid. He has no right to demand the fees until the services are performed.—Levy v. Inglish, 4 Ark. (4 Pike) 65.

[b] (Colo. 1887) Where the appeal bond has been filed and approved, and an appeal accordingly prayed, within the 10 days fixed by Gen. St. § 1979, the failure to pay to the justice the costs of the appeal within that time is no ground for dismissing the appeal.—Schofield v. Felt, 10 Colo. 146, 14 Pac. 128.

[c] (Ind. 1892) A justice of the peace is not entitled to his fees in advance for approving the bond and making up and transmitting a transcript of the proceedings had before him to the clerk of the circuit court.—Coats v. State, 133 Ind. 36, 32 N. E. 737.

[d] (Iowa, 1806) It is error to affirm the judgment of a justice of the peace, on the ground that the appellant has failed to pay the docket fee by noon of the second day of the next term after his appeal, as required by rule of court, when less than 10 days intervenes between the taking of the appeal and the commencement of the next term of the district court. Revision 1860, §§ 3926, 3929, 3930.—Seeberger v. Miller, 20 Iowa, 428.

[e] (Iowa, 1870) A transcript is not on "file," within the rule of court providing that on appeal from a justice, if appellant fails to file a transcript by the second day of the term, appellee may file such transcript and obtain an affirmance, unless the filing fee is paid to the clerk, or security therefor is given.—Pinders v. Yager, 29 Iowa, 468.

[f] (Mich. 1875) On appeal from a justice's court the appellants are entitled to the whole of the day on which the return is filed in which to make payment of the entry fee, without being in default; and it is error to enter a

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dismissal grounded upon an order nisi, made on the day of filing the return, requiring payment of the entry fee and of an attorney's fee of five dollars.—Grand Rapids & I. R. Co. v. Wright, 32 Mich. 491.

[g] (Mo. 1851) If the appellant from a justice's judgment fail to pay the clerk the jury fee, as required by the act of 1847, the circuit court may, upon the appellee filing a proper transcript of the judgment and paying the jury fee, affirm the judgment of the justice.—Gordon v. Scott, 15 Mo. 249.

[h] (Mo. 1892) Defendant appealed from a judgment against him in the justice's court, and the justice delivered the transcript to the deputy clerk, without paying the filing fee required by Rev. St. 1889, p. 2148, § 17, and the deputy did not docket the case. Subsequently, plaintiff obtained an affirmance of the judgment. *Held*, that the fact that defendant had an understanding with the clerk whereby the clerk filed all transcripts in cases appealed by defendant, and charged the fee to defendant, and that the deputy did not know of this arrangement, was an excuse for not paying the fee, and ground for setting aside the affirmance.—Johnson v. St. Louis, I. M. & S. Ry. Co., 48 Mo. App. 630.

[i] (Mo. 1892) Under 2 Rev. St. p. 2148, § 17, requiring appellant from a justice's judgment, on filing his transcript in the St. Louis circuit court, to pay a filing fee, such fee may be paid and transcript filed the first day of the term to which the appeal is returnable.—Meits v. Koetter, 51 Mo. App. 370.

[j] (N. Y. 1879) The Code, amended 1851, has restored the rule requiring service of a notice of appeal and payment of the costs within 20 days to render effectual an appeal from a justice of the peace to the county court.—Thomas v. Thomas, 18 Hun, 481.

[k] (N. Y. 1896) A justice whose judgment was appealed from failed to state to appellant the correct amount of the costs included in the judgment, and hence appellant did not pay them all, as required by Code Civ. Proc. § 3047. *Held*, that the authority given appellate courts by section 3049, to permit omissions through mistake or excusable neglect to be supplied on just terms, was properly exercised by allowing appellant to correct the omission.—Black v. Maitland, 1 App. Div. 6, 36 N. Y. Supp. 739.

[l] (Pa. 1878) Where, in an appeal from a justice, the costs are not paid within 20 days, and the transcript is not filed in the common pleas until after the next return day, the appeal is not valid.—Donnelly v. Purcell, 1 Sus. Leg. Chron. 47.

[m] (Pa. 1895) Bail for an appeal from a judgment of a justice was entered within the time prescribed by law, but by oversight the costs were not paid under 23 days after judgment, when defendant paid the costs, and, an appeal being refused, took a transcript which he filed as an appeal. *Held*, that the appeal should be allowed to stand.—Stone v. Conway (Com. Pl.) 5 Pa. Dist. R. 74.

§ 546. Costs and fees included.

[a] (Iowa, 1879) Under Code 1873, § 3583, providing that on the taking of an appeal from a justice of the peace the justice shall file in the office of the clerk of the circuit court certain papers, including a transcript, he cannot make a payment to himself of the filing fees of the clerk of the circuit court a condition of transmitting the papers to the clerk; he not being required to pay the clerk any fees.—McKay v. Maloy, 53 Iowa, 33, 3 N. W. 808.

[b] (Mich. 1894) The costs of judgment, which How. Ann. St. § 7003, requires appellant to pay to the justice of the peace within five days, include jury fees.—Swarthout v. McKnight, 99 Mich. 347, 58 N. W. 315.

[c] (Minn. 1865) In a civil action before a justice, the fees of witnesses of the defeated party are not taxable as costs under the judgment, and therefore such party may appeal without paying such fees.—Trigg v. Larson, 10 Minn. 220 (Gil. 175).

[d] (Mo. 1879) The law of 1847, requiring the payment of a jury fee on filing a transcript from a justice, is not repealed by Rev. St. 1855, p. 913, §§ 27–29, nor by section 21 of the act of March 3, 1857.—Bailey v. Lubke, 8 Mo. App. 57.

[e] (N. J. 1827) A rule of the common pleas, requiring the appellant upon the return of the appeal papers, and prior to the entry of the appeal, to pay to the clerk of the court the sum of one dollar, is illegal.—Carpenter v. Titus, 9 N. J. Law (4 Halst.) 90.

[f] (N. Y. 1827) The appellant is not bound to pay his own costs, nor any more than the costs recovered by the opposite party and included in the judgment.—Ex parte Beadlestone, 7 Cow. 507.

[g] (N. Y. 1828) On appeal all the costs must be paid to the justice. The party has no right to retain a part as belonging to him.—People v. Saratoga Common Pleas, 1 Wend. 282.

[h] (N. Y. 1893) Laws 1881, c. 438, provides that in all civil actions in which an issue of fact shall be tried in the justice's court of the city of Albany, now known as the "City Court of Albany," there shall be allowed to the prevailing party, and be included in the judgment by way of indemnity for his expenses, an attorney's fee, according to the amount involved. Code Civ. Proc. § 3047, requires appellant, when he serves his notice of appeal from a justice's judgment, to pay the costs of the action included in the judgment. *Held*, that the attorney's fee allowed the prevailing party in the city court is a part of the costs which appellant must pay on appealing to the county court.—Schwemmer v. Stratton, 66 Hun, 629, 22 N. Y. Supp. 523.

[i] (N. Y. 1895) Code Civ. Proc. § 3047, providing that, at the time of serving notice of appeal from a justice's judgment, appellant shall pay to the justice's clerk the costs of the action, includes an allowance made under section 3129, providing that the prevailing party in a justice's court in the city of Brooklyn shall be allowed $12.—Kenney v. Livery Stable Keepers' Ass'n, 89 Hun, 190, 35 N. Y. Supp. 8.

[j] (N. Y. 1896) Where a judgment is reversed, and the case remanded to a justice, and on new trial he dismisses the complaint, on tender of the costs of the second trial, as provided by Code Civ. Proc. § 3047, without tender of the costs of the former appeal, the justice must make a return of the appeal.—Van Bussum v. Metropolitan Life Ins. Co., 16 Misc. Rep. 40, 37 N. Y. Supp. 665.

[k] (Ohio, 1824) A justice of the peace, on an appeal from his judgment, is bound to give a transcript to the appellant, on a demand for it, and a tender of the fee, and cannot insist on the costs being first paid.—Leffingwell v. Flint, 1 Ohio (1 Ham.) 274.

[l] (Pa. 1878) Act April 20, 1876, did not repeal Act 1873, requiring the prepayment of constable's costs in all cases of appeal; and hence, where such costs are not paid, the appeal will be dismissed.—Rafferty v. McKeeby, 11 Lanc. Bar, 150.

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[m] (Pa. 1881) Where an execution has been issued on a judgment of an alderman before appeal was taken, the costs of the execution are a part of the costs which must be paid before the bill will be allowed.—Knapp v. Stoner, 13 Lanc. Bar, 67.

[n] (Pa. 1883) An appeal will not be stricken by reason of the nonpayment of the attorney's fee.—Shirk v. Schadt, 5 Law T. (N. S.) 167.

[o] (Pa. 1887) Under Act June 24, 1885, the failure of defendant, on an appeal from a judgment of a justice of the peace, to pay the cost of plaintiff's witnesses, is not fatal to the appeal; the justice having demanded and received his own costs and the constable's costs alone.—Clark v. Stephens, 3 Pa. Co. Ct. R. 592.

[p] (Pa. 1895) Under Act March 2, 1868, providing that justices of the peace shall be entitled to receive from appellant, before giving a transcript of appeal, "all costs that have accrued in the said action," as well as, under Act June 24, 1885, providing that, in "all cases" of appeal from a justice, he shall be entitled to receive from appellant "the costs in the case" before delivery of the transcript for the appeal, he is entitled to costs that have accrued on execution on the judgment.—Commonwealth v. Snayberger (Com. Pl.) 16 Pa. Co. Ct. R. 83; Sunday v. Same, 4 Pa. Dist. R. 295.

[q] (Wis. 1841) On appeal from an order of a justice of the peace, the appellant is not required to pay any portion of the costs, except the justice's fees.—Kensler v. Brunett, 1 Pin. 112.

§ 547. —— Fees for transcript or return.

[a] (Ind. 1834) The justice is bound to file his transcript seasonably, although his fees have not been paid nor tendered.—Ingram v. Plasket, 3 Blackf. 450.

[b] (Iowa, 1879) Under Code 1873, § 3804, allowing a justice of the peace a fee of 50 cents for making and certifying transcript on appeal, he may require the payment of his fee therefor before allowing the same to go out of his possession.—McKay v. Maloy, 53 Iowa, 33, 3 N. W. 808.

[c] (Mich. 1874) Payment to a justice of the peace for making return to an appeal is a condition precedent to the right to maintain the appeal.—People v. Allegan Circuit Judge, 29 Mich. 487.

[d] (Minn. 1865) Under Comp. St. c. 59, § 150, payment of the costs and of the fee for the return by the justice of the peace are essential conditions to the jurisdiction of a justice to allow an appeal in a civil action; and, where it appears from the return that the fee for the return has not been paid, the appeal may be dismissed.—Trigg v. Larson, 10 Minn. 220 (Gil. 175).

[e] (N. Y.) The justice is not bound to make return on appeal, where the return fee is not paid him; and, if the making the return is prevented by nonpayment of the fee, it is ground for dismissing the appeal.—(1850) Van Hensen v. Kirkpatrick, 1 Code R. (N. S.) 74; (1851) Id., 5 How. Prac. 422.

[f] (S. D. 1892) On appeal from the judgment of a justice, the service and filing of a notice of appeal, and an undertaking on appeal, as required by the statute, are the only prerequisites to the taking of an appeal that are jurisdictional; and the payment of the justice's fee for making his return does not constitute one of the acts necessary to perfect the appeal.—Edminster v. Rathbun, 3 S. D. 129, 52 N. W. 263.

[g] (Wis. 1861) A justice of the peace, whose judgment has been appealed from, may make his return of the record, without payment of the fee and tax prescribed to be paid to him.—Golling v. Harder, 14 Wis. 86.

§ 548. Sufficiency of payment or tender, and evidence of payment.

[a] (Cal. 1858) An offer made to a justice to pay his fee when the papers for appeal are made out is not a sufficient tender, under Wood's Dig. p. 245, § 627, requiring a justice's fees to be paid before the justice is required to send up the papers.—People v. Harris, 9 Cal. 571.

[b] (Colo. 1888) Under Gen. St. § 1979, allowing appeals from justices of the peace, provided the party appealing shall, within 10 days, give bond and pay the cost of granting the appeal, it is not necessary, in order to perfect the appeal, that the costs be paid to the justice personally when the appeal bond is filed in the county court, as sections 1982, 1983, require that, upon the bond being filed and approved, the clerk shall issue a supersedeas enjoining the justice from further proceedings.—Denver & R. G. Ry. Co. v. Rader, 11 Colo. 536, 19 Pac. 476; Same v. Tong, 11 Colo. 539, 19 Pac. 478.

[c] (Ga. 1878) The requirement of Code, § 3616, that the appellant shall "pay" all costs up to the time of entering the appeal, is not complied with by a mere deposit thereof. Such payment is for the benefit of the party finally successful.—Abrams v. Lang, 60 Ga. 218.

[d] (Ga. 1881) An appeal to the superior court from a justice's court will not be dismissed because of the failure of the justice to certify that the appellant had, within the proper time, paid the costs and given bond, as required by law.—Pearce v. Renfroe, 68 Ga. 194.

[e] (Ill. 1893) It is reversible error to dismiss the appeal upon nonpayment of court fees in excess of the amount of such fees as allowed by statute.—Hanford v. Hagler, 49 Ill. App. 258.

[f] (Mich. 1894) The return of the justice of the peace is not conclusive that the jury fees have been paid by appellant; How. Ann. St. § 7019, making such return conclusive evidence only of the payment of the justice's fees.—Swarthout v. McKnight, 99 Mich. 347, 58 N. W. 315.

[g] (Minn. 1870) A certificate of a justice, on allowance of appeal, "Costs paid, and appeal allowed," is evidence that the appeal fee required by Gen. St. 1866, c. 65, § 104, was paid.—Rahilly v. Lane, 15 Minn. 447 (Gil. 360).

[h] (N. Y. 1824) The fact of payment to the justice need not be indorsed on the appeal bond.—Ex parte Kellogg, 3 Cow. 372.

[i] (N. Y. 1826) To entitle a party to appeal, he must pay, not only the 75 cents for making and filing the return, but the costs to the justice. Paying the 75 cents to the justice and the costs to the opposite party will not satisfy the words of the act, which are to be taken strictly against the party seeking to appeal.—Ex parte Stephens, 6 Cow. 69.

[j] (N. Y. 1830) It is no cause for quashing an appeal that the justice took less costs than he was entitled to, when a party was willing and offered to pay all that could be required of him, and in fact paid all that was demanded.—People v. Genesee Common Pleas, 4 Wend. 202.

[k] (N. Y. 1888) Where defendant, on judgment being rendered against him in justice's

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court, paid all costs that the justice said were due, the defendant being refused permission to see the taxed bill of costs, his appeal will not be dismissed because the fee due the justice for filing his return was not paid within the required time.—Mann v. Dennis, 50 Hun, 605, 3 N. Y. Supp. 95.

§ 549. Waiver of payment.

[a] (Colo. 1887) Under Gen. St. §§ 1979, 1981, requiring a party appealing from the judgment of a justice to file an appeal bond, and pay the costs of granting the appeal, the payment of such costs within the prescribed time is not a prerequisite of the right of appeal, when it is waived by the justice, by filing the transcript in the appellate court without such payment.—Carbonate Town Co. v. Ives, 10 Colo. 81, 14 Pac. 120.

[b] (N. Y. 1826) To warrant an appeal, the costs must be actually paid. The justice cannot waive payment by charging them in account against the party.—Ex parte La Farge, 6 Cow. 61.

(e) BONDS OR OTHER SECURITIES.

NECESSITY OF BOND, § 550.
PARTIES REQUIRED TO GIVE SECURITY AND APPEALS PRO FORMA PAUPERIS, § 551.
OBLIGORS IN BONDS OR SECURITY, § 552.
OBLIGEES IN BONDS OR SECURITY, § 553.
SURETIES ON BONDS OR SECURITY, § 554.
—— JUSTIFICATION OF SURETIES, § 555.
NATURE OF SECURITY REQUIRED, § 556.
EXECUTION AND FILING OF BOND OR SECURITY, § 557.
TIME FOR EXECUTION OR FILING BOND OR SECURITY, § 558.
—— NECESSITY OF TIMELY EXECUTION AND FILING AND EFFECT OF FAILURE, § 559.
—— CALCULATION AND DETERMINATION OF TIME, § 560.
—— EXCUSES FOR DELAY AND RELIEF AND EXTENSION OF TIME, § 561.
AMOUNT OF BOND OR SECURITY, § 562.
CONDITIONS OF BONDS, § 563.
—— CONDITION TO PROSECUTE APPEAL AND SATISFY JUDGMENT, § 564.
REQUISITES AND SUFFICIENCY IN GENERAL, § 565.
DESCRIPTION OF JUDGMENT, § 566.
—— RECITALS AS TO PARTIES AND COURT, § 567.
—— RECITAL OF DATE, § 568.
—— RECITAL OF AMOUNT, § 569.
APPROVAL OF BOND OR SECURITY, § 570.
—— ACTS CONSTITUTING APPROVAL AND INDORSEMENT OF APPROVAL, § 571.
—— EFFECT OF APPROVAL, § 572.
AMENDMENT AND NEW SECURITY IN GENERAL, § 573.
DEFECTS WHICH MAY BE AMENDED OR CORRECTED, § 574.
—— DEFECTS IN AMOUNT OR CONDITION OF BOND, § 575.
—— OMISSION TO GIVE BOND AND DEFECTS RELATING TO PARTIES OR SURETIES, § 576.
PROCEDURE FOR AMENDMENT OR CORRECTION OF BOND, § 577.
WAIVER OF DEFECTS IN BOND AND DELAY IN FILING, § 578.

Bond for stay of proceedings, see post, § 606.
Defective bond as ground for refusal to send up transcript on appeal, see post, § 631.
Entering recognizance as prayer for appeal, see ante, § 521.
Insufficiency of bond as ground for refusing an appeal, see ante, § 522.
Liabilities on bonds or other securities, see post, §§ 735–750.
Liability of justice for refusal to take security required on appeal, see ante, § 41.
Presumptions as to appeal bond, see post, § 710.
Refusal to enter bail as refusal to allow appeal, see ante, § 522.
Effect of appeal bond as superseding replevin bond, see "Replevin," VII.

§ 550. Necessity of bond.

Effect of bond as giving appellate court jurisdiction, see post, § 605.
Time for dismissal for failure to give proper bond, see post, § 643.

[a] (Cal. 1880) The word, "or," in Civ. Code, § 978, joining the clauses referring respectively to the undertaking for costs on appeal from a justice's court and an undertaking for a stay of proceedings, is to be read "and," and in all cases the former undertaking is essential.—McConky v. Alameda County Superior Court, 56 Cal. 83.

[b] (Ga. 1884) One who brings two suits in a justice's court, one suit against two defendants, and the other against the same two and a third person, must, on appeal to a jury in the justice's court, give an appeal bond in each case.—Sparks v. Hancock, 73 Ga. 143.

[c] (Ga. 1894) Where no bond on appeal from a justice's judgment was filed, an execution on the judgment, issued by the justice after the attempted appeal, was legal.—Brown v. Griffith, 94 Ga. 453, 20 S. E. 383; McGarrity v. Same, Id.

[d] (Ill. 1879) On trial of the right of property, an appeal taken without giving bond within the prescribed five days gives the superior court no jurisdiction.—Rozier v. Williams, 92 Ill. 187.

[e] (Ky. 1820) On appeal from the judgment of a justice, an appeal bond and security is indispensable.—Bledsoe v. Cassady, 9 Ky. (2 A. K. Marsh.) 459.

[f] (Me. 1854) An appeal from the judgment of a justice of the peace is void without a recognizance by the appellant. Dolloff v. Hartwell, 38 Me. 54.

[g] (Me. 1859) The appellant should recognize to prosecute his appeal from the decision of the justice, although the right to sureties be waived by the opposite party.—Bennett v. Green, 46 Me. 499.

[h] (Me. 1884) The provision of the statute declaring that before an appeal from the decision of a trial justice is allowed "the appellant shall recognize, with sufficient surety or sureties to the adverse party, if required by him," means that no recognizance, with or without sureties, is necessary, unless required by the adverse party.—Colby v. Sawyer, 76 Me. 545; overruling Dolloff v. Hartwell (1854) 38 Me. 54.

[i] (Mass. 1865) An appellant from the judgment of a justice of the peace or police court in a civil action is not obliged to enter into any recognizance for the prosecution of his appeal and the payment of costs, under Gen. St. c. 120, § 26, unless required by the adverse party.—McKeag v. O'Donnell, 92 Mass. (10 Allen) 543.

[j, k] (Miss. 1880) An appeal from a judgment of a justice of the peace will be dismissed where no bond is given as required by the Code.—Mann v. Lowry, 58 Miss. 73.

[l] (N. Y. 1869) Code Civ. Proc. § 355, requiring security on appeal from justice court

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only in cases where, on prevailing, appellant would be entitled to a new trial, does not require security in a case where appellant would be entitled to a new trial, but does not ask for one.—Lake v. Kels, 11 Abb. Prac. (N. S.) 37.

[m] (Pa. 1817) It is good cause for dismissing an appeal that it does not appear from the record that a recognizance was entered into by the appellant, according to the act.—Guilky v. Gillingham, 3 Serg. & R. 93.

[n] (Pa. 1873) Where, on an appeal from a justice of the peace, no affidavit was made or recognizance entered into, the appeal will be stricken.—Columbia v. Patton, 5 Lanc. Bar, No. 2, p. 2.

[o] (Utah, 1883) An appeal from a justice cannot be dismissed for noncompliance with a rule of court or a custom of the clerk to require a deposit as security for his costs, where no statute authorizes such rule or custom.—Wescott v. Eccles, 3 Utah, 258, 2 Pac. 525.

[p] (Vt. 1839) Where a party has had notice of a suit before a justice, appears, consents to a judgment, and appeals, but neglects to enter bail, in consequence of which execution issues, he cannot be relieved, on petition, under the statute of 1829.—Finney v. Hill, 11 Vt. 233.

[q] (Wis. 1854) A recognizance is a necessary prerequisite to an appeal from the judgment of a justice of the peace.—Pelton v. Town of Blooming Grove, 3 Wis. 310.

§ 551. Parties required to give security and appeals pro forma pauperis.

[a] (Ala. 1842) The statute (Dig. p. 260, § 9) requiring the appellant from a judgment of a justice of the peace to give bond, applies as well to the plaintiff as to the defendant.—Quinn v. Adair, 4 Ala. 315.

[b] (Miss. 1879) A litigant who has commenced a suit in forma pauperis in a justice's court cannot, under Code 1871, § 1332, appeal without a bond from an adverse decision.—Woods v. Davidson, 57 Miss. 206.

[c, d] (Neb. 1895) When a school district appeals to the district court from a judgment rendered by a justice of the peace, it must file an appeal bond, as required by Code Civ. Proc. § 1007.—Cass County School Dist. No. 6 v. Traver, 43 Neb. 524, 61 N. W. 720.

[e] (Ohio, 1885) Under Rev. St. § 6408, declaring that when a party in a fiduciary capacity, who has given bond for the faithful performance of his duties, appeals, in the interest of the trust, from a judgment or order of any court, he may do so, without giving bond, by giving written notice to the court of his intention to appeal within the time allowed for giving bond, an assignee who has given bond as such need not give bond on appeal from a justice of the peace.—Terry Clock Co. v. Mussey (Com. Pl.) 13 Wkly. Law Bul. 568.

[f] (Ohio, 1894) An appeal from the judgment of a justice of the peace, by a party described in the action as the administrator of an estate, is not perfected without an undertaking therefor, as required by Rev. St. § 6584, unless appellant is a party to the judgment in his fiduciary capacity, and the appeal is in the interest of the trust.—Thomas v. Moore, 52 Ohio St. 200, 39 N. E. 803.

[g] (Pa. 1823) Under the act of March 22, 1817, a corporation, on an appeal, must give bail for the debt, interest, and costs, in all cases where, by the previously existing laws, private persons were bound to give special bail or surety in the nature of special bail.—Germantown & P. Turnpike Co. v. Naglee, 9 Serg. & R. 227.

[h] (Pa. 1844) Under Act July 12, 1842, § 33, women are required to give security in order to obtain an appeal from the judgment of an alderman or justice of the peace.—Johnson v. Fackney, 1 Clark, 501.

[i] (Pa. 1882) Notice must be given to the opposite party for leave to appeal in forma pauperis.—Jessup v. Coniff, 4 Law T. (N. S.) 122.

[j] (Pa. 1882) Where an appeal from the judgment of a justice has been taken by an administrator in his representative capacity, no security for the appeal is required, as his administration bond is sufficient.—Koontz's Adm'r v. Howsare, 100 Pa. 506.

[k] (Pa. 1895) One appealing in forma pauperis is not relieved from the necessity of giving bail, as required by Act March 20, 1845, and by Act June 24, 1885 (P. L. 159), providing that any party to a suit before a justice of the peace shall have the right to appeal, without payment of costs, on filing with the justice an affidavit that he is unable to pay them on account of poverty.—Davison v. Good Will Cloak & Suit Co. (Com. Pl.) 16 Pa. Co. Ct. R. 27, 4 Pa. Dist. R. 237.

[l] (Pa. 1895) On failure of a party, who has filed his affidavit of inability to pay costs, appealing from a judgment of a justice of the peace, to give bail, as required by Act March 20, 1845, the appeal will be dismissed on motion.—Iams v. Hall (Com. Pl.) 4 Pa. Dist. R. 259.

[m] (Tenn. 1873) A next friend cannot prosecute an appeal from the judgment of a justice of the peace upon the pauper's oath.—Brooks v. Workman, 57 Tenn. (10 Heisk.) 430.

[n] (Tex. 1871) The statute of 1866, providing for appeals from justices' courts, does not repeal the statute (Pasch. Dig. art. 1503) by which executors are exonerated from giving bonds for costs on appeals.—Jones v. Hughes, 33 Tex. 598.

[o] (Tex. 1881) An affidavit in lieu of an appeal bond from a justice's court, stating that appellant, "by reason of his poverty, is unable to give the appeal bond in this case," does not comply with the law, and the appeal should be dismissed.—Young v. Bickley, 1 White & W. Civ. Cas. Ct. App. § 1073.

[p] (Tex. 1885) An affidavit given in lieu of an appeal bond, in an appeal from a justice to a county court, is not sufficient when made before the justice after the adjournment of the term, but not certified by the county judge to the effect that the facts therein contained have been proved before him.—Isbell v. Everheart, 2 Willson, Civ. Cas. Ct. App. § 658.

[q] (Tex. 1888) An affidavit in forma pauperis, in lieu of security for costs on appeal, which was made before the trial justice at a regular session of his court, at the same term at which judgment was rendered, and describing the judgment appealed from, is sufficient, though it failed to show that affiant was unable to pay "any part of the costs."—Duffey v. Cagle, 3 Willson, Civ. Cas. Ct. App. § 419.

[r] (Tex. 1890) On appeal from justice's court to the county court without bond, an affidavit in forma pauperis that the appellants "are unable to pay the costs," is insufficient, under Rev. St. 1879, art. 1401, requiring the appellant to make oath that he "is unable to pay the costs of appeal, or give security therefor."—Golightly v. Irvine (App.) 15 S. W. 48.

[s] (Tex. 1894) On appeal from a justice by a person unable to give bond, it is not necessary for the county judge, where no contest is made as to appellant's ability to give bond,

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to state the facts in his certificate upon which he bases it.—Cox v. Wright, 27 S. W. 294.

[t] (Wis. 1871) The appellant in replevin from a justice of the peace may perfect his appeal, under Rev. St. c. 120, § 205, without giving the undertaking described in Laws 1859, c. 112, § 4.—Haentze v. Howe, 28 Wis. 293.

§ 552. Obligors in bonds or security.

[a] It is only necessary for the surety, and not for the party, to sign an appeal.
—(Ga. 1900) Shirley v. Price, 30 Ga. 328;
(Tex. 1882) Trial v. Lepori, 1 White & W. Civ. Cas. Ct. App. § 1274.

[b] (Ill. 1850) Where an attorney, having no authority under seal from his client to execute a sealed instrument, did execute an appeal bond from the decision of a justice of the peace, which was afterwards ratified by his client by the execution of a power of attorney under seal, it was *held* that, under the act concerning justices of the peace and constables (Rev. St. p. 325), whenever a party intends to appeal and make such an attempt at the execution of a bond that the officer authorized to approve it accepts the bond, it is not designed that the appellant should be prejudiced by any informality or deficiency in the bond.—Bragg v. Fessenden, 11 Ill. (1 Peck) 544.

[c] (Ill. 1857) Where the overseer of highways in township organizations makes complaint to the justice on account of an alleged neglect to perform road labor, and an appeal is taken by the town from a judgment therein, the appeal bond should be executed by the town supervisor in the name of the town.—Gardner v. Town of Chambersburgh, 19 Ill. (9 Peck) 99.

[d] (Mich. 1848) Where a statute provides that, "if any party shall appeal from a judgment rendered by a justice," such party, his agent, or attorney "shall enter into a recognizance," it was *held* that the appeal might be taken, and the recognizance entered into, by the person for whose use the suit was brought.—Wilson v. Davis, 1 Mich. (Man.) 156.

[e] (Mich. 1890) How. Ann. St. § 7000, provides that the party appealing from a justice of the peace shall give a bond to the adverse party, which shall be executed by appellant, with one or more sureties, or by two or more sufficient sureties without the appellant. Judgment was rendered against two defendants. One made affidavit of appeal, stating therein that it was made on behalf of both defendants, and that both appealed. The bond was signed only by the one making the affidavit, as principal, and by one surety. *Held*, that the judgment against the other defendant was unaffected thereby, and that he was not entitled to any notice of trial in the circuit court.—Jopp v. Kegel, 83 Mich. 50, 46 N. W. 1027.

[f] (Mo. 1823) Under Geyer's Dig. p. 390, providing that a party appealing from a justice of the peace shall give a recognizance subscribed by himself and the surety, an appeal will be dismissed where the recognizance was not signed by the appellant, as well as the surety.—Nichols v. Circuit Ct. of St. Louis Co., 1 Mo. 357.

[g] (Mo. 1826) Where an appeal from a justice is prayed for by one of two defendants, but recognizance is entered into by both, the appeal is well taken.—Sargent v. Sharp, 1 Mo. 601.

[h] (N. Y.) Executing an appeal bond by surety alone is not sufficient. It must be executed by the party, or one of the parties, appealing.—(1827) In re Brooks, 7 Cow. 428. CONTRA, see (1825) People v. Judges of Dutchess County, 5 Cow. 34.

[i] (Ohio, 1885) Where the evidence shows that a case was appealed at the instance of defendant, it is sufficient, though the sureties only signed the bond.—Geller v. Puchta, 1 O. C. D. 18.

[j] (Or. 1896) It is not necessary to its validity that the appellant himself should sign the undertaking required by section 70 of the Justices' Code, declaring that, on an appeal from a justice's court, "the undertaking of the appellant must be given with one or more sureties."—Drouilhat v. Rottner, 13 Or. 493, 11 Pac. 221.

[k] (Pa. 1809) Under the act of 1804, which required that an appellant from a justice's judgment should be "bound with surety" in the nature of special bail, it was *held* by the common pleas that the defendant himself must enter into the recognizance with his surety.—Newton v. Haggerman, 1 Browne, 94.

[l] (Pa. 1813) Under Act March 20, 1810, directing that defendant who appeals from the judgment of a justice shall be bound with surety in the nature of a special bail, defendant need not join in the recognizance.—Cavence v. Butler, 6 Bin. 52.

[m] (R. I. 1887) Where the attorney of record has no authority under seal so to do, a bond executed by him in behalf of his client on appeal from a justice court is void; and hence the appeal will be dismissed.—Andrews v. Beane, 15 R. I. 451, 8 Atl. 540.

[n] (R. I. 1887) Pub. Laws, c. 582, § 2, is unconstitutional, in so far as it attempts to make valid bonds theretofore signed in behalf of their clients by attorneys of record in appeals from justices' courts.—Andrews v. Beane, 15 R. I. 451, 8 Atl. 540.

[o] (Tex. 1882) Where plaintiff's affidavit, for a writ of sequestration against the firm of M. & Co., stated that M. was a member of the firm, but that the other partners were unknown, it is proper for M., on an appeal from a judgment in a justice's court for plaintiff, to sign the appeal bond in his individual name.—Munzerheimer v. Merrill, 1 White & W. Civ. Cas. Ct. App. § 578.

[p] (Tex. 1894) Though, in a bond on appeal from a joint judgment in a justice's court against two persons, one of them fails to bind himself to pay such judgment as may be rendered on appeal against the two jointly, the bond, as to the other, is good.—Missouri, K. & T. Ry. Co. v. Mosty, 8 Tex. Civ. App. 330, 27 S. W. 1057.

[q] (Tex. 1894) An appeal bond filed in a justice's court, executed by one of several against whom judgment is jointly given, is sufficient.—Ayers v. Smith (Civ. App.) 28 S. W. 835; following Missouri, K. & T. Ry. Co. v. Mosty (Civ. App.) 27 S. W. 1057.

§ 553. Obligees in bonds or security.

[a] (Conn. 1856) Rev. St. p. 822, § 10, provides that a person may appeal from a judgment rendered against him by a justice to the county court, provided on appeal he shall give a bond of recognizance to the treasurer of the county. St. 1855, c. 26, § 17, abolished the county court and transfers its jurisdiction to the superior court. *Held*, that the bond on appeal to the superior court should be made to the county treasurer.—Calef v. Phelps, 25 Conn. 114.

[b] (Tex. 1881) Where a firm is the appellee, an appeal bond from a justice's court, made payable to the firm in its firm name, without naming the members, is sufficient.—Sullivan v. McFarland, 1 White & W. Civ. Cas. Ct. App. § 1198.

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[c] (Tex. 1893) Where a judgment rendered by a justice of the peace is transferred by the judgment plaintiff to third persons before an appeal is taken, an appeal bond afterwards made to such plaintiff, and not to the transferees, is sufficient.—Wells, Fargo Exp. Co. v. Holliday (Civ. App.) 23 S. W. 91.

[d] (Tex. 1894) Where the judgment in a justice's court is for different amounts against each of three defendants, and provides that the amounts collected on the judgments against two shall be applied in satisfaction of the judgment against the third, the bond on appeal from the two former judgments should run in favor of the third defendant also.—Cockrill v. Eason (Civ. App.) 26 S. W. 464.

[e] (Tex. 1895) Appellant's failure, on appeal from a justice court, to make the appeal bond payable to all the other parties adversely interested, deprives the appellate court of jurisdiction.—Packenius v. Petri (Civ. App.) 29 S. W. 1095.

[f] (Tex. 1895) One of several joint judgment defendants, in an action of debt in justice court, may, when such defendants are not adversely interested, appeal without making his codefendants obligees in his appeal bond.—Martin v. Lapowski, 11 Tex. Civ. App. 690, 33 S. W. 300.

[g] (Tex. 1896) In an action in a justice's court against F. to recover a diamond, plaintiff obtained a writ of sequestration, and had it levied on a diamond in possession of S., who claimed it, and replevied it. S. was made a defendant, cited and served as such, and judgment was obtained against him for the possession and value of the diamond claimed by him. F. disclaimed the diamond sued for, and judgment was rendered in his favor. *Held* that, the interests of F. and S. being adverse, on appeal to the county court by S., a bond payable to plaintiff only gave such court no jurisdiction.—Friedman v. Dockery (Civ. App.) 34 S. W. 766.

[h] (Tex. 1896) A bond on appeal from a justice of the peace is required by statute to be payable to the appellee, and one made payable to the appellees "or their certain attorneys" is fatally defective.—Nones v. McGregor (Civ. App.) 35 S. W. 1083.

§ 554. Sureties on bonds or security.

Substitution of competent surety for one declared incompetent, see post, § 576.

[a] (Ga. 1894) As the surety on a replevin bond given by defendant in a distress warrant is liable for the condemnation money, he cannot become surety on an appeal taken by defendant to the superior court from the judgment rendered against him in the justice's court.—Osborne v. Hughes, 93 Ga. 445, 21 S. E. 65.

[b] (Ind. 1878) A party, against whom a judgment had been rendered by a justice of the peace, tendered to the justice a bond executed by him without any surety, and demanded an appeal to the circuit court. *Held*, in an action by such judgment defendant against such justice and the judgment plaintiff, for a writ of mandate to compel the granting of such appeal, that such bond was insufficient.—Indianapolis, P. & C. R. Co. v. Beam, 63 Ind. 490.

[c] (Ind. 1878) Where the rules of a court prohibit attorneys from becoming sureties on appeal bonds in cases appealed from justices of the peace, attorneys infringing such rule are liable on the bond; and the bond is sufficient, though they are probably liable also for contempt.—Ohio & M. Ry. Co. v. Hardy, 64 Ind. 454.

[d] (N. H.) The want of two sureties on a recognizance entered into upon an appeal from the judgment of a justice of the peace, in a civil cause, is merely an irregularity in the proceedings, and not a jurisdictional exception.—(1855) Farnam v. Davis, 32 N. H. 302. CONTRA, see (1849) Gilman v. Bartlett, 20 N. H. 168.

[e] (N. Y. 1879) The ordinary practice is to require two sureties on appeal, even if the justice to whom the undertaking is submitted may, in his discretion, require but one.—Delamater v. Byrne, 57 How. Prac. 170.

[f] (N. Y. 1880) Gen. Prac. Rule 5 declares that an attorney shall not be surety on any bond required by law or rule, or any order of a court, or judge, in any action or proceeding. *Held* not to apply to justice courts; and hence an appeal bond from a justice court was valid, though the surety was an attorney.—Lawler v. Van Aernam, 22 Alb. Law J. 156.

[g] (Okl. 1895) The requirement of St. 1890, § 5255, that an appeal from a justice's court shall not be effectual unless an undertaking with two or more sureties be filed, is not complied with by filing a bond containing but one surety.—Brickner v. Sporleder, 3 Okl. 561, 41 Pac. 726.

[h] (Pa. 1880) A rule of court preventing an attorney at law from becoming bail in any action pending in the common pleas does not prevent him from taking bail on appeal from a judgment of a justice.—Ober v. Koser, 12 Lanc. Bar, 104.

[i] (S. D. 1892) On appeal from a justice's court, after it has been established that one of the sureties on the appeal bond was incompetent, because of his being an attorney, the appellate court commits reversible error if it proceeds to try the action and enter judgment without a new bond.—Towle v. Bradley, 2 S. D. 472, 50 N. W. 1057.

[j] (Tex. 1882) Where a bond on appeal from a justice does not have two or more sureties, as required by Rev. St. art. 1639, it is insufficient.—Bradway v. Clipper, 1 White & W. Civ. Cas. Ct. App. § 306.

[k] (Tex. 1883) The fact that one of two sureties on an appeal bond from a justice's court had been a surety on the claim bond, and a judgment of such court had been rendered against him, does not preclude him from being considered as a surety on the appeal bond.—Heidenheimer v. Bledsoe, 1 White & W. Civ. Cas. Ct. App. § 317.

[l] (Tex. 1884) Where a joint action was brought against two defendants, and judgment was recovered as to one only, who appealed, the other was a proper person to act as surety on the appeal bond.—Baumbach v. Cook, 2 Willson, Civ. Cas. Ct. App. § 100.

[m] (Tex. 1885) Sureties on a sequestration bond in justice court who do not join in plaintiff's appeal from the judgment are competent as sureties on the appeal bond.—Word v. Reither, 2 Willson, Civ. Cas. Ct. App. § 778.

[n] (Tex. 1890) On appeal from a judgment in a justice's court against the defendant, and the sureties on a bond given by him on replevying property seized on attachment issued in the cause, the sureties on the replevin bond are competent as sureties on the appeal bond.—Witten v. Caspary (App.) 15 S. W. 47.

[nn] (Tex. 1890) The surety on the appeal bond on an appeal from a justice need not be a resident of the county where the judgment was rendered.—Fuerman v. Ruhle (App.) 16 S. W. 536.

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[o] (Tex. 1895) Appeal by the principal in a claim bond from the judgment in the claim proceeding does not render the surety on such bond a party to the appeal, nor incompetent as a surety on the appeal bond.—Peoples v. Rodgers, 11 Tex. Civ. App. 447, 32 S. W. 798.

[p] (Wyo. 1879) The Justices' Code, requiring the surety on an appeal bond from a justice of the peace to be a resident property holder within the county, is complied with when the record shows that the undertaking was tendered with proper affidavit, and he received it and allowed the appeal.—Jenkins v. Emery, 2 Wyo. 58.

§ 555. —— Justification of sureties.

[a] (Cal. 1890) That on appeal from a justice court the undertaking was filed more than five days before the notice of appeal was served does not deprive appellee of his opportunity to except to the sureties, since such service was notice that the undertaking had been or would be filed within the statutory time.—Dutertre v. San Francisco Superior Court, 84 Cal. 535, 24 Pac. 284.

[b] (Cal. 1890) The sureties in a bond given on appeal from a justice of the peace having failed to justify in five days after exception to their sufficiency, the superior court is without jurisdiction to extend the time in which they may justify or new sureties be given; Code, Civ. Proc. § 978, providing that unless they or other sureties justify in five days "the appeal must be regarded as if no such undertaking had been given."—McCracken v. Los Angeles County Superior Court, 86 Cal. 74, 24 Pac. 845.

[c] (Dak. 1888) Justices' Code, § 93, provides that an appeal from a justice to a district court is not effectual, unless an undertaking be filed, and that the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and, unless the sureties justify before the justice, on notice to the adverse party, the appeal is void. *Held*, that a justification filed with the appeal bond, and a certificate of the justice approving the sureties, constituted a sufficient compliance with the statute to give the district court jurisdiction; and failure of the sureties to again justify, after notice by the adverse party, was immaterial.—Judson v. Bulen, 6 Dak. 70, 50 N. W. 484.

[d] (Iowa, 1867) Under Rev. St. § 4125, a justice may require a person offered as surety to justify that he is worth the amount required by law over and above his liabilities, and reject him if he refuses.—Lane v. Goldsmith, 23 Iowa, 240.

[e] (Kan. 1887) The failure of the sureties upon an appeal bond to make affidavit of their qualifications, where it does not appear that the sureties are insufficient, is not a ground for a dismissal of the appeal.—Smith v. Nescatunga Town Co., 36 Kan. 758, 14 Pac. 246.

[f] (Kan. 1892) Where an appeal bond is tendered to a justice of the peace without any justification by the sureties thereon, and the justice objects to their sufficiency, appellant should satisfy him by affidavit or other proof of their qualifications.—Chicago, K. & N. Ry Co. v. Marshall, 47 Kan. 614, 28 Pac. 701.

[g] (N. Y. 1884) Code Civ. Proc. § 3050, requires an undertaking on appeal from a justice to be approved by the justice who rendered the judgment, or by a judge of the appellate court, and also provides that section 1335 shall apply to such an undertaking. The latter section provides that on failure of sureties to justify on notice within a certain time the effect is the same as if the undertaking had not been given. *Held*, that failure of sureties, on appeal from a justice, though approved by the justice or a judge of the appellate court, to justify after notice, renders the undertaking a nullity.—Ross v. Markham, 5 Civ. Proc. R. 81.

[h] (Or. 1886) An affidavit of a surety on an undertaking for appeal from a justice's court, as follows: "——, being first duly sworn, say that I am a resident householder under the state of Oregon, and am worth the sum of ——. P. M. Coffin,"—is not in compliance with the law, and the appeal will be dismissed.—Starks v. Stafford, 14 Or. 317, 12 Pac. 670.

[i] (Pa. 1831) Where bail for an appeal is entered within 20 days, the justice should allow time for exception and justification, and, if necessary, for entering other bail.—Smith v. Steel, 1 Ashm. 80.

[j] (Pa. 1831) Where bail for an appeal is entered within 20 days, the justice retains the right to inquire and decide on the sufficiency of bail, while it is left to the election of appellant to prosecute the appeal or not, and before it is filed in the common pleas.—Smith v. Steel, 1 Ashm. 80.

[k] (Pa. 1847) Where an appeal is taken from the judgment of a justice of the peace, and the bail excepted to, the place to justify bail is before the justice; and if, after the bail has been refused by him, the appellant enter the appeal, it will, on application of the appellee, be stricken off.—Cummings v. Forsman, 6 Pa. (6 Barr) 194.

[l] (S. D. 1894) An appeal from a justice's court will be dismissed if the sureties in the undertaking are excepted to, as provided in Comp. Laws, § 6133, and they do not justify as required.—Barber v. Johnson, 4 S. D. 528, 57 N. W. 225.

[m] (S. D. 1894) The affidavits of the sureties as to their qualifications, appended to the undertaking when executed, do not constitute such justification as is contemplated by said section.—Barber v. Johnson, 4 S. D. 528, 57 N. W. 225.

[n] (Utah, 1892) An appeal from a commissioner's court is governed by the same rules that regulate appeals from justices' courts, and, where appellant's sureties failed to justify until three days after notice excepting thereto was served on him by the adverse party, the appeal was properly dismissed, under 2 Comp. Laws 1888, § 3660, providing that on an appeal from a justice's court the appellant must, on exceptance to the sufficiency of his sureties, have them justify within two days thereafter.—Pratt v. Jarvis, 8 Utah, 5, 28 Pac. 869.

[o] (Wis. 1853) No appeal from a justice can be entertained by the county court when the sureties upon the appellant's recognizance neither justify their responsibility on oath within 10 days after the rendition of judgment nor are acknowledged to be sufficient by the appellee or his attorney.—Clark v. Bowers, 2 Wis. 123.

§ 556. Nature of security required.

[a] (Iowa, 1849) Rev. St. p. 333, § 34, allowing security for the prosecution of appeals to be given by recognizance, applies to appeals in proceedings before a justice against boats and vessels.—The Lake of the Woods v. Shaw, 2 G. Greene, 91.

[b] (N. H. 1846) When the statute requires a bond on appeal from a justice of the peace, a recognizance will not be accepted as a substitute.—Nurse v. Porter, 18 N. H. 57.

[c] (N. C. 1889) Code, §§ 883, 884, provide that on appeal from a justice's court the appel-

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lant may give an undertaking before the justice, with one or more sureties, to the effect that if judgment be rendered against the appellant the sureties will pay the amount with costs. Section 117, being part of the chapter relating to clerks of the superior court, provides that any person desiring to commence or defend any civil action or special proceeding may execute a mortgage on real estate of the value of the bond or undertaking required, and with similar conditions, in lieu thereof. *Held*, that this section has no application to justices' courts, but there is nothing to prevent a respondent from accepting a chattel mortgage in lieu of the undertaking, if he pleases.—Comron v. Standland, 103 N. C. 207, 9 S. E. 317, 14 Am. St. Rep. 797.

[d] (Ohio, 1883) On appeal from a justice of the peace, appellant deposited a check with the justice, who attached it to the ordinary form of undertaking, regularly filled out, except the signature, and certified that the check was received as a bond and was approved. *Held*, that appellant had not entered "into an undertaking," as required by the statute; and hence the appellate court acquired no jurisdiction.—Allen v. Walnut Hills, M. & P. Turnpike Co., 12 Wkly. Law Bul. 168.

[e] (Pa. 1894) The depositing of money with a justice is not a compliance with the act regulating appeals.—Steam Heat & Power Co. v. Hutchinson (Com. Pl.) 14 Pa. Co. Ct. R. 491.

§ 557. Execution and filing of bond or security.

Compelling to make return of recognizance on appeal, see post, § 631.

Effect of filing appeal bond as giving appellate court jurisdiction, see post, § 605.

Filing an appeal bond as appearance in appellate court, see post, § 595.

—— *of appeal bond as notice of appeal, see* post, § 589.

[a] (Ill. 1838) Where the statute requires that an appeal bond shall be entered into in the clerk's office, and the sureties approved by him, it is sufficient if the bond prepared by the clerk be duly lodged and filed in his office, although not executed therein.—Waldo v. Averett, 2 Ill. (1 Scam.) 487.

[b] (Iowa, 1859) An appeal from a justice to the district court should not be dismissed, for want of a proper bond, where the attesting and approving thereof is in substantial, though not in strict, conformity with the mode prescribed by statute.—Moore v. Manser, 9 Iowa, 47.

[c] (Me. 1857) The recognizance taken before a magistrate to prosecute an appeal must be returned to the court to which the appeal is taken.—Inhabitants of Stetson v. Inhabitants of Corinna, 44 Me. 29.

[d] (Me. 1857) The original recognizance, and not a copy, should be returned to the appellate court.—Inhabitants of Stetson v. Inhabitants of Corinna, 44 Me. 29.

[e] (Mich. 1849) The recognizance for an appeal under the act of 1845 must be taken before the justice by whom the cause was tried.—Austin v. Strong, 1 Mich. (Man.) 259.

[f] (Mo. 1826) Where a justice signs his name to an appeal bond in his character of justice, it is not necessary that the word "Teste" or "Witness" should be prefixed.—Sargent v. Sharp, 1 Mo. 601.

[g] (Mo. 1896) Rev. St. 1855, p. 972, § 4, requiring that a recognizance before a justice must be signed by the parties and approved by the justice, does not require the presence of the appellant before the justice.—Crist v. Smith, 66 Mo. App. 398, 2 Mo. App. Rep'r, 1354.

[h] (Neb. 1888) The sureties on an appeal bond from a justice need not sign it in his presence. If he requires proof of the genuineness of the signatures or sufficiency of the sureties, he should make it known when the bond is received by him or soon thereafter; otherwise, the objection will be waived.—State v. Clark, 24 Neb. 318, 38 N. W. 832.

[i] (N. H. 1846) When the statute requires a bond to be given by a person appealing from a decision of a justice of the peace, it is not the duty of the justice to draw up the bond.—Nurse v. Porter, 18 N. H. 57.

[j] (N. H. 1854) When an appeal is taken from the judgment of a justice of the peace, the proper practice is for the justice to go through with the usual form in taking the recognizance of the principal and sureties.—Ballou v. Smith, 29 N. H. (9 Fost.) 530.

[k] (N. J. 1833) If the affidavit is indorsed on the appeal bond, and sworn to before the justice who tried the cause, and on the same day on which the appeal bond is filed and the appeal demanded, it is sufficient evidence of the seasonable filing of the bond.—Carman v. Smick, 14 N. J. Law (2 J. S. Green) 117.

[l] (Ohio, 1862) The filing of the original undertaking for an appeal from the decision of a justice with the clerk by the appellant, though irregular, is a substantial compliance with the statute, which requires a certified copy of such undertaking to be so filed.—Job v. Harlan, 13 Ohio St. 485.

[m] (Ohio, 1882) An appeal from a justice's court will not be dismissed for want of a seal opposite the party's signature to the undertaking for appeal.—Fisher v. Trevor, 8 Ohio Dec. 408, 7 Wkly. Law Bul. 322.

[n] (Tex. 1880) An appeal bond from a justice's court, signed by marks of obligors unable to write, is valid, though there were no subscribing witnesses.—Boehl v. Hecker, 1 White & W. Civ. Cas. Ct. App. § 761.

[o] (Tex. 1880) The mere recitation in the body of an appeal bond of the names of sureties is not sufficient evidence that the persons so designated are bound as sureties.—Pevito v. Rodgers, 52 Tex. 581.

[p] (Tex. 1885) The failure of a justice to place a file mark on the appeal bond does not affect its validity, nor prejudice the rights of the appellant.—Whitman Agricultural Co. v. Voss, 2 Willson, Civ. Cas. Ct. App. § 552.

[q] (Tex. 1885) Where the bond on appeal from a justice is properly approved, the filing of it will be presumed.—Whitman Agricultural Co. v. Voss, 2 Willson, Civ. Cas. Ct. App. § 551.

§ 558. Time for execution or filing bond or security.

Time for amendment of appeal bond, see post, § 577.

—— *for approval of appeal bond, see* post, §§ 570, 571.

—— *for justification by sureties on appeal bond, see* ante, § 555.

[a] (U. S. 1824) Where a bond on appeal from a justice of the peace was not entered on the day of trial before him, the appellant could give bond within 10 days, under Geyer's Dig. Ark. p. 390.—Billingsley v. Bell, Fed. Cas. No. 18,237 [Hemp. 24].

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[b] (Ala. 1850) If an appeal be taken from the judgment of a justice of the peace within five days after it is rendered, it cannot be dismissed because no bond has been executed, if the appellant is ready to give the bond when the motion to dismiss is made.—Henderson v. Plumb, 18 Ala. 74.

[c] (Miss. 1888) The fact that a bond on appeal from a justice is executed and approved before rendition of the judgment appealed from does not invalidate the bond, and hence the appeal will not be dismissed.—James v. Woods, 65 Miss. 528, 5 South. 106.

[d] (N. C. 1827) An appeal from a justice, granted on security given two days after the judgment, will not be dismissed, though no entry appears that time was given at the trial for the appellant to find sureties, and though the appeal was allowed without affidavits.—Lamon v. Gilchrist, 12 N. C. 176.

[e] (Or. 1886) An undertaking, prepared and signed, to be used in perfecting an appeal from a justice's court, is valid where it is not prepared until after judgment is rendered, and not filed until the notice of appeal is filed, though prepared before such notice is served, and hence the appeal will not be dismissed.—Byers v. Cook, 13 Or. 297, 10 Pac. 417.

[f] (Pa. 1835) On an appeal from the decision of the regulators of the district of Southwark, made to the court of common pleas, it is not necessary, under the provision of the third section of Act April 15, 1782, that the security for costs should be given at the time of filing the appeal; but it must be given and approved before the venire can be issued to the sheriff to summon a jury for the trial of the cause.—Perot v. Packer, 2 Ashm. 155.

[g] (Pa. 1873) Bail in an appeal from a judgment of a justice of the peace must be perfected within 20 days after rendition of the judgment by the justice.—Sounders v. Pottelger, 1 Leg. Chron. 88.

[h] (Pa.) Where an appeal has been taken from a judgment of a justice of the peace, security must be given within the 20 days allowed by law in which to appeal.—(1873) Singerfield v. George, 30 Leg. Int. 321; (1881) Beerbower v. Furry, 1 Chest. Co. Rep. 369.

[i] (Tenn. 1871) Where an appeal is prayed and granted from the judgment of a justice of the peace within the time prescribed by law, the mere fact that the appeal bond was executed afterwards, if accepted and filed by the justice, will not vitiate the appeal.—McCarver v. Jenkins, 49 Tenn. (2 Heisk.) 629.

[j] (Vt. 1838) An appeal from a justice of the peace must be entered within two hours, and bail for the prosecution of the appeal must be actually entered within that time. The entering of bail is necessary to perfect the appeal.—Webb v. Hopkinson, 10 Vt. 544.

§ 559. —— Necessity of timely execution and filing and effect of failure.

[a] (Cal. 1885) Where, under Code Civ. Proc. § 978, money has been deposited in lieu of an undertaking on appeal from a justice court, the appellant cannot withdraw it, and file an undertaking, after the statutory limitation of time for filing undertakings has expired. He thus abandons his appeal.—Mullen v. Hunt, 67 Cal. 69, 7 Pac. 121.

[b] (Cal. 1891) Under Code Civ. Proc. §§ 974, 978, the undertaking on appeal from a justice of the peace must be filed within 30 days from the rendition of judgment in order to give jurisdiction, and, where it is not filed in time, the judgment, on appeal, of the municipal court of appeals of San Francisco, to which it was transferred from the county court, is void.—McKeen v. Naughton, 88 Cal. 462, 26 Pac. 354.

[c] (Ga. 1894) An appeal from a justice's court to the superior court is void if the return thereto is transmitted before a bond is given or an affidavit in forma pauperis is filed.—Brown v. Griffith, 94 Ga. 453, 20 S. E. 383; McGarrity v. Same, Id.

[d] (Ill. 1841) A failure on the part of a justice of the peace to file an appeal bond, in 20 days from the taking of the appeal, in the office of the clerk of the circuit court, defeats the appeal.—Campbell v. Quinlin, 4 Ill. (3 Scam.) 288.

[e] (Ind. 1847) Under Rev. St. 1843, p. 189, authorizing appeals from a judgment of a justice to the circuit court within 30 days thereafter, and requiring the justice to cause the bonds filed with him to be filed in the clerk's office to which such appeals are taken, where an appeal from a justice in Franklin county is by mistake taken to the Fayette circuit court, where the papers are filed and remain for a year, and are then withdrawn and filed in the Franklin circuit court, there is no legal appeal.—White Water Val. Canal Co. v. Henderson, 8 Blackf. 528.

[f] (Kan. 1887) In order to effect a valid appeal from the judgment of a justice of the peace, the appellant must, within 10 days from the rendition of the judgment, place in the hands of the justice, or in his office, a proper appeal bond, under Justice Code, §§ 121, 122.—Bubb v. Cain, 37 Kan. 692, 16 Pac. 89.

[g] (Ky. 1820) On appeals from justices, the bond must be filed within 20 days, or the appeal cannot be sustained.—Bledsoe v. Cassady, 9 Ky. (2 A. K. Marsh.) 459.

[h] (Mass. 1887) Pub. St. c. 155, §§ 28, 29, provide that no appeal from a trial justice's judgment shall be allowed, unless appellant, within 24 hours after entry thereof, enter into recognizance to obey the judgment of the superior court, with sureties approved by the appellee. The plaintiff claimed an appeal, but the trial justice, being in doubt whether the plaintiff should recognize or give a bond, extended the time "until such time as he should notify the plaintiffs to appear before him," and subsequently, upon notice, the plaintiff appeared and recognized with surety, but no notice was given to the defendant. *Held*, that the appeal was not legally allowed and perfected.—Parker v. Snow, 143 Mass. 423, 9 N. E. 808.

[i] (Neb. 1887) Under the statute requiring an undertaking on appeal to be filed within 10 days from the rendition of judgment, the justice has no right to approve an undertaking filed after the 10 days.—Bell v. White Lake Lumber Co., 21 Neb. 525, 32 N. W. 561.

[j] (N. J. 1819) An appeal bond must be legally executed before a justice can grant, or the common pleas receive, the appeal; and it must be perfected and filed at the first term after judgment. If further time be granted, it is error.—Stevens v. Scudder, 5 N. J. Law (2 Southard) 503.

[k] (Ohio, 1878) Where a justice improperly refused to allow the execution of an appeal bond, he cannot be compelled to allow it by mandamus after the time in which the bond could have been executed has expired.—State v. Block, 3 Wkly. Law Bul. 792.

[l] (Or. 1860) In appeals from justices of the peace to circuit courts, the provisions of the statute for filing notice, serving it on the opposite party, and filing bond must be complied with within 20 days; otherwise, the circuit

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court has no jurisdiction.—Strang v. Keith, 1 Or. 312.

[m] (Pa. 1835) A defendant can, on the appeal, rule the plaintiff to give security for costs within a reasonable time; and, if he does not enter it within the time designated by the court, the appeal will be dismissed.—Perot v. Packer, 2 Ashm. 155.

[n, o] (Pa.) The entry of bail within 20 days after the judgment of a justice of the peace has been rendered is essential to sustain an appeal to the court of common pleas.—(1870) Souders v. Potteiger, 2 Woodw. Dec. 18; (1896) Fogarty v. Manville Colliery Ben. Ass'n (Com. Pl.) 2 Lack. Leg. N. 170.

[p] (Tenn. 1879) Where a justice of the peace granted an appeal within two days from his judgment, but the appeal bond was not executed for nearly three months, the appeal must be dismissed, as Code, §§ 3140, 3141, were not complied with.—Howard v. Long, 71 Tenn. (3 Lea) 207.

[q] (Tex. 1881) An appeal from a justice's court to the county court will be dismissed for want of jurisdiction, if the appeal bond is not filed within 10 days after rendition of judgment, as required by Rev. St. art. 1639.—Conally v. Gambull, 1 White & W. Civ. Cas. Ct. App. § 90.

§ 560. —— Calculation and determination of time.

[a] (Iowa, 1859) Trial was had before a justice on March 23d, and the transcript stated that the appeal bond was filed March 25th, but the bond was indorsed as filed May 25th. The transcript was marked filed in the district court on April 29th. *Held*, that it appeared reasonably certain that the filing with the justice was on March 25th.—Moore v. Mauser, 9 Iowa, 47.

[aa] (Iowa, 1862) A justice rendered judgment June 8th. His original transcript showed the filing of an appeal bond on the 19th; but the bond bore date the 29th, and the amended transcript stated that the appeal was taken on the 29th. *Held*, that the conclusion that the appeal was not taken in time was justified by this record.—Brown v. Beesett, 13 Iowa, 185.

[b] (Mich. 1875) Comp. Laws 1871, §§ 5432, 5433, provide that on appeal from a justice an affidavit and bond shall be presented to the justice within five days after the rendition of the judgment. *Held* that, where the fifth day is Sunday, a party is not entitled to perfect the appeal on the day after.—Dale v. Lavigne, 31 Mich. 149.

[c] (Neb. 1879) Under Code, § 1007, allowing 10 days for an appeal from a justice's judgment, if the tenth day falls on Sunday, the undertaking may, under the rule of section 895, be filed on the next succeeding Monday.—Monell v. Terwilliger, 8 Neb. 360, 1 N. W. 246.

[d] (Tex.) An appeal bond filed within 10 days from the date of the judgment overruling the motion for a new trial before a justice is within the time prescribed by law, although not within 10 days from the date of the original judgment.—(1883) Kyle v. Becton, 2 Willson, Civ. Cas. Ct. App. § 49; (1884) Laird v. Frieberg, 2 Willson, Civ. Cas. Ct. App. § 110; (1885) Missouri Pac. Ry. Co. v. Houston Flour Mills Co., 2 Willson, Civ. Cas. Ct. App. § 571; (1886) Grant v. Fowzes, 3 Willson, Civ. Cas. Ct. App. § 105; (1890) Williams v. Sims (App.) 16 S. W. 786.

[e] (Tex. 1887) On appeal from a justice of the peace, it is competent to contradict by parol the file mark indorsed upon the appeal bond, to show that it was not filed within the proper time.—St. Louis, I. M. & S. Ry. Co. v. Turner, 3 Willson, Civ. Cas. Ct. App. § 341.

[f] (Tex. 1890) Under Sayles' Civ. St. art. 1639, providing that, on appeal from justice's court, the appeal bond shall be filed within 10 days from the judgment, where a judgment is rendered October 13th, an appeal bond which is approved October 23d is filed in time.—Easton v. Wash (App.) 16 S. W. 788.

[g] (Tex. 1890) Where, after judgment in justice's court, a motion for new trial is made, an appeal bond, filed within 10 days after the last day on which such motion can be acted upon, is filed in time.—West v. White (App.) 16 S. W. 788.

§ 561. —— Excuses for delay and relief and extension of time.

[a] (Ala. 1851) When a party against whom a judgment is rendered by a justice of the peace craves an appeal from the judgment on the day of its rendition, but does not give bond until the sixth day afterwards, being prevented from giving bond on the fifth day by reason of the justice's absence from home, it is error to dismiss the appeal.—Averett v. Horn, 19 Ala. 803.

[b] (Cal. 1894) An appeal will not be dismissed because the bond was not filed within 30 days after the rendition of the judgment by a justice of the peace, if the bond was delivered and left at the office of the justice, but was not received or marked "Filed" by him until 2 days after the 30 days.—Perkins v. Superior Court of Fresno County, 37 Pac. 780.

[c] (Colo. 1885) The court may, on appeal from a justice of the peace, extend the time allowed for filing the bond, or for filing a second bond, where the first is insufficient.—McKee v. Bassick Min. Co., 8 Colo. 392, 8 Pac. 561.

[d] (Ill. 1879) No court can make a rule whereby jurisdiction of a cause may be obtained, when it is not conferred by general law. So *held* as to a refusal to dismiss an appeal from a justice's court on motion, where the required appeal bond had not been filed in the statutory time.—Rozier v. Williams, 92 Ill. 187.

[e] (Kan. 1887) If an appeal bond is presented to a justice of the peace in time, his failure to enter the same in his docket till the day after will not deprive the party of his right of appeal.—Struber v. Rohlfs, 36 Kan. 202, 12 Pac. 830.

[f] (Mo. 1831) Though the record shows that an appeal from a justice was taken on the day of trial, and that the bond was by mistake dated the next day, yet the appeal will not be dismissed for this cause.—Pearce v. Myers, 3 Mo. 31.

[g] (N. C. 1876) A justice of the peace accepted an appeal bond, assuring the appellant that it was sufficient; but, after the expiration of the statutory time for giving bond, it was determined to be defective. *Held* a case of excusable neglect, entitling the appellant to perfect his appeal in the superior court.—Richardson v. Debnam, 75 N. C. 390.

[h] (Tex. 1887) Where an appeal bond was sent to the justice by mail, and taken from the post office by his son, who placed it in his father's docket within the proper time after the rendition of the judgment, but which was not discovered by the justice until 23 days thereafter, it was proper for the justice to approve and file it as of the day on which it was received from the post office.—Williams v. Hilburn, 3 Willson, Civ. Cas. Ct. App. § 287.

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§ 562. Amount of bond or security.

[a] (Ala. 1877) Code, § 3654, not having prescribed any sum or penalty in which the bond on appeal from a justice's judgment shall be given, the omission therein to specify any penalty is not a ground for dismissal of the appeal.—Ruffin v. Hines, 59 Ala. 565.

[b] (Cal. 1881) On appeal from a judgment in a justice's court, one of the conditions of the undertaking was that the appellant would pay all costs recovered against him in the appellate court. *Held*, that neither the circumstance that the amount of the bond was more than $100, nor that it was insufficient in amount to operate a stay of execution, rendered the appeal ineffectual.—Ward v. Marin County Superior Court, 58 Cal. 519.

[c] (Ky. 1830) Under the act of 1812, providing that the bond on appeal from the judgment of a justice shall be double the amount of the debt and costs, a bond for only $1 less than double the amount of the debt and costs is defective, and the appeal will be dismissed.—Field v. O'Bryan, 27 Ky. (4 J. J. Marsh.) 365.

[d] (N. Y.) The bond required to be given on appeal to the common pleas from the judgment of a justice of the peace must be in the penalty of double the judgment, whether for costs only, or for damages and costs.—(1825) Ex parte Harrison, 4 Cow. 61; (1826) Ex parte Corwin, 5 Cow. 291.

[e] (Or. 1890) On an appeal from the judgment of a justice of the peace in an action to recover the possession of a mining claim, an undertaking given in accordance with Code, § 2182, for an amount sufficient to compensate the plaintiff for its use pending appeal, and for costs and disbursements, is sufficient, not only for a stay of proceedings on the judgment, but for an appeal as well.—Bilyeu v. Smith, 18 Or. 335, 22 Pac. 1073.

[f] (Pa. 1811) The court of common pleas dismissed an appeal where appellant had not given security, but had lodged the amount of the judgment with the justice to await the event of the suit; there being no provision for interest and costs.—Stewart v. Prosser, 1 Browne, 282.

[g] (Pa. 1815) An appeal will be quashed if security is not given for double the amount of the judgment.—Langs v. Galbraith, 1 Serg. & R. 491.

[h] (Pa. 1823) Where, on an appeal from a justice by a corporation, bail was not given absolute in a sum sufficient to cover debt, interest, and costs, the appeal will be dismissed.—Germantown & P. Turnpike Co. v. Maglee, 9 Serg. & R. 227.

[i] (Pa. 1852) By the act of 1845, all bail in cases of appeal from the judgments of justices of the peace must be bail absolute in double the amount of costs. *Held*, that a recognizance "in the sum of $35, on condition that the defendant shall appear at the next court of common pleas to prosecute his appeal with effect," was sufficient.—Murray v. Haslett, 19 Pa. (7 Harris) 356.

[j] (Pa. 1888) Under Act April 20, 1876 (P. L. p. 43, § 1), providing that, before taking an appeal from a judgment before a justice for wages for labor, defendant must give bail for payment of the debt and costs, where a judgment is entered on a claim in part for wages and in part for other matters, an appeal cannot be taken without bail for the whole debt.—Davenport v. Searfoss, 13 Atl. 956.

[k] (Pa. 1895) Act March 15, 1847 (P. L. 361), providing that when any corporation, not a municipal corporation, shall appeal or take a writ of error, the bail shall be taken absolute for the payment of the debt, interest, and costs, on affirmance of the judgment, applies to appeals from justices of the peace.—Young v. Colvin, 168 Pa. 449, 31 Atl. 1094.

[l] (Tex. 1881) An appeal bond filed by a plaintiff in a justice's court for $20 is sufficient, where judgment was for costs amounting to $16.25, of which plaintiff had paid $9.40.—Sullivan v. McFarland, 1 White & W. Civ. Cas. Ct. App. § 1200.

[m] (Tex. 1890) The plaintiff having sued out a distress warrant, one W. claimed the property levied on, and made affidavit and gave bond for the trial of the right of property. Judgment was rendered in justice's court that W. recover of plaintiff the property in controversy, and all costs of suit. *Held*, that an appeal bond in double the amount of costs was sufficient.—Ross v. Williams, 78 Tex. 371, 14 S. W. 796.

[n] (Tex.) Under the act requiring that a bond on appeal from a justice's to a county court shall be double the amount of the judgment, the costs of the justice's court must be included in the amount of the bond.—(1895) Bell v. Brady, 11 Tex. Civ. App. 526, 33 S. W. 303. CONTRA, see (1881) Colorado County v. Delaney, 54 Tex. 280.

[o] (Wis. 1855) Under the statute requiring that a party appealing from a justice shall enter into a recognizance in double the amount of the judgment, the term "judgment" does not include costs.—Ganet v. Mears, 4 Wis. 306.

[p] (Wis. 1856) The recognizance for appeal from a justice's court must be in the sum of $50, at least, though the damages and costs below are less than $25.—Kearney v. Andrews, 5 Wis. 23.

[q] (Wyo. 1879) Under the justice's code, requiring a bond on appeal from a justice to be in a sum certain, but not requiring the sum to be named, a bond is sufficient which does not name the sum.—Jenkins v. Emery, 2 Wyo. 58.

§ 563. Conditions of bonds.

Amendment of defective condition in bond for appeal, see post, § 575.

[a] (Cal. 1855) The omission of the words "to pay to" will not affect the obligation of an appeal bond given on appeal from a justice's court.—Billings v. Roadhouse, 5 Cal. 71.

[b] (Ky. 1825) On appeal from a justice of the peace, the bond must be conditioned to pay the original debt and costs, provided appellant gets cast.—Talbot v. Benson, 18 Ky. (2 T. B. Mon.) 59.

[c] (Ky. 1846) The act regulating appeals from justices of the peace provides that persons praying an appeal shall, in the clerk's office of the circuit court to which the appeal is returnable, enter into a bond, etc., with condition to pay the same, "provided he gets cast." *Held*, that a condition of a bond that, "if judgment be confirmed or the appeal dismissed, then," etc., is a substantial compliance with the statute.—Feemster v. Anderson, 22 Ky. (6 T. B. Mon.) 537.

[d] (Me. 1854) If a recognizance upon an appeal contain provisions not authorized by law, and omit those required by law, the appeal will be dismissed, as void.—French v. Snell, 37 Me. 100.

[e] (Me. 1858) A recognizance conditioned "to pay all intervening damages and costs," entered into to prosecute an appeal to this court from a judgment of a justice of the peace, in an action of trover, is unauthorized and void

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and furnishes no security to the adverse party for costs; and the court, on motion, will dismiss the appeal.—Jordan v. McKenney, 45 Me. 306.

[f] (N. Y. 1828) Where judgment was against two, but qualified as to one, because he had been discharged under the body act, and the other alone appealed, it was *held* that the bond need not provide for the surrender of the insolvent party's body.—People v. Judges of Onondaga County, 8 Cow. 120.

[g] (N. Y. 1828) The appellee cannot object that the bond is better for him than the statute requires, as if it omit the clause providing for the surrender of the appellants' bodies.—Ex parte Hurlburt, 8 Cow. 138.

[h] (Pa. 1833) A recognizance taken by a justice on appeal by a defendant must contain a condition that the recognizor shall be discharged if the defendant shall, on affirmance, pay the debt, interest, and costs.—Pier v. McKinney, 2 Watts, 103.

[i] (Tex. 1883) The fact that an appeal bond from a justice's court was made, conditioned on payment of the judgment "in the county court," does not affect its validity.—Heidenheimer v. Bledsoe, 1 White & W. Civ. Cas. Ct. App. § 316.

[j] (Tex. 1891) Rev. St. art. 1405, providing that, where the judgment is for the recovery of land or other property, the appeal bond shall be conditioned to pay the appellee the value of the rent or the hire of such property, is not applicable to an appeal from a judgment of a justice of the peace for the possession of personal property, as such appeals are governed by article 1639.—Batsel v. Blaine (App.) 15 S. W. 283.

§ 564. —— Condition to prosecute appeal and satisfy judgment.

[a] (Ala. 1845) Under Clay's Dig. p. 314, § 9, providing that, on appeal from a justice of the peace to the circuit court, the bond shall be conditioned that appellant shall prosecute his appeal with effect, and, if cast in the suit, pay and satisfy the condemnation of the court, an appeal bond is sufficient when conditioned that the appellants shall prosecute their appeal with effect, and, if they "fail therein, then pay the judgment, with such damages and costs as shall be adjudged against them in said court."—Lightfoot v. Strahan, 7 Ala. 444.

[b] (Ala. 1845) On an appeal from a justice of the peace, the defendant and his sureties acknowledged that they were bound unto the plaintiff in a definite sum "for the payment of the principal, costs, charges, and all expenses attending the suit" between the plaintiff and the defendant, and that the latter had "appealed from the justice's court of beat No. 3 for the county," etc., to the circuit court to be holden, etc. *Held* that, although the bond did not conform literally to the act, yet that it was substantially sufficient, and was equivalent to a condition "to prosecute the appeal to effect, and, in case the appellant be cast therein, to pay and satisfy the condemnation of the court."—Windham v. Coats, 8 Ala. 285.

[c] (Ill. 1878) An appeal from a justice court will be dismissed, where the bond is conditioned to "pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal," since such bond is not in substantial conformity with Rev. St. 1878, p. 647, which provides that such bonds shall require appellants to "pay whatever judgment may be rendered against them by said court upon the trial of said appeal, or, in case the appeal is dismissed, pay the judgment rendered against them by said justice, and all costs occasioned by said appeal."—Smith v. Davis, 89 Ill. 203.

[d] (N. C. 1883) Battle's Revisal, c. 63, § 63, providing that, on appeal from a justice of the peace to the superior court, the undertaking shall be "to the effect that, if judgment be rendered against appellant," the sureties will pay the amount unsatisfied by execution, "together with all costs awarded against the appellant," is sufficiently complied with by an undertaking that "appellant shall pay all costs that may be awarded against him, and that, if the judgment, or any part thereof, be affirmed, or the appeal be dismissed, appellant shall pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed."—Walker v. Williams, 88 N. C. 7.

[e] (Ohio, 1862) The stipulation "that the appellant will prosecute his appeal to effect and without unnecessary delay," by section 112, Justice's Code, is an indispensable condition of the undertaking, and must be substantially complied with to perfect the appeal.—Job v. Harlan, 13 Ohio St. 485.

[f] (Ohio, 1880) An appeal bond from a justice of the peace, in which the surety recites that, if judgment is rendered against appellant, "I will satisfy," etc., is sufficient, though the statutes provide that the bond shall be conditioned that appellant satisfy the judgment.—Farrell v. Finch, 6 Ohio Dec. 995.

[g] (Pa. 1865) A recognizance taken on an appeal from the judgment of a justice of the peace, by this entry on the docket, "B. goes surety in the sum of fifty dollars for the prosecution of this suit to effect," is sufficient to entitle the appellants to their appeal.—Rhey v. Baird, 51 Pa. (1 P. F. Smith) 85.

[h] (Tex. 1879) The condition of an appeal bond from a justice's court, that "the said G. prosecutes his appeal to effect, or will pay or satisfy the judgment against the that may be obligators on the bond," is without meaning, and fails to comply with Acts 15th Leg. p. 163, § 21, prescribing conditions for such bonds.—Carter v. Grigsby, 1 White & W. Civ. Cas. Ct. App. § 348.

[i] (Tex. 1881) An appeal bond from a justice's to a county court, conditioned "that the said H. shall prosecute his appeal to effect, and satisfy the judgment or decree that may be rendered against the obligors in this bond," substantially complies with Rev. St. art. 1639, requiring the bond to be "conditioned that the appellant shall prosecute his appeal to effect, and shall pay off and satisfy the judgment which may be rendered against him on such appeal."—Haby v. Haby, 1 White & W. Civ. Cas. Ct. App. § 157.

[j] (Tex. 1881) An appeal bond from a justice's court, conditioned "that the said M. & H. shall prosecute their said appeal to effect, and shall pay and satisfy any judgment that may be rendered against them in said suit," substantially complies with Rev. St. art. 1639.—Miller v. Sappington, 1 White & W. Civ. Cas. Ct. App. § 176.

[k] (Tex. 1881) An appeal bond from a justice's court, conditioned that appellant shall prosecute his appeal "with" effect, "and" shall pay and satisfy the judgment, substantially complies with Rev. St. art. 1639.—Kerr v. Clegg, 1 White & W. Civ. Cas. Ct. App. § 791.

[l] (Tex. 1881) An appeal bond from a justice's court, conditioned as required by Rev. St. art. 1639, is not invalidated by the additional words, describing the judgment which the obligors bind themselves to pay as one to be rendered "on the trial of this case in the county

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court aforesaid, if the decision shall be against the said K. [appellant.]"—Kerr v. Clegg, 1 White & W. Civ. Cas. Ct. App. § 791.

[m] (Tex. 1881) An appeal bond from a justice's court, conditioned on payment of all costs that may be adjudged against appellants, if they fail to prosecute the suit, is fatally defective.—Garrett v. Gay, 1 White & W. Civ. Cas. Ct. App. § 1026.

[n] (Tex.) Rev. St. 1879, art. 1639, provides that a party appealing from a judgment in a justice's court to the district court shall, within 10 days from the date of the judgment, file with the justice a bond payable to the appellee, "conditioned that the appellant shall prosecute his appeal to effect, and shall pay off and satisfy the judgment which may be rendered against him on such appeal." *Held*, that an appeal bond conditioned that appellant should "prosecute its appeal to effect, or pay," etc., is a sufficient compliance with the statute.—(1881) Sullivan v. McFarland, 1 White & W. Civ. Cas. Ct. App. § 1198; (1883) Mills v. Hackett, 1 White & W. Civ. Cas. Ct. App. § 845; (1883) Worley v. Hudson, 2 Willson, Civ. Cas. Ct. App. § 26; (1890) Southern Pac. Ry. Co. v. Stanley, 76 Tex. 418, 13 S. W. 480.

[o] (Tex. 1882) An appeal bond from a justice's court, conditioned "that the said L. shall prosecute his appeal to effect, and shall pay and satisfy the judgment or decree that may be rendered against the obligors of this bond," substantially complies with Rev. St. art. 1639.—Trial v. Lepori, 1 White & W. Civ. Cas. Ct. App. § 1275; Lee v. Stone, 1 White & W. Civ. Cas. Ct. App. § 1277.

[p] (Tex. 1884) A bond conditioned that appellant will prosecute his appeal "with effect," instead of "to effect," does not vitiate the bond.—Laird v. Frieberg, 2 Willson, Civ. Cas. Ct. App. § 112.

[q] (Tex. 1885) A bond on appeal from the judgment of a justice, conditioned that "the appellant shall pay off and satisfy the judgment which shall be rendered," instead of "shall pay off and satisfy the judgment which may be rendered," is sufficient.—Stitt v. Barefoot, 2 Willson, Civ. Cas. Ct. App. § 793.

[r] (Tex. 1887) On appeal from the judgment of a justice, an appeal bond conditioned to "pay off" a judgment, instead of "pay of and satisfy" the judgment, is sufficient.—Clifford v. Clark, 3 Willson, Civ. Cas. Ct. App. § 238.

[s] (Tex. 1887) A bond upon appeal from justice's court that fails to provide, as one of its conditions, "that the appellant shall prosecute his appeal to effect," is not a compliance with the statutory provisions (Rev. St. art. 1639), regarding such bonds.—Figures v. Dunklin, 68 Tex. 644, 5 S. W. 503.

[t] (Tex. 1890) Under Rev. St. 1879, art. 1639, a bond is sufficient, the condition of which is that they "shall prosecute their appeal with effect, and shall pay all costs which have accrued in this court, together with that which may accrue in the county court, should they be cast in the suit."—Moove v. Alston (App.) 15 S. W. 47.

[u] (Tex. 1890) Under Rev. St. 1879, art. 1639, a bond is insufficient, the condition of which is that the "appellant shall prosecute his appeal to effect, and shall pay all the costs which have accrued in the court below, or which may accrue in the appellate court."—Allison v. Gregory (App.) 15 S. W. 416.

[v] (Tex. 1891) Sayles' Civ. St. art. 1639, requires an appeal bond to be in a sum double the amount of the judgment, "conditioned that the appellant shall prosecute his appeal to effect, and shall pay off and satisfy the judgment which may be rendered against him." By Id. art. 1639a, it is provided that an appellant who is unable to give bond or pay costs shall nevertheless be allowed to prosecute his appeal upon making strict proof of his inability. *Held*, that a bond, on appeal from a justice of the peace, conditioned that "appellant shall prosecute his appeal with effect, and shall pay all costs," is a compliance with neither section, and the appeal must be dismissed.—Pace v. Webb, 79 Tex. 314, 15 S. W. 269.

§ 565. Requisites and sufficiency in general.

[a] (Ind. 1846) That an appeal bond, in the case of an appeal from the judgment of a justice of the peace, bears date after the bond was filed in the clerk's office, is no objection to the bond.—Littell v. Bradford, 8 Blackf. 185.

[b] (Mass. 1885) A. appealed from a judgment against him, and filed a bond under St. 1882, c. 95, which did not state against whom the judgment appealed from was rendered, nor the date of the judgment, nor the amount thereof, either in debt or costs. The bond bore no date, and did not appear to have received the approval of the adverse party or the justice before whom the case was tried. *Held*, appeal should be dismissed.—Putnam v. Boyer, 140 Mass. 235, 5 N. E. 493.

[c] (N. H. 1854) An entry on the docket of the justice in this form: "Appealed. A. B., principal, C. D., and E. F., sureties, in the sum of $20, for costs,"—is a sufficient docket entry, from which the justice may draw out the recognizance in full and furnish a copy when requested.—Ballou v. Smith, 29 N. H. (9 Fost. 530.

[d] (N. Y. 1865) The Code prescribes no form for the undertaking to be given on appeal from the judgment of the justice of the peace.—Doolittle v. Dininny, 31 N. Y. 350.

[e] (Tex. 1880) An appeal bond from a justice's court, conditioned that appellant shall prosecute the appeal or pay the judgment "that may rendered," is valid; the word "be" being manifestly omitted through a clerical mistake.—Kerr v. Murrell, 1 White & W. Civ. Cas. Ct. App. § 890.

[f] (Tex. 1881) The law requiring an appeal bond from a justice's court to be "a bond filed with the justice" is not complied with by an entry in the justice's docket that certain persons acknowledge themselves bound by the obligations required in an appeal bond.—Garrett v. Gay, 1 White & W. Civ. Cas. Ct. App. § 1026.

[g] (Tex. 1885) On appeal from a judgment rendered in a justice court, the appeal will not be dismissed because the date of execution on the appeal bond antedates the date of the judgment one day, where it recites the proper date.—Galveston, H. & S. A. Ry. Co. v. Hodge, 2 Willson, Civ. Cas. Ct. App. § 619.

[h] (Tex. 1886) It is not essential that an appeal bond should state that an appeal has been taken, if the fact that it has been taken is otherwise made to appear.—Moses v. Clements, 3 Willson, Civ. Cas. Ct. App. § 172.

[i] (Tex. 1886) On appealing from the judgment of a justice, the use of the word "applies," instead of the word "appeals," in the bond, is a clerical mistake which could not possibly mislead, and will not invalidate the bond.—Moses v. Clements, 3 Willson, Civ. Cas. Ct. App. § 172.

[j] (Tex. 1888) In appealing from a judgment entered against plaintiff in justice court for defendant's costs, the appeal bond, reciting,

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"From which said judgment for said costs the said R. has appealed to the county court," sufficiently shows that it is from the whole judgment the appeal is taken, and not only from that part of it adjudging the costs against appellant.—Robinson v. Justin, 3 Willson, Civ. Cas. Ct. App. § 376.

[k] (Tex. 1895) Where the bond on appeal from the judgment of a justice of the peace is filed and approved after the judgment, and within the time fixed by law, the fact that it bears date prior to the rendition of the judgment does not affect its validity.—Peoples v. Rodgers, 11 Tex. Civ. App. 447, 32 S. W. 798.

§ 566. Description of judgment.

[a] (Tex. 1882) An appeal from a justice's court to the county court will be dismissed, where the appeal bond misdescribes the judgment—Bradway v. Clipper, 1 White & W. Civ. Cas. Ct. App. § 306.

[b] (Tex. 1882) An appeal from a justice's court will be dismissed, where the appeal bond does not give the style and number of the case, gives the date of the rendition of the judgment incorrectly, and omits the name of one of the parties against whom it was rendered.—Kerr v. Stone, 1 White & W. Civ. Cas. Ct. App. § 811.

[c] (Tex. 1883) On appeal from a judgment in a justice's court "that plaintiff take nothing by his suit, and that defendant go hence, and that he recover his costs of plaintiff," the appeal bond recited that "The defendant recovered a judgment against K. for the cost of seven suits, said cost amounting to * * * $27.25." *Held*, that the bond did not misdescribe the judgment.—Kerr v. Nutten, 1 White & W. Civ. Cas. Ct. App. § 410.

[d] (Tex. 1884) Where a justice renders judgment for the recovery of a horse, or, in case a recovery could not be had, its value, and damages, an appeal bond which describes the judgment as one for the value and damages, without mentioning the recovery of the horse, is sufficiently certain to support the appeal.—Austin v. McMahan, 2 Willson, Civ. Cas. Ct. App. § 429.

[e] (Tex. 1886) On appeal from the judgment of a justice on an account, and ordering the foreclosure of a landlord's lien on property seized under a distress warrant, the omission to mention that part of the judgment which foreclosed the lien in the appeal bond is not a misdescription, but a failure to fully describe the terms of the judgment, and does not invalidate the bond.—Moses v. Clements, 3 Willson, Civ. Cas. Ct. App. § 171.

[f] (Tex. 1887) A judgment was rendered in justice court against a constable and his sureties upon his bond, but which did not specify that it was rendered against the constable as principal and the others as sureties. Defendants appealed, and their appeal bond described the judgment as rendered against the constable as principal and the others as sureties. *Held*, that the recital of the facts in the bond was not calculated to mislead, since the record shows that the constable was principal and the other defendants were his sureties.—Lewis v. Richardson, 3 Willson, Civ. Cas. Ct. App. § 343.

[g] (Tex. 1887) The caption of an appeal bond from a justice's court set forth the number of the case, the names of the parties thereto, and described it as being in the justice's court of a certain county and precinct. The body of the bond recited a recovery by the plaintiff against the defendant, giving a correct description of the recovery. *Held* sufficient.—Wilkes v. Adler, 68 Tex. 689, 5 S. W. 497.

[h] (Tex. 1890) An appeal to the district court from a judgment in replevin in a justice's court is properly dismissed when the appeal bond describes the judgment as having been rendered August 21st, against the principals in the bond as defendants, for $150, and a certain sum as costs, when it was in fact rendered August 22d, against such defendants and specified sureties for the recovery of the property, and, in case that could not be found, for $150, and recited that that sum was the value of the property sued for.—James v. Roberts, 78 Tex. 670, 15 S. W. 111.

[i] (Tex. 1890) An appeal bond properly describes the judgment when it states the style and number of the suit, the justice who rendered it, the date of its rendition, the amount, and the parties for and against whom it was rendered.—Williams v. Sims (App.) 16 S. W. 786.

[j] (Tex. 1891) A clerical error will not vitiate an appeal bond or affidavit, and where, on appeal from a justice's court, the appellant files an affidavit in lieu of an appeal bond, in which the judgment is correctly described in every respect except the number of the cause is given as 391, instead of 395, it is error for the county court to dismiss the appeal on motion of appellee.—Jones v. Malloy (App.) 15 S. W. 198.

[k] (Tex. 1893) A bond on appeal from a justice's court stated the title of the cause and the court, and the date and amount of the judgment against the garnishee. It then recited that, after the writ was served on the garnishee, defendant replevied the fund in the hands of the garnishee, giving a bond thereon, and that judgment was rendered against defendant and the sureties on the replevin bond for the amount of the judgment against the garnishee; and that, "when this judgment on said bond is collected and satisfied, it shall operate as a satisfaction of the judgment against said garnishee, from which judgment the defendant has taken an appeal to the county court." *Held*, that the appeal should not be dismissed as insufficiently describing the judgment appealed from.—Bauer v. Fields (Civ. App.) 22 S. W. 180; Same v. Adkins, Id. 181.

[l] (Tex. 1893) On an appeal to the county court from a judgment of a justice's court in favor of defendant, a bond which recites that the judgment was against plaintiff for the costs of the suit sufficiently describes the judgment, though it fails to recite the further provisions of the judgment that the plaintiff take nothing by his suit, and that defendant go hence without day, and fails to give the number of the cause in the justice's court.—Brown v. Shelton (Civ. App.) 23 S. W. 483.

[m] (Tex. 1894) Sayles' Civ. St. art. 1639, prescribing the requisites of a bond on appeal from the justice court, does not require a description of the judgment or its amount to be in the bond.—Perry v. Cullen, 6 Tex. Civ. App. 478, 25 S. W. 1043.

§ 567. —— Recitals as to parties and court.

[a] (Ala. 1876) An appeal bond, given in a justice's court, reciting that the appeal was taken by the defendant and his wife, whose name is also given, but which does not recite that the justice rendered judgment against both, and correctly states the amount and date of the judgment, and the name of the plaintiff therein, conforming substantially to the requirements of the statute, does not alter the case or give the defendant ground for moving to dismiss the proceedings because complaint

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was filed against the husband alone in the city court.—Sossman v. Price, 57 Ala. 204.

[b] (Kan. 1887) On an appeal from a judgment by a justice of the peace of Comanche county, which was then unorganized, and attached to Barber county for judicial purposes, the justice was referred to in the appeal bond as an officer of Comanche county, instead of being designated as an officer of Comanche township, Barber county. *Held*, that the technical defect did not prejudice any one, nor invalidate the undertaking.—Smith v. Nescatunga Town Co., 36 Kan. 758, 14 Pac. 246.

[c] (N. Y. 1828) A bond reciting the judgment as rendered before I. S., justice of the peace, is good, without adding the county of which he is a justice.—Anonymous, 1 Wend. 85.

[d] (Ohio, 1854) If a recognizance is taken in the form prescribed in section 111, Act March 14, 1831, defining the duties of justices of the peace in civil cases, it is sufficient, although it does not appear, either by the recognizance or the transcript, which party took the appeal.—Holton v. Wade, 3 Ohio St. 543.

[e] (Tex. 1882) The variance between an appeal bond from a justice's court, giving the name of a party to a judgment as "Lapori," and the judgment, giving the name as "Lepori," is not fatal.—Trial v. Lepori, 1 White & W. Civ. Cas. Ct. App. § 1273.

[f] (Tex. 1883) A judgment of the justice of the peace against a firm, rendered on service on an individual partner, named the member served as defendant, against whom judgment was rendered individually, while the appeal bond named only the firm by firm name. *Held*, that there was no variance, and that the objectionable words would be regarded as surplusage.—Hedges v. Armistead, 60 Tex. 276.

[g] (Tex. 1887) Describing the judgment as rendered against "the Texas Pacific Railway Co.," instead of "the Texas & Pacific Railway Co.," in the appeal bond, does not render it void, since it could not possibly mislead the appellee.—Texas & P. Ry. Co. v. McCumsey, 3 Willson, Civ. Cas. Ct. App. § 264.

[h] (Tex. 1890) When an appeal bond describes the judgment so as to identify it, it is sufficient though it does not recite that the judgment was against the sureties on a replevin bond as well as against defendant.—Witten v. Caspary (App.) 15 S. W. 47.

[i] (Tex. 1892) Where the bond on appeal from a justice court correctly states the number and style of the cause and the court in which the judgment was rendered, the appeal should not be dismissed as insufficiently describing the judgment, though all of the parties against whom it is entered are not named, the amount is misstated, and the date of entry can only be inferred from the date of the verdict.—Warren v. Marberry, 85 Tex. 193, 19 S. W. 994.

[j] (Tex. 1894) The omission of the number of the case, and the names of all the parties to the judgment, from the bond on appeal from a justice court, is not a fatal defect.—Farror v. Dowd (Civ. App.) 28 S. W. 919.

[k] (Tex. 1896) A bond on appeal from a justice court is not insufficient because it names the justice before whom the judgment was rendered as "T. W. R.," instead of "W. T. R.," and appellant as the "M., K. & T. Railroad Company," instead of "Railway Company," where the judgment was otherwise identified.—Missouri, K. & T. Ry. Co. v. Vowell (Civ. App.) 34 S. W. 354.

[l] (Wis. 1877) Where the notice of appeal from a justice and the bond state that the appeal is to the circuit court, while appeals from justices' courts lie only to the county court, the latter does not acquire jurisdiction.—Johnson v. Chicago, M. & St. P. R. Co., 43 Wis. 431.

§ 568. —— Recital of date.

[a] (Kan. 1889) A cause was tried before a justice of the peace on the 28th day of May, 1886, and judgment rendered for plaintiff on that day. The transcript of the justice failed to show that any appeal was taken by the defendant, or that any appeal bond was presented, approved, or filed. The justice, in transmitting the transcript to the clerk of the district court, included among the papers sent up an appeal bond, which purported to have been approved by him in time, but the bond recited a judgment rendered May 31, 1886. *Held*, that the district court, upon the motion of the plaintiff, should have dismissed the appeal.—Shuster v. Overturf, 42 Kan. 668, 22 Pac. 718.

[b] (N. Y. 1829) A bond is good, without stating the day of the rendition of the justice's judgment.—People v. Orleans Common Pleas, 2 Wend. 292.

[c] (Tex. 1883) An appeal bond from a justice court, which described the judgment by giving the style of the cause, the court in which the judgment was rendered, the amount, and in whose favor and against whom, is sufficient, although it does not show the number of the cause nor the date of the judgment.—Knight v. Old, 2 Willson, Civ. Cas. Ct. App. § 77.

[d] (Tex. 1884) An appeal from a judgment of a justice should be dismissed, where the appeal bond misdescribes the judgment, both as to date and amount.—Gibson v. Giles, 2 Willson, Civ. Cas. Ct. App. § 402.

[e] (Tex. 1885) Though a bond on appeal from justice court need not give the date of the judgment, the date, when given, becomes part of the description, and cannot be disregarded as surplusage; hence an appeal bond, describing a judgment rendered September 27th, as being rendered on November 27th, is insufficient.—Texas & P. Ry. Co. v. Rains, 2 Willson, Civ. Cas. Ct. App. § 752.

[f] (Tex. 1886) An appeal bond from a justice's to the county court, which describes the judgment as to the number of the cause, the justice before whom the same was tried, and the amount of the judgment, although it omits the date of its rendition, is sufficiently certain to support an appeal.—Eichman v. State, 22 Tex. App. 137, 2 S. W. 538.

[g] (Tex. 1890) Where the justice's transcript misdescribes the judgment as having been rendered on one date, when in fact it was rendered on another, the appeal should not be dismissed because the appeal bond properly describes the judgment by the date when it was in fact rendered.—Knight v. Grigsby (App.) 16 S. W. 866.

[h] (Tex. 1891) An error in stating the date of a judgment will not invalidate a bond on appeal from a justice's court, if the other statements contained therein fully identify the judgment.—Edwards v. Allen (App.) 17 S. W. 1074.

[i] (Tex. 1893) Where the bond on appeal from a justice correctly describes the judgment by the number of the case, names of the parties, amount, and the court in which it was rendered, it is sufficient, though it gives the date as the 28th, instead of the 30th, of the month.—Alderman v. Jones, 2 Tex. Civ. App. 336, 21 S. W. 298.

[j] (Tex. 1894) A bond on appeal from a justice, describing the judgment in conformity with the description in the justice's transcript,

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should not be dismissed for uncertainty for reciting that on the day the judgment was rendered, "or on the next day," the court allowed a remittitur, the transcript showing that the remittitur was made on the day the judgment was rendered.—Crow v. Curry (Civ. App.) 28 S. W. 715.

§ 569. —— Recital of amount.

Misdescription as to both date and amount, see ante, § 568.

—— *parties and amount of judgment, see* ante, § 567.

[a] (N. Y.) The bond must recite the precise amount of the justice's judgment.—(1826) Ex parte Weed, 5 Cow. 286; (1827) Ex parte Alvord, 6 Cow. 585.

[b] (Tex. 1881) An appeal bond from a justice's court, giving the names of the parties to a judgment for $264, the court in which it was rendered, and its date, is not invalid because it gives the amount of the judgment as $260.—Nelson v. Baird, 1 White & W. Civ. Cas. Ct. App. § 1236.

[c] (Tex. 1883) A failure of an appeal bond from a justice's court to mention the sum of $2 adjudicated as damages does not render it invalid.—Mills v. Hackett, 1 White & W. Civ. Cas. Ct. App. § 846.

[d] (Tex. 1883) An appeal bond from a justice of the peace need not show the amount of the judgment, nor that it was final.—Christian v. Crawford, 60 Tex. 45.

[e] (Tex. 1884) A discrepancy in an appeal bond of one cent in stating the amount of a judgment does not vitiate the bond.—Laird v. Frieberg, 2 Willson, Civ. Cas. Ct. App. § 111.

[f] (Tex. 1885) An appeal bond which describes the property recovered with reasonable certainty in every other respect, except that it omits the amount, is sufficiently certain.—Parsons v. Crawford, 2 Willson, Civ. Cas. Ct. App. § 669.

[g] (Tex. 1887) On appeal from the judgment of a justice, an appeal bond which describes the judgment rendered as amounting to a sum which includes the costs does not misdescribe the judgment, so as to avoid the appeal bond.—Anderson v. Beaty, 3 Willson, Civ. Cas. Ct. App. § 260.

[h] (Tex. 1894) Where the bond on appeal from a justice's court correctly states the number and style of the cause, the court, and the date of the judgment, such judgment having been rendered for different amounts against each defendant, and for the foreclosure of a chattel mortgage, the appeal should not be dismissed, though the bond fails to state the amount of the judgment against one of the defendants, or mention the order of foreclosure.—Cockrill v. Eason (Civ. App.) 26 S. W. 464.

§ 570. Approval of bond or security.

Liability of justice for refusal to approve an appeal bond, see ante, § 41.

Power to accept or approve appeal bond after expiration of term, see ante, § 204 [c, h].

Presumption as to approval of bond for appeal, see post, § 710.

[a] (Ark. 1858) The recognizance prescribed by the statute should be taken and approved by the justice before granting an appeal, or the recognizance should be perfected in the circuit court.—Merrill v. Manees, 19 Ark. 647.

[b] (Ill. 1891) On appeal from a justice, appellant may either file his bond with the justice and have it approved by him, or with the clerk of the appellate court and be approved by him, under Rev. St. c. 79, §§ 62, 64, 65.—Fairbank v. Streeter, 41 Ill. App. 434, reversed (1892) 142 Ill. 226, 31 N. E. 494.

[bb] (Ind. 1882) Where a justice of the peace had accepted an appeal bond, and it was discovered to be in too small a sum, he could not recall his acceptance and demand another bond.—Miller v. O'Reilly, 84 Ind. 168.

[c] (Ind. 1892) On refusal by a justice to approve a good and sufficient appeal bond, the injured party may bring mandamus to compel him so to do, and to transmit a transcript of proceedings to the clerk of the circuit court, without waiting for the expiration of the 20 days allowed the justice by Rev. St. § 1501, for preparing and transmitting the transcript.—Coats v. State, 133 Ind. 36, 32 N. E. 737.

[d] (Kan. 1880) A justice of the peace from whose judgment an appeal has been taken, is bound by Comp. Laws 1879, p. 720, c. 81, § 121, to approve an appeal undertaking, conditioned, with sufficient surety, in the sum of $50, said sum being more than double the amount of the judgment and costs, if presented to him within 10 days from the rendition of said judgment.—Cox v. Rich, 24 Kan. 20.

[e] (Kan. 1892) Mandamus will not lie to compel a justice to approve an appeal bond after expiration of the time for appeal, when it has been tendered without any justification by the sureties, and the justice objects to their sufficiency, though the sureties possessed the requisite qualifications.—Chicago, K. & N. Ry. Co. v. Marshall, 47 Kan. 614, 28 Pac. 701.

[f] (Mich. 1895) Under 2 How. Ann. St. § 8307, providing that appeals from judgments of circuit court commissioners shall be conducted as near as may be as on appeals from justices; and the subsequent enactment (3 How. Ann. St. § 7000), providing that on appeal from a justice the bond may be taken by the county clerk,—the county clerk may approve a bond on appeal from a commissioner.—Cole v. Donovan, 106 Mich. 692, 64 N. W. 741.

[g] (N. J. 1836) A justice of the peace is the proper judge of the sufficiency of an appeal bond filed in a case before him; and it is error for the common pleas to require him to send up an appeal, without proof that an appeal has been legally taken.—Stull v. Abbott, 15 N. J. Law (3 J. S. Green) 338.

[h] (N. Y. 1845) A peremptory mandamus will be allowed to compel a court of common pleas to approve a new appeal bond, where the bond returned by the justice is not approved by him, or is approved by an officer who is not authorized under the law "of appeals to the court of common pleas."—People v. Judges of Niagara County Common Pleas, 1 How. Prac. 196.

[i] (N. Y. 1884) Under Code Civ. Proc. § 1350, requiring an undertaking on appeal from a justice to be approved by the justice or by a judge of the appellate court, such approval is necessary before the bond is delivered.—Ross v. Markham, 5 Civ. Proc. R. 81.

[j] (Pa. 1827) If the justice erroneously reject a recognizance offered within 20 days, he may correct the mistake by receiving it afterwards, and the appeal will be good.—Noble v. Honk, 16 Serg. & R. 421.

[k] (Tex. 1885) Where, on appeal from the judgment of a justice, his transcript shows that the appeal bond was approved, it is unnecessary that the approval be indorsed on the bond, and that it be marked "Filed."—Whitman Agricultural Co. v. Voss, 2 Willson, Civ. Cas. Ct. App. § 648.

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[l] (Tex. 1885) Where the bond on appeal from the judgment of a justice is neither approved nor filed, and the record contains nothing from which its verity or authenticity can be presumed, it will not be considered.—Whitman Agricultural Co. v. Voss, 2 Willson, Civ. Cas. Ct. App. § 549.

[m] (Tex. 1886) It is the duty of a justice, when an appeal bond is presented to him, to either approve or reject it.—Jones v. Wells, 3 Willson, Civ. Cas. Ct. App. § 95.

[n] (Wis. 1855) Where a party, appealing from the judgment of a justice of the peace, entered into a recognizance before another justice, who certified in the usual form that the opposite party was satisfied with the surety, the recognizance was sufficient.—Ganet v. Mears, 4 Wis. 306.

§ 571. —— Acts constituting approval and indorsement of approval.

[a] (Ind. 1845) The filing of an appeal bond, with the transcript, etc., in the clerk's office, by the justice, in the case of an appeal, is prima facie evidence that he had approved of the bond.—Lacy v. Fairman, 7 Blackf. 558.

[b] (Ind. 1886) Where, on appeal to the circuit court from a justice's judgment, it does not appear that the appeal bond was filed with the justice, or approved by him, parol evidence is admissible to show the facts.—McCrory v. Anderson, 103 Ind. 12, 2 N. E. 211.

[c] (Neb. 1895) A bond on appeal from a justice of the peace to the district court is approved by the justice if he receives it, examines it, and expresses himself as "satisfied," and retains it in his custody.—Bingham v. Shadle, 45 Neb. 82, 63 N. W. 143.

[d] (N. H. 1854) Where, upon an appeal being taken from the judgment of a justice of the peace, the principal and sureties presented themselves before the magistrate to recognize as required by statute, and he, with their assent and in their presence, made an entry upon his docket of an appeal and of their recognizing as principal and sureties, it was *held* that the appeal and recognizance were sufficiently taken.—Ballou v. Smith, 29 N. H. (9 Fost.) 530.

[e] (N. Y. 1824) The justice's approbation of the appeal bond may be inferred from the act of filing it; and the appellee cannot object to a hearing of the appeal because the justice has not indorsed his approbation on the bond, nor because he has not filed it within the time required by the act.—Sholts v. Judges of Yates County, 2 Cow. 506.

[f] (N. Y. 1827) The justice need not indorse his approval of the surety within any particular time. He may approve before the bond is executed, and indorsed after the 10 days allowed for the appeal.—People v. Judges of Dutchess County, 7 Cow. 487.

[g] (Tex. 1885) On appeal from the judgment of a justice, where the bond was not approved or marked "Filed," but the record disclosed its approval, the appellant is entitled to have the justice approve and file the same nunc pro tunc.—Whitman Agricultural Co. v. Voss, 2 Willson, Civ. Cas. Ct. App. § 553.

[h] (Tex. 1885) On appeal from the judgment of a justice, where the appeal bond erroneously appears to have been executed, approved, and filed on a day prior to that in which judgment was rendered, the appellant is entitled to have the justice indorse his approval on the bond nunc pro tunc as of the proper date.—Galveston, H. & S. A. Ry. Co. v. Hodge, 2 Willson, Civ. Cas. Ct. App. § 620.

[i] (Tex. 1886) The approval of an appeal bond is directory, and the bond is not a nullity because the justice neglects to indorse his approval upon it.—Jones v. Wells, 3 Willson, Civ. Cas. Ct. App. § 95.

[j] (Tex. 1886) The entry upon an appeal bond that it is approved is not a judicial, but a clerical, act, and the omission to make the entry does not affect the validity of the bond.—Jones v. Wells, 3 Willson, Civ. Cas. Ct. App. § 95.

[k] (Tex. 1887) That the approval by a justice of an appeal bond is not dated will not affect its validity, where it is filed within proper time.—Jones v. Spann, 3 Willson, Civ. Cas. Ct. App. § 283.

[l] (Tex. 1889) Where the appeal bond had been delivered to the justice, and by him approved in due time, but he failed to mark it filed and approved, he should be permitted by the county court to do so nunc pro tunc.—Muller v. Humphreys (App.) 14 S. W. 1068.

[m] (Wis. 1855) If the party taking an appeal from a justice of the peace does everything required of him by the statute to perfect his appeal, but the magistrate neglects to make his indorsement of satisfaction as to the surety, the appeal ought not to be dismissed as imperfectly executed.—Shiff v. Brownell, 4 Wis. 285.

[n] (Wyo. 1879) The statute requiring approval by justice of appeal bond is complied with when the record shows that the justice received the undertaking and allowed the appeal.—Jenkins v. Emery, 2 Wyo. 58.

§ 572. —— Effect of approval

[a] The judgment of a justice of the peace as to the sufficiency of the sureties in an appeal recognizance is final.

—(Me. 1851) Wood v. Estes, 33 Me. 578;
(Tex. 1887) Pickle v. Abbott, 3 Willson, Civ. Cas. Ct. App. § 345.

[b] (Ill. 1843) Where a party, appealing from a judgment of a justice of the peace, has entered into bond, which is approved and accepted by the justice, the appeal is taken.—Little v. Smith, 5 Ill. (4 Scam.) 400; Ewing v. Bailey, Id. 420.

[c] (Ill. 1875) When an appeal bond is accepted and approved by the justice, even if it is defective, the appeal is nevertheless taken from the judgment, and it is the duty of the opposite party to follow the case to the appellate court. If he is not satisfied with the bond, he can obtain a rule to file a sufficient bond, and, in default thereof, the appeal can be dismissed.—Miller v. Superior Mach. Co., 79 Ill. 450.

[d] (Tex. 1890) The surety on the appeal bond need not be a resident of the county where the judgment was rendered; and, where the justice of the peace has approved the bond, the solvency of the sureties need not be shown by certificate or otherwise.—Fuerman v. Ruhle (App.) 16 S. W. 536.

[e] (Tex. 1893) The fact that an appeal bond given by plaintiff on appeal from a justice's court is signed by one of the defendants as surety is no ground for dismissing the appeal, since the approval of the bond by the justice determines the sufficiency of the surety.—Voss v. Feurmann (Civ. App.) 23 S. W. 936.

§ 573. Amendment and new security in general.

Amendment of bond by release of surety to become witness, see "Witnesses," II. (B).

[a] On motion to quash an appeal from a justice of the peace on the ground of a defective recognizance, the appellant should be

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permitted to amend it, and thus perfect his appeal.
—(Ark. 1883) Morrison v. State, 40 Ark. 448; (Miss. 1883) Gaddis v. Palmer, 60 Miss. 758; (Pa. 1841) Bream v. Spangler, 1 Watts & S. 378.

[b] (Ala. 1847) An appeal from a justice of the peace should not be quashed for a defect in the bond, unless the appellant, upon being required by the court, fails or refuses to execute a perfect one.—Carter v. Pickard, 11 Ala. 673.

[c] (Ala. 1851) It is erroneous to dismiss an appeal from a justice of the peace to the circuit court on account of a defect in the appeal bond, when the appellant offers to execute a new and sufficient bond and proceed to trial forthwith.—Appleton v. Turrentine, 19 Ala. 706.

[d] (Ark. 1846) On appeal from a justice of the peace, the circuit court may take a recognizance for the appeal only when no recognizance, or a defective one, was taken below.—Miller v. Heard, 7 Ark. (2 Eng.) 50.

[e] (Ill.) In appeals from justices of the peace, if the bond is insufficient, the statute is imperative that the court shall permit a good and sufficient bond to be filed. Gale's St. p. 409.—(1836) Dedman v. Barber, 2 Ill. (1 Scam.) 254; (1838) Hubbard v. Freer, Id. 467.

[f] (Ill. 1851) Where a party, by himself or his agent, undertakes to appeal from the decision of a justice of the peace, and executes a bond which is accepted, the appeal shall be sustained, if he will supply any defect in the bond, when objection is made thereto.—Trustees of Schools v. Starbird, 13 Ill. (3 Peck) 49.

[g] (Ill. 1858) An appellant from a decision of a justice of the peace, in a trial of the right of property, having filed a defective bond, may have leave to amend it in the appellate court.—Patty v. Winchester, 20 Ill. (10 Peck) 261.

[h] (Ill. 1876) It is within the discretion of the circuit court, on appeal from a justice, to require appellant to file an additional bond.—Bennett v. Pierson, 82 Ill. 424.

[i] (Ill. 1889) Where a party, on appealing to the circuit court from a judgment of a justice of the peace, files an imperfect appeal bond, it is error to dismiss the appeal before rule on appellant to file a sufficient bond.—Murphy v. Consolidated Tank Line Co., 32 Ill. App. 612.

[j] (Ind. 1864) Where an appeal is prayed from the judgment of a justice of the peace within the time limited by law, and a bond signed by the surety, but not by the principal, is filed and approved by the justice, the appellant is entitled to his appeal, and the subsequent withdrawal of the bond to procure its execution by the principal, and its absence from the files until after the expiration of the time limited for an appeal, will not devest the party's right to the appeal.—Hollensbe v. Thomas, 22 Ind. 375.

[k] (Me. 1878) A magistrate may, with the permission of the court, amend a recognizance returned by him, or make a new return, more fully and correctly to set forth the undertaking.—Ingalls v. Chase, 68 Me. 113.

[l] (Mo. 1863) By the Revised Code, an appellant from a justice's court may file a new or amended affidavit and recognizance in the appellate court.—Williams v. Watson, 34 Mo. 95.

[m] (Neb. 1888) On appeal from a justice to the district court, appellee at a succeeding term obtained an order that appellant give an additional undertaking within 25 days, or his appeal be dismissed. No undertaking was filed, but at the next term appellant made showing that his undertaking was sufficient, and asked for further time to file an additional one, if required. *Held* no error to grant this request, the first order not having been obeyed, and the court not having lost jurisdiction.—Robare v. Kendall, 22 Neb. 677, 35 N. W. 940.

[n] (N. Y.) The common pleas have no jurisdiction of an appeal case, unless the proceedings required by section 36 of the $50 act (Acts 47th Sess. c. 238), relative to the appeal bond, etc., are strictly complied with. That court cannot amend the bond; nor can it acquire jurisdiction (when the bond, etc., is defective) by consent of parties, and by their proceeding to trial. A judgment given in such case has no effect.—(1825) Ex parte Chryslin, 4 Cow. 80; (1827) Ex parte Alvord, 6 Cow. 585; (1827) Ex parte Brown, 7 Cow. 468; (1828) Latham v. Edgerton, 9 Cow. 227.

[o] (Pa. 1831) Where judgment was obtained before a justice, and bail for an appeal was entered on the twentieth day, and was excepted to and struck off, and other bail entered on a following day, the court would not dismiss the appeal on motion.—Dickinson v. McGuire, 1 Ashm. 47.

[p] (Pa. 1865) On the trial of an appeal from the judgment of a magistrate, new bail may, if necessary, be substituted on trial.—Hill v. Schucker, 1 Woodw. Dec. 251.

[q] (Pa. 1869) Where a bond on appeal from a judgment of a justice is defective, the appellant may file a new bond, if he files it within the 20 days after the rendition of the judgment by the justice, and thereby perfect the appeal.—Gehring v. Lambert, 1 Leg. Gaz. 85.

[r] (Pa. 1879) If the recognizance for an appeal be defective, the appellant should have leave to perfect the same.—Tripp v. Barnes, 1 Law T. (N. S.) 73.

[s] (Pa. 1883) If defective bail be entered, the appellant will be given time to perfect it before his appeal will be stricken off.—Repp v. Coal Co., 5 Law T. (N. S.) 77.

§ 574. Defects which may be amended or corrected.

[a] (Cal. 1882) Upon an appeal from a justice's court, the superior court has power to authorize the appellant to file a new undertaking, in lieu of an undertaking insufficient in form.—Gray v. Amador County Superior Court, 61 Cal. 337.

[b] (Conn. 1866) An appeal was taken from a justice of the peace to the superior court, and a bond properly taken on the appeal by a recognizance; but the justice, in afterwards writing out the bond, described the court to which the appeal was taken as the county court instead of the superior court. *Held*, that the mistake was a clerical one that could be amended, and did not invalidate the appeal.—Russell v. Monson, 33 Conn. 506.

[c] (Ill. 1866) Rev. St. p. 325, § 65, permitting a bond on appeal from justice court to be amended in the appellate court, authorizes the amendment in the appellate court of the justice's approval of the bond by attaching a revenue stamp.—Hinman v. Kitterman, 40 Ill. 253.

[d] (Ill. 1866) Under Rev. St. p. 325, § 65, permitting appeal bonds from justice's court to be amended, all defects which are not jurisdictional may be corrected by amendment.—Hinman v. Kitterman, 40 Ill. 253.

[e] (Ill. 1879) One appealing from a justice's judgment may properly be allowed in the cir-

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cuit court to amend his appeal bond, to correct a misrecital in the date of the judgment.—Stilley v. King, 3 Ill. App. (3 Bradw.) 338.

[f] (Iowa, 1855) Where an appeal bond, in which the names of the parties before the justice are transposed, appears on the record to be given in the cause appealed, the district court by Code, § 2511, may allow the defect to be corrected.—Brock v. Manatt, 1 Iowa (1 Clarke) 128.

[g] (Kan. 1892) Gen. St. 1889, par. 1395, provides that an appeal from an award of damages by commissioners in railroad condemnation proceedings may be taken to the district court in the same manner as an appeal from a judgment of a justice of the peace. Paragraph 4973 provides that the party appealing from a judgment of a justice of the peace shall, within 10 days from its rendition, enter into an undertaking to the adverse party, with at least one surety, to be approved by such justice, in a sum not less than $50 in any case, nor less than double the amount of the judgment and costs, conditioned to prosecute the appeal to effect, etc. Paragraph 4974 provides that the appeal shall be complete on the filing and approval of the undertaking, as provided in paragraph 4973. *Held*, that an appeal bond in condemnation proceedings which was signed by the surety only, and which left blank the amount of the penalty, was void, and that the district court did not acquire sufficient jurisdiction by the attempt to permit the bond to be amended by inserting the amount.—St. Louis, K. & S. W. Ry. Co. v. Morse, 50 Kan. 99, 31 Pac. 676.

[h] (Mich. 1873) Under Comp. Laws 1871, §§ 5451, 5453, an appeal from a justice of the peace cannot be dismissed absolutely for defects and informalities in the affidavit and bond for appeal, where the applicant tenders a new and proper affidavit and bond.—People v. Judge of Wayne Circuit Court, 27 Mich. 303.

[i] (Ohio, 1883) Rev. St. § 6595, provides that in proceedings on appeal, when the surety in the undertaking shall be insufficient, or such undertaking is insufficient in form or amount, the court, on motion, may order a change or renewal of such undertaking. On appeal from a justice, a bank check was deposited with him by the appellant, payable "to the justice of the peace, appeal, or order," and thereupon the ordinary form of an undertaking for appeal was written out by the justice on his docket, but was not signed by any one, and the certificate added and signed by the justice that the check was received as bond, and was approved. *Held*, that it did not constitute an undertaking for appeal, and that the court of common pleas had no authornty to allow the filing of a new undertaking, but was without jurisdiction to proceed.—Allen v. Walnut Hills, M. & P. Turnpike Co., 9 Ohio Dec. 322, 12 Wkly. Law Bul. 168.

[j] (Or. 1885) Under Justices' Code, §§ 7-9, an appeal cannot be dismissed on motion of the defendant, on account of the undertaking being defective, when such defect was merely technical, and when the appellant, before the determination of the motion to dismiss, offered to file a new undertaking, and it was not necessary, under the statute, that such undertaking should be served on the adverse party.—Hosford v. Logus, 13 Or. 130, 11 Pac. 900.

[k] (Pa. 1878) On an appeal from a judgment of a magistrate, the recognizance to secure costs must be taken before the magistrate who rendered the judgment; but, where this has not been done, the court will permit appellant to perfect his recognizance, and will not strike off the appeal.—Insurance Co. v. Swaigert, 9 Lanc. Bar, 138.

[l] (Tex. 1896) A bond on appeal from a justice of the peace, which is made payable to the appellees or "their certain attorneys," is fatally defective, and cannot be amended.—Nones v. McGregor (Civ. App.) 35 S. W. 1083.

§ 575. —— Defects in amount or condition of bond.

[a] (Dak. 1889) The fact that an undertaking on appeal from a justice's judgment to the district court omits the condition binding appellant to obey any order of the district court, in case it should dismiss the appeal or affirm the judgment, as required by Justices' Code, § 93, does not warrant the district court in dismissing the appeal, where appellant offers to amend the undertaking by inserting the omitted condition.—Keehl v. Schaller, 6 Dak. 499, 50 N. W. 195.

[b] (Ill. 1851) On an appeal from the judgment of a justice, the bond must be at least in twice the amount of that judgment. If not, the appeal should be dismissed; but the appellant may avoid the difficulty by executing a sufficient bond.—Brown v. Keirns, 13 Ill. (3 Peck) 296.

[c, d] (Kan. 1894) Where an appeal bond, filed with and approved by a justice of the peace, is insufficient in form or amount, the party appealing should be given an opportunity by the district court, where the appeal is pending, to change or renew the bond before the case is dismissed for the defect therein.—St. Louis & S. F. Ry. Co. v. Hurst, 52 Kan. 609, 35 Pac. 211.

[e] (Mo. 1835) On appeal from a justice of the peace to the circuit court, if the appeal bond is not sufficient, the appellant may be allowed to file a new appeal bond.—Jones v. Davis, 4 Mo. 28.

[f] (Mo. 1895) Where a bond is given on appeal from a justice, in an action for rent and possession, under Rev. St. § 6400, providing that no appeal shall be given defendant in such a case unless he give bond, with security, sufficient to secure all damages and rent due and to become due, a bond given in the court to which appeal is taken, under section 6340, providing that an appeal from a justice shall not be dismissed because the bond is insufficient, if appellant give such bond as he ought to have given before the allowance of the appeal, is in place of, not in addition to, the first bond.—Kellogg v. Linger, 60 Mo. App. 571, 1 Mo. App. Rep'r, 235.

[g] (Pa. 1883) Where an appeal was taken from a judgment of a justice of the peace, and a recognizance was entered and transcript taken out, but the plaintiff excepted to the sufficiency of the bail, and no new bail was furnished, the appeal was not to be stricken, but may be perfected in the common pleas.—Johnson v. Miller, 2 Chest. Co. Rep. 148.

[h] (Pa. 1887) Where the amount of bail on appeal from a justice court was sufficient to cover the debt, but was not so conditioned, the defect may be remedied, and is not ground for dismissal of the appeal.—Lesch v. Turnpike Co., 1 Wilcox, 195.

[i] (S. D. 1892) When a motion to dismiss an appeal is made in the appellate court on the ground that the undertaking filed is insufficient, and the appeal appears to have been taken in good faith, the appellate court must permit appellant to file a new undertaking, and, when it is filed, deny the motion to dismiss.—Towle v. Bradley, 2 S. D. 472, 50 N. W. 1057, distinguishing Rudolph v. Herman (1891) 50 N. W. 833.

[j] (Tex. 1877) On an appeal from the justice's court, the county court cannot permit

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appellant to amend an appeal bond that is not conditioned as prescribed by statute.—Bremond v. Seeligson, 1 White & W. Civ. Cas. Ct. App. § 637.

§ 576. —— Omission to give bond and defects relating to parties or sureties.

[a] (Ill. 1880) Where an appeal from a justice is taken by filing a bond in the appellate court, that court has no jurisdiction to enter an order requiring the surety on the bond to justify, or the defendant to file, a new bond, or, in default thereof, to dismiss the appeal.—Woodhull v. Kelly, 6 Ill. App. (6 Bradw.) 323.

[b] (Ind. 1875) The provision in section 66 of the act concerning justices of the peace (2 Gav. & H. St. p. 595), that no appeal from a justice of the peace to the circuit court shall be dismissed for the insufficiency of the appeal bond, if the appellant will file a sufficient bond to the acceptance of the court, embraces an insufficiency of the bond caused by its being executed by the appellant alone without any surety.—Murphy v. Steele, 51 Ind. 81.

[c] (Kan. 1881) On an appeal from the judgment of a justice of the peace, the appeal bond was made to run to one not a party to the record or proceedings. *Held* that, no special equities being shown, the appeal could not be perfected by making a new bond to the right party; that this would be in the nature of an amendment, while there was nothing to amend.—Lovitt v. Wellington & W. R. Co., 26 Kan. 297.

[d] (Kan. 1885) When the surety on an appeal bond is disqualified, the appellate court may permit the bond to be corrected.—McClelland v. Allison, 34 Kan. 155, 8 Pac. 239.

[e] (Mo. 1846) Where, on appeal from a justice of the peace, it appears to the appellate court that the surety in the recognizance given below is insufficient, such court may require a new recognizance.—State v. Lavalley, 9 Mo. 834.

[f] (N. Y. 1865) Under Code Proc. § 327, providing that when a party shall in good faith give notice of appeal, and shall omit by mistake to do any other necessary act, the court may permit an amendment, where appellant, on appeal from a justice, fails to give security, the error is amendable by leave of the court.—Briggs v. Swales, 29 How. Prac. 201, 19 Abb. Prac. 323.

[g] (N. Y. 1869) Under Code Civ. Proc. § 355, requiring appellant, in cases where he is entitled to a trial de novo, to give security, an appellant who omits to give such security may, in the discretion of the appellate court, be permitted to give it nunc pro tunc.—Lake v. Kels, 11 Abb. Prac. (N. S.) 37.

[h] (N. Y. 1884) Where an appeal is taken from a justice, and the undertaking required by Code Civ. Proc. § 3069, is given, and on objections to the sufficiency of the sureties they do not justify, the court, under Code Civ. Proc. § 3049, can permit the appellants to give a new undertaking and perfect the appeal.—Ross v. Markham, 5 Civ. Proc. R. 81.

[i] (N. Y. 1892) A party appealing from a justice's court to the county court cannot be compelled to file a new undertaking in case of the death or insolvency of the surety to his original undertaking, either under Code Civ. Proc. § 1308, which is limited to appeals other than from justices' courts, or under section 3276, which applies only to the undertaking to secure costs required of plaintiffs in certain cases at the beginning of an action.—Bonnett v. Townsend, 63 Hun, 45, 17 N. Y. Supp. 566.

[j] (Or. 1886) Subdivision 4, § 527, Civ. Code, authorizing the filing of the undertaking on appeal where it has been omitted through mistake, does not apply to appeals from a justice's court. The undertaking in appeals from a justice of the peace must be filed within 30 days from the date of the entry of judgment.—Odell v. Gotfrey, 13 Or. 466, 11 Pac. 190.

[k] (Pa. 1872) Where an appeal was taken from a judgment of a justice of the peace, and the appellant did not file an appeal bond, on the ground that he was a freeholder, the court will not dismiss the appeal on account of such failure, but will permit him to file the requisite bond.—Fishburn v. Siffiers, 4 Leg. Op. 468.

[l] (Pa. 1880) Where an appeal was taken from the judgment of a justice of the peace, but no recognizance was given, on the ground that appellant was a freeholder and not required to give bail, the common pleas will allow the appeal to be perfected by giving proper security.—Davis v. Marra, 1 Chest. Co. Rep. 328.

[m] (Pa. 1886) Where a defective recognizance has been entered into on an appeal from a justice's court, the appellant will be permitted to perfect it; or if, without fault of his, he has been prevented from appealing by the act of the justice, an appeal will be allowed nunc pro tunc, if asked for in reasonable time.—McElhaney v. Holland, 111 Pa. 634, 5 Atl. 731.

[n] (Tex. 1895) On appeal to the district court from a judgment of a justice of the peace, refusal to allow the appellant to substitute a competent surety on the appeal bond for one whom the court has declared incompetent is error.—Peoples v. Rodgers, 11 Tex. Civ. App. 447, 32 S. W. 798.

[o] (Wis. 1841) Rev. St. p. 322, § 12, provides that no appeal allowed by a justice shall be dismissed on account of there being no recognizance, or that the recognizance is defective if the appellant will, before motion to dismiss, enter before the district court into such recognizance as he ought to have entered into before the allowance of the appeal, and pay all costs that shall be incurred by reason of such default or omission. *Held* that, where appellant failed to execute a recognizance before taking such appeal, it would not avail him to offer to file a sufficient recognizance in the district court. The statute must be complied with by actually filing such recognizance and paying costs before the motion to dismiss is disposed of.—Kensler v. Brunett, 1 Pin. 112.

§ 577. Procedure for amendment or correction of bond.

[a] (Cal.) Where, on appeal from a justice court, the sufficiency of the sureties on appellant's undertaking is excepted to, and he files a new undertaking, with other sureties, but gives no notice, as required by statute (Code Civ. Proc. § 978), the appeal must be dismissed.—(1885) Wood v. Monterey County Superior Court, 67 Cal. 115, 7 Pac. 200; (1886) Herting v. Santa Barbara Superior Court, 10 Pac. 514.

[b] (Conn. 1852) The proper mode of taking objection to an error in a bond on appeal from a justice court is by plea in abatement.—Ives v. Finch, 22 Conn. 101.

[c] (Ill. 1865) On appeal from a justice of the peace to the circuit court, if the bond filed in the cause is adjudged informal, or otherwise insufficient, it is the duty of the

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court to enter a rule against the appellant that, unless he file a sufficient bond by a day named by the court, the appeal will be dismissed.—Wear v. Killeen, 38 Ill. 259.

[d] (Ind. 1882) Where an appeal bond has been taken by a justice of the peace, he loses jurisdiction, and remedy for any defect therein must be sought in the court to which the appeal was taken.—Miller v. O'Reilly, 84 Ind. 168.

[e] (Mo. 1863) In proceedings in the St. Louis land court on appeal from a justice of the peace, the fact that appellee's second motion to dismiss the appeal (the first being overruled) was placed on the court's law docket will not be sufficient notice to him that on the ex parte hearing of the second motion he was adjudged to furnish additional security for his appeal. Hence his failure to furnish it will not be ground for dismissal.—Papin v. Buckingham, 33 Mo. 454.

[f] (Neb. 1896) If the court is satisfied of the insufficiency of the appeal undertaking, it is proper practice to fix the time within which a renewal shall be effected, and to enter a dismissal of the action for a noncompliance with such order.—Galligher v. Wolf, 47 Neb. 589, 66 N. W. 645.

[g] (Neb. 1896) If, in an appeal to the district court from a judgment of a justice of the peace, the appeal bond is believed to be insufficient, it is proper, under Code Civ. Proc. § 1016, for the appellee to file a motion asking the court to order a change or renewal of such undertaking.—Galligher v. Wolf, 47 Neb. 589, 66 N. W. 645.

[h] (Pa. 1894) Where the bond in an appeal from a justice is defective, appellant should be called upon by rule to perfect it.—Steam Heat & Power Co. v. Hutchinson (Com Pl.) 14 Pa. Co. Ct. R. 491.

[i] (Pa. 1895) Where the recognizance for an appeal from a justice of the peace is defective, appellant should be called upon by rule to perfect the same within a given period, and it is error to quash the appeal until this has been done.—Twyford v. Dyer (Com. Pl.) 17 Pa. Co. Ct. R. 28, 4 Pa. Dist. R. 714.

[j] (S. D. 1893) Where an appeal from a justice court has been dismissed for want of a good bond, it is proper to refuse an application to amend the bond, so long as the judgment of dismissal remains in force.—Rudolph v. Herman, 4 S. D. 430, 57 N. W. 65.

[k] (S. D. 1893) It is proper to refuse to allow the application, though the motion contains a prayer for general relief, under which the court might vacate the judgment, if it were asked to do so.—Rudolph v. Herman, 4 S. D. 430, 57 N. W. 65.

§ 578. Waiver of defects in bond and delay in filing.

[a] (Conn. 1852) Where plaintiff without objection suffered an appeal to be taken from a justice court, the bond to be filed, the case to be entered and continued for several terms, and his attorney's appearance entered, he will be deemed to have waived objections to the bond, and cannot first raise the same on the eve of the trial.—Ives v. Finch, 22 Conn. 101.

[b] (Conn. 1852) The provision of St. 1849, p. 67, requiring a bond with surety to be filed on appeal from a justice court, being solely for the benefit of the appellee, he may waive the same.—Ives v. Finch, 22 Conn. 101.

[c] (Ill. 1895) Where a bond on appeal was executed in compliance with the order of the county court, and was duly approved by the county judge, an objection thereto will not be entertained after the case has been submitted to a jury.—Matlock v. Pray, 61 Ill. App. 102.

[d] (Kan. 1887) Where, in an appeal from the judgment of a justice of the peace to the district court, an appeal bond was filed with the justice, more than 10 days after the judgment, the appellee does not waive the defects of the appeal by appearing in the district court for the purpose of questioning the jurisdiction of the court.—Bubb v. Cain, 37 Kan. 692, 16 Pac. 89.

[e] (Mass. 1861) The omission to move in the superior court for the dismissal of an appeal from the judgment of the justices, on charges of fraud alleged against a debtor on his application to take the poor debtor's oath, is a waiver of formal objections to the recognizance entered into by the creditor on his appeal.—Brown v. Tobias, 83 Mass. (1 Allen) 385.

[f] (Mich. 1895) After a general appearance on appeal from a justice of the peace, a party is not entitled, in response to a motion for security for costs, to have the appeal dismissed because the sureties on the appeal bond did not justify before the justice, as required by How. Ann. St. § 7000.—Sherwood v. Ionia Circuit Judge, 107 Mich. 136, 64 N. W. 1045.

[ff] (Miss. 1852) After the term of the circuit court to which an appeal is taken from a justice of the peace, it is too late to move the court to dismiss the appeal for the insufficiency of the appeal bond, provided the bond be voidable only, and not void.—Battle v. Woolf, 23 Miss. (1 Cushm.) 318.

[g] (Mo. 1894) On appeal from a justice's court, where the appellee appears to the merits without objection, he waives objections to the formality of the appeal bond and the validity of the order of the justice.—Long Bros. v. Bolen Coal Co., 56 Mo. App. 605.

[h] (N. H. 1855) The provision of the statute requiring sureties on a recognizance on appeal from a judgment of a justice in a civil cause may be waived by the appellee.—Farnam v. Davis, 32 N. H. 302.

[i] (N. H. 1855) The objection to a want of sureties on a recognizance on appeal from a justice in a civil cause is waived, if appellee appears at the term at which the appeal is entered, and the cause be continued without a motion to dismiss.—Farnam v. Davis, 32 N. H. 302.

[j] (N. Y. 1825) The court may refuse to proceed, for want of jurisdiction, if they become satisfied, during the trial, that the appeal bond was executed without authority, as the want of jurisdiction was not waived by going to trial.—Ex parte Shethar, 4 Cow. 540.

[k] (Pa. 1813) If special bail on an appeal is informally taken, and the plaintiff moves to quash the appeal, and afterwards appears before arbitrators and pleads his cause, the informality is waived.—Cavence v. Butler, 6 Bin. 52.

[l] (Pa. 1826) Motion to dismiss an appeal from a justice, on the ground of the recognizance being defective, not made until May, 1823, while the appeal was entered August term, 1821, is too late.—Shank v. Warfel, 14 Serg. & R. 205.

[m] (S. D. 1892) Where, on appeal from a judgment of a justice of the peace, an undertaking to pay costs on appeal has not been filed under Comp. St. § 6133, providing that an appeal is ineffectual for any purpose unless such an undertaking is filed, the appellate court acquires no jurisdiction, even though the appellee may have consented to the undertaking

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that was filed as sufficient.—Rudolph v. Herman, 2 S. D. 399, 50 N. W. 833.

[n] (S. D. 1892) Comp. Laws, § 6133, providing for undertakings on appeal from justices' courts, does not require that an affidavit of the sureties be made unless the adverse party excepts to the sureties, in which case it provides that, "unless they or other sureties justify before the justice before whom the appeal is taken within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given." *Held*, that the exception to sureties so provided for is limited to their pecuniary responsibility, and not to their ability to become sureties, and a failure to except to the sufficiency of an attorney as a surety is no waiver of the right to object to the undertaking, on the ground that by section 469 attorneys are prohibited from becoming sureties.—Towle v. Bradley, 2 S. D. 472, 50 N. W. 1057.

[o] (Tex. 1890) An affidavit in forma pauperis not conforming to Rev. St. 1879, art. 1401, will not perfect an appeal from a justice's court, and it may be dismissed for want of jurisdiction after several continuances have been had in the county court.—Golightly v. Irvine (App.) 15 S. W. 48.

[p] (Tex. 1891) On appeal by defendants from a justice's court, plaintiff appeared in the district court and amended his original account, and, after allowing several terms of the district court to pass, moved to dismiss the appeal for formal defects in the appeal bond. *Held*, that plaintiff's acts constituted a waiver of such objections to the bond.—Cason v. Laney, 82 Tex. 317, 18 S. W. 667.

(f) NOTICE OF APPEAL.

NECESSITY OF NOTICE OF APPEAL, § 579.
AUTHORITY TO GIVE NOTICE, § 580.
PARTIES ENTITLED TO NOTICE, § 581.
FILING AND SERVICE OF NOTICE, § 582.
—— PERSONS TO BE OR WHO MAY BE SERVED, § 583.
—— TIME OF GIVING OR SERVING NOTICE OF APPEAL, § 584.
EFFECT OF FAILURE TO GIVE NOTICE, § 585.
REQUISITES AND SUFFICIENCY OF NOTICE, § 586.
—— DESCRIPTION OF JUDGMENT, § 587.
—— STATING GROUNDS OF APPEAL, § 588.
SUBSTITUTES FOR NOTICE, § 589.
DEFECTS AND AMENDMENT OF NOTICE, § 590.
WAIVER OF WANT OF NOTICE AND DEFECTS, § 591.

Notice of filing new bond on appeal, see ante, § 577.
—— *transcript on appeal, see* post, § 619.
Summons or process on appeal, see post, § 658.

§ 579. Necessity of notice of appeal.

Notice of appeal as prerequisite to judgment by default, see post, § 723.

[a] (U. S. 1824) Where an appeal from a justice of the peace is prayed on the day of the trial before him, a notice of appeal is not necessary under Geyer's Dig. Ark. p. 391.—Billingsley v. Bell, Fed. Cas. No. 18,237 (Hemp. 24).

[b] (U. S. 1825) The opposite party is entitled to notice of an appeal from a judgment of a justice of the peace, when not taken on the day of trial.—Sinclair v. McElmurry, Fed. Cas. No. 12,895a [1 Hemp. 28].

[c] (Ala. 1893) Under Code, § 3403, relating to notice of appeal from justices' courts, which provides that the justice must issue a notice of the appeal to the appellee, which must be executed by personal service five days before the return term of the appeal, and returned to the clerk of the court to which the appeal is taken, it was error to dismiss a suit for want of prosecution on appeal by defendant to the circuit court, taken two weeks after such court convened, in the absence of proof of service on appellee of such notice.—Murphy v. Wood, 103 Ala. 638, 16 South. 22.

[d] (Ill. 1874) Where an appeal from the judgment of a justice of the peace is taken and perfected before the justice, no summons or other notice to the appellee is required.—Fix v. Quinn, 75 Ill. 232.

[e] (Ill. 1878) On a plaintiff's appeal, perfected before the justice, from a judgment dismissing the suit, no notice to the defendant is necessary.—Reiman v. Ater, 88 Ill. 299.

[f] (Iowa, 1858) To give the district court jurisdiction of the appeal, it must appear either that the appellee had notice of the appeal, according to Code, §§ 2341, 2342, or that he voluntarily appeared.—Quillan v. Windsor, 6 Iowa (6 Clarke) 396.

[g] (Iowa, 1873) The statute relative to appeals does not require notice to the appellee to perfect an appeal from a justice; nor does a failure to give such notice authorize a dismissal of the appeal.—Bond v. Davis, 37 Iowa, 163.

[h] (Minn. 1876) Under Gen. St. 1866, c. 65, § 104, which provides that no appeal from a judgment of a justice of the peace shall be allowed unless certain requisites are complied with, including the filing of an affidavit, the execution of a bond, service of a notice of appeal, and the filing of such notice with proof of service within 10 days, such filing of the notice and proof of service is jurisdictional, and an appeal appearing from the justice's docket to have been allowed on the affidavit and bond alone is ineffectual.—Marsile v. Milwaukee & St. P. Ry. Co., 23 Minn. 4.

[i] (Mo. 1851) Under Rev. Code 1845, notice of an appeal from a justice's court is still necessary, although a continuance has been granted at the first term in the court of common pleas for the want of it. An appeal is never properly ready for trial until notice thereof has been given to the appellee, or he has done some act from which such notice may be presumed, or the want of it is waived.—McCabe v. Lecompte, 15 Mo. 78.

[j] (Mo. 1874) Where an appeal is taken from the judgment of a justice of the peace on a day subsequent to the date of the judgment, the appellant will not be excused for failure to notify the appellee by reason of irregular entries made by the clerk at the return term of the circuit court, where no appearance is entered by the appellee and no record entry made to that effect.—McGregor v. Leighton, 57 Mo. 597.

[k] (Mo. 1891) When an appeal from a justice is not allowed on the same day the judgment is rendered, appellant must notify the other party of the appeal before the second term of the circuit court thereafter; otherwise, the appeal should be dismissed, or the judgment affirmed.—Crosby v. Clary, 43 Mo. App. 222.

[l] (Mo. 1894) Under Rev. St. 1879 § 6337, the failure of a justice of the peace to file his transcript does not affect an appeal taken from his judgment, or excuse appellant for failing to give notice of the appeal as required

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by sections 6342, 6344.—Studer v. Federle, 57 Mo. App. 534.

[m] (Neb. 1894) On an appeal to a district court from a judgment of a justice of the peace, appellant need not give notice of the appeal to his adversary.—McBrien v. Riley, 38 Neb. 561, 57 N. W. 385.

[n] (N. Y. 1848) Code, § 304, requiring the appellant, on appeal from a judgment of a justice, to serve with the affidavit of appeal a notice thereof and of the hearing before the county judge, must be complied with to make an appeal effectual.—Purdy v. Harrison, 1 Code Rep. 54.

[o] (N. C. 1882) An appeal must be taken to the next term of the appellate court; and it is therefore error to proceed in a case on appeal from a justice's court taken after that time, in the absence of notice to the appellee that he may show cause against it.—Hahn v. Guilford, 87 N. C. 172.

[p] (Pa. 1864) Where defendant in an action before a justice of the peace is appellant on appeal from the judgment, and plaintiff appears neither by counsel nor in person, actual notice of the appeal must be given him before a judgment can be taken against him for want of a declaration.—Henry v. Rowe, 1 Woodw. Dec. 173.

[q] (Pa. 1864) Where plaintiff appeals from a judgment of a justice, defendant must be brought into the appellate court by notice of appeal before any step beyond the filing of the declaration can be taken in the action.—Henry v. Rowe, 1 Woodw. Dec. 173.

§ 580. Authority to give notice.

[a] (Cal. 1887) Under Code Civ. Proc. §§ 842, 974, which provide that the party, or any person he may select for the purpose, may sign the notice, a notice of appeal from the judgment of a justice's court may be signed by other attorneys than those who appeared for appellant in the justice's court.—Totton v. Sonoma County Superior Court, 72 Cal. 37, 13 Pac. 72.

[b] (N. Y. 1866) A notice of appeal from the judgment of a justice's court to the county court, signed, "M. S., Defendant, by W. J. S., His Attorney," is valid, though W. J. S. is not an attorney at law.—Hall v. Sawyer, 47 Barb. 116.

[c] (N. Y. 1881) Under Code, § 3046, a notice of appeal from a justice's judgment is properly entitled as a mandate in the county court, and may be signed by the appellant's attorney at law without proof of his authority; but it cannot be signed by his attorney in fact, or agent, as such.—Bishop v. Van Vechten, 62 How. Prac. 261, 10 Abb. N. C. 220.

[d] (Wis. 1869) That a statute requires notice of an appeal from a justice of the peace or an affidavit to be executed for appellant by some one "by him authorized" does not of necessity require proof of the authority of the agent or attorney on the face of the papers.—Benjamin v. Houston, 24 Wis. 309.

[e] (Wis. 1884) On an appeal from a justice of the peace, the notice of appeal must be signed by the appellant, or some one in his behalf, or, if not signed, the record must show that the notice was presented to the justice by the appellant or some one authorized by him.—Evangelical Lutheran St. Peter's Soc. v. Koehler, 59 Wis. 650, 18 N. W. 476.

§ 581. Parties entitled to notice.

[a] (Cal. 1895) On appeal from a judgment of a justice of the peace by defendants against whom the judgment was rendered, other defendants jointly liable, but not served, are not adverse parties, on whom the notice of appeal must be served.—Terry v. Superior Court of San Diego County, 110 Cal. 85, 42 Pac. 464.

[b] (Tex. 1885) Rev. St. art. 1638, providing for notice in the county court of an appeal from justice court, applies alone to the party against whom the appeal is taken.—Curtis v. Bernstein, 2 Willson, Civ. Cas. Ct. App. § 673.

§ 582. Filing and service of notice.

Service of petition for appeal, see ante, § 521.

[a] (Cal. 1887) Under Code Civ. Proc. § 974, which provides that an appeal from a justice's court to the superior court shall be taken "by filing a notice of appeal with the justice, and serving a copy on the adverse party," and section 978, which relates to the undertaking on such appeal, it is not necessary that the notice and undertaking should be filed before service thereof.—Hall v. El Dorado County Superior Court, 71 Cal. 550, 12 Pac. 672.

[b] (Mo. 1887) The notice required by Rev. St. §§ 3055, 3057, in the case of appeal from the judgment of a justice of the peace, is not process in any legal sense; and, since the statute does not devolve on the sheriff the duty to serve the notice and make return, or declare what force and effect such return should have, the return of such a notice by the sheriff is not even prima facie evidence of the facts recited by him in the return.—Horton v. Kansas City, Ft. Scott & Gulf R. Co., 26 Mo. App. 349.

[c] (Mo. 1895) The official return by an officer authorized to serve a notice of appeal from a judgment of a justice is sufficient to establish fact of service.—Hansard v. German Ins. Co., 62 Mo. App. 146.

[d] (Neb. 1871) On appeal from a mayor to a district court, a statement in the mayor's transcript of the proceedings, which states that after rendition of judgment the appellant "gave notice of an appeal to the district court the same day," is sufficient to establish a notice given in open court at the time of the rendition of the judgment.—Newcomb v. Boulware, 1 Neb. 428.

[e] (N. Y. 1886) The tender of a notice of appeal to a justice, who refuses to receive it, but who accepts it as sufficient service, is good ground for an order of the county court permitting appellant to perfect his appeal under Code Civ. Proc. § 3049; the tender of the notice in such case being sufficient to save the right of appeal.—Gray v. Wolcott, 5 N. Y. St. Rep. 129.

[f] (N. C. 1891) Service of the notice of appeal was made by one not an officer. Code, § 597, regulates the manner of service of notices, and subdivision 4 provides that a subpœna may be served by a person not an officer. *Held*, that service of the notice should have been made by an officer.—State v. Johnson, 109 N. C. 852, 13 S. E. 843.

[g] (Or. 1887) Under the state practice, upon an appeal from a justice's court the appellant cannot personally serve the notice of appeal.—Williams v. Schmidt, 14 Or. 470, 13 Pac. 305.

[h] (Or. 1888) Under Hill's Code, § 2119, requiring the notice of appeal to be filed with the justice "with the proof of service indorsed thereon," filing a notice without such proof of service is ineffectual for any purpose.—Henness v. Wells, 16 Or. 266, 19 Pac. 121, following Briney v. Starr (1876) 6 Or. 207.

[i] (Wash. 1869) An appeal from a justice's court will not be dismissed because of slight discrepancies between the notice of appeal serv-

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ed on the justice and the copy served on the appellee.—McKilver v. Manchester, 1 Wash. T. 255.

§ 583. —— Persons to be or who may be served.

Retroactive effect of statutes relating to service of notice of appeal, see ante, § 466.

[a] (Cal. 1856) Notice of appeal from the judgment of a justice of the peace may be served on the attorney of the adverse party.—Welton v. Garibardi, 6 Cal. 245.

[b] (Cal. 1889) Code Civ. Proc. § 974, providing that a notice of appeal from a justice to a superior court shall be served on the adverse party, is complied with by service on the manager of a corporation, for the corporation itself, as such notice is analogous to a summons which, under section 411, may be served on the managing agent of a corporation; the terms "manager" and "managing agent" being synonymous.—Pacific Coast Ry. Co. v. Superior Court of San Luis Obispo County, 79 Cal. 103, 21 Pac. 609.

[c] (Ill. 1894) On appeal from a justice's court, a notice served on the attorneys for the parties below is sufficient where the relation of attorney and client at the time of the service is not denied by affidavit, and the parties appear in the court without other notice.—Vallens v. Hopkins, 51 Ill. App. 337.

[d] (Ill. 1894) Where an attorney appeared for a party in a justice court, no formal retainer is necessary to constitute him the attorney for such party on appeal to the county court, since his retainer may be implied and notice of appeal may be served on him.—Johnston v. Brown, 51 Ill. App. 549.

[e] (Minn. 1891) Under Gen. St. 1878, c. 65, § 114, providing that notice of appeal from justice's court shall be served by delivering to the opposite party a copy of the notice, or by leaving a copy at his residence, an affidavit of service of notice is sufficient which states that it had been served on the respondent "by delivering to and leaving with him, personally, a copy thereof, at his residence, in said township, by delivering to and leaving with his father" a true copy thereof.—Toner v. Advance Thresher Co., 45 Minn. 293, 47 N. W. 810.

[f] (Minn. 1892) Under Gen. St. 1878, c. 65, allowing service of the notice of appeal from a justice's court to be made otherwise than personally, by leaving a copy of the notice "at the residence" of the person to be served, and making the filing of proof of service of the notice essential before the appeal can be allowed, such proof is insufficient and of no effect if it merely shows the delivery of a copy of the notice to the wife of the person to be served, without showing that such delivery was made at his residence.—Stolt v. Chicago, M. & St. P. Ry. Co., 49 Minn. 353, 51 N. W. 1103.

[g] (Mo. 1890) Rev. St. § 3055, provides, with respect to notices of appeal from a judgment of a justice, that "the notice may be served in like manner as an original writ of summons; * * * and when the appellee does not reside in the county, and has no agent in the suit therein within the knowledge of the justice, the service may be by leaving a copy of such notice with the justice." *Held*, upon appeal from a judgment on a motion to quash a return, that service upon a person shown by the evidence to have been the attorney for the appellee in such motion was sufficient, the attorney being the agent of appellee, within the meaning of said statute.—Bensberg v. Turk, 40 Mo. App. 227.

[h] (Mo. 1891) Under Rev. St. 1879, § 3055, providing that on appeal from the justice's court, if appellee does not reside in the county, "and has no agent in the suit therein within the knowledge of the justice," notice of appeal may be served by leaving a copy with the justice, a notice of appeal left with the justice when he knows that appellees have an attorney attending to their interests in the suit is insufficient. The justice's act, in such case, is not judicial, but ministerial. He is a mere custodian of the notice.—Southard v. Nelson, 43 Mo. App. 210.

[i] (Mo. 1891) Rev. St. 1889, § 6342, provides that a notice of appeal from a judgment in a justice's court may be served in like manner as an original writ or summons, or by delivering a copy of the same to the appellee by any person competent to be sworn as a witness, or, "if the appellee shall have appeared to the suit before the justice, either by agent or attorney, said notice may be served on said agent or attorney." *Held*, that where a notice of appeal was served on an attorney employed to conduct the case for appellee in the circuit court, but who had not entered a general appearance, the notice gave the circuit court no jurisdiction.—Ellis v. Kyes, 47 Mo. App. 155.

[j] (N. Y. 1832) Notice of appeal, required to be served on a justice on making an appeal, may be served, in his absence, on a member of his family of suitable age.—People v. Ulster Common Pleas, 7 Wend. 492.

[k] (N. Y. 1849) On an appeal from a justice's court, it is not sufficient evidence of the nonresidence of a respondent that she could not be found at her place of residence, and that she could not be found by diligent search for 20 days; and service of notice of appeal on respondent's attorney was not sufficient.—Duffy v. Morgan, 4 N. Y. Super. Ct. (2 Sandf.) 631.

[l] (N. Y. 1852) An appeal from the justice court is perfected by the service of the affidavit and notice of appeal on the justice, and service of appeal on the respondent, or his attorney, if the respondent is a nonresident.—Schermerhorn v. Golief, 1 Code R. (N. S.) 290.

[m] (N. Y. 1865) Where a notice of appeal from a justice's judgment, specifying the particulars in which the judgment should have been more favorable to the appellant, is served upon the respondent, the respondent, in serving his offer of acceptance, must not only serve it upon the party, but also upon the justice.—Smith v. Hinds, 30 How. Prac. 187.

[n] (N. Y. 1869) Code Civ. Proc. § 354, authorizing service of a notice of appeal on respondent's attorney or agent, if respondent does not reside or cannot be found in the county, permits such service only where the attorney or agent resides in the county where the judgment was rendered.—Lake v. Kels, 11 Abb. Prac. (N. S.) 37.

[o] (N. Y. 1870) Notice of appeal from a justice's court must be served upon all the members of the board of commissioners of excise of a county, in order to constitute a legal service on the board, within section 354 of the Code of Civil Procedure.—Metcalf v. Garlinghouse, 40 How. Prac. 50.

[p] (N. Y. 1874) Where respondents in an appeal from a judgment rendered by a justice of the peace are partners, service of notice of appeal upon one is notice to both.—Miller v. Perrine, 1 Hun, 620; Perrine v. Miller, 4 Thomp. & C. 36.

[q] (N. Y. 1884) Under Code Civ. Proc. § 3048, providing that service of notice of appeal from the judgment of a justice must be

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made upon the respondent personally, if he is a resident of the county, an order by respondent, who is a resident of the county, permitting appellant to serve a notice of appeal upon his attorney, is of no avail, since it could not enlarge or limit the scope of the statute.—Andrews v. Snyder, 6 Civ. Proc. R. 333.

[r] (N. Y. 1884) Under Code Civ. Proc. § 3048, requiring the notice of appeal from the judgment of a justice to be delivered to the respondent personally, or at his residence with a person of suitable age and discretion, if he is a resident of the county, service on his attorney, who appeared for him in the court below, is insufficient, although the appellant was of the opinion that he was not a resident of the county.—Andrews v. Snyder, 6 Civ. Proc. R. 333.

[s] (N. Y. 1886) The statute designates no person on whom notice of appeal from a justice's judgment may be served, after the appellee's death and before the appointment of an administrator. *Held*, that service on the widow, the justice, the county clerk, and the attorney who appeared before the justice is not legal service.—Clark v. Snyder, 40 Hun, 330.

[t] (N. Y. 1887) A judgment of the county court, rendered on appeal from a justice, will not be set aside because service of the notice of appeal was made merely on the appellee's attorney, where at the close of the trial before the justice appellant stated in the presence of appellee and his attorney that the case would be appealed, and the appellee told his attorney to attend to it, and the latter gave appellant a notice of retainer and appeared for the appellee on such appeal.—Bennett v. Kenyon, 5 N. Y. St. Rep. 496.

[u] (N. C.) Service of the notice of appeal on the justice did not obviate the necessity of service on defendant.—(1876) Green v. Hobgood, 74 N. C. 234; (1891) State v. Johnson, 109 N. C. 852, 13 S. E. 845.

[v] (Or. 1869) Under Code, p. 595, § 66, providing that the appeal in justice court shall be taken by serving a notice thereof on the adverse party and filing the original, the notice may be served either upon the party or on the attorney who appeared for him in the action, if such attorney resides in the county where the trial was had.—Carr v. Hurd, 3 Or. 160.

[w] (Or. 1886) On appeal from a justice's judgment, notice of the appeal need not be served on the attorney who represented the appellee before the justice.—Byers v. Cook, 13 Or. 297, 10 Pac. 417.

[x] (Or. 1895) Under Hill's Code, § 2119, which provides that notice of appeal from a judgment of a justice shall be served upon the adverse party, a notice served on his attorney is sufficient.—Dryden Printing Co. v. Reeves, 26 Or. 1145, 38 Pac. 622.

[y] (Or. 1895) A return of service of notice of appeal from a justice's judgment, which shows that the notice was served on appellee's attorney, established a valid service, in the absence of anything to show that such attorney was not a resident of the county in which the judgment was rendered.—Hughes v. Clemens, 28 Or. 440, 42 Pac. 617.

[z] (S. C. 1894) Code, § 360, provides that a notice of appeal from a justice of the peace must be served, in case respondent is not a resident of the county, on the agent, if any, "who is a resident of such county," and appeared for respondent on the trial, etc. *Held* that, where respondent was a nonresident, service of the notice on the agent who appeared for respondent, but who was also a nonresident of the county, was insufficient.—Sheldon v. Pearson, 42 S. C. 111, 20 S. E. 26.

§ 584. —— Time of giving or serving notice of appeal.

[a] (U. S. 1835) Where an appeal from a justice is not taken on the day of trial, 10 days' notice before the sitting of the next court authorized to try the same must be given to the opposite party.—Kirk v. Armstrong, Fed. Cas. No. 7,838a [Hemp. 283].

[b] (Idaho, 1886) To effectuate an appeal from a judgment of a justice of the peace, the notice of appeal must be filed with the justice, a copy of the same served on the adverse party, and the undertaking must be filed, and all these things must be done within 30 days after the rendition of the judgment, but the mere order in which they are done is not material.—Salt Lake Brewing Co. v. Gillman, 2 Idaho, 180, 10 Pac. 32.

[c] (Iowa, 1883) Under Code 1873, § 4691, providing that a prosecuting witness before a justice of the peace may appeal to the district court, "by there giving notice to the justice that he claims such appeal, and the fact of giving such notice shall be entered on his record by the justice," such notice must be given at the time the judgment is rendered.—State v. Knapf, 61 Iowa, 522, 16 N. W. 590.

[d] (Mo. 1883) Under Rev. St. § 3056, providing that if, on appeal from a justice of the peace, the appellant fail to give notice of his appeal at least 10 days before the first day of the term at which the cause is to be determined, the case may be tried at the option of the appellee, "but no appeal shall be dismissed for want of such notice," and section 3057, providing that, on failure to give such notice at least 10 days before the second term of the appellate court, after the appeal is taken the judgment shall be affirmed, it is error to affirm the judgment for want of such notice before the second term at which the cause is triable.—Davis v. Schields, 14 Mo App. 397.

[e] (Mo.) Under Rev. St. § 3056, providing that if appellant fail to give notice of appeal, when such notice was required, the cause shall, at the option of appellee, be tried at the first term, if he shall enter his appearance on or before the second day thereof, or at his instance shall be continued as a matter of course until the succeeding term, at cost of appellant, and section 3057, providing that, if appellant shall fail to give such notice at least 10 days before the second term of the appellate court after the appeal is taken, the judgment will be affirmed or the appeal dismissed, at the option of appellee, where appellant fails to give notice, and appellee enters his appearance on or before the second day of the term, the circuit court has no authority to affirm the judgment at the first term without giving appellant an opportunity to try the cause. It can only do so at the second term, where appellant fails to give such notice 10 days before the beginning of the term.—(1884) Dooley v. Missouri Pac. Ry. Co., 83 Mo. 103; (1885) Priest v. Missouri Pac. Ry. Co., 85 Mo. 521.

[f] (Mo. 1894) Where a change of venue of a case appealed from the justice's court was taken at the first term, after the appeal, of the court to which such appeal was returnable, and the first succeeding term of the court to which the venue was changed began several months afterwards, the latter constituted the second term of the appellate court for the purpose of notice of the appeal.—Evans v. Hannibal & St. J. R. Co., 58 Mo. App. 427.

[g] (N. Y. 1848) Code, tit. 9, c. 5, provides the only mode of reviewing a judgment in a

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justice's court. Section 303 requires notice of appeal to be served within 10 days before the time for hearing the appeal. *Held*, that the words "therein designated" cannot be interpolated after the word "time," and hence the copy affidavit of the appellant and notice of appeal must be served within at least 10 days before the hearing of the appeal, and not 10 days merely before the time for the hearing designated in the notice; and, where a notice of appeal designates the time for the hearing within 10 days of the serving of a notice, the court will appoint another time, that due notice may be given.—Tullock v. Bradshaw, 1 Code Rep. 53.

[h] (N. Y. 1853) Notice of an appeal may be served as soon as the justice renders his judgment.—Griswold v. Van Deusen, 2 E. D. Smith, 178.

[i] (N. Y. 1879) Under the Code, as amended in 1851, notice of appeal is required to be served in 20 days to render effectual an appeal from a justice to the county court.—Thomas v. Thomas, 18 Hun, 481.

[j] (Or. 1890) Code, § 2119, providing that "an appeal [from a justice of the peace] is taken by serving a notice thereof on the adverse party, and filing the original, with proof of service indorsed thereon, with the justice, and by giving the undertaking for the costs of the appeal," does not in terms require that the notice of appeal be first filed; and hence an appeal is sufficient where the undertaking is filed before the notice, both being filed within 30 days after entry of judgment, as required by section 2118.—Brown v. Jessup, 19 Or. 288, 24 Pac. 232.

[k] (S. C. 1882) In order to perfect an appeal from a trial justice, notice of appeal must be served on the justice within the statutory five days.—Foot v. Williams, 18 S. C. 601.

[l] (Tex. 1881) A party cannot give notice of appeal from a justice's judgment after the court has adjourned and during vacation, though the motion for new trial was overruled in vacation; Rev. St. art. 1639, requiring the notice of appeal to be given at the same term at which the judgment is rendered.—Williams v. Dennis, 1 White & W. Civ. Cas. Ct. App. § 1233.

[m] (Tex. 1881) The requirement of Rev. St. art. 1639, that a notice of appeal should be filed within 10 days after the rendition of a judgment in a justice's court, is not affected by article 1622, giving the justice such time within which to act on a motion for new trial.—Bach v. Ginacchio, 1 White & W. Civ. Cas. Ct. App. § 1310.

§ 585. Effect of failure to give notice.

[a] (Ala. 1893) Code, § 3403, providing that notice of appeal from a justice must be served on appellee, is mandatory; and a judgment by default against the appellee will be reversed, unless the record affirmatively shows that such notice was given.—Hightower v. Crow, 102 Ala. 584, 15 South. 350.

[b] (Cal. 1885) If service of notice of appeal from a justice court was not made within the statutory time, and as required by statute, the appellate court has no jurisdiction, and may dismiss the appeal ex mero motu.—Dalzell v. San Benito County Superior Court, 67 Cal. 453, 7 Pac. 910.

[c] (Iowa, 1851) If an appeal from a justice is not taken on the day judgment is rendered, no valid judgment can be given in the district court without notice to the appellee or a waiver of it by his appearance.—McCormick v. Bishop, 3 G. Greene, 99.

[d] (Iowa, 1854) Where a decision of a justice of the peace was taken to the district court by writ of error, without any notice to the defendant, it was *held* that the judgment in the district court was a nullity.—Sprote v. Marshall, 4 G. Greene, 344.

[e] (Mo. 1847) Where an appeal is taken after the day of trial before a justice of the peace, and no notice given to the appellee, the cause will not be for trial at the first term, unless the appellee enters his appearance on the first day of the term.—Slater v. The Convoy, 10 Mo. 513; Masterson v. Ellington, Id. 712.

[f] (Mo. 1873) Under 2 Wag. St. p. 850, § 22, regulating appeals from justices' courts, where appellant fails to give notice of his appeal, the cause shall, at the option of the appellee, be decided at the first term, if he shall enter his appearance on or before the second day thereof, or, at his instance, may be continued as a matter of course.—Blake v. Downey, 51 Mo. 437.

[g] (Mo. 1873) Where, on appeal from the judgment of a justice, the appellant fails to give the assignee the notice required by 2 Wag. St. p. 850, § 21, judgment for want of prosecution cannot be taken at the return term of the appeal, unless the appellee enter his appearance on or before the second day thereof.—Nay v. Hannibal & St. J. R. Co., 51 Mo. 575.

[h] (Mo. 1873) Where an appeal is allowed from a justice of the peace, and appellant fails to give notice of his appeal, as required by 2 Wag. St. p. 850, § 21, before the second ensuing term of court, the appellee is entitled to an order of affirmance.—Nay v. Hannibal & St. J. R. Co., 51 Mo. 575.

[i] (Mo. 1875) Where an appeal from a judgment of a justice of the peace is not taken on the day when the judgment is rendered, and notice thereof is not given before the second term of the circuit court after that at which the case is to be determined, such omission will be held to be a failure to prosecute the appeal, authorizing an affirmance of the judgment.—Page v. Atlantic & P. R. Co., 61 Mo. 78.

[j] (Mo. 1876) Where appeal from judgment in a justice's court is not taken on the day of its rendition, and no notice of appeal is given before the second term thereafter, at which the case is triable in the circuit court, the judgment below may be affirmed on motion; and it is immaterial that, after filing, and before hearing of the motion, such notice is given.—Town of Brownsville v. Rembert, 63 Mo. 393.

[k] (Mo. 1876) A judgment of a justice of the peace must be affirmed, where a notice of appeal is not given before the second term after judgment, although the appellant may have been unable after diligent search to discover appellee's residence before that time.—Thurston v. Kansas Pac. Ry. Co., 1 Mo. App. 400.

[l] (Mo. 1887) It is not enough, in order to overthrow a judgment of the circuit court affirming a judgment of a justice court, when notice of appeal to the circuit court was not given, that the objection in the justice's court is defective in form and substance. If the appellant fail to prosecute his appeal, he is not in a situation to raise the question in the circuit court.—Horton v. Kansas City, Ft. S. & G. R. Co., 26 Mo. App. 349.

[m] (Mo. 1887) An omission by appellant from a justice's judgment to give the 10 days' notice of appeal, as required by Rev. St. 1879, § 3057, does not constitute a failure of jurisdiction, but is only a failure to prosecute the appeal.—Holdridge v. Marsh, 28 Mo. App. 283.

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[n] (Mo. 1891) When an appeal from a judgment of a justice is taken on a day subsequent to its rendition, and no notice thereof is given 10 days before the second term of the appellate court thereafter, as required by Rev. St. 1889, § 6342, then the judgment of the justice shall be affirmed at the election of the appellee as required by section 6344. In the absence of such notice and the appearance of the appellee, the circuit court has no jurisdiction to enter any other judgment than that of affirmance or dismissal of the appeal.—Wolff v. Coffin, 46 Mo. App. 190.

[o] (N. J. 1860) The plaintiffs paid the amount of a judgment recovered against them before a justice, and, without giving any notice afterwards, appealed. The judgment of the court of pleas was reversed in the supreme court for want of notice.—Apgar v. Degraw, 28 N. J. Law (4 Dutch.) 527.

[p] (N. C. 1873) An omission to give the notice of appeal required by Code Proc. § 535, limited strictly within the 10 days, is not so serious a default as will preclude a party from the right to have his case reheard.—Marsh v. Cohen, 68 N. C. 283.

[q] (S. C. 1878) Where no notice of an appeal to the circuit court from the judgment of a trial justice is given within the time fixed by statute, the circuit court acquires no jurisdiction.—Scott v. Pratt, 9 S. C. (9 Rich.) 82.

[r] (Tex. 1881) An appeal from a justice's court to a county court will be dismissed, where no notice of appeal appears in the record.—Harris v. Credille, 1 White & W. Civ. Cas. Ct. App. § 562.

§ 586. Requisites and sufficiency of notice.

[a] (Cal. 1855) A notice of appeal from a justice's to the county court, stating that he appealed from the "whole judgment," is a definite notice.—Price v. Van Caneghan, 5 Cal. 123.

[b] (Cal. 1863) A notice of appeal from a justice of the peace from a judgment in an action of forcible entry and detainer is not invalid because it contains the clause, "This appeal is taken on questions of law alone."—Zoller v. McDonald, 23 Cal. 136.

[bb] (Cal. 1885) The omission of the persons signing to designate themselves as attorneys for the appellant will not render the notice of appeal from a justice's judgment ineffectual.—Rutledge v. Humboldt County Superior Court, 67 Cal. 85, 7 Pac. 144.

[c] (Dak. 1887) Where the caption and venue in the notice of an appeal show that the appeal is taken from a judgment rendered in Hand county, by a justice of the peace in and for such county, the fact that the notice is directed to such justice "of the county of Hughes" is immaterial.—Kirkpatrick v. Dakota Cent. Ry. Co., 4 Dak. 481, 33 N. W. 103.

[d] (Dak. 1887) A notice that the defendant "appeals from the judgment entered" in an action is a sufficient compliance with the provision of Justices' Code, § 89, requiring the notice to state whether the appeal is taken from the whole or a part of the judgment.—Kirkpatrick v. Dakota Cent. Ry. Co., 4 Dak. 481, 33 N. W. 103.

[e] (Dak. 1887) Justices' Code, § 89 (Amend. Sess. Laws 1881, c. 4), provides that the notice of appeal from a justice's court to the district court must state whether the appeal is taken from the whole or a part of the judgment, and whether the appeal is taken on questions of law or fact, or both. Section 91 (Amend. Sess. Laws 1879, c. 31, § 2) provides that when a party appeals to the district court on questions of fact, or on questions of both law and fact, and demands in his notice of appeal a new trial in the district court, no statement must be made, but the action must be tried anew in that court. *Held* that, where the notice stated that the appeal was from the judgment entered therein on the questions of both law and fact therein, it was error to dismiss the appeal for failure of the notice to demand a new trial, and that it should have been entertained for the determination of the questions of law.—Karr v. Chicago & N. W. Ry. Co., 6 Dak. 14, 50 N. W. 125.

[f] (Dak. 1887) Under Justices' Code, § 89, providing that "any person dissatisfied with a judgment rendered in a civil action in a justice's court may appeal therefrom. * * * The notice must state whether the appeal * * * is taken on questions of law or fact, or both"; and section 91, providing that when the appeal is taken on questions of both law and fact, and a new trial is demanded in the district court, the action must be tried anew in that court,—an appeal must be entertained by the district court, and a trial granted there, where the notice stated that the appeal was on questions of law and fact, and demanded a new trial in the district court, though the justice merely sustained a demurrer to the counterclaims, and entered judgment for the amount demanded in the complaint.—Purcell v. Booth, 6 Dak. 17, 50 N. W. 196.

[g] (La. 1865) A citation of appeal to the supreme court from a judgment rendered by a justice of the peace should issue as if rendered in a district court, or the appeal will be dismissed.—Carrollton v. Gailliard, 17 La. Ann. 120.

[h] (Minn. 1870) Where, in a return on appeal from a justice, the transcript recites that notice of appeal was served and filed, but the papers returned by the justice show the notice void for want of signature, the papers qualify the statement in the transcript, and the return shows a want of jurisdiction to allow the appeal.—Larrabee v. Morrison, 15 Minn. 196 (Gil. 151).

[i] (Minn. 1890) Under Sp. Laws 1889, c. 351, § 28, which provides that on appeal from a justice of the peace to the municipal court of St. Paul, the appellant shall serve on the respondent a notice of trial at least three days before the term at which the appeal is to be heard, such a notice, dated May 26th, and stating that the action would be brought to trial at the next general term of the court on May 3d, is fatally defective.—Marcotte v. Fitzgerald, 45 Minn. 51, 47 N. W. 316.

[j] (Mo. 1828) Under Act Feb. 21, 1825, providing that a party appealing from a judgment in a justice's court shall notify the other party, where the appeal is not prayed for on the day of the trial, a notice on the day of the trial by one of the parties that he "intends" to appeal at a subsequent date is insufficient.—Hempstead v. Darby, 2 Mo. 25.

[jj] (N. Y. 1874) A notice of appeal from a judgment of a justice of the peace, which was not signed at the bottom by the appellant or his attorney, but was indorsed on the outside: "Notice of Appeal. H. N. Warner, Appellant's Attorney,"—is sufficient.—Burrows v. Norton, 2 Hun, 550, 5 Thomp. & C. 97.

[k] (N. Y. 1887) Where a notice of appeal from a justice's judgment to a county court is sufficient and regular, it should not be dismissed on the ground that a new trial is demanded, and the case is not one in which he is entitled to a new trial; the sum demanded being less than $50.—Dudley v. Brinckerhoff, 13 Civ. Proc. R. 92.

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[l] (N. Y. 1868) Under Code Civ. Proc. c. 19, tit. 8, relating to appeals from justices of the peace, an appeal, in a case where a new trial cannot be had in the appellate court, will not be dismissed because appellant, in his notice of appeal, demands a new trial, but the appeal will be heard on the law.—Kimball v. Rich (Super. Buff.) 3 N. Y. Supp. 248.

[m] (N. C. 1876) A verbal notice of appeal from the judgment of a justice, given to the appellee by the justice in the presence of both parties at the trial, is sufficient.—Richardson v. Debnam, 75 N. C. 390.

[n] (N. C. 1892) Under Code, § 876, giving a defendant who was not personally served with process, and did not appear, in a suit before a justice, the right to appeal from a judgment, on serving notice thereof, such defendant cannot appeal by serving a "limited notice of appeal in the nature of a special appearance."—Clark v. Deloach Mill Mfg. Co., 110 N. C. 111, 14 S. E. 518.

[o] (Pa. 1864) A statement to plaintiff, before the justice, that defendant intends to appeal from a judgment of the justice, is insufficient as a notice of appeal.—Henry v. Rowe, 1 Woodw. Dec. 173.

[p] (Wash. 1893) A notice of appeal from a justice, entitled: "State of Washington, County of Spokane—ss.: Before C., Justice of the Peace,"—is not objectionable as not entitled in a court.—State v. Spokane County Super. Ct., 7 Wash. 223, 34 Pac. 922.

[q] (Wis. 1879) The affidavit and notice of appeal from a justice of the peace failed to show that they were made by or on behalf of defendant, or by any person authorized by him, and were in fact made by one having no authority. *Held*, that the circuit court acquired no jurisdiction of the appeal, and that jurisdiction thereof could not be conferred by consent.—Palmer v. Peterson, 46 Wis. 401, 1 N. W. 73.

§ 587. —— Description of judgment.

[a] (Minn. 1880) A notice of appeal from a judgment of a justice of the peace, which fails to show by what justice or in what county the judgment was rendered, is fatally defective.—Pettingill v. Donnelly, 27 Minn. 332, 7 N. W. 360.

[b] (Mo. 1889) Where a notice of appeal from a judgment of a justice of the peace, rendered June 4, 1887, described the judgment as rendered June 21, 1887, the appeal was properly dismissed for want of a sufficient notice.—Hammond v. Kroff, 36 Mo. App. 118.

[c] (Mo. 1891) After service of notice of appeal, the justice of the peace, without rule of court, filed an amended transcript of the judgment which varied the amount thereof from that given in the original transcript, which the notice described with sufficient accuracy. *Held* that, in passing upon the sufficiency of the notice, the court cannot consider the amended transcript, as the justice had no power to file such transcript without an order of court.—Thomas v. Moore, 46 Mo. App. 22.

[d] (Mo. 1892) Where a notice of appeal from a judgment of a justice of the peace correctly states the style of the cause, the name of the justice, and the month, the fact that it incorrectly states the day of the month does not render it insufficient, in the absence of a claim that any other judgment was rendered between the parties in that month.—Holschen Coal Co. v. Missouri Pac. Ry. Co., 48 Mo. App. 578.

[e] (Or. 1871) Where the notice of appeal specified a judgment for $57.75, and the transcript disclosed a judgment for $52.50, *held*, that the appeal should be dismissed. As the court acquires jurisdiction through the notice of appeal, it is necessary that the notice should identify the case with reasonable certainty. The identification should be such that, when the record is made up, the notice will of itself show that this is the same cause that was pending in the court below. It may not be necessary in all cases to state the amount of the judgment appealed from; but, if it is stated, it should be stated correctly.—Chipman v. Bronson, 3 Or. 320.

[f] (Or. 1886) Where the notice of an appeal from a judgment by a justice of the peace alleges that it was rendered on the 22d of December, and the transcript shows that it was rendered the 22d of November, this error is not sufficient to warrant the dismissal of the appeal by the circuit court, where it appears to have been a mere clerical oversight, and that the respondent could in no way have been injured thereby.—Moorhouse v. Donica, 13 Or. 435, 11 Pac. 71.

[g] (Or. 1886) Under the practice a notice of appeal from a justice's court properly entitled as to court and names and parties, and headed "Civil Action to Recover Money," and which describes the judgment as "given and entered therein in the above-entitled action on the 4th day of August, 1885, in favor of the above-named plaintiff, and against the above-named defendant," sufficiently describes the judgment.—Lancaster v. McDonald, 14 Or. 264, 12 Pac. 374.

[h] (Or. 1886) Where, in an action before a justice of the peace, the plaintiff, in the complaint and answer, is described as "Amanda H. Starks," and in the notice of appeal to the circuit court as "A. H. Starks," such a discrepancy is no cause for dismissal.—Starks v. Stafford, 14 Or. 317, 12 Pac. 670.

[i] (Wash. 1893) A notice of appeal from a justice, addressed to above-named plaintiff and his attorneys "that the above-named defendant appeals to the superior court from a judgment heretofore rendered by said justice of the peace against him in the above-entitled action," is not bad for failure to more particularly describe the judgment.—State v. Spokane County Super. Ct., 7 Wash. 223, 34 Pac. 922.

[j] (Wis. 1861) An appeal from the decision of a justice is not invalidated by the fact that the notice of appeal served on him, which is sufficiently accurate in other respects to identify the judgment, is faulty in describing it as a judgment for the value of the property found by the jury, when technically it was for nominal damages and costs; there being an order for the delivery of the property.—Hills v. Miles, 13 Wis. 625.

[k] (Wis. 1863) A notice of appeal, and an accompanying affidavit, as required by law, in both which the cause was entitled "J. W. against 'William' W.," were *held* not sufficient to constitute an appeal from the judgment in an action by "J. W. against 'David' W."—Widner v. Wood, 19 Wis. 190.

[l] (Wis. 1884) A notice of appeal from the decision of a justice of the peace gives the circuit court no jurisdiction where it fails to identify the parties and the case, and states that a certain party appeals, although signed by the other party, and fails to state that the persons signing take the appeal.—Morris v. Brewster, 60 Wis. 229, 19 N. W. 50.

[m] (Wis. 1892) A notice of appeal by defendant from a justice's court to the superior court, in an action by an infant by his next friend, which fails to recite in the title of the action the name of the next friend in addition

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to that of the infant, and which is signed by defendant as "E. M. R.," instead of "Edward M. R.," and which recites that the justice's judgment was for a certain amount as damages and $24.25 costs, instead of $30.76 costs, as was the fact, is a substantial compliance with the statute (Sanb. & B. Ann. St. § 3754) providing that appellant shall make and present to the justice having custody of the docket containing the judgment appealed from a notice of appeal.—Friemark v. Rosenkrans, 81 Wis. 359, 51 N. W. 557.

[n] (Wis. 1893) Where, in defendant's notice of appeal from a judgment of the justice's court to the circuit court, plaintiff's name was spelled "Noel" instead of "Noall," and one of the defendants' names was spelled "Manuel," instead of "Emanuel," and the amount of the judgment was therein designated as "damages" and an additional sum named as costs, such variances were not sufficiently substantial to deprive the circuit court of jurisdiction.—Noall v. Halonen, 84 Wis. 402, 54 N. W. 729.

[o] (Wis. 1895) A notice of appeal in replevin from a justice to the circuit court, which fails to mention the value of the property as determined, and that such property was ordered to be delivered to plaintiff, is sufficient if it identifies the party appealing, and the cause in which and the judgment from which the appeal is taken.—Hender v. Ring, 90 Wis. 358, 63 N. W. 282.

§ 588. —— Stating grounds of appeal.

Admission of service of void notice as waiver, see post, § 591.

Scope of review as based on statement of grounds of appeal in notice of appeal, see post, § 715.

[a] (Cal. 1858) On appeal to the county court from a judgment of the justice's court, on questions of law, appellant must set forth, in the notice of appeal, a statement of the grounds on which he intends to rely.—People v. El Dorado County Court, 10 Cal. 19.

[b] (N. Y. 1853) Where notice of an appeal from justice's court assigns no cause therefor, the appeal will be dismissed.—Schwartz v. Beudel, 2 E. D. Smith, 123; Griswold v. Van Deusen, Id. 178; Suydam v. Munson, Id. 198.

[c] (N. Y. 1855) Notice of appeal from the judgment of a justice, which fails to state the grounds thereof, is defective.—Morton v. Clark, 11 How. Prac. 498.

[d] (N. Y.) Where a notice of appeal from a judgment of a justice's court to the county court does not state the grounds upon which the appeal is founded, the county court is bound to affirm the judgment.—(1856) Derby v. Hannin, 5 Abb. Prac. 150; (1857) Id., 15 How. Prac. 82.

[e] (N. Y. 1863) In an appeal from a justice's court to the county court, where the claim exceeds $50, an allegation, in the notice of appeal, that the judgment was against law and evidence, is a sufficient compliance with the requirement of the Code that the grounds of appeal shall be stated.—Fowler v. Westervelt, 40 Barb. 374, 17 Abb. Prac. 59.

[f] (N. Y.) Under Code, § 371, requiring a party appealing from a judgment of a justice of the peace to the county court to state, in his notice of appeal, "in what particular or particulars he claims the judgment should have been more favorable to him," and providing that, unless the respondent offers to allow the judgment to be corrected in the particulars mentioned, appellant shall be entitled to costs on appeal in case the judgment of the county court is more favorable to him than the judgment below, a statement in the notice that the judgment should have been in appellant's favor, for no cause of action, is not sufficient to entitle appellant to costs.—(1863) Wynkoop v. Halbert, 25 How. Prac. 158; (1865) Id., 43 Barb. 266.

[g] (N. Y. 1865) Code, § 371, requiring a statement of particulars on notice of appeal from the judgment of a justice, when the appellant claims the judgment below should have been more favorable to him, does not require such a statement when a reversal alone is sought.—Wallace v. Patterson, 29 How. Prac. 170.

[h] (N. Y. 1872) Code Civ. Proc. p. 353, provides that, on appeal from a judgment of a justice of the peace, the appellant shall serve a notice of appeal, stating the grounds on which the appeal is founded. *Held*, that a party alleging want of jurisdiction in the justice, but failing to state it as a ground of error in his notice of appeal, is precluded from insisting that no jurisdiction was acquired.—Avery v. Woodbeck, 62 Barb. 557, 5 Lans. 498.

[hh] (N. Y. 1872) Under Code Civ. Proc. § 371, providing that, to entitle appellant to costs, he must specify in his notice of appeal the particulars in which he claims the judgment should have been more favorable to him, a notice stating that the judgment is against the weight of evidence, is not supported by the evidence, on the evidence the plaintiff was not entitled to recover, and the judgment is contrary to law upon the evidence, is not sufficient.—Moran v. McClearns, 43 How. Prac. 77.

[hhh] (N. Y. 1872) Under Code Civ. Proc. § 371, a notice of appeal stating that the judgment should have been in appellant's favor and against the defendant, and that there was no evidence to warrant the judgment, is not sufficient; but plaintiff, being the prevailing party, was entitled to costs.—Colvert v. Hall, 43 How. Prac. 80.

[i] (N. Y. 1872) Under Code Civ. Proc. § 371, a notice of appeal by defendant, that judgment should have been in his favor, and against plaintiff, for $200, and for damages and costs, and that it should have been for a less sum against appellant, is not sufficient to entitle him to costs, where the plaintiff recovers judgment on appeal.—Wadley v. Davis, 43 How. Prac. 82.

[ii] (N. Y. 1872) Under Code Civ. Proc. § 371, a notice of appeal by defendant, that the judgment should have been more favorable to him, in that it should not have been for more than $25 damages, besides costs, is sufficient to entitle defendant to costs.—Younghanse v. Fingar, 43 How. Prac. 259.

[j] (N. Y. 1873) A notice of appeal from a justice's judgment upon the law, which assigns as grounds of appeal that the evidence "was incompetent, did not support the judgment, that on it the plaintiff was not entitled to recover, and that the judgment was contrary to law," but that does not point out specifically any errors, will not sustain any appeal.—Delong v. Brainard, 1 Thomp. & C. 1.

[k] (N. Y. 1877) Where a party appeals from a justice's judgment, on the ground that it is less favorable to him than it should be, he must state in his notice of appeal what amount the judgment should have adjudged him.—Jones v. Cook, 11 Hun, 230.

[l] (N. Y. 1878) In a notice of appeal to county court, a specification that the justice rejected proper evidence offered by the appellant is sufficient to authorize an examination of the ruling rejecting the evidence.—Vedder v. Van Buren, 14 Hun, 250.

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[m] (N. Y. 1878) A statement in the notice of appeal from a justice's judgment, of the grounds of appeal, as being merely "against law and evidence," is too defective to give the appellate court jurisdiction even to allow it to be amended.—Amsdell v. McCaffrey, 16 Hun, 255.

[n] (S. C. 1886) On appeal to the circuit court from a judgment by default rendered by a justice, a notice of appeal, which only states "that manifest injustice had been done defendant by the said judgment, and that defendant's default in not being present at the trial was excusable," is insufficient.—Wolfe v. Port Royal & A. Ry. Co., 25 S. C. 379.

[o] (S. C. 1887) On an appeal from a trial justice to the court of common pleas, a statement of the grounds of appeal, as follows: "On the ground of the manifest injustice done this defendant, and those set out in writing, made on the motion for a new trial before the trial justice, and the affidavits there used in behalf of said motion, and all the evidence and records in the case,"—is sufficient, in the absence of a rule of court against such form of statement.—Dargan v. West, 27 S. C. 156, 3 S. E. 68.

§ 589. Substitutes for notice.

[a] (Iowa, 1862) The mere filing of an appeal bond, without the notice required under section 5095 of the Revision, is not sufficient to entitle the defendant to an appeal from the judgment of a justice of the peace.—State v. Leyden, 13 Iowa, 433.

[b] (Mo. 1894) Actual knowledge of an appeal from a justice's court by the appellee does not obviate the necessity of notice of appeal as required by law.—Walker v. Carrew, 56 Mo. App. 320.

[c] (Mo. 1894) Where an appeal is taken from the judgment of a justice of the peace, and appellant takes a change of venue from the circuit court to which such appeal is returnable, notice by him to appellee of the application for such change of venue will not obviate the necessity for a notice of the appeal.—Evans v. Hannibal & St. J. R. Co., 58 Mo. App. 427.

[d] (N. C. 1876) The attorney's asking the justice, before judgment, and in presence of the plaintiff, that he will, in case he renders judgment against defendant, make an entry that defendant prays an appeal, is not a sufficient notice of appeal to plaintiff; there being no proof that the plaintiff heard the request.—Green v. Hobgood, 74 N. C. 234.

[e] (Ohio, 1885) Under Rev. St. § 6408, providing that when a trustee, appealing from any judgment or order in his fiduciary capacity, has given bond within the state for the faithful performance of his duties, he shall not be required to give an additional appeal bond, but shall be allowed the appeal by giving written notice to the court of his intention to appeal, within the time limited for the filing of the bond, the filing within 10 days of a transcript of a judgment of a justice of the peace in the court of common pleas, by an assignee who has filed a bond within this state for the faithful performance of his duties, appeals the case, though no notice was given the justice of the intention to appeal, since the demand of the transcript was in itself sufficient notice of appeal to the justice.—Terry Clock Co. v. Mussey, 9 Ohio Dec. 449, 13 Wkly. Law Bul. 568.

§ 590. Defects and amendment of notice.

Amendment of notice of appeal as curing error in appealing before final judgment, see ante, § 490.

[a] (Minn. 1892) The filing of proof of a legally effectual service of the notice of appeal from a justice's court being by statute made necessary to give the district court jurisdiction, a failure to comply with the statute cannot be cured by amendment after the time to appeal has expired.—Stolt v. Chicago, M. & St. P. Ry. Co., 49 Minn. 353, 51 N. W. 1103.

[b] (N. Y. 1824) A notice of appeal served on the justice did not state that the appeal was made to the common pleas. The appeal bond, however, did so state, and the justice made a return. *Held* to be regular.—Ex parte Clarke, 3 Cow. 379.

[c] (N. Y. 1855) Where the notice of appeal from the judgment of a justice is defective, the remedy is by motion to dismiss the appeal in the appellate court.—Webster v. Hopkins, 11 How. Prac. 140.

[d] (N. Y. 1859) When amendments are necessary to make an appeal effectual, the common pleas has authority to allow them to remedy mistakes. Even, it seems, to allow an amendment of the notice of the appeal.—Wood v. Kelly, 2 Hilt. 334.

[e] (N. Y. 1889) Where the defendant, by mistake, asked for a new trial in his notice of appeal to the county court, when he was not entitled to it, the county court could allow an amendment to the notice, under Code Civ. Proc. § 3049, providing that the court may, in its discretion, permit an omission to be supplied or an amendment to be made to a notice of appeal.—McCarthy v. Crowley, 52 Hun, 614, 5 N. Y. Supp. 675.

[f] (N. Y. 1889) The refusal of the county court to exercise its discretion to permit an amendment of a notice of appeal, which by mistake asked for a new trial, was reversible error.—McCarthy v. Crowley, 52 Hun, 614, 5 N. Y. Supp. 675.

[g] (N. Y. 1896) A notice of appeal from a justice of the peace to the county court, demanding a new trial in the county court, when appellant is not entitled thereto, may be amended by striking out such demand, where it is shown by the uncontradicted affidavit of appellant's attorney that he prepared the original notice of appeal, and erased the demand for a new trial, but that his clerk, who prepared the copy of the notice served on respondent, failed to make the erasure, and that the demand has been erased from the notice served on the trial justice.—O'Reilly v. Block (Co. Ct.) 23 N. Y. Supp. 670.

§ 591. Waiver of want of notice and defects.

[a] (Cal. 1886) The voluntary appearance of the attorney of record in an action before a justice of the peace appealed to the superior court, and his participation in the proceedings in that court, without objection to the service of notice of appeal, operates as a waiver of any defects in such notice.—Matthews v. Superior Court of Marin County, 70 Cal. 527, 11 Pac. 665.

[b] (Kan. 1868) Where the defendant in a case on trial before a justice appeals to the district court, the entering by an attorney of his name as attorney for the plaintiff, and inquiries by him in regard to the case, is not such an appearance by the plaintiff as to waive the necessity of notice of the appeal.—Halford v. Coe, 4 Kan. 561.

[c] (Minn. 1870) Admission of service of notice of appeal, void for want of signature, does not estop the party making the admission from taking advantage of the defective notice, under Gen. St. 1866, c. 66, § 104, subd. 3, which makes the jurisdiction of the justice

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to grant an appeal dependent on service of notice in writing signed by the applicant, etc. —Larrabee v. Morrison, 15 Minn. 196 (Gil. 151).

[d] (Mo. 1872) An appearance of the appellee in the circuit court, on appeal from a justice for the purpose of asking an affirmance, is not such an appearance as will waive the failure of appellant to give the notice of the appeal required by the statute.—Wag. St. p. 850, § 21.—Rowley v. Hinds, 50 Mo. 403.

[e] (Mo. 1879) A notice to take depositions, served, after appeal from a justice's judgment, upon the appellant, will not operate as a waiver of the notice of appeal, if the notice to take depositions does not appear to have been given by the appellee or his attorney, and the depositions taken in pursuance thereof are not filed in court.—Wolff v. Danforth Artificial Light Co., 70 Mo. 182.

[f] (Mo. 1880) Where an appellant in a suit instituted before a justice fails to give notice of an appeal before the second term of the circuit court held after the appeal was taken, the court on motion will affirm the judgment; but if it refuses, and the appellee enters into trial, he waives the error.—Parmerlee v. Williams, 71 Mo. 410.

[g] (Mo. 1889) In case of an appeal from a justice's court, a failure to give the statutory notice of appeal is waived by appellee accepting service of notice to take depositions by appellant after the appeal, appearing at the taking of the depositions, objecting to certain questions asked of witness, and having the grounds of objection noted.—Bates v. Scott, 26 Mo. App. 428.

[h] (Mo. 1889) Where notice of appeal from a justice of the peace is not given, as required by Rev. St. § 3055, the right of the appellee to an affirmance on that account is not affected by his appearance in the circuit court, for the purpose of moving for such affirmance.—Wolf v. Harrington, 38 Mo. App. 276.

[i] (Or. 1886) Parties will be deemed to have waived a defect in the notice of appeal from a justice court where they appear and have the cause continued.—Moorehouse v. Donica, 13 Or. 435, 11 Pac. 71.

[j] (Tex. 1884) On appeal from the judgment of a justice, notice of the appeal is dispensed with by the appellee appearing in the county court and consenting to a continuance to the next term.—Texas & P. Ry. Co. v. Netherland, 2 Willson, Civ. Cas. Ct. App. § 237.

[k] (Tex. 1890) An appearance by the appellee in the district court on appeal from a justice is a waiver of notice of appeal.—Hayworth v. Rogan, 77 Tex. 362, 14 S. W. 70.

[l] (Wis. 1879) Where the notice of appeal from a justice was void because given by a person without authority, consent of the parties could not give jurisdiction.—Palmer v. Peterson, 46 Wis. 401, 1 N. W. 73.

(g) ENTRY, DOCKETING, AND APPEARANCE.

ENTRY AND DOCKETING, § 592.
—— TIME FOR ENTRY AND DOCKETING, § 593.
—— EXCUSING DELAY, § 594.
APPEARANCE, § 595.
EFFECT OF APPEARANCE AS WAIVER OF DEFECTS AND OBJECTIONS, § 596.
—— OBJECTIONS TO APPELLATE JURISDICTION, § 597.
—— TO PROCEEDINGS FOR APPEAL, § 598.
SPECIAL APPEARANCE, § 599.

§ 592. Entry and docketing.

[a] (Ark. 1851) Until the appeal, affidavit, and the recognizance are sent up by the justice and filed, the circuit court has no jurisdiction of the case.—Poindexter v. Russell, 11 Ark. (6 Eng.) 664.

[b] (Ark. 1876) Unless an appellant appealing from a justice's judgment procures the transcript to be filed and the case docketed, the circuit court may, in the exercise of a sound discretion, dismiss his appeal.—Smith v. Allen, 31 Ark. 268; McGehee v. Carroll, Id. 550.

[c] (Ga. 1892) It is the duty of the clerk of the superior court to docket appeals from justices' courts, and if this duty be omitted at the proper time he may perform it at any time thereafter without leave or direction from the court, and without notice to the appellant, whose failure to keep sight of the case, and to ascertain when it stands for trial, is negligence against which equity will not grant relief after the case has been tried ex parte, and judgment rendered for respondent.—Combs v. Choven, 89 Ga. 779, 15 S. E. 686.

[d] (Ill. 1875) Where a case is taken from a justice court to the superior court, but the appeal papers were by mistake filed in the circuit court, a transfer of such papers by the clerk of such court to the superior court was proper.—Wadhams v. Hotchkiss, 80 Ill. 437.

[e] (Ind. 1873) On an appeal from a justice of the peace by each party to a cause, only one cause should be docketed in the appellate court.—Montgomery Gravel Road Co. v. Stockton, 43 Ind. 328.

[f] (Mass. 1875) An appeal from a justice of the peace not having been entered in the superior court, that court, upon the complaint of the adverse party, rightly affirmed the judgment of the justice.—Inhabitants of Leyden v. Sweeney, 118 Mass. 418.

[g, h] (Tex. 1849) In appeals from a justice to the district court, the parties stand, not as appellant and appellee, but as plaintiff and defendant, the same as they stood before the justice; and the case should be so docketed.—Perry v. McKinzie, 4 Tex. 154.

[i] (W. Va. 1888) Where an application is made to a judge of the circuit court in vacation, who grants an appeal from the judgment of a justice, the written application and proofs, as well as the bond, and the order granting such appeal, should be transmitted to the clerk of the circuit court, and entered in the order book under the title of the case, and a copy served on the justice.—Hubbard v. Yocum, 30 W. Va. 740, 5 S. E. 867.

[j] (Wis. 1859) That the justice sent the appeal papers to the circuit court of the wrong county does not prevent the appellant from having them sent to the proper court.—Steckmesser v. Graham, 10 Wis. 37.

§ 593. —— Time for entry and docketing.

[a] (Ariz. 1881) An appeal from an order dismissing an appeal from justice's court not perfected and entered within 30 days after judgment rendered, in accordance with Act, § 1, regulating appeals from justices of the peace, will be dismissed.—Zechendorf v. Zechendorf, 1 Ariz. 401, 25 Pac. 648.

[b] (Mont. 1894) Where an appeal from a justice's court was not filed within 30 days after the appeal was perfected, as required by rule of the district court, and appellee moved to dismiss, and appellant filed and docketed his appeal before the hearing of the motion, and the case was one in which appellant was

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entitled to a jury, but no jury was in attendance till after the appeal was docketed, the motion should have been denied, since the rule is not jurisdictional, and should be applied with discretion.—Stevenson v. Cadwell, 14 Mont. 311, 36 Pac. 185.

[c] (N. J. 1811) The common pleas ought to receive appeal papers if they are filed during the next term after the judgment of the justice, since the act requiring them to be sent on or before the first day of the term is merely directory to the justice, and not to the court.—State v. Judges of Common Pleas of Bergen County, 3 N. J. Law (2 Penning.) 737.

[d] (N. C. 1891) Code, § 565, provides that appeals from justices of the peace shall stand for trial de novo on the dockets of the superior courts at the first term after the appeal is taken, and that, if defendant should make default, judgment should be rendered against him, final in some cases, and by default and inquiry in others. By an amendatory act (Laws 1889, c. 443) it is further provided that where the appellant failed to have his appeal docketed at the next term the appellee might file a transcript of the justice's record, and move to dismiss. *Held*, that where defendant failed to docket his appeal at the next term, but did so at the second term, when plaintiff, on defendant's failure to appear, took judgment by default against him, which was subsequently set aside on the ground that his failure to appear was excusable negligence, plaintiff was still entitled to move for a dismissal for failure to docket the appeal in time.—Ballard v. Gay, 108 N. C. 544, 13 S. E. 207.

[e] (N. C. 1893) Under Code, §§ 565, 876, 877, 880, requiring that where a judgment is rendered in a justice's court 10 days before the next ensuing term of the superior court an appeal therefrom shall be docketed at that term, a docketing at a subsequent term is a nullity, and does not entitle the plaintiff appellant to take a nonsuit.—Davenport v. Grissom, 113 N. C. 38, 18 S. E. 78.

[f] (Pa. 1811) Under the act of 1804, it was not necessary that an appeal should be entered on the docket of the prothonotary within 20 days from the time of the judgment. It was sufficient if it was entered before the justice and security given within that period, and if the transcript was filed with the prothonotary before the commencement of the next term after the judgment.—Beale v. Dougherty, 3 Bin. 432.

[g] (Pa. 1838) After an execution had issued immediately upon a justice's judgment, and the money had been made by a sale of personal property, it was *held* too late to enter an appeal, notwithstanding section 6 of the act of 1820.—Patterson v. Pelronnet, 7 Watts, 337.

[h] (Pa. 1849) An appeal from a judgment of a justice of the peace, if filed in the common pleas within 20 days, is in time, although a return day has intervened, prior to which the appellant had given bail, which he withdrew after the return day, and entered other bail.—Potts v. Staeger, 12 Pa. (2 Jones) 363.

[i] (Pa. 1870) An appeal entered out of time may be quashed, if the appellee has done no act as a waiver of the irregularity, although a non pros. has been entered on the appeal, for want of a declaration.—Carothers v. Cummings, 63 Pa. (13 P. F. Smith) 199.

[j] (Pa.) An appeal from a judgment of an alderman is in time if the appeal is filed before the monthly return day thereafter.—(1873) Singerfield v. George, 30 Leg. Int. 321; (1877) Hartranft v. Clarke, 12 Phila. 487.

[k] (Pa. 1880) Under Act April 9, 1862 (P. L. 347), an appeal from a justice of the peace may be filed within 20 days after the appeal is taken.—Singer Co. v. Rice, 1 Chest. Co. Rep. 108, 1 Del. Co. Ct. R. 63.

[l] (Pa. 1880) The act of April 9, 1862 (P. L. 347), providing "that all appeals shall be filed on or before the next return day after the taking thereof, if 20 days shall have elapsed, and, if not, then on or before the next return day thereafter" refers to the regular monthly return days, and gives at least 20 days to file the appeal after it is taken, i. e., until the next monthly return day, or, if at that time 20 days shall not have elapsed, appellant is allowed till the next monthly return day to file his appeal in the prothonotary's office.—Singer Co. v. Rice, 1 Chest. Co. Rep. 108, 1 Del. Co. Ct. R. 63.

[m] (Pa. 1893) An appeal from a justice should be entered on or before the next return day of the common pleas.—Seltzer v. Schoener (Com. Pl.) 13 Pa. Co. Ct. R. 288.

§ 594. —— Excusing delay.

[a, b] (Pa. 1889) Under Act June 13, 1836, appeals from the orders of justices for removal of paupers must be entered in the court of quarter sessions of the peace at the next sessions after the service of the order of removal. Permission will not be granted to appeal nunc pro tunc, where the appellants had a week in which to enter an appeal, and neglected to inquire when the next court would commence.—Jenkins Tp. v. Paradise Tp., 8 Pa. Co. Ct. R. 164.

[c] (Pa. 1892) Failure to file an appeal from a justice of the peace within the time limited by law is not excused by the fact that the justice told appellant that he had a longer time in which to file his appeal.—Kichline v. Shimer (Com. Pl.) 12 Pa. Co. Ct. R. 279, 2 Pa. Dist. R. 355.

[d] (Pa. 1892) Where an appeal was taken from a judgment of a justice of the peace, and the appellant was misinformed by the justice of the peace as to the time when it was necessary to file it in court, and for that reason did not file the same until after the first day of the next term of court, the appeal will not be stricken off.—Swinehart v. Montgomery (Com. Pl.) 1 Pa. Dist. R. 802.

[e] (Pa. 1893) Where the only reason for not filing in the court of common pleas an appeal from the judgment of a justice of the peace in Allegheny county on or before the monthly return day next ensuing after rendition of the judgment, as required by Act May 18, 1871 (P. L. 938), is that the matter was forgotten by appellants' counsel, such appeal cannot afterwards be filed nunc pro tunc.—Ward v. Letzkus, 152 Pa. 318, 25 Atl. 778, 31 Wkly. Notes Cas. 412.

§ 595. Appearance.

Appeal as equivalent to appearance in appellate court, see post, § 602.

Appearance on appeal as prerequisite to judgment by default, see post, § 723.

[a] (Colo. 1877) Though defendant fail to appear before the justice of the peace, by filing his appeal bond, he enters his appearance in the appellate court.—Wyatt v. Freeman, 4 Colo. 14.

[aa] (Conn. 1865) An appellant from a judgment of a justice of the peace was allowed until the opening of court on the second day of the term to enter his appeal. The entry was made by him on the first day, but was inserted by the clerk in an unusual place on the docket. The appellee's attorney, after examining the docket for the case without success on the first day, left a memorandum with the

clerk, requesting him to enter his appearance if the appeal should be entered. The clerk assented, but inadvertently neglected to do so, and the appellee was defaulted. He had no knowledge of the fact until an officer called on him with an execution issued upon the judgment. *Held*, that he was entitled to an injunction and a new trial.—Seymour v. Miller, 32 Conn. 402.

[b] (Ill. 1863) When an appeal from the judgment of the justices of the peace is perfected by filing the appeal bond in the office of the justice, in which case no summons is required to be issued, the appellee may, without having been served with a notice of the appeal, enter his appearance in the circuit court.—Boyd v. Kocher, 31 Ill. 295.

[c] (Ill. 1882) The delivery to the clerk of the trial notice by the appellee, on an appeal from a justice, does not amount to an entry of appearance.—McVey v. Huott, 11 Ill. App. (11 Bradw.) 203.

[d] (Ill. 1883) The mere leaving with the clerk of the circuit court a trial notice, which is neither filed nor placed among the papers, does not constitute an appearance in a case appealed from a justice.—Norton v. Allen, 12 Ill. App. (12 Bradw.) 592

[e] (Ill. 1887) Where one of two defendants appeals from a justice's judgment, a written plea of nul tiel corporation, filed in the justice's court by such defendant, which is found after the appeal among the papers, with the file mark of the clerk of the circuit court, is not an appearance by him.—Bourton v. Rathbone, 23 Ill. App. 654.

[f] (Ill. 1889) Rev. St. c. 79, § 68, which provides that "in case the appeal from the justice of the peace is perfected by filing the papers and transcript of judgment 10 days before the commencement of the term of the court to which the appeal is taken, the appearance of the appellee may be entered in writing, and filed among the papers in the case, and, if so entered 10 days before the first day of the term of court, the case shall stand for trial at that term," applies only to appeals taken by filing a bond with the clerk, and not to those taken by filing a bond with the justice.—Bessey v. Ruhland, 33 Ill. App. 73.

[g] (Ill. 1890) Where an appeal is taken from a judgment of a justice of the peace, the appearance of appellee, as an alternative for service of summons or two nihils, must be entered not less than 10 days before the first day of the term, to enable the appellee therein to proceed ex parte.—Wollman v. Greshetti, 37 Ill. App. 366.

[h] (Mo. 1871) Section 22 of the statute concerning justices (Wag. St. p. 850) construed, with reference to the duty of the appellee, in a cause carried from a justice's court to the circuit court, to enter his appearance on or before the second day of any subsequent term after the first at which the appeal is triable, in order to procure a hearing.—Hammerstein v. Haase, 47 Mo. 498.

[i] (Mo. 1874) An appeal to the circuit court, without anything further, amounts to a full appearance to the action in that court.—Blunt v. Atlantic & P. R. Co., 55 Mo. 157.

[ii] (Mo. 1886) On appeal from the judgment of a justice, the appearance of the respondent on the second day of the return term gives him the right to have the cause tried or continued, but does not entitle him to an affirmance for failure to prosecute the appeal.—Smith v. St. Louis, I. M. & S. Ry. Co., 20 Mo. App. 689.

[j] (Neb. 1894) Removing a case to the district court by error to a justice's court, cross-examining a witness whose testimony was taken by deposition, waiving a jury in open court, and consenting to a trial on the merits, constitute a general appearance in the district court.—Ward v. Western Horse & Cattle Ins. Co., 42 Neb. 374, 60 N. W. 547.

[k] (Pa. 1807) On the entry of an appeal from the judgment of a justice taken by defendant, there can be no judgment for want of an appearance, the entry of the appeal being equivalent to an appearance propria persona.—Seidel v. Hurley, 1 Woodw. Dec. 352.

[l] (Pa. 1883) The rule of the court of common pleas that on appeal from a justice of the peace, if no appearance is entered within a specified time by the appellee, judgment shall be rendered against him, is void, under Act March 20, 1810, § 4 (5 Smith's Laws, p. 161), which provides that, from the entry of such an appeal upon the prothonotary's docket, the suit shall "take grade with, and be subject to the same rules as, other actions where the parties are considered to be in court."—Jones v. Brown (Com. Pl.) 1 Pa. Dist. R. 675.

§ 596. Effect of appearance as waiver of defects and objections.

Appeal as waiver of objections to jurisdiction of lower court, see post, § 601.

[a] (Ga. 1895) Where defendant in an attachment sued out in justice court appealed to the superior court, and appeared therein at the first term and filed a plea to the merits, he waived all right of objection to the legality of the levy on the ground that the levy was made by plaintiff's son.—Pickett v. Smith, 95 Ga. 757, 22 S. E. 669.

[b] (Ill. 1862) On an appeal from a justice of the peace, the circuit court may render a judgment against defendants who have been served, although service of the process issued by the justice had not been made on all, and he had rendered judgment against all. Appearance in the circuit court gave jurisdiction to that court. The proper inquiry in the circuit court was, had the justice jurisdiction over the subject-matter?—Marshall v. Pope, 29 Ill. (19 Peck) 441.

[c] (Iowa, 1840) An appearance and plea on appeal from the judgment of a justice of the peace is a waiver of all defects of service of the original process.—Cane v. Watson, 1 Morris, 52.

[d] (Iowa. 1854) A failure of service of notice before a justice of the peace is waived by the appearance of the defendant, and his going to trial on the merits, in the district court.—Drake v. Achison, 4 G. Greene, 297.

[e] (Mich. 1859) Action in trespass brought against three in the justice's court, discontinuance as to one, and judgment against the other two, one of whom appealed, and both appeared before the appellate court, and judgment on the merits was rendered against the two before convicted, and one appealed to the supreme court. *Held*, that the appearance of the two in the county court cures the defect of only one appealing, and that such appearance obviates any objection which he can make on error to the jurisdiction of the justice, or to the joining of the other defendants in the county court.—Tower v. Lamb, 6 Mich. 362.

[f, g] (Miss. 1883) An appeal and appearance in the circuit court by defendant, sued in a justice's court, gives the circuit court jurisdiction, notwithstanding defendant received no copy of the summons in the justice's court.—Mobile & O. R. Co. v. Dale, 61 Miss. 206.

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[h] (Ohio, 1879) Where the subject-matter of an appeal case is within the original jurisdiction of the common pleas, where it is to be tried de novo, the objection that the lower court had not such jurisdiction is waived by appearing to the action in the common pleas.—Miller v. Creighton (D. C.) 4 Wkly. Law Bul. 139.

[i] (Pa. 1889) In an action before a justice of the peace judgment was entered against two defendants, and an appeal therefrom appeared on its face to have been taken by both. One defendant moved the court of common pleas to set aside all proceedings as to him, for that the justice acquired no jurisdiction of his person, and that no appeal had in fact been taken on his part. The motion was supported by affidavit, but, being denied, defendants pleaded and went to trial. *Held*, that the motion was properly refused, as the alleged error could only have been reached by certiorari to the justice's court, and that, having appeared and pleaded in the court of common pleas, defendants are concluded by the judgment.—Short v. Bowell, 130 Pa. 434, 18 Atl. 621.

[j] (S. D. 1892) Where a justice of the peace assumes jurisdiction of an action for a sum in excess of the amount to which his jurisdiction is limited, and renders judgment for an amount not in excess of the limit of his jurisdiction, defendant does not waive want of jurisdiction by appealing, and appearing in the district court, where judgment is again rendered against him, since the district court in such case has only the jurisdiction of the justice; its original jurisdiction not being involved or called into exercise.—Plunket v. Evans, 2 S. D. 434, 50 N. W. 961.

§ 597. —— Objections to appellate jurisdiction.

Effect of appeal as waiver of jurisdiction in attachment and garnishment proceedings, see post, § 604.

Waiver of objections and consent to appellate jurisdiction, see ante, § 475.

[a] (Cal. 1882) The voluntary appearance of a defendant in the municipal court of appeals does not give the latter jurisdiction of an appeal from a justice's court, where the appeal can only be transferred by the county court to the municipal court of appeals.—Descalso v. San Francisco Municipal Court, 60 Cal. 296.

[b] (Colo. 1888) By appearing in the county court, and, without questioning its jurisdiction on the ground of nonresidence, entering on trial on the merits, a defendant gives that court complete jurisdiction.—Reed v. Cates, 11 Colo. 527, 19 Pac. 464.

[c] (Colo. 1888) Though the justice had no jurisdiction of the subject-matter of an action, defendant, after appearing on appeal taken by plaintiff in a court having jurisdiction, and going to trial without raising the objection, cannot question the jurisdiction of the appellate court.—Behymer v. Nordloh, 12 Colo. 354, 21 Pac. 37.

[d] (Conn. 1873) A suit before a justice of the peace for damages beyond the jurisdiction of the justice was appealed by the defendant to the court of common pleas, which had original jurisdiction of the subject-matter. At the third term after the entry of the case in that court defendant moved that it be erased from the docket, on the ground that the court had acquired no jurisdiction by the appeal. The defendant had appeared in the case at the term at which the appeal was entered, and had continued his appearance until motion to erase was filed. *Held* that, although the case was to be regarded as having been irregularly brought before the court, the defendant had waived this irregularity and submitted himself to the jurisdiction of the court.—Cook v. Morse, 40 Conn. 544.

[e] (Ill. 1865) Where the court has no original, but only appellate, jurisdiction of the subject-matter of a suit, appellee, by appearing and moving to dismiss the appeal bond, does not waive defects therein, so as to give the court jurisdiction of the appeal.—McKoy v. Allen, 36 Ill. 429.

[f] (Ill. 1891) Upon appeal from the finding of a jury in a case tried before a justice, he failing to enter a formal judgment therein, the successful party may, for such reason, require a dismissal of the appeal, but a motion to dismiss the suit amounts to admitting jurisdiction as having been obtained by the appeal: and where the case is of such a kind that the court below had original jurisdiction, and to which such party could submit his person without process, he should not, having done so, be allowed to question the jurisdiction.—Northrup v. Smothers, 39 Ill. App. 588.

[g] (Iowa, 1849) Where no judgment has been rendered by a justice, appearance on appeal in the district court will not confer jurisdiction on it.—Kimble v. Riggin, 2 G. Greene, 245.

[h] (Kan. 1881) Under Comp. Laws 1879, p. 420, § 80, which provides that a claim against a decedent's estate may be established by an action against the personal representative in a court of record, and the presentation of a copy of the judgment to the probate court, the district court has jurisdiction of an action against an administrator on a debt of his decedent, brought there on appeal from a justice, where, after appeal, both parties enter a general appearance.—Freeman v. Waynant, 25 Kan. 279.

[i] (Minn. 1881) Const. art. 6, § 5, gives the district court jurisdiction of appeals from judgments of justices of the peace anywhere within the district. Gen. St. Minn. 1878, c. 65, provides for appeals from judgments of justices of the peace to the district court of the county in which such judgments were rendered, but does not prohibit the exercise of such jurisdiction in any other county when the consent of the parties is given. *Held*, that appearing and arguing such appeal in a county other than that wherein the appeal is pending, without objecting to the jurisdiction of the court, is a waiver of all objections thereto.—Chesterton v. Munson, 27 Minn. 498, 8 N. W. 593.

[j] (Mo. 1885) Where the lower court had no jurisdiction of the subject-matter, and the circuit court has only appellate jurisdiction, the circuit court acquires no jurisdiction on appeal, though the parties appear and plead.—McQuoid v. Lamb, 19 Mo. App. 153.

[k] (Ohio, 1877) On appeal from a justice's judgment in an action of trespass, the plaintiff filed his petition, claiming damages in a sum of which the court of common pleas had original jurisdiction; and the defendant, without objecting to the jurisdiction, obtained an order of the court requiring the plaintiff to amend his petition, and then demurred to the petition as amended. *Held*, that the defendant had thereby entered his appearance as in an original action in the court of common pleas.—O'Neal v. Blessing, 34 Ohio St. 33.

[l] (Tenn. 1850) A justice of the peace made the following entry in a case tried before him: "Judgment against plaintiff for costs, from which plaintiff appeals." This entry was not signed by the justice. A bond was given, reciting trial, judgment, and appeal. The parties appeared in the circuit court, and no objection

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was taken to the jurisdiction. *Held*, that on these facts no valid objection could be taken to the jurisdiction of the circuit court.—Glass v. Stovall, 29 Tenn. (10 Humph.) 453.

[m] (Tenn. 1868) The appearance of a party in the circuit court does not give it jurisdiction, where the court has no jurisdiction of the subject-matter.—White v. Buchanan, 46 Tenn. (6 Cold.) 32.

§ 598. —— To proceedings for appeal.

Appearance as waiver of delay in filing transcript, see post, § 623.

—— *of justification of surety on appeal bond, see* ante, § 578.

Appearance on appeal as waiver of notice of appeal, see ante, § 591.

—— *of proper affidavit, see* ante, § 542.

Appearance on appeal as waiving defects in appeal bond, see ante, § 578.

Effect of appearance on appeal as waiving delay in taking proceedings, see ante, § 528.

—— *to secure affirmance for want of notice of appeal, see* ante, § 591.

[a] (Cal. 1881) A defendant cannot object to the sufficiency of the notice and undertaking on appeal from the justice's court, where on appeal he appeared by counsel, and defended the action on its merits, and made no objection to the regularity of the proceedings.—Shay v. Superior Court of San Francisco, 57 Cal. 541.

[b] (Ill. 1892) Where a defendant appears in the circuit court on an appeal from a justice court, taken by his codefendant, testifies, and joins in the motion for a new trial, he waives the right to object to the jurisdiction of the court over his person, on the ground that he had never been summoned in the circuit court.—Duggan v. Smyser, 46 Ill. App. 39.

[c] (Ind. 1852) Where, on appeal by the state from a judgment of a justice, defendant has appeared and reaped the benefits of the jury trial, it is too late to object that the appeal was improperly taken.—Neff v. State, 3 Ind. 564.

[d] (Mich. 1882) On appeal from a judgment of a justice, an entry of general appearance by the appellee in the circuit court is conclusive of the jurisdiction of that court, so that thereafter a motion to dismiss the appeal because not taken in time, and because no return had been made to it, cannot be entertained.—McCombs v. Johnson, 47 Mich. 592, 11 N. W. 400.

[e] (Minn. 1893) Where an unauthorized appeal to the district court was taken from the judgment of a justice of the peace, and the parties appeared in the district court, submitted to its jurisdiction, amended their pleadings, and consented to a trial of the case on a day fixed, the district court acquired jurisdiction to hear and determine the case on its merits, notwithstanding the irregular mode in which it was brought into that court.—Wrolsen v. Anderson, 53 Minn. 508, 55 N. W. 597; Knies v. Green, 53 Minn. 511, 55 N. W. 598.

[f] (Mo. 1834) Appearance in court and acknowledgment of an agreement to refer all matters in difference to the arbitrament of certain persons are a sufficient recognition of the agency of a person who has made the affidavit and recognizance required in an appeal from a justice.—Burton v. Collin, 3 Mo. 315.

[g] (Mo. 1895) The circuit court has jurisdiction of an appeal from a justice's court which was irregularly or defectively taken, but not where no appeal has been taken or allowed, although the parties appear and participate in the trial.—Moulder & Simpson v. Anderson, 63 Mo. App. 34, 1 Mo. App. Rep'r, 588.

[h] (Neb. 1896) After both parties to an appeal from justice court, taken within the prescribed time, appear in the appellate court, and file pleadings, and notice the case for trial, without objections, neither can question the validity of the appeal.—Claflin v. American Nat. Bank, 46 Neb. 894, 65 N. W. 1056.

[i] (Tex. 1892) Where parties to an appeal from a justice's court to the district court have voluntarily submitted themselves to the jurisdiction of the latter court, it is too late to ask for the dismissal of the appeal because of defects in the appeal bond or because the judgment of the justice was not final.—Cason v. Westfall (Sup.) 18 S. W. 668.

§ 599. Special appearance.

[a] (Ill. 1878) An appellee's appearance in the circuit court merely to move a dismissal of the appeal from a justice of the peace is no waiver of the right to have the appeal dismissed.—Lucas v. Beebe, 88 Ill. 367.

[b] (Mich. 1892) Where a writ of attachment in a justice court was not served, and defendant's attorney entered a special appearance in the justice court to object to the sufficiency of the writ, defendant's general entry on his special appeal to the circuit court from a judgment allowing the affidavit to be amended was not a waiver of the defect, and conferred no jurisdiction on the court.—Freer v. White, 91 Mich. 74, 51 N. W. 807.

[c] (Mo. 1875) On appeal to the circuit court from a judgment of a justice of the peace, any appearance by the appellee in the circuit court for a special object, such as a motion to dismiss on account of defective process, or to affirm on the ground of a failure to prosecute the appeal, is not such an appearance as will confer upon the court jurisdiction to try the case. To give such jurisdiction, some act is necessary which implies that the appellee is in the circuit court for general purposes.—Page v. Atlantic & P. R. Co., 61 Mo. 78.

[d] (N. Y. 1869) The mere signing of "attorney for plaintiff and respondent," on motion papers in a motion to dismiss an appeal from a judgment of a justice, on the ground of want of jurisdiction, is not such an appearance as waives the objection to the jurisdiction.—Lake v. Kels, 11 Abb. Prac. (N. S.) 37.

[e] (Tex. 1895) The appearance of the appellee, on an appeal from a justice's court, to resist the substitution of certain papers, is not an appearance to answer to the merits of the case.—Wren v. Kirsey (Civ. App.) 30 S. W. 252.

[f] (Tex. 1895) An appearance in the district court on an appeal thereto, although for the purpose only of questioning its jurisdiction, gives jurisdiction for all purposes.—Landa v. Mercantile & Banking Co., 10 Tex. Civ. App. 582, 31 S. W. 55.

7. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR AND SUPERSEDEAS.

POWERS AND PROCEEDINGS OF LOWER COURT, § 600.
EFFECT AS WAIVER OF OBJECTIONS TO JURISDICTION OF LOWER COURT, § 601.
EFFECT AS WAIVER OF IRREGULARITIES OF SUMMONS AND PROCEEDINGS, § 602.
EFFECT ON JUDGMENT, § 603.
EFFECT IN ATTACHMENT AND GARNISHMENT PROCEEDINGS, § 604.

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WHEN JURISDICTION OF APPELLATE COURT ATTACHES, § 605.
SUPERSEDEAS OR STAY OF PROCEEDINGS, § 606.

§ 600. Powers and proceedings of lower court.

Authority of justice to amend transcript after appeal has been taken, see post, § 627.
Effect of failure to give bond on appeal on right of justice to issue execution, see ante, § 550.
Jurisdiction of justice to amend appeal bond as affected by transfer of cause, see ante, § 577.

[a] (Ala. 1847) After an appeal is taken by the defendant from the judgment of a justice of the peace, the justice has no authority, even before he returns the papers, to receive the amount he adjudged to the plaintiff. Yet if he receives it and pays it to the plaintiff, and the latter accepts it, and directs the appeal to be returned, that he may recover the damages which the law gives in cases where the defendant's object was delay, by thus receiving the sum due on the judgment, the plaintiff must be held to have waived all right to the damages; these being recovered as a consequence of a subsisting debt or demand.—Andress v. Longmire, 11 Ala. 166.

[b] (Conn. 1883) A justice of the peace, after appeal, may amend his record, so that it may show a final judgment rendered, the record showing a taxation of costs, and a demurrer overruled.—Rowe v. Smith, 51 Conn. 266, 50 Am. Rep. 16.

[c] (Ga. 1877) After appeal from a justice's court, the justice amended the judgment so as to charge the defendant individually instead of as administrator. The appeal had been taken without the security required upon a personal judgment. *Held*, that defendant's rights under the appeal were not affected by the amendment in the judgment.—Cannon v. Sheffield, 59 Ga. 103.

[d] (Iowa, 1857) A justice has no authority to enter on his docket or return in his transcript that one party accepted a certain proposition made after judgment and appeal, and that he was ordered not to send up the papers in the appeal to the district court; and, if made, such entries or return are of no effect.—Kimpson v. Hunt, 4 Iowa (4 Clarke) 340.

[e] (Iowa, 1884) When a writ of error to a justice's court is pending in a circuit court, which, under Code 1873, § 162, has exclusive jurisdiction of such writs, the justice's order of change of venue to the district court is void.—Sayles v. Deluhrey, 19 N. W. 883.

[f] (Neb. 1884) Where a party perfects his appeal from the judgment of a justice of the peace by filing an undertaking, he cannot thereafter move to set the judgment aside.—Dean v. Kinman, 15 Neb. 492, 20 N. W. 112.

[g] (Nev. 1866) The filing of a notice of appeal and undertaking, on appeal in a justice's court, after verdict, but before the entry of judgment thereon, does not deprive the justice of authority to enter up judgment on the verdict.—Fugitt v. Cox, 2 Nev. 370.

[h] (N. C. 1895) A justice of the peace has no power, after he has transmitted an appeal from his judgment and all the papers to the reviewing court, to grant a motion to set aside his judgment for want of jurisdiction.—Forbes v. McGuire, 116 N. C. 449, 21 S. E. 178.

[i] (Pa. 1831) When the common pleas has possession of a case, in the shape of an appeal, though defectively entered, the functions of the justice terminate.—Robinson v. Shrouds, 1 Ashm. 168.

[j] (Pa. 1881) Where an appeal has been properly, and in due time, taken from a justice's judgment, and the transcript on the appeal shows that all the costs were paid by the appellant, the justice has no power to issue an execution to collect costs alleged to have been omitted. The appeal suspends his powers.—Hoffman v. Reber, 1 Chest. Co. Rep. 240.

§ 601. Effect as waiver of objections to jurisdiction of lower court.

Appearance on appeal as waiver of defects in process, see ante, § 596.

[a] (Ala. 1844) An appeal from the decision of a justice of the peace prevents the party appealing from objecting before the higher court that the justice issued the process and determined the case in a place beyond his precinct.—Monroe v. Brady, 7 Ala. 59.

[b] (Ala. 1858) In an action commenced in a justice's court, if the defendant suffers judgment by default to be rendered against him, from which he takes an appeal to a jury, and afterwards appeals to the circuit court, he cannot there plead in abatement on account of his being a freeholder and resident citizen of another county.—Thompson v. Clopton, 31 Ala. 647.

[c] (Ill. 1877) A defendant who has removed the case to the circuit court by appeal will not be heard to insist that the justice of the peace had no jurisdiction.—Wasson v. Cone, 86 Ill. 46.

[d] (Me. 1885) Taking an appeal from a judgment of a magistrate overruling a plea in abatement made after a general continuance of the action, without pleading any general defense, brings up the one question appealed from, and is a waiver of a defense on the merits of the case.—Otis v. Ellis, 78 Me. 75, 2 Atl. 851.

[e] (Ohio, 1846) Where a cause over which a justice had no jurisdiction is begun in a justice's court, and appealed to the common pleas, the proceedings before the justice are wholly void; and the case stands in the common pleas as though issue had been joined without process. It is too late to object to the jurisdiction of the justice.—Harrington v. Heath, 15 Ohio, 483.

[f] (Tenn. 1869) A scire facias to revive a judgment is in the nature of a suit; hence an appeal from a decision of a justice of the peace, upon a scire facias issued by him, to revive a judgment previously rendered in his court, does not have the effect of removing into the circuit court the suit in which the original judgment was rendered.—Bryant v. Smith, 47 Tenn. (7 Cold.) 113.

§ 602. Effect as waiver of irregularities of summons and proceedings.

[a] By appealing from a justice's court defendant waives defects in the summons.
—(Colo. 1871) Deitz v. City of Central, 1 Colo. 323;
(Ill. 1882) Schofield v. Pope, 104 Ill. 130;
(Mo. 1844) Ser v. Bobst, 8 Mo. 506; (1883) Boulware v. Chicago & A. R. Co., 79 Mo. 494; (1883) Gant v. Chicago, R. I. & P. Ry. Co., 79 Mo. 502; (1883) Fitterling v. Missouri Pac. Ry. Co., 79 Mo. 504, 20 Am. & Eng. R. Cas. 454; (1887) Witting v. St. Louis & S. F. R. Co., 28 Mo. App. 103; (1890) Witting v. St. Louis & S. F. Ry. Co., 101 Mo. 631, 14 S. W. 743, 20 Am. St. Rep. 636, 10 L. R. A. 602;

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(Pa. 1874) Jones v. Delaware & H. Canal Co., 10 Phila. 570;
(Wis. 1860) Barnum v. Fitzpatrick, 11 Wis. 81.

[b] The taking of an appeal from a justice's judgment waives all errors in the service of process and is equivalent to a general appearance to the merits in the circuit court.
—(Ark. 1885) Kansas City & M. R. Co. v. Summers, 45 Ark. 295;
(Ind. 1891) Baltimore & O. R. Co. v. Tess, 2 Ind. App. 507, 28 N. E. 721;
(Mo. 1882) Gibbs v. Missouri Pac. R. Co., 11 Mo. App. 459; (1888) Rice v. St. Louis, I. M. & S. Ry. Co., 30 Mo. App. 110; (1889) Fitzpatrick v. Missouri Pac. Ry. Co., 34 Mo. App. 280;
(Mont. 1890) Gage v. Maryatt, 9 Mont. 265, 23 Pac. 337.

[c] A party waives all objection to the jurisdiction of a justice of the peace by appealing from a judgment rendered by the justice on default of appearance and filing a transcript of the record in the district court.
—(Mo. 1887) Eubank v. Pope, 27 Mo. App. 463;
(Neb. 1884) Dean v. Kinman, 15 Neb. 492, 20 N. W. 112.

[d, e] (Ala. 1857) On an appeal from a justice's court, if the defendant pleads to the statement filed against him in the circuit court, he cannot afterwards object to any irregularities in the appeal, notice thereof, or process commencing the suit; nor can he afterwards take advantage of a previous discontinuance against a co-defendant.—McElhaney v. Gilleland, 30 Ala. 183.

[f] (Ala. 1889) By failing to object to the jurisdiction of the justice of the peace at the time of trial, and thereafter appealing to the circuit court, defendant waived, in the latter court, the question of jurisdiction, as appeals to the circuit court are triable de novo.—Western Ry. Co. v. Lazarus, 88 Ala. 453, 6 South. 877.

[g] (Ark. 1839) Where a party appeals from the decision of a justice of the peace, and afterwards brings his writ of error, he cannot assign for error any defects in the summons in the justice's court or in the service of it.—Smith v. Stinnett, 1 Ark. (1 Pike) 497.

[h] (Colo. 1887) Defendant in an attachment suit objected to the jurisdiction of the county court, on the grounds that the justice, before whom the case was first tried, did not cause notice of the suit to be published as required by law; and that the constable did not retain the summons put into his hands for service until the date of the trial. *Held* that, by filing his appeal bond in the appellate court, the defendant waived objection to the jurisdiction of that court.—Charles v. Amos, 10 Colo. 272, 15 Pac. 417.

[i] (Colo. 1887) Error committed by a justice in continuing a case is waived by the taking of an appeal to the county court, securing a change of venue to the district court, and appearing there and trying the case on its merits.—Craig v. Smith, 10 Colo. 220, 15 Pac. 337.

[j] (Colo. 1888) An appeal by defendant from the judgment of the justice in an action against a railway company gives the county court jurisdiction of defendant, and is a waiver of a defective service of summons.—Colorado Cent. R. Co. v. Caldwell, 11 Colo. 545, 19 Pac. 542.

[k] (Colo. 1895) Where a justice, after allowing an amendment of a summons by substitution of the defendant's proper name, assumes jurisdiction, and enters judgment against the defendant as originally summoned, defendant, by appealing and participating in a trial de novo, waives the want of jurisdiction.—Union Pac., D. & G. Ry. Co. v. Perkins, 7 Colo. App. 184, 42 Pac. 1047.

[l] (Ill. 1859) The circuit court has jurisdiction on appeal from a justice of the peace, where the justice had jurisdiction, however defective the service of summons by the constable may have been; and by taking an appeal the appellant gives jurisdiction, even in cases where there was not any service.—Swingley v. Haynes, 22 Ill. (12 Peck) 214.

[m] (Ill. 1861) An appeal from the decision of a justice of the peace gives the appellate court jurisdiction of the party, although he was not served with process in the case appealed from; and the appellate court can proceed to a trial on the merits.—Ohio & M. R. Co. v. McCutchin, 27 Ill. (17 Peck) 9.

[n] (Ill. 1874) Where the defendant, in an action before a justice of the peace appeals from the judgment of the justice to the circuit court and files an appeal bond, he thereby waives all informalities in the proceedings before the justice; and the suit cannot be dismissed by the circuit court, except on a showing that the justice had no jurisdiction.—Village of Coulterville v. Gillen, 72 Ill. 599.

[o] (Ill. 1894) A party, by appealing to the circuit court from a judgment of a justice, submitted himself to the jurisdiction of the circuit court, where the justice acquired jurisdiction of the subject-matter of the action.—Eckels v. Wolf, 55 Ill. App. 310.

[p] (Ill. 1895) A defendant in an action before a justice of the peace waives defects in the service of the summons by filing his appeal bond.—Willerton v. Shoemaker, 60 Ill. App. 126.

[q] (Kan. 1877) Taking and perfecting an appeal from a justice's judgment rendered upon default is a waiver of any objection to want of service of summons to commence the action.—Haas v. Lees, 18 Kan. 449.

[r] (Me. 1844) If parties go to trial on the merits, in an action before a justice of the peace, and an appeal is entered, without the addition of the similiter to the plea, the district court, nevertheless, has jurisdiction of the case.—Strout v. Inhabitants of Durham, 23 Me. (10 Shep.) 483.

[s] (Mass. 1861) It is too late for a defendant to object for the first time in a superior court to the service of a writ upon him, in an action brought originally in the justice's court in Boston, in which, after a default was there entered against him, he appeared at the taxation of costs, and appealed from the clerk's taxation, and finally, upon its affirmance by the court, entered a general appeal from the judgment there rendered against him.—Briggs v. Humphrey, 83 Mass. (1 Allen) 371.

[t] (Minn. 1878) Where there is no appearance in an action before a justice, an appeal on questions of law alone, under Laws 1865, c. 22, will not preclude the defendant from availing himself of a want of jurisdiction of his person by the justice.—Craighead v. Martin, 25 Minn. 41.

[u] (Minn. 1884) A motion by defendant, in an action before a justice of the peace, for a dismissal of the action on the ground that the summons was void, was denied. After trial before the justice, defendant appealed from the judgment thereon upon questions of fact, thereby seeking a retrial in the appellate court upon the merits. *Held*, that the objec-

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tion to the jurisdiction of the court over him was waived.—Seurer v. Horst, 31 Minn. 479, 18 N. W. 283.

[v] (Mo. 1839) In proceedings before a justice of the peace, any error is cured, by statute, on appeal to the circuit court.—Atwood v. Reyburn, 5 Mo. 555.

[vv] (Mo. 1882) By appealing and going to trial on the merits defendant waives the right to show that the justice from whose judgment the appeal was taken was not "the next nearest justice" to the one who granted a change of venue.—Spahn v. Sharp, 12 Mo. App. 123.

[w] (Mont. 1890) Irregularities in a summons issued from a justice's court, in not fully apprising defendant of the nature of the action, or of the relief that will be demanded in case of default, are waived by appealing after default, though defendant appear specially in the appellate court to move to dismiss the action.—Gage v. Maryatt, 9 Mont. 265, 23 Pac. 337.

[ww] (N. C. 1847) Where a party appealed from the judgment of a magistrate to the county court, under the act of 1831, relating to injuries done to stock in another's inclosure, and a trial was had by jury, the matter being gone through with de novo, the defects in the proceedings before the magistrate are not material, as they are vacated by the appeal.—Kearney v. Jeffreys, 30 N. C. 96.

[x] (N. D. 1891) On appeal by a defendant in justice's court, on questions of law and fact, where the notice of appeal demands a new trial, the district court has jurisdiction of the person of the defendant, though the summons was not properly served, and the defendant appeared specially before the justice and moved to set aside the service.—Lyons v. Miller, 2 N. D. 1, 48 N. W. 514.

[xx] (N. D. 1894) An objection to jurisdiction of a justice is not waived by an appeal to the district court, and subsequently to the supreme court, to review the sufficiency of the summons of the justice.—Miner v. Francis, 3 N. D. 549, 58 N. W. 343.

[y] (W. Va. 1889) Defendant who had suffered judgment by default in a justice's court appealed to the circuit court, and moved to quash the return of service of summons, on the ground that it was served by an unauthorized person. The motion was overruled, and defendant proceeded to trial on the merits. *Held*, that any irregularity in the service was waived.—Johnson v. MacCoy, 32 W. Va. 552, 9 S. E. 887.

[yy] (Wis. 1860) A default before a justice, followed by an appeal by the defendant without specially insisting upon defects of service, is a waiver thereof.—Barnum v. Fitzpatrick, 11 Wis. 81.

[z] (Wis. 1861) Where, in a justice's suit, judgment has been rendered against the defendant for more than $15, a defect in the process is waived by the taking by him of an appeal.—Lowe v. Stringham, 14 Wis. 222.

§ 603. Effect on Judgment.

Appeal as suspending judgment and preventing dormancy, see ante, § 413 [g].

[a] An appeal from the judgment of a justice of the peace vacates that judgment.
—(Ala. 1885) Lehman v. Hudmon, 79 Ala. 532;
(Me. 1860) Hunter v. Cole, 49 Me. 556;
(N. J. 1851) Vannoy v. Givens, 23 N. J. Law (3 Zab.) 201;
(N. C. 1813) Marshall v. Lester, 4 N. C. 13, 6 N. C. 227; (1853) Sturgill v. Thompson, 44 N. C. 392;
(Tex. 1885) Bender v. Lockett, 64 Tex. 566.

[b] (Conn. 1843) An appeal from a judgment of a justice of the peace to the county court allowed, but not duly entered in that court, not merely suspends such judgment, but vacates it, so that an action of debt thereon cannot be sustained.—Curtiss v. Beardsley, 15 Conn. 518.

[c] (Conn. 1856) The defendants, in an action of trespass before a justice of the peace, pleaded in abatement the defective service of the plaintiff's writ, to which plea the latter demurred. The court sustained the demurrer, and ordered the defendants to answer over, which they refused to do, whereupon judgment was rendered in favor of the plaintiff. The defendants then appealed from the judgment upon the demurrer to the superior court. *Held*, that such appeal did not vacate the final judgment of the justice, and that the superior court could take no cognizance of the case.—Blackman v. Beha, 24 Conn. 331.

[d] (Conn. 1872) On appeal from a judgment recovered before a justice of the peace, on motion of the appellee, the case was stricken from the docket on the ground of an irregularity in the appeal. The judgment creditor afterwards brought an action of debt on the judgment rendered by the justice. *Held*, in this action, that while an appeal well taken vacates the judgment appealed from, yet that here, by reason of the judgment of the appellate court that the appeal was not legally taken, it was, as between the parties to be considered as not legally taken, without reference to the actual fact, which was not open, as between them, to inquiry, and that therefore the original judgment of the justice was in force, and would sustain the action of debt.—Cunningham v. Rogers, 39 Conn. 482.

[e] (Ind. 1872) An appeal from the judgment of a justice of the peace has the effect to vacate the judgment, and brings the case into court for a retrial, as if it had not been before tried. The appellate court is not a court of errors.—Britton v. Fox, 39 Ind. 369.

[f] (Ky. 1816) Though the power of the legislature to increase the jurisdiction of justices may be questionable, where it provides that on appeal to the circuit court the latter court should proceed to hear and determine the case on the merits, it renders the judgment of a magistrate by appeal null and void, and the original validity of such judgment is immaterial.—Pollard v. Holemen, 7 Ky. (4 Bibb) 416.

[g] (Mass. 1878) Under Gen. St. c. 120, § 125, and Id. c. 124, § 32, regulating appeals from a magistrate's judgment, the appeal therefrom on charges of fraud against a poor debtor vacates both the part in favor of the appellant and the part against him, and opens the case for trial in the superior court on all the charges.—Morse v. Dayton, 125 Mass. 47.

[h] (Mo. 1886) Under Rev. St. 1879, § 3041, a regularly perfected appeal from a judgment rendered by a justice of the peace absolutely vacates such judgment during the pendency of such appeal.—Earl v. Hart, 89 Mo. 263, 1 S. W. 238.

[i] (N. H. 1852) On an appeal from a justice, no objection can be made to the judgment for any cause, the effect of the appeal being to vacate, for most purposes, such judgment.—Bixby v. Harris, 26 N. H. (6 Fost.) 125.

[j] (N. Y. 1851) The judgment of a justice, notwithstanding an appeal from it which is pending in other courts, under the provisions

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of the Code, remains a fixed right, and not affected by a statute enacted pending the appeal.—Pruyn v. Tyler, 18 How. Prac. 331.

[k, l] (N. Y. 1859) The appeal, under the Code, from a justice's judgment to the county court, does not supersede the justice's judgment, nor does the county court proceed de novo with a trial; but the appellate jurisdiction is merely of errors in the court below. The judgment is merely of affirmance or reversal; and the whole proceedings are like those formerly had on certiorari. The judgment of the justice remains a valid judgment.—Pruyn v. Tyler, 18 How. Prac. 331.

[m] (Pa. 1848) Where a plaintiff, having obtained a judgment before a justice, appealed to the common pleas, and then discontinued his appeal, it was *held* that no action would lie upon the judgment obtained by him before the justice.—Felton v. Weyman, 10 Pa. (10 Barr) 70.

[n] (Tex. 1886) A justice's judgment is annulled by an appeal therefrom, its execution not being merely suspended until the determination of the cause in the appellate court.—Moore v. Jordan, 65 Tex. 395.

[o] (Tex. 1894) Where, on appeal from a judgment of a justice against two or more persons jointly, a trial de novo is to be had, an appeal by one of such judgment debtors annuls the judgment appealed from.—Missouri, K. & T. Ry. Co. v. Mosty, 8 Tex. Civ. App. 330, 27 S. W. 1057.

[p] (Vt. 1848) The effect of an appeal by one defendant from a judgment in a justice court, in a joint action on a promissory note against several defendants, is to vacate the judgment rendered by the justice, and remove the entire case to the appellate court.—Town of Fletcher v. Blair, 20 Vt. 124.

[q] (W. Va. 1886) An appeal from a justice's judgment to the common pleas renders that judgment ineffectual as the foundation of an action.—Evans v. Taylor, 28 W. Va. 184.

§ 604. Effect in attachment and garnishment proceedings.

[a] The giving of an appeal bond releases the lien of an attachment issued from a justice's court.

—(Ind. 1856) The Standart v. Bond, 8 Ind. 270;
(Mich. 1881) Bushey v. Raths, 45 Mich. 181, 7 N. W. 802.

[b] (Ala. 1846) After an appeal from a justice, no plea in abatement can be interposed to disclose a defect in the affidavit for the attachment, which was the process in the suit. This is a defect in the proceedings of the justice, and is cured by the statute.—Clough v. Johnson, 9 Ala. 425.

[bb] (Ala. 1875) Defects in an affidavit for attachment, or in an attachment sued out before a justice of the peace, such as an omission to name the individuals composing a partnership suing out the writ, are cured on appeal by Rev. Code, § 2772, providing that the cause should be tried "according to equity and justice, without regard to any defects in the summons or other proceedings before the justice."—Paulhaus v. Leber, 54 Ala. 91.

[c] (Colo. 1895) Where a justice of the peace fails to acquire jurisdiction in an attachment proceeding on account of irregularity in the papers, an appearance by the defendant or garnishee in the county court on appeal will not confer jurisdiction upon that court in the attachment and garnishment proceedings.—Colorado Fuel & Iron Co. v. Blair, 6 Colo. App. 40, 39 Pac. 897.

[d] (Iowa, 1851) An appeal to the district court does not release the plaintiff from responsibility on the attachment bond given before the justice.—McCall v. Bradley, 3 G. Greene, 200.

[e] (Iowa, 1873) Appeal to the circuit court, by an intervener, from a judgment rendered against him in attachment proceedings before a justice of the peace, and the execution of an appeal bond, do not entitle the intervener to possession of the other property.—Jennings v. Warnock, 37 Iowa, 278.

[f] (Iowa, 1881) Where attached property has been released by a justice of the peace as exempt, his decision is conclusive as to defendant's rights until reversed; and suing out a writ of error, if no supersedeas bond is filed, as required by Code 1873, § 3186, will not preserve the lien of attachment.—Pellersells v. Allen, 56 Iowa, 717, 10 N. W. 261.

[g] (Kan. 1880) A simple appeal from the judgment of a justice of the peace to the district court does not authorize the latter to enter an order against a garnishee, who has been discharged by the justice, prior to the appeal.—Brown v. Tuppeny, 24 Kan. 29.

[h] (Kan. 1889) In an action before a justice, in which an attachment had issued, a motion was made by defendant to discharge the attachment, which was overruled. Afterwards a judgment was rendered in favor of defendant on the merits, and the property was ordered to be returned to defendant. Within 10 days from final judgment the plaintiff appealed to the district court, filing an ordinary appeal bond. *Held*, that the appeal did not carry the attachment proceedings to the district court, so as to authorize the constable, after judgment rendered by the justice, to continue to hold possession of the property.—Becker v. Steele, 41 Kan. 173, 21 Pac. 169.

[i] (Mo. 1885) The pendency of the appeal of an interpleader from a justice's judgment in attachment operates as a supersedeas, where bond is given, as to other cases.—State v. Ranson, 86 Mo. 327.

[j] (Ohio, 1890) Rev. St. § 6524, provides that any party to a suit affected by an order discharging or refusing to discharge an order of attachment shall be entitled to file a petition in error in the court of common pleas to reverse, vacate, or modify the same. Section 6506 declares that in case of appeal by either party the attachment shall be continued and determined by the court of common pleas in the same manner as though the attachment had issued from the court of common pleas. *Held*, that where, in an attachment before a justice of the peace, a party filed a petition in error in the common pleas from a decision of the justice overruling a motion to dissolve the attachment, and appealed the case from a final judgment of the justice, he was entitled to have the writ of error adjudicated, without waiting for the determination of the suit, since section 6506 refers only to cases where no ruling has been made by the justice as to the validity of the attachment, and was not intended to cut off the right to prosecute error to a ruling by the justice on a motion to discharge the attachment.—Nau v. Gobrecht, 4 O. C. D. 495.

[k] (Ohio, 1894) Where defendant in an attachment prosecutes a petition in error from an order of a justice of the peace overruling his motion to discharge the attachment, as authorized by Rev. St. § 6524, a subsequent appeal by him from a judgment in the principal case does not destroy his right to have his petition in error adjudicated.—Nau v. Gobrecht, 8 Ohio Cir. Ct. R. 518.

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[l] (Pa. 1892) In an attachment suit commenced before a justice of the peace, where the justice overrules defendant's exceptions to his jurisdiction on the ground of the insufficiency of the affidavit, the entry of an appeal in the court of common pleas is no waiver of the right to except to the jurisdiction, and the question may be raised in the supreme court after the trial of the appeal in the court of common pleas.—Gates v. Bloom, 149 Pa. 107, 24 Atl. 184, 30 Wkly. Notes Cas. 127.

[m] (Pa. 1893) In an action for the wages of manual labor, brought before an alderman by process of foreign attachment, under Act May 8, 1874, on plaintiff's affidavit that defendant is a nonresident, an objection to the jurisdiction over defendant's person because he was in fact a resident is waived by defendant's appeal from the judgment of the alderman to the court of common pleas, the entry of bail for the debt and costs, and his general appearance in the court of common pleas.—Wright v. Millikin, 152 Pa. 507, 25 Atl. 756, 31 Wkly. Notes Cas. 469; Wright v. Same, 152 Pa. 511, 25 Atl. 757; Cook v. Same, 152 Pa. 512, 25 Atl. 757.

[n] (Tenn. 1881) An appeal from a judgment of the justice of the peace, where an instanter execution had issued under affidavit, vacates a judgment on a garnishment levied under such execution.—Karr v. Schade, 75 Tenn. (7 Lea) 294.

[o] (Wis. 1864) Where, in an action upon a promissory note commenced before a justice of the peace, the affidavit for an attachment, which was taken for the complaint, was not sufficient to authorize the warrant which was issued, it was *held* that after the defendant had appeared generally, and pleaded to the merits, and appealed from the judgment of the circuit court, whether the attachment might have been dissolved or not, it was too late to dismiss the suit as a personal action, for any defect in the process or in the service of the same.—Woodruff v. Sanders, 18 Wis. 161.

§ 605. When jurisdiction of appellate court attaches.

[a] (U. S. 1832) The appeal of one party from the judgment of a justice of the peace gives the circuit court jurisdiction.—Dillingham v. Skein, Fed. Cas. No. 3,912a [1 Hemp. 181].

[b] (Ala. 1853) A defendant, against whom judgment is rendered by a justice of the peace, is regarded as the actor in the subsequent proceedings after he has removed the case by appeal to the circuit court, and is held to be constantly in court.—Martin v. Higgins, 23 Ala. 775.

[c] (Ark. 1839) Under the territorial law, the prayer and grant of an appeal from the decision of a justice of the peace gives jurisdiction to the circuit court. It does not depend upon giving bail in appeal.—Smith v. Stinnett, 1 Ark. (1 Pike) 497.

[d] (Cal. 1885) The superior court obtains jurisdiction of an appeal from a justice's court, where the notice of appeal is served and filed, and the undertaking on appeal filed within the statutory time, and it cannot then dismiss for want of jurisdiction; and the fact that the acts necessary to the perfection of the appeal were not done in the order prescribed in the statute is immaterial, if they are all done within the prescribed time.—Hall v. El Dorado County Superior Court, 68 Cal. 24, 8 Pac. 509.

[e] (Colo. 1888) Under Gen. St. § 1983, requiring the justice, on the issue of a supersedeas by the clerk of the county court, to return all papers and a transcript of the judgment, the filing of the transcript is necessary to give the appellate court sufficient jurisdiction to dismiss the appeal.—Denver & R. G. Ry. Co. v. Rader, 11 Colo. 536, 19 Pac. 476.

[f] (Colo. 1888) An appeal by defendant from the judgment of a justice of the peace, in an action against a railroad company, wherein the summons was served on a station agent, which in itself was not sufficient to give the justice jurisdiction, operates to give the county court jurisdiction.—Colorado Cent. R. Co. v. Caldwell, 11 Colo. 545, 19 Pac. 542.

[g] (Ill. 1875) Where an appeal bond is taken and approved by the justice, even if it is defective, the appeal is nevertheless taken from the judgment, and the opposite party must follow the case to the appellate court.—Miller v. Superior Mach. Co., 79 Ill. 450.

[h] (Ill. 1878) On appeal from the judgment of a justice of the peace, the transcript of the proceedings before the justice must be filed in the circuit court, in order to give it jurisdiction of the case. The mere filing of an appeal bond is not sufficient.—Sheridan v. Beardsley, 89 Ill. 477.

[i] (Ill. 1882) A court to which an appeal is taken from a justice of the peace has no jurisdiction to dismiss the appeal without the consent of the appellant, where no transcript from the justice has been filed.—Robinson v. Allen, 11 Ill. App. (11 Bradw.) 574.

[j] (Ill. 1883) Until the transcript of the justices' proceedings is filed in the circuit court, the court has no power to make any order in the case, other than to continue it. Until the transcript is filed, jurisdiction is not obtained.—Odd Fellows' Benev. Soc. v. Alt, 12 Ill. App. (12 Bradw.) 570.

[k] (Iowa, 1861) Whenever an appeal bond or recognizance is filed in the office of the justice, with approved sureties, within the time limited for the taking of appeals, the magistrate's action over the case, beyond what is necessary to be done in order to send up a transcript of the proceedings, is suspended.—McKeever v. Horine, 12 Iowa, 227.

[l] (Iowa, 1887) Under Code 1873, § 3584, regulating appeals from justices, an appeal is deemed in the circuit court by the filing of the justice's return in the office of the clerk.—Goodman v. Allen, 72 Iowa, 616, 34 N. W. 445.

[m] (Kan. 1894) An appeal from the judgment of a justice of the peace is complete upon the filing and approval of the appeal bond or undertaking within 10 days from the rendition of the judgment.—St. Louis & S. F. Ry. Co. v. Hurst, 52 Kan. 609, 35 Pac. 211.

[n] (Mich. 1874) The circuit court has no jurisdiction to try an appeal from a justice until a return is made to the appeal from justice court.—People v. Allegan Circuit Judge, 29 Mich. 487.

[o] (Mo. 1880) A cause appealed from the decision of a justice is pending in the circuit court from the time when the appeal was granted, not from the time when the transcript was filed with the clerk.—Sullivan v. Sanders, 9 Mo. App. 75.

[p] (Neb. 1891) Code, § 1007, requires the party appealing from a judgment of a justice of the peace to enter into an undertaking within 10 days. To perfect an appeal, other sections require a transcript of the judgment, including the undertaking, to be delivered to the clerk of the district court within 30 days after the judgment was rendered. Plaintiff, after recovering a judgment before a justice, filed a certified transcript with the clerk of the district court a few days after the judgment

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was rendered, so as to make it a lien on defendant's land. Afterwards, defendant gave an appeal undertaking in time, and filed with said clerk, but not until the 30 days had expired, another transcript of the judgment and the undertaking. *Held*, that the district court had jurisdiction because of the transcript filed by the appellee, since such transcript, though imperfect, gave it jurisdiction to order a perfect one, and the subsequent filing of such a transcript by appellant had the same effect as if it had been ordered.—Fulton v. Ryan, 33 Neb. 456, 50 N. W. 430.

[q] (Pa. 1870) Where an appeal from a judgment of a justice has not been perfected by reason of its being filed too late, the common pleas has no authority to issue the rule to show cause why the execution issued on the judgment should not be set aside.—Dailey v. Mayer, 2 Leg. Gaz. 223.

[r] (Pa. 1873) To complete an appeal a justice's transcript of the proceedings must be filed in the court by the principal appellant. —Dietrick v. Mann, 1 Leg. Chron. 159.

[s] (Tex. 1884) On appeal from the judgment of a justice, the appellant, by filing the proper appeal bond within the time provided by law, perfects the jurisdiction of the county court, which may issue any writ necessary to enforce its jurisdiction. compelling the justice to send up the papers.—Texas & P. Ry. Co. v. Dyer, 2 Willson, Civ. Cas. Ct. App. § 312.

[t] (Tex. 1885) Upon the filing of the appeal bond, the appeal becomes perfected upon the adjournment of that term, and the court has no further jurisdiction over the case, which thereafter attaches to the court appealed to.—Curtis v. Bernstein, 2 Willson, Civ. Cas. Ct. App. § 672.

§ 606. Supersedeas or stay of proceedings.

Liabilities on supersedeas bonds, see post, §§ 735–750.

[a] (Ark. 1877) The failure of the appellant, on appeal from a justice of the peace to the circuit court, to file a supersedeas bond, is no ground for the dismissal of the appeal.—Hughes v. Wheat, 32 Ark. 292.

[b] (Iowa, 1882) Code 1873, § 3601, provides that "all proceedings in the justice's court subsequent to judgment may be stayed by a bond * * * like that required in cases of appeals." *Held*, that a constable levying upon goods under an execution issued upon a judgment of a justice. from which an appeal has been taken or writ of error sued out, without filing such bond, is not liable in damages for the levy.—Thomas v. Nicklas, 58 Iowa, 49, 11 N. W. 722.

[c] (Ky. 1875) Civ. Code, § 292, permitting an appeal from an order of justices' or quarterly courts sustaining an attachment to the circuit, without appealing from the personal judgment, does not prevent the creditor from collecting his judgment by execution, but stays the sale until the circuit court shall sustain the attachment or the debt be paid.—Hawkins v. Baldauf, 73 Ky. (10 Bush) 624.

[d] (Md. 1889) Act 1888, c. 235, adds a new condition to replevin bonds in magistrate's cases, to the effect that the plaintiff will not only abide by and perform the judgment of the justice, but also "of the circuit court of the county or Baltimore city court, as the case may be." *Held*, that the giving of such a bond does not obviate the necessity for giving another bond on appeal in order to stay execution.—State v. Carrick, 70 Md. 586, 17 Atl. 559. 14 Am. St. Rep. 387.

[dd] (Mo. 1847) An appeal from the judgment of a justice of the peace is not taken until a recognizance is entered and approved.—Adams v. Wilson, 10 Mo. 341; Slater v. The Convoy, 10 Mo. 513.

[e] (Neb. 1890) Under Code Civ. Proc. § 1049, providing that to obtain a stay of execution on a justice's judgment the judgment debtor shall enter into an undertaking, with sufficient surety, to pay the judgment, etc., "which undertaking shall * * * be signed by the surety," it is not necessary that the judgment debtor should sign the undertaking.—State v. Cochran, 28 Neb. 798, 45 N. W. 52.

[f] (N. J. 1793) While an appeal is pending from the judgment of a justice every proceeding under the original judgment is void.—Thompson v. Thompson, 1 N. J. Law (Coxe) 159.

[g] (N. J. 1825) Where an appeal from a justice to the court of common pleas was dismissed, and an execution issued on the judgment, and a rule was obtained on the court of common pleas to show cause why mandamus should not issue to compel reinstatement of the appeal, the supreme court will grant a rule on the sheriff to stay proceedings under the execution.—Allen v. Joice, 8 N. J. Law (3 Halst.) 135.

[h] (N. Y. 1824) An appeal from a justice's judgment, though after transcript filed and execution issued, supersedes the execution.—Sholts v. Judges of Yates County, 2 Cow. 506.

[i] (N. Y. 1850) An appeal from the judgment of a justice of the peace, not followed up by the undertaking required by the Code (sections 355–357), will not operate as a stay of any further proceedings which the plaintiff may elect to pursue in order to enforce the collection of the judgment.—Conway v. Hitchins, 9 Barb. 378.

[j] (N. Y. 1858) The defendant perfected his appeal from a judgment of a justice's court, after execution had been issued, and when it was in a constable's hands; but before levy he served a copy of his undertaking upon the plaintiff, though not upon the constable. After receiving the copy undertaking, the plaintiff directed the constable to levy. *Held*, that the levy should be set aside. as made in bad faith. —Jones v. McCarl, 7 Abb. Prac. 418.

[k] (N. Y. 1865) Where, on taking an appeal from a judgment recovered in a court of a justice of the peace, the appellant executed two undertakings, one containing the clause necessary to effect a stay of proceedings, and the other without such clause, and served the former on the justice, and filed the latter with the clerk, *held*, that proceedings were not stayed.—Brush v. Lee, 18 Abb. Prac. 398.

[l] (N. Y. 1887) Where one appeals from a justice's judgment, if he desires a stay of execution, he must serve a copy of the undertaking required by Code, § 3050, on the respondent, as the statute requires. It is not enough to serve the copy on the officer holding the execution.—Wells v. Dawson, 43 Hun, 509.

[m] (Ohio, 1832) The party interested in an appeal from the judgment of a justice, which is perfected after execution, should himself, or by his attorney, serve an order for recalling the execution.—Holt v. Bingham, Wright, 163.

[n] (Pa. 1809) Under the statute of 1804, the defendant, in a suit before a justice, might enter bail to obtain stay of execution after the expiration of the 20 days allowed for an appeal, if execution had not already been issued.—Mann v. Alberti, 2 Bin. 195.

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[o] (Pa. 1824) The entry of security to obtain a stay of execution, under the act of 1806, operates as a discharge of the special bail, on an appeal from a justice of the peace.—Roup v. Waldhouer, 12 Serg. & R. 24.

[p] (Pa. 1838) After an execution had issued immediately upon a justice's judgment, and the money had been made by a sale of personal property, it was *held* too late to enter an appeal or bail for stay of execution, notwithstanding section 6 of the act of 1820.—Patterson v. Peironnet, 7 Watts, 337.

[q] (Pa. 1847) On appeal from a justice of the peace, the time of the stay of execution is to be computed from the first day of the term to which the appeal is taken.—Woods v. Connor, 6 Pa. (6 Barr) 430.

[r] (Pa. 1854) Where a party has entered bail before an alderman for an appeal, the magistrate may, after the expiration of the time for filing the appeal, issue execution, if satisfied that the appeal has not been perfected, without a certificate of that fact from the court of common pleas.—Setterly v. Yearsley, 1 Phila. 517.

[s] (Pa. 1857) Where an appeal from the judgment of a justice of the peace to the court of common pleas is taken, it is ineffectual to stay an execution, unless the transcript is filed within the time required by law.—Appeal of Herron, 29 Pa. (5 Casey) 240.

[t] (Pa. 1881) When an appeal has been taken from the judgment of a justice, the latter may issue execution without the production of a certificate from the prothonotary to him that the appeal taken in the case by the defendant had not been entered in the common pleas; the justice taking the risk of the legality of the execution.—Carpenter v. Mills, 2 Leg. Rec. Rep. 162.

[u] (Vt. 1879) Where no security is given for the prosecution of an appeal from a judgment of a justice of the peace, the appeal is void; and the creditor must take out execution within the statutory number of days from the date of the judgment, in order to preserve his attachment and hold the receiptors.—Bass v. Gay, 51 Vt. 581.

8. RETURN, STATEMENT, RECORD, OR TRANSCRIPT.

(a) MATTERS TO BE SHOWN BY TRANSCRIPT OR RECORD, §§ 607-613.
(b) NECESSITY, SCOPE, CONTENTS, AND REQUISITES OF TRANSCRIPT AND BILLS OF EXCEPTIONS, §§ 614-618.
(c) FILING TRANSCRIPT OR RECORD, §§ 619-623.
(d) DEFECTS, OBJECTIONS, AND AMENDMENT OF RETURN, AND COMPELLING RETURN, §§ 624-632.
(e) CONCLUSIVENESS OF TRANSCRIPT, AND QUESTIONS PRESENTED FOR REVIEW, §§ 633-636.

Actions against justice for false return on appeal, see ante, §§ 48–55.
Liability of justice for false or erroneous return on appeal, see ante, § 41.
—— *for negligence in returning recognizance on appeal, see* ante, § 44.
Transcript or return of justice as evidence on appeal, see post, § 696.

(a) MATTERS TO BE SHOWN BY TRANSCRIPT OR RECORD.

IN GENERAL, § 607.
JURISDICTION OF JUSTICE, § 608.
PROCESS, § 609.
PLEADINGS AND DEMANDS OF PARTIES, § 610.
EVIDENCE, § 611.
CONDUCT OF TRIAL AND JUDGMENT, § 612.
PROCEEDINGS FOR APPEAL, § 613.

§ 607. In general.

[a] (Iowa, 1856) Upon writ of error to a justice, the only points as to which he is to make return are those stated in the affidavit for the writ.—Hays v. Gorby, 3 Iowa (3 Clarke) 203.

[b] (Iowa, 1859) A justice, commanded to certify the records and proceedings, must certify to all proceedings whatsoever stated in the affidavit on which the writ of error has been based.—Miller v. O'Neal, 9 Iowa, 446.

[c] (Minn. 1872) The return of a justice on appeal need not show of what county he is a justice.—Barber v. Kennedy, 18 Minn. 216 (Gil. 196).

[d] (N. J. 1839) On appeal from the court for the trial of small causes to the common pleas, it is no ground for dismissing the appeal that the transcript does not show in what county the cause was tried, nor that the person before whom it was tried was a magistrate.—Case v. Rowland, 17 N. J. Law (2 Har.) 76.

[e] (N. Y. 1882) Under Code Prac. §§ 3053, 3213, a return on an appeal from a justice "must contain all the proceedings, including the evidence and the judgment."—Gardner v. Smith, 2 Civ. Proc. R. 420.

[f] (Ohio, 1832) On error, it is sufficient if the justice certify that his transcript contains the substance of his proceedings.—Brackenridge v. Husted, Wright, 70.

[g] (S. C. 1812) The district court will refuse to hear an appeal from the judgment of a justice of the peace, unless the facts before the magistrate, and the reasons of his decision, are fully certified.—Richardson v. Johnson, 3 Brev. 51.

[h, i] (Tex. 1889) Under Rev. St. art. 1640, requiring a certified copy of the bill of costs from the justice's day book to accompany the transcript on appeal, a bill of costs in the transcript, over a certificate of the justice that the transcript is a true one of all the entries on his docket, is a substantial compliance therewith.—Forst v. Mayer, 3 Willson, Civ. Cas. Ct. App. § 450.

[j] (Wis. 1850) The return of a justice, on an appeal from his judgment, touching the matters appealed from, must be such as to show that his proceedings have been regular and in conformity with law.—Hale v. Thayer, 2 Chand. 68, 2 Pin. 410.

§ 608. Jurisdiction of justice.

[a] (Ark. 1850) On appeal from the judgment of a justice of the peace, the transcript showed that a summons issued 10 days before the cause of action was filed, but neither the note in suit nor the summons was sent up. *Held*, that the record did not show any jurisdiction in the justice, and that none could be exercised by the circuit court until the proceedings were perfected below.—Heflin v. Owens, 10 Ark. (5 Eng.) 265.

[b] (Del. 1843) On an appeal from a justice of the peace, the transcript must show the jurisdiction below and the right of appeal; and the want of this may be objected to at any time.—Townsend v. Steward, 4 Har. 94.

[c] (Mo. 1883) In an action before a justice for killing stock, it must affirmatively appear from the transcript that the animal was killed in his township, and that the justice had juris-

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diction of the cause.—Matson v. Hannibal & St. J. R. Co., 80 Mo. 229.

[d] (Mo.) The requirement of Rev. St. 1889, § 6126, that an action against a railroad company for killing live stock must be brought before a justice of the peace of the township in which the injury happened, or in an adjoining township, is jurisdictional; and the record on appeal must affirmatively show such jurisdictional fact, or a judgment against the company will be reversed.—(1885) Vaughn v. Missouri Pac. R. Co., 17 Mo. App. 4; (1885) Manuel v. Missouri Pac. R. Co., 19 Mo. App. 631; (1892) Nickerson v. Eddy, 50 Mo. App. 569.

[e] (Mo. 1886) On appeal, the jurisdiction of a justice of the peace must appear. It cannot be presumed.—Gideon v. Hughes, 21 Mo. App. 528.

[f] (Mo. 1889) In an action before a justice against a railway company for damages for the killing of live stock by reason of failure to fence the railroad, the transcript of the justice showed that the failure to fence and the killing of the stock occurred in a certain township, and that the suit was begun before a justice thereof. *Held*, that this sufficiently showed the jurisdiction of the justice.—Emmerson v. St. Louis & H. Ry. Co., 35 Mo. App. 621.

[g] (N. Y. 1831) In ejectment, a transcript of a justice's judgment is good, although it does not, on its face, show that the justice had jurisdiction.—Jackson v. Rowland, 6 Wend. 666, 22 Am. Dec. 557.

[h] (N. Y. 1857) It is not necessary that a justice's transcript of a judgment rendered by him should show the proceedings to give him jurisdiction to render a valid judgment in order to authorize it to be filed and docketed. It is for that purpose prima facie evidence that such justice had jurisdiction to the judgment.—Dickinson v. Smith, 25 Barb. 102.

[i] (Ohio, 1860) Under Swan's St. p. 332, § 327, providing that if any debtor shall appear before a justice of the peace without process, and confess that he is indebted to another, the justice may render judgment on such confession, the transcript of a justice of such judgment is erroneous, unless it shows the personal appearance and confession of defendant, and the personal application of the plaintiff for judgment.—Murdock v. Cooper, 2 Ohio Dec. 306.

[j] (Pa. 1881) It is sufficient if the record substantially shows the justice's jurisdiction.—Leamy v. McClure, 1 Chest. Co. Rep. 220, 1 Del. Co. R. 100.

[k] (Pa. 1881) A record stated plaintiffs' claim as follows: "Parties appear. Plaintiff claims recovery of a note to the amount of $200, which she gave defendant for safe-keeping, which defendant denies." It further showed that the justice proceeded to hear the cause, and gave judgment for plaintiff for $185.60. *Held* to show an action in trover for the conversion of a note, in so far as that was necessary in the record to show the jurisdiction of the justice.—Leamy v. McClure, 1 Chest. Co. Rep. 220, 1 Del. Co. R. 100.

[l] (Pa. 1891) A transcript of a justice's judgment must not only show the form of action and the fact that plaintiff testified, but must set forth the cause of action sufficiently to show that the justice had jurisdiction of the case.—Fitzgerald v. Campbell (Com. Pl.) 10 Pa. Co. Ct. R. 396.

[m] (Pa. 1893) Under Act May 25, 1887 (P. L. 271), abolishing all distinction between forms of action, so far as procedure is concerned, a justice's transcript on appeal fails to show jurisdiction of the justice, where it designates the action substantially in the words of Act March 22, 1814 (6 Smith's Laws, p. 182) § 1, by which jurisdiction is conferred on justices in trespass for damages for injuries to real estate; but it must designate the wrongful act alleged, so as to show that it is within the jurisdiction conferred by the latter act.—Wood v. Bronson (Com. Pl.) 2 Pa. Dist. R. 746.

§ 609. Process.

[a] (Ill. 1878) The jurisdiction of the circuit courts in the case of an appeal from a judgment of a justice of the peace is not affected by the neglect or failure of the justice to transmit the summons with the bond and transcript.—Buettner v. Norton & Dickinson Mfg. Co., 90 Ill. 415.

[b] (Ind. 1879) On appeal from the circuit court, in an action on a note which originated in a justice's court, the record showed that a summons was personally served three days before the trial in the justice's court, and that an appeal was taken from the justice's judgment to the circuit court. *Held*, that the circuit court had acquired jurisdiction; and in such case no copy of the summons need be set out in the record.—Baldwin v. Webster, 68 Ind. 133.

[c] (Iowa, 1856) The original notice before the justice is not necessary on appeal. Its only effect would be to show the original cause of action, and where that sufficiently appears from the proper entries on the justice's docket, not objected to for insufficiency, nothing more is needed.—Shawg v. Bruce, 3 Iowa (3 Clarke) 324.

[d] (Minn. 1872) It is the duty of the justice to include the summons in his return on appeal to the district court; but the fact that he did not so return the summons, to be available, should appear affirmatively on the record.—Barber v. Kennedy, 18 Minn. 216 (Gil. 196).

[e] (Ohio, 1834) Section 44 of the act defining the duties of justices of the peace, and requiring a justice on appeal to certify up all the original papers used on the trial before him, includes only such papers and instruments as were used as evidence on the trial, and does not include the original writ.—Austin v. Hayden, 6 Ohio (6 Ham.) 388.

[f] (Pa. 1882) In a suit against a turnpike company, brought under a provision of its charter, authorizing the recovery of $5 for taking toll on any part of the road out of repair, the transcript of the justice spoke of an action of debt, while the summons styled the action "penal debt." *Held*, that the discrepancy was immaterial.—Fetterman v. Robbins, 100 Pa. 282.

§ 610. Pleadings and demands of parties.

Stating cause of action so as to show jurisdiction of justice, see ante, § 608.

[a] (Ark. 1847) It being essential to the jurisdiction of a justice of the peace that the cause of action be filed with him before suing out the summons, his transcript of a case sent up on appeal must show that it was so filed or the case will be remanded, with instructions to the justice to amend according to the facts.—Keath v. Berkley, 7 Ark. (2 Eng.) 469.

[b] (Ill. 1878) Where a complaint in writing, in a forcible detainer suit, is transmitted with the papers on an appeal from a justice, and his transcript shows that a complaint was filed, though his file mark is not on the complaint,

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this is sufficient to give jurisdiction to both the justice and circuit court.—Reynolds v. Gage, 91 Ill. 125.

[c] (Ill. 1891) A statement in the transcript that the summons was issued on complaint of the plaintiff does not warrant the conclusion that a sufficient complaint in writing was filed with the justice.—Abbott v. Kruse, 37 Ill. App. 549.

[d] (Ind. 1841) On an appeal from the judgment of a justice of the peace to the circuit court, the cause of action filed with the justice need not be copied or referred to in the justice's transcript.—White v. Fortune, 6 Blackf. 116.

[e] (Ind. 1878) An appeal from a justice's judgment on a note, which was the only cause of action filed, may be dismissed on motion, if the note is not transmitted to the circuit court with the transcript.—Tucker v. Gardiner, 63 Ind. 299.

[f] (Kan. 1866) Where an action was appealed from a justice to the district court, and only the justice's transcript was filed, the district court, on motion, should have dismissed the case, or else should have required the filing of pleadings; and this, even before the adoption of the rule requiring it.—Tarleston v. Brily, 3 Kan. 433.

[g] (Mo. 1872) Where a transcript from a justice stated that plaintiff filed his affidavit, and gave its substance, and the justice sent up, as one of the original papers in the case, a statement indorsed, "Affidavit," it sufficiently appeared that the statement had been filed at the institution of the suit, and it was error to dismiss the case on the ground that no statement had been filed.—Kruse v. Hagedorn, 50 Mo. 576.

[h] (Mo. 1893) Where it appears in the court of appeals that the justice's transcript states that an affidavit for attachment was filed with him, and that defendant's plea in abatement denies the allegations of the affidavit, it sufficiently appears that such affidavit was filed, though it is not contained in the abstract.—Pearson v. Gillett, 55 Mo. App. 312.

[i] (N. J. 1839) On an appeal from the court for the trial of small causes to the common pleas, it is no objection that the transcript of the justice does not show a state of demand, if the fact appear, or may be fairly presumed, by the proceedings and papers in the case.—English v. Bonham, 17 N. J. Law (2 Har.) 850.

[j] (N. Y. 1836) 2 Rev. St. p. 260, § 195, directing a justice on an appeal to file all the papers relating to the case with the clerk of common pleas, does not require him to file an original note for which suit was brought.—Mappa v. Pease, 15 Wend. 669.

[k] (N. Y. 1836) A justice, stating in his return on appeal that plaintiff sued defendant on a note, and then setting out all the note, except the signature, complies with 2 Rev. St. p. 262, § 214, requiring him to return "the demand of the plaintiff."—Mappa v. Pease, 15 Wend. 669.

[l] (N. Y. 1842) A justice of the peace may return the original instead of the copy of the defendant's plea, under the statute prescribing the form of a justice's return of an appeal.—Miller v. Woodworth, 3 Hill, 529.

[m] (N. Y. 1858) On an appeal from a judgment by default, the justice must strictly comply with the statute by returning that a copy of the complaint was served, verified by the oath of the pleader or his attorney. A return that the summons was, by the constable's return, certified "to have been served with the complant verified," is insufficient.—Spring v. Baker, 1 Hilt. 526.

[n] (N. Y. 1858) The return of the justice must state that the complaint annexed is the one served and on which judgment was rendered.—Spring v. Baker, 1 Hilt. 526.

[o] (Ohio, 1818) The transcript of a justice of the peace must state the cause of action, the proceeding, and the judgment.—Means v. Stephenson, Tapp. 283.

[p] (Ohio, 1839) Under Swan's St. p. 528, § 203, the transcript of a justice must state both the filing and the nature of the plaintiff's bill of particulars or the proceedings are erroneous.—McCarty v. Blake, 2 Ohio Dec. 165.

[q] (Tex. 1887) On appeal, in a cause originating in a justice's court the cause of action must appear from the entries made on the justice's docket, from the pleadings filed in the case, or from an agreed case, as required by Rev. St. arts. 1573, 1640, since the district court can pass on no other case than the one tried in the justice's court, nor can the supreme court review the action of the district court unless the issues appear from the transcript in some of these methods.—Maass v. Solinsky, 67 Tex. 290, 3 S. W. 289.

§ 611. Evidence.

[a] (Ala.) A justice of the peace need not record any evidence in a case before him, except such as is objected to. That must appear of record, whether admitted or not.—(1827) Ward v. Lewis, 1 Stew. 26; (1830) Lecatt v. Stewart, 2 Stew. 474; (1835) Mead v. Daniel, 2 Port. 86.

[b] (Iowa, 1859) Where there is no bill of exceptions to the ruling of a justice he must certify all that he remembers; and he cannot excuse himself because he can only know by recollection the truth of the statements of the evidence made in the affidavit on which the writ of error is based.—Miller v. O'Neal, 9 Iowa, 446.

[c] (Iowa, 1859) A writ of error requires a justice to certify evidence offered at the trial only, for the purpose of enabling the court to judge of the correctness of his admission or rejection thereof.—Miller v. O'Neal, 9 Iowa, 446.

[d] (La. 1878) When the papers sufficiently present the issue involved in an appeal from a justice's court, the record need not set forth the facts.—Parish of St. Martin v. Delahoussaye, 30 La. Ann. 1092.

[e] (N. Y. 1820) By the "witnesses," whose names the justice was required by the statute to return, was intended not merely persons called to testify and sworn or rejected, in a technical sense, but evidence, and that therefore the justice must have stated in his return, not only the names of the persons offered or sworn as witnesses, but the documentary or written evidence, admitted or offered, and rejected by him; otherwise, on the trial before the court of common pleas, any documentary evidence not stated in the return could not be admitted, it being the intention of the act to confine the parties, after the appeal to that court, to the same issue and the same evidence as taken in the court below, excepting such evidence only as might have been offered and improperly rejected by the justice.—McChesney v. Lansing, 18 Johns. 388.

[f] (N. Y. 1849) On appeal from the judgment of a justice, the court below must make return of all the testimony and proceedings when a return is ordered, though the affidavits conflict in a few particulars.—McCafferty v. Kelly, 4 N. Y. Super. Ct. (2 Sandf.) 637.

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[g] (N. Y. 1856) The rule, in cases brought up to the county court from a justice's court on certiorari, that where the return does not show evidence sufficient to sustain the judgment, and where the justice does not certify that his return contains all the evidence, etc., given and had before him, the appellate court will, in support of the judgment, presume that there was other and sufficient evidence given to warrant the judgment, does not apply in cases of appeal from a justice's judgment under the Code. The return is now required to show all the testimony; and it must be presumed to be made in compliance with the law.—Calligan v. Mix, 12 How. Prac. 495.

[h] (N. Y. 1868) On an appeal from judgment in a justice's court to a county court, the justice cannot be compelled to return the evidence taken before him on the trial, where the case is a proper one for a new trial in the county court.—Hobbs v. Wetherwax, 38 How. Prac. 385.

[i] (N. C. 1877) On appeal to the superior court from a justice's judgment for $25 or less, the justice should not send up the evidence, unless there are exceptions to his rulings admitting it.—London v. Headen, 76 N. C. 72.

[j] (Tenn. 1881) Where a garnishee appeals to the circuit court from a judgment of a justice of the peace against them, neither the evidence, documentary or otherwise, nor the affidavit, if any, on which the execution was sued out, constitutes a part of the papers to be entered of record in the circuit court.—Cowan v. Lowry, 75 Tenn. (7 Lea) 620.

[k] (Wis. 1860) In those appeals from justices' decisions by justices where the Code does not allow a new trial in the circuit court, the justice's return should state the evidence, that the court may pass upon the questions of law, substantially in the same manner as upon a return to a certiorari under the old practice; if it fails to do this, this court cannot determine whether the action of the circuit court was right or not, or allow further return to be made, but must affirm the judgment below.—Pfeil v. Harboldt, 11 Wis. 9.

§ 612. Conduct of trial and judgment.

[a] (Ga. 1881) A case appealed from a justice's court to the superior court is tried de novo; and a failure of the justice to return with the papers in the case his judgment thereon is not ground for dismissal of the appeal.—Pearce v. Renfroe, 68 Ga. 194.

[b] (Iowa, 1849) Though the transcript of a justice of the peace does not set out the judgment in hæc verba, yet if it contains sufficient to show its character, its amount, and against whom rendered, it is sufficient.—Wilson v. Albright, 2 G. Greene, 125.

[c] (Neb. 1890) A transcript, on appeal from justice court decision opening a default, reciting that "defendant confessed judgment for costs awarded against him," sufficiently shows such confession; and it need not show a formal entry thereof.—Tyler v. Baxter, 29 Neb. 688, 46 N. W. 153.

[d] (N. J. 1829) If it appears by the transcript that the justice took time to advise, and it does not appear that the defendant attended at the time the judgment was rendered, the common pleas may dismiss the appeal.—Vandoren v. Vandoren, 10 N. J. Law (5 Halst.) 286.

[e] (N. Y. 1846) A justice's return must show affirmatively that the plaintiff, or some person authorized by him, appeared when the jury returned their verdict; and where it appeared that on the return of the jury the justice called the plaintiff, "and some person not known to him answered," upon which he received the verdict and rendered judgment, it was *held* erroneous.—Shove v. Raynor, 3 Denio, 77.

[f] (N. Y. 1891) Verdict having been rendered for plaintiffs, a return of the justice on appeal in the following words: "Jury retire, and return a verdict for plaintiffs for possession of property. Jury discharged. Judgment entered of $12 costs against defendants,"—was insufficient, by reason of its failure to show that judgment had been entered in accordance with the verdict.—Griswold v. Burroughs, 60 Hun, 558, 15 N. Y. Supp. 314.

§ 613. Proceedings for appeal.

[a] (Ark. 1847) Where the transcript of a justice states "appeal prayed and granted, affidavit and bond filed," the entry sufficiently shows that an appeal was granted.—Pryor v. Williams, 7 Ark. (2 Eng.) 295.

[b] (Ill. 1894) Under Rev. St. c. 79, § 102, providing that appeal may be taken from the judgment of a justice in a case of trial of right of property as in other cases, if the same is prayed on the day of entering judgment, it is not necessary that the justice's transcript should show that the appeal was prayed on such day, but it is sufficient if the fact is shown by the filing and approval of the appeal bond on such day and other satisfactory evidence.—Hughes v. Glover, 53 Ill. App. 141.

[c] (Ind. 1846) The fact that the appeal had been prayed for need not be recited in the justice's transcript.—Littell v. Bradford, 8 Blackf. 185.

[d] (Ind. 1873) Where an appeal is taken by both parties from the judgment of a justice of the peace at separate times, the justice, in order to complete the transcript, need only certify the entry relating to the second appeal and file the appeal bond.—Montmorency Gravel Road Co. v. Stockton, 43 Ind. 328.

[e] (Miss. 1872) Under Code 1857, art. 24, which directs the justice from whose decision an appeal shall be prayed to transmit to the circuit court a certified copy of all the records and proceedings, with all the original papers and records in the case, including the original appeal bond and affidavit given by the appellant, an appeal cannot be entertained where no affidavit of appeal, and no certified copy of the record of the proceedings, were filed in the circuit court.—Stevens v. Patterson, 47 Miss. 228.

[f] (N. J. 1822) Under Act Nov. 23, 1821, providing that no appeal shall be granted from a justice's judgment, etc., unless the party demanding the appeal shall, in filing the appeal bond with the justice, also file with him an affidavit that the appeal is not made for delay, but because appellant verily believes he has a good defense on the merits, the transcript of the justice's docket must show that the affidavit required by the statute was made and filed with the justice when the appeal bond was filed.—Anonymous, 6 N. J. Law (1 Halst.) 230.

[g] (N. Y. 1851) Under Code, § 360, requiring a justice of the peace, on appeal, to make a return of the testimony, proceedings, and judgment, and file the same, with the affidavits served upon him, in the appellate court, a return which contains a certificate that a portion of the affidavit served on him by respondent contains a true account of a part of the proceedings, and that the affidavit served on him by appellant is true in certain particulars, is insufficient.—Belshaw v. Colie, 3 Code Rep. 184.

[h] (Tex. 1892) Rev. St. art. 1640, requiring a justice to transmit the papers of an appealed case to the county court, includes the appeal bond.—Trial v. Lepori, 1 White & W. Civ. Cas. Ct. App. § 1272.

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[i] (Tex. 1885) Where, on appeal from the judgment of a justice, the appeal bond is given and approved within the time prescribed by law, it becomes an original paper in the cause, and should be transmitted to the county court.—Stitt v. Barefoot, 2 Willson, Civ. Cas. Ct. App. § 791.

[j] (Tex. 1885) Where the bond on appeal from the judgment of a justice was approved and filed by him, and so indorsed, it is not necessary that the transcript should show that it has been approved and filed.—Stitt v. Barefoot, 2 Willson, Civ. Cas. Ct. App. § 792.

(b) NECESSITY, SCOPE, CONTENTS, AND REQUISITES OF TRANSCRIPT AND BILLS OF EXCEPTIONS.

SCOPE AND CONTENTS OF TRANSCRIPT OR RECORD, § 614.
MAKING, FORM, AND REQUISITES OF TRANSCRIPT OR RETURN, § 615.
NECESSITY OF BILL OF EXCEPTIONS AND MATTERS TO BE SHOWN, § 616.
CONTENTS AND MAKING OF BILL OF EXCEPTIONS, § 617.
SIGNING AND CERTIFICATE TO TRANSCRIPT OR BILL OF EXCEPTIONS, § 618.

§ 614. Scope and contents of transcript or record.

[a] (Ill. 1896) A bond given upon an appeal from a justice of the peace becomes a part of the record of the court to which the appeal is taken.—Straus v. Oltusky, 62 Ill. App. 660.

[b] (Iowa, 1856) A return of a justice amending his transcript is a part of the record.—Cooper v. Woodrow, 3 Iowa (3 Clarke) 189.

[c] (Kan. 1875) Where a justice enters upon his docket a statement of matters other than those required by law to be entered thereon, such statement does not thereby become a part of the record, and available for review in a higher court upon petition in error.—Hagaman v. Neitzel, 15 Kan. 383.

[d] (Mich. 1848) Facts coming to the knowledge of a justice of the peace after trial should not be incorporated into his return to an appellate court; and, if so, they will be rejected.—Savier v. Chipman, 1 Mich. (Man.) 116.

[e] (Minn. 1872) The minutes taken by a justice of testimony before him are no part of his return to the district court.—Barber v. Kennedy, 18 Minn. 216 (Gil. 196).

[f] (Mo. 1890) A judgment of a justice, though it is set aside and a new trial granted, is a part of the record before the circuit court, on appeal from the second judgment, and may be considered by the appellate court.—Leith v. Shingleton, 42 Mo. App. 449.

[g] (Neb. 1882) The transcript of the record of proceedings before a justice will not be stricken from the files on appeal to the district court, on the ground that the bills of exception were not by the justice spread at length on his docket; the same not being in terms required by Code Civ. Proc. § 988.—Campbell v. Sutton, 12 Neb. 522, 12 N. W. 3.

[h] (N. J. 1836) The state of demand in the court for the trial of small causes is no part of the record.—Vandyke v. Bastedo, 15 N. J. Law (3 J. S. Green) 224.

[i] (N. Y. 1894) Where matter which ought to have been included in the justice's return on appeal from a court of special sessions appears in an affidavit made by the justice, and attached to his return, the affidavit will be treated as part of the return.—People v. Linzey, 79 Hun, 23, 29 N. Y. Supp. 560.

[j] (Ohio, 1834) Original process issued by a justice of the peace cannot be made part of the record, by oyer, on appeal to the common pleas.—Austin v. Hayden, 6 Ohio (6 Ham.) 388.

[k] (Pa. 1868) On appeal from a judgment of an alderman, who states in his findings that the complaint is just and correct, the allegations in the complaint will be considered as a part of the findings.—Speigle v. McFarland, 1 Walk. 354.

§ 615. Making, form, and requisites of transcript or return.

[a] (Ind. 1873) On the appeal of a cause from a justice of the peace by each party, only one transcript is necessary.—Montmorency Gravel Road Co. v. Stockton, 43 Ind. 328.

[b] (Mass. 1836) Where, on appeal from the judgment of a justice of the peace, appellant is prevented by the death of the justice from producing in court a copy of the whole case attested by the justice, in pursuance of St. 1783, c. 42, § 6 (Rev. St. c. 85, § 15), the deficiency may be supplied by a sworn copy.—Davidson v. Slocomb, 35 Mass. (18 Pick.) 464.

[c] (Mass. 1836) Where the justice of the peace died during the pendency of an appeal taken before him, and before extending the record of the proceedings, his original minutes, containing all the material facts which the records would have comprised, are admissible as a record.—Davidson v. Slocomb, 35 Mass. (18 Pick.) 464.

[d] (Neb. 1882) The transcript of the record of proceedings before a justice of the peace cannot be any part of appellant's petition in error, and a motion to strike such transcript from the file of the district court because it appears to be no part of the petition in error must be denied.—Campbell v. Sutton, 12 Neb. 522, 12 N. W. 3.

[e] (N. Y. 1823) A justice's return need not be sealed.—Scott v. Rushman, 1 Cow. 212.

[f] (N. Y. 1852) The return of a justice is not to be treated as a bill of exceptions. It partakes more of the nature of a case to set aside a verdict or the report of referees. The whole case is to be examined; and if the court see that substantial justice has been done, notwithstanding an alleged error, they will not interfere.—Spencer v. Saratoga & W. R. Co., 12 Barb. 382.

[g] (N. Y. 1865) The return of a justice will not be set aside because drawn up by the attorney for defendant in error, where it was afterwards corrected by the justice, unless an abuse is shown.—Smith v. Johnston, 30 How. Prac. 374.

[h] (N. Y. 1896) Code Civ. Proc. § 3064, which provides that if an appeal is taken by a defendant who failed to appear, and he shows by affidavit a manifest injustice, and renders a satisfactory excuse for his default, the appellate court may set aside the judgment and direct a new trial, does not authorize the appellate court to set aside a default judgment before the trial justice has made his return to the appellate court, as such section contains no provision dispensing with the necessity of a return before the matter can be heard in the appellate court as required by sections 3044, 3053, 3062.—Kellock v. Dickinson, 5 App. Div. 515, 39 N. Y. Supp. 38.

[i] (Pa. 1821) The transcript of a suit before a justice is sufficient, if it set forth the substance of his proceedings, though inartificially.—Cochran v. Parker, 6 Serg. & R. 549.

[j] (Wis. 1878) On appeal from a justice's judgment, until the justice has made a return

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showing the proceedings in his court, no proceedings can be taken in the appellate court, except for a dismissal of the appeal, or for an order compelling a proper return.—Bruins v. Downey, 45 Wis. 496.

§ 616. Necessity of bill of exceptions and matters to be shown.

Exceptions to rulings in justices' courts, see ante, §§ 508–515.

[a] (Ala. 1824) Proceedings before a justice of the peace, except in cases of forcible entry and detainer by statute, are not matters of record; and their irregularities must be shown by bill of exceptions.—Gayle v. Turner, Minor, 204.

[b] (Ala. 1857) On an appeal involving less than $20, which is tried by the court without the intervention of a jury, all the evidence must be set out in the bill of exceptions.—Stein v. Feltheimer, 31 Ala. 57.

[c] (Ind. 1858) Suit upon a note, commenced before a justice, and appealed. From the evidence the defense appeared to be failure of consideration. The bill of exceptions by the plaintiff stated that no one denied that a buggy was the consideration, or pretended any other. The evidence was directed to the value of the buggy. *Held* that, in the absence of pleadings and direct evidence upon the point, the statement in the bill sufficiently showed that the buggy was the consideration.—Heller v. Jelly, 10 Ind. 382.

[d] (Iowa, 1859) A contradictory and ambiguous bill of exceptions from a justice's court may be disregarded, especially when unsustained by anything in the justice's return.—Bell v. Rowland, 9 Iowa, 281.

[e] (Kan. 1875) The statute directs what matters shall be entered on the docket of a justice of the peace; and if a party desires to preserve the rulings of the justice as to other matters, for review on petition in error, he must take a bill of exceptions.—Hagaman v. Neitzel, 15 Kan. 383.

[f] (Kan. 1889) When a party takes a case by petition in error from a judgment of a justice's court to the district court, the bill of exceptions should set out all the pleadings filed in justice's court.—Winter v. Shutter, 42 Kan. 544, 22 Pac. 564.

[g] (Mo. 1855) Where no bill of exceptions was preserved in a cause originating before a justice, the judgment will be affirmed.—Elliot v. Pogue, 20 Mo. 263.

[h] (Neb. 1876) To obtain a review of a judgment of the district court dismissing an appeal taken from a justice of the peace, no exception need be taken or made part of the record by a formal bill of exceptions.—Morrow v. Sullender, 4 Neb. 374.

[i] (Neb. 1891) The taking of exceptions to the opinion of a justice of the peace upon questions of law arising during the trial in cases tried by a jury, under Code Civ. Proc. § 988, which provides that "in all cases which shall be tried by a jury before a justice of the peace either party shall have the right to except to the opinion of the justice upon any question of law arising during the trial of the cause; and when either party shall allege such exception it shall be the duty of the justice to sign and seal a bill containing such exceptions,"—does not extend to or include questions touching the sufficiency of evidence to support the verdict.—Chicago, B. & Q. R. Co. v. Goracke, 32 Neb. 90, 48 N. W. 879.

[j] (N. J.) The evidence which a particular witness gave before a justice may, when such evidence may be correctly had, be brought before the supreme court by affidavit, for the purpose of showing such evidence was incompetent, or that the justice erred in admitting it.—(1817) Sockwell v. Bateman, 4 N. J. Law (1 Southard) 364; (1825) Goldsmith v. Bane, 8 N. J. Law (3 Halst.) 87.

[k] (N. J. 1828) A refusal of a justice of the peace to give a requested charge to a jury will not work a reversal unless the bill of exceptions discloses facts in evidence warranting such charge.—Davison v. Schooley, 10 N. J. Law (5 Halst.) 145.

[l] (Ohio, 1877) Under section 93 of the Justices' Code, as amended in 1869 (66 Ohio Laws, p. 7), a bill of exceptions may be taken on a trial before a justice of the peace to bring into the record the fact that no evidence was offered on a point necessary to be established to obtain a judgment.—Kaufman v. Broughton, 31 Ohio St. 424.

[m] (Pa. 1846) Unless it appears on the face of the proceedings that the justice proceeded and rendered judgment upon the plaintiff's own oath, it must be so distinctly averred by way of exception, and shown by proof.—Wilson v. Wilson, 5 Pa. Law J. 461.

[n] (Tex. 1893) The sufficiency of oral pleadings in justice's court will not be reviewed on appeal, unless such pleadings, together with the objections interposed, and the rulings of the court thereon, are fully shown by bills of exceptions; and the brief statement of the pleadings required to be noted in the justice's docket will not supply the place of such a bill.—Williams v. Deen, 5 Tex. Civ. App. 575, 24 S. W. 536.

§ 617. Contents and making of bill of exceptions.

[a] There is no authority for the making of a bill in a cause before a justice of the peace.
—(Md. 1877) Cole v. Hynes, 46 Md. 181;
(N. J. 1810) Elkinson v. Bennet, 3 N. J. Law (2 Penning.) 637.

[b] A bill to an opinion or judgment of a justice of the peace cannot be taken in an action of forcible entry and detainer.
—(Ark. 1839) Thorn v. Reed, 1 Ark. (1 Pike) 480;
(Ohio, 1847) Barto v. Abbe, 16 Ohio, 408; (1878) State v. Harmeyer, 3 Wkly. Law Bul. 570.

[c] (U. S. 1828) Upon a jury trial before a justice of the peace, under Act March 1, 1823 (3 Stat. 743), "to extend the jurisdiction of justices of the peace in the recovery of debts in the District of Columbia," the justice is not bound to sign a bill of exceptions, as no writ of error or appeal will lie in such a case.—Smith v. Chase, Fed. Cas. No. 13,022 [3 Cranch, C. C. 348].

[d] (Kan. 1868) Though a bill of exceptions in a trial before a justice of the peace must be filed during the term at which the trial is had, the time for filing may be extended by extending the "term" for that purpose.—West v. Rice, 4 Kan. 563.

[e] (Kan. 1882) Bills of exceptions may be allowed by justices of the peace in cases tried before them, either with or without a jury.—Stager v. Harrington, 27 Kan. 414.

[f] (Kan. 1883) A bill of exceptions, signed by the private clerk of a justice of the peace without the knowledge or consent of the justice, is a nullity, and is not made valid by the fact that the justice was told of it afterwards, and, without seeing the bill, made no objection, and that the parties agree that the bill speaks

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the truth.—Whitzell v. Forgler, 30 Kan. 525, 1 Pac. 823.

[g] (Kan. 1892) A justice of the peace may allow and sign a bill of exceptions for one party to an action, in the absence of the other, without notice.—Long v. Froman, 49 Kan. 360, 30 Pac. 461.

[h] (Kan. 1892) A bill of exceptions which shows that it has been allowed, signed, and filed by the justice of the peace is sufficient to show that it was properly filed in the office of the justice allowing the same.—Long v. Froman, 49 Kan. 360, 30 Pac. 461.

[i] (Neb. 1881) Code Civ. Proc. § 311, relating to bills of exceptions, does not apply to justices' courts; and a party cannot object that the bill, before being signed by the justice, was not submitted to him.—Leach v. Sutphen, 11 Neb. 527, 10 N. W. 409.

[j] (Neb.) A justice of the peace has no power to settle a bill of exceptions.—(1894) Real v. Honey, 39 Neb. 516, 58 N. W. 136; (1895) Vlasek v. Wilson, 44 Neb. 10, 62 N. W. 245.

[k] (Neb. 1895) A justice of the peace cannot settle a bill of exceptions preserving testimony given at a hearing on a motion to discharge an attachment.—Donaldson v. Fisher, 43 Neb. 260, 61 N. W. 609.

[l] (N. J. 1854) On trial of an appeal from a justice, the court of common pleas has no authority to seal a bill of exceptions.—Moore v. Hamilton, 24 N. J. Law (4 Zab.) 532.

[m] (N. Y. 1864) Under Judiciary Act 1847 (1 Laws 1847, p. 328), conferring the same powers on county courts to try appeals from justices' courts, and to grant new trials, that were theretofore possessed by the common pleas, the county court could incorporate a bill of exceptions, or a "case and exceptions," into a judgment roll in an action appealed thereto from a justice's court.—Monroe v. Monroe, 27 How. Prac. 208.

[n] (Ohio, 1847) A bill of exceptions, entered by a justice of the peace upon the record, will not be regarded in the higher court, on error; the law not requiring or authorizing the justice so to do.—Barto v. Abbe, 16 Ohio, 408.

[o] (Ohio, 1872) Justices' Act, § 137 (1 Swan & C. St. p. 794), authorizing the taking of exceptions to the opinion of a justice on "questions of law and evidence," does not include questions touching the weight or the sufficiency of the evidence, but only such as relate to its competency.—State v. Wood, 22 Ohio St. 537.

[p] (Ohio) Bills of exceptions taken before a justice pending trial must be entered at length on his docket, and until so done the reviewing court can take no cognizance of their contents. —(1876) Huston v. Huston, 29 Ohio St. 600; (1882) Argo v. Belsar, 8 Wkly. Law Bul. 189.

[q] (Ohio, 1895) Under Rev. St. § 6565, providing that when a party, during a trial before a justice of the peace, requires time to prepare a bill of exceptions to a ruling, the justice shall appoint a time not more than five days from the day of the trial within which to settle the bill, unless the party requiring time shall so inform the justice, and the justice shall appoint a time when the same shall be settled not more than five days from the day of trial, the justice cannot, after the trial, allow the bill.—Lewis v. Bancroft, 53 Ohio St. 92, 11 N. E. 32.

§ 618. Signing and certificate to transcript or bill of exceptions.

Amendment of certificate, see post, §§ 625–629.

[a] (Ala. 1850) When, on an appeal from a justice's court, the original papers and judgment entry are sent up properly certified by the justice, the appellate court, without other proof of their execution or identity than that afforded by the justice's certificate, will look to them as evidence of what was done before him in the cause.—Wolfe v. Parham, 18 Ala. 441.

[b] (Ark. 1846) A transcript filed by a justice of the peace in an appellate court, without authentication by him, does not give such court jurisdiction, and a judgment rendered thereon is void.—Watts v. Hill, 7 Ark. (2 Eng.) 203.

[c] (Ark. 1850) On appeal from the judgment of a justice of the peace, the certificate of the justice to the transcript of the record that "the above is a transcript of a judgment on my docket," though not strictly technical, is sufficient.—Nevells v. Sisson, 10 Ark. (5 Eng.) 249.

[d] (Ill. 1871) On appeal from a justice's judgment, his certificate to his transcript was in these words: "That the foregoing transcript and papers contain a full statement of all the proceedings had before me." *Held* sufficient, although the language of the statute was that he should certify it to be "a full and perfect statement," etc.; and the omission of the word "perfect" did not, in the slightest degree, affect the meaning of the certificate. If the transcript is full, it must be perfect, in the sense in which the term is employed. In substance, the certificate was sufficient; and that is all the law requires.—Smith v. Frazer, 61 Ill. 164.

[e] (Ind. 1843) On appeal to the circuit court from the judgment of a justice of the peace, the certificate of the justice annexed to the transcript was as follows: "I hereby certify that the foregoing is a true transcript of the proceedings had before me in the above cause, as appears from my docket. Given under my hand and seal," etc. *Held*, that the certificate was sufficient.—Whitney v. Mills, 6 Blackf. 545.

[f] (Kan. 1888) A certificate of a justice of the peace, regular on its face, to a bill of exceptions, and bearing date within 10 days after judgment, cannot be impeached by a certificate of the same justice, made more than a month thereafter, which sets forth the circumstances under which the original certificate was made.—Fuller v. Champaign Twine & Bagging Co., 39 Kan. 492, 18 Pac. 504.

[g] (Me. 1844) A justice should certify that exceptions were allowed and were in conformity to the truth, and should affix his signature and seal thereto, in order that they may be reviewed.—Simpson v. Wilson, 24 Me. (11 Shep.) 437.

[h] (Mich. 1855) A signature by a justice, "I, A. B.," etc., "do hereby," in the caption to his returns of proceedings before him, is sufficient. It is not necessary it should be at the end.—Smart v. Howe, 3 Mich. 590.

[i] (Minn. 1883) A return of evidence by a justice of the peace to a district court was entitled "Transcript of all the evidence given upon the trial of said cause before me on," etc., and the certificate at the end of the return was: "I hereby certify that the foregoing is the testimony as given in said case, and that the same is correct, substantially as given." *Held*, that this sufficiently showed that all the evidence was returned, and that it might be considered by the appellate court, although there was no request to the justice to return the evidence, the appeal being on questions of law alone.—Smith v. Force, 31 Minn. 119, 16 N. W. 704.

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[j] (Miss. 1894) On appeal from justice court, where the record contained a list of papers, including a copy of the judgment, with the justice's certificate that they were all the papers used in the cause, the judgment was sufficiently certified.—Coleman v. Gordon, 16 South. 340.

[k] (Mo. 1843) A justice of the peace, in certifying transcripts from his docket, may embrace several judgments in one certificate; and it will not be necessary to certify each judgment separately.—Perryman v. State, 8 Mo. 208.

[l] (N. J. 1853) The justice, in certifying a transcript from his docket, under Rev. St. p. 244, § 54, need not employ the words, "Witness my hand and seal," or otherwise certify that it is his hand and seal. The onus is on him who holds the contrary to show it.—Henry v. Campbell, 24 N. J. Law (4 Zab.) 141.

[m] (N. J. 1870) When an appeal is taken from a judgment of a justice, and the latter neglects to certify his transcript, the appellant is entitled to a rule upon him to amend.—Hockenbury v. Alpaugh, 34 N. J. Law (5 Vroom) 342.

[n] (Pa. 1895) A typewritten instrument purporting to be an appeal from a justice is a nullity where it is not certified or signed by him.—Weaver v. Russell (Com. Pl.) 1 Lack. Leg. N. 306, 16 Pa. Co. Ct. R. 428.

(c) FILING TRANSCRIPT OR RECORD.

IN GENERAL, § 619.
TIME FOR FILING TRANSCRIPT OR RECORD, § 620.
EFFECT OF DELAY IN FILING TRANSCRIPT OR RECORD, § 621.
EXCUSING FAILURE TO FILE TRANSCRIPT OR RECORD, § 622.
WAIVER OF DELAY IN FILING OR FAILURE TO FILE TRANSCRIPT OR RECORD, § 623.

Effect of failure to pay fee for filing transcript as preventing filing, see ante, § 545.
—— *of filing return as giving appellate court jurisdiction of the appeal, see* ante, § 605.
Filing of transcript on appeal as notice of appeal, see ante, § 589.
—— *transcript of justice's record as evidence of allowance of appeal, see* ante, § 522.
Reinstatement of appeal after dismissal for failure to file transcript, see post, § 646.

§ 619. In general.

[a] (Ark. 1877) Failure, on appeal from a justice, of the circuit court clerk to mark the transcript "Filed," is no ground for dismissing the appeal.—Hughes v. Wheat, 32 Ark. 292.

[b] (Dak. 1888) Where the papers on an appeal from a justice are received by the clerk of the district court within the 15 days for filing allowed by Justices' Code, § 96, but are not marked "Filed" by the clerk because of nonpayment of his fees, the court obtains jurisdiction, and it is error to dismiss the appeal.—Harris v. Watkins, 5 Dak. 374, 40 N. W. 536.

[c] (Ill. 1878) Under Rev. St. 1874, §§ 64, 66, which require that, in all actions where an appeal is taken to the circuit court from a judgment rendered by a justice of the peace, the justice shall return all the papers and his transcript of the judgment to the clerk of the appellate court, the circuit court has no jurisdiction to dismiss an appeal and render judgment for damages and costs against the appellant for want of prosecution, where the appellant has filed an appeal bond in the circuit court which has been approved by the clerk, but no certified transcript of the proceedings before the justice has been filed.—Sheridan v. Beardsley, 89 Ill. 477

[d, e] (Ind. 1860) It is the duty of the justice to file a transcript of his judgment in the clerk's office, but he may employ the attorney of the party to carry it to the office for him.—Burgess v. Matlock, 14 Ind. 475.

[f] (Kan. 1862) The law does not require a justice of the peace to file the transcript in an appeal from his court; and, if he does so, he acts as the agent of the appellant, and not as an officer.—Bush v. Doy, 1 Kan. 86.

[g] (Kan. 1871) Supreme court rule 15, providing for the dismissal of an appeal from a justice's court where the notice of filing of the transcript was not served on the appellee, is not in conflict with Comp. Laws 1862, c. 121, §§ 104–106, regarding appeals.—Coleman v. Newby, 7 Kan. 82.

[h, i] (Or. 1886) The appellant alone can carry forward an appeal into the circuit court, and the action of a respondent in filing a transcript in the circuit court is without authority, and void.—Steel v. Rees, 13 Or. 428, 11 Pac. 68.

[j] (Vt. 1855) An appeal from a justice is in no sense entered when the copies required by Comp. Laws, p. 238, § 73, are never filed; the statute being mandatory.—Goodenow v. Stafford, 27 Vt. (1 Williams) 437.

[k] (W. Va. 1888) Where a justice has transmitted to the clerk of the circuit court a complete transcript of his docket, with the original papers, in an action where a circuit judge has granted an appeal after the regular 10 days, for good cause shown, under Code, c. 50, § 174, the clerk should file with them all the papers transmitted to him by the judge.—Hubbard v. Yocum, 30 W. Va. 740, 5 S. E. 867.

§ 620. Time for filing transcript or record.

[a] (Iowa, 1860) An appeal from the decision of a justice must be returned to the next regular term of the district court.—Coon v. Matthews, 10 Iowa, 290.

[b] (Iowa, 1860) Where an appeal is allowed 10 days before a term of the district court, it is the duty of the justice to make his return to the clerk's office at least 5 days before the term commences.—Fisher v. Harber, 10 Iowa, 293.

[c] (Mo. 1866) An appellant from the judgment rendered in a justice's court during term time of the appellate court must file the transcript and other papers in such court within six days after the rendition of the judgment, under Rev. Code 1855, p. 797, § 12.—Bernicker v. Miller, 37 Mo. 498.

[d] (Neb. 1879) The neglect to file a transcript in the district court, in the case of an appeal from the judgment of a justice of the peace, within the 30 days given by Code Civ. Proc. § 1008, as amended by Act Feb. 19, 1877, is no ground for dismissal of the appeal, unless continued beyond the second day of the next succeeding term. A failure to file the transcript, unless continued beyond the second day of the next succeeding term, does not prejudice an appeal otherwise regularly taken.—Roesink v. Barnett, 8 Neb. 146; Monell v. Terwilliger, 8 Neb. 360, 1 N. W. 246.

[e] (Neb. 1888) Under Code 1886, §§ 1008, 1011, an appellant had 30 days from the rendition of the judgment to file his transcript in the district court, and until the second day of

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the next term after the 30 days, and where a transcript is filed by either party on or before the thirtieth day the court will acquire jurisdiction.—Union Pac. R. Co. v. Marston, 22 Neb. 721, 36 N. W. 153.

[f] (Neb. 1888) Under Code 1886, §§ 1008, 1011, providing that an appellant has 30 days from the rendition of the judgment in a justice's court in which to file his transcript in the district court, and until the second day of the next term of the district court after the 30 days, the district court has jurisdiction where judgment was rendered February 15th, the term of court held March 11th, the next regular term in September, and the transcript filed April 1st.—Johnson v. Van Cleve, 23 Neb. 559, 37 N. W. 320.

[g] (N. J. 1838) Where a bond for an appeal from a justice of the peace to the common pleas is left at the house of the justice at the proper day, in his absence, so that he does not receive it until his return on the next day, it is his duty to send the appeal papers to the common pleas on the latter day.—Dyer v. Ludlum, 16 N. J. Law (1 Har.) 531.

[h] (N. Y. 1896) Code Civ. Proc. § 3053, providing that a justice must, after 10 and within 30 days from the service of the notice of appeal from his decision, make his return to the appellate court, does not forbid him to make his return within 10 days.—Lazarus v. Ludwig, 17 Misc. Rep. 365, 40 N. Y. Supp. 63.

[i] (Ohio, 1859) Under Justice Act, § 113, providing that on appeal from the judgment of a justice the transcript, etc., shall be delivered to the clerk of the court to which such appeal may be taken on or before the second day of the term next following such appeal, the term at which a transcript must be filed to perfect such appeal is the first regular term after such judgment, and not an intervening special term.—Rea v. McColloch, 2 Ohio Dec. 169.

[j] (Ohio, 1876) Swan & S. St. p. 419, makes it the duty of one appealing from the judgment of a justice of the peace to file the transcript with the clerk of the court of common pleas "on or before the thirtieth day" from the rendition of the judgment appealed from. *Held* that, when the thirtieth day falls on Sunday, the transcript cannot be filed on the next succeeding day.—McLees v. Morrison, 29 Ohio St. 155.

[k] (Ohio, 1881) Rev. St. 1880, § 4951, providing that the time within which an act is to be done shall be calculated by excluding the first and including the last day, and that, if the last day fall on Sunday, it shall be excluded, applies to the filing of a transcript for appeal from a magistrate's court.—Redus v. Green, 6 Ohio Dec. 1034.

[l] (Okl. 1893) Under Code Civ. Proc. Neb. § 1008, on appeal from the decision of a county judge exercising the jurisdiction of a justice, a certified transcript of the proceedings must be delivered by the appellant to the clerk of the court to which the appeal is taken within 30 days after the rendition of the judgment.—Swope v. Smith, 1 Okl. 283, 33 Pac. 504.

[m] (Or. 1890) Hill's Code, § 2125, requiring the transcript on appeal from a justice of the peace to be filed in the circuit court on or before the first day of the term next following the allowance of the appeal, is mandatory, and the circuit court has no authority to extend or enlarge the time.—Carter v. Monastes, 19 Or. 538, 25 Pac. 29.

[n] (Or. 1895) Hill's Ann. Laws, §§ 119, 2117–2129, provide that an appeal from justice court shall be allowed on the service of notice and the giving of a bond with sureties who may be required to justify before the justice, and that, on or before the first day of the next term of circuit court, appellant shall file a transcript in the circuit court, on the filing of which the appeal shall become perfected, but prescribe no time within which exceptions to the sufficiency of the sureties must be taken. *Held*, that the transcript may be filed in the circuit court immediately after the allowance of the appeal by the justice.—Hughes v. Clemens, 28 Or. 440, 42 Pac. 617.

[o] (Pa. 1809) Under the act of 1804, the transcript must have been filed in the office of the prothonotary within 20 days from the time of judgment.—Newton v. Haggerman, 1 Browne, 94.

[p] (Pa. 1881) Where a defendant appeals from the judgment of a justice, he has only until the first day of the next term to file a transcript, though it be less than 20 days.—Sollenberger v. Heisker, 2 Leg. Rec. 368.

[q] (Pa. 1886) On appeal from a judgment of a justice of the peace, the appellant must file a transcript of the record in the prothonotary's office on or before the first day of the next term.—Ferry v. Wallen, 2 Lehigh Val. Law Rep. 324.

[r] (Pa. 1891) The fact that a term return day intervenes between the taking of an appeal from a judgment of a justice and the filing of the transcript, does not make the appeal too late.—Care v. Atkinson (Com. Pl.) 10 Pa. Co. Ct. R. 400.

[s] (Tenn. 1851) Though the act of 1811 makes it the duty of a justice of the peace, in case of an appeal, to return the papers to the circuit court within the first two days of the term to which the appeal is taken, yet the appellant is authorized by the second section of the act to prosecute his appeal, if they are returned at any time during the term.—Humphrey v. Humphrey, 31 Tenn. (1 Swan.) 154.

[t] (Tex. 1890) Under Sayles' Civ. St. art. 1641, requiring an appeal from a justice of the peace to be filed in the county court on the first day of the return term, which is the next term after the appeal is perfected, and providing that, if not filed on the first day of the next term after the return term, it shall be dismissed, an appeal which is not perfected until the first day of a term of the county court is not returnable to that term, and it is error to dismiss it because the transcript is not filed in the county court on the first day of the next succeeding term.—Foos Mfg. Co. v. Prather (App.) 16 S. W. 865.

§ 621. Effect of delay in filing transcript or record.

[a] (Ala. 1841) A mere omission by a justice of the peace to send a statement of a case to the appellate court does not justify a dismissal of an appeal, if the other proceedings are regular.—Larcher v. Scott, 2 Ala. 40.

[b] (Ark. 1877) Where a justice from whom an appeal is taken to the circuit court fails to file the transcript and papers in the clerk's office on or before the first day of the term, it is discretionary with the circuit court to dismiss the appeal, in the absence of any showing why they were not seasonably filed.—Hughes v. Wheat, 32 Ark. 292.

[c] (Ark. 1886) When an affidavit for an appeal from a justice of the peace is filed, and the judgment superseded, but the transcript is not filed until the time prescribed by statute (Mansf. Dig. § 4139) has expired, and appellant can give no sufficient excuse for the delay, the judgment of the justice may be affirmed by the circuit court, and judgment rendered

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against the sureties on the appeal bond.—Wilson v. Starks, 48 Ark. 73, 2 S. W. 346.

[d] (Cal. 1890) Code Civ. Proc. § 129, gives courts of record power to make rules for their own government, not inconsistent with the laws of the state; and section 980 provides that for a failure to prosecute an appeal from a justice's court, or unnecessary delay in bringing it to a hearing, the superior court, after notice, may order the appeal to be dismissed. *Held*, that the superior court has power to make and enforce a rule that the record and transcript of a case tried in a justice's court must be filed in the superior court within 10 days after the perfection of the appeal, and that if not so filed, the appeal might, on motion, with notice, be dismissed.—McKay v. Superior Court of Santa Barbara County, 86 Cal. 431, 25 Pac. 10.

[e] (Ga. 1881) The fact that the papers in a case appealed from a justice's to a superior court were not returned to the office of the clerk of the superior court 10 days before the beginning of the term was not ground for dismissal of the appeal.—Pearce v. Renfroe, 68 Ga. 194.

[f] (Ill. 1882) The circuit court acquires no right to dismiss an appeal from a justice of the peace by merely ordering appellant to file a transcript within a stated time and his failure to do so.—Schmidt v. Skelly, 10 Ill. App. (10 Bradw.) 564; Bonfield v. McGreavy, Id. 577.

[g] (Ill. 1883) The circuit court cannot dismiss an appeal without the appellant's consent, because of the want of a transcript, even though the appellant has been ruled to furnish one within a certain time.—Andrews v. Esher, 14 Ill. App. (14 Bradw.) 67.

[h] (Ind.) An appeal to the circuit court will be dismissed, unless the transcript is filed with the clerk within 20 days after the appeal bond is filed.—(1833) Barnes v. Modisett, 3 Blackf. 253; (1834) Brown v. Modisett, Id. 381; (1834) Butler v. Skomp, Id. 392.

[i] (Ind. 1870) Where a party against whom judgment has been rendered by a justice has been granted leave to appeal to the court of common pleas after the expiration of 30 days, under Gav. & H. St. p. 597, § 68, and he fails to perfect his appeal by having the order to the justice to certify of the case issued and served, and by causing the justice to make out a transcript of the proceedings and judgment before him, and file it, with the original papers, in the office of the clerk of the common pleas within a reasonable time, and until the case has been regularly called for trial, the appeal may be dismissed on motion of the adverse party.—Davis v. Luark, 34 Ind. 403.

[j] (Iowa, 1858) On an appeal from the judgment of a justice, if the justice neglects his duty in respect to returning and filing the requisite papers, the appellee cannot have the judgment affirmed as of course, on account of the neglect, but may docket the cause himself and have the judgment proper upon the merits entered.—Holloway v. Baker, 6 Iowa (6 Clarke) 52.

[k] (Iowa, 1860) Where an appeal from a justice has been taken within 10 days before the term of the district court, the failure of the justice to return the transcript at least 5 days before the term commences will not entitle appellee to judgment.—Fisher v. Harber, 10 Iowa, 293.

[l] (Iowa, 1867) The rule of practice of the district courts, providing that, if an appeal is not filed before noon of the first day of the term, the appellee may file it, and have the judgment below affirmed, does not authorize the dismissal of the appeal where the appellee has not filed a transcript.—Heiserman v. Rush, 22 Iowa, 240.

[m] (Mo. 1856) Upon an appeal from a justice's court to that of the law commissioners, it is the duty of the former to file a transcript with the commissioner within six days. If he omit to do so, the commissioner has no authority in the case to affirm the judgment upon the appellee's filing the transcript.—Grassmuck v. Atwell, 23 Mo. 63.

[mm] (Mo. 1856) The law commissioners' court cannot, in case of an appeal from a justice of the peace, where the justice fails to deliver his transcript, etc., affirm the judgment appealed from, upon the filing of a transcript by the appellee and a motion made by him for its affirmance.—Lala v. The City of Joliet, 24 Mo. 23.

[n] (Mo. 1869) Under the provisions of Gen. St. 1865, c. 188, § 12, providing that an appeal from a judgment of a justice of the peace rendered during the term of the circuit court shall be returnable within six days after the rendition of the judgment, and section 23, providing that the appellant shall file a transcript of the record on or before return day, an appeal from a judgment rendered before a justice during a term of the circuit court will be dismissed, as irregular, upon the omission of the appellant to file the transcript within six days after the rendition of the judgment.—Robinson v. Walker, 45 Mo. 117.

[o] (Neb. 1887) Code Civ. Proc. §§ 1008, 1011, as the same stood prior to the amendment of the latter section by the act of 1887, being in pari materia, must be construed together, and, being so construed together, *held*, that the transcript of the proceedings before the justice of the peace not having been presented to the clerk of the district court until after the second day of the term of the district "court next after such appeal," and more than 30 days having elapsed since the rendition of the judgment appealed from before the filing of such transcript, the dismissal of such appeal by the district court was right and must be affirmed.—Clapp v. Bowman, 22 Neb. 198, 34 N. W. 362.

[p] (Neb. 1888) On appeal from the judgment of a justice of the peace to the district court, Civ. Code, § 1011, requires that appellant deliver a transcript of the proceedings to the clerk of the district court, within 30 days next following the rendition of the judgment, and if the transcript is not filed within the time the district court may dismiss the appeal at appellant's costs, and remand the cause to the justice of the peace.—Converse Cattle Co. v. Campbell, 25 Neb. 37, 40 N. W. 594.

[q] (Neb. 1892) Where a party to a judgment rendered by a justice of the peace files an undertaking for an appeal in time, but fails to file a transcript of the proceedings in the district court within 30 days after rendition of the judgment, as required by Code Civ. Proc. § 1008, the appellee may, under the express provisions of section 1011, file such transcript and have the cause docketed, and may then apply to the district court either to dismiss the appeal, or enter a judgment in his favor similar to that rendered by the justice; and such right is not affected by the fact that, after he has so filed a transcript, appellant, 3 months after rendition of the judgment by the justice, also files a transcript and petition in error.—Wilde v. Preuss, 33 Neb. 790, 50 N. W. 1125.

[r] (Neb. 1895) Where, on a failure of appellant to file a transcript on appeal from a justice's judgment, the appellee files the same, the district court can, on its own motion, either dismiss the appeal, or give judgment for the

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appellee.—Scott v. Burrill, 44 Neb. 755, 62 N. W. 1093.

[ss] (N. J. 1848) Where a justice has not returned papers to the court of common pleas within the statutory time, but returns them at the next term, without a rule from the court of common pleas requiring him to return such papers at such term, as permitted by a rule of court, the appeal should not be dismissed.—Ferguson v. Kays, 21 N. J. Law (1 Zab.) 431.

[ss] (N. Y. 1824) Though the justice do not file his return on the first day of the term of common pleas next after the appeal, that court should not quash the return, but proceed thereon when it comes in.—Ex parte Kellogg, 3 Cow. 372.

[t] (Pa. 1810) Under the act of 1810, the transcript must be filed on or before the first day of the next term after entering bail on the appeal; and therefore, where judgment was obtained before the justice, on the 2d of June, and on the same day the defendant entered bail for an appeal, but did not file the transcript until the 7th of June, the return day of June term being the 4th, the court dismissed the appeal, although the defendant was not bound to enter bail before the first day of June term.—Talbert v. Williams, 1 Browne, 160.

[tt] (Pa. 1871) Where, on an appeal from an alderman or a justice of the peace, the transcript is not filed in the prothonotary's office on or before the first day of the next term of the court of common pleas after the appeal is taken, the appeal will be dismissed.—Williams v. Gibbons, 2 Lanc. Bar, No. 36, p. 2.

[u] (Pa. 1878) Where the transcript on an appeal from a justice is not filed in the common pleas until after the next return day, the appeal is not valid.—Donnelly v. Purcell, 1 Sus. Leg. Chron. 47.

[uu] (Pa. 1887) Where the transcript of an alderman on appeal is defective, the plaintiffs may move for its correction; but, if he endeavors to procure a correct transcript from the alderman after the time for filing the appeal expires, the appeal will be dismissed.—Bell v. Snyder, 3 Del. Co. Ct. R. 265.

[v] (S. D. 1892) When an appeal from a justice's judgment has been perfected more than 30 days before a term of the appellate court, but the justice's return is not filed until after the commencement of the term, it is not error to dismiss the appeal if no sufficient excuse is shown for the delay, since Comp. Laws, § 6136, requiring the return to be filed within 15 days from the time the appeal is perfected, if not mandatory, at least vests the appellate court with discretion as to dismissal.—Edminster v. Rathbun, 3 S. D. 129, 52 N. W. 263.

[vv] (Tenn. 1856) Acts 1811, c. 119, § 1, makes it the duty of a justice from whose judgment an appeal is taken to transmit the papers in the cause on the second day of the term on which the appeal was made returnable. Section 2 provides that if any justice shall return the papers during the term to which the same is made returnable, and appellant shall fail to appear, plaintiff shall have judgment by default for the amount of the judgment by the justice. *Held*, upon an appeal from a justice's judgment, where the papers were not filed until a term subsequent to the return term, the appeal was properly dismissed.—Pierce v. Pierce, 36 Tenn. (4 Sneed) 77.

[w] (Tex. 1882) Where the transcript and papers on appeal from a justice's court are not filed within the time prescribed by Rev. St. art. 1641, the appeal will be dismissed.—Bradway v. Clipper, 1 White & W. Civ. Cas. Ct. App. § 306.

[ww] (Tex. 1889) An appeal from a justice of the peace should not be dismissed for the failure of the justice to file the transcript within the time prescribed by law.—Muller v. Humphreys (App.) 14 S. W. 1068.

[x] (Tex. 1893) Where an appeal from a justice of the peace has been perfected by service of the notice of appeal, and the execution and filing in the district court of a proper appeal bond, the justice's failure to make out and transmit to the district court a transcript of his record before the first day of the second term next succeeding the rendition of judgment, as required by Sayles' Civ. St. arts. 1639–1641, is no ground for dismissing the appeal.—Petty v. Miller, 5 Tex. Civ. App. 308, 24 S. W. 330.

[xx] (Tex. 1894) Appellant perfected his appeal from the justice to the district court by filing a bond which was approved by the justice. The justice failed to transmit a transcript of the proceedings on or before the first day of the second term following, as required by law, but transmitted it during such term. *Held*, that appellant's failure to apply for mandamus to compel the justice to send up the transcript was not ground for dismissing his appeal.—Campbell v. Bechsenschutz, 25 S. W. 971.

[y] (Wash. 1894) While 2 Hill's Code, § 1634, requires an appellant from justice's court to furnish the superior court with a transcript of the entries in the justice's docket within 10 days after an appeal has been taken, the failure to do so will not deprive the superior court of jurisdiction, and a motion to dismiss on this ground is addressed to the discretion of the district court.—State v. Yakima County Super. Ct., 9 Wash. 307, 37 Pac. 448.

[yy] (Wis. 1843) If, on appeal from a judgment of a justice of the peace, appellant neglects to perfect his appeal, or to take a rule against the justice requiring him to make the return within the time limited by law, the appeal cannot be entered on a subsequent day, and appellee has the right to have judgment rendered in his favor upon the judgment of the justice.—Bryant v. Barber, 1 Pin. 303.

[z] (Wis. 1862) An appeal from a justice's court should not be dismissed because the return was made within 10 days after the appeal was taken. The statute is directory, and the return is good, if made before the 10 or after the 30 days have expired; the parties being in no fault.—Demming v. Weston, 15 Wis. 236.

[zz] (Wis. 1873) Rev. St. c. 120, § 212, requiring the return of a justice of the peace to the appellate court of the testimony, etc., in the cause tried before him, to be made within 30 days after service of notice of the appeal, is directory; and a return, not otherwise defective or improper, should not be rejected because made after the time named.—Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 782.

§ 622. Excusing failure to file transcript or record.

[a] On an appeal from a justice's court, neglect by the justice to transmit the transcript within the statutory time is not a ground for dismissing the appeal.

—(Ga. 1877) Robison v. Medlock, 59 Ga. 598; Cannon v. Sheffield, Id. 103;

(Ill. 1843) Little v. Smith, 5 Ill. (4 Scam.) 400;

(Ind. 1845) Lacy v. Fairman, 7 Blackf. 558; (1867) Gumberts v. Adams Express Co., 28 Ind. 181.

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(Ill. 1841) Campbell v. Quinlin, 4 Ill. (3 Scam.) 288.

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[b] (Iowa, 1854) An appellant cannot be deprived of his rights by the laches of a justice of the peace in not making his return to the district court five days before the term, as required by the Code.—Whitcomb v. Holloway, 4 G. Greene, 311.

[c] (Kan. 1862) If, under the statute regulating appeals from justices of the peace, it is in the power of the court to extend the time for filing the transcript, the neglect of the justice to file the transcript in due time, according to agreement with the appellant, is not sufficient cause to compel the court to extend the time in the exercise of a sound discretion.—Bush v. Doy, 1 Kan. 86.

[d] (Mich. 1880) Where a justice gives a receipt for a certain sum as "fees and costs of appeal," he cannot excuse himself from making return to the appeal by the fact that such amount was only the taxed costs, and did not include cost of return on appeal; and appellant will not be deprived of his right to appeal by such failure.—Stephenson v. Kent Circuit Judge, 44 Mich. 162, 6 N. W. 217.

[e] (Neb. 1888) An agreement that the justice shall file the transcript in the district court will not relieve the appellant from the consequence of the justice's neglect to do so.—Union Pac. R. Co. v. Marston, 22 Neb. 721, 36 N. W. 153.

[f] (Neb. 1889) Code, § 1011, requires the filing of a transcript from the judgment of a justice of the peace "within 30 days next following the rendition of said judgment." *Held*, that the fact that the transcript, after being received at the office of the attorney of the appellant, was laid aside by the one in charge of the office, who did not know its character, and that it was not discovered till too late to file within the time limited, did not excuse the delay.—Lincoln Brick & Tile Works v. Hall, 27 Neb. 874, 44 N. W. 45.

[g] (N. C. 1827) Where a justice forgets to return an appeal at the next term after the judgment, it is proper, upon notice to the appellee, to return it and place the case on the trial docket at a subsequent term.—Lamon v. Gilchrist, 12 N. C. 176.

[h] (Pa. 1833) A defendant against whom a justice had rendered a judgment appealed. The justice promised to file a transcript, but did not do it in time. *Held*, that the misconduct would not justify the court in sustaining an appeal entered after the first day of the next term.—Houk v. Knop, 2 Watts, 72.

[i] (Pa. 1840) Where a justice of the peace, who had given judgment against a defendant, promised him to make out a transcript and deliver it to the defendant's attorney, and the justice made out a transcript, but did not deliver it to the attorney, in consequence of which it was not filed in season, it was *held* that the neglect was that of the party, and not official in the justice, and therefore that the appellant was not entitled to relief.—Sherwood v. McKinney, 5 Whart. 435.

[j] (Pa. 1886) The omission of an alderman to inform a party appealing from his judgment that a transcript is necessary will not excuse the failure to file a transcript.—Wardell v. Weidner, 2 C. P. Rep. 238.

[k] (Pa. 1888) Where it appears that the failure of appellant to perfect an appeal within the proper time from the justice is due to the neglect of the justice to make the transcript promptly, the appeal will not be stricken.—Gallagher v. Silkman, 5 Lanc. Law Rev. 192.

§ 623. Waiver of delay in filing or failure to file transcript or record.

Waiver of defects in transcript or record, see post, § 630.

[a] (Ark. 1886) In the case of an appeal from a justice, where the transcript is not filed within the time prescribed by the statute, the fact that the appellee has appeared by motion to dismiss for a defect in the appeal affidavit, and an order has been made refusing such motion, and allowing the affidavit to be amended previous to the filing of a motion to affirm, does not deprive the court of its discretion to grant the motion, nor does appellee waive his right to have the action dismissed for delay in filing the transcript by appearing on such a motion.—Wilson v. Starks, 48 Ark. 73, 2 S. W. 346.

[b] (Ill. 1878) Where, on appeal from a justice, both parties appear and proceed to trial without objection to the want of service or failure to file a transcript, the defects will be considered waived.—Rosenberg v. Barrett, 2 Ill. App. (2 Bradw.) 386.

[c] (Ind. 1837) If the papers in an appeal from the judgment of a justice be not filed in time, the appellee may for that reason have the appeal dismissed on motion; but if, without making the objection, he go to trial on the merits, the objection is waived.—Dougherty v. Mason, 4 Blackf. 432.

[d] (Ind. 1873) Where, on an appeal from a justice of the peace, the parties proceed to trial before the court of common pleas, without objection that no transcript of the proceedings before the justice was filed in the court of common pleas, such objection cannot be made for the first time in the supreme court.—Cromwell v. Baty, 43 Ind. 357.

[e] (Mass. 1890) The omission of a debtor, at the trial of an appeal by him from the judgment of a magistrate upon charges of fraud, under Gen. St. c. 124, to file in court copies of charges, plea, and examination, does not entitle the creditor, after proceeding to trial without raising any objection on this ground, to have the debtor defaulted.—Morse v. Dayton, 128 Mass. 451.

[f] (Neb. 1890) Where, on appeal from the judgment of a justice of the peace to the district court, the appellee makes a general appearance, the court thereby acquires jurisdiction, though the transcript was not filed therein within 30 days after the rendition of the judgment, as required by Code Civ. Proc. § 1011.—Steven v. Nebraska & I. Ins. Co., 29 Neb. 187, 45 N. W. 284.

[g] (Tex. 1891) Under Rev. St. art. 1641, which provides that, on appeal from justice court, the transcript must be filed in the county court on or before the first day of the second term after such appeal is taken, an appeal is irregular where the transcript is not filed until several terms after the appeal bond was given, and a failure to move for the dismissal thereof at the second term after the filing of the bond does not waive the irregularity.—King v. Lacy (App.) 17 S. W. 143; Gulf, C. & S. F. Ry. Co. v. Lynch, Id. 144.

(d) DEFECTS, OBJECTIONS, AND AMENDMENT OF RETURN, AND COMPELLING RETURN.

EFFECT OF DEFECTS IN GENERAL, § 624.
AMENDMENT OF TRANSCRIPT OR RECORD AND NEW RETURN, § 625.
—— ERRORS AND IRREGULARITIES AMENDABLE, § 626.

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— AUTHORITY TO MAKE AMENDMENTS, § 627.
— PROCEEDINGS FOR AMENDMENT, § 628.
— TIME FOR AMENDMENT, § 629.
WAIVER OF DEFECTS IN TRANSCRIPT OR RECORD, § 630.
REQUIRING JUSTICE TO SEND UP TRANSCRIPT OR RECORD, § 631.
OBJECTIONS TO TRANSCRIPT OR RECORD, § 632.

§ 624. Effect of defects in general.

[a] (Ark. 1855) Where the record sent up from the court below on appeal is insufficient to give the proper jurisdiction as an appeal case, the court may, in its discretion, either compel the proper record to be certified to it, or the proceedings dismissed for want of jurisdiction.—Baker v. Calvert, 16 Ark. 485.

[b] (Ill. 1874) The fact that the replevin bond is omitted from the papers filed with the transcript on appeal by the defendant to the county court from a judgment of a justice of the peace in the replevin suit is not ground for dismissing the suit on motion of the defendant. It is defendant's duty in such case to file all necessary papers with the transcript.—McArthur v. Howett, 72 Ill. 358.

[c] (Ind. 1835) On appeal from the judgment of a justice of the peace to the circuit court, it must appear from the transcript of the record that the plaintiff below had filed a statement of his demand, or some note or other writing relied on as the cause of action; otherwise, the action will be dismissed.—Bell v. Trotter, 4 Blackf. 12; Denby v. Hart, Id. 13.

[d] (Ind. 1836) Where the transcript on appeal from a justice of the peace is imperfect, but shows a good cause of action, the suit should not be dismissed, but only the appeal.—Boiles v. Barnes, 4 Blackf. 176.

[e] (Iowa, 1855) On appeal from the judgment of a justice of the peace, appellant cannot have the appeal or the cause dismissed because the record is not properly certified.—Stowers v. Milledge, 1 Iowa (1 Clarke) 150, 63 Am. Dec. 434.

[f] (Ky. 1895) Where the transcript on appeal from a justice's judgment of restitution in forcible detainer contains all the necessary papers, properly executed, except that a traverse and bond, duly signed and filed, were not indorsed by the justice, it is error to dismiss the traverse and exclude proof that the bond and traverse were duly executed and filed as required by law, but were not indorsed, owing to the negligence of the justice.—Hicks v. Parks, 30 S. W. 202.

[g] (La. 1884) An appeal from a mayor's court will not be dismissed for irregularities and deficiencies in the transcript, if the transcript contains the ordinances on which the judgment complained of was predicated, as such defects cannot be attributed to the fault of the appellant.—City of Baton Rouge v. Cremonini, 36 La. Ann. 247.

[h] (Minn. 1870) An appeal will not be dismissed on the ground that a justice did not attach the papers in the case to the transcript, or otherwise identify them, or return them all into the district court, the court having power to compel the justice to supply such omissions.—Rahilly v. Lane, 15 Minn. 447 (Gil. 360).

[i] (Minn. 1893) On appeal to the district court on questions of law alone, a justice's judgment will not be reversed because the justice, having been requested to do so, has not returned all the evidence, the party's remedy being by proceedings to compel a full return.—Cour v. Cowdry, 53 Minn. 51, 54 N. W. 935.

[j] (Minn. 1893) A justice's judgment will not be reversed or modified because his return fails to specify the items of costs taxed, unless it appears that items not taxable have been erroneously included. The remedy is by application for an order to the justice to amend his return.—Smith v. Victorin, 54 Minn. 338, 56 N. W. 47.

[k] (N. H. 1852) Though a justice of the peace, in making up the record of his judgment, has committed an error, it will be no defense upon the trial, if the copies which are sent to the common pleas by the justice are sufficient to give that court jurisdiction of the case.—Gallup v. Mulvah, 26 N. H. (6 Fost.) 132.

[l] (N. Y. 1843) If a justice's return on an appeal set forth matter not required by the statute, such matter should be treated as surplusage.—Swartwout v. Roddis, 5 Hill, 118; Wood v. Randall, 5 Hill, 264.

[m] (N. Y. 1851) In appeals from justices' courts judgment will not be reversed because the return of the justice is defective.—Klenck v. De Forest, 3 Code Rep. 185.

[n] (N. Y.) Where the return from the court below to the appellate court is defective, the case must stand over for a further return.—(1853) Matthews v. Fiestel, 2 E. D. Smith, 90; (1854) Woodside v. Pender, Id. 390.

[o] (N. Y. 1895) A justice of the peace entered judgment for defendant for damages for $5.05; costs, 35 cents. In the return on appeal from the judgment, it was stated that the amount entered as damages was in reality costs, and the items making up the amount were given. *Held*, that the entry, "Damages, $5.05; costs, 35 cents," was a mere irregularity or clerical defect, which could be disregarded.—Tousley v. Mowers (Co. Ct.) 14 Misc. Rep. 125, 35 N. Y. Supp. 855.

[p] (Ohio, 1846) An appeal from a justice of the peace to the court of common pleas ought not to be dismissed because the transcript of the justice does not state the form of action, or because he has omitted to send up a bill of particulars.—Humiston v. Anderson's Adm'rs, 15 Ohio, 556.

[q] (S. D. 1895) The mere fact that the certified copy of the justice's docket transmitted on appeal to the circuit court fails to show the receipt of a notice of appeal, and the filing of an undertaking, does not devest the circuit court of jurisdiction.—Warder, Bushnell & Glessner Co. v. Raymond, 7 S. D. 451, 64 N. W. 525.

[r] (Tenn. 1870) Where the record shows that defendant prayed an appeal to the circuit court and the justice certifies that he took the pauper oath, but no such oath is found in the record, the appeal will be dismissed.—Jennings v. Mercer, 48 Tenn. (1 Heisk.) 9.

[s] (Wis. 1851) An obvious clerical error in an amended return of a justice of the peace as to the month in which he rendered judgment will not be regarded by the appellate court.—Caughey v. Vance, 3 Chand. 308, 3 Pin. 275.

[t] (Wis. 1851) The original return of a justice stated that the judgment appealed from was rendered June 17th. An amendment and return stated that the case was submitted on August 14th following, and that a judgment was rendered on the 17th day of the same month. The affidavit and recognizance on appeal were perfected June 27th previous, and it appeared therefrom that an adjournment of the case had taken place which could have been lawfully made to June 14th, but not to August 14th. *Held*, on motion to dismiss the appeal

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on the ground that it had been adjourned beyond the jurisdiction of the justice, that the insertion of the word "August" was a clerical error, as it was apparent that the word "June" was intended.—Caughey v. Vance, 3 Chand. 308, 3 Pin. 275.

[u] (Wis. 1862) An appeal from a justice of the peace should not be dismissed, nor the case stricken from the calendar, because the return was defective, or because the testimony was not contained in it.—Demming v. Weston, 15 Wis. 236.

§ 625. Amendment of transcript or record and new return.

Amended return of justice as part of record, see ante, § 614.

Amendment of affidavit for appeal, see ante, § 541.

—— *of record by justice after appeal, see* ante, § 600.

[a] (Conn. 1890) In an action pending before a justice of the peace, it was agreed by the counsel for the parties that judgment on a demurrer to the complaint should be rendered for plaintiff, and that defendant should appeal to the next term of the court of common pleas. On December 10th judgment was rendered for plaintiff, and an appeal allowed, but in consequence of the agreement no counsel was present. The justice did not adjourn his court on the day the judgment was rendered, but held it open to enable defendant to give an appeal bond, which was done on January 28th, following, in time for a hearing at the next term of the common pleas, as agreed on. *Held*, that mandamus to compel the justice to amend his record so as to show an adjournment sine die on the day the judgment was entered would be denied, since the appeal was taken to the next term of the common pleas, as had been agreed, and there was no averment that the time from December 10th to January 29th was not reasonable and necessary for defendant to give an appeal bond.—Chesebro v. Babcock, 59 Conn. 213, 22 Atl. 145.

[b] (Ill. 1880) An appeal from a justice of the peace was entered in the superior court, and the case placed on the trial calendar. When it was reached, the appeal was dismissed for want of prosecution. The transcript from the justice was filed in the superior court on the day of the dismissal; but the appellee made an affidavit that it was a new transcript, as one had been already filed and lost. *Held*, that the case should not have been dismissed, but continued to the next term.—McMullen v. Graham, 6 Ill. App. (6 Bradw.) 239.

[bb] (Ind. 1838) After an appeal from the judgment of a justice of the peace, judgment in the circuit court, and judgment reversed by the supreme court and remanded for another trial, it is too late for a motion in the circuit court to dismiss the appeal because the justice had not filed the papers in time.—Abel v. Burgett, 4 Blackf. 511.

[c] (Iowa, 1854) A justice of the peace, having sent up an erroneous transcript, subsequently, and within the time directed for returning a transcript, filed an amended one. *Held* error in the district court to exclude this latter.—Smith v. Snodgrass, 4 G. Greene, 282.

[d] (Iowa, 1854) Where the transcript sent by the justice of the peace to the district court is defective, without fault on the part of the appellant, the latter should not be allowed to be prejudiced thereby, and, upon application reasonably made, he should be allowed to perfect the record.—Atwater v. Woodward, 4 G. Greene, 431.

[e] (Iowa, 1859) If a transcript of a justice of the peace, sent to an upper court on appeal, omits any essential fact, the injured party should apply to the court for an amendment, to be made by the justice, before the court can pronounce error in the proceedings.—Lord v. Ellis, 9 Iowa, 301.

[f] (Iowa, 1860) It is the duty of a justice to write down in his docket the substance of the defendant's plea, if oral; and in doing this he should state the substance of the facts relied on, and not what he inferred was meant thereby, and, if he on appeal by an amended transcript states his opinion as to what a plea referred to, such amended transcript may be stricken.—Jordan v. Quick, 11 Iowa, 9.

[g] (Iowa, 1883) Where a defendant is in default in a justice's court, and his only right under the statutes is to appear and cross-examine plaintiff's witnesses, and the docket entries show that he was present when judgment was entered against him, it is immaterial, for the purpose of reviewing such judgment, when the witnesses were examined, or whether in his presence; and an order for an amendment to the return of the justice to show that fact should not be allowed.—Olim v. Chicago, M. & St. P. Ry. Co., 61 Iowa, 250, 16 N. W. 124.

[h] (Iowa, 1883) A return to a writ of error made by a justice of the peace that judgment was entered "on the eleventh (10th) day of July," being evidently a clerical mistake, it is not necessary that the return should be amended when other papers in the case indicate that the judgment was entered on the 10th day of July.—Olim v. Chicago, M. & St. P. Ry. Co., 61 Iowa, 250, 16 N. W. 124.

[i] (Miss. 1871) In case of appeal from a justice's court, the circuit court has power to protect against any apparent irregularity in the appeal by allowing the justice to amend his return according to the facts; and, if a party fail to avail himself of this power in the court, he cannot afterwards invoke the aid of a court of chancery.—Weddell v. Seal, 45 Miss. 726.

[j] (N. Y. 1849) On appeal from a justice's court, if the return of the testimony and proceedings is insufficient to present the whole case, the parties must call for a further return.—McCafferty v. Kelly, 4 N. Y. Super. Ct. (2 Sandf.) 637.

[k] (N. Y. 1853) Where all facts occurring at the trial below are not returned, the party aggrieved should make application to compel a further return.—Capewell v. Ormsby, 2 E. D. Smith, 180; Hyland v. Sherman, Id. 234.

[l] (N. Y. 1854) Appeals from justices' courts cannot be decided, except on an original return or a certified copy. If the original is lost, the signature of justice must be obtained to the copy submitted, or a new return obtained.—Smith v. Van Brunt, 2 E. D. Smith, 534.

[m] (N. Y. 1859) Where the return of a plaintiff's appeal from a judgment of a justice court shows that it was rendered for plaintiff, the plaintiff should obtain an amended return, showing that it was in reality a judgment for defendant, to overcome the presumption that it was not.—Slaman v. Buckley, 29 Barb. 289.

[n] (N. Y. 1892) Where evidence has been lost, on appeal from justice court, the remedy is by application to produce the same by affidavits or witnesses in the appellate court, under Code Civ. Proc. §§ 3056, 3213.—McGovern v. Eldridge (Com. Pl.) 1 Misc. Rep. 170, 20 N. Y. Supp. 654.

[o] (N. Y. 1895) Code Civ. Proc. § 2990, relating to trials in justice courts, provides that, unless a jury trial be demanded at the time of

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the joining of issue, the right to trial by jury shall be deemed waived. *Held*, that where, on appeal from a justice's judgment, the entries in the justice's transcript leave it uncertain as to whether a jury was demanded on the day of joinder of issue, or on a subsequent day, to which the trial was adjourned, it is error for the county court to deny a motion to require the justice to amend his return so as to show exactly when the demand for a jury was made. —Sherman v. Green, 90 Hun, 462, 36 N. Y. Supp. 53, 25 Civ. Proc. R. 191.

[p] (Pa. 1834) On an appeal from a justice, the record may be amended by the transcript. —Smith v. Boyer, 2 Watts, 173.

[q] (Pa. 1838) A certificate of fact within the recollection of a justice relative to a judgment rendered by him cannot be used to amend his transcript.—Boylan v. Hays, 7 Watts, 509.

[qq] (Tex. 1891) On appeal from justice's court a motion to dismiss because the transcript was not filed by the first day of the second term is too late if not made during that term, the transcript having been filed before the making of the motion.—Gulf, C. & S. F. Ry. Co. v. Conerty (App.) 15 S. W. 504.

[r] (Vt. 1876) New copies of appeal from the judgment of a justice of the peace cannot be filed in the county court in vacation, and after final judgment has been rendered on the copies originally filed; nor can the presiding judge allow such copies to be filed, so as to make them part of the record.—Wood v. Davis, 48 Vt. 319.

[s] (Wis. 1861) Where it does not appear from the return of the justice that notice of appeal was served, the proper course is to procure a further return.—Hills v. Miles, 13 Wis. 625.

§ 626. —— Errors and irregularities amendable.

[a] (Del. 1857) An appeal from a justice of the peace will not be dismissed for the want of a proper certificate by him of "all the docket entries in the case before him," but leave will be granted to amend the certificate.—Waters v. Kirby, 1 Houst. 364.

[b] (Ill. 1891) If, on appeal to the superior court from a justice's court, the certificate to the transcript is defective, a rule on the justice to supply a proper certificate may be obtained, but it is not proper to strike the transcript from the file.—McNichols v. Hunt, 43 Ill. App. 451.

[c] (Ind. 1858) Where defendant appealed from a judgment of a justice on a written offer to confess judgment, the court refused to grant a writ of certiorari to compel the justice to certify that defendant had verbally withdrawn his offer of confession, as that would be a matter of proof on the trial.—Lewis v. Morrison, 10 Ind. 394.

[d] (Ind. 1862) The justice should be allowed to correct a mere clerical error in his transcript.—Baker v. Chambers, 18 Ind. 222.

[e] (Iowa, 1856) The entries of oral pleadings on the docket of a justice may be corrected at the trial on appeal, by an amendment offered by the justice.—Cooper v. Woodrow, 3 Iowa (3 Clarke) 189.

[f] (Mo. 1834) It is the duty of justices of the peace to keep a docket, in which he shall keep fair and accurate entries of all suits instituted before him, with the proceedings thereon; and, if a justice of the peace has failed to certify to a paper intended as an affidavit, it is error in the circuit court to permit him to come into court and there to certify to the same.—Price v. Halsed, 3 Mo. 461.

[g] (Mo. 1895) On appeal from a justice, a constable's return may be amended to conform to the facts.—Godman v. Gordon, 61 Mo. App. 685, 1 Mo. App. Rep'r, 403.

[h] (N. J. 1822) The common pleas may, at the third term after filing the appeal, permit the transcript of a justice to be amended by affixing a seal thereto, provided no delay is occasioned thereby.—Thompson v. Sutton, 6 N. J. Law (1 Halst.) 220.

[i] (N. J.) The court of common pleas should permit a justice who is present in court to amend his transcript, by stating the time when and by whom the appeal was demanded, provided no delay is occasioned thereby.—(1825) Allen v. Joice, 8 N. J. Law (3 Halst.) 135; (1831) Camp v. Martin, 12 N. J. Law (7 Halst.) 181.

[j] (N. Y. 1805) A justice will not be required to amend his return to an appeal, so as to make it contrary to what he has already sworn to, although he gave a certificate impeaching the return.—Keeler v. Adams, 3 Caines, 84.

[k] (N. Y. 1865) A justice of the peace will be required to answer specific interrogatories by an amended reply in regard to any matters material to the case.—Smith v. Johnston, 30 How. Prac. 374.

[l] (N. Y. 1893) A justice of the peace will not be permitted to amend his return on appeal so as to absolutely contradict his original return, unless it appears that he was induced by fraud to sign a false return.—Bennett v. Taylor, 70 Hun, 51, 23 N. Y. Supp. 1094.

[m] (N. C. 1843) On an appeal from the verdict of a jury in the county court assessing damages for the erection of a mill, the superior court has a right to permit the sheriff to amend his return of the verdict of the jury, so as to set forth that they were sworn on the premises.—Harper v. Miller, 26 N. C. 34.

[n] (Ohio, 1877) Whether a defective transcript on appeal from a justice can be amended or not, a paper neither signed, certified to, nor written by him is not a transcript, and hence is not capable of amendment after the 30 days allowed for filing a transcript have expired.—Berne v. Britton (D. C.) 2 Wkly. Law Bul. 239.

[o] (Pa. 1892) Where a justice of the peace, in making out his docket and preparing a transcript for appeal, makes a mistake in designating the day on which the appeal was taken and the bail bond filed, so as to endanger appellant's right of appeal, it is proper to allow the justice to correct the error in both the docket and the transcript.—Kearney v. Pennock (Com. Pl.) 12 Pa. Co. Ct. R. 37, 2 Pa. Dist. R. 32.

[p] (Tenn. 1838) The omission of a justice to enter a party's prayer for an appeal, and the grant of the appeal, may be amended by the justice, upon motion in the circuit court, by supplying the omitted entry by means of the recitals in the appeal bond.—Turner v. Lumbrick, 19 Tenn. (1 Meigs) 7.

[q] (Wash. 1890) On appeal from a justice of the peace, it is not error for the district court to refuse to allow an amendment of the return in aid of the justice's jurisdiction.—Knoff v. Puget Sound Co-op. Colony, 1 Wash. St. 57, 24 Pac. 27.

[r] (Wis. 1884) Where the record is silent in case of an unsigned notice of appeal from a justice of the peace, the justice may be re-

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quired to amend his record so as to show by whom the notice was presented; it being required to be signed or presented by appellant or some one authorized by him.—Evangelical Lutheran St. Peter's Soc. v. Koehler, 59 Wis. 650, 18 N. W. 476.

§ 627. —— Authority to make amendments.

Power of justice to amend papers after appeal has been taken, see ante, § 600.

[a] (Mo. 1876) It is the duty of a justice, ruled to return a transcript of the proceedings in an action, to furnish a faithful transcript; and he cannot, of his own motion, make amendments in it.—Norton v. Porter, 63 Mo. 346.

[b] (Mo. 1879) A justice of the peace can only file an amended transcript by order of the circuit court, and any amendment not directed by such order will be void.—Smith v. Chapman, 71 Mo. 217.

[c] (Mo. 1886) After an appeal has been taken from a justice, and the papers filed with the circuit court, the justice cannot make an amendment or alteration therein without the consent of the parties and under the direction of the circuit court.—Horton v. St. Louis, I. M. & S. Ry. Co., 21 Mo. App. 147.

[d] (N. Y. 1895) A special term of the supreme court has no power to order the amendment of the return of a justice of the peace on which a cause was heard in the county court on appeal.—Pratt v. Baker, 88 Hun, 301, 34 N. Y. Supp. 766.

[e] (N. C. 1880) Where an action was brought in a justice's court against two defendants and an appeal was taken from the judgment recovered, but no memorandum thereof entered on the justice's docket, it was competent for the superior court, upon proof, to amend the record, to show that in fact only one of the defendants appealed.—People's Nat. Bank v. McArthur, 82 N. C. 107.

[f] (N. C. 1891) On appeal from a justice of the peace, an additional return will not be recognized, unless filed by consent of parties, or made pursuant to a recordari.—Beville v. Cox, 109 N. C. 265, 13 S. E. 800.

[g] (Tenn. 1850) Where, on an appeal from a judgment of a justice of the peace to the circuit court, there is a formal appeal bond attested by the justice, but no other entry or allowing of an appeal appears, it is competent for the circuit court to allow an amendment of the record, so as to show the entry of an appeal by the justice, and such amendment will be presumed by the supreme court to have been made by the justice, where there is nothing shown to the contrary.—Hall v. Bewley, 30 Tenn. (11 Humph.) 106.

[h] (Tex. 1894) After an appeal is taken from a judgment in a justice's court, the justice, or his successor in office, has still jurisdiction to correct clerical errors in the transcript.—Texas & P. Ry. Co. v. Gill, 9 Tex. Civ. App. 189, 28 S. W. 911.

[i] (Wis. 1873) If the return of a justice of the peace to the appellate court be defective, and a further return be made by the justice, which is received and acted upon by the appellate court, the fact that the amendment was made without any order of the appellate court is no ground of objection.—Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 782.

§ 628. —— Proceedings for amendment.

[a] (Iowa, 1847) On an affidavit made in the district court that the transcript from a justice of the peace is erroneous in setting forth the day upon which the affidavit for an appeal was made, it is proper to rule the justice to file an amended transcript; and such amended transcript must be regarded as so much of the record in the case.—Cook v. United States, 1 G. Greene, 39.

[b] (Kan. 1864) The way to obviate an objection "that the record of the justice," sent up on appeal, "is defective in substance and form," is by suggesting a diminution of the record.—Reedy v. Gift, 2 Kan. 392.

[c] (Mich. 1889) On appeal from the judgment of a justice of the peace, in an action on a note against the indorser, the justice's return set out a declaration which contained no reference to any note on file, and which did not aver that notice of dishonor had been served on defendant. The return contained no recital of service of process, or of defendant's appearance or default; nor was it accompanied by any summons or proof of service, nor any evidence or copy of any note filed with the justice. *Held*, that defendant was not bound to plead in the circuit court, as the return showed no jurisdiction, and it was error to allow the return to be amended without a proper application and showing, and an opportunity to defendant to be heard on the motion.—Moore v. Hanson, 75 Mich. 564, 42 N. W. 981.

[d] (N. Y. 1851) A justice's return on appeal is conclusive of the facts in the case, and, if important matter is omitted, affidavits may be used as the foundation of an order directing a more full or specific return.—Lynsky v. Pendegrast, 2 E. D. Smith, 43.

[e] (Ohio, 1876) On petition in error to reverse a judgment of a justice of the peace in a civil action on the ground that the record fails to show either legal service or voluntary appearance of the plaintiff in error, an answer by the defendant in error alleging a voluntary appearance, and that the transcript is imperfect and defective in failing to show such appearance, may be regarded as a suggestion of diminution of record, sufficient to authorize the court to order the justice to furnish a complete and valid transcript of the proceedings and judgment in the action.—Godfred v. Godfred, 30 Ohio St. 53.

[f] (Pa. 1821) The transcript of a suit before a justice is sufficient, if it set forth the substance of his proceedings, though inartificially; and, if the transcript be defective, the court of common pleas may receive an additional return from the justice, or examine him on oath.—Cochran v. Parker, 6 Serg. & R. 549.

[g] (Tex. 1884) Under Const. art. 5, § 16, authorizing county courts to issue all writs necessary to the enforcement of their jurisdiction, writs of certiorari may issue therefrom to justices' courts to complete defective records on appeal, sent from the justices' to the county courts.—Brown v. Grinnan, 2 Willson, Civ. Cas. Ct. App. § 413.

[h] (Tex. 1884) On appeal from a judgment of a justice, where the record sent to the county court is imperfect, that court may avail itself of a writ of certiorari, or any other writ to have the record perfected, so as to enforce its jurisdiction.—Brown v. Grinnan, 2 Willson, Civ. Cas. Ct. App. § 413.

§ 629. —— Time for amendment.

Continuance to procure proper transcript of record, see post, § 654.

[a] (Ark. 1846) The transcript on appeal from a justice cannot be amended after judgment, so as to give it validity. It should be amended before judgment by a rule upon the justice.—Watts v. Hill, 7 Ark. (2 Eng.) 203.

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[b] (Ind. 1836) If the transcript sent up by a justice of the peace on appeal be imperfect, a motion for a rule against the justice to certify to the court a full and correct transcript should be granted, although not made until after a motion to dismiss the suit by the appellee.—Boiles v. Barnes, 4 Blackf. 176.

[c] (Iowa, 1858) The transcript sent up by the justice may be amended, if erroneous, after a trial above, and a new trial allowed to give the appellant the benefit of the amendment.—Clark v. Barnes, 7 Iowa (7 Clarke) 6.

[d] (Mo. 1889) Rev. St. § 3049, provides that, whenever the circuit court is satisfied that the return of a justice is substantially erroneous or defective, the court may, by rule and attachment, compel him to amend the same. Section 3580 provides that all returns made by any sheriff or other officer, or by any court or subordinate tribunal, to any court, may be amended, in matters of form, by the court to which returns shall be made, as well before as after judgment. *Held*, that a motion in the circuit court for a rule on a justice to amend his return in matter of form may be made during the term, during the trial, or after judgment.—Hill v. Patterson, 34 Mo. App. 169.

[e] (N. Y. 1891) On appeal from a judgment of a New York City district court, the judgment was reversed on the ground that the justice had proceeded after his jurisdiction was arrested by an application for removal of the cause to the common pleas, under Code Civ. Proc. § 3216, allowing such removal on application of the defendant, "after issue is joined, and before an adjournment has been granted on his application." *Held* that, after the appellate court had intimated or announced its decision, it was too late for a motion to amend the justice's return so as to show that, before defendants' application for removal, there had been an adjournment on their application, and for a reargument on such amended return.—Warren v. Campbell (Com. Pl.) 14 N. Y. Supp. 165; Persons v. Same, Id.

§ 630. Waiver of defects in transcript or record.

Waiver of delay or failure to file transcript, see ante, § 623.

[a] (Del. 1847) Though the transcript of a justice of the peace on appeal is required to be under seal, the seal is not necessary to give jurisdiction to the superior court; and the seal may be waived by pleading to an irregular transcript.—Lewis v. Hazel, 4 Har. 470.

[b] (Ky. 1829) On appeal from a justice of the peace, it is too late, after the jury is sworn, to object that the warrant and account are not sent up by the justice.—Grimes v. Dearborn, 26 Ky. (3 J. J. Marsh.) 61.

[c] (N. Y. 1854) Where a general return of a justice states that the examination of witness was stopped, because vexatious and improper, if appellant supposed that opinion erroneous, he should procure an amended return specifying particulars. Not having done so, he acquiesces in the truth of the return. If he supposes the court erred as to the pertinency of questions asked, he should obtain such a return containing them.—Peck v. Richmond, 2 E. D. Smith. 380.

[d] (N. Y. 1893) If the return on appeal from a justice's court is incorrect, insufficient, or indefinite, the remedy of the party aggrieved is by motion to correct the return, and he cannot attack the return on the hearing of the appeal.—Young v. Conklin (Co. Ct.) 3 Misc. Rep. 122, 23 N. Y. Supp. 993.

[e] (Ohio, 1876) Unless a party objects in apt time, an appeal from a justice of the peace may properly be heard on an amended transcript, and determined accordingly.—Godfred v. Godfred, 30 Ohio St. 53.

[f] (Pa. 1831) An appellee, who would avail himself of a defect appearing on the justice's transcript, must do so at the first opportunity. If he lie by and suffer an amended return to be received, and take no step for more than a year, he cannot afterwards object.—Robinson v. Shrouds, 1 Ashm. 168.

[g] (Wis. 1861) It did not appear from the return of the justice that notice of appeal was ever served. The court decided that this might be shown by affidavit, to which no exception was taken, and the affidavit was waived. *Held*, that the proper course would have been to have procured a further return; but, as no exception was taken and the affidavit was waived, the defendant was not entitled to a dismissal of the appeal in the court below on that ground.—Hills v. Miles, 13 Wis. 625.

§ 631. Requiring justice to send up transcript or record.

Compelling amendment of transcript or return, see ante, § 628.

Failure to pay costs as ground for refusal to make transcript, see ante, § 543.

Jurisdiction of appellate court on filing appeal bond to compel justice to make a return, see ante, § 605.

[a] Where, on appeal from a justice of the peace, the appeal and recognizance were properly taken, on refusal of the magistrate to make out a copy of the recognizance in due form, mandamus will issue.
—(Mass. 1811) Johnson v. Randall, 7 Mass. 340;
(N. H. 1854) Ballou v. Smith, 29 N. H. (9 Fost.) 530.

[b] (Ala. 1878) A refusal to award a certiorari to a justice of the peace to send up the original papers, together with the statement required on appeal to the circuit court, is not ground for reversal, when it appears from the whole record that awarding the writ would not have affected the result; the appeal bond being sufficiently formal to give jurisdiction, and it not being stated that the original papers would show a departure in the circuit court, or any other reason shown why the writ should have been granted.—South & North Alabama R. Co. v. Pilgreen, 62 Ala. 305.

[c] (Cal. 1858) When a party carried up a cause by appeal from a justice's court to the county court, and the justice neglected to send it up, the county court should give the appellant the opportunity to move for an order compelling the justice to send it up.—Sherman v. Rolberg, 9 Cal. 17.

[d] (Cal. 1864) The county court has no power to grant a writ of mandamus commanding a justice of the peace to file with the clerk of that court the papers necessary in the appeal of a case, in which the justice has issued a search warrant for stolen property and ordered it to be delivered to the owner, and has filed with the clerk of the county court the papers required by law.—People v. Halloway, 26 Cal. 651.

[e] (Cal. 1887) On an appeal from a justice's court to a superior court, where all the papers in the case have been transferred, except a copy of the justice's docket, the superior court has jurisdiction to order the transfer of a copy of the justice's docket, under Code Civ. Proc. § 975, relating to appeals from justice's or police courts.—Burgess v. Superior Court, 13 Pac. 166.

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[f] (Conn. 1871) In mandamus to a justice to compel him to make a true record of a judgment rendered by him, and to furnish a copy to a party claiming to be aggrieved thereby, the superior court has jurisdiction to determine whether such record or copy is correct.—Smith v. Moore, 38 Conn. 105.

[g] (Ill. 1843) Where a justice of the peace neglects to return an appeal bond, appellant should apply to the circuit court to compel him to make the return.—Little v. Smith, 5 Ill. (4 Scam.) 400.

[h] (Mich. 1874) Where it is claimed that an appeal has been duly taken, but that the justice has failed to make his return, it is proper to call on the justice, under a showing by affidavit, to state the facts.—People v. Allegan Circuit Judge, 29 Mich. 487.

[i] (Mo. 1859) Where a judgment is rendered on default by a justice of the peace, and defendant, without moving to set aside the default, appeals, and the justice files a transcript before the appellate court, and afterwards the defendant, within the time allowed by law, moved to set aside the default in the justice court, and, on refusal, made application for an appeal, the appellate court should have granted a motion to compel the justice to amend his return, showing such application and refusal, so that appellants may have had a trial on the merits.—Dermody v. The Maria Denning, 28 Mo. 284; Grant v. Same. Id.

[j] (N. Y. 1828) Where a justice refused to give plaintiff a transcript in a case requiring one, mandamus will lie compelling him to do so.—People v. Lynde, 8 Cow. 133.

[k] (N. Y. 1846) The court of common pleas cannot compel a return by the justice, where there is a defective appeal bond served on him.—People v. Judges of Steuben County Common Pleas, 2 How. Prac. 248.

[l] (N. Y. 1848) The court will not order a return, under Code, § 310, in case of the omission of appellant to set forth the judgment appealed from, where respondent has filed no affidavit, since such section does not apply, except in cases where counter affidavits are filed by respondent.—Davis v. Lounsbury, 1 Code Rep. 71.

[m] (Tenn. 1883) A petition for certiorari to compel a justice to send a record to the circuit court, the appeal having been perfected by taking the pauper oath, need not state that it is the first application for the writ.—McGhee v. Grady, 80 Tenn. (12 Lea.) 89.

[n] (Tenn. 1883) A petition for certiorari to the circuit court, on the ground that the justice before whom the case was tried, and who had granted an appeal, had promised to bring up the papers, but subsequently refused to do so unless required by the circuit judge, is not a petition for certiorari in lieu of an appeal.—McGhee v. Grady, 80 Tenn. (12 Lea) 89.

[o] (Tex. 1887) Where the appellant filed his appeal bond within proper time, he cannot be bound by the justice's failure to transmit the papers to the county court; but, if the papers and transcript be not filed before the first day of the second term after the appeal is perfected, it is the duty of appellant to apply for a writ of certiorari to compel the justice to perform his duty.—Jones v. Spann, 3 Willson, Civ. Cas. Ct. App. § 283.

§ 632. Objections to transcript or record.

[a] (Kan. 1887) Where facts material to appear in the record of a justice of the peace are untruthfully stated therein, they cannot be disposed of in a summary manner in the district court by affidavits upon a motion to dismiss the appeal.—Struber v. Rohlfs, 36 Kan. 202, 12 Pac. 830.

[b] (Mo. 1844) On appeal from the judgment of a justice of the peace, an objection to the transcript in general terms that it contains irrelevant matter is not sufficient. The irrelevant matter should be pointed out.—Palmer v. Hunter, 8 Mo. 512.

[c] (N. Y. 1891) Where a justice of a district court avails himself of an order to show cause why his return on an appeal should not be amended, the amended return, when made, cannot be vacated because of fraud or irregularity in the procurement of the order; the remedy of the party aggrieved being to move for a further amended return, or to proceed against the justice for a false return.—Thomas v. Whitlegge (Com. Pl.) 14 N. Y. Supp. 779.

(e) CONCLUSIVENESS OF TRANSCRIPT AND QUESTIONS PRESENTED FOR REVIEW.

CONCLUSIVENESS OF TRANSCRIPT OR RECORD, § 633.
ADMISSIBILITY OF EVIDENCE TO CONTRADICT OR IMPEACH, § 634.
—— TO SUPPLY OMISSIONS, § 635.
QUESTIONS PRESENTED FOR REVIEW, § 636.

§ 633. Conclusiveness of transcript or record.

[a] (Ark. 1860) A transcript of proceedings before a justice, sent up to a higher court, is a record, and conclusive of the facts that were or should have been therein mentioned.—Moehring v. Kayser, 21 Ark. 457.

[b] (Ind. 1873) The record of a justice of the peace is conclusive evidence of the facts set forth therein, and such record cannot be contradicted by a pleading.—Larr v. State, 45 Ind. 364.

[c] (Iowa, 1862). A justice's amended transcript, unless stricken from the files, must be regarded as the true record.—Brown v. Beesett, 13 Iowa, 185.

[d] (Kan. 1884) The transcript filed is not conclusive evidence of what was done in the justice's court. It may be shown that the justice altered the record after the appeal was perfected, and, on such showing, he may be ordered to send up a transcript of the record as it stood at the time the appeal was perfected.—Stuttle v. Bowers, 2 Pac. 806.

[e] (Mich. 1890) Where erasures appeared on the margin of a justice's docket given in evidence, and, although the justice testified in the case, defendant asked no questions as to such erasures, he cannot, on appeal, question the validity of the entries on that ground.—Whitworth v. Detroit, L. & N. R. Co., 81 Mich. 98, 45 N. W. 500.

[f] (Mich. 1890) The docket entries of a justice showed simply that plaintiffs appeared by attorney, and that, "defendants making no defense to the merits," judgment was entered against them. In answer to the affidavit on appeal to the circuit court, the justice, in his return, certified the circumstances under which the judgment was rendered. *Held*, that the matters so returned cannot be taken to impeach the docket entries.—Hodges v. Bagg, 81 Mich. 243, 45 N. W. 841.

[g] (Mo. 1890) Who are parties plaintiff and defendant in an action instituted in a justice's court, and appealed to the circuit court, is to be determined prima facie from the justice's entries on his docket.—Clements v. Greenwell, 40 Mo. App. 589.

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[h] (Mo. 1892) The official character of a justice of the peace, before whom an action for the killing of stock has been instituted, is established prima facie by a recital thereof in the transcript on appeal.—Burger v. St. Louis, K. & N. W. Ry. Co., 52 Mo. App. 119.

[i] (Neb. 1892) The transcript of a justice's docket, from which it appears that he did not enter judgment immediately upon the rendition of the verdict, as required by Code, § 1002, is conclusive upon the district court out of which a writ of error is prosecuted, and it should not, upon affidavits being made that the judgment was in fact entered immediately, allow a rule to require the justice to correct the journal entry.—Worley v. Shong, 35 Neb. 311, 53 N. W. 72.

[j] (N. Y. 1849) On appeal from the judgment of a justice the appellate court can look to the return alone, and not to the affidavits. —McCafferty v. Kelly, 4 N. Y. Super. Ct. (2 Sandf.) 637.

[k] (N. Y. 1850) On appeal from a justice's court, the appellate court can look only at the return of the justice for the facts of the case and the proceedings in the court below.—De Courcy v. Spalding, 3 Code Rep. 16.

[l] (N. Y. 1857) Where the affidavits of the parties to an action differ as to which of two days it was continued to, the return of the justice must govern.—Kelly v. Brower, 1 Hilt. 514.

[m] (N. Y. 1887) Where the return of a justice before whom four actions were pending between the same parties states that on the return day of the summons the parties appeared by their respective attorneys, and issue was joined, making the complaint and answer in the first suit by stipulation the same in the others, and in like manner applying the evidence in that action to them, it must, for the purposes of review, be taken as true.—Village of Suspension Bridge v. Bedford, 10 N. Y. St. Rep. 850.

§ 634. Admissibility of evidence to contradict or impeach.

[a] (Conn. 1786) Averments in a writ of error to review a judgment of a justice of the peace, which are contrary to the record, are inadmissible.—Wight v. Mott, Kirby, 152.

[b] (Iowa, 1862) The district court, on appeal, may hear testimony to explain and correct a mistake in a justice's record.—Brown v. Beesett, 13 Iowa, 185.

[c] (Me. 1839) Where the justice of the peace certifies, at the bottom of a paper purporting to be the record of a judgment rendered before him, that it is "a true copy," he will not be allowed to testify that he made no record of the judgment in such case.—Wheeler v. Lothrop, 16 Me. (4 Shep.) 18.

[d] (Me. 1855) Under the statute requiring the appellant from a decision of a justice of the peace to produce a copy of the record and of all the papers filed in the case, a regularly authenticated copy of the record is the legal and best evidence of it, and cannot be explained or contradicted by parol testimony or extraneous documents.—Holden v. Barrows, 39 Me. 135.

[e] (Mass. 1869) In an action on an amended recognizance given on appeal from a magistrate, oral evidence is not admissible to contradict or vary a copy of the recognizance certified to by the magistrate, as it appears of record, by showing the contents of the original recognizance, since the magistrate's certificate is conclusive as to what the contract of the parties really was.—Cook v. Berth, 102 Mass. 372.

[f] (Neb. 1895) The record of the proceedings in a justice court, as embodied in a duly-certified transcript, imports absolute verity, and cannot be contradicted by extrinsic evidence in the appellate court.—Dryfus v. Moline, Milburn & Stoddard Co., 43 Neb. 233, 61 N. W. 599.

[g] (N. J. 1806) On appeal from a justice, a return denying certain facts on which plaintiff relied for a reversal cannot be contradicted by the affidavits of bystanders.—Prall v. Waldron, 2 N. J. Law (1 Penning.) 145.

[h] (N. J. 1810) A mistake of a justice in entering the Christian name of a witness in his record on an appeal to the common pleas may be explained on appeal by parol testimony.—Crane v. Ward, 3 N. J. Law (2 Penning.) 650.

[i] (N. J. 1854) A rule to take affidavits to contradict the return of a justice is irregular. The return is conclusive.—Paterson & R. R. Co. v. Ackerman, 24 N. J. Law (4 Zab.) 535.

[j] (N. Y. 1857) An erroneous return by the justice on an appeal from a district court cannot be impeached by counter affidavit. It must be corrected by motion.—Spence v. Beck, 1 Hilt. 276.

[k] (N. Y. 1878) Justice's return on appeal cannot be contradicted by affidavits on the appeal. The remedy of the party aggrieved by defect in it is an action for a false return.—Barber v. Stettheimer, 18 Hun, 198.

[l] (N. Y. 1893) A recital in the return on appeal from a justice's court, that the "parties stipulated to adjourn this matter to July 2d," cannot be contradicted by extrinsic evidence; the return being a record, and therefore conclusive.—Young v. Conklin (Co. Ct.) 3 Misc. Rep. 122, 23 N. Y. Supp. 993.

[m] (N. C. 1878) Parol evidence is admissible, on appeal to the superior court from the judgment of a justice of the peace, to explain the meaning of an entry on his docket.—Evans v. Williamson, 79 N. C. 86.

[n] (Ohio, 1844) Where the title of a case on the docket of a justice of the peace is against one as principal and another as bail, it may be treated on appeal as a mere description, and the true position of the parties may be shown by parol.—Golden's Adm'r v. McConnell, 1 Ohio Dec. 58.

[o] (Pa. 1846) The transcript of a justice on appeal cannot be altered by parol evidence, except in case of fraud.—Halliday v. Mills, 3 Clark, 394, 5 Pa. Law J. 416.

[p] (Pa. 1880) Wherever a justice's transcript shows the cause of action, it cannot be supplemented or changed in the appellate court by parol evidence, so as to deprive a party of a trial by jury.—Foss v. Bogan, 92 Pa. 296.

[q] (Pa. 1887) The docket of a justice of the peace is the best evidence of what transpired before him, and parol evidence is not admissible on appeal to vary or contradict it.—Fenstemacher v. Lilly, 5 Lanc. Law Rev. 44.

[r] (S. C. 1882) Where the judgment of a justice of the peace is invalid on its face for want of service, the transcript filed in the circuit court can give no life to the judgment, and the plaintiff cannot be permitted to show in the circuit court that the defendant in fact appeared.—Barron v. Dent, 17 S. C. 75.

[s] (S. D. 1892) If the justice has failed to make the entries in his docket which by law he is required to make, though the appellate court may, in a proper application, direct the docket to be amended, the certified copy of the docket cannot be attacked collaterally, and its correctness determined upon ex parte affidavits.

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—Mouser v. Palmer, 2 S. D. 466, 50 N. W. 967.

[t] (Vt. 1847) Judgment was rendered by a justice of the peace by default, and the justice certified in his record that notice to defendant of the pendency of the suit was proved. *Held*, that defendant, on petition to the county court, founded on Rev. St. c. 33, § 8, might prove by parol evidence that he did not in fact have any notice of the suit prior to the rendition of the judgment.—Mosseaux v. Brigham, 19 Vt. 457.

§ 635. —— To supply omissions.

[a] (U. S. 1831) Defects in the transcript, certified by a justice of the peace to the circuit court, cannot be supplied by him, by certificate or otherwise, nor by the testimony of persons present at the trial; nor can anything in any way be added to it.—Jacobs v. Jacobs, Fed. Cas. No. 7,161a [Hemp. 101].

[b] (Ark. 1892) It having been adjudged that suits against railway companies for injuries to cattle and other stock must be brought in the county where the injury was inflicted, the venue of such suits can be established in the circuit court on appeal from a justice's judgment by proof aliunde the justice's record; Mansf. Dig. § 4140, providing that on such appeals the cause shall be tried anew, "without any regard to any error, defect, or other imperfections in the proceedings of the justice."—St. Louis, I. M. & S. Ry. Co. v. Lindsay, 55 Ark. 281, 18 S. W. 59.

[c] (Mich. 1875) Where a transcript of a justice's judgment is entered and docketed by the clerk of the circuit court without an affidavit of amount due, as required by law, and no showing is made that such affidavit has been searched for, or is lost or destroyed, testimony of the deputy clerk that an affidavit of amount due was brought to the office after the transcript of the judgment was left, and that he filed it, but the contents of which he was unable to tell, or who made it, or the title of the case in which it was used, or the amount the affidavit stated to be due, is inadmissible.—Monaghan v. McKimmie, 32 Mich. 40.

[d] (Minn. 1891) The return of a justice of the peace on appeal cannot be disputed or supplemented by affidavits, and where only a part of the evidence is reduced to writing by the justice, and, in addition to that, he certifies that his return contains all the evidence given on the trial according to his best recollection, it will be construed as containing substantially all the evidence in the case, so that if either party claims that any evidence is omitted, a further return should be applied for.—Plymat v. Brush, 46 Minn. 23, 48 N. W. 443.

[e] (Pa. 1849) Where the justice's docket contained no entry of an offer to confess judgment for a particular sum, that fact cannot be proved by his certificate accompanying the transcript; it being no part of the transcript, and no better than the unofficial assertion of the justice.—Clemens v. Gilbert, 12 Pa. (2 Jones) 255.

[f] (Pa. 1873) Where a justice's transcript on a defendant's appeal did not show that the action was brought under a certain act, which would have made it apparent that the recognizance was insufficient, and the appeal incomplete for want of a required affidavit, it cannot be made to appear by the plaintiff's affidavit, made after the appeal was taken.—Delaware & H. Canal Co. v. Loftus, 71 Pa. (21 P. F. Smith) 418.

[g] (S. D. 1892) In appeals from justice court judgments the appellate court must learn the status of the case from the transcript and papers transmitted by the justice, and, if such transcript is imperfect or insufficient, a further return may be required; but affidavits of parties cannot be used to supply what should, but does not, appear in the transcript.—Mouser v. Palmer, 2 S. D. 466, 50 N. W. 967.

[h] (Tex. 1895) Since, in an action in a justice court, the pleadings may be oral, the justice merely being required to enter a brief notice in his docket thereof, on appeal it may be shown by parol evidence what the pleadings were, where they have been omitted from the transcript sent up by the magistrate.—Gholston v. Ramey (Civ. App.) 30 S. W. 713.

[i] (Vt. 1826) If, on an appeal from a justice, his record does not show that a plea in abatement was pleaded before him, such fact cannot be proved by parol evidence. Diminution of the record should be alleged, and a mandamus moved for on the justice to certify more fully.—Martin v. Blodget, 1 Aikens, 375.

[j] (Wis. 1853) The county court has no authority to examine a witness, who testified at the trial before the justice, to supply an alleged defect in the return of the justice.—Talbot v. White, 1 Wis. 444.

§ 636. Questions presented for review.

[a] (Conn. 1787) On error from a justice of the peace, the court refused to reverse the judgment because it did not appear from the record what, or in whose favor, the judgment was, or whether any had been rendered.—Butler v. Scovel, Kirby, 352.

[b] (Iowa) The averments in an affidavit for a writ of error amount to nothing, unless there is a response to the same in the return of the justice.—(1856) Stone v. Murphy, 2 Iowa (2 Clarke) 35; (1865) Vance v. Kirfman, 20 Iowa, 13.

[c] (Iowa, 1856) On writ of error only those points are open to review which are included in the return of the justice and are responsive to the affidavit on which the writ was issued.—Hays v. Gorby, 3 Iowa (3 Clarke) 203.

[d] (Iowa, 1867) When the return of a justice to a writ of error completely negatives the errors alleged in the affidavit, the writ will not be sustained by the district court.—Lane v. Goldsmith, 23 Iowa, 240.

[e] (Mo. 1890) On appeal from a justice of the peace, the appellate court will not consider grounds of appeal not embraced in the abstract of the record.—Bensberg v. Turk, 40 Mo. App. 227.

[f] (N. Y. 1889) An objection that the summons was not properly served, which is overruled, the defendant answering over, is not available on appeal to the county court for a new trial, under Code Civ. Proc. § 3053, which provides that the justice's return in such case shall contain the summons, with the proof of service, the pleadings, the proceedings upon the trial, the judgment, and a brief statement of the amount and nature of the claim litigated, such return not embracing objections taken before the justice to the process or its service.—Pearce v. Nester, 50 Hun, 546, 3 N. Y. Supp. 720.

9. ASSIGNMENT OF ERRORS AND BRIEFS.

§ 637. Assignment of errors and briefs.

[a] (Conn. 1843) But where it appeared from the record of a justice of the peace that he was present on the 7th of August, and adjourned the cause until the 14th, when he rendered judgment against the defendant by default, and

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it was alleged in the assignment of errors that the defendant attended on the 7th of August, from 9 o'clock until 10 o'clock in the forenoon, and the justice did not appear, it was *held* that such assignment was not inconsistent with the record.—Burgess v. Tweedy, 16 Conn. 39.

[b] (N. Y. 1822) The practice of the common pleas of proceeding on appeal from a justice by a general assignment of errors was incorrect.—Reab v. Moor, 19 Johns. 337; Breese v. Williams, 20 Johns. 280.

[c] (N. Y. 1850) An assignment of errors of fact is not abolished by the Code.—Craw v. Daly, 2 Code Rep. 118.

10. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

VOLUNTARY DISMISSAL OR DISCONTINUANCE OF APPEAL, § 638.
GROUNDS FOR DISMISSAL IN GENERAL, § 639.
—— FAILURE TO APPEAR AND PROSECUTE APPEAL, § 640.
—— WANT OF JURISDICTION OF JUSTICE, § 641.
PROCEEDINGS FOR DISMISSAL, § 642.
—— TIME FOR DISMISSAL OR MOTION TO DISMISS, § 643.
JUDGMENT ON DISMISSAL, § 644.
EFFECT OF DISMISSAL AND ACTS CONSTITUTING DISMISSAL, § 645.
REINSTATEMENT, § 646.

Dismissal of action and nonsuit, see post, §§ 649–651.

Liability of sureties on bond on dismissal of appeal, see post, §§ 739, 740.

Necessity of filing transcript to give jurisdiction to dismiss appeal, see ante, § 605.

§ 638. Voluntary dismissal or discontinuance of appeal.

Dismissal of appeal to avoid judgment against appellant and sureties, see post, § 741.

[a] (Ill. 1887) An appellant from a justice's court to the county court has the right to dismiss his appeal, even though the other party, who has not appealed, is also dissatisfied with the justice's judgment.—Pacific Exp. Co. v. Peadro, 25 Ill. App. 75.

[b] (Iowa, 1875) An appeal from the judgment in a justice's court may be withdrawn, and an application to set aside the judgment be made, within the time fixed by statute for making such application, provided the appeal has not been perfected or the transcript sent up.—Park v. Ratcliffe, 42 Iowa, 42.

[c] (Kan. 1881) An appeal from a judgment of a justice of the peace may be waived by the party appealing at any time before trial begun in the district court.—Kansas City, Ft. S. & G. R. Co. v. Hammond, 25 Kan. 208.

[d] (Mich. 1896) Under How. Ann. St. § 7014, relating to appeals from a justice to the circuit court, and providing that "on filing the return of the justice the circuit shall become possessed of the cause the same as if it had been originally commenced in said appellate court," appellant cannot dismiss his appeal against appellee's objections.—Peterson v. Frey, 109 Mich. 689, 67 N. W. 974.

[e] (Mo. 1883) Where plaintiff appeals from the judgment rendered by a justice of the peace, he may dismiss his appeal.—Lee v. Kaiser, 80 Mo. 431.

[f] (Neb. 1893) A party appealing from a judgment of a justice of the peace to the district court may dismiss his appeal, without the consent of the appellee, at any time before the cause is submitted to the court or jury.—Eden Musee Co. v. Yohe, 37 Neb. 452, 55 N. W. 866.

[g] (N. C. 1841) Where an appeal was taken from the judgment of a justice of the peace, it was *held* that the parties might by consent, while the papers remained in the hands of the magistrate, set aside the appeal and have a new trial.—Wardens of Poor v. Cope, 24 N. C. 44.

[h] (Pa. 1885) A defendant has a right to abandon his appeal from a judgment of a justice of the peace before perfecting it by filing his transcript, and to elect his remedy by writ of certiorari within the period allowed by statute.—Wilcox v. Fowler, 2 Chest. Co. Rep. 497.

§ 639. Grounds for dismissal in general.

Abandoning set-off as ground for dismissal of appeal, see ante, § 485.

Amendment of amount of claim beyond jurisdiction of justice as ground for dismissal of appeal, see post, § 674.

Amount in controversy as grounds for dismissal of appeal, see ante, §§ 479–490.

Appeal by party not entitled as ground for dismissal of appeal, see ante, § 505.

Appearance on motion to dismiss appeal as waiver of right to dismissal, see ante, § 597.

Defective transcript as ground for dismissal of appeal, see ante, § 624.

Dismissal of appeal because not allowed by justice, see ante, § 522.

—— *for failure to file new pleadings, see* post, § 687.

—— *from judgments by confession, see* ante, § 496.

—— *from judgments by default, see* ante, § 495.

Failure of justice to certify that costs have been paid as ground for dismissal of appeal, see ante, § 548.

—— *of necessary parties to join in appeal as ground for dismissal of appeal, see* ante, §§ 517, 518.

—— *of transcript on appeal to contain judgment as ground for dismissal, see* ante, § 612.

—— *of transcript on appeal to contain pleadings as ground for dismissal, see* ante, § 610.

—— *of transcript on appeal to show presence of defendant at rendition of judgment below as ground for dismissal, see* ante, § 612.

—— *of transcript to show county of trial or court as ground for dismissal of appeal, see* ante, § 607.

—— *to enter or docket appeal in time as ground for dismissal, see* ante, §§ 592–594.

—— *to file supersedeas bond as ground for dismissal of appeal, see* ante, § 606.

—— *to file transcript as ground for dismissal of appeal, see* ante, §§ 619–623.

—— *to give bond on appeal as ground for dismissal, see* ante, §§ 550–578.

—— *to give proper notice of appeal as ground for dismissal, see* ante, §§ 579–591.

—— *to make sufficient affidavit as ground for dismissal of appeal, see* ante, §§ 534–542.

—— *to move for new trial or to set aside default as ground for dismissal of appeal, see* ante, § 515.

—— *to pay fees or costs as ground for dismissal of appeal, see* ante, §§ 543–549.

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—— *to take appeal in time as ground for dismissal of appeal, see* ante, §§ 524–533.

Falsity of affidavit for appeal pro forma pauperis as ground for dismissing appeal, see ante, § 544.

Filing set-off merely for purpose of obtaining appeal as ground for dismissal, see ante, § 485.

Judgments not final as grounds for dismissing appeal, see ante, § 490.

Void judgment as ground for dismissal of appeal, see ante, § 494.

Want of jurisdiction of justice as ground for dismissal of appeal, see ante, §§ 472–474.

Want of proper certificate to transcript on appeal as ground for dismissal, see ante, § 618.

[a] An appeal from a justice of the peace, if not taken in literal compliance with the statute, will be stricken from the docket of the appellate court.
—(Wis. 1850) Clark v. Miles, 2 Chand. 94, 2 Pin. 432;
(Wyo. 1875) Ivinson v. Pease, 1 Wyo. 277; Jenkins v. City of Cheyenne, 1 Wyo. 287.

[b] Whenever it is made to appear to the circuit court that an appeal from a justice of the peace is improperly depending before it, it is the duty of that court to dismiss it.
—(Ill. 1852) Edwards v. Vandemack, 13 Ill. (3 Peck) 633;
(N. J. 1829) Vandoren v. Vandoren, 10 N. J. Law (5 Halst.) 286.

[c] (Ala. 1840) On appeal from the judgment of a justice of the peace, where the trial is to be had de novo on the merits, it is error to quash the proceedings for a defect in the warrant.—McCrory v. Smith, 1 Ala. 157.

[cc] (Cal. 1855) Where the parties are in the county court on appeal for the purpose of trying the case de novo, it is the duty of the court to proceed with the trial on the merits of the case, and a judgment of dismissal, upon the ground that it did not appear that the defendants had notice of the trial before the justice of the peace, is erroneous and will be reversed. —Coyle v. Baldwin, 5 Cal. 75.

[d] (Cal. 1886) When the question heard and determined in the justice's court is made the subject of appeal, the appeal gave the court jurisdiction of the case, and, upon a sufficient showing in the statement, it must be considered, and not dismissed on the ground that "the appeal ought to have been taken on questions of law and fact."—Carlson v. Alameda County Superior Court, 70 Cal. 628, 11 Pac. 788.

[e] (Ind. 1838) Where judgment had been rendered by a justice for the plaintiff, a new trial granted, an appearance by the parties, a continuance at the instance of the plaintiff, judgment again for the plaintiff, and an appeal by the defendant, the court refused to set aside the appeal on the affidavit of the plaintiff that the first judgment was rendered in his absence and that the new trial was granted without his knowledge.—Jones v. Rodman, 4 Blackf. 492.

[f] (Ind. 1863) An appeal from a justice's decision to the circuit court will not be dismissed because the justice has not copied the plaintiff's cause of action on the docket.—Indianapolis & C. R. Co. v. Wilsey, 20 Ind. 229; Same v. Toon, Id. 230; Same v. Brinkman, Id.

[g] (Ind. 1870) Where judgment defendant makes application to the common pleas to be allowed to appeal from a justice, under 2 Gav. & H. St. p. 597, § 68, more than 30 days after the judgment, and fails to perfect his appeal by having the order to the justice to certify up the case issued and served, and by causing the justice to make out a transcript of the proceedings and judgment before him, and file it, with the original papers, in the office of the clerk of the common pleas, within a reasonable time, and until the case has been regularly called for trial, the appeal may be dismissed on motion of the adverse party.—Davis v. Luark, 34 Ind. 403.

[h] (Ind. 1875) Where, on appeal to the circuit court from a justice's judgment, there is a ground on which the appeal may be dismissed, and also a ground on which, if the appeal was properly perfected, the action might be dismissed, the court should dismiss the appeal, and not the action.—Hunter v. Thomas, 51 Ind. 44.

[i] (Ind. 1878) Where a justice of the peace made his finding and rendered judgment in a case before him more than four days after the trial of such case, it was *held* that when the case was appealed the judgment was opened and the case left pending, as if no judgment had ever been rendered, and that the rendition of a wrong judgment by a justice is no ground for dismissing a case on appeal.—State v. Brewer, 64 Ind. 131.

[j] (Ind. 1893) As objection to a justice's trial of a cause because of his disqualification may be waived, a motion in the circuit court to dismiss an appeal from the justice's judgment is properly denied, where the record does not show when defendant first acquired knowledge of the facts.—Baldwin v. Runyon, 8 Ind. App. 344, 35 N. E. 569.

[k] (Miss. 1847) It is error for an appellate court to dismiss an appeal from the judgment of a magistrate, unless it is shown affirmatively that the magistrate had exclusive jurisdiction of the case.—Agnew v. City of Natchez, 17 Miss. (9 Smedes & M.) 104.

[l] (Miss. 1867) Acts 1863, pp. 155, 156, § 18, providing for an appeal to the circuit court from a justice, requires the circuit court at the return of the appeal "to impanel a jury and hear and determine the cause anew on its merits in a summary way." *Held*, that under said act the circuit court cannot quash an appeal bond and dismiss a cause on account of errors in the trial before a justice.—Porter v. Fooshee, 41 Miss. 337.

[m] (Mo. 1866) Upon an appeal from a justice of the peace, the justice is required to file with the clerk of the appellate court a transcript of his docket entries and all the process and other original papers relating to the suit; and if the papers are filed, and afterwards lost, the appellant may have the lost record supplied, if he desires to prosecute his appeal, and if he fails to do this the other party will be entitled to an affirmance of his judgment; but it is error to dismiss the appeal because the original papers are not on file, when they have been lost.—Fanning v. Voelker, 39 Mo. 120.

[n] (Mo. 1892) Where, on appeal from a justice of the peace to the circuit court, the record does not show that any bond was given or affidavit made, as required by Rev. St. §§ 6328, 6330, or that any appeal was allowed by the justice, or that there was any effort to have an appeal allowed by the circuit court under section 6333, the circuit court has no jurisdiction to dispose of the case on its merits, and it should be stricken from the docket of that court.—Devore v. Staeckler, 49 Mo. App. 547.

[o] (N. Y. 1828) If the common pleas allow a justice to amend his judgment so as to make it conform to the appeal bond, the supreme court, on proper affidavit, will issue a manda-

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mus to quash the appeal.—People v. Tioga Common Pleas, 1 Wend. 291.

[p] (N. Y. 1837) Where, after a judgment in a justice's court and previous to an appeal, the suit between the parties is settled, but the defendant prosecutes an appeal, the plaintiff cannot allege the accord and satisfaction by way of plea puis darrein continuance. The common pleas, on motion, will dismiss the appeal.—Schenck v. Lincoln, 17 Wend. 506.

[q] (N. C. 1870) An appeal from an approved judgment of a justice, if regular, should not be dismissed. There should be a judgment of affirmance.—Barringer v. Holbrook, 64 N. C. 540.

[r] (N. C. 1877) An appeal from a justice is properly dismissed, where appellant's ground of appeal is simply that the only notice he had of the action was the service of the summons.—Sparrow v. Davidson College, 77 N. C. 35.

[s] (Pa. 1873) The appellee has no control over proceedings relating to an appeal, and an appeal which has been perfected by him, and not by appellant, will be dismissed.—Dietrick v. Mann, 1 Leg. Chron. 159.

[t] (Pa. 1882) Though it appear on an appeal from a justice court that the defendant understood the justice to refuse to allow him to appear by counsel on the trial of the cause, the appeal will not be dismissed for this act of the justice.—McIlvane v. Moran, 1 Chest. Co. Rep. 458.

[u] (Tex. 1847) Where judgment was confessed in a suit on a note before a justice of the peace, and an appeal was taken to the district court, by whom it was dismissed and a procedendo awarded, it was *held* to be error to dismiss the appeal; but the district court should have rendered judgment according to section 58 of the act of 1846.—Wahrenberger v. Horan, 2 Tex. 291.

[v] (Tex. 1877) A trial in a county court on appeal from a justice's court is de novo, and hence it is error to dismiss because of defective service in the justice's court.—Boaz v. Paddock, 1 White & W. Civ. Cas. Ct. App. § 39.

[w] (Vt. 1846) An action was commenced against an infant before a justice of the peace, and judgment was rendered against him, and he appealed. The case was entered in the county court, and a judgment was there rendered against him. The infant had appeared by himself before the justice, and by attorney before the county court, and not by guardian. On writ of error brought for this cause, the supreme court vacated the judgment, and remanded the case to the county court, and a guardian ad litem was then appointed by the county court, who moved to dismiss the appeal, for the reason that it was taken and entered in the county court by attorney, and not by guardian. *Held*, that the appeal should not be dismissed.—Barber v. Graves, 18 Vt. 290.

[x] (Vt. 1876) A defendant's appeal from a judgment of a justice of the peace will not be dismissed, on motion, because the copies of appeal do not show a right of appeal. The right of appeal may grow out of the character of the defense, and not appear of record. The presumption is in favor of the regularity of an appeal; and, if the appellee alleges a want of right to appeal not apparent of record, he must plead such facts as, in connection with the record, will show such want of right.—Johnson v. Williams, 48 Vt. 565.

[y] (Wis. 1870) An appeal from the judgment of a justice's court cannot be dismissed, for the reason that the appellant failed to prove any cause of action in the court below.—Hicken v. Alden, 26 Wis. 40.

§ 640. —— Failure to appear and prosecute appeal.

Discretion of court to try cause anew or dismiss appeal on default of appellant, see post, § 657.

Dismissal for want of prosecution where appellee has not been summoned, see post, § 658.

Failure to file new pleadings on appeal as failure to prosecute appeal, see post, § 687.

—— *to prosecute appeal as ground for affirmance of judgment, see* post, § 728.

[a] (Ga. 1886) An appeal from a judgment of a justice of the peace should not be dismissed for nonappearance of appellant, as the appeal is a de novo investigation.—Griffin Marble, etc., Works v. Padgett, 77 Ga. 497; Singer Mfg. Co. v. Walker, Id. 649.

[b] (Ill. 1859) If the appellant fails to appear, the appeal may be dismissed, and the judgment of the justice of the peace affirmed.—Shook v. Thomas, 21 Ill. (11 Peck) 87.

[c] (Ill. 1863) Where an appeal has been perfected, but no notice has been given, the appellee, on entering his appearance, may have the appeal dismissed for want of prosecution.—Boyd v. Kocher, 31 Ill. 295.

[d] (Ill. 1877) Appellees are not entitled to a dismissal on appeal from a justice to the circuit court for failure to enter appellant's attorney's name on the docket, where appellant states that he is ready to try his own case.—Gregson v. Allen, 85 Ill. 478.

[e] (Ill. 1880) Under Rev. St. 1874, p. 648, on appeal from a justice of the peace, the trial should proceed in the circuit de novo. The appeal cannot be dismissed for want of prosecution, without requiring the plaintiff to prove a cause of action.—Eichelberger v. Garvin, 7 Ill. App. (7 Bradw.) 129.

[f] (Ill. 1880) It is error to dismiss an appeal from a justice on a preliminary call of the docket, in the circuit court, in the absence of any rule providing for such preliminary calls.—Goode v. LeClair, 10 Ill. App. (10 Bradw.) 647.

[g] (Ill. 1891) Where counsel appears for appellant on appeal from a judgment of a justice for plaintiff, it is error to dismiss the appeal, with procedendo, for want of prosecution, against the objection of appellant's counsel. Plaintiff should be required to prove up his case.—Brown v. Cook, 37 Ill. App. 608.

[h] (Ill. 1895) Under a published notice that a general call of cases would begin on a certain day, and that when a case was called it might be stricken from the docket or dismissed for want of prosecution, there was no authority for dismissing an appeal from a justice of the peace.—Gottschalk v. Lembke, 61 Ill. App. 236.

[i] (Ill. 1895) Where it appears from the record that on appeal from justice's court the party appealing was duly called in court, and failed to appear, an order dismissing such appeal will be affirmed.—Cronin v. Sullivan, 61 Ill. App. 338.

[j] (Mich. 1873) A rule of the circuit court which provides for the dismissal of appeals from a justice court on motion, where the cause has not been noticed for trial for some term not later than the fourth term after the entry of the cause in the circuit, does not apply to a case which has once been duly noticed within the prescribed time, though there has

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subsequently been a delay without notice for the time prescribed.—Willis v. Gimbert, 27 Mich. 91.

[k] (N. J. 1837) On an appeal from the small cause court to the common pleas, the appellant, although defendant below, must appear and prosecute his appeal, or it will be dismissed. —Lum v. Price, 16 N. J. Law (1 Har.) 195.

[l] (N. C. 1878) Defendant, who had appealed from a justice's judgment in open court, afterwards caused the justice to delay in sending up the papers by telling him not to send them. Finally he determined to prosecute the appeal, and filed the necessary bond. *Held*, that his acts did not show an intention to abandon the appeal, and the refusal to dismiss on that ground was not error.—Suttle v. Green, 78 N. C. 76.

[m] (Wis. 1862) An appeal from a justice of the peace was properly dismissed on motion of the appellee, under Rev. St. 1858, c. 120, § 216, when two terms of the circuit court had passed after return made without the case being noticed for trial by either party.—Vibbert v. Shepard, 15 Wis. 106.

[n] (Wis. 1884) Rev. St. § 3766, provides that an appeal from a justice's court, not brought to a hearing before the end of the second term, shall be dismissed. Respondent noticed for trial a case thus appealed, and appellant made an attempt to change the venue, which attempt was ineffectual, because the papers were not transmitted within the time required by statute. At the third term respondent again noticed the case for trial, and, when it was called for trial, moved its dismissal on the ground that it had not been brought to a hearing before the end of the second term. *Held*, that respondent had not waived his right so to move, and that the appeal was properly dismissed.—Holt v. Coleman, 61 Wis. 422, 21 N. W. 297.

[o] (Wis. 1885) Under Rev. St. 1878, § 3766, providing for dismissal of an appeal if the cause is not brought to a hearing before the end of the second term after the filing of the justice's return, unless the court shall continue the same for good cause shown, where the cause is continued on stipulation because of the sudden death of one of the attorneys for appellee, the appeal is saved.—Platto v. Western Union Tel. Co., 64 Wis. 341, 25 N. W. 421.

[p] (Wis. 1886) Under Rev. St. § 3766, providing that, "if neither party shall bring the appeal to a hearing in the appellate court before the end of the second term after filing the return therein," the appeal shall be dismissed, an appeal by defendant from a judgment by default before a justice should be dismissed for such failure, notwithstanding that at the first term plaintiff procured a continuance upon defendant being permitted to answer, neither party noticing the case for trial at the following term.—Bates v. Steele, 65 Wis. 355, 27 N. W. 42.

[q] (Wis. 1889) An appeal from a justice was noticed for trial at the first term by appellant, and after the evidence was given, and argument made, respondent moved to dismiss because the return showed that the appeal was not taken in time. The jury was discharged, and cause continued, with leave to procure an amended return, which was procured, and showed that the appeal was in time. *Held* that, though the appeal was not brought to trial at the following term, appellant had complied with Rev. St. § 3766, which requires the appeal to be brought to a hearing before the end of the second term.—Newman v. Board, 74 Wis. 303, 41 N. W. 961.

[r] (Wis. 1892) On motion in the superior court to dismiss an appeal from a justice's court, where it appeared that appellant served due notice of trial for the third term of court after the hearing before the justice; that service thereof was admitted; that appellant's attorney failed to notice the cause for trial sooner because of statements of appellant that he believed the matter would be discontinued or settled; and that appellant was given no encouragement by respondent that the case would be so disposed of,—the court properly granted the motion, under Rev. St. § 3766, requiring appeals from justices' courts to be brought to a hearing before the end of the second term.—Fred Miller Brewing Co. v. Quirk, 82 Wis. 197, 52 N. W. 93.

[s] (Wis. 1892) Where an appeal from a justice of the peace to the circuit court is continued on application of the plaintiff, and at the next term the case was not brought to trial, and the appeal was dismissed for that reason under the statute, the order dismissing the appeal should be set aside, where the failure to notice the case for trial was on account of plaintiff's attorneys believing that an understanding had been made in open court with the opposing counsel that the case should not be brought to trial at that term, but await the determination of another action between the same parties then pending.—Stone v. Halpin, 88 Wis. 483, 53 N. W. 691.

§ 641. —— Want of jurisdiction of justice.

[a] (Ill. 1850) By the statute regulating appeals the circuit court cannot dismiss an appeal from a justice of the peace, unless it appears from the evidence that the justice had no jurisdiction of the matter in controversy; and in all cases the court must hear the case appealed on its merits, unless the want of jurisdiction appears from the evidence.—Ballard v. McCarty, 11 Ill. (1 Peck) 501.

[aa] (Ill. 1861) Upon an appeal from a justice of the peace, the circuit court should try the cause de novo, and it is error to dismiss the suit because the justice rendered judgment against two defendants, when he had only obtained jurisdiction over the person of one of them.—Stephens v. Cross, 27 Ill. (17 Peck) 35.

[b] (Ill. 1891) A complaint in writing in forcible detainer before a justice being jurisdictional, where it does not appear on appeal that the complaint was filed, the case will be dismissed. It is erroneous in such case to dismiss the appeal.—Abbott v. Kruse, 37 Ill. App. 549.

[c] (Mass. 1860) If a justice of the peace has jurisdiction of any one of the causes of action counted upon, the action, after the defendant's appeal, cannot be dismissed by the superior court for want of jurisdiction.—Harris v. Doggett, 82 Mass. (16 Gray) 118.

[d] (Mich. 1880) A case commenced before a justice by warrant, under which defendant was brought into court, was by stipulation adjourned to a certain time, without the appearance of either party. The return showed that the parties appearing at the hearing were attorneys. Judgment for defendant was rendered after a four days' adjournment from the hearing. No objection to adjournment was made. *Held* that, as it did not appear that defendant was in custody at the time of the hearing, it could not, in the absence of a return of the justice showing that fact, be assumed that he was, so as to authorize a dismissal of plaintiff's appeal on the ground that the justice lost jurisdiction by delaying his decision while defendant was in custody.—Barker v. Wheeler, 44 Mich. 176, 6 N. W. 234.

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[e] (N. Y. 1888) Code Civ. Proc. § 3062, provides for dismissal of an appeal from a justice's court only in case the action is not brought to a hearing before the end of the second term after appeal taken. Section 3063 provides that the judgment may be either affirmed or reversed in whole or in part. *Held*, that such appeal cannot be dismissed on the ground that the justice had no jurisdiction to enter judgment at the time he entered it.—Kuklo v. Kleis, 50 Hun, 600, 2 N. Y. Supp. 358, 15 Civ. Proc. R. 431.

[f] (Ohio, 1833) An appeal will not be quashed for want of jurisdiction of the justice, unless such want appear on the face of the proceeding, or is stated as the ground for quashing.—Paine v. Portage County Com'rs, Wright, 417.

[g] (Wis. 1861) Where a judgment of a justice is invalid by reason of having been rendered at an improper adjournment of the court, the remedy of the defendant is by certiorari, or a suit to enjoin its collection; and if the record on appeal showed a proper adjournment, he could not then move to dismiss, and sustain his motion by affidavits.—Mahr v. Young, 13 Wis. 634.

§ 642. Proceedings for dismissal.

[a] (Ill. 1859) On a motion to dismiss an appeal for want of jurisdiction in the justice, evidence must be heard, before it can be determined that a justice of the peace had not jurisdiction.—Swingley v. Haynes, 22 Ill. (12 Peck) 214.

[b] (Ill. 1876) It is the duty of one appealing from a justice's judgment to cause the papers in the case to be deposited in the office of the clerk of the circuit court, and to advance such fees as are required by statute to be prepaid; and upon his failing to do so the adverse party may file the papers and advance the fees, and upon due notice obtain a rule requiring the fees so advanced to be refunded by the appellant, whose appeal may be dismissed for a disobedience of the rule.—Garrity v. Bash, 84 Ill. 73.

[c] (Ill. 1876) Under Rev. St. 1845, §§ 60, 62, regulating proceedings before justices of the peace, making the transcript on appeal take the place of a declaration, if the papers have been lost, a party wishing to dismiss the appeal must first have the judgment restored.—Reed v. Driscoll, 84 Ill. 96.

[d] (La. 1886) On motion to dismiss an appeal from a justice's judgment to the district court, on the ground that the matter in dispute is below the jurisdiction limit, the appellant should be allowed to offer evidence to maintain his appeal, unless his want of right to the appeal conclusively appears from the face of the papers.—State ex rel. Fontenot v. Judge of Thirteenth Judicial Court, 38 La. Ann. 718.

[e] (Me. 1857) A mere copy of a recognizance on appeal from a justice's court cannot be used to contradict the original, on motion to dismiss the appeal for want of proper recognizance.—Inhabitants of Stetson v. Inhabitants of Corinna, 44 Me. 29.

[f, g] (Minn. 1866) On appeal from a judgment of a justice of the peace, plaintiff made a motion to dismiss the appeal, which was granted. Defendant's attorney was present, and assented to the dismissal. *Held*, that defendant's right to a notice of the motion to dismiss was waived.—McFarland v. Butler, 11 Minn. 72 (Gil. 42); Id., 11 Minn. 77 (Gil. 44).

[h] (Or. 1890) Where respondents filed a motion to dismiss an appeal, on the ground of an alleged defect in the undertaking, and the certificate of the clerk of the circuit court to the transcript showed that an undertaking had been given, with a surety named therein, and that the undertaking was given for an appeal, and for a stay of proceedings also, as provided by Code, subd. 1, § 514, and there was no authenticated proof as to the terms and conditions of the undertaking, the motion will not be considered.—Bilyeu v. Smith, 18 Or. 335, 22 Pac. 1073.

[i] (Pa. 1880) Where the record of a justice of the peace fails to show that the costs have been paid, which payment is a prerequisite to the right of appeal, the affidavit of a justice is admissible, on motion to dismiss the appeal, to show that the costs have been paid.—Ober v. Koser, 12 Lanc. Bar, 104.

[j] (Pa. 1883) An appeal allowed nunc pro tunc will not be stricken off on affidavits.—Smith v. Finn, 5 Law T. (N. S.) 78; Lowery v. Collins, Id. 97.

[k] (Pa. 1887) On an application to strike off an appeal in justice's court on the ground that the judgment is under the amount of the county court's jurisdiction, parol evidence will be heard to determine the sum in controversy, though it might be inferred from the transcript that the original demand was the same as that of the bill presented and sustained by proof of the same on the trial below.—Stollars v. East Finley Tp., 3 Pa. Co. Ct. R. 209.

[l] (Pa. 1887) On a motion to strike off an appeal from the justice court on the ground that the set-off by defendant was not offered in good faith, but for the purpose of securing an appeal, the court will not pass on the merits of the set-off, but only on the question of its effect.—Baldwin v. Burgess, 1 Wilcox, 223.

[m] (Pa. 1893) On appeal by defendant from a justice, a judgment of non pros. by the court of common pleas, in default of appearance and affidavit of claim, without notice to plaintiff, is irregular.—Hubert v. Weger (Com. Pl.) 14 Pa. Co. Ct. R. 128.

[n] (Pa. 1896) The record of a magistrate showed an agreement to submit matters to referees, and abide their decision. From this defendant appealed, and plaintiff took a rule to show cause why the appeal should not be stricken off. Defendant filed a denial on oath of his attorney that he agreed to abide the decision of the referees. *Held*, that it was error to discharge the rule to show cause.—Hindman v. Doughty, 172 Pa. 573, 33 Atl. 563, 37 Wkly. Notes Cas. 440.

[o] (S. D. 1890) If, on appeal from a justice of the peace, the appellant does not appear when the case is called for trial, the adverse party may proceed with the case, and take a dismissal of the complaint or verdict or judgment, as the case may require, under Comp. Laws Dak. § 5035; but he cannot have a dismissal of the appeal except on notice under section 6136.—Myers v. Mitchell, 1 S. D. 249, 46 N. W. 245; Keehl v. Schaller, 1 S. D. 290, 46 N. W. 934.

[p] (Tex. 1892) A motion made in a county court to dismiss an appeal pending therein from a justice's court is a pleading, and should be in writing.—Tadlock v. Walden (App.) 19 S. W. 330.

[q] (Tex. 1894) A motion to dismiss an appeal from a justice for want of jurisdiction should be determined on the case made by plaintiff, in the absence of pleading and proof to the contrary.—Hilderbrand v. Walter A. Wood Mowing & Reaping Mach. Co., 8 Tex. Civ. App. 132, 27 S. W. 826.

[r] (Tex. 1895) On a motion to dismiss an appeal from a justice, on the ground that the

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bond filed was not for double the amount of the judgment appealed from, the court may reduce the judgment by striking therefrom an improper charge in the bill of costs.—Porter v. Russek (Civ. App.) 29 S. W. 72.

[s] (W. Va. 1888) The opposite party to the one who has obtained an appeal from a justice's judgment to a circuit judge, may move to have it dismissed, as improvidently awarded, because good cause was not shown for not having taken such appeal within said 10 days, by the written proof, including the affidavits in writing on which the judge acted in granting such appeal.—Hubbard v. Yocum, 30 W. Va. 740, 5 S. E. 867.

§ 643. —— Time for dismissal or motion to dismiss.

[a] (Ala. 1827) After the term to which an appeal from a justice of the peace is returned, it cannot be dismissed for the insufficiency of the appeal bond, unless the motion to dismiss is entered at the return term.—Jenkins v. Cauley, 1 Stew. 61.

[b] (Ala. 1845) Where there is a defect in proceedings removed by appeal or certiorari from a justice of the peace to the circuit or county court, a motion to dismiss, if available, should be made at the first term after the parties are in court and before a continuance of the cause.—Alford v. Colson, 8 Ala. 550.

[c] (Ill. 1881) Where the transcript and papers on appeal from a justice of the peace were filed in court less than 10 days before the beginning of the term, the appeal cannot be dismissed at that term.—Steinborn v. Thomas, 8 Ill. App. (8 Bradw.) 515.

[d] (Ill. 1889) A motion to strike a cause from the docket, when made after full appearance, being dilatory, comes too late, and will not be granted.—Metropolitan Life Ins. Co. v. Broach, 31 Ill. App. 496.

[e, f] (Iowa, 1854) The plaintiff appealed from the decision of a justice of the peace in favor of the defendant. In the district court the defendant's motion to dismiss on the ground of a variance between the petition and notice was granted, though not made until after a change of venue, a continuance, and other proceedings in which the defendant had appeared had been had. *Held*, that the motion was made too late, and that the order granting it must be reversed.—Frink v. Whicher, 4 G. Greene, 382.

[g] (Mass. 1850) Where, in an action pending in the court of common pleas on appeal from a judgment of a justice of the peace, it appears that the justice had an interest in the suit and instigated its prosecution, it should be dismissed, though the motion therefor is not made until the case is open to the jury, and the ground of the motion was known to the defendant and his attorneys four days before.—Richardson v. Welcome, 60 Mass. (6 Cush.) 331.

[h] (Mass. 1857) A motion to dismiss an action in the court of common pleas, for the refusal of the justice of the peace before whom it has been commenced to order a jury, cannot be entertained after the first term, even if a similar motion has been made before the justice.—Trees v. Rushworth, 75 Mass. (9 Gray) 47.

[i] (Mass. 1859) A motion of the plaintiff to dismiss an appeal from a judgment of a justice of the peace, on the ground that his record does not show that an appeal was taken, need not be made at the first term.—Moore v. Lyman, 79 Mass. (13 Gray) 394.

[j] (Mass. 1890) After a supplemental complaint has been filed in the superior court, and defendant has appeared there by attorney, a motion to dismiss the original complaint, because it does not appear to have been taken and sworn to before a court or magistrate authorized to take it, comes too late.—Davis v. McEnaney, 150 Mass. 221, 23 N. E. 221.

[k, l] (N. C. 1859) Where an appeal from a justice's judgment had pended for several terms in the county court, before a motion to dismiss for irregularity in taking the appeal was made, and had afterwards pended several terms in the superior court before the like motion was made, it was *held* to have been such an acquiescence as waived the irregularity, and that the motion was properly refused.—McMillan v. Davis, 52 N. C. 218.

[m] (N. C. 1860) Where a plaintiff in a warrant failed to appeal on a judgment rendered against him before a justice, at the rendition of such a judgment, or to make application for time to appeal, but appealed several days afterwards, it was *held* that a motion to dismiss the appeal at the second term after it was returned to the court was in apt time.—Council v. Monroe, 52 N. C. 396.

[n] (Pa.) A motion to quash an appeal from the judgment of a justice of the peace will not be entertained after the case has been referred to arbitrators, a trial had upon the merits, and an award filed.—(1846) Marks v. Swearingen, 3 Pa. (3 Barr) 454; (1848) Greenawalt v. Shannon, 8 Pa. (8 Barr) 465.

[o] (Pa. 1865) A motion to quash suspends proceedings in the case; and a judgment of non pros. for want of a declaration cannot be entered while it is pending, though the time in which it should otherwise have been filed has passed.—Craig v. Brown, 48 Pa. (12 Wright) 202.

[p] (Pa. 1874) Where it appears on appeal from a judgment of a justice of the peace that the amount in controversy exceeded the jurisdiction of the justice, the appeal will be dismissed, even after an arbitration of the cause.—Baer v. Garrett, 2 Leg. Chron. 207.

[q] (Pa. 1882) The court will not strike off an appeal after plea pleaded.—Executors v. Stove Co., 4 Law T. (N. S.) 13.

[r, s] (Tex. 1895) An appeal from a justice's to a county court may, on failure of appellant to give a proper bond, be dismissed before the term at which the case would be triable.—Bell v. Brady, 11 Tex. Civ. App. 526, 33 S. W. 303.

[t] (Wis. 1862) A motion to dismiss an appeal under Rev. St. c. 120, § 216, made before "the end of the second term," is premature, and will be denied.—Webster v. School Dist. No. 4, 16 Wis. 316.

§ 644. Judgment on dismissal.

Judgment on appeal bond on dismissal of appeal, see post, § 744.

[a] (U. S. 1831) Where an appeal from a justice of the peace is invalid, because not taken in time, it can only be dismissed with costs, and it is error to give judgment for the money in controversy.—Jacobs v. Jacobs, Fed. Cas. No. 7,161a [Hemp. 101].

[b] (Ill. 1894) Where a case appealed from a justice's to a circuit court is dismissed for want of prosecution, plaintiff is entitled to a procedendo to the justice without proof.—Wilson v. Moses, 55 Ill. App. 230.

[c] (Ky. 1822) If the circuit court dismiss an appeal from a justice, they should not affirm his judgment, unless the cause is so before them that they could regularly try it.—Chambers v. O'Bannon, 11 Ky. (1 Litt.) 194.

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[d] (Mass. 1816) An appeal from a justice to the common pleas should not be dismissed without formal judgment being entered, since the effect of the judgment was destroyed by the appeal.—Keen v. Turner, 13 Mass. 265.

[e] (Mo. 1830) After an appeal from a justice of the peace in an action on a note has been dismissed by the circuit court, such court cannot render a judgment for the debt.—Thompson v. Curtis, 2 Mo. 209.

[f] (Mo.) It is error for the circuit court to dismiss an appeal, and to reverse the judgment of a justice; for, by dismissing the appeal, the court loses cognizance of the subject, and the judgment of the justice stands in full force.—(1831) Barns v. Holland, 3 Mo. 47; (1833) Runkle v. Hagan, 3 Mo. 234; (1848) Manion v. State, 11 Mo. 578.

[g] (Mo. 1876) When an appeal from a justice is dismissed, the court has no authority to affirm the judgment of the justice.—Hooker v. Atlantic & P. R. Co., 63 Mo. 449.

[h] (N. J. 1827) It is not necessary that the common pleas should state on the record the reason for dismissing the appeal.—Obert v. Whitehead, 9 N. J. Law (4 Halst.) 244.

[i] (Or. 1875) Where the circuit court dismisses an appeal for want of jurisdiction, it has no authority to render any further judgment than that of dismissal; and an affirmance of the judgment below by such circuit court is error.—Long v. Sharp, 5 Or. 438.

[j] (Tenn. 1880) Where, in the circuit court, an appeal from the judgment of a justice of the peace is dismissed because the record shows no appeal prayed or granted, the proper judgment is a procedendo, and not an affirmance.—Jackson v. Baxter, 73 Tenn. (5 Lea) 344.

[k] (Tenn. 1890) Where an appeal is taken from the judgment of a justice, but not within two days, as required by the statutes, so that the appellate court acquires no jurisdiction, the proper judgment therein is a "dismissal for want of jurisdiction," and costs, as provided by Mill. & V. Code, § 3940; and section 3861, which provides that "if the appeal is dismissed for any cause the appellee is entitled to an affirmance of the judgment below, with costs," does not apply to such a dismissal.—Douglass v. Neguelona, 88 Tenn. 769, 14 S. W. 283.

[l] (Tex. 1885) The district court cannot, on dismissing an appeal from a justice's court, order that the dismissal be without prejudice to the judgment rendered below.—Bender v. Lockett, 64 Tex. 566.

[m] (Tex. 1893) Though a county court, on dismissing an appeal from a justice of the peace, is not authorized to award a writ of procedendo, an order in its judgment that "the justice court proceed with the execution of its judgment" is mere surplusage, and harmless error, and does not vitiate the rest of the judgment.—Llano Improvement & Furnace Co. v. White, 5 Tex. Civ. App. 109, 23 S. W. 594.

[n] (Vt. 1829) The judgment of the county court dismissing an appeal is conclusive until reversed on error or removal of the cause to the supreme court.—Loveland v. Burton, 2 Vt. 521.

[o] (Wis. 1855) If an appeal from the judgment of a justice of the peace is improperly perfected, and for that reason dismissed by the circuit court, that court has no jurisdiction to render judgment in favor of plaintiff for the amount recovered before the justice, with costs.—Shiff v. Brownell, 4 Wis. 285.

[p] (Wis. 1863) On dismissing an appeal from a justice of the peace by the plaintiff in an action for the recovery of personal property, it was error for the circuit court to render a judgment against the plaintiff; and where the judgment of the justice was for nominal damages and costs in favor of the defendant, with an order that the constable deliver the property to him, and that of the circuit court, on dismissing the appeal, was for a return of the property or its value, etc., the error was material, and the latter judgment must be reversed.—Falvey v. O'Brien, 17 Wis. 188.

§ 645. Effect of dismissal and acts constituting dismissal.

[a] (Ark. 1856) Where a judgment rendered by a justice of the peace is brought into the circuit court by appeal, and that court adjudges that the appellant has lost his right of appeal by his own laches, and dismisses the case, there is no mode provided by which the appellant can obtain a trial de novo.—Hill v. Steel, 17 Ark. 440.

[b] (Ind. 1836) If an appeal to the circuit court from the judgment of a justice of the peace be dismissed by the appellant before the defendant has appeared, the appellant is not subject to the payment of a docket fee.—Cassaday v. Reid, 4 Blackf. 178.

[c] (Iowa, 1866) An order made during the term, dismissing an appeal, is binding, notwithstanding the failure of the judge to sign the record.—O'Hare v. Leonard, 19 Iowa, 515.

[d] (Iowa, 1887) An action was brought against a justice for unlawfully issuing an execution after the plaintiff had appealed, but by his own negligence had failed to perfect the appeal, and the term of court at which such appeal could have been tried had begun. *Held*, that the plaintiff must be deemed to have abandoned his appeal, and that the action would not lie.—Goodman v. Allen, 72 Iowa, 616, 34 N. W. 445.

[e] (Kan. 1880) Where the plaintiff put in evidence a judgment in replevin rendered before a justice and an appeal therefrom, and a subsequent dismissal at the costs of the plaintiff were also shown, *held*, that the court erred in refusing to instruct that the appeal and dismissal operated to vacate the justice's judgment.—Hodgin v. Barton, 23 Kan. 740.

[f] (Kan. 1881) The waiver of an appeal from a justice by the appellant restores the judgment below in the same manner as if no appeal had been taken.—Kansas City, Ft. S. & G. R. Co. v. Hammond, 25 Kan. 208.

[g] (Ky. 1867) The dismissal of an appeal by the court of common pleas per se deprives that court of jurisdiction over the case, and remits it to the magistrate whose judgment has been appealed from; and thereafter that court should refuse a writ of prohibition against an enforcement of the judgment.—Olmstead v. Mason, 66 Ky. (3 Bush) 603.

[h] (Mich. 1880) Discontinuing a suit after appeal from a justice court, where judgment was rendered for defendant for costs, is not a discontinuance of the appeal, within Comp. Laws, § 5456, providing that, on the discontinuance or dismissal of an appeal from a justice, the justice shall proceed as if it never had been taken.—Franks v. Fecheimer, 44 Mich. 177, 6 N. W. 215.

[i] (Mo. 1883) Where plaintiff dismisses his appeal from a justice, it vacates the judgment below, and he may sue again.—Lee v. Kaiser, 80 Mo. 431.

[j] (N. C. 1853) Where a party, after appealing from the judgment of a justice, countermanded the appeal, the judgment which had been vacated by the appeal was restored to its

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former force.—Sturgill v. Thompson, 44 N. C. 392.

[k] (N. C. 1857) Where a judgment rendered before a justice of the peace is appealed from, and the parties by consent withdraw the appeal, the judgment is restored.—Mathis v. Bryson, 49 N. C. 508.

[l] (Tex. 1885) Where notice of appeal from the judgment of a justice is given, and an appeal bond filed, the county court is not deprived of jurisdiction by the appellant subsequently placing in the papers in the cause a writing abandoning his appeal, and agreeing that execution upon the judgment might issue instanter, where neither the justice nor the appellee had any notice of the same.—Curtis v. Bernstein, 2 Willson, Civ. Cas. Ct. App. § 671.

§ 646. Reinstatement.

[a] (Cal. 1868) The county court having final jurisdiction to dismiss an appeal from a justice of the peace, mandamus will not lie to compel a reinstatement, even though the dismissal was erroneous.—Lewis v. Barclay, 35 Cal. 213.

[b] (Ill. 1888) A complaint that the circuit court irregularly dismissed an appeal from a justice for want of prosecution comes too late at a subsequent term.—Hunt v. Baldwin, 27 Ill. App. 446.

[c] (Ill. 1889) When a county court sets aside an order dismissing an appeal from a justice, it may require the costs for the term to be paid 10 days before the first day of the next term.—Buettner v. Village of Percy, 31 Ill. App. 389.

[d] (Kan. 1889) Where defendant appeals from the judgment of a justice to the district court, and does not prosecute his appeal, and the case remains on the docket for more than eight months, when it is called for trial and the appeal dismissed, and afterwards defendant moves to set aside the order of dismissal, and shows that he was necessarily absent from the state, on account of sickness in his family, but it appears that he left 17 days before the case was called for trial, without employing any one to take charge of his case, depending upon a newspaper to give him the necessary information, an order of the district court overruling defendant's motion is not error.—Byington v. State Journal Co., 40 Kan. 622, 20 Pac. 514.

[e] (Mich. 1883) Where an appeal from a judgment of a justice of the peace has been dismissed for nonpayment of the entry fee, it may be reinstated, in the discretion of the circuit judge, upon satisfactory excuse for the default, notwithstanding the filing of a transcript of the judgment and the issuance of execution thereon.—Aldrich v. Clinton County Circuit Judge, 49 Mich. 609, 14 N. W. 565.

[f] (Mo. 1887) An appeal from a justice having been properly dismissed by the circuit court on the record before it, it is not error to refuse to reinstate the appeal, on a showing that the record was not correct, where the facts claimed as showing indulgence in the prosecution of the appeal are controverted by opposing affidavits.—Bullock v. Cook, 28 Mo. App. 222.

[g] (N. J. 1848) Where an appeal from a justice has been dismissed because of failure of appellant to rule the justice to return the appeal papers at the next term, but the justice returns them without a rule at such term, mandamus will issue to restore the appeal.—Ferguson v. Kays, 21 N. J. Law (1 Zab.) 431.

[h] (N. J. 1870) Where an appeal is taken from a judgment of a justice who neglects to certify his transcript, and appellant is prevented by surprise, and without fault on his part, from obtaining a rule on the justice requiring him to amend, and the appeal is dismissed, mandamus lies to compel the reinstatement of the appeal.—Hockenbury v. Alpaugh, 34 N. J. Law (5 Vroom) 342.

[i] (Tex. 1878) Mandamus will not lie to compel a county judge to vacate a judgment rendered by him, dismissing an appeal from a justice's court.—Porter v. Klahn, 1 White & W. Civ. Cas. Ct. App. § 528.

11. PROCEEDINGS PRELIMINARY TO HEARING, AND HEARING.

PROCEEDINGS PRELIMINARY TO HEARING, § 647.
— CHANGE OF VENUE, § 648.
DISMISSAL OF ACTION AND NONSUIT, § 649.
— CONDITION OF CAUSE, § 650.
— GROUNDS FOR DISMISSAL OR NONSUIT, § 651.
HEARING IN GENERAL, § 652.
TIME OF HEARING, § 653.
CONTINUANCES, § 654.

§ 647. Proceedings preliminary to hearing.

[a] (Ala. 1844) Where several suits are depending between the same parties on appeal or by certiorari from the judgment of a justice of the peace, the court may, at the instance of either party, direct a consolidation, unless the party objecting can show that he will in some way be prejudiced thereby.—Cooper v. Maddan, 6 Ala. 431.

[b] (Mo. 1893) On appeal to the circuit court from a justice's judgment on a note, against a person whose name is on the back of the note above the payee's name, plaintiff may be required to elect, if he has not done so, whether he will seek to charge defendant as joint maker, indorser, surety, or guarantor, and he will be bound by such election.—Barnett v. Nolte, 55 Mo. App. 184.

[c] (N. Y. 1827) The common pleas may appoint a guardian ad litem for infants, on appeal, though none was appointed in the justice's court.—Moody v. Gleason, 7 Cow. 482.

§ 648. —— Change of venue.

Notice of motion for change of venue on appeal as substitute for notice of appeal, see ante, § 589.

[a] (Ark. 1893) A change of venue may be had in an action pending in the circuit court on appeal from a justice of the peace.—Hurley v. Bevens, 57 Ark. 547, 22 S. W. 172.

[b] (Cal. 1886) Const. art. 6, § 5, enacting that the superior courts in California "shall have appellate jurisdiction in such cases arising in justice's and other inferior courts in their respective counties as may be prescribed by law," confers no jurisdiction on a superior court to which an action has been appealed from a justice's court in the same county, where it was properly commenced, to change the place of trial to the superior court of another county of which defendant is a resident.—Gross v. Superior Court, 71 Cal. 382, 12 Pac. 264.

[c] (Cal. 1887) Under Const. art. 6, § 5, which provides that the superior courts "shall have appellate jurisdiction in such cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law," that part of Code Civ. Proc. § 980, which declares that "the provisions of this Code as to changing the place of trial * * * are applicable to trials on appeal to the superior court," is unconstitutional; and where an action tried

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in a justice's court of a county is appealed to the superior court thereof, an application to transfer the cause to the superior court of another county, on the ground that the defendants are residents of such other county, cannot be granted.—Luco v. Superior Court of Tuolumne County, 71 Cal. 555, 12 Pac. 677.

[d] (Ind. 1881) Plaintiff, in an action before a justice of the peace appealed by defendant, is entitled to have a motion by him for a change of venue from the county granted, upon the costs of the change being paid or replevied; and defendant's motion to tax to plaintiff all the costs that have accrued up to the granting of a change, on the ground that they are governed by the provisions of the justices' act on that subject, is properly overruled.—McDonough v. Kane, 75 Ind. 181.

[e] (Iowa, 1883) Under Code 1873, § 162, providing that the circuit court has "exclusive jurisdiction in all appeals and writs of error from inferior courts," and Id. § 2592, that when a change of venue is granted "the action shall be transferred to the district or circuit court," a replevin appeal of which the circuit court had exclusive jurisdiction could not be transferred to a district court.—Schuchart v. Lammey, 62 Iowa, 197, 17 N. W. 467.

[f] (Iowa, 1885) Under Miller's Code, § 2590, providing for a change of venue where the judge is prejudiced, excepting cases of appeal from a justice of the peace, a change from the county in such excepted cases will not be allowed, although prejudice be alleged on the part of both the circuit and district judges.—Ardery v. Chicago, B. & Q. Ry. Co., 65 Iowa, 723, 23 N. W. 141.

[g] (Iowa, 1886) A suit in a justice's court for rent under a lease was appealed to the circuit court, and there consolidated, by consent, with another suit there pending on the same lease, and motions for a change of place of trial, which were pending when the order for consolidation was made, were decided by sending the consolidated cause to the district court for trial. *Held*, that the change of venue to the district court was proper, although that court has no jurisdiction of appeals from a justice's court.—Browne v. Hickie, 68 Iowa, 330, 27 N. W. 276, distinguishing Schuchart v. Lammey (1883) 62 Iowa, 197, 17 N. W. 467.

[h] (Iowa, 1886) Under Miller's Code, § 2590, which provides that no change of venue from the county shall be allowed in case of an appeal from a justice of the peace, no such appeal can be sent out of the county for any cause whatever.—Boileau v. Chicago, B. & Q. R. Co., 69 Iowa, 324, 28 N. W. 621.

[i] (Ky. 1877) In case of an appeal pending in the circuit court from an order rejecting a claim against the county, 10 days' notice of a motion for a change of venue of such appeal given the county judge is sufficient, under Gen. St. art. 3, c. 27, § 11, without serving it on all the justices.—Washington County Court v. Thompson, 76 Ky. (13 Bush) 239.

[j] (Md. 1857) The circuit court has no power to grant a change of venue in a proceeding pending before it on appeal, under Const. art. 4, § 28, providing for change of venue in cases "instituted" in certain courts.—Hoshall v. Hoffacker, 11 Md. 362.

[k] (Md. 1879) The provision in the constitution relating to the removal of causes has been altered by Acts 1874, c. 364, and does not extend to the case of an appeal from a justice of the peace pending in the circuit court.—Geekie v. Harbourd, 52 Md. 460.

[l] (Mo. 1890) Under Rev. St. 1879, § 3729, providing that "a change of venue may be awarded in any civil suit to any court of record," the right to a change of venue is not limited to causes where the suit was originally brought in a court of record, but extends to causes appealed to the circuit court from the judgment of a justice of the peace.—Clements v. Greenwell, 40 Mo. App. 589.

[m] (Wis. 1854) Previous to the act abolishing the civil jurisdiction of the county court, the venue in appeals from justices of the peace could only be changed from the county to the circuit court by order showing cause according to the statute, and not by the mere consent of parties.—Dykeman v. Budd, 3 Wis. 640.

[n] (Wis. 1874) Laws 1872, c. 8, entitling a defendant on appeal from the judgment of a justice of the peace to a change of venue "to the circuit court of the county in which he resides," does not apply where there is another but resident defendant, though the latter does not object to such change.—Campbell v. Chambers, 34 Wis. 310.

[o] (Wis. 1881) Since the provision of Rev. St. § 2624, that pending an appeal in an action "commenced before a justice of the peace, by process personally served," the circuit court shall change the place of trial "to the county in which the defendant resides," is made applicable to actions in the municipal court of Dare county, defendant, on an appeal from an action therein, was entitled to such change of venue, regardless of the convenience of witnesses.—Van Kleck v. Hanchett, 51 Wis. 398, 8 N. W. 236.

§ 649. Dismissal of action and nonsuit.

Amendment of pleading by striking out parties defendant, see post, § 679.

Discontinuance as to part of cause of action, see post, § 671.

Dismissal of appeal, see ante, §§ 638–646.

—— *of cause of action as dismissal of appeal, see* ante, § 645.

Imperfect transcript on appeal as ground for dismissal of action, see ante, § 624.

Judgment of reversal as dismissal of action, see post, § 730.

—— *on nonsuit, see* post. § 723.

Want of jurisdiction of justice as ground for dismissing action on appeal, see ante, §§ 472–474.

[a] (Del. 1845) The plaintiff, on an appeal from a justice of the peace, cannot take a non pros. at pleasure.—Prettyman v. Waples' Ex'r, 4 Har. 299.

[b] (Ill. 1852) The judgment of a justice of the peace is opened by appeal therefrom, and the judgment falls by dismissal of the case by the plaintiff.—Shaffer v. Currier, 13 Ill. (3 Peck) 667.

[c] (Ill. 1852) A party who commences suit before a justice of the peace may dismiss his suit after appeal in the circuit court, even though the defendant obtained a judgment in his favor against the plaintiff; but he must dismiss the suit at his own costs.—Shaffer v. Currier, 13 Ill. (3 Peck) 667.

[d] (Ill.) Where some of defendants appeal from a justice's judgment, and plaintiff proceeds to trial in the appellate court without bringing the other defendants into court, the suit is dismissed as to such defendants.—(1878) Callaghan v. Myers, 89 Ill. 566; (1894) Smith v. Hyde Park Portland Cement Paving Co., 55 Ill. App. 282.

[e] (Iowa, 1850) In an action commenced before a justice of the peace, a misnomer may

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be taken advantage of by motion, as well as by plea, after appeal taken.—Hall v. Bennett, 2 G. Greene, 466.

[f] (Ky. 1838) A dismissal of the suit, on an appeal from a justice of the peace, for want of jurisdiction in the justice, annuls the judgment and abates the suit.—Bassett v. Oldham, 37 Ky. (7 Dana) 168.

[g] (Md. 1861) On an appeal from a justice, the court may reverse the judgment of the justice for the plaintiff, without prejudice, upon a non pros. by the plaintiff, who may then bring in a new action.—Borden Min. Co. v. Barry, 17 Md. 419.

[h] (Minn. 1858) A dismissal, by the district court, of the cause and proceeding on appeal from justice court, is a dismissal of the action, and not merely the appeal, and cures a previous error in refusing to grant a motion to quash proceedings.—Fallman v. Gilman, 1 Minn. 179 (Gil. 153).

[i] (Minn. 1858) Upon appeal from a judgment of a justice of the peace in favor of plaintiff, the proceedings are mere lis pendens in the district court, and the relations of the parties are the same as they were at the commencement of the trial in the justice's court; and where no provisional remedy has been allowed, and there is no pleading by defendant, plaintiff has an absolute right to dismiss the cause before trial, under Rev. St. c. 70, § 162, subd. 1, without leave of court or of defendant; but defendant, in such case, is entitled to a judgment for costs.—Fallman v. Gilman, 1 Minn. 179 (Gil. 153).

[j] (Mo. 1845) A plaintiff may discontinue his suit at any time, as well after an appeal from the judgment of a justice of the peace as before.—Turner v. Northcut, 9 Mo. 251.

[k] (N. J. 1828) If plaintiff appeals from a judgment rendered against him in favor of the defendant, he cannot, on appeal, move the court for a judgment of nonsuit, and thereby get rid of the judgment against him.—Reed v. Rocap, 9 N. J. Law (4 Halst.) 347, 350.

[l] (N. Y. 1828) The plaintiff, appellant or appellee, in the common pleas, may submit to be nonsuited, as in other cases.—People v. Judges of Tompkins County, 8 Cow. 131.

[m] (N. Y. 1846) Where defendant, in an action in the supreme court on a justice's judgment, pleads to the merits, and then appeals the justice's judgment to the common pleas, and plaintiff fails to notice the cause for trial, plaintiff will be permitted to stipulate for a discontinuance, as in case of nonsuit, on payment of costs of a motion for such discontinuance.—Hibbard v. Hoag, 2 How. Prac. 186.

[n] (Tex. 1887) Plaintiff brought suit in justice court to recover a phaeton or its value. He sued out a writ of sequestration, which was quashed, and the suit dismissed. On appeal to the county court the sequestration proceedings were quashed and dismissed, but plaintiff recovered judgment for the phaeton, or its value, and costs. *Held*, that the suit was properly treated in the county court as an action for the recovery of the phaeton or its value; and the quashal of the sequestration proceedings did not dispose of the suit upon its merits.—Brown Mfg. Co. v. Watson, 3 Willson, Civ. Cas. Ct. App. § 329.

[o] (Vt. 1872) A trustee suit appealed from a justice and continued at the first term, without an affirmance against the principal defendant, who died before the next term, is thereby discontinued.—Dow v. Batchelder, 45 Vt. 60.

[p] (Wis. 1856) A nonsuit for an irregularity in an appeal from a justice is error.—Cavenaugh v. Titus, 5 Wis. 143.

§ 650. —— Condition of cause.

[a] (Ill. 1854) A judgment for trespass to personal property had been rendered by a justice against four defendants, one of whom appealed. Summons was not issued to the others from the circuit court, and a nolle prosequi was entered as to them. *Held* that, as to the defendant served, a nonsuit could not be entered after the jury retired.—Flinn v. Barlow, 16 Ill. (6 Peck) 39.

[b] (Ill. 1866) A motion to dismiss for the want of a cost bond, in a prosecution before a justice of the peace, is dilatory, and is too late, when made for the first time after appeal to the circuit court.—Yocum v. Town of Waynesville, 39 Ill. 220.

[c] (Mo. 1887) Where an appeal by plaintiff to the circuit court from a judgment of a justice of the peace has been dismissed for want of prosecution, and afterwards reinstated, plaintiff may dismiss his cause in the circuit court.—Holdridge v. Marsh, 28 Mo. App. 283.

[cc] (Mo. 1893) A demurrer, improperly filed in a suit instituted before a justice of the peace, may be treated, on appeal, as a motion to dismiss, if properly preserved by bill of exceptions.—Langford v. City of Doniphan, 53 Mo. App. 62.

[d] (N. J. 1829) If, from a judgment rendered by a justice in favor of a defendant, the plaintiff appeal, and on the trial of the appeal submit the cause to a jury, he cannot, by voluntarily withdrawing or neglecting to appear when called, obtain a nonsuit, or prevent a verdict being rendered against him.—Williamson v. Brown, 10 N. J. Law (5 Halst.) 296.

[e] (N. J.) Under sections 19 and 51 of the small cause act (Rev. St. pp. 235, 244), the justices in the original suit, and the common pleas, on the appeal, are prohibited from granting a nonsuit after the merits of the cause on either side have been submitted to the jury. —(1852) Doremus v. Howard, 23 N. J. Law (3 Zab.) 390; (1853) Bogert v. Chrystie, 24 N. J. Law (4 Zab.) 57.

§ 651. —— Grounds for dismissal or nonsuit.

[a] (Ala. 1833) Under a statute which requires that on appeal from a justice the cause shall be tried according to the justice and equity of the case, regardless of any defects or informality in the proceedings before the justice, a motion to quash the proceedings should be granted where, on appeal to the county court, it appears that the justice entirely disregarded the general course of law in the trial before him.—Hemphill v. Coats, 4 Stew. & P. 125.

[b] (Cal. 1895) Under Code Civ. Proc. § 976, providing that on appeals from a justice to the superior court on questions of fact, or law and fact, the action must be tried anew, on such appeals it is proper for the superior court to first determine defendant's plea to the jurisdiction, in that the action was brought in the wrong county, before considering the merits; and, on the plea being sustained, the action is properly dismissed.—Holbrook, Merrill & Stetson v. Superior Court of Sacramento County, 106 Cal. 589, 39 Pac. 936.

[c] (Ind. 1875) Where, on an appeal by the defendant to the circuit court from a judgment of a justice of the peace, the original papers have been lost from the files, and leave has been granted each party to substitute copies

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therefor, after the lapse of a reasonable time, without substitution of the copies, a motion by the defendant to dismiss the action should be denied, and a motion by the plaintiff to dismiss the appeal should be granted.—Hunter v. Thomas, 51 Ind. 44.

[d] (Iowa, 1866) If the district court has no jurisdiction of an appeal from a justice, the cause should not be dismissed, but only the appeal.—Ely v. Dillon, 21 Iowa, 47.

[e] (Mass. 1850) It is a sufficient ground for dismissing an action pending in the court of common pleas, on an appeal from a justice of the peace, that the justice had an interest in the suit, and instigated the prosecution of the same.—Richardson v. Welcome, 60 Mass. (6 Cush.) 331.

[f] (Mich. 1871) When a plaintiff appeals from the judgment of a justice of the peace, in a case where a set-off was established against him, and does not appear for trial in the circuit court, that court cannot try the cause, nor render any judgment but one of nonsuit or discontinuance.—People v. Judge of Wayne Circuit Court, 22 Mich. 408.

[g] (Mo. 1845) An improper refusal to grant a continuance by a justice of the peace is no ground for dismissing the action on appeal.—Harper v. Baker, 9 Mo. 116.

[h] (Mo. 1875) Where a transcript from a justice's court shows judgment rendered against two or more defendants without sufficient service, the cause may be dismissed by the circuit court on motion as to those who appeal, but not as to those not appealing.—Urton v. Sherlock, 61 Mo. 257.

[i] (Neb. 1886) Where plaintiff fails to prosecute his appeal from a justice of the peace to the district court by filing his petition in time, it is not error for the court, under Code Civ. Proc. §§ 1010, 1011, providing that, if plaintiff on appeal fail to file his petition within 20 days, judgment shall be entered against him, to render judgment of nonsuit; the plaintiff showing no excuse for the delay.—Jacoby v. Mitchell, 19 Neb. 537, 26 N. W. 255.

[j] (N. H. 1852) A case will not be dismissed on appeal, on motion of the appellant, because the amount of damages awarded by the justice of the peace exceeds a justice's jurisdiction, nor because it exceeds the ad damnum of the writ.—Wallace v. Brown, 25 N. H. (5 Fost.) 216.

[k] (N. C. 1844) On appeal to the county court by defendant, from a judgment rendered against him by a justice in an amount beyond the justice's jurisdiction, defendant can there take advantage of the objection only by plea in abatement, or under the established course of the courts under a general issue, and not by dismissal.—Morgan v. Allen, 27 N. C. 156.

[l] (Vt. 1843) Where an appeal had been taken by the defendant from a justice's judgment, and the defendant neglected to enter the appeal in the county court, and the plaintiff entered the action for an affirmance of the judgment, it was *held* no cause for dismissing the action that the defendant, more than 12 days before the term to which the appeal was taken, tendered a confession of judgment, under the statute, before the justice who rendered the original judgment, and that the justice, being then out of office, refused to accept the same.—Smith v. Fisher, 17 Vt. 117.

[m] (Vt. 1847) A justice's writ filled up by a constable is void, and will be dismissed by the county court on motion, though the case may have come to that court by appeal, and though the defect was not pleaded in abatement until too late.—Winchell v. Pond, 19 Vt. 198.

§ 652. Hearing in general.

Injunction against hearing of appeal, see "Injunction," vol. 27, c. 1545, § 53 [e].

[a, b] (N. Y.) Appeals from judgments of justices of the peace, which the county judge is incapable of deciding, by reason of his relationship to the parties (2 Laws 1847, p. 643, c. 470, § 31), or for other causes, must be heard in the first instance at a special term of the supreme court instead of the general term.—(1853) Sheldon v. Albro, 8 How. Prac. 305; (1858) Davis v. Stone, 16 How. Prac. 538.

[c] (N. Y. 1858) Where an appeal from a judgment of a justice of the peace is transferred from the county court to the supreme court, because the county judge is disqualified to hear the appeal, it must be heard in the county in which the county court is. The code requires it to be heard on the original papers. These are on file with the county clerk, and he should not permit them to be removed, except when required by the court to produce them at the court house within his county.—Wiles v. Peck, 16 How. Prac. 541.

[d] (N. Y. 1878) Where an appeal has been taken from a judgment of a justice court, involving questions of law only, and the case has been regularly noted for argument and placed on the calendar of the county court, the case will remain upon the calendar at a subsequent term without any further notice by either party, but it cannot be brought on for argument except by motion, of which eight days' notice must be given, as provided in Code Civ. Proc. § 364.—Matthews v. Arnold, 14 Hun, 376.

§ 653. Time of hearing.

[a] (Ill. 1857) When an appeal from a justice has been taken less than 10 days before the sitting of the circuit court, and the appellee has not been served with process, he cannot force the appellant to trial, for he cannot be forced to trial himself. Rev. St. c. 59, § 64.—Hooper v. Smith, 19 Ill. (9 Peck) 53.

[b] (Ill.) Unless the transcript is filed 10 days before a term of court, an appeal from a justice is not triable at that term, under Rev. St. p. 648, § 68 (justice act), providing that where the transcript is filed 10 days before the term of court to which the appeal is taken, and the appearance of the appellee entered in writing 10 days before the first day of the term, the case shall stand for trial at that term.—(1874) Hayward v. Ramsey, 74 Ill. 372; (1887) Ogden v. Danz, 22 Ill. App. 544; (1890) Van Stavern v. Sears, 35 Ill. App. 546; (1894) Armstrong v. Crilly, 152 Ill. 646, 38 N. E. 936, affirming (1894) 51 Ill. App. 504.

[c] (Ill. 1894) Where an appeal from a justice's court is perfected by filing the bond in the justice's court 11 days before the term of the court to which it is taken, it may be placed on the trial docket for that term.—Vallens v. Hopkins, 51 Ill. App. 337.

[d] (Ill. 1895) Under Rev. St. 1893, c. 79, § 68, which provides that, "in case the appeal from the justice of the peace is perfected by filing the papers and transcript of judgment 10 days before the commencement of the term of the court to which the appeal is taken, the appearance of the appellee may be entered in writing, and filed among the papers in the case; and if so entered 10 days before the first day of the term of court, the case shall stand for trial at that term," the court has no jurisdiction to hear the cause on appeal, unless the transcript has been filed 10 days

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before the term, even in cases where the appeal is taken by filing the appeal bond with the justice.—Vallens v. Hopkins, 157 Ill. 267, 41 N. E. 632, reversing (1894) 51 Ill. App. 337.

[e] (Iowa, 1860) Under Laws 1858, c. 127, an appeal from a justice's to the district court could not be tried at the first term after the transcript was filed.—Mediken v. Mason, 10 Iowa, 406.

[f] (Iowa, 1880) On appeal to the circuit court from a judgment rendered by default before a justice, the court cannot, in the absence of any general rule of court regulating appeals from a justice, try such appeal before it is reached in regular order on the docket, under Code 1873, § 3587, which provides that appeals "must be tried when reached, unless continued for cause."—Harty v. D. M. & M. R. Co., 54 Iowa, 327, 6 N. W. 545; Berry v. Same, Id.

[g] (Kan. 1887) Where, on appeal from a justice court, the respondent appeared at an adjourned term of the term in session when the summons in error was returned and presented his case without objection, he cannot object that the case did not properly stand for trial until the next regular term of the court.—Sawyer v. Forbes, 36 Kan. 612, 14 Pac. 148.

[h] (Ky. 1847) The statute of 1802, requiring writs of error coram vobis to be tried at the first term, does not apply to an appeal from the justice on such writs.—Breckinridge v. Coleman, 46 Ky. (7 B. Mon.) 331.

[i] (Minn. 1881) Under Gen. St. 1878, c. 65, § 123, which provides that all appeals from the judgments of justices "allowed 30 days before the first day of the term of the district court next after the appeal allowed shall be determined at such term, unless continued for cause," an appeal which is properly on the calendar may be heard though 30 days have not elapsed since the decision by the justice.—Chesterton v. Munson, 27 Minn. 498, 8 N. W. 593.

[j] (Minn. 1893) Under Gen. St. 1878, c. 66, § 244, any issue or question of law alone, such as an appeal from a justice of the peace on questions of law alone, may be brought on for hearing before the court at any time.—Rollins v. Nolting, 53 Minn. 232, 54 N. W. 1118.

[k] (Mo. 1862) Where an appeal from a justice is taken within less than 10 days before the first day of the term of the appellate court, the case is not triable at that term, except by consent of parties.—Knapp v. Skeele, 31 Mo. 434.

[l] (Mo. 1882) A rule preventing a case from being tried, on appeal from a justice, at the first term, is waived by the fact that the appellant gave, and appellee accepted, notice to take depositions, and the depositions were taken and filed before the return term, and by the further fact that appellee took out subpœnas for witnesses on the third day of the return term.—Berry v. Union Trust Co., 75 Mo. 430.

[m] (Mo. 1883) An appeal from a judgment of a justice of the peace, not taken on the same day that the judgment was rendered, no notice of the appeal being given, cannot be tried at the first term of the appellate court, except by consent of both parties, or unless the appellee shall enter his appearance on or before the second day of such term.—Blakely v. Missouri Pac. Ry. Co., 79 Mo. 342.

[n] (Mo. 1883) Under Rev. St. § 3056, an appeal must be continued where no notice has been given and no appearance entered before the second day of the term. *Held* error to hear the case and render judgment at the first term.—Hawley v. Missouri Pac. Ry. Co., 80 Mo. 540.

[o] (N. J. 1896) Under Supp. Revision, p. 404, art. 4, § 15, when an appeal to the court of common pleas is taken from a judgment of the court for the trial of small causes within five days prior to the beginning of the next term, and the papers are not filed with the clerk of the court three days prior to the beginning of such term, the appeal cannot be placed on the list for trial at such term, but must go over, and be put on the list for trial at the next term thereafter.—Matthews v. Rankin, 58 N. J. Law (29 Vroom) 584, 33 Atl. 1052.

[p] (N. J. 1896) The party against whom judgment is rendered before a justice of the peace does not waive his right to have the cause go over to the next term, under Supp. Revision, p. 404, art. 4, § 15, by appearing at the term to which the appeal is taken, and objecting to the trial at that time.—Matthews v. Rankin, 58 N. J. Law (29 Vroom) 584, 33 Atl. 1052.

[q] (N. C. 1892) Under a rule providing that appeals from justices of the peace in civil actions will not be tried unless docketed 10 days before the term, it was error in the superior court to try, against defendant's objection, an appeal from a justice which was docketed on the first day of the term.—State v. Edwards, 110 N. C. 511, 14 S. E. 741.

[r] (N. C. 1892) A bastardy proceeding, being essentially a civil action, is within the purview of a rule providing that appeals from justices of the peace in civil actions will not be tried unless docketed 10 days before the term.—State v. Edwards, 110 N. C. 511, 14 S. E. 741.

[s] (R. I. 1883) Under the statute regulating appeals from justices' courts, an appeal is to be taken to the term of the appellate court next to be held after 10 days from the time of perfecting the appeal, not from the time of taking it.—McCaffrey v. Doyle, 14 R. I. 313.

[t] (S. D. 1890) An appeal from a justice of the peace stands for trial at an appointed term as if it were a regular one, under Comp. Laws, § 426, providing that an appointed term shall be "in all respects the same as the general terms provided for in this act."—Myers v. Mitchell, 1 S. D. 249, 46 N. W. 245.

[u] (Tenn. 1895) On appeal from a judgment of a justice it was not error to require a party to proceed to trial at the first term after the appeal was taken, though the papers were not filed until the second day of the term.—Rogers v. Hollingsworth, 95 Tenn. 357, 32 S. W. 197.

[v] (Tex. 1881) Rev. St. art. 1641, requiring the transcript and papers of a case appealed from a justice's court to be transmitted to the clerk of the county court before the first day of the next term, if practicable, otherwise, before the first day of the second term, precludes the trial of an appeal in the county court at a term after the first day of which such papers and transcript were filed.—Cowart v. Oram, 1 White & W. Civ. Cas. Ct. App. § 183.

[w] (Tex. 1884) Under Rev. St. art. 1641, providing that on appeals from justice courts the transcript and papers shall, if practicable, be transmitted to the county court on or before the first day of the next term of such court, but, if there be not time to make out and transmit to the first term, they may be so transmitted on or before the first day of the second term, where the appeal papers do not reach the county court until the third day of the first term, the case is not properly before the court for disposition until the first day of the succeeding term.—Henson v. Martin, 2 Willson, Civ. Cas. Ct. App. § 272.

[x] (Tex. 1894) Under Sayles' Civ. St. tit. 82, c. 17, relating to appeals from justice courts to a district or county court, and Id. art. 1294,

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contemplating that the cause shall there be tried de novo, a case so appealed is an "appearance case," and should not be called for trial before appearance day.—Hadden v. Smith (Civ. App.) 28 S. W. 458.

[y] (Vt. 1830) An appeal from an order of removal must be taken to the next term of the court in the same county, if there be sufficient time after service of the order.—Strafford v. Hartland, 2 Vt. 565.

§ 654. Continuances.

Continuance as waiver of plea in abatement, see post, § 691.

—— *on allowing amendments to pleadings, see* post, § 686.

Procuring continuance as complying with requirement to prosecute appeal to avoid dismissal, see ante, § 640.

Right to continuance on appeal for want of notice of appeal, see ante, § 585.

[a] (Ark. 1850) A refusal of a continuance on appeal from a justice, where the transcript was filed only three days before the term, and the affidavit showed the witness to be a material one, and that he lived more than 60 miles from the place of trial, was an abuse of the discretion of the court.—Hensley v. Tucker, 10 Ark. (5 Eng.) 527.

[b] (Ark. 1850) It is no ground for refusing a continuance of a case by the circuit court, brought there by appeal, because of the absence of a witness, that a continuance has been granted by the justice of the peace for the same cause.—Hensley v. Tucker, 10 Ark. (5 Eng.) 527.

[c] (Ga. 1880) A party, who had exhausted his continuances in a justice court, moved for a continuance on account of the sickness of a material witness. The presiding justice stated that no subpœna had been asked for to bring in the witness, but that he had been at the store of the justice shortly before court, apparently well. *Held*, that there was no error in refusing a continuance.—Rivers v. Hood, 65 Ga. 302.

[d] (Ind. 1851) In an action on a promissory note before a justice, the plea was that the note was given for a clock, which the plaintiff warranted would prove a good timekeeper, and that the clock was worthless. Judgment was given for the plaintiff, and an appeal taken. The defendant then filed a bill of discovery against the plaintiff to obtain proof of warranty. The plaintiff was beyond the jurisdiction of the court, and did not answer. The defendant moved for a continuance on affidavit filed, setting forth these facts, which was refused. He then moved to take his bill as confessed, or to suspend the further proceedings in the cause until the plaintiff should answer, which were also overruled. *Held*, that there was no error in overruling these motions, as the defendant might have examined the plaintiff before the justice, by having him subpœnaed.—Noble v. Tillotson, 2 Ind. (2 Cart.) 553.

[e] (Ind. 1864) A party appealing from a judgment of a justice's court is not entitled to a continuance in the circuit court, because the justice has not filed a complete transcript.—Mitchell v. Stephens, 23 Ind. 466.

[f] (Ind. 1872) An application for a continuance, in a cause appealed from a justice of the peace, on the ground of the absence of the justice, by whom the applicant proposes to prove that the transcript is not complete, should not be sustained.—Whaley v. Gleason, 40 Ind. 405.

[g] (Iowa, 1859) Action commenced before a justice of the peace in April, 1856, to which the defendant made no defense, and judgment was rendered against him. On appeal, and in September, 1857, the defendant filed in the district court an affidavit for a continuance, on the ground of the absence of a witness, stating in his affidavit "that said witness resides somewhere in the state of Illinois, but the county I am not able to state, at present." *Held*, that the continuance was properly refused.—James v. Arbuckle, 8 Iowa (8 Clarke) 272.

[h] (Mich. 1889) Where, on an appeal from a justice, it appeared that one of plaintiffs was a minor, and the court appointed the other plaintiff as guardian, it was not error to refuse to grant a continuance, without terms, though defendant asked therefor, on the ground that he was not prepared for defense on the merits, having relied on the fact of infancy.—McDonald v. Weir, 76 Mich. 243, 42 N. W. 1114.

[i] (Mo. 1894) Rev. St. 1889, § 2128, provides that when a party amends any pleading or proceeding, and the court is satisfied, by affidavit or otherwise, that the opposite party cannot be ready for trial, in consequence thereof, a continuance may be granted. *Held*, that where, on an appeal to the circuit court from a justice's court, plaintiff filed an unimportant amendment to his statement, the court properly refused a continuance because of such amendment.—Pifer v. Stanley, 57 Mo. App. 516.

[j] (N. J. 1894) When, on appeal from a justice's court, 10 days' notice is given of an intention to produce new evidence, it is the duty of the common pleas to postpone the trial of the appeal, so that the new evidence may be received.—Johnson v. O'Neil, 46 N. J. Law (17 Vroom) 510.

[k] (Tex. 1887) Where an action for damage by fire has been brought before a justice of the peace against a railroad company, and appealed by defendant to the district court, and the case is not called for trial till 13 days after taking the appeal bond, and defendant applies for a continuance in order to secure the testimony of a witness in defendant's employ, which is refused, the appellate court will not hold such refusal to be erroneous; it appearing that by proper diligence defendant could have obtained the testimony.—International & G. N. R. Co. v. Ragsdale, 67 Tex. 24, 2 S. W. 515.

[l] (Vt. 1860) The defendant appealed from the judgment of a justice, but neglected to enter his appeal. The plaintiff, at the next term of the county court following the appeal, caused a copy of the justice's record, certified by the county clerk (the justice, though out of office, still continuing to reside in the same county), to be entered for affirmance. The defendant moved to dismiss the suit, on account of the defective mode of certifying the records and consequent want of jurisdiction. *Held*, that it was not error for the county court, pending this motion, to continue the cause to enable the plaintiff to file a properly certified copy of the record, and, upon its being filed, to proceed and try the cause upon its merits.—Carruth v. Tighe, 32 Vt. 626.

[m] (Wis. 1866) Under Rev. St. c. 120, § 216, the circuit court, for sufficient cause shown, may continue an action, on appeal from a justice of the peace, which has not been noticed for trial at the first or second term after the appeal was taken.—Wilcox v. Holmes, 20 Wis. 307.

[n] (Wis. 1888) Rev. St. § 3766, requiring an appeal from justice's court to be brought to a hearing before the end of the second term after the filing of the justice's return, does not deprive the appellate court of juris-

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diction to continue the appeal by an order made after the expiration of the second term; the application for the order of continuance having been made during the term.—Sutton v. Wegner, 72 Wis. 294, 39 N. W. 775.

[o] (Wis. 1895) Rev. St. § 2831, provides that the court may, on good cause shown, allow any proceedings in any action to be taken after the time limited by statute or by order of court has expired. Section 3766 provides that if neither party shall bring an appeal from justice court to a hearing in the appellate court "before the end of the second term after filing the return of the justice therein, such court shall dismiss the appeal, unless it shall continue the same by special order for cause shown." *Held*, that the appellate court has discretion, on a proper showing, to allow a continuance after the second term from the filing of the return has expired, though neither party has previously brought the appeal to a hearing, and its refusal to exercise such discretion is reversible error.—Whitham v. Mappes, 89 Wis. 668, 62 N. W. 430.

12. TRIAL OF CAUSE ANEW.

(a) CASES TRIABLE AND PROCEEDINGS FOR TRIAL DE NOVO, §§ 655-659.
(b) SCOPE OF INQUIRY, §§ 660-664.
(c) FURTHER PLEADINGS OR NEW PLEADINGS, §§ 665-693.
(d) EVIDENCE, §§ 694-698.
(e) MODE AND CONDUCT OF TRIAL, §§ 699-704.

(a) CASES TRIABLE AND PROCEEDINGS FOR TRIAL DE NOVO.

CASES TRIABLE ANEW IN APPELLATE COURT IN GENERAL, § 655.
AMOUNT AND NATURE OF CAUSE OF ACTION, § 656.
—— NATURE AND VALIDITY OF JUDGMENT BELOW, § 657.
SUMMONS, § 658.
NOTICING CAUSE FOR TRIAL, § 659.

On certification to court of record of cause without justice's jurisdiction, see ante, § 244.
Validity of act providing for trials de novo on appeal, see ante, § 466.

§ 655. Cases triable anew in appellate court in general.

Filing affidavit of merits as prerequisite to right to trial on appeal, see post, § 687.

[a] On an appeal from the judgment of a justice of the peace, the cause is to be tried de novo.
—(U. S. 1811) Minifie v. Duckworth, Fed. Cas. No. 9,633 [2 Cranch, C. C. 39]; (1822) Taylor v. Hogan, Fed. Cas. No. 13,794a [Hemp. 16];
(Ala. 1835) Hagen v. Thompson, 2 Port. 48; (1837) Harrison v. Danelly, 5 Port. 213; (1837) Murfs v. Harding, 6 Port. 121;
(Ark. 1870) Touhy v. Rector, 26 Ark. 315;
(Ill. 1834) Tindall v. Meeker, 2 Ill. (1 Scam.) 137; (1844) Waterman v. Bristol, 6 Ill. (1 Gilman) 593;
(Ind. 1872) Britton v. Fox, 39 Ind. 369; (1878) State v. Miller, 63 Ind. 475;
(Md. 1861) Borden Min. Co. v. Barry, 17 Md. 419;
(Mo. 1845) Harper v. Baker, 9 Mo. 116;
(N. J. 1809) Woodruff v. Carnes, 3 N. J. Law (2 Penning.) 505;
(Vt. 1889) Bundy v. Bruce, 61 Vt. 619, 17 Atl. 796.

[b] (Ala. 1836) Where garnishment proceedings in justice court are removed to the circuit court by appeal they are triable de novo.—Colman v. Waters, 3 Port. 381.

[c] (Ala. 1885) On appeal from a judgment rendered by a justice of the peace, the case stands on the process and pleadings, and is triable de novo on the merits, under Code, §§ 3121, 3122.—Lehman v. Hudmon, 79 Ala. 532.

[d] (Cal. 1881) Defendant in the justice's court appeared specially, and moved that the service be set aside; he having been served with a summons only, and not with a copy of the complaint. The motion was granted, judgment entered against the plaintiff, and an appeal taken. In the superior court defendant appeared specially and moved to dismiss the appeal, but the court, without disposing of the motion, ordered defendant to answer and proceed to trial. *Held*, that the court was without power to make such order, that it could only affirm or reverse the judgment of the justice's court.—Southern Pac. R. Co. v. Kern County Superior Court, 59 Cal. 471.

[e] (Colo. 1871) Rev. St. c. 50, § 46, providing that on appeal from the judgment of a justice no exception shall be taken to the form or service of the summons issued by the justice, nor to any of the proceedings before him, but the appellate court shall hear and determine the cause in a summary way, without pleadings in writing, applies to cases arising under the ordinances of a city before the police magistrate of such city.—Deitz v. City of Central, 1 Colo. 323.

[f] (Colo. 1888) Upon appeal in the county court the case stands as it stood in the justice's court, and the claim of exemption is to be passed on like any other defense.—Bassett v. Inman, 7 Colo. 270, 3 Pac. 383.

[g] (Colo. 1890) Where, in an attachment before a justice of the peace, the issues in attachment and upon the merits are tried at the same time, and judgment on both issues is rendered for defendant, from which plaintiff appeals, the county court should retry the issues in attachment, as well as on the merits, under Gen. St. §§ 1979, 1987, providing for the right of appeal from all judgments rendered by justices, and that the rights of the parties shall be the same as in the original action, and shall be determined in a summary way.—Hurtgen v. Kantrowitz, 15 Colo. 442, 24 Pac. 872.

[h] (Ill. 1852) The right of appeal from an inferior to a superior tribunal, for the purpose of obtaining trials de novo, is unknown to the common law, and only exists where it is expressly given by statute.—Edwards v. Vandemack, 13 Ill. (3 Peck) 633.

[i] (Mo. 1834) An appeal regularly in the circuit court must be tried, unless there was no legal cause before the justice.—Myers v. Woolfolk, 3 Mo. 348.

[j] (Mo. 1892) Under Rev. St. 1889, § 6339, which provides for a trial de novo of cases appealed from justices' courts, on appeal from a judgment, under section 2613, allowing an attorney's fee as costs to plaintiff in a suit for injury to stock resulting from the failure of a railroad company to fence its track, the value of such attorney's fee should be tried anew.—Briggs v. St. Louis & S. F. Ry. Co., 111 Mo. 168, 20 S. W. 32.

[k] (N. Y. 1859) An appeal from a justice's judgment, under the Code, is not to be tried de novo in the county court. The appellate jurisdiction is merely of errors in the court below.—Pruyn v. Tyler, 18 How. Prac. 331.

[l] (Ohio, 1885) Where a judgment has been rendered against the defendant, and he does

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not appeal, but files a petition in error to reverse such judgment, he cannot have such petition amended, by assigning errors of fact, and secure a retrial of the case.—Bruder v. Biehl, 1 Ohio Cir. Ct. R. 85.

[m] (W. Va. 1885) Const. art. 8, § 13, as amended in 1880, providing that "no fact tried by a jury shall be otherwise re-examined in any case than according to the rules of common law," applies to trials by a jury of six before a justice, and prevents a trial de novo on appeal therefrom.—Barlow v. Daniels, 25 W. Va. 512.

[n] (W. Va. 1887) No fact tried in a civil action by a jury of six persons before a justice can be retried de novo by the circuit court, or otherwise than according to the rules of the common law.—Hall v. Wadsworth, 30 W. Va. 55, 3 S. E. 29.

[o] (W. Va. 1887) The judgment of a justice rendered on the verdict of six jurors in an action for damages, in which no defense was made, cannot be tried de novo on appeal.—Hickman v. Baltimore & O. R. Co., 30 W. Va. 206, 4 S. E. 654, 7 S. E. 455; Vandervort v. Fouse, 30 W. Va. 326, 4 S. E. 660.

[p] (Wis. 1867) Where a statute gives an appeal from a justice, but says nothing as to how the cause shall be tried in the appellate court, the fair implication is that there is to be a new trial.—Vroman v. Dewey, 22 Wis. 323.

[q] (Wis. 1882) On appeal from a justice's court in a case where, by Rev. St. § 3767, the same is required to be "heard on the original papers and the return of the justice containing all the material evidence," etc., the court cannot take authority, from a stipulation of the parties, to try the case de novo, as if originally brought in that court; and a judgment rendered upon such a trial is void for want of jurisdiction.—Bullard v. Kuhl, 54 Wis. 544, 11 N. W. 801.

§ 656. Amount and nature of cause of action.

[a] (Ill. 1876) On the trial of an appeal from a justice, in an action to recover for stock injured by the defendant's railroad, it being made to appear that the justice had jurisdiction, the cause will be determined on the proof.—Cairo & St. L. R. Co. v. Murray, 82 Ill. 76.

[b] (Neb. 1894) On appeal from a judgment entered by a justice on an award of arbitrators, assessing damages by trespassing animals, under Comp. St. 1893, c. 2, § 3, trial must be had de novo on a petition alleging the damages.—Holub v. Mitchell, 42 Neb. 389, 60 N. W. 596.

[c] (N. Y. 1864) Under Code, § 352, which provides that, on appeal from a justice's judgment to a county court, a new trial shall be had in the appellate court, "when the amount of the claim or claims of either party litigated in the court below shall exceed $50," it is not the amount of the verdict or recovery in the court below, nor the amount which any evidence goes to show the plaintiff entitled to, which controls, but the amount of the claim made and put in issue by the pleadings.—Ovenshire v. Adee, 27 How. Prac. 368.

[d] (N. Y. 1869) The law allowing appeals from justices' courts to the county courts "when the amount of the claim or claims for which judgment was demanded by either party in his pleadings in the court below shall exceed $50" will not permit a new trial in the county court, unless judgment for a sum exceeding $50 is demanded in good faith and in a proper case. Defendant has a right to so draw his answer in the justice's court as to have a new trial in the county court, if unsuccessful, provided his defenses are not sham or false, are proper and in good faith. If clearly sham and false, they will be stricken out by the county court on motion, and the appeal ordered to be heard by argument upon the justice's return.—Houghton v. Kenyon, 38 How. Prac. 107.

[e] (N. Y. 1870) A retrial may be had in all cases brought into the county courts by appeal, without reference to the form of the action, when the claim or claims for judgment made by the pleadings of either party shall exceed the sum of $50; and also in actions for the recovery of specific personal property, where no claim or claims exceeding that amount may be made, provided the damages actually recovered, added to the assessed value of the property, shall exceed that sum.—Merrill v. Pattison, 44 How. Prac. 289.

[f] (N. Y. 1877) The right of plaintiff, upon appeal from the judgment of a justice, to a new trial in the county court, depends upon the amount claimed in the pleading.—Hayes v. Kedzie, 11 Hun, 577.

[g] (N. Y. 1883) It is not in every case where the defendant demands in his answer judgment for more than $50 that he may have a new trial in the appellate court, but only in those cases where, from the nature of the action and the condition of the pleading, it can be seen that the demand has some basis in fact or law in its support.—Harvey v. Van Dyke, 66 How. Prac. 396.

[h] (N. Y. 1884) Under Code, § 3068, providing for a new trial in the county court, on appeal from a justice, where judgment is demanded for a sum exceeding $50, a new trial cannot be had where the proceeding is to recover possession of land.—Brown v. Cassady, 34 Hun, 55.

[i] (N. Y. 1885) On the question of the value of the property in controversy, in an action before a justice, although the justice does not fix the value, if it can be gathered from the record, the effect is the same on the question of the right to a new trial above.—Reynolds v. Swick, 35 Hun, 278.

[j] (N. Y.) Where the answer in an action before a justice alleges a breach of contract by which defendant lost more than $50, but does not demand judgment, or set up a counterclaim, it will be treated as a defense merely, and defendant cannot avail himself of Code Civ. Proc. § 3068, authorizing a new trial in the county court, "where the amount of the judgment demanded by either party exceeds $50."—(1887) Dudley v. Brinckerhoff, 13 Civ. Proc. R. 92; (1888) Royce v. Gibbons, 50 Hun, 341, 3 N. Y. Supp. 106.

[k] (N. Y. 1888) Where defendant, in a justice's court, pleads a set-off for $55, though his bill of items is only for $50, he is entitled to a new trial, on appeal to the county court, under Code Civ. Proc. § 3068, which provides that, where the sum for which judgment was demanded by either party in his pleadings exceeds $50, the appellant shall be entitled to a new trial.—Dudley v. Brinckerhoff, 48 Hun, 618, 2 N. Y. Supp. 321.

[l] (N. Y. 1895) Code Civ. Proc. § 3068, provides that when, in an action brought in a justice's court, judgment for more than $50 is demanded in either pleading, appellant shall be entitled to a new trial, if in his notice of appeal he demands one. *Held* that, where the answer contains a counterclaim sufficient on its face, the question whether it was pleaded merely to obtain a new trial on appeal could not be tried on motion in the county court, on appeal thereto.—Baum's Castorine Co. v. Thomas, 92 Hun, 1, 37 N. Y. Supp. 913.

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[m] (N. C. 1873) Upon an appeal to a superior court by plaintiff, in an action commenced before a justice, for the recovery of an amount due by a former judgment, he is entitled to have the case heard de novo, and for that purpose it should be entered on the civil issue docket.—Wells v. Sluder, 68 N. C. 156.

[n] (S. C. 1880) On an appeal from the decision of a trial justice, the amount involved exceeding $10, the trial must be de novo, unless the notice of appeal states that the appeal is on questions of law only.—Sternberger v. McSween, 14 S. C. 35.

[o] (Wis. 1864) In replevin before a justice of the peace where the justice fails to find the value of the property, the statement of its value in the affidavit for the writ must be taken as true, for the purpose of determining whether there shall be a trial de novo in the appellate court in case of an appeal.—Shaw v. Webster, 18 Wis. 498.

[p] (Wis. 1867) In replevin, when the value of the property is stated in the affidavit, and not found by the justice, on appeal the value so stated must govern in determining whether there shall be a trial de novo.—Bradley v. Morse, 21 Wis. 680.

§ 657. —— Nature and validity of judgment below.

[a] (Ala. 1827) Although the county court is required to try appeals from the judgment of justices of the peace according to the justice and equity of the case, without regarding any defects in the warrant, capias, summons, or other proceedings, it cannot entertain a case where there is a misjoinder of parties.—Smith v. Cobb, 1 Stew. 62.

[b, c] (Cal. 1858) Defendant, on appeal to the county court from a judgment in the justice court, on questions of both law and fact, is not entitled to a trial de novo, where he was properly served with process, and allowed judgment to be taken against him by default.—People v. El Dorado County Court, 10 Cal. 19.

[d] (Cal. 1885) Where an action is dismissed without trial by the justice, on the ground that the complaint was not indorsed, the upper court cannot try the issue of fact, but should reverse the case.—Myrick v. Superior Court of Contra Costa County, 68 Cal. 98, 8 Pac. 648.

[e] (Cal. 1894) On appeal from a justice of the peace to the superior court, the latter court, on determining that the justice had no original jurisdiction, because title to land was involved, may properly try such question of title as a court of original jurisdiction.—Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196.

[f] (Ind. 1877) Upon default in the circuit court of a party who has appealed from a judgment of a justice of the peace, the court may try the case or dismiss the appeal, in its discretion.—Louisville, N. A. & C. R. Co. v. Nicholson, 56 Ind. 261.

[g] (Mass. 1853) On an appeal from a judgment of nonsuit by a justice, the whole case is to be tried on the merits in the appellate court.—Ball v. Burke, 65 Mass. (11 Cush.) 80.

[h] (Minn. 1892) An appeal from a judgment of a justice of the peace on questions of law and fact brings the case before the appellate court for trial de novo on its merits, irrespective of whether the judgment appealed from was valid or not.—Finke v. Lukensmeyer, 51 Minn. 252, 53 N. W. 546.

[i] (Miss. 1884) A case from a justice of the peace may, as to defense, but not as to set-off, be tried de novo in the circuit court, though the appeal was from a judgment by default.—Callahan v. Newell, 61 Miss. 437.

[j] (Mo. 1856) On appeal from a justice's court, the circuit court should proceed to try the cause anew, and not dismiss it on account of irregularities in the justice's proceedings.—Maltock v. King, 23 Mo. 400.

[k] (Mo. 1885) Rev. St. § 3052, relating to appeals from justices' courts, provides that, on the return of a justice being filed in the clerk's office, the circuit court shall be possessed of the cause, and shall proceed to hear, try, and determine the same anew, without regarding any error or defect in the original summons, or in the service thereof, or on the trial, judgment, or other proceedings of the justice or constable in relation to the cause. *Held* that, where the justice's transcript shows that the justice acquired jurisdiction of the defendant by its having filed a motion to set aside the judgment by default, the circuit court should proceed to try the cause de novo, though an agreed statement of facts shows that defendant was served in the wrong township, and the justice had no jurisdiction of his person.—Kelly v. Chicago, R. I. & P. R. Co., 86 Mo. 681.

[l] (Ohio, 1861) Where a justice had no jurisdiction, and the case is appealed to the common pleas, the case must be stricken from the docket without any judgment, unless the court has original jurisdiction, and an appearance is entered, from which time it becomes an original case in the common pleas.—Place v. Welch, 2 Ohio Dec. 542.

§ 658. Summons.

Appearance as alternative for service of summons, see ante, § 595.

—— *as waiver of summons on appeal, see ante,* § 598.

Reversal of justice's judgment as to defendant not brought into appellate court, see post, § 729.

[a] (Ill. 1848) The circuit court has no jurisdiction of an appeal from a justice of the peace, unless appellee has been served with process, or has entered an appearance in the circuit court.—Smith v. Irwin, 10 Ill. (5 Gilman) 268.

[b] (Ill. 1858) Where judgment for plaintiff has been rendered in a justice's court, in an action brought by A. for the use of B. on a promissory note, and an appeal taken to the circuit court, A., the nominal plaintiff, must be served with summons (Rev. St. p. 324); and a summons to B. is not sufficient, unless there has been an assignment of the note to the latter.—McCormick v. Fulton, 19 Ill. (9 Peck) 570.

[c] (Ill. 1863) If an appeal be perfected, under Rev. St. 1845, c. 59, § 61, by filing the bond in the office of the clerk of the circuit court, a summons must issue to the appellee; in that case, the appellant using proper diligence in procuring process, the appellee, if not served with the process, would have no right, by entering his appearance, to have the appeal dismissed for want of prosecution.—Boyd v. Kocher, 31 Ill. 295.

[d] (Ill. 1863) Where an appeal from the judgment of a justice of the peace to the circuit court is perfected according to the provisions of Rev. St. 1845, c. 59, § 60, by filing the appeal bond in the office of the justice, no summons is required to be issued to the appellee. Each party is bound to follow up the appeal.—Boyd v. Kocher, 31 Ill. 295.

[e] (Ill. 1864) Section 64 of the act relative to justices of the peace provides that when an appeal is taken by one of several parties from a judgment of a justice of the peace the clerk of the circuit court shall issue a summons

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against the other parties, notifying them to appear and abide by the judgment of the court on the appeal, and, in case it is not served, that the cause shall stand continued at the first term, but shall be tried at the second term. *Held*, that where no summons was issued for those of the defendants who did not join in the appeal, and they did not enter their appearance, it was error to try the appeal at the first term.—Stewart v. Peters, 33 Ill. 384.

[f] (Ill. 1864) Where several defendants are sued before a justice of the peace upon a joint liability, all having been served with process, and an appeal is taken by one of them to the circuit court, judgment must be rendered upon the appeal against all the defendants, or none. To render a judgment against all, it is necessary that all of the defendants should be in court by actual or constructive notice.—Stewart v. Peters, 33 Ill. 384.

[g] (Ill. 1871) One of two defendants, against whom a judgment had been rendered in a justice's court, took an appeal therefrom to the circuit court. That court, at the next term after the appeal was perfected, upon the motion of the party who recovered the judgment, without any summons having been issued to bring in the other defendant, or his appearance having been entered, dismissed the appeal, with a procedendo, and rendered judgment against both defendants "for damages in the delay in taking said appeal," and for costs. *Held* error, as the circuit court had no jurisdiction, under the statute, to render judgment against the defendant in joining in the appeal without summons issued against him, notifying him of the appeal, and requiring him to appear.—Walter v. Bierman, 59 Ill. 186.

[h] (Ill. 1874) Where an appeal is taken from the judgment of a justice of the peace, and perfected by filing an appeal bond with the circuit clerk, it is error to dismiss the appeal, or do anything else in the case, without the consent of the appellant, until the appellee is in court in one of the ways provided by statute, namely, by service of summons, by return of two nihils, or by the entry of his appearance, in writing, filed with the papers in the case 10 days before the commencement of the term of court at which the motion to dismiss is entered.—Camp v. Hogan, 73 Ill. 228.

[i] (Ill. 1877) Where one of two defendants appeals from a judgment of a justice to a superior court, but no summons is issued in such court to the appellee or to the defendant not joining in the appeal, and no appearance is made by the appellee in writing within 10 days before the beginning of the term, a judgment by default in the superior court was unwarranted.—Lehman v. Freeman, 86 Ill. 208.

[j] (Ill. 1878) Where, on an appeal from a justice, there has been no service upon the appellee, nor a return of two nihils, nor an appearance entered by him, the court cannot dismiss, but only continue the case until it acquires jurisdiction.—Pratt v. Bryant, 2 Ill. App. (2 Bradw.) 314.

[k] (Ill. 1881) The circuit court has no jurisdiction of an appeal from a justice of the peace, where there are several codefendants, one of whom appeals, until the others are before the court, either by service, under the statute, or by appearance.—Steinborn v. Thomas, 8 Ill. App. (8 Bradw.) 515.

[l] (Ill. 1881) Upon an appeal taken by one of two joint defendants from the judgment of a justice of the peace, a summons must issue from the circuit court to the defendant not appealing, before that court can acquire jurisdiction.—Humphreys v. Rodgers, 9 Ill. App. (9 Bradw.) 281.

[m] (Ill. 1882) The circuit court has no power to either dismiss or try an appeal without the consent of the appellant, unless the appellee has been brought into court 10 days before the term, either by service of summons, the return of two nihils, or voluntary appearance; and the delivery to the clerk of the trial notice by the appellee does not amount to an entry of appearance.—McVey v. Huott, 11 Ill. App. (11 Bradw.) 203.

[n] (Ill. 1882) Upon appeal from a justice of the peace to the circuit court, no appeal summons was served upon the appellee, nor was there a return of two nihils, or any appearance in writing or otherwise by the appellee. *Held*, that the circuit court had no jurisdiction in the case, and could not dismiss the suit.—Chicago Dredging & Dock Co. v. McCarty, 11 Ill. App. (11 Bradw.) 552.

[o] (Ill. 1887) On appeal by one of two defendants from a justice's judgment, where the other has not appeared, and no process has issued against him, the circuit court cannot overrule a motion for a continuance, and enter judgment against both defendants.—Bourton v. Rathbone, 23 Ill. App. 654.

[p] (Ill. 1888) An appeal by part of the defendants from a justice's judgment, when the appeal is perfected by filing bond, does not stand for trial until the other defendants have been brought in or have entered their appearance.—Fergus v. Lohman, 27 Ill. App. 448.

[q] (Ill. 1889) On appeal from the decision of a justice, where less than the full number of defendants appeal, those not appealing must be summoned, or a return of "Not found" made, before the case can be tried.—Howard v. Costello, 31 Ill. App. 611.

[r] (Ill. 1890) Where an appeal is taken from a justice of the peace, by filing the bond with the clerk of the court appealed to, the appellee must be summoned or appear, or two nihils be returned, before the court can proceed; and, if one of two or more defendants against whom judgment has been entered appeals, there must be summons to those not appearing.—Norton v. Coggswell, 35 Ill. App. 566.

[s] (Ill. 1895) Where a bond on appeal from a justice of the peace is filed with the circuit court clerk, and appellee is not summoned and does not enter appearance in such court, it is error to dismiss the appeal for want of prosecution.—Sutherland v. Lawrence, 60 Ill. App. 331.

[t] (Ill. 1896) Where an appeal from a justice of the peace is taken by one of two defendants, the neglect to bring in the other defendant by summons is not error, where the parties go to trial without objection.—Straus v. Oltusky, 62 Ill. App. 660.

[u] (Kan. 1864) Where, on appeal from a justice's judgment of dismissal, the plaintiff filed a sufficient petition, setting forth a cause of action on a bond, and a summons was regularly issued thereon and served on defendants, who answered, and the plaintiff replied, it was *held* that a subsisting right of action on the bond, of which the district court had original jurisdiction, existed, and that the proceeding was valid as, in effect, the commencing of a new action in the district court.—Reedy v. Gift, 2 Kan. 392.

§ 659. Noticing cause for trial.

Noticing cause for trial as an appearance, see ante, § 595.

[a] (Ill. 1895) Under a rule of court that only actions at issue may be noticed for trial on the "short-cause calendar," an appeal from

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a justice cannot be so noticed unless the appeal papers were filed 10 days before the term.—Vallens v. Hopkins, 157 Ill. 267, 41 N. E. 632, reversing (1894) 51 Ill. App. 337.

[b] (Mich. 1869) 2 Comp. Laws, § 4347, requires all issues of fact to be noticed for trial, and circuit court rule No. 10 provides that "in cases of appeal, where the party upon whom notice is to be served has not appeared by attorney or agent, and his place of residence cannot be ascertained, notice may be served by posting it in some conspicuous place in the office of the county clerk. *Held*, that a judgment recovered in the circuit court against an absent defendant, by posting notice on appeal from a justice's judgment, should be vacated, where it was entered without proof that the notice was posted in a "conspicuous" place in the clerk's office.—People v. Bacon, 18 Mich. 247.

[c, d] (Mich. 1869) 2 Comp. Laws, § 4347, requires all issues of fact to be noticed for trial, and circuit court rule No. 10 provides that "in cases of appeal, where the party upon whom notice is to be served has not appeared by attorney or agent, and his place of residence cannot be ascertained, notice may be served by posting it in some conspicuous place in the office of the county clerk. *Held*, that a judgment recovered in the circuit court against an absent defendant, by posting notice on appeal from a justice's judgment, should be vacated, where the affidavit of the plaintiff as to notice, while it alleges diligence in and inability to ascertain the defendant's residence inferentially, shows that his residence was known to plaintiff.—People v. Bacon, 18 Mich. 247.

[e] (N. Y. 1848) In order to bring on an appeal ex parte appellant must produce, in addition to the affidavit stating the proceedings in the court below, his notice of appeal served with the affidavit, and proof of due service of the affidavit and notice in the time and manner prescribed for instituting the appeal; and, if the appeal be not moved on the day specified in the notice as the day on which the appeal will be heard, appellant must also state that he has given the notice prescribed by section 310, or, if there has been a return from the justice ordered, the notice prescribed by section 315, and a compliance with the seventh rule of the court, made in June, 1848; and in addition thereto he should show whether there has been any counter affidavit served, or any return made, and whether respondent has appeared on the appeal.—Bellamy v. Alexander, 1 Code Rep. 64.

[f] (N. Y. 1859) An appeal from a justice's judgment does not require to be noticed for trial by either party after it has been regularly placed upon the calendar. Code, § 304.—Townsend v. Keenan, 2 Hilt. 544.

[g] (Wis. 1862) Notice of trial of an appeal from a justice of the peace is premature when given before the justice's return is made, and the case should be stricken from the calendar, on motion.—Demming v. Weston, 15 Wis. 236.

[h] (Wis. 1862) Only one notice of trial is required in appeals from justices of the peace, and it may be given by either party, and under it the appeal may be brought to a hearing without further notice.—Webster v. School Dist. No. 4, 16 Wis. 316.

[i] (Wis. 1869) An affidavit stating that affiant's attorney was unavoidably absent from home, and that he had written to another attorney to notice an appeal for trial at the coming term of court, but, through error or mistake, such notice had not been given, was sufficient to excuse a neglect to notice the cause for trial at the proper time, under the provisions of Rev. St. c. 120, § 216, requiring appeals from a justice of the peace to be noticed for trial within two terms succeeding the return.—Howe v. Elliott, 24 Wis. 677.

[j] (Wis. 1879) Where, on appeal from a justice, both parties, before the return is filed, notice the cause for trial, and it remains on the calendar over one term without objection, such notices operate as a mutual stipulation to put the cause on the calendar, and a motion to strike, therefore, made at a subsequent term, on the ground that the cause had not been regularly noticed, should be denied.—Gorton v. Bailey, 46 Wis. 638, 1 N. W. 217.

(b) SCOPE OF INQUIRY.

ISSUES AS TRIED BELOW, § 660.
ERRORS AND IRREGULARITIES, § 661.
DEFECTS IN PROCESS, § 662.
JURISDICTION OF JUSTICE, § 663.
ERRORS WAIVED IN APPELLATE COURT, § 664.

§ 660. Issues as tried below.

Amending pleading so as to change issue, see post, § 665.

[a] (Ark. 1875) On appeal from a justice of the peace, the same cause of action must be tried in the circuit court as was tried before the justice.—Chowning v. Barnett, 30 Ark. 560.

[b] (Cal. 1858) The "trial anew" of Prac. Act, § 626, means only a retrial of such issue as was actually tried below; and, if issue was not there taken on the facts, it cannot be taken on the appeal.—People v. El Dorado County Court, 10 Cal. 19.

[c] (Del. 1854) On an appeal from a justice, in an action against a constable for money collected by him for plaintiff, the officer can be charged only with a neglect of duty for which suit was brought below.—Lord v. Townsend, 5 Har. 457.

[d] (Kan. 1873) A defendant having filed an answer to a bill of particulars in a justice's court, and no new pleadings having been filed, the district court, in the trial of the case on appeal, may limit the investigation to the issues made by the pleadings in the justice's court.—Donnel v. Clark, 12 Kan. 154.

[e] (Md. 1834) Under Act 1791, c. 68, § 4, relating to the filing of appeals from judgments of magistrates, the county court may inquire into the want of consideration of a note, if such defense had been set up before the justice, since such courts have both law and equity jurisdiction.—Gott v. Carr, 6 Gill & J. 309.

[f] (Mass. 1845) When a plaintiff in a justice's court duly files a bill of particulars, in an action of general indebitatus assumpsit, and an appeal is taken from the justice's judgment, and he transmits to the court of common pleas a copy of the record and of the papers filed in the case, the trial in that court, on the appeal, must be confined to the matter set forth in the bill of particulars, unless the plaintiff obtains leave to amend it.—Smith v. Kirby, 51 Mass. (10 Metc.) 150.

[g] (Mass. 1856) At the trial, in the court of common pleas, of an action brought before a justice of the peace upon a bond for the prison limits, the plaintiff may prove any act of escape specified in his bill of particulars filed before the justice, although not relied upon at the trial there.—Kennedy v. Gooding, 73 Mass. (7 Gray) 417.

[h] (Mich. 1885) On the trial in the circuit court of a case appealed from a justice of the peace, the plaintiff should be restricted to the

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particulars of his claim as they stand of record.—Button v. Russell, 55 Mich. 478, 21 N. W. 899.

[i] (Minn. 1858) Under Act Minn. T. "Concerning Justices," art. 4, § 7, providing that "pleadings" shall be put in before justices when required by them or the opposite party, and article 13, § 5, providing that, on appeal from a justice's decision, the "issue before the justice shall be tried before the court above, without other or further new declaration or pleading" except as otherwise directed by the court, the issues on such appeal must be confined to the pleadings in the case, and it is error to charge that, if the evidence for plaintiff is sufficient to warrant a recovery, the verdict should be in his favor, "without reference to the declaration," on the ground that Laws Minn. T. c. 50, §§ 4, 7, 8, allow the declaration to be amended to conform to the proof.—Desnoyer v. L'Hereux, 1 Minn. 17 (Gil. 1).

[j] (Mo. 1885) The statutory rule that in appeals from justices' courts the same cause shall be tried as was tried below has no application to the case of a third person asserting independent rights, a claimant of credits, for instance, in a garnishment suit.—Wolff v. Vette, 17 Mo. App. 36.

[k] (Neb. 1884) The issues in the district court, on appeal from a justice, will be the same as before the justice.—Baier v. Humpall, 16 Neb. 127, 20 N. W. 108.

[l] (Neb. 1892) On appeal from a justice of the peace to the district court, the case must be tried on substantially the same issues as were presented to the justice, unless some matter such as payment, release, etc., has arisen since the former trial.—Lee v. Walker, 35 Neb. 689, 53 N. W. 597; Clarke v. Same, 35 Neb. 693, 53 N. W. 598.

[m] (N. Y. 1848) On appeal from a judgment rendered by a justice of the peace, the common pleas is restricted to the issue or issues of law or fact framed in the court below and appearing upon the record.—Ross v. Hamilton, 3 Barb. 609.

[n] (N. Y. 1876) Where a new trial is to be had in the county court, on appeal from a justice's court, the county court must pass on all questions raised on the trial before the justice as to the regularity of process, its service and return, as to the jurisdiction of the justice, and as to whether proper parties have been brought in.—Maxon v. Reed, 8 Hun, 618.

[o] (Pa.) It is error if, on an appeal from a magistrate, the case tried is different from that in which the appeal is entered.—(1807) Moore v. Waite, 1 Bin. 219; (1819) Stehley v. Harp, 5 Serg. & R. 544.

[p] (Pa.) The proceedings in the common pleas, on an appeal, are de novo only as to the declaration, pleadings, and evidence; but the cause of action must continue the same.—(1810) Owen v. Shelhamer, 3 Bin. 45; (1895) Ripple v. Keast (Com. Pl.) 8 Kulp. 109, 16 Pa. Co. Ct. R. 548, 5 Pa. Dist. R. 31, 26 Pittsb. Leg. J. (N. S.) 205.

[q] (W. Va. 1884) An appeal from the judgment of a justice made by law triable de novo in the appellate court is not a new action, but the continuation of the old one.—Bratt v. Marum, 24 W. Va. 652.

§ 661. Errors and irregularities.

[a] On the trial of an appeal from a justice court to the district court, the defendant cannot set up any defense that does not go to the merits.

—(Ark. 1840) Ball v. Kuykendall, 2 Ark. (2 Pike) 195;
(Tex. 1849) Perry v. McKlenzie, 4 Tex. 154;
(1884) Fulton v. Thomas, 2 Willson, Civ. Cas. Ct. App. § 244.

[b] The appeal takes the case up for trial de novo, rather than for the correction of the justice's errors.

—(Ark. 1885) Hopkins v. Harper, 46 Ark. 251;
(Tex. 1860) Sheldon v. City of San Antonio, 25 Tex. Supp. 177.

[c] (Ala. 1852) When a suit is instituted before a justice of the peace, judgment rendered there, and an appeal taken to the circuit court, the cause must be tried there de novo, without regard to any defect in the proceedings before the justice.—Goss v. Davis, 21 Ala. 479.

[d, e] (Ark. 1838) The statute which provides that, on appeal from a justice of the peace, "a case shall be tried on its merits," cures only irregularities and formal defects. It does not cure the admission of improper testimony.—Jeffery v. Underwood, 1 Ark. (1 Pike) 108.

[f] (Dak. 1877) Justices' Code providing that, on appeal from a justice of the peace, the parties shall proceed in all respects as though the action had been brought in the district court, the judgment of the justice cannot be reversed for errors committed at the trial, but the case must be retried de novo.—Bonesteel v. Gardner, 1 Dak. 372, 46 N. W. 590.

[g, h] (Ill. 1853) On appeal, the circuit court will give the parties a trial upon the merits of their controversy, without regard to forms or technicalities, except in cases where the justice has no jurisdiction.—Vaughan v. Thompson, 15 Ill. (5 Peck) 39.

[i] (Ind. 1862) Causes appealed from a justice of the peace are not tried upon errors in the transcript, but on the merits, upon the original papers.—Baker v. Chambers, 18 Ind. 222.

[j] (Ind. 1864) Errors that occur in the trial of a case in a justice's court are waived by a submission to a trial de novo in the circuit court.—Harrington v. Luddington, 23 Ind. 542.

[k] (Ind. 1867) The court of common pleas cannot review the action of a justice in rejecting any part of the pleadings; and where the justice on motion rejected the answer filed before him, *held*, that it did not make any part of the files in the case on appeal, and that the defendant should refile it, if he desired to avail himself of its benefit.—Hunter v. Thomas, 28 Ind. 448.

[l] (Ind. 1877) That the complaint, in an action originating before a justice of the peace and appealed to the circuit court, is not signed by either the plaintiff or his attorney, is an informality which cannot be reached by demurrer or a motion in arrest of judgment.—Hewett v. Jenkins, 60 Ind. 110.

[m] (Iowa, 1857) By section 2341 of the Code, an appeal brings up a cause for trial on the merits and for no other purpose. All errors and irregularities are to be disregarded.—Gilson v. Johnson, 4 Iowa (4 Clarke) 463.

[n] (Kan. 1877) Where a bill of particulars in a justice's court omits a fact essential to a cause of action, and the case is tried without objection, as though such fact was duly proved, the omission will, on appeal, be considered as waived.—Kansas Pac. Ry. Co. v. Taylor, 17 Kan. 566.

[o] (Ky. 1820) On appeal, no advantage can be taken of irregularity before the justice.—Bledsoe v. Cassady, 9 Ky. (2 A. K. Marsh.) 459.

[p] (Mass. 1875) An appeal from a justice's judgment opens to the appellant in the superior court the whole case as to the law, the facts,

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and the judgment, and renders immaterial any irregularities in the judgment appealed from.—Inhabitants of Leyden v. Sweeney, 118 Mass. 418.

[q] (Minn. 1859) Under Pub. St. c. 59, § 189, which provides that, on appeal from a justice's court to a district court, the case shall proceed in the latter court as near as may be, as in actions originally brought therein, the case is thereby brought into that court in the same condition as it stood before the trial in the justice's court.—Hooper v. Farwell, 8 Minn. 106 (Gil. 58).

[r] (Minn. 1888) An appeal from a judgment of a justice on both law and fact brings the case up for a trial de novo upon the merits, irrespective of errors or irregularities occurring in the course of the trial in the court below, or in the judgment rendered therein, under Gen. St. 1878, c. 65, § 117.—Welter v. Nokken, 38 Minn. 876, 37 N. W. 947.

[s] (Mo. 1844) Where judgment by default is improperly entered by a justice of the peace, and an appeal is allowed, although not authorized in such case, the circuit court should proceed to try the cause de novo, disregarding any error or imperfection in the proceedings before the justice.—Ser v. Bobst, 8 Mo. 506.

[t] (Mo. 1845) On appeal from a justice of the peace the cause will be tried de novo in the circuit court, and the rulings of the justice cannot be revised.—Harper v. Baker, 9 Mo. 116.

[u] (Mo. 1886) Though judgment was erroneously rendered before the maturity of a note to recover on which suit by attachment was brought in a justice's court, yet this defect will not prejudice the case of plaintiff in the circuit court, under section 3052, Rev. St., by which the circuit court is directed to try cases coming to it from justice's courts de novo, without regard to defects in the proceedings before the justice.—Musgrove v. Mott, 90 Mo. 107, 2 S. W. 214.

[v] (Mont. 1893) Under Code Civ. Proc. §§ 730, 731, 822–826, providing that on appeal from a justice's court the cause shall be tried de novo in the district court, the latter court cannot review the action of the justice in rendering judgment five days after hearing instead of within four days, as provided by Code Civ. Proc. § 794.—Missoula Electric Light Co. v. Morgan, 13 Mont. 394, 34 Pac. 488.

[w] (N. H. 1861) An appeal after judgment by a justice on the merits does not open the question of the propriety of the decision upon a motion to quash the writ.—Parker v. Barker, 43 N. H. 35, 80 Am. Dec. 130.

[ww] (N. H. 1861) An appeal after judgment by a justice on the merits does not open the question of the propriety of an amendment of process.—Parker v. Barker, 43 N. H. 35, 80 Am. Dec. 130.

[x] (N. J. 1887) On appeal from a court for the trial of small causes to the common pleas, when the appeal has been regularly taken and prosecuted, it is the duty of the common pleas to retry the cause, and not to pass upon the legality of mere procedure in the court below.—Barclay v. Brabston, 49 N. J. Law (20 Vroom) 629, 9 Atl. 769.

[xx] (N. M. 1857) The transcript is to be resorted to only to ascertain that the case originated and was tried in such justice's court, a judgment rendered, and an appeal properly taken, and it is not error for the court to refuse to dismiss the case for errors apparent in the transcript, as the court tries the case de novo.—Archibeque v. Miera, 1 N. M. 160.

[y] (N. Y. 1855) The notice of appeal from the judgment of a justice is no part of the papers upon which the appeal is to be heard in the appellate court, and its defects cannot be considered where the appeal is brought to hearing upon its merits.—Webster v. Hopkins, 11 How. Prac. 140.

[yy] (Pa. 1833) An informality in the plaintiff's name, in the justice's court, will be disregarded in the court appealed to.—Graham v. Vandalore, 2 Watts, 131.

[z] (S. D. 1896) When an appeal is taken from a justice's court upon questions of both law and fact, and the case is tried anew in the appellate court, and no statement of the case is provided for, the appellate court cannot review alleged errors of the justice's court.—City of Yankton v. Douglass, 8 S. D. 441, 66 N. W. 923.

[zz] (Tenn. 1858) On appeal from a justice the case comes before the court not for revision, as on a writ of error, but for trial de novo on the merits, and the court should give judgment on the merits, regardless of defects in the justice's judgment.—Allen v. Wood, 88 Tenn. (1 Head) 436.

§ 662. Defects in process.

[a] (Ala. 1822) The court to which an appeal is taken is to try it according to equity and justice, without regarding any defect in the warrant, summons, or any other proceeding of the justice. No demurrer, nor motion to quash, in the appellate court, ought to be sustained.—Perry v. Brown, Minor, 55.

[b] (Ala. 1830) On appeal from the judgment of a justice, no exception can be taken on account of the warrant on which suit was commenced, not being under seal.—Rutledge v. Rutledge, 2 Stew. 400.

[c] (Ala. 1840) A defect in the summons, in a case before a justice of the peace, cannot be taken advantage of on an appeal.—Hill v. White, 1 Ala. 576.

[d] (Ala. 1849) In the trial of an appeal, in the circuit or county court, from a judgment of a justice of the peace, the appellate court is required by the statute to try the same, according to the justice and equity of the case, without regard to defects in the warrant, capias, summons, or other proceedings of the justice, before whom it was originally tried.—Hart v. Turk, 15 Ala. 675.

[e] (Ala. 1849) On the trial of an appeal from a justice of the peace, the appellate court, being required by statute to try the case de novo and to give judgment according to its justice and equity, etc., should, in a case where the plaintiff could maintain trespass or assumpsit, disregard the form of the warrant designating the proceeding as an action of debt.—Catterlin v. Spinks, 16 Ala. 467.

[f] (Ala. 1877) A justice's judgment, when appealed from, the cause being triable de novo, will not be vacated on motion merely because no service of process appears.—South & North Alabama R. Co. v. Seale, 59 Ala. 608.

[g] (Ala. 1880) On appeal from the judgment of a justice in a summary proceeding against a constable, the case is required to be tried "according to equity and justice, without regard to any defects in the summons or other process before the justice." Code, § 3121. Consequently, defects in the notice are not available.—Abrams v. Johnson, 65 Ala. 465.

[h] (Colo. 1871) Rev. St. c. 50, § 46, providing that on appeal from the judgment of a justice no exception shall be taken to the form or service of the summons issued, nor to any of

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the proceedings before him, an objection in the district court that the summons was returnable on the day it was issued cannot be maintained.—Deitz v. City of Central, 1 Colo. 323.

[i] (Colo. 1871) Under Rev. St. p. 407, c. 50, § 46, providing that in proceedings on appeal from a justice of the peace no exception shall be taken to the form or service of the summons issued by the justice, objection cannot be made that the process was signed by the title of police magistrate, which the justice had no right to assume.—Deitz v. City of Central, 1 Colo. 323.

[j] (Idaho, 1893) While it is the general rule that a party who has objected to the sufficiency of process, by answering over, waives such objection, this rule does not apply to appeals from justice or probate courts to district courts, since Rev. St. § 4841, provides that in such appeals either party may have the benefit of all legal objections and exceptions in the court below, and the trial in the district court shall be de novo.—Chase v. Hagood, 34 Pac. 811.

[k] (Ill. 1843) Under the act of 1839, to amend the several laws in relation to appeal, on appeal by the defendant from a judgment of a justice of the peace, he cannot assign for error that the year of the return day of the process was not stated therein.—Bines v. Proctor, 5 Ill. (4 Scam.) 174.

[l] (Ill. 1873) On appeal from the judgment of a justice of the peace to the circuit court, no advantage can be taken of any irregularity in the process issued by the justice, or in the service of such process.—City of Alton v. Kirsch, 68 Ill. 261.

[m] (Iowa, 1860) On appeal from a judgment by default before a justice, defendant, relying on the affidavit of the constable who served notice, moved to correct the original notice and the justice's transcript, on the ground that the notice when issued and served was returnable at an hour different from that named in the record. *Held*, that the alleged alteration was of no importance; the trial in the district court being on the merits.—Graves v. Heaton, 11 Iowa, 169.

[n] (Ky. 1823) On an appeal from a justice to the circuit court, it is immaterial whether the warrant of the justice was voidable, or void. If the plaintiff in the circuit court can give evidence supporting a cause of action cognizable by the justice, and of the same species of that in which the judgment below was rendered, it is sufficient.—Burton v. Longs, 13 Ky. (3 Litt.) 441.

[o] (Mo. 1887) The sufficiency of a constable's return of service cannot be inquired into by the circuit court on appeal from the justice's court.—Williamson v. Missouri Pac. Ry. Co., 25 Mo. App. 481.

[p] (Tenn. 1855) After a suit commenced before a magistrate has been brought by appeal to the circuit court, it is too late to file a plea in abatement for irregularity in the process or its execution.—Childres v. City of Nashville, 35 Tenn. (3 Sneed) 347.

[q] (Tex. 1880) On an appeal from a justice's court, in an action against the indorser of a note, an exception to the citation will not be sustained on the ground that it did not allege that the maker was dead, insolvent, or a nonresident.—Kerr v. Murrell, 1 White & W. Civ. Cas. Ct. App. § 891.

[r] (Tex. 1892) On an appeal by defendant from a justice's court he is not entitled to have the citation quashed, although the justice erroneously refused to do so, as he is sufficiently apprised of the nature of the action, and may make his defense de novo.—Irwin v. Davenport, 84 Tex. 512, 19 S. W. 692.

§ 663. Jurisdiction of justice.

[a] (Ala. 1886) Want of jurisdiction on the part of a justice of the peace to render a judgment can be availed of upon appeal from the judgment.—Alabama G. S. R. Co. v. Christian, 82 Ala. 307, 1 South. 121.

[b] (Ky.) The validity of the statute of 1812, increasing the jurisdiction of justices, does not come in question on an appeal from a justice's judgment.—(1816) Pollard v. Holeman, 7 Ky. (4 Bibb) 416; (1827) Suter v. Cardwell, 22 Ky. (6 T. B. Mon.) 34.

[c] (Pa. 1823) If, on an appeal from a judgment of a justice court, it appears from the transcript that the justice exceeded his jurisdiction, defendant may take advantage of the error, though after a plea of the general issue and a trial on the merits.—Wright v. Guy, 10 Serg. & R. 227.

[d] (Pa. 1866) On appeal from a judgment of a justice, and after a trial and verdict, it is not error to refuse to inquire whether the sum demanded was not too large to give the justice jurisdiction, when it did not clearly appear that the sum was too large, and there had been no previous averment of want of jurisdiction.—Funk v. Ely, 52 Pa. (2 P. F. Smith) 442.

[e] (Pa. 1890) Want of jurisdiction of an attachment by a justice may be shown on appeal in the common pleas at any time.—Curwensville Mfg. Co. v. Bloom (Com. Pl.) 10 Pa. Co. Ct. R. 295.

[f] (Tenn. 1852) The fact that a justice was incompetent because of relationship to a party is no ground for a plea in abatement after removal to the circuit court on appeal.—Wroe v. Greer, 32 Tenn. (2 Swan) 172.

[g] (Utah, 1886) Where a justice has decided an action involving a question of title to land, of which, under Code Civ. Proc. § 707, he has no jurisdiction, the district court can only try, upon appeal, the question of the jurisdiction of the justice, and not the question of title.—Ducheneau v. House, 4 Utah, 369, 10 Pac. 838.

§ 664. Errors waived in appellate court.

Effect of appearance in appellate court as waiver of errors, see ante, §§ 596–598.

Objections to replevin bond after appeal, see "Animals," vol. 2, c. 651, § 410.

[a] (Ark. 1843) An agreement by the parties, on appeal from a justice of the peace, to waive all technical objections and try the cause on the merits, is a waiver of notice of a set-off which was offered in the justice's court.—Roy v. O'Connor, 5 Ark. (5 Pike) 252.

[b] (Colo. 1894) On appeal to the county court from a justice court, if defendant, after his motion to dismiss for want of jurisdiction in the justice court has been overruled, enters upon a trial on the merits, objections to the jurisdiction of the justice court are waived.—Schoolfield v. Brunton, 20 Colo. 139, 36 Pac. 1103.

[c] (Ill. 1872) An objection to a justice's exercise of unauthorized jurisdiction is not waived by not being made until after appeal and trial in the circuit court, on motion for a new trial.—Taylor v. Smith, 64 Ill. 445.

[d] (Ill. 1874) Defendant appeared before a justice and went to trial without objecting to the complaint. In the circuit court he submitted to trial without objection. *Held*, that any

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defect in the complaint was waived.—Center v. Gibney, 71 Ill. 557.

[e] (Ill. 1887) Where, on appeal from a justice, the court improperly refuses a continuance over defendant's objection and exception, the error is not waived by defendant's contesting the case on its merits.—Ogden v. Dana, 22 Ill. App. 544.

[f] (Ill. 1894) The service of notice to place an appeal from a justice's court on the short-cause calendar 2 days before the transcript is filed being a mere irregularity, the delay of the party for 15 days to move to have the same stricken therefrom waives the irregularity.—Johnston v. Brown, 51 Ill. App. 549.

[g] (Ind. 1836) Where a plea to the jurisdiction of a justice of the peace was not sworn to, but the plaintiff went to trial on it before the justice, and on appeal in the circuit court, without making the objection, it was waived.—McCormick v. Maxwell, 4 Blackf. 168.

[h] (Ind. 1892) Where, in an action before a justice of the peace by a partnership, only the firm name is used in the complaint, but there is no demurrer or motion in arrest of judgment, and when the cause reaches the circuit court it is docketed by setting out the full name of each member of the firm as plaintiff, and the names so appear in the subsequent proceedings, the technical omission in the complaint as originally made is cured.—Greene v. Witte, 5 Ind. App. 343, 32 N. E. 214.

[i] (Iowa, 1851) Where defendant goes to trial on the merits on an appeal from a justice, after the court has denied a motion to dismiss because of insufficient notice of trial before the justice, without excepting, he waived such objection.—Wilson v. Knight, 3 G. Greene, 126.

[j] (Kan. 1887) Where an action against a railroad company is brought under Code Civ. Proc. § 50, providing that an action for property injured may be brought in any county through which the road passes, before a justice of the peace, and judgment is rendered against said company, and on appeal taken to the district court, judgment is again rendered against the defendant, which then moves for a new trial, upon the ground, claimed for the first time, that the court has no jurisdiction, the objection comes too late.—Kansas City, St. J. & C. B. R. Co. v. Rodebaugh, 38 Kan. 45, 15 Pac. 899, 5 Am. St. Rep. 715.

[k] (Me. 1844) In an action for damages against a town, defendant cannot, after entering an appeal and trying the case on its merits in the district court, object that the action was brought before a justice of the peace who was an inhabitant of the town.—Strout v. Inhabitants of Durham, 23 Me. (10 Shep.) 483.

[l, m] (Mo. 1889) In an action for an injury which must have been committed either in the township of the justice appealed from or in an adjacent township, if the necessary jurisdictional fact is proved in the circuit court, the judgment of that court will not be reversed merely because the statement filed with the justice did not state such jurisdictional fact.—Fitzpatrick v. Missouri Pac. Ry. Co., 34 Mo. App. 280.

[n] (N. J. 1873) In an action in a justice court on a promissory note, an appeal was taken by defendant to the court of common pleas, and there tried in his absence. No statement of demand was filed, but defendant in his offset gave plaintiff credit for the note, and it was received in evidence without objection. *Held*, that defendant on appeal could not raise the objection that no demand had been filed.—Steward v. Sears, 36 N. J. Law (7 Vroom) 173.

[o] (N. J. 1880) A. filed a state of demand against B., in which he declared upon a guaranty of B. to pay the amount of A.'s sale to C. On the trial before the justice, he proved a sale directly to B. B. moved for a nonsuit, which was refused, and no amendment of state of demand was made. Upon trial of an appeal, the same variance appeared, but B. raised no objection upon that ground. *Held*, that by his silence below he waived his right, in the hearing of the cause in the supreme court upon certiorari, to insist upon the variance as error.—Butts v. French, 42 N. J. Law (13 Vroom) 397.

[p] (Ohio, 1846) If an action for nuisance upon land be commenced before a justice and appealed to the common pleas, on issue joined in that court by declaration and plea, it is too late to object to the want of jurisdiction on the part of the justice, and the court of common pleas may proceed to trial and judgment.—Harrington v. Heath, 15 Ohio, 483.

[q] (Ohio, 1859) A case in which the common pleas would have had original jurisdiction was brought into that court by appeal from a justice. The defendant answered and went to trial. *Held* that, after having taken his chances as to the verdict, it was too late for him to object that the justice had no jurisdiction.—Bisher v. Richards, 9 Ohio St. 495.

[r] (Pa. 1882) A plaintiff, by ruling the cause to arbitration and proceeding to trial and award, treats an appeal from a judgment of a justice of the peace as valid and regular, and waives any right to strike off the appeal unless he took exceptions to the form of the transcript within a reasonable time.—Boyer v. Indiantown Gap Silver Min. Co., 2 Chest. Co. Rep. 331.

[s] (Tenn. 1891) A plea to the jurisdiction of a justice of the peace, because defendant is not a resident of the county, is waived if on appeal the plea is not brought to the attention of the trial court until after plaintiff's testimony and part of defendant's has been introduced.—Eller v. Richardson, 89 Tenn. 575, 15 S. W. 650.

[t] (Vt. 1861) Where a justice, not having jurisdiction of a suit by reason of the amount in controversy, tries it, and the judgment is appealed from, and referred by the parties to a referee for trial, they thereby waive the objection which they might have made to the jurisdiction, especially where by the terms of the reference the objecting party agreed to interpose no motion to dismiss if the suit was tried by the referee.—Reed v. Stockwell, 34 Vt. 206.

[u] (Wis. 1851) A party making a motion to dismiss a cause appealed from a justice court in the appellate court, on the ground that it had been adjourned beyond the jurisdiction of the justice, having at a previous term appeared and obtained a continuance of the cause, thereby waived the right to make such objection.—Caughey v. Vance, 3 Chand. 308, 3 Pin. 275.

(c) FURTHER PLEADINGS OR NEW PLEADINGS.

NEW AND AMENDED PLEADINGS IN GENERAL, § 665.
NECESSITY OF NEW PLEADINGS ON APPEAL, § 666.
NEW OR AMENDED PLEADINGS AS MATTER OF RIGHT, § 667.
POWER AND DISCRETION OF COURT TO ALLOW NEW OR AMENDED PLEADINGS, § 668.
SUBSTITUTING LOST PLEADINGS, § 669.
PLEADING NEW CAUSE OF ACTION, § 670.
DISMISSAL OF PART OF CAUSE OF ACTION, § 671.

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INCREASING AMOUNT DEMANDED, § 672.
PLEADING MATTERS NOT WITHIN JURISDICTION OF JUSTICE, § 673.
INCREASING DEMAND BEYOND JURISDICTION OF JUSTICE, § 674.
PLEADING NEW DEFENSES, § 675.
—— ON APPEALS FROM JUDGMENTS BY DEFAULT, § 676.
—— PLEAS IN ABATEMENT AND BAR, § 677.
PLEADING SET-OFFS AND COUNTERCLAIMS, § 678.
AMENDMENTS AS TO PARTIES, § 679.
CHANGING FORM OF ACTION, § 680.
AMENDMENT OF PROCESS, § 681.
MAKING PLEADING MORE DEFINITE AND CERTAIN, § 682.
AMENDMENTS AS TO JURISDICTIONAL FACTS, § 683.
—— BRINGING ACTION WITHIN JUSTICE'S JURISDICTION, § 684.
AMENDMENTS TO CONFORM TO CASE OR PROOF, § 685.
PROCEEDINGS FOR ALLOWANCE OF AMENDMENTS, § 686.
TIME OF PLEADING ANEW AND NOTICE, § 687.
SUFFICIENCY OF PLEADINGS, § 688.
DEPARTURE IN PLEADINGS IN APPELLATE COURTS FROM THOSE IN JUSTICE COURTS, § 689.
PLEAS PUIS DARREIN CONTINUANCE, § 690.
DEMURRERS ON APPEAL, § 690½.
WAIVER OF PLEAS AND OBJECTIONS TO AMENDMENT OF PLEADING, § 691.
MATTERS ADMITTED AND TO BE PROVED AND VARIANCE, § 692.
EVIDENCE ADMISSIBLE UNDER PLEADINGS, § 693.

Affidavits for appeal, see ante, §§ 534–542.
Amendment of affidavit for appeal, see ante, § 541.
—— *of bonds on appeal, see* ante, § 573.
—— *of transcript on appeal, see* ante, §§ 624–632.
Filing pleading in appellate court as appearance, see ante, § 595.
Further pleadings on reversal of justice's judgment, see post, § 734.
Petition or prayer for appeal, see ante, § 521.

§ 665. New and amended pleadings in general.

[a] (Ala. 1884) Under Code, § 3121, providing that, on the removal of a cause from a justice to the circuit court, it shall be tried de novo, trial may either be had on the original complaint, or it is subject to amendment.—Littleton v. Clayton, 77 Ala. 571.

[b] (Ark. 1881) Pleadings before justices, whether written or oral, may be without verification; and, when the transcript is removed to the circuit court on appeal, there is no objection to allowing amendments on the same terms, under the sound discretion of the judge.—Shinn v. Tucker, 37 Ark. 580.

[c] (Cal. 1868) Where a suit brought in a justice's court to recover a personal judgment for taxes is removed to the district court, the complaint may be amended in that court, so as to ask both a personal judgment and also one against the real estate on which the taxes were levied.—People v. Nelson, 36 Cal. 375.

[d] (Conn. 1863) A case appealed from a justice of the peace comes to the higher court as an original one, unaffected by the pleadings below, except as to preliminary pleas that may have been waived in the court below.—Phelps v. Hurd, 31 Conn. 444.

[e] (Ga. 1894) After defendant in a suit on a note, brought and tried in a justice's court, has established in that court the defense of payment, failure to reduce the defense to writing before the jury is stricken in the superior court to try an appeal taken by plaintiff will not preclude the filing of a proper plea of payment then tendered, unless it appears that some injustice will be done plaintiff by allowing the plea to be filed, but, where it appears that the same defense sought to be set up by the plea was litigated in the justice's court, it is error not to permit the plea to be filed.—Booz v. Battey, 94 Ga. 669, 21 S. E. 848.

[f] (Ind. 1857) The general issue, by statute in justice cases, in the absence of a special plea, remains on appeal.—Chapman v. Clevinger, 10 Ind. 23.

[g] (Iowa, 1860) On appeal from a justice's court, the appellant cannot set up by a new pleading a question not raised upon the pleadings below.—Craine v. Fulton, 10 Iowa, 457.

[gg] (Mich. 1872) Comp. Laws, §§ 3859, 3860, authorizing a dismissal of an appeal from a justice's court for want of jurisdiction, and proceeding as if it had not been taken, construed not to apply where the appeal record has been varied in the circuit court, as by filing a new declaration.—Fowler v. Pixley, 25 Mich. 513.

[h] (Mich. 1889) On appeal to the circuit court from the judgment of a justice in assumpsit brought on a verbal declaration, it is not error to permit the filing of a written declaration by way of amendment.—Ziegler v. Henry, 77 Mich. 480, 43 N. W. 1018.

[i, j] (N. M. 1883) Act 1876, relating to justices of the peace, contains 125 sections. Sections 48 to 55 relate to actions of replevin. Section 120 provides that in all causes removed into the district court "the courts shall allow all amendments which may be necessary in furtherance of justice." *Held* to apply to actions of replevin.—Martinez v. Martinez, 2 N. M. 464.

[k] (N. C. 1891) On appeals from justice court, under Code, §§ 875, 880, 881, when the return fails to show the pleadings before the justice, the superior court may allow all pleas to be filed to which either party might have been entitled.—Moore v. Garner, 109 N. C. 157, 13 S. E. 768.

[l] (Or. 1892) Under Justices' Code, c. 9, § 80, which prohibits the appellate court from amending pleadings so as to substantially change the issues tried in the justice's court, an allowance by the circuit court of a reply, which raises issues not presented in the justice's court, is ground for reversal.—Currie v. Southern Pac. Co., 21 Or. 566, 28 Pac. 884.

[m] (R. I. 1852) If no pleas are filed in the inferior court, the appellate court will not permit pleas to be filed therein, and the only matter subject to review is the assessment of damages.—Dunn v. Littlefield, 2 R. I. 97.

[n] (Tenn. 1872) A written plea of the two-year statute of limitations, filed in justice's court, may be disregarded on appeal to the circuit court, and the case may be tried on matters in controversy and the three-year statute applicable to it.—Bailey v. Brooks, 58 Tenn. (11 Heisk.) 1.

[o] (Tex. 1884) Where defendant, sued in justice court for the value of a mule, pleaded that plaintiff warranted that a wound which was on the animal would not injure it, and that it afterwards caused its death, he was properly allowed on appeal to amend the pleadings by alleging that after the mule died plaintiff purchased a horse for defendant, the

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purchase price of which defendant paid, since it did not contain new matter or present a counterclaim or set-off.—Green v. Malone, 2 Willson, Civ. Cas. Ct. App. § 466.

[p] (Tex. 1895) New matter not constituting a new cause of action, which was not pleaded in a justice's court, may be set up by way of amendment on appeal to the county court, under Rev. St. art. 316.—City of Dallas v. McAllister (Civ. App.) 30 S. W. 452.

[q] (Tex. 1895) In a suit appealed from the justice's court to the county court, the parties may, under Rev. St. art. 316, plead new matter not pleaded in the justice's court, which would have been admitted had the cause been originally commenced in the county court.—Harrold v. Barwise (Civ. App.) 30 S. W. 498.

[r] (Tex. 1895) Rev. St. art. 316, though contained in the chapter relating to certiorari to a justice court, applies equally to appeals from a justice court; and therefore, on such appeals, new matter may be pleaded for the first time.—Gholston v. Ramey (Civ. App.) 30 S. W. 713.

[s] (Tex. 1895) On appeal from a justice's court an amended complaint consisting of a tabulated statement of damages claimed, may be supplemented by oral pleading.—D. M. Osborne & Co. v. Ayers (Civ. App.) 32 S. W. 73.

[t] (Wash. 1862) While, on an appeal from a justice's court, the issue before the justice should be tried in the district court without other or new pleadings, unless otherwise directed by the court, still the pleadings may be amended on appeal when by such amendment substantial justice will be promoted.—Newberg v. Farmer, 1 Wash. T. 183.

[u] (Wis. 1851) On appeal from a justice of the peace the appellate court may allow the parties to plead or file new pleadings, where it appears that there was no issue joined before the justice or that the pleadings were oral.—Caughey v. Vance, 3 Chand. 308, 3 Pin. 275.

§ 666 Necessity of new pleadings on appeal.

Waiver of necessity of affidavit of defense, see post, § 691.

[a] (Ala. 1839) On appeal from a justice of the peace, if the demand which is the cause of action exceeds $20, a declaration or statement of the cause of action is necessary.—Steelman v. Owen, 8 Port. 562; Moffitt v. Bragg, 9 Port. 424.

[b] (Ala. 1845) Where, in a cause appealed from a justice of the peace, the judgment of the county court recited that the parties came by their attorneys, and thereupon came a jury, etc., who returned a verdict for the plaintiff, the absence of declaration, plea, and issue furnish no ground for reversal of the judgment.—Bancroft v. Stanton, 7 Ala. 351.

[c] (Ala. 1880) On appeal from the judgment of a justice, a written statement of the cause of action is not necessary.—Abrams v. Johnson, 65 Ala. 465.

[d] (Ala. 1893) Where an action for more than $20 is commenced in justice's court without a sufficient complaint being filed, and it is taken to the circuit court, a judgment for plaintiff by default in the circuit court, without a complaint being filed therein, is erroneous.—Simmons v. Titche, 102 Ala. 317, 14 South. 786.

[e] (Del. 1853) Rule to file a narr. on a plaintiff, against whom there were two returns of non est inventus, on appeal from a justice of the peace.—City of Wilmington v. Hedges, 5 Har. 421.

[f] (Ill. 1878) On appeal from a justice, defendant may, without formal pleadings, urge any defense he may have.—Latham v. Sumner, 89 Ill. 233, 31 Am. Rep. 79.

[g] (Ill. 1885) Upon appeal from a justice of the peace to the circuit court, the case is to be tried de novo upon the proofs offered by the parties, without written pleadings; the circuit court having no other or more extensive power or jurisdiction in disposing of the case than the justice who had tried it below.—Dodge v. People, 113 Ill. 491, 1 N. E. 826.

[h] (Ill. 1894) In cases in the circuit court pending on appeal from a justice's court, defendant, if he wishes to avail himself of a set-off, must file his plea thereof, or give the notice thereof required by statute.—Morgan v. Campbell, 54 Ill. App. 242.

[i] (Ill. 1894) Rev. St. c. 110, § 37, preventing defendant from putting in a plea unless he shall file "with" his plea an affidavit, does not require that defendant file an affidavit on appeal in assumpsit from a justice's court, he having filed no plea at all, as the word "with" is used to denote association in respect of environment, and not simultaneously happening; and, as no plea is filed, nothing can be filed with it, and therefore defendant may defend without filing the affidavit.—Furness v. Helm, 54 Ill. App. 435.

[j] (Ind.) A defense, good, without plea, before a justice, need not be filed on appeal.—(1858) Forgey v. Tucker, 11 Ind. 320; (1858) Helfer v. Jelly, 10 Ind. 382; (1859) Riggs v. Adams, 12 Ind. 199.

[k] (Ind. 1861) The court to which an appeal from a judgment of a justice of the peace is taken may proceed to trial under the same rules of pleading which are allowed before a justice, and a replication is unnecessary, if not required in the court below.—Carter v. Edwards, 16 Ind. 238.

[l] (Iowa, 1861) Where, on appeal from a justice, the transcript failed to show any denial or pleadings on the part of the defendant, a decision of the district court refusing to allow him to introduce evidence was erroneous.—Weimer v. Linhard, 12 Iowa, 359.

[m] (Kan. 1880) An appeal was made from a justice's court to the district court, and the plaintiff allowed to file an amended petition, which the defendant did not answer within the time allowed him. *Held*, that it was error to adjudge him in default, as the case could be tried upon the same pleadings as in the justice's court.—Ziegler v. Osborn, 23 Kan. 464.

[n] (Ky. 1826) It is not necessary to file an affidavit, on appeal from a justice, to a plea that impeaches the consideration of a note.—Davis v. Young, 19 Ky. (3 T. B. Mon.) 381.

[o] (Mass. 1879) If a declaration in set-off is seasonably filed in an inferior court, and is transmitted with the other papers in the case to the superior court on appeal, it need not be filed anew in the latter court in order to warrant the admission of evidence in support of it.—Manson v. Arnold, 126 Mass. 399.

[p] (Minn. 1891) Gen. St. 1878, c. 65, § 117, provides that, on appeal to the district court on questions both of law and fact, the action is to be tried as if originally commenced therein. By Sp. Laws 1889, c. 351, § 28, all laws applicable to appeals to the district courts are made applicable to appeals to the municipal court of St. Paul. *Held* that, on appeal to such municipal court from a justice of the peace, no reply is necessary where none was necessary before the justice.—Barth v. Horejs, 45 Minn. 184, 47 N. W. 717.

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[q] (Miss. 1846) Cases brought from justices of the peace to the circuit court may be tried in the latter court without any written pleading whatever.—Hairston v. Francher, 15 Miss. (7 Smedes & M.) 249.

[r] (Mo. 1896) Limitations need not be pleaded on appeal from a justice of the peace.—Hornsby v. Stevens, 2 Mo. App. Rep'r, 1218.

[s] (Pa.) A statement of the cause of action is not proper on an appeal.—(1819) Stehley v. Harp, 5 Serg. & R. 544. CONTRA, see (1824) Thompson v. Gifford, 12 Serg. & R. 74.

[t] (Pa. 1846) On an appeal from a judgment of an alderman, before whom an action was commenced by scire facias, it is unnecessary to file a declaration, in order to take judgment for want of an affidavit of defense.—Mintzer v. Blight, 3 Clark, 433.

[u] (Pa. 1858) The parties on an appeal from a justice may go to trial without pleadings; and, if they try the case on a declaration in which important averments are left blank, this court will not for such cause reverse, but will treat the case as having been tried without a declaration.—Cunningham v. McCue, 31 Pa. (7 Casey) 469.

[v] (Pa. 1876) On an appeal from a justice of the peace, the defendant can be ruled to plead to the transcript of appeal in the same manner as to a declaration, if served with a copy.—Union Transfer Co. v. Copeland, 33 Leg. Int. 391.

[w] (Pa. 1881) In an appeal from a judgment of a justice of the peace, defendant was *held* not bound to file an affidavit of defense unless plaintiff put something on the record showing his intention to ask for judgment for want of an affidavit of defense.—Pritchett v. Moss, 9 Wkly. Notes Cas. 558.

[x] (Pa. 1889) Act May 25, 1887, requiring plaintiff to file a concise statement of his demand, does not apply to appeals from judgments of the justices of the peace.—Lentz v. Sylvester, 6 Pa. Co. Ct. R. 580.

[y] (Vt. 1865) Where a plea is filed before a justice, and an appeal is taken to the county court, the parties may, but are not obliged to, file a new plea.—Whittaker v. Perry, 37 Vt. 631.

[z] (Vt. 1881) On appeal to the county court from the judgment of a justice of the peace, a new declaration in offset is unnecessary; the pleadings having been correct before the justice.—Proctor v. Wiley, 58 Vt. 406.

§ 667. New or amended pleadings as matter of right.

[a] (Ill. 1843) On appeal from a justice of the peace, the defendant cannot, as a matter of right, in the appellate court demand to file his account for the first time, or to file additional items thereof; but the court may, in its discretion, allow such new or amended account to be filed.—Webb v. Lasater, 5 Ill. (4 Scam.) 543.

[b] (Ind. 1862) A material amendment, inserted without leave in a complaint after an appeal from a justice's judgment to the circuit court, forms no part of the complaint; and the court should, upon application, tell the jury to allow nothing on it.—Best v. Powers, 19 Ind. 85.

[bb] (Iowa, 1858) After default upon proper service before a justice, and judgment thereupon, the defendant cannot upon appeal file an answer as matter of right.—Ruddick v. Vail, 7 Iowa (7 Clarke) 44.

[c] (Iowa, 1864) A defendant, defaulted before a justice of the peace for want of an answer, cannot, on appeal, demur or file an answer as a matter of right.—Leftwick v. Thornton, 18 Iowa, 56.

[d] (Iowa) While leave may be granted to file new pleadings in the district court on appeal from a justice, upon satisfactory evidence being shown to excuse the omission to plead before the justice, it seems that this cannot be demanded as a matter of right.—(1866) May v. Wilson, 21 Iowa, 79; (1871) Warren v. Scott, 32 Iowa, 22.

[e] (Iowa) While the district or circuit court may, in the exercise of a proper discretion and upon proper showing, allow amendments to pleadings after appeal from a justice of the peace, the parties cannot file them as a matter of right.—(1872) Packard v. Snell, 35 Iowa, 80; (1675) Griswold v. Bowman, 40 Iowa, 367.

[f] (Iowa, 1880) On appeal from a judgment by default before a justice, defendant has an absolute right to file pleadings in the circuit court, under Code 1873, § 3596, which provides in such case that defendant may file "any pleading necessary to properly set forth any defense he may have."—Harty v. D. M. & M. R. Co., 54 Iowa, 327, 6 N. W. 545; Berry v. Same, Id.

[g] (Mo. 1891) Plaintiff in garnishment proceedings before a justice of the peace, having failed to deny the answer of the garnishee within the time provided by statute, is not entitled as a matter of right to make such denial in the circuit court on appeal; and it is not error for the circuit court to refuse plaintiff leave to file a denial, or to strike out such denial after leave has been given to file it.—Blackstone v. St. Louis, I. M. & S. R. Co., 44 Mo. App. 555.

[h] (N. M. 1857) On an appeal from a justice of the peace to the district court, the case is tried de novo on its merits, and the parties may file accounts, set-offs, etc., as if the case had originated in the latter court.—Archibeque v. Miera, 1 N. M. 160.

[hh] (N. C. 1882) The plea of the statute of limitations, not relied on before a justice, cannot be set up on appeal in the superior court without leave. Amendment of pleadings in such case is matter of discretion.—Poston v. Rose, 87 N. C. 279.

[i] (N. C. 1895) Pleadings on appeal from a justice are in the discretion of the court, and an adjudication that the matter could be better determined upon the trial de novo upon the original appeal, made on the denial of a motion to dismiss for want of jurisdiction in the justice, pending an appeal from his judgment, is simply a continuance of the matter to the next regular term of the appellate court, and does not give defendant, who had not before pleaded, the right to plead to the jurisdiction.—Forbes v. McGuire, 116 N. C. 449, 21 S. E. 178.

[j] (Pa. 1884) Where plaintiff, after plea entered on appeal from the judgment of a justice of the peace, amends his declaration, the pleadings are de novo, and defendant may file a plea in abatement at the next term of court.—Hastings v. Hastings, 1 Lanc. Law Rev. 77.

§ 668. Power and discretion of court to allow new or amended pleadings.

[a] (Cal. 1880) The jurisdiction of the district court over cases transferred to it from the justice's court, under Code, § 838, is special, and the trial must be had upon the pleadings as made below.—City of Santa Cruz v. Santa Cruz R. Co., 56 Cal. 143.

[b] (Ind. 1862) On appeal from a justice's judgment to the common pleas, the court may

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in its discretion allow the defendant to amend his answer, and should decide whether or not costs shall abide the event of the suit.—Duke v. Brown, 18 Ind. 111.

[c] (Ind. 1863) On appeals from justices to the common pleas or circuit courts, it is competent for the latter courts, under Code, § 97, to permit amendments to be made to the complaint.—Indianapolis & C. R. Co. v. Clark, 21 Ind. 150.

[d] (Iowa, 1879) On appeal from a justice of the peace to a circuit court it is in the discretion of the court to allow an amendment to a pleading.—Clow v. Murphy, 52 Iowa, 695, 3 N. W. 723.

[e] (Kan. 1873) An appeal was taken from the judgment of a justice of the peace to the district court in 1869, in accordance with the law as it then was; but the petition was not filed as required by rule 15 of the supreme court then in force. The trial was had nearly two years after the petition was filed, at which time, after the plaintiff had rested his case, the court allowed the defendant to file an answer, which did not set up anything but what the defendant had a right to prove in the justice's court. The trial then proceeded to a termination; both parties introducing evidence, and neither asking for a continuance. *Held*, that it was within the discretion of the court below to allow said answer to be filed, and that the court did not err in doing so.—Stevens v. Perrier, 12 Kan. 297.

[f] (Me. 1844) In an action against a town to recover damages alleged to have been sustained by the plaintiff, by reason of a defect in a highway within the town, commenced before a justice of the peace and carried by appeal to the district court, it is competent for that court to order a repleader or an amendment of the pleadings.—Strout v. Inhabitants of Durham, 23 Me. (10 Shep.) 483.

[g] (Minn. 1869) After an appeal had been taken, on questions of law and fact, under Gen. St. 1866, c. 65, from a judgment of a justice of the peace, section 107 of that chapter was amended so as to provide, in regard to such appeals, merely that the action should be tried "in the same manner as actions originally commenced in the district court"; the proviso contained in the remaining portion of the section not being re-enacted. *Held*, that after such amendment the district court had full power to allow an amendment of the pleadings in the case, even though it would change the issue.—Bingham v. Stewart, 14 Minn. 214 (Gil. 153).

[h] (N. M. 1857) If it appears that the justice had jurisdiction of the subject-matter and of the parties, the district court has a discretion to grant leave to amend the pleadings. A motion in the district court to dismiss the suit, because the complaint is not sworn to and is defective in other particulars, may be denied, and the plaintiff given leave to amend; no objection having been made before the justice on that ground, and plaintiff also offering to correct the defects.—Sanchez v. Luna, 1 N. M. 238.

[i] (N. M. 1857) The district court has the same power, in such a case, to permit the petition filed as an amended cause of action to be sworn to on a subsequent day, where such verification was omitted when it was first filed, as it had to permit the amendment.—Sanchez v. Luna, 1 N. M. 238.

[j] (N. M. 1890) Under Comp. Laws 1884, § 1848, which provides that "all appeals from inferior tribunals to the district courts shall be tried anew in said courts, on their merits, as if no trial had been had below," the district court has the power to allow amendments to the pleadings in a case appealed from a justice of the peace.—Sanchez v. Candelaria, 5 N. M. 400, 23 Pac. 289.

[k] (N. Y. 1855) Neither the supreme nor the county court has any power under the Code to amend the pleading in a case originating in a justice's court.—Gould v. Glass, 19 Barb. 179.

[l] (N. C. 1876) On an appeal from a justice's judgment, the superior court judge may allow a new plea to be entered, on payment of costs, but is not required to do so.—Hinton v. Deans, 75 N. C. 18.

[m, n] (Or. 1896) On appeal from a judgment of a justice, it is within the discretion of the circuit court to refuse to allow the filing of an amended complaint offered there for the first time.—Watson v. Buckler, 29 Or. 235, 45 Pac. 765.

[o] (Vt. 1858) On appeal from a justice, the power of the court to allow amendments which did not change the parties or the nature of the action, is derived from its general power to allow amendments of process and proceedings.—Stevens v. Hewitt, 30 Vt. 262.

[p] (Wash. 1892) Under Hill's Ann. Code, § 1635, providing that on appeals from justices of the peace "the issue shall be tried in the superior court without other or new pleadings, unless otherwise directed by the court," superior courts have discretionary power to permit amendments of pleadings in such cases, and a writ of prohibition will not issue to restrain such court from proceeding to trial of a case brought up on appeal from a justice, wherein the plaintiff was permitted to file an amended affidavit.—State v. Superior Court of King County, 3 Wash. St. 705, 29 Pac. 213.

[q] (Wis. 1851) On appeal from the judgment of a justice of the peace, the circuit court may, in its discretion, allow the plaintiff to file a new declaration; and in such case the defendant may plead anew.—Caughey v. Vance, 3 Chand. 308, 3 Pin. 275.

[r] (Wis. 1861) After return in a case appealed from a justice's court under Rev. St. c. 120, § 204, the court can direct the defendant to serve and file his answer, and allow the issue to be made up and proceed to trial as in other cases.—Burnham v. Turner, 14 Wis. 622.

[s] (Wis. 1895) An appeal from a justice to the superior court of Milwaukee, under Rev. St. § 3768, is triable as if originally brought there; and the court, under Rev. St. § 2830, can amend the proceedings at any time.—Marlett v. Doctor, 89 Wis. 347, 61 N. W. 1125.

§ 669. Substituting lost pleadings.

[a] (Ala. 1853) In appeal cases from justices of the peace, where judgment was rendered as on issue joined, it is not error to allow the substitution of a lost statement without notice to the defendant.—Ortez v. Jewett, 23 Ala. 662.

[b] (Ill. 1889) On appeal to the county court from the judgment of a justice of the peace, if papers are missing from the record which the transcript shows were filed before the justice, the proper practice is to enter a rule upon the justice to send them up, or, if there is reason to believe that they have been lost or destroyed, plaintiff may be required to furnish copies.—Ritchie v. Village of Warrensburg, 32 Ill. App. 181.

[c] (Mich. 1886) Where it appears on an appeal from a justice's court that the complaint has been lost, it is not error to allow the plaintiff to file a copy to complete the record.—Bauer v. Wasson, 60 Mich. 194, 26 N. W. 877.

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[d] (Tex. 1889) Where, on an appeal from the judgment of the justice against a garnishee defendant, it appeared that the original papers have been lost, and no substitution has been made, it was error to proceed to try the cause, since the application under oath for the writ of garnishment is the basis of the proceedings, and is indispensable.—Smissen v. Lee, 3 Willson, Civ. Cas. Ct. App. § 449.

§ 670. Pleading new cause of action.

Waiver of objection to amended pleading setting up new cause of action, see post, § 691.

[a] A complaint in a justice's court cannot on appeal be so amended as to add a new and independent cause of action.

—(Pa. 1887) Depew v. Scism, 3 Del. Co. R. 275;

(Wis. 1895) Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58.

[b] (Ark. 1885) On an appeal from a justice, plaintiff may amend his action by adding a claim which was not included in the original action.—Birmingham v. Rogers, 46 Ark. 254.

[c] (Colo. 1889) Where a statutory action against a railroad company for stock killing is brought before a justice of the peace under Gen. St. c. 93, div. 5, and defendant appeals to the county court, it is error to allow plaintiff to amend in that court by adding a count for damages to grass land caused by fire; that being a new cause of action, and requiring different proof from the statutory action.—Union Pac. Ry. Co. v. Sternberg, 13 Colo. 141, 21 Pac. 1021.

[d] (Conn. 1893) Gen. St. § 893, provides that no attachment shall be granted against the body unless each cause of action in the complaint be such that execution may issue against the body of defendant on the judgment founded thereon. Section 1023 allows plaintiff to amend by inserting new counts which might have been originally inserted. Section 879 provides that, on appeal from a justice, either party may amend by introducing any equitable right, cause of action, defense, or set-off. *Held*, that on appeal from a judgment of a justice for plaintiff in an action in which defendant's body was attached, where no release of the attachment was made, there could not be an amendment by the introduction of a cause of action which would not authorize attachment or execution against the body.—Allen v. Woodruff, 63 Conn. 369, 28 Atl. 532.

[e] (Ill. 1839) Where a case commenced before a justice of the peace is carried to the circuit court, an additional bill of particulars cannot be filed, setting forth other claims, different from those declared on.—Brookbank v. Smith, 3 Ill. (2 Scam.) 78.

[ee] (Ill. 1844) On appeal to the circuit court from a judgment of a justice of the peace, where plaintiff has been allowed to file and prove additional accounts, such accounts, after the offsets are deducted, must not exceed the original demand indorsed on the process.—Waterman v. Bristol, 6 Ill. (1 Gilman) 593.

[f] (Ill. 1879) On an appeal from a justice of the peace to the circuit court, no amendment can be permitted which will make an entirely new case against entirely new parties to the record.—Douglas v. Newman, 5 Ill. App. (5 Bradw.) 518.

[g] (Iowa, 1882) Where an action is brought before a justice of the peace, who, under the laws, has no chancery jurisdiction, on an alleged promissory note which omits to mention the amount in the body of the instrument, on appeal to the circuit court it is error to allow an amendment to the petition, stating that the amount was omitted by mistake, and praying that it be inserted; for Code 1873, § 3591, prohibits the introduction of "any new demand" after the case comes into the circuit court.—Hollen v. Davis, 59 Iowa, 444, 13 N. W. 413, 44 Am. St. Rep. 668.

[h] (Kan. 1883) Plaintiff's bill of particulars in an action against a railroad company for killing a cow stated a case at common law, and also under the statute, except that there was an omission to state the want of a fence. *Held*, that the defect in the bill might be supplied by amendment allowed by the district court after an appeal from a judgment for plaintiff in the justice's court.—Kansas City, Ft. Scott & G. R. Co. v. Hays, 29 Kan. 193.

[i] (Mo.) Upon an appeal from a justice of the peace to the circuit court, the case must be tried de novo upon the same cause of action that was tried before the justice, and the plaintiff cannot in the circuit court, by amendment, wholly change the cause of action.—(1838) Smith v. Anthony, 5 Mo. 504; (1867) Clark v. Smith, 39 Mo. 498.

[j] (Mo. 1869) H. commenced an action before a justice of the peace against a railroad company for damages for the killing of stock, and filed a declaration at common law. A trial was had, and judgment rendered in his favor. The defendant appealed, and the plaintiff filed an amended statement under Rev. Code 1855, c. 51, § 5. *Held*, that there was no error in striking out the amended statement.—Hansberger v. Pacific R. Co., 43 Mo. 196.

[k] (Mo. 1883) Under Rev. St. 1879, § 3060, permitting amendments in the circuit court on appeal from a justice of the peace, where the cause of action is not changed, a statement in an action for killing live stock might be amended so as to bring it plainly under the statute, and show that the killing was in consequence of defendant's failure to fence.—Dryden v. Smith, 79 Mo. 525; King v. Chicago, R. I. & P. Ry. Co., 79 Mo. 328.

[l] (Mo. 1884) Rev. St. 1879, § 2851, provides that, before any process shall be issued in a suit before a justice, the plaintiff shall file the instrument sued on, or a statement of the account, or the facts constituting the cause of action. *Held* that, where no such statement was filed before the justice, an amended statement could not be filed in a circuit court on appeal from the judgment.—Peddicord v. Missouri Pac. Ry. Co., 85 Mo. 160.

[m] (Mo.) Rev. St. § 3060, relating to amendments in the circuit courts on appeals from justices of the peace, will not justify an amendment changing the cause of action.—(1887) Sturges v. Botts, 24 Mo. App. 282; (1888) Rankin v. Fairley, 29 Mo. App. 587.

[n] (Mo. 1888) Rev. St. § 3060, allows a plaintiff to amend his statement in the circuit court after an appeal from a justice "when, by such amendment, substantial justice will be promoted," provided that "no new cause of action not embraced or intended to be included in the original account or statement shall be added by such amendment." *Held*, that it was proper to allow an amendment when it appeared that the item or cause of action introduced by the amended statement was intended to be embraced in the original statement.—Heman v. Fanning, 33 Mo. App. 50.

[o] (Mo. 1896) Where a statement filed before a justice states a common-law action, it is error to permit it to be amended on appeal so as to state a cause of action under a statute.—Evans v. St. Louis & S. F. R. Co., 67 Mo. App. 255, 1 Mo. App. Rep'r, 504.

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[p] (Ohio, 1876) In a suit before a justice of the peace to recover of the defendant, on his liability as husband, the principal and interest on a note made by his wife before marriage, the plaintiff failed to recover judgment by reason of a divorce decreed between the defendant and his wife before trial. He then appealed to the court of common pleas, and there filed a petition on a special contract, alleging a promise by the defendant to pay a part of the sum due on the note in full satisfaction of the entire note, and upon the performance by the plaintiff of certain conditions precedent. *Held*, that the court of common pleas acquired no jurisdiction by the appeal to try the new cause of action.—Wilson v. Wilson, 30 Ohio St. 365.

[q] (Ohio, 1878) A petition on an appeal from a justice which states a different cause of action from that tried before the justice should be struck from the files on motion, but with leave to file another petition.—Ballou v. Farnsworth, 4 Ohio Dec. 88, 1 Cleve. Law Rep. 17.

[r] (Pa. 1829) The form of action may be sometimes changed; the cause of action, never.—Caldwell v. Thompson, 1 Rawle, 370.

[s] (Pa. 1889) Though on appeal from a justice of the peace to the common pleas in Pennsylvania the proceedings are de novo, the cause of action must remain the same, and, where an action before a justice for killing a horse is changed by amendment in the common pleas into an action for breach of contract in not maintaining a fence along defendant's right of way, a nonsuit is proper.—Reitze v. Meadville & L. Ry. Co., 126 Pa. 663, 17 Atl. 663.

[t] (Tenn. 1865) By section 4177 of the Code, the circuit court has the power and it is its duty to permit an original motion against an officer, brought into court by appeal, to be so amended as to make the suit one as well for the delinquency for which it was brought before the justice, as for all insufficient returns on the same executions.—King v. Breeden, 42 Tenn. (2 Cold.) 455.

[u] (Tex. 1882) Where, after judgment in a justice's court, the case is appealed or taken to the county court by certiorari, the parties cannot plead causes of action or defenses not pleaded in the justice's court.—Curry v. Terrell, 1 White & W. Civ. Cas. Ct. App. § 239.

[v] (Tex. 1885) Where, after appeal from justice court of proceedings to replevin an animal, there is an increase, an amendment by adding a demand for the offspring does not introduce a new cause of action.—Hodges v. Peacock, 2 Willson, Civ. Cas. Ct. App. § 825.

[w] (Tex. 1889) Plaintiff in an action on an account in justice court cannot on appeal set up a cause of action upon a written obligation.—Laing v. St. Louis Type Foundry Co., 3 Willson, Civ. Cas. Ct. App. § 463.

[x] (Tex. 1890) Where an action is brought in justice's court on a claim for witness fees, independent of the judgment in the case in which the fees accrued, no amendment is allowable on appeal to the county court, whereby it is sought to recover under and by virtue of the judgment.—Ballard v. Murphy (App.) 15 S. W. 42.

[y] (Tex. 1892) Plaintiff sued in a justice's court on an open account for rent. The justice rendered judgment for defendant, and plaintiff appealed to the county court. In the latter court plaintiff filed an amended petition, alleging that defendant had given a note in liquidation of the account; that the note had been lost after maturity, while plaintiff was the legal owner and holder thereof; that the balance due on the note was $125; and that it was given for the same debt as that stated in the account on which the suit was originally based. *Held*, that the amendment did not set up a new cause of action, since the debt, the amount, and the transaction were the same.—Roe v. Holbert (App.) 18 S. W. 417.

§ 671. Dismissal of part of cause of action.

[a] (Mo. 1886) Plaintiff may dismiss a part of his cause of action, notwithstanding the statute which requires that the same case which was tried before the justice shall be tried on appeal.—Gerber v. McCoy, 23 Mo. App. 295.

[b] (N. C. 1880) Plaintiff brought suit before a justice of the peace, claiming a debt of $50, and also possession of a horse and wagon under a certain mortgage. On appeal from the justice's judgment to the superior court, plaintiff offered to remit his claim for the personal property, and declare only for the debt. *Held*, that he had a right to take such a course, in his discretion, and that the court erred in denying him that privilege.—Jones v. Palmer, 83 N. C. 303.

[c] (N. C. 1894) In an action against R. and D. before a justice, the summons stated the cause of action to be for nonpayment of $70.80 "due by account and contract." The justice's return on appeal stated that plaintiff claimed $70.80 for breach of contract in not delivering tobacco bought of R., and asked to subject that sum out of the proceeds of the tobacco in the hands of D., to whom R. had sold it. *Held*, that the superior court properly allowed an amendment submitting only the issue as to whether there was a breach of contract by R., and, if so, plaintiff's damages.—Starke v. Cotton, 115 N. C. 81, 20 S. E. 184.

§ 672. Increasing amount demanded.

[a] (Ark. 1881) Under Gantt's Dig. § 4616, an affidavit in replevin may, on appeal from a justice to the circuit court, be amended so as to enlarge the damages.—Hanf v. Ford, 37 Ark. 544.

[b] (Ill. 1844) On appeal to the circuit court from a judgment of a justice of the peace, the court may, in its discretion, allow amendments, not only of the appeal bond, but also of the original accounts filed in the case, and either party may file additional accounts upon such terms as the court may direct.—Waterman v. Bristol, 6 Ill. (1 Gilman) 593.

[c] (Ind. 1866) Where a case has been appealed from a justice of the peace to the circuit court, it is not error to allow the plaintiff in the latter court to amend his complaint by increasing the amount of his demand, provided it is not increased to an amount beyond the jurisdiction of the justice.—Miller v. Beal, 26 Ind. 234.

[d] (Ky. 1860) On appeal from the decision of a justice, a plaintiff is not authorized to increase the amount of his demand. The same cause of action must be tried anew, and a new action is not to be substituted.—Burbage v. Squires, 60 Ky. (3 Metc.) 77.

[dd] (Mich. 1889) Where, on appeal from a justice, defendant objected to the admission of evidence because no bill of particulars had been filed, it was not error to permit a bill of particulars to be filed for a larger amount than the one in the justice's court when the amount claimed was no greater.—McDonald v. Weir, 76 Mich. 243, 42 N. W. 1114.

[e] (Miss. 1877) In trespass for the recovery of the statutory penalty for cutting trees, an itemized bill of particulars filed in the justice's court, embracing three trees, may, under Code,

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§ 621, be amended in the circuit court by adding two trees.—McCleary v. Anthony, 54 Miss. 708.

[f] (Mo. 1886) Where a transcript from a justice of the peace shows that the case was tried before him on an account showing a balance of a certain sum, plaintiff cannot amend his cause of action on the appeal in the circuit court by filing an account showing a balance of a larger sum.—Wehringer v. Ahlemeyer, 23 Mo. App. 277.

[g] (Mo. 1887) Where the recovery before the justice was for the amount sued for, under a statement showing quantity and price of the goods sold, the plaintiff cannot so amend his statement in the circuit court as to enable him to recover a judgment for more than double that amount.—Boughton v. St. Louis, Iron Mountain & Southern Ry. Co., 25 Mo. App. 10.

[h] (N. Y. 1889) On an appeal from a justice of the peace the court cannot allow an amendment demanding judgment for more than $50, so as to entitle appellant to a new trial, as allowed by Code Civ. Proc. § 3068, where more than that sum is demanded by the pleadings of either party, as the case must be disposed of on the pleadings as they left the trial court.—Longrill v. Downey (Super. Buff.) 7 N. Y. Supp. 503.

[i] (Ohio, 1876) Where, on appeal from a justice's judgment, items not appearing in the bill of particulars are added to the petition without leave, a judgment by default for the full amount is erroneous.—Hannon v. Tallman, 7 Ohio Dec. 45, 1 Wkly. Law Bul. 79.

[j] (Tex. 1884) On appeal from the judgment of a justice on a suit based on an account containing four items, the plaintiffs will not be allowed in the county court to amend their claim by adding another item.—Texas & St. L. Ry. Co. v. Melear, 2 Willson, Civ. Cas. Ct. App. § 457.

[k] (Tex. 1885) On appeal from a justice court in an action for damages for breach of warranty, an amendment to the complaint adding an additional item of damages arising from the breach is permissible.—Cullers v. Wilson, 2 Willson, Civ. Cas. Ct. App. § 818.

[l] (Tex. 1887) Where plaintiff sued in justice court for the amount due on a promissory note, and obtained judgment, he cannot on appeal amend his claim by claiming 10 per cent. of the amount of the note for collection expenses, as stipulated therein, since it presents a new cause of action.—Hendricks v. Cameron, 3 Willson, Civ. Cas. Ct. App. § 261.

[m] (Tex. 1890) In an action for damages to a horse and wagon caused by collision with a street car, the pleadings may be amended on appeal from a justice of the peace to the county court so as to claim, as additional damages, the full value of the horse, which had died, and other expenses accrued since the trial in the justice court.—North Side St. Ry. Co. v. Want (App.) 15 S. W. 40.

[n] (Wis. 1895) A complaint in a justice's court cannot, on appeal to the superior court, be so amended as to increase the amount of damages claimed.—Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58.

[o] (Wis. 1896) Under Rev. St. § 2896, providing that the relief granted plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint, where, in a replevin suit commenced in justice court, defendant, after appeal of plaintiff to the circuit court, withdrew his answer, plaintiff was not entitled to amend his complaint (which, by section 3739, is the affidavit) so as to increase the amount alleged therein as the value of property, and to judgment, in case of nondelivery of the property, to the amount of the amended complaint.—Geer v. Holcomb, 92 Wis. 661, 66 N. W. 796.

§ 673. Pleading matters not within jurisdiction of justice.

Pleading set-off or counterclaim beyond justice's jurisdiction, see post, § 678.

[a] As, in an action of trespass, appealed from a justice of the peace, the issues to be tried are those joined in the justice's court, it is not error for the appellate court to refuse to allow defendant to amend his plea of the general issue by setting up title to the locus in quo in himself.
—(Me. 1837) Fillebrown v. Webber, 14 Me. (2 Shep.) 441;
(Mass. 1885) Kelley v. Taylor, 34 Mass. (17 Pick.) 218;
(Mich. 1884) Bureau v. Marshall, 55 Mich. 234, 21 N. W. 304;
(N. H. 1834) Flagg v. Gotham, 7 N. H. 266; (1851) Johnson v. Gould, 23 N. H. (3 Fost.) 251.

[b] (Conn. 1892) On appeal from a justice of the peace all the counts on which the case has been tried cannot be stricken out, and a count substituted which is not within the jurisdiction of the lower court.—Colvin v. Peck, 62 Conn. 155, 25 Atl. 355.

[c] (Ky. 1825) On appeal from the judgment of a justice, plaintiff cannot, without defendant's consent, file a declaration on a cause different from that set up in the warrant of the justice, and of which the justice would have no jurisdiction.—Kirk v. Williams' Ex'x, 18 Ky. (2 T. B. Mon.) 135.

[d] (Mo. 1888) Rev. St. § 3060, relating to amendments in the circuit courts on appeals from justices of the peace, will not justify an amendment giving jurisdiction over the subject not had by the justice when the suit was instituted.—Rankin v. Fairley, 29 Mo. App. 587.

§ 674. Increasing demand beyond jurisdiction of justice.

Increasing demand beyond justice's jurisdiction as release of surety on appeal bond, see post, § 741.

Waiver of objections to amended pleading setting cause beyond justice's jurisdiction, see post, § 691.

[a] Where the district court acquires jurisdiction on appeal from justice's court upon law and fact, the trial proceeds de novo, and the appellate court may allow an amendment of the complaint increasing the amount of plaintiff's claim beyond that to which the jurisdiction of the justice is limited.
—(Minn. 1889) McOmber v. Balow, 40 Minn. 388, 42 N. W. 83;
(Wis. 1860) Dressler v. Davis, 12 Wis. 58; (1872) Heath v. Heath, 31 Wis. 223.
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(N. C. 1882) Meneely v. Craven, 86 N. C. 364;
(Pa. 1884) Hastings v. Hastings, 1 Lanc. Law Rev. 77.

[b] (Ind. 1846) Under statutory restrictions limiting the jurisdiction of a justice of the peace in cases of tort to $20 where the cause of action set forth in the declaration in a justice's court is a tort, and on appeal to the circuit court the declaration is so amended that the aggregate of damages claimed is $100, the court has no jurisdiction.—White Water Val. Canal Co. v. Boden, 8 Blackf. 130.

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[c] (Ind. 1848) Justices of the peace have not jurisdiction of an action of tort where the claim is for $100 or more; and where the claim was for a less sum than $100 before the justice of the peace, and afterwards, in the circuit court, the plaintiff amended his writ and claimed $100, it was *held* that the process was void ab initio.—White Water Val. Canal Co. v. Dow, Smith, 62.

[d] (Ind. 1863) The court of common pleas on appeal from a justice's decision may authorize an amendment increasing the amount sought to be recovered, though it be enlarged beyond $100, and may make the proper order respecting costs, and also as to the defendant's reforming his defense.—Bogys v. Near, 20 Ind. 395.

[e] (Ind. 1873) Error in overruling a motion to dismiss an action instituted before a justice of the peace, made after the amendment of the complaint in the circuit court by which the amount demanded exceeds the jurisdiction of a justice, cannot be cured by an offer to remit the excess of the judgment over the amount claimed before the justice.—Pritchard v. Bartholomew, 45 Ind. 219.

[f] (Ind. 1873) A motion by defendant to dismiss the action on the ground that the amount claimed is beyond the jurisdiction of a justice of the peace, made pending an appeal in the circuit court from a justice's judgment, after plaintiff has, by leave of court, filed a second paragraph to his complaint, demanding judgment for $300, should be sustained, under 2 Gav. & H. St. p. 576, § 67, providing that on appeal from a justice's judgment the cause shall be tried under the same rules and regulations prescribed for trials before justices.—Pritchard v. Bartholomew, 45 Ind. 219.

[g, h] (Kan. 1884) The district court, on appeal from the judgment of a justice of the peace, cannot allow claims to be presented which would bring the amount in controversy up to a sum greater than that within the jurisdiction of the justice.—Wagstaff v. Challiss, 31 Kan. 212, 1 Pac. 631.

[i, j] (Miss. 1856) The rule that the circuit court, upon appeal from a justice of the peace, has no other jurisdiction than the justice of the peace had, does not preclude the circuit court from consolidating cases arising upon the same facts and coming before it by appeal, although the aggregate amount in suit exceeds the jurisdiction of a justice of the peace.—Ammons v. Whitehead, 31 Miss. 99.

[k] (Neb. 1882) Where, pending an appeal in replevin to the district court, the property in controversy has materially increased in value, the appellate court may allow the petition to be amended so as to show the increased value, and the appeal will not be dismissed on the ground that the value of the property had increased to an amount which was beyond the jurisdiction of the justice's court, from which the appeal was taken.—Deck v. Smith, 12 Neb. 389, 11 N. W. 852.

[l] (N. Y. 1888) Code Civ. Proc. § 3071, relative to appeals from justices' to county courts, provides that, after the expiration of 10 days from the filing of the justice's return, the action is to be deemed an action at issue in the county court, and all the proceedings therein are the same as if the action had been commenced in the county court. Section 348 confers upon the county court the same jurisdiction, power, and authority over actions which the supreme court possesses. *Held*, that the county court has power, on the trial of an action appealed from a justice's court, to allow an amendment of the complaint increasing the demand for judgment from $200 to $1,000.—Simpson v. Rome, W. & O. R. Co., 48 Hun, 113.

[m] (Ohio, 1871) In an action commenced in justice court, it is error, on appeal to the common pleas, to allow plaintiff to amend his account so as to increase it beyond a sum that would have been within the justice's jurisdiction, since without consent of the parties, the appellate court is only authorized to allow such an amendment as might have been allowed by the justice.—Bickett v. Garner, 21 Ohio St. 659.

[n] (Pa.) On appeal to the common pleas from a judgment of a justice of the peace the amount demanded by plaintiff cannot be increased beyond the limits of the justice's jurisdiction, except so far as to embrace interest accruing after the suit is brought.—(1881) Linton v. Vogel, 98 Pa. 457; (1893) Shaw v. Squires, 153 Pa. 150, 26 Atl. 252.

[o] (Pa. 1887) On appeal from the judgment of an alderman, the declaration cannot be amended so as to recover damages in excess of the jurisdiction of the alderman.—Depew v. Seism, 3 Del. Co. R. 275.

[p] (Tex. 1881) An appeal by plaintiff from a justice's court will not be dismissed because he filed an amendment increasing his demand to an amount exceeding the jurisdiction of the justice's court.—Ross v. Anderson, 1 White & W. Civ. Cas. Ct. App. § 1032.

[q] (Wis. 1875) In general, on appeal from a judgment of a justice's court the jurisdiction of the circuit court is limited to that of the justice; and, although an increase of the claim for damages beyond the amount of a justice's jurisdiction may be made by leave of the court, yet without leave the general rule governs.—Zitske v. Goldberg, 38 Wis. 216.

§ 675. Pleading new defenses.

Pleading defense on appeal as matter of right, see ante, § 667.

Waiver of objections to new defenses on appeal, see post, § 691.

[a] A defense may be made on the trial of an appeal from a justice of the peace which was not made before the justice.

—(Fla. 1853) Davis v. Fitchett, 5 Fla. 261;
(Mo. 1847) Hall v. Mills, 11 Mo. 215.

[b] In an action on a note, appealed from a justice of the peace, a plea of non est factum may be filed for the first time in the circuit court.

—(Ill. 1892) Gane v. Loemo Printing Co., 46 Ill. App. 456;
(Mo. 1879) Moore v. Hutchinson, 69 Mo. 429.

[c] (Colo. 1883) The dissolution of an attachment by the county court, on appeal from a justice's court, on the ground that the property attached was exempt from such process, was not error, where defendant's claim of exemption was made in the form of an affidavit describing the property, and reciting the taking thereof under the writ in question, though no notice of the filing of such affidavit was given to plaintiff, and though such claim was made after defendant had traversed the attachment on other grounds, as the trial in the county court was de novo, in which such claim was a legitimate matter of defense.—Bassett v. Onman, 7 Colo. 270, 3 Pac. 383.

[d] (Colo. 1886) Upon appeal from a justice's court to the county court, defendant asked leave to file his affidavit denying the genuineness of the signatures to the notes upon which the judgment had been obtained, which defense he did not make before the justice. The

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county court denied the application. *Held* error, as there are no pleadings in cases appealed from justices of the peace, and the affidavit properly raised the issue of the genuineness of the signatures.—Assig v. Pearsons, 9 Colo. 587, 13 Pac. 719.

[e] (Conn. 1795) Where, in an action of trespass in justice court, defendant sets up a plea of title, he cannot on appeal amend his plea to set up another defense.—Matson v. Meach, 1 Root, 344.

[f] (Fla. 1853) There being no time limited within which a plea denying the execution of a bond, note, or other writing sued upon shall be filed in a justice's court, it may be filed on the entry of the appeal in the circuit court.—Davis v. Fitchett, 5 Fla. 261.

[g] (Ga. 1842) On appeal from a justice in actions on several notes, the defendant will not be allowed to set up the defense in superior court that the notes were all given as consideration of the same contract, where it was not set up as a defense below.—Jack v. Watson, Ga. Dec. 168, pt. 1.

[h] (Ill. 1845) Where the defense of usury was not set up at the trial before a justice of the peace, in an action on a promissory note it is too late to allege it in the appellate court, after a motion to dismiss the case has been overruled.—Bates v. Bulkley, 7 Ill. (2 Gilman) 389.

[i] (Ind.) A defense filed before a justice of the peace cannot be amended in substance, nor essentially varied, on an appeal.—(1832) Nelson v. Zink, 3 Blackf. 101; (1834) Bastion v. Dalrymple, Id. 365.

[j] (Iowa, 1853) The defense of tender, not having been urged before a justice of the peace, is inadmissible on appeal in the district court.—Johnson v. Triggs, 4 G. Greene, 97.

[k] (Iowa, 1883) On appeal from a justice's court, the circuit court may allow an answer to be so amended as to set up a defense of payment not pleaded before the justice; payment being neither a new demand nor a counterclaim, in contemplation of Code, 1873, § 3591.—St. Louis Type Foundry v. Medes, 60 Iowa, 525, 15 N. W. 424.

[l] (Minn. 1861) Since a justice of the peace has nothing to do with actions or defenses of a purely equitable nature, a party sued before a justice, and having an equitable defense, may appeal to the district court, and then interpose his equities by way of answer, as if the suit had been originally brought there, the refusal of the court to permit him to set up such a defense does not enable him to make his equities the subject of another action.—Fowler v. Atkinson, 6 Minn. 503 (Gil. 350).

[m] (Mo. 1885) On appeal from the decision of the justice of the peace, defendant cannot set up equitable defenses.—Gruenewald v. Schaales, 17 Mo. App. 324.

[n] (Mo. 1887) Where a justice of the peace treats a plea in abatement in an attachment suit as one to the merits, defendant's remedy is by appeal from the final judgment, when the cause will be tried de novo in the circuit court, and defendant will be allowed to file an amended affidavit or to plead in that court.—Hubbard v. Quisenberry, 28 Mo. App. 20.

[o] (N. J. 1870) A defendant in an action of trespass, brought in the New Jersey court for the trial of small causes, pleaded liberum tenementum, and, on judgment being given against him, took an appeal to the supreme court, where he pleaded justification by right of private way. *Held*, that the defendant was not confined, in the supreme court, to precisely the same plea filed before the justice; he was only restricted to a plea of title. And it was immaterial that the title set up before the justice was to the soil and freehold, and in the supreme court to an easement therein.—Hawk v. Segraves, 34 N. J. Law (5 Vroom) 355.

[p] (N. Y. 1804) Where defendant in an action of trespass commenced before a justice of the peace under the "act for the more speedy recovery of debts to the value of twenty-five dollars" (1 Rev. Laws, p. 491) relies on his title, he admits the trespass, and cannot, on moving the cause into the supreme court, plead the general issue.—Strong v. Smith, 2 Caines, 28.

[q] (N. Y. 1864) Where a case is in the county court on appeal from a justice, and the new trial, under Code, § 366, subd. 3, is of the issues of fact joined in the justice court, and the action below was for money due, and the answer was a general denial, defendant cannot amend so as to set up payment.—Savage v. Cock, 17 Abb. Prac. 403.

[r] (N. Y. 1878) Under Code, § 366, subd. 5, authorizing the county court, upon an appeal from a justice's court, to allow either party to amend his pleading upon such terms as shall be just, in cases where a new trial may be had in that court, the court cannot allow an answer interposed in the justice court, consisting of a general denial, to be amended by inserting therein new and affirmative defenses.—Reno v. Millspaugh, 14 Hun, 229.

[s] (N. Y. 1886) A defendant in a district court filing a general denial in an action to recover rent and for money expended on defendant's account cannot so amend his answer on appeal to the court of common pleas as to allege payment.—Fagan v. Poor, 11 Civ. Proc. R. 220.

[t] (Or. 1892) Under Hill's Code, § 2130, which prohibits the appellate court from allowing amendment of pleadings so as to change the issues tried in the justice's court, where a judgment sustaining a demurrer to the complaint is reversed on appeal defendant is not entitled to answer.—Forbis v Inman, Paulson & Co., 23 Or. 68, 31 Pac. 204.

[u] (Or. 1893) Laws 1893, p. 88, authorizing the substitution of formal pleadings on appeal from justice's court when required by the court or either party, does not change the established rule of practice prohibiting the filing of amendments or new pleadings changing the issues on which the case was tried below; and where a demurrer to a complaint or bill of items was sustained by the justice, but overruled on appeal, the defendant is not entitled to answer.—Waggy v. Scott, 29 Or. 386, 45 Pac. 774.

[uu] (Tex. 1877) A meritorious defense is as available on an appeal from a justice's court, in which the service was defective, as it would be if the case was remanded to the justice's court.—Boaz v. Paddock, 1 White & W. Civ. Cas. Ct. App. § 40.

[v] (Tex. 1883) The law precluding a defendant from pleading a set-off or counterclaim on an appeal from a justice's court, if it was not pleaded in such court, does not preclude him from first making an affidavit denying the correctness of an account sued on, after an appeal.—Texas & P. R. Co. v. Norton, 1 White & W. Civ. Cas. Ct. App. § 403.

[vv] (Tex. 1884) Where the defendant in justice court in an action on a promissory note pleads failure of consideration, and then abandons the plea, he cannot upon appeal rely upon it in the county court.—Rush v. Lester, 2 Willson, Civ. Cas. Ct. App. § 442.

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[w] (Tex. 1885) In an action on an injunction bond given upon enjoining the sale of property under execution, defendant cannot, on appeal, claim that the property levied upon was exempt, when such defense was not presented in the justice court.—Bridges v. Wilson, 2 Willson, Civ. Cas. Ct. App. § 625.

[ww] (Tex. 1891) Suit was brought in justice's court on this writing: "In regard to the Woodale reaper. I will keep the reaper, and will pay all on it I agreed to pay, which is $120. I will not go back on a fair trade on account of the weather. I want you to come Monday, and set it up for me." In the county court the defendant pleaded orally that he did not agree absolutely to buy the reaper, but only to take and pay for it when it was made to run by the plaintiff. *Held* that, this plea not having been made in justice's court, it could not be made in the county court on appeal.—McCormick Harvesting Mach. Co. v. Slover (App.) 16 S. W. 105.

[x] (Tex. 1893) Under the rule that on appeal to the county court the trial shall be de novo, subject only to the limitation that plaintiff can set up no new cause of action—or defendant, any set-off or counterclaim—not pleaded in the court below, in an action for wrongful seizure, on execution against another, of property alleged to have been transferred to plaintiff, the fact that, in the justice's court, defendant relied on the evidence that there was no such transfer, did not prevent him from showing in the county court that if there was a transfer it was fraudulent and void.—Milam v. Filgo, 3 Tex. Civ. App. 343, 22 S. W. 538.

[xx] (Tex.) Under 1 Sayles' Civ. St. art. 316, which expressly authorizes the pleading of new matter in the county court on appeal from justice's court, defendant may on such appeal plead, for the first time, want of consideration for the contract sued on.—(1893) Texas & P. Ry. Co. v. Klepper (Civ. App.) 24 S. W. 567. CONTRA, see (1894) Ostrom v. Tarver (Civ. App.) 28 S. W. 701; (1895) Id., 29 S. W. 69.

[xxx] (Tex. 1894) Where a justice sustains an exception to a plea to the venue, and the defendant does not plead to the merits, but appeals, the court should allow a defense to the merits on striking out the plea to the venue.—Mahoney v. Cope (Civ. App.) 27 S. W. 157.

[y] (Tex. 1895) The plea of payment may be pleaded, on appeal from a justice court, for the first time in the district court, under Rev. St. art. 316, authorizing the pleading of new matter provided no new cause of action or set-off or counterclaim is pleaded.—Gholston v. Ramey (Civ. App.) 30 S. W. 713.

[yy] (Tex. 1895) Under Rev. St. art. 316 (providing that no counterclaim can be pleaded in the county court unless it had been relied on in the justice's court), in an action for a balance due on contract for pasturing cattle, defendant cannot, in the county court, for the first time set up a claim for breach of such contract, and an agreement that, if plaintiff violated the contract, he would forfeit his pasturage.—Good v. Caldwell, 11 Tex. Civ. App. 515, 33 S. W. 243.

[z] (Tex. 1895) In an action commenced in the justice court for loss of goods consigned to a railroad company for shipment over its own and connecting lines, defendant may, for the first time on appeal to the county court, deny an allegation of partnership between it and the connecting roads.—Gulf, C. & S. F. Ry. Co. v. Crossman, 11 Tex. Civ. App. 622, 33 S. W. 290.

[zz] (Tex. 1896) Under Rev. St. art. 316, which authorizes a defendant to plead any new matter to defeat a plaintiff's claim except a counterclaim or set-off, and which applies to cases removed from justice to county court by appeal as well as by certiorari, defendant is entitled on such an appeal to file written pleadings, including all defenses except pleas of set-off or counterclaim not pleaded below.—Slover v. McCormick Harvesting Mach. Co., 12 Tex. Civ. App. 446, 34 S. W. 1055.

§ 676. —— On appeals from judgments by default.

Pleading counterclaims on appeals from default judgments, see post, § 677.

—— *defenses in appeals from default judgments as matter of right, see* ante, § 667.

Waiver of objection to defense on appeal from a default, see post, § 691.

[a] (Ark. 1880) Appeals from justices' courts are tried in the circuit court de novo on the merits. Amendments and new issues may be there made, and an answer may be there filed after default in the justice's court.—Hall v. Doyle, 35 Ark. 445.

[b] (Colo. 1896) A party who has defaulted in justice court cannot, on appeal, interpose a plea raising a new issue, to oust the county court of its jurisdiction on the ground that the justice had no jurisdiction, though such plea if raised below, would have been good.—Hamill v. Clear Creek County Bank, 22 Colo. 384, 45 Pac. 411.

[c] (Iowa, 1864) The defendant in an appealed case from a justice of the peace, who was in default before the justice, cannot plead before the default is set aside.—Brayton v. Delaware County, 16 Iowa, 44.

[d] (Miss. 1884) The failure of a defendant to interpose a defense in the magistrate's court does not preclude him from defending in the circuit court on appeal.—Illinois Cent. R. Co. v. Andrews, 61 Miss. 474.

[e] (Minn. 1887) On an appeal to the municipal court of St. Paul from the judgment of a justice of the peace on questions of both law and fact, the court may relieve the defendant from a default, and allow him to make answer, although none was made in justice's court.—Webb v. Paxton, 36 Minn. 532, 32 N. W. 749.

[f] (Tex. 1890) Where a defendant allows judgment to go by default in justice's court, he cannot, on appeal, plead a former recovery for a part of the same cause of action.—Harrison v. Gulf, C. & S. F. Ry. Co. (App.) 15 S. W. 643.

[g] (Tex. 1893) Under Rev. St. art. 316, providing that, on appeal from a justice's court to the county or district court, either party may plead any new matter, except that no new cause of action shall be set up by plaintiff, nor counterclaim by defendant, not pleaded in the court below, though defendant allows judgment by default in the justice's court, he may answer in the district court on appeal.—Texas & N. O. R. Co. v. Jones (Civ. App.) 23 S. W. 424.

[h] (Tex. 1893) Under 1 Sayles' Civ. St. art. 316, permitting either party to plead new matter in the county court not pleaded in the justice's court, except a new cause of action, set-off, or counterclaim, defendant, though he has filed no pleading before the justice, may in the county court file an answer containing a general denial, and special denials of certain items in plaintiff's account.—Swinborn v. Johnson (Civ. App.) 24 S. W. 567.

[i] (Tex. 1893) Rev. St. art. 1578, provides that, though defendant fails to appear in a suit in the justice court, plaintiff must still prove his case. *Held*, that on appeal to the county

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court, where the trial is de novo, a defendant who failed to appear below may interpose a general denial.—White v. Johnson, 5 Tex. Civ. App. 480, 24 S. W. 568.

[j] (Tex. 1894) On appeal to the district court from a judgment by default in a justice's court, defendant may plead a general denial, as the cause is to be tried de novo, under Rev. St. art. 316, prohibiting the pleading of new causes of action, set-offs, and counterclaims.—St. Louis S. W. Ry. Co. v. Denson, 26 S. W. 265.

[k] (Tex. 1894) On appeal from a justice to the county court, defendant may rely on the general denial in the county court, though he made no plea in the justice court.—McCormick Harvesting Mach. Co. v. Slover (Civ. App.) 34 S. W. 1054.

[l] (Wis. 1866) Where judgment before a justice of the peace was taken upon default of answer or appearance by defendant, the circuit court on appeal may allow an answer to be filed.—Wilcox v. Holmes, 20 Wis. 307.

§ 677. —— Pleas in abatement and bar.

Pleas in abatement and bar on appeals from judgments by default, see ante, § 676.

[a] Defendant cannot set up matter in abatement for the first time on appeal from a justice of the peace.
—(Pa. 1835) Hinckley v. Smith, 4 Watts, 433;
(Vt. 1826) Martin v. Blodget, 1 Aikens, 375;
(1876) Hopkins v. Town of Elmore, 49 Vt. 176.

[b] (Ala. 1874) Where a plea in abatement in a justice's court was waived because not filed at the first term at which the case stood for trial, the right to plead it could not be revived on appeal.—Noles v. Marable, 50 Ala. 366.

[c] (Ala. 1893) On appeal from justice's court to city court, defendant cannot set up the summons, complaint, and judgment in the justice's court, and plead in abatement, as the case is to be tried de novo.—McConnell v. Worns, 102 Ala. 587, 14 South. 849.

[d] (Ga. 1842) Where the defendant in an action in justice's court intends to rely on a former recovery, he must plead it in the justice's court in order to make it available on appeal.—Jack v. Watson, Ga. Dec. 168, pt. 1.

[e] (Ind. 1875) Where, in an action for the recovery of the possession of personal property before a justice of the peace, there has been a trial without any answer filed or objection made by the defendant, upon appeal to the circuit court an answer alleging the justice's want of jurisdiction, because the replevin bond filed before him was executed on Sunday, is bad on demurrer.—Davis v. Brinker, 50 Ind. 25.

[f] (Iowa, 1867) It is not error, on an appeal from a justice, to allow the defendant to amend his answer and plead a former adjudication not pleaded below.—Nettman v. Schramm, 23 Iowa, 521.

[g] (Mo. 1862) Upon appeal from a justice in an attachment suit the defendant may in the circuit court plead in abatement of the attachment, although he may have defended upon the merits before the justice. Rev. Code 1855, p. 975.—Phillips v. Bliss, 32 Mo. 427.

[h] (Mo. 1896) In an attachment proceeding commenced before a justice of the peace, where there is no trial on the merits, but on a plea in abatement, a mere omission to note the plea on the justice's docket will not preclude the circuit court from permitting defendant to file a formal plea in that court.—Robinson v. Taylor, 2 Mo. App. Rep'r, 1180.

[i, j] (Tex. 1894) One who, in an action in justice's court, does not plead the statute of limitations, cannot do so on appeal to the district court.—Pickett v. Edwards, 25 S. W. 32.

[k] (Tex. 1894) The fact that, after the filing by defendant of a plea to the venue in a justice court, the case was continued by consent, was not ground for striking out such plea when again made on defendant's appeal to the county court.—Mahoney v. Cope (Civ. App.) 27 S. W. 157.

[l] (Tex. 1895) In a suit on a note which shows on its face that it was barred, brought in a justice's court, where defendant pleaded payment only, the defense of limitation is new matter, and is not too late because pleaded by special exception for the first time in the district court on appeal from the justice's judgment in favor of plaintiff.—Nunn v. Edmiston, 9 Tex. Civ. App. 502, 29 S. W. 1115.

§ 678. Pleading set-offs and counterclaims.

Waiver of objections to amendment increasing counterclaims beyond justice's jurisdiction, see post, § 691.

[a] In a suit begun in a justice court, a plea asking affirmative relief, interposed for the first time on appeal to the county court, is properly rejected, whether technically a counterclaim or not.
—(Ark. 1867) Amis v. Cooper, 25 Ark. 14;
(Tex. 1885) Texas & P. Ry. Co. v. Haney, 2 Willson, Civ. Cas. Ct. App. § 710;
(1893) White v. Johnson, 5 Tex. Civ. App. 480, 24 S. W. 568.

[b, c] (Mich. 1889) Where, on appeal from a justice, plaintiff had been permitted to file a bill of particulars for a larger amount than one before the justice, though claiming no more, it was not error to give defendant time to file a set-off except on payment of costs.—McDonald v. Weir, 76 Mich. 243, 42 N. W. 1114.

[d] (Miss. 1874) Where, on appeal from the judgment of a justice, defendant obtained leave to file a set-off not filed in the justice's court, it was not error, under Rev. Code, §§ 1305, 1306, 1334, to refuse to permit any proof to be offered in support of the set-off.—Marx v. Trussell, 50 Miss. 498.

[e] (Neb. 1892) Where defendant, in an action before a justice of the peace, failed to appear on the day to which the cause was continued, he cannot on appeal plead a counterclaim.—Carr v. Luscher, 35 Neb. 318, 53 N. W. 144.

[f] (N. C. 1879) On appeal to the superior court from a judgment of a justice, defendant may plead a counterclaim.—Thomas v. Simpson, 80 N. C. 4.

[g] (Ohio, 1852) Where an action is appealed from a justice of the peace to the common pleas, defendant can only prosecute a counterclaim in the latter court in such sum as that of which the former had jurisdiction, unless the plaintiff answers such counterclaim, or in some other way submits to the jurisdiction.—Bill Pub. Co. v. Curtis, 1 Ohio Dec. 476.

[h] (Pa. 1828) Where defendant, sued in a justice court, first pleaded a set-off after plaintiff's appeal from the judgment of the justice, the jurisdiction of the appellate court is not limited to that of the justice, but it has jurisdiction of the set-off, though the justice had not.—Boone v. Boone, 17 Serg. & R. 386.

[i] (Pa. 1856) On the trial of an appeal, the defendant is not restricted to the set-off relied

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on before the justice of the peace.—Tate v. Tate, 2 Grant, Cas. 150.

[j] (Pa. 1865) In an action on a book account before a justice of the peace, a note exceeding $100 (the extent of the magistrate's jurisdiction) was offered in defalcation. On appeal by the defendant the plaintiff filed his statement and copy of book entries, against which, in his affidavit of defense, the defendant claimed to defalcate his note. *Held*, that proceedings on appeal were not de novo as to jurisdiction, and that therefore the entry of judgment in the common pleas for want of a sufficient affidavit of defense was not error.—Walden v. Berry, 48 Pa. (12 Wright) 456.

[k] (Pa. 1888) Where, on an appeal from a justice of the peace, defendant in the appellate court pleads as a set-off a contract of which a justice has not jurisdiction, the appellate court acquires none.—Deihm v. Snell, 119 Pa. 316, 13 Atl. 283.

[l] (Tenn. 1837) Upon an appeal from the judgment of a justice of the peace to the circuit court, the defendant may, in the latter court, prove his account by his own oath, as an offset, though he did not make, or offer to make, such defense before the justice.—Clark v. Howard, 18 Tenn. (10 Yerg.) 250.

[m] (Tex. 1887) Under Rev. St. art. 316, in an action in a justice's court, to which a counterclaim has been filed, and judgment rendered in the whole case, and an appeal taken to a district court, the party filing the counterclaim will not be allowed in the latter court to enlarge the counterclaim, by adding items of damages not embraced in the pleadings in the justice's court, which amounted to a sum greater than the justice's court would have jurisdiction of.—Boudon v. Gilbert, 67 Tex. 689, 4 S. W. 578.

[n] (Tex. 1893) Rev. St. art. 316, prohibiting any set-off or counterclaim from being set up in the county court which was not pleaded in the justice's court, in cases brought up by certiorari, applies also to cases brought up by appeal.—Downtain v. Connellee, 2 Tex. Civ. App. 95, 21 S. W. 56.

[o] (Tex. 1894) On appeal from a justice's judgment an answer cannot be amended so as to set up in reconvention an amount in excess of a justice's jurisdiction.—Ostrom v. Tarver (Civ. App.) 28 S. W. 701.

[p] (Vt. 1842) Where, in book account before a justice, the debit side of defendant's account exceeds $100, and he appeals to the county court, he may there plead his account in offset to plaintiff's, though he could not have done so before the justice.—Temple v. Bradley, 14 Vt. 254.

[q] (Wis. 1870) Under Laws 1864, c. 262, providing for appeals from a justice of the peace, the circuit court has power to allow an amendment of the answer setting up a counterclaim, although amendment has been refused by the justice.—Richardson v. Chynoweth, 26 Wis. 656.

§ 679. Amendments as to parties.

Amendment of summons by changing names of parties, see post, § 681.

Discontinuance of action against one or more defendants, see ante, §§ 649, 651.

Intervention of parties, see ante, § 519.

Parties on appeal, see ante, §§ 516–519.

Waiver of objections as to variance as to parties on appeal, see post, § 691.

[a] On an appeal from a justice of the peace the court will, in its discretion, amend the record by adding or changing the names of either plaintiff or defendant, where it would work no prejudice to the other party.
—(Pa. 1880) Mulvaney v. Turner, 12 Lanc. Bar, 140;
(Tex. 1884) Fulton v. Thomas, 2 Willson, Civ. Cas. Ct. App. § 245.

[b] (Ala. 1841) Though a warrant issued by a justice is in the firm name of the plaintiffs, on appeal their full names may be recited at length in the declaration.—Snow v. Ray, 2 Ala. 344.

[c] (Ala. 1846) After a cause commenced before a justice of the peace has been removed by appeal to a higher court, the parties cannot be changed, unless death or some other cause has supervened.—Wilson v. Collins, 9 Ala. 127.

[d] (Ala. 1857) In a case removed by appeal from a justice's court, a new party cannot be brought in before the circuit court.—Peck v. Colby, 31 Ala. 252.

[e] (Ala. 1858) In an action brought before a justice of the peace in the name of C. & Co., and carried by appeal to the circuit court, if the names of the partners nowhere appear in the proceedings the plaintiffs may declare in that court in the name of C. individually.—Couch v. Atkinson, 32 Ala. 633.

[f] (Ala. 1881) On appeal from a judgment by a justice of the peace, a mistake in plaintiff's Christian name may be corrected in the complaint filed in the circuit court, or, if only the initials or an abbreviation of the Christian name were used, the full name may be used.—South & North Alabama R. Co. v. Small, 70 Ala. 499.

[g] (Ala. 1893) When an action has been tried in a justice's court without a written complaint, and appealed and tried de novo, plaintiff, pending the latter trial, may amend by joining another as coplaintiff, on a showing that he and such other are partners in the property in controversy.—Southern Exp. Co. v. Boullemet, 100 Ala. 275, 13 South. 941.

[h] (Ala. 1893) Where the summons in the justice court runs in the name of E. L. and J. L., doing business as L. & Co., they may file their complaint on appeal to the circuit court in their individual names.—Kuhl v. Long, 102 Ala. 563, 15 South. 267.

[i] (Ark. 1875) Where an account in proper form is filed before a justice of the peace as the foundation of an action, and is lost, and a substituted account is filed, in which the name of the creditor is omitted, he should be permitted to amend at any time, even after judgment and an appeal to the circuit court.—Martin v. McClellan, 30 Ark. 405.

[j] (Ga. 1878) After A. has brought an action on a note before a justice of the peace, and from a judgment rendered for the defendant on a plea of payment has appealed to the superior court, an amendment seeking to make the action the suit of A. for the use of B. is not allowable.—Cobb v. Lowry, 60 Ga. 637.

[k] (Ill. 1839) The circuit court cannot amend the papers on appeal from a justice of the peace by striking out the name of one of the defendants.—Maxcy v. Padfield, 2 Ill. (1 Scam.) 590.

[l] (Ill.) On appeal from a justice of the peace to the circuit court, a new party plaintiff may be joined with the original plaintiff after the trial has begun.—(1888) Smith v. Martin, 28 Ill. App. 224; (1889) Zipp v. Uhland Hain No. 16, 30 Ill. App. 280.

[m] (Ind. 1862) On appeal from a justice's judgment to the common pleas, a motion to add

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a certain party as defendant is properly granted.—Osborn v. Osborn, 18 Ind. 373.

[n] (Ind. 1873) If a judgment has been rendered by a justice of the peace, and, before an appeal has been taken by the defendant, the plaintiff assigns the judgment on the docket of the justice, a motion made by the defendant in the court to which he appeals to dismiss the cause as to the original plaintiff, and to substitute the assignee, should be overruled.—Peterman v. Ott, 45 Ind. 224.

[o] (Ind. 1877) The circuit court, on appeal from a judgment of a justice of the peace, may properly allow the complaint to be amended by changing the name of the plaintiff to correspond with his name as given in the appeal bond.—Hayden v. Souger, 56 Ind. 42, 26 Am. Rep. 1.

[p] (Mich. 1878) A rule of court permitting a plaintiff to discontinue as to one or more defendants has no application to cases appealed from a justice's court.—Anderson v. Robinson, 38 Mich. 407.

[q] (Mo. 1847) On an appeal from a justice of the peace, his transcript cannot be so amended as to introduce a new plaintiff.—Kraft v. Hurtz, 11 Mo. 109.

[qq] (Mo. 1856) In a suit carried by appeal from a justice's court, the circuit court cannot allow an amendment to be made by striking out two of several plaintiffs.—Flemm v. Whitmore, 23 Mo. 430.

[r] (Mo. 1872) On appeal from a justice of the peace, the rectification of a mistake in the name of a party, or the introduction of a new party, does not change the cause of action, and is permissible.—House v. Duncan, 50 Mo. 453.

[rr] (Mo. 1875) Where suit before a justice is brought in the name of a firm, the cause may be amended on appeal in the circuit court by inserting the names in full of the members composing the firm. This is not the introduction of any new parties, and does not change the cause of action, within the meaning of the statute.—Beattie v. Hill, 60 Mo. 72.

[s] (Mo. 1885) Nothing in the statutes before or since the revision of 1879 permits the bringing in of other parties by amendment on appeal from a justice's court.—Thieman v. Goodnight, 17 Mo. App. 429.

[ss] (Mo. 1889) In an action in a justice's court for the price of a cow, the defense was false representations by plaintiff as to the cow's condition, and the evidence showed that both parties dealt with each other in proper person. On appeal to the circuit court, defendant filed an application to be made a defendant as administrator of the partnership estate of himself and another, who was his partner at the time of the purchase. *Held*, that it was proper to overrule the application; for, if granted, the effect would have been to deprive the court of jurisdiction, for the reason that under Rev. St. 1879, § 2837, justices of the peace are not permitted to try causes against an administrator.—Ingalls v. Averitt, 34 Mo. App. 371.

[t] (Mo. 1891) Rev. St. 1889, § 6345, provides that "the same cause of action, and no other, that was tried before the justice, shall be tried before the appellate court on the appeal: provided, that new parties plaintiff or defendant, necessary to a complete determination of the cause of action, may be made in the appellate court." *Held*, that where a case was commenced in the justice's court by A., as agent, after an appeal to the circuit court, it was error to allow A.'s principal to be substituted as plaintiff in the case.—Altheimer v. Teuscher, 47 Mo. App. 284.

[tt] (N. M. 1857) On appeal from a judgment of the justice the plaintiff may amend his pleadings by striking out some of the defendants if the subject-matter of the controversy remains the same.—Sanchez v. Luna, 1 N. M. 238.

[u] (Ohio, 1883) Where the petition on appeal from a justice of the peace omitted the name of one of the appellants by mistake, an amendment will be allowed for the inserting of such name.—Secor v. Witter, 39 Ohio St. 218.

[uu] (Ohio, 1885) A party sued before a justice of the peace may interplead adverse claimants on an appeal to the common pleas.—Geller v. Puchta, 1 O. C. D. 18.

[v] (Pa.) Informalities in the names of parties may be corrected on appeals from justices of the peace.—(1833) Graham v. Vandalore, 2 Watts, 131; (1835) Bratton v. Seymour, 4 Watts, 329.

[vv] (Pa. 1842) On appeal from the judgment of a justice of the peace to the common pleas, the names of the parties may be so transposed as to adapt the legal form to the merits of the case.—Giffin v. St. Clair Tp., 4 Watts & S. 327.

[w] (Pa. 1844) Where an action was brought before an alderman by a person in his individual capacity, the declaration may be amended on appeal by making the action in his name as executor, and joining the other executors.—Logan v. Chandler, 2 Clark, 509, 4 Pa. Law J. 297.

[ww] (Pa. 1846) On appeal names of parties may be changed.—Dohan v. Walsh, 5 Pa. Law J. 145, note.

[x] (Pa. 1850) On an appeal from the judgment of a justice of the peace, the court may allow an amendment in an action originally brought in the name of B. by substituting the names of "A. and B., late partners, to the use of B."—Gue v. Kline, 13 Pa. (1 Harris) 60.

[xx] (Pa. 1850) On appeal from the judgment of a justice of the peace, the court may, before trial, allow the plaintiff to amend by substituting the trustee of defendant as defendant.—Seitz v. Buffum, 14 Pa. (2 Harris) 69.

[y] (Tenn. 1873) An amendment, on appeal from a justice in an action based on a note under seal, making the original payee plaintiff for the use of the assignee, amending the warrant, and striking out the assignment, was properly allowed.—Cannon v. Mathis, 57 Tenn. (10 Heisk.) 575.

[yy] (Tex. 1891) Where, on appeal from a justice, the defendant pleads nonjoinder of plaintiffs in abatement in the district court, he cannot object to an amendment making the person named in the plea a party plaintiff.—Missouri Pac. Ry. Co. v. Smith (Sup.) 16 S. W. 803.

[z] (Tex. 1895) Where a new party is for the first time cited to appear as a defendant on appeal from a justice court to a county court, no appellate jurisdiction over him is acquired.—Missouri, K. & T. Ry. Co. v. Wallis (Civ. App.) 29 S. W. 1123.

[zz] (Tex. 1895) Since, in actions by the county judge on convict bonds, the bonds show that the actions are brought for the benefit of the county, it is not error, on appeal by defendants to the county court from default judgments, to permit plaintiff to orally plead such fact.—Day v. Johnson (Civ. App.) 33 S. W. 676.

§ 680. Changing form of action.

Change of form of action on appeal as discharging surety on appeal bond, see post, § 741.

Waiver of objections to form of action, see post, § 691.

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[a] (Ala. 1893) Plaintiff, after commencing an action on contract in a justice court, cannot, on appeal, file a complaint in tort.—Smith v. East Tennessee, V. & G. Ry. Co., 98 Ala. 154, 13 South. 784.

[b] (Del. 1887) Under Rev. Code, p. 648, § 11, providing that it shall be no objection to maintaining actions on the case "that, but for this section, the form therefor should have been trespass, and in all actions of trespass it shall be no objection to maintaining such actions that, but for this section, the form thereof should have been case," an appeal from a judgment of a justice court in an action of trespass may be brought in the form of trespass or case.—Conner v. Reardon (Super.) 8 Houst. 19, 31 Atl. 878.

[c] (Ill. 1873) The rule that the right of recovery is not affected by the form of action named by the justice of the peace, in whose court no written pleadings are required, applies on the trial of the cause on appeal.—Allen v. Nichols, 68 Ill. 250.

[d] (Ill. 1895) The fact that an action of trespass for mesne profits was called, by the justice before whom it was instituted, an "action on account of rent," did not preclude the court on appeal from treating it otherwise.—Skakel v. Hennessey, 57 Ill. App. 332.

[e] (Ky. 1879) Under Code, § 726, allowing trial de novo on appeal from a justice's judgment, the appellee may file an amendment to his demand after such appeal has been taken; this going to the form, rather than to the substance.—Puff v. Huchter, 78 Ky. 146.

[f] (Mich. 1894) How. Ann. St. § 9035, prohibits justices and others from taking greater than legal fees. Section 9037 makes them liable for treble damages to the person aggrieved, and section 9044 requires one receiving official fees, on request, to make out, receipt, and deliver to the payor a particular account of them; otherwise, to be liable to him for thrice the payment. Plaintiff declared orally before a justice on the common counts, and especially for money had and received for official fees, and refusing plaintiff a particular account of them; and, by bill of particulars, alleged money demanded and received by defendant, as justice, for costs in transferring a certain suit against plaintiff pending before him, and recovered judgment for thrice the damages sustained. *Held* that, on appeal in the circuit court, plaintiff could amend and declare separately on section 9044, this introducing no new cause of action.—Vreeland v. Loeckner, 99 Mich. 93, 57 N. W. 1093.

[g] (N. Y. 1896) A complaint alleging false and fraudulent representations by defendants as to their responsibility, made with intent to deceive plaintiff, whereby he, relying upon such representations, was induced to loan defendants money, taking their note (which was set out in the complaint), is an action for fraud; and therefore, on appeal by defendants to the county court from a judgment of the justice court for plaintiff, plaintiff should not be allowed to recover in contract, on the note.—Smith v. Smith, 4 App. Div. 227, 38 N. Y. Supp. 551.

[h] (Ohio, 1834) In case before a justice for killing a hog, plaintiff, on appeal to the common pleas, may declare in trespass without violating the statutory requirement that the parties shall proceed in the common pleas in all respects and in the same manner as though the suit or action had been originally commenced in said court.—Austin v. Hayden, 6 Ohio (6 Ham.) 388.

[i] (Ohio, 1800) On appeal from the judgment of a justice of the peace in an action upon a promissory note, the plaintiff cannot amend his bill of particulars by substituting for the cause of action a cause for the value of the work for which the note was given.—Sneath v. Holtz, 2 Ohio Dec. 423.

[j] (Pa. 1828) Where an action of trespass is brought before a justice for holding and detaining a horse and selling him contrary to law, plaintiff may, on appeal by defendant from the judgment rendered, declare in assumpsit for money had and received.—Esher v. Flagler, 17 Serg. & R. 141.

[k] (Pa. 1833) The form of a suit before a justice may be changed on an appeal, if the cause of action be not changed.—Lyon v. Chalker, 2 Watts, 14.

[l] (Pa. 1858) Where suit was brought before a justice of the peace, in debt, on book account, in which the plaintiff's demand was stated to be $43.50 for a lot of spars, on appeal from the judgment of the justice it was not error for the plaintiff to declare in trover.—Kraft v. Gilchrist, 31 Pa. (7 Casey) 470.

[m] (Pa. 1892) On appeal from justice's court in an action to recover for timber sold defendant, plaintiff can amend his pleadings by adding a count on the note given by defendant for the purchase price.—Boner v. Luhman, 148 Pa. 591, 24 Atl. 90, 30 Wkly. Notes Cas. 110.

[n] (S. C. 1882) A complaint in an action before a trial justice alleged the taking by defendant of plaintiff's personal property, and asked judgment for the thing taken, or for damages "in case such possession cannot be had." The form of the summons was adapted to an action for the recovery of damages, and said nothing about recovering possession of the property. *Held*, that the plaintiff could elect to treat the case as an action for damages, merely, after appeal to the court of common pleas, in which case no affidavit was necessary that the value of the property did not exceed $100.—Williams v. Irby, 16 S. C. 371.

[o] (Vt. 1848) Where an action upon a promissory note is commenced before a justice, the plaintiff may file a declaration in form of a count for money had and received on appeal.—Town of Fletcher v. Blair, 20 Vt. 124.

§ 681. Amendment of process.

[a] (Ga. 1893) On an appeal to the superior court from a judgment by a justice, the summons is amendable in matters of substance as well as of form, provided there is enough to amend by. Code, § 3479.—Neal v. Reynolds, 91 Ga. 609. 18 S. E. 530; Reynolds v. Neal, Id.

[b] (Ill. 1852) The circuit court may, on an appeal from a justice of the peace, allow an amendment of the original summons, especially if there is anything in the proceedings to amend by.—Moss v. Flint, 13 Ill. (3 Peck) 570.

[c] (Ill. 1861) The circuit court should not, in cases of appeal from a justice of the peace, authorize an amendment of the summons by changing the names of parties.—Henckler v. Monroe County Court, 27 Ill. (17 Peck) 89.

[d] (Mo. 1873) On appeal from a justice's court, the appellate court has power to allow the amendment of a constable's return made to the justice's court.—Transier v. St. Louis, K. C. & N. Ry. Co., 54 Mo. 189.

[e] (Mo. 1894) Where it is admitted that proper service was in fact had upon the garnishee, though the officer's return fails to disclose such fact, and when the justice before whom the garnishment proceeding was had permitted the officer to amend his return so as to conform to the facts, such amendment, on proper application, should also be allowed

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by the circuit court to which the case has been appealed, and where the officer's return is to be used in evidence.—Fee v. Kansas City, Ft. S. & M. R. Co., 58 Mo. App. 90.

[f] (N. C. 1877) Error in one of the initials of defendant's name in a justice's summons, if the right man is served, and is not misled, does not vitiate judgment by default, and may be amended on an appeal.—Clawson v. Wolfe, 77 N. C. 100.

[g] (N. C. 1882) An amendment of a summons in the superior court that would, if made in the justice's court, have given the justice jurisdiction of the action, is properly refused. —Allen v. Jackson, 86 N. C. 321.

[h] (N. C. 1886) The superior court, on an appeal from a justice of the peace, has power to make such amendment to the summons as will show the action to be within the jurisdiction of the court where it originated.—Singer Mfg. Co. v. Barrett, 95 N. C. 36.

[i] (N. C. 1894) Where a summons issued by a justice failed to show the amount claimed, the insertion of such amount was properly permitted upon appeal to the superior court, and such amendment was retroactive.—McPhail v. Johnson, 115 N. C. 298, 20 S. E. 373.

§ 682. Making pleading more definite and certain.

[a] (Colo. 1883) In an appeal from a justice court, though there be no written pleadings, a motion for a rule for a more specific bill of particulars should be entertained.—De Lappe v. Sullivan, 7 Colo. 182, 2 Pac. 926; Id., 7 Colo. 184, 2 Pac. 927.

[b] (Miss. 1885) On appeal from an attachment case before a justice of the peace by the judgment defendant, plaintiff should have been allowed to file an itemized account of his demand, the amount of which was stated in his affidavit for attachment.—Boisseau v. Kahn, 62 Miss. 757.

[c] (Mo. 1887) Under Rev. St. § 3060, allowing amendments on appeal from justices' courts to supply deficiencies or omissions in the statement, "when by such amendment substantial justice will be promoted," an amendment in the circuit court which merely amplifies the statement, without changing the cause of action, is properly allowed.—Eubank v. Pope, 27 Mo. App. 463.

[d] (Mo. 1888) In a suit brought before a justice of the peace for a "balance on settlement," it is not error for the circuit court, on appeal, to refuse to strike out an amended statement giving the items of the account, but stating the same balance originally sued for.—Lee v. Dunn, 29 Mo. App. 467.

[e] (Mo. 1890) The statement before a justice of the peace, "For the services of the season of 1887, two mares, balance eighteen dollars," while stating no cause of action, being apparently intended as a statement, is amendable by stating a cause of action on account for the services of a stallion to two mares.—Nutter v. Houston, 42 Mo. App. 363.

[f] (Mo. 1892) Rev. St. 1889, § 6347, provides that amendments may be made in the appellate court to supply any deficiency or omission therein, "but no new item or cause of action not embraced or intended to be included in the original account or statement shall be added by such amendment." *Held* that, in an action instituted in a justice's court for the price of a buggy and harness, it is proper, on appeal to the circuit court, to permit plaintiff to amend the statement by adding the words "and harness," which had been omitted by oversight.—Huffer v. Riley, 47 Mo. App. 479.

[g] (Mo. 1895) A plaintiff may be permitted, under Rev. St. 1889, § 6347, to amend his statement by more fully stating, without changing, the cause of action, after the case has been appealed to the circuit court.—Green v. Southwest Missouri Electric Ry. Co., 60 Mo. App. 311, 1 Mo. App. Rep'r, 130.

[h] (Mo. 1895) The statement in an action before a justice of the peace, charging in general terms negligence on the part of defendant railroad company in killing plaintiff's stock, may be amended so as to show specifically of what the negligence consisted.—Norville v. St. Louis, K. & N. W. R. Co., 60 Mo. App. 414, 1 Mo. App. Rep'r, 171.

[i] (Mo. 1895) An amended complaint may be filed in the circuit court on appeal from a judgment of a justice's court where it merely states in a correct and formal manner the true nature of the demand in suit.—Bradley v. Sweiger, 61 Mo. App. 419, 1 Mo. App. Rep'r, 644.

[j] (N. Y. 1890) Even if a wrongful taking should have been more fully alleged, the county court, on appeal from the justice, has power to allow an amendment to that effect, as such amendment will not introduce a new cause of action.—Button v. Lusk, 57 Hun, 589, 10 N. Y. Supp. 582, 19 Civ. Proc. R. 111.

[k] (Tenn. 1891) Under Mill. & V. Code, § 4952, allowing amendments in cases appealed from a justice of the peace, in a suit by subcontractors to enforce a mechanic's lien, where the warrant embraced, as subject-matter of litigation, both the debt and the lien, an amendment, on appeal to the circuit court, for the purpose of more particularly describing the property, is proper.—Reeves v. Henderson, 90 Tenn. 521, 18 S. W. 242.

[l] (Tex. 1883) Upon appeal from a justice court, a party may be allowed to file a pleading which merely amplifies or amends his cause of action as stated in a general way in his claim affidavit, and which does not set up a new cause of action.—Durham v. Flannagan, 2 Willson, Civ. Cas. Ct. App. § 23.

[m] (Tex. 1894) In an action against a railroad company for injuries to horses from negligence in loading them in defendant's cars, appealed to the district court, the district court, on appeal from a justice, may allow plaintiff to file a trial amendment to his complaint by adding thereto, "defendant then and there being a common carrier of live stock, and then and there receiving said stock to be carried thence to M."—Galveston, H. & S. A. Ry. Co. v. Herring (Civ. App.) 28 S. W. 580.

[n] (Wis. 1863) Where an action comes from a justice's court to the circuit or county court by appeal, in which the complaint is oral, and it is vague and uncertain, the defendant may, if in doubt as to what constitutes the plaintiff's cause of action, require a written complaint sufficiently definite and certain to inform him.—Swineford v. Pomeroy, 16 Wis. 553.

[o] (Wis. 1875) The complaint in justice's court alleged merely that defendant was indebted to plaintiff in a certain sum for the services of A. M., a qualified teacher, plaintiff's daughter, and a minor. On the trial in the circuit court an amendment was allowed, alleging that such services were rendered in pursuance of a certain described contract, being one which had been put in evidence and relied on throughout the proceedings. *Held* no error.—Monaghan v. School Dist. No. 1 of Town of Randall, 38 Wis. 100.

§ 683. Amendments as to jurisdictional facts.

[a] (Ark. 1881) An affidavit for attachment in a suit before a justice may be amended

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during the trial in the circuit court on appeal, no ground of attachment being stated in the amendment that did not exist at the commencement of the suit.—Sherrill v. Bench, 37 Ark. 560.

[b] (Ill. 1875) A plaintiff in replevin has the right to amend his affidavit so as to make it conform to the statute, and the fact that leave was granted to amend it before the justice of the peace, which was not done, affords no reason for refusing leave to amend on appeal.—Kirkpatrick v. Cooper, 77 Ill. 565.

[c] (Ind. 1865) Suit before a justice of the peace to recover the possession of real estate which was alleged to be "unlawfully detained." On appeal to the court of common pleas, pending a motion to dismiss for want of jurisdiction in the justice of the cause of action, the plaintiff asked leave to amend the complaint, by inserting after "unlawfully" the words "forcibly and with strong hand." *Held*, that the objection to the jurisdiction of the justice was not waived by the failure to make the objection sooner, and that, as the justice had no jurisdiction of the cause of action made by the complaint, his proceedings were a nullity, and there was nothing to amend in the common pleas.—Kiphart v. Brennemen, 25 Ind. 152.

[d] (Ind. 1877) A motion to dismiss on appeal from a justice to the circuit court is properly overruled where plaintiff, while it is pending, files a substituted and sufficient complaint in the place of the insufficient one upon which the motion was based.—Evansville & C. R. Co. v. Murphy, 59 Ind. 515.

[e] (Ind. 1892) Where an action to recover a penalty for obstructing a highway was commenced in justice court, and the complaint was fatally defective by reason of its failure to allege that the obstruction was "unnecessary and a hindrance to passengers," on appeal to the circuit court it was no abuse of discretion to allow an amendment.—Toledo, St. L. & K. C. R. Co. v. Stevenson, 131 Ind. 203, 30 N. E. 1082.

[f] (Mo.) The affidavit of the plaintiff in an action before a justice of the peace under Wag. St. 817, relative to the claim and delivery of personal property, omitted to state that the property claimed "had not been seized under any process, execution, or attachment against the property of the plaintiff." *Held*, that an amendment to supply the omission could not be made in the circuit court on appeal.—(1875) Gist v. Loring, 60 Mo. 487; (1877) Madkins v. Trice, 65 Mo. 656.

[g] (Mo. 1876) In an action before a justice for the killing of stock, the omission to show in the statement in what township the killing occurred cannot be cured by making an amended statement.—Haggard v. Atlantic & P. R. Co., 63 Mo. 302.

[h] (Mo. 1884) Under Rev. St. § 3060, providing that on appeal plaintiff's statement before the justice may be amended to supply any deficiency or omission, where substantial justice will be promoted, but that no new item or cause of action not intended to be included in the original statement shall be added, *held* that, in an action for double damages for killing stock, the statement might be so amended as to allege that the killing occurred in a township adjoining that in which suit was brought.—Mitchell v. Missouri Pac. Ry. Co., 82 Mo. 106; Kitchen v. Same, Id. 686.

[i] (Mo. 1888) Rev. St. § 3060, which provides that the statement of plaintiff's cause of action may be amended, upon appeal to the appellate court, to supply any deficiency or omission therein, does not authorize the addition of the affidavit in replevin required before the issue of process in the action, where none exists.—Turner v. Bondalier, 31 Mo. App. 582.

[j] (Mo. 1889) On appeal of an action begun before a justice of the peace to foreclose a mechanic's lien, defendant moved to dismiss for want of jurisdiction because the statement contained no averment that before bringing suit plaintiff had filed with the clerk of the circuit court a notice showing when and before what justice such suit would be begun, as required by Rev. St. § 2874. The motion to dismiss was granted, and plaintiff, on request, was allowed to supply the omitted allegation by amendment. *Held* proper, under Rev. St. § 3060, allowing amendments on appeal from justices of the peace, to supply any deficiency, when by such amendments substantial justice would be promoted.—Fathman & Miller Planing Mill Co. v. Ritter, 33 Mo. App. 404.

[k] (Mo. 1889) In replevin before a justice of the peace, the statement and affidavit contained all the averments required by Rev. St. § 2882, but neither was signed by the plaintiffs, or either of them, though the justice's jurat to the affidavit certified that both had sworn to it. On appeal to the circuit court, and on motion to dismiss for this defect, the evidence showed that plaintiffs had not signed because the justice had advised that it was unnecessary. *Held*, that the defect was formal, and it was subject to amendment, there being no question of jurisdiction raised; and it was proper to allow plaintiffs to sign the statement, and to overrule the motion to dismiss.—Crum v. Ellis-ton, 33 Mo. App. 591.

[l] (Mo.) Upon an appeal from a justice of the peace, an amendment averring a jurisdictional fact may be made in the circuit court.—(1889) Keltenbaugh v. St. Louis, A. & T. Ry. Co., 34 Mo. App. 147; (1896) Kincaid v. Griffith, 64 Mo. App. 673, 2 Mo. App. Rep'r, 1135.

[m] (Mo. 1890) In an action of replevin upon appeal the statement and affidavits before the justice, when defective, may be amended, if not absolute nullities.—South Missouri Land Co. v. Jeffries, 40 Mo. App. 360.

[n] (Mo. 1890) The failure of plaintiff to state a jurisdictional fact in an action of replevin begun before a justice of the peace cannot be remedied, under Rev. St. 1879, § 3060, which provides that the statement of plaintiff's cause of action filed before a justice may be amended on appeal to supply any deficiency therein.—Dowdy v. Womble, 41 Mo. App. 573.

[o] (Mo. 1891) In an action under Act March 27, 1888, to recover double the costs of repairs of crossings of public roads over a railroad, on failure of the company to make such repairs after notice, the statement filed before the justice may be amended on appeal in the circuit court, and jurisdictional defects may be supplied by such amendment, so long as the cause of action is not changed.—Henry v. Wabash Western R. Co., 44 Mo. App. 100.

[p] (N. M. 1890) On an appeal to the district court from a justice of the peace, under Comp. Laws 1884, § 1848, providing that such appeals shall be tried on their merits as if there had been no trial below, where the justice had jurisdiction, but the complaint failed to allege the jurisdictional facts, it is error for the district court to refuse to allow an amendment adding the necessary averments.—Sanchez v. Candelaria, 5 N. M. 400, 23 Pac. 239.

[q] (N. M. 1892) Under Laws 1889, c. 28, § 7, which provides that where the jurisdiction of the justice of the peace actually existed, though not affirmatively appearing on the face of the papers transmitted on appeal, the district court

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must allow any amendment necessary to set forth correctly the fact of jurisdiction, an affidavit in replevin may be amended in the district court so as to show the value of the property in question.—Romero v. Luna, 6 N. M. 440, 30 Pac. 855; following Martinez v. Martinez (1883) 2 N. M. 464, and Sanchez v. Candelaria (1890) 5 N. M. 400, 23 Pac. 239.

[r] (N. C. 1892) Where an affidavit for attachment in a justice's court, on the ground that defendant is a nonresident, is defective in failing to state that the amount claimed is due on a justice's judgment, or that defendant cannot be found in the state after due diligence, the superior court, on appeal, may amend so as to state such facts, under Code, § 908, providing that in such cases the court may amend "either in form or in substance."—Sheldon v. Kivett, 110 N. C. 408, 14 S. E. 970.

[s] (Ohio, 1894) Where defendant in replevin appeals from the judgment of a justice of the peace, who has no jurisdiction because of defective affidavit, and obtains from the court of common pleas an order to sell the property then in his possession under a redelivery bond, and also answers to the merits after a motion by him to dismiss is overruled, the court should not dismiss the action for want of sufficient affidavit after it has heard the case on the pleadings and evidence, but should permit plaintiff to amend the affidavit.—Gaiser v. Heim, 8 Ohio Cir. Ct. R. 120.

§ 684. —— Bringing action within justice's jurisdiction.

[a] When the damages claimed in the justice's court were not within the jurisdiction of that court, the defect cannot be cured by an amendment in the appellate court.

—(Mass. 1858) Ladd v. Kimball, 78 Mass. (12 Gray) 139;

(Mo. 1860) Webb v. Tweedie, 30 Mo. 488.

[b] The circuit court cannot acquire jurisdiction on appeal from a justice of the peace in an action in which the justice has no jurisdiction by permitting the plaintiff, without the defendant's consent, to so amend his complaint as to state a cause of action within the justice's jurisdiction.

—(Ind. 1891) Goodwine v. Barnett, 2 Ind. App. 16, 28 N. E. 115;

(Mich. 1882) Fowler v. Hyland, 48 Mich. 179, 12 N. W. 26;

(Vt. 1834) Thompson v. Colony, 6 Vt. 91.

[c] (Ala. 1873) On appeal from a justice's judgment in an action to recover personal property in specie, if the complaint in the circuit court alleges a value of the property greater than the sum of which a justice has jurisdiction it may be amended by substituting a smaller amount, so as to bring the case within the justice's jurisdiction.—House v. Lassiter, 49 Ala. 307.

[d] (Cal. 1856) On appeal from the judgment of a justice of the peace on an action brought for the recovery of a mining claim and damages, it is error to refuse to allow plaintiff to strike out his claim for damages, without regard to the purpose which may influence him, since the justice had no jurisdiction thereof.—Grass Val. Quartz Min. Co. v. Stackhouse, 6 Cal. 413.

[e] (Ky. 1824) A party may, in the discretion of the appellate court, file a declaration containing a cause of action cognizable by a justice.—Condict v. Stevens, 17 Ky. (1 T. B. Mon.) 73.

[f] (Mo. 1845) Where a set-off offered before a justice of the peace is rejected, as exceeding his jurisdiction, it cannot on appeal be reduced by a credit so as to be within the jurisdiction of the justice.—Robinett v. Nunn, 9 Mo. 246.

[g] (Pa. 1896) Where, on trial of an appeal from a justice in the common pleas, plaintiff's demand exceeds the amount for which the justice had jurisdiction, plaintiff cannot reduce the claim by allowing a credit of a distinct and independent debt.—Antes v. Antes (Com. Pl.) 12 Montg. Co. Law Rep'r, 86.

§ 685. Amendments to conform to case or proof.

[a] (Ala. 1887) If a complaint in justice's court is filed in debt or assumpsit, while the summons and other proceedings show that the action is in detinue, a proper complaint may be filed in the circuit court on appeal.—Freeman v. Speegle, 83 Ala. 191, 3 South. 620.

[b] (Conn. 1895) Where the real cause of an action begun before a justice of the peace was a sale by defendant of goods pledged to it, and its appropriation of the proceeds after its right to the benefit of the pledge had ceased, a complaint erroneously describing the action as one for goods sold and delivered and a loan of money was properly allowed to be amended, on appeal to the court of common pleas, by substituting a cause of action for conversion of money.—Lovell v. Hammond Co., 66 Conn. 500, 34 Atl. 511.

[c] (Ill. 1873) In an action of forcible detainer before a justice of the peace, permitting an amendment of the complaint, not calculated to surprise the defendant, after a submission of the cause to the superior court, to which the case has been taken by appeal, is not error.—Snowell v. Moss, 70 Ill. 313.

[d] (Kan. 1878) When a bill of particulars filed before a justice of the peace contains a copy of the note sued on, and a statement that defendant placed his name on the back thereof before delivery and at the time it was made, and then, with the maker, delivered it to the payee, and that defendant is an indorser, and that demand has been made on the maker, and notice of protest has been given, it may be amended on appeal to the district court so as to allege that defendant is liable as a guarantor.—Sarbach v. Jones, 20 Kan. 497.

[e] (Mich. 1874) To allow an amendment to the declaration, after the evidence is all in, merely to avoid a variance as to some circumstances connected with the cause of action, where evidence of the whole transaction has been given, and it discloses or refers to but the one contract, and the amendment cannot tend to defeat the purposes of justice or operate as any real hardship or surprise upon the defendant, is within the discretion of the court.—Detroit, H. & I. R. Co. v. Forbes, 30 Mich. 165.

[f] (Mo. 1881) Where a statement filed under section 43 of the railroad law inferentially refers to that section, it may be amended on appeal to the circuit court so as to conform to the requirements of that act.—Rowland v. St. Louis, I. M. & S. Ry. Co., 73 Mo. 619.

[g] (N. Y. 1874) Where, in an action in justice's court, a counterclaim, good if it had been properly pleaded, was introduced in evidence without objection, the pleadings will be treated as amended on appeal so as to contain it.—Williams v. Wieting, 3 Thomp. & C. 439.

[h] (N. Y. 1889) A complaint in justice's court charged an assault on plaintiff "by defendant and his dog," but the case was tried on the theory that defendant was liable for negligently keeping a vicious dog. *Held*, that on appeal to the county court an amendment of the complaint so as to charge that defend-

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ant's dog, being vicious and known to be so by defendant, bit plaintiff, was proper, as the amendment did not change the "claim" actually tried, but simply conformed the complaint to it, within the requirement of Code Civ. Proc. § 723.—Argersinger v. Levor, 54 Hun, 613, 7 N. Y. Supp. 923, 17 Civ. Proc. R. 352.

[i] (Vt. 1858) If, in an action of debt upon judgment before a justice of the peace, the judgment is described erroneously by giving a wrong initial of the justice's name, and by stating the aggregate amount of the debt and costs, instead of reciting each of them separately, the plaintiff, after the action has been appealed to the county court, may be allowed to file a new declaration, properly describing the judgment in those particulars.—Stevens v. Hewitt, 30 Vt. 262.

§ 686. Proceedings for allowance of amendments.

[a] (Iowa, 1860) Where a judgment by default was entered before a justice of the peace, and an appeal was taken to the district court, and it appeared on appeal that the original notice and justice's transcript erroneously stated that when the notice was issued and served it was returnable at an hour different from that named in the record, defendant may base an application for leave to file an answer on a statement of such error, without first correcting it.—Graves v. Heaton, 11 Iowa, 169.

[b] (Iowa, 1866) Leave may be granted to file new pleadings in the district court in a cause brought up by appeal from a justice's court, upon satisfactory evidence being shown to excuse the omission to plead before the justice.—Stanton v. Warrick, 21 Iowa, 76; May v. Wilson, Id. 79.

[c] (Iowa) A defendant may be allowed to amend his answer in the circuit court on appeal from the judgment of a justice, under equitable circumstances, upon proper terms, and after a showing of excuse for failure to plead before the justice.—(1871) Warren v. Scott, 32 Iowa, 22; (1873) Ping v. Cockyne, 37 Iowa, 211.

[d] (N. Y. 1889) After an action against a village for an accident caused by a defective highway has been tried in the justice's court, and thence appealed to the county court, it is proper to refuse a motion to amend the answer by setting up want of funds with which to repair the defect, where the moving papers do not show that the needed repairs would cost any money.—Cook v. Village of Waterford, 53 Hun, 634, 6 N. Y. Supp. 616.

[e] (Wash. 1862) On an appeal from a justice's court, if a defendant in the district court proposes to amend his answer by including new matter in set-off, the proposed amendment must show the nature and character of such new matter.—Newberg v. Farmer, 1 Wash. T. 183.

[f] (W. Va. 1892) If a party during trial of an appeal from a justice is entitled to amend his pleadings, that right cannot be made to depend on whether the adverse party is then ready to proceed with the trial; but, if the amendment would be a surprise to the other party, it should nevertheless be allowed, and a continuance granted.—Powell v. Love, 36 W. Va. 96, 14 S. E. 405.

[g] (Wis. 1866) The affidavits in this case were *held* to show a sufficient cause for leave to file an answer and continue the action.—Wilcox v. Holmes, 20 Wis. 307.

[h] (Wis. 1870) In determining the question of the allowance of an amendment on appeal from justice court by the setting up of a counterclaim by defendant, affidavits tending to disapprove the counterclaim should not be considered.—Richardson v. Chynoweth, 26 Wis. 656.

§ 687. Time of pleading anew and notice.

[a] (Ala. 1893) A complaint filed in the circuit court on appeal before the trial was entered upon is in time.—Kuhl v. Long, 102 Ala. 563, 15 South. 267.

[b] (Conn. 1884) The right to ask for an amendment of pleadings exists after as well as before the expiration of the first term of court, in a civil case appealed from a justice of the peace.—Bennett v. Collins, 52 Conn. 1.

[c] (Ga. 1885) Where, on appeal to the superior court from judgments of a justice of the peace, no plea was filed at the first term, but at the second term after the appeal, the defendant having died, his executors filed a plea of non est factum, without any sufficient cause being shown for the delay, such plea is properly stricken out.—Searcy v. Tillman, 75 Ga. 504.

[d] (Ill. 1869) An affidavit of merits filed after the expiration of the rule to plead comes too late to prevent a dismissal of the appeal.—Bell v. Nims, 51 Ill. 171.

[e] (Ill. 1874) On appeal from the judgment of a justice of the peace in an action of trover to the superior court of Cook county, appellant is not required by law to file an affidavit of merits, as a precedent to his right to trial on the appeal.—Wayne v. Stern, 75 Ill. 313.

[f] (Ill. 1888) On appeal to the circuit court from a justice of the peace, where plaintiff has only filed his affidavit of claim, the defendant is not required to file an affidavit of merits until the cause is reached for trial; neither chapter 79, § 34, nor chapter 110, § 37, Rev. St., requiring in terms that the affidavit shall be filed at any specified time.—Martin v. Hochstadter, 27 Ill. App. 166; World's Soap Mfg. Co. v. Woltz, Id. 302.

[g] (Ill. 1889) It is error to dismiss an appeal from the justice's court for failure to comply with an order, entered at the same term that the justice's transcript was filed, requiring appellant to file an affidavit of merit, as he is not required to file such affidavit, under Rev. St. c. 79, § 34, until the cause is reached for trial.—Jensen v. Fricke, 35 Ill. App. 23, following Martin v. Hochstadter (1887) 27 Ill. App. 166.

[h] (Ill. 1890) On appeal from a judgment of a justice of the peace, defendant is not required to file an affidavit of merits until the cause is reached for trial; and there is no distinction in this respect between an appeal perfected by entering into bond before the clerk of the circuit or superior court, and one where the bond is approved by the justice.—Reid v. Cisler, 35 Ill. App. 572.

[i] (Iowa, 1887) The circuit court may, in the exercise of its discretion, permit an answer in an action appealed from a justice's court to be filed after the cause is reached for trial; but, where no showing is made to excuse the failure to file such pleading within the proper time, there is no abuse of discretion in refusing leave to permit it to be filed at such a stage of the cause.—McDowell v. Booth, 72 Iowa, 141, 33 N. W. 463.

[j] (Iowa, 1887) Although, under Code 1873, § 3596, a defendant in justice's court, who has filed no pleading there, is entitled, on appeal to the circuit, to file any pleading necessary to any defense he may have to the action, an offer to file such answer, made for the first time after the jury had been called and sworn as to qualifications, comes too late. Id. § 2636, pro-

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vides that all pleadings must be filed by the time the cause is reached for trial.—McDowell v. Booth, 72 Iowa, 141, 33 N. W. 463.

[k] (Mich. 1874) To permit an amendment of the declaration in an action originally commenced before a justice to be made at the commencement of the trial on appeal in the circuit, upon the objection being then raised that the declaration discloses no cause of action, which amendment simply changes the statement of the consideration for the defendant's alleged promise from an executed to an executory consideration, viz., that plaintiff "would convey," instead of "had conveyed," cannot mislead or surprise defendant, and is not error. And on allowing such an amendment, it is not error to refuse time to plead, as provided by rules for pleading in vacation to an original declaration.—Detroit, H. & I. R. Co. v. Forbes, 30 Mich. 165.

[l] (Neb. 1887) Under section 1008 of the Code as it existed in 1885, a party appealing from the judgment of a justice of the peace had until the second day of the succeeding term of the district court in which to file the transcript, and the plaintiff had 20 days thereafter in which to file his petition. Therefore, where an appeal has been properly taken by a defendant, a motion made by him on the first day of such term to dismiss the cause for want of prosecution was premature, and should have been overruled.—Smith v. Borden, 22 Neb. 487, 35 N. W. 218.

[m] (Neb. 1894) Code Civ. Proc. § 1008, provides that the party appealing from a judgment of a justice of the peace shall file a transcript thereof in the appellate court within 30 days from the rendition of the judgment. Section 1010a provides that, when an appeal from a justice of the peace is perfected, plaintiff in the action shall file his petition within 20 days after the filing of the transcript in the appellate court. *Held*, that plaintiff has 50 days from the rendition of the judgment appealed from in which to file his petition, without regard to the date of filing the transcript.—Beard v. Ringer, 41 Neb. 831, 60 N. W. 95.

[n] (Pa. 1865) An appeal from the judgment of a justice is an "action brought," within the meaning of a rule of court requiring a declaration to be filed in 12 months from the first day of the term to which it is entered.—Craig v. Brown, 48 Pa. (12 Wright) 202.

[o] (Pa. 1889) Under Act May 25, 1887, § 1, the notice of filing of the statement of claim on appeal from a justice of the peace must be in writing, and served on defendant in like manner as the service of summons.—Connolly v. Wilson, 6 Pa. Co. Ct. R. 421.

§ 688. Sufficiency of pleadings.

[a] On appeal from the justice's court to the district court, the justice's court rules of pleading apply, and not the rules of pleading for the district court.

—(Ark. 1880) Heartman v. Franks, 36 Ark. 501;

(Tex. 1891) Missouri Pac. Ry. Co. v. Ivy, 79 Tex. 444, 15 S. W. 692.

[b] (Ala. 1830) An omission to state the term of the court in a declaration on an appeal from a justice does not thereby make it demurrable.—Spann v. Boyd, 2 Stew. 480.

[c] (Ala. 1848) A statement in an appeal case brought against an indorser, which alleges that A., the payee, indorsed the note to the plaintiffs, and that they sued the maker thereon within 30 days after its maturity, recovered a judgment in that suit, on which a fieri facias was issued, and placed in the hands of a constable of the county of the maker's residence, which has been returned no property found, is sufficient.—Schaefer v. Adler, 14 Ala. 723.

[d] (Ala. 1851) On an appeal from a judgment rendered by a justice of the peace, a statement of the cause of action in the appellate court which does not set forth the amount sued for is defective.—Jones v. Buckley, 19 Ala. 604.

[e] (Ala. 1875) The statement which plaintiff, on appeal from a judgment of a justice of the peace, is required to file in the circuit court, is not subject to the technical rules of pleading, but is sufficient if it discloses a substantial cause of action.—Mobile & G. R. Co. v. Williams, 54 Ala. 168.

[f] (Ga. 1877) A defendant cannot be requred to make oath of an issuable defense in the appellate court, where none is required in the justice's court.—Howell v. Glover, 59 Ga. 774.

[g] (Ill. 1888) On appeal from a justice of the peace, a bill of particulars as follows: "To one mowing and reaping machine, $185,"—is sufficient to enable plaintiff to recover damages for breach of a special contract for payment in notes.—Dunsworth v. Walter A. Wood Machine Co., 29 Ill. App. 23.

[h] (Ill. 1889) On appeal from a justice of the peace, where one of the defendants has filed a plea denying execution of the joint note sued on, it is error to render judgment against him on default, without a trial by jury, or any waiver thereof by him.—Barnett v. Craig, 38 Ill. App. 96.

[i] (Ind. 1835) A statement of the cause of action in the transcript on appeal from a justice, however short or informal, will support the judgment on appeal.—Denby v. Hart, 4 Blackf. 13.

[j] (Ind. 1884) Where a case is in the circuit court on appeal from a justice, and the complaint is amended, the rules of pleading before justices will be applied to the amended complaint.—Pennsylvania Co. v. Rusie, 95 Ind. 236.

[k] (Ind. 1888) A complaint in an action originating in a justice court, after appeal to the circuit court and a finding there in plaintiff's favor, cannot, on motion to arrest judgment, be assailed as not stating a cause of action, where it fully informs defendant of the nature of the alleged cause of action, and is so explicit in its statement of facts that a judgment thereon in plaintiff's favor could be used by defendant as an absolute bar to another suit.—Anderson v. Lipe, 114 Ind. 464, 16 N. E. 833.

[l] (Ind. 1894) A pleading which is sufficient in a justice's court is sufficient in the circuit court on appeal.—Terre Haute & I. R. Co. v. Jarvis, 9 Ind. App. 438, 36 N. E. 774.

[m] (Iowa, 1854) In a suit for trespass and damages before a justice of the peace, a petition was filed, but was mislaid during the trial. Afterwards the justice sent it up to the district court. *Held* that, since the petition and docket showed a cause of action, it was sufficient.—Boon v. Orr, 4 G. Greene, 304.

[n] (Kan. 1892) Where a case is tried in a justice's court on a bill of particulars which sets forth two causes of action without separately stating and numbering them, and which is not as definite and certain as a petition in the district court should be, and defendant appeals to the district court from a judgment against him, it is not error for the district court to overrule a motion there made by him to require plaintiffs to separately state and number their causes of action, and to make their bill of particulars more definite, both for

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the reason that, from the trial before the justice, defendant must have learned what plaintiffs relied on, and because Justices' Act, § 122, requires the case to be tried de novo in the district court on the original papers on which it was tried before the justice, unless the district court, in the furtherance of justice, allows amended or new pleadings to be filed.—St. Louis & S. F. Ry. Co. v. Curtis, 48 Kan. 179, 29 Pac. 146; Same v. McMullen, 48 Kan. 281, 29 Pac. 147.

[o] (Ky. 1835) In appeal from a justice to a circuit court, the defendant may plead in writing, and the circuit court is not bound to reject any pleas that present an appropriate issue.—Wheatly v. Phelps, 33 Ky. (3 Dana) 302.

[p] (Mass. 1846) It seems that the rules of the court of common pleas, established at July term, 1837, respecting specifications of defense, do not apply to cases of appeal from a justice of the peace.—Holman v. Sigourney, 52 Mass. (11 Metc.) 436.

[q] (Miss. 1846) Though the proceedings on appeal from justices of the peace to the circuit court are de novo, and can be conducted without any pleadings whatever, yet, if the parties undertake to conduct and carry on the case by means of written pleadings, they will be held to the rules of pleading.—Atkinson v. Fortinberry, 15 Miss. (7 Smedes & M.) 302.

[r] (Mo. 1893) Under Rev. St. 1889, § 2113, providing that a judgment shall not be reversed for omitting an averment, without proof of which the verdict ought not to have been given, a statement of suit brought in justice's court on a bill of exchange is good, after verdict in the circuit court, if it specify the drawee and payee and amount, though it omit the name of the drawer.—Lockhart v. Moss, 53 Mo. App. 633.

[s] (N. H. 1862) On appeal from the judgment of a justice, a replication to a plea of release, seeking to avoid it by setting up an attorney's lien on the judgment below, and an absolute assignment of the claim to the attorney, must be regarded as containing but one answer to the plea; and a traverse of the assignment, without noticing the rest, is good.—Jordan v. Gillen, 44 N. H. 65.

[t] (N. M. 1857) A petition filed in the district court, on an appeal from a justice's court, under a grant of leave to amend the cause of action, will be deemed sufficient, notwithstanding informalities, if it contains all the substantial elements to place fully and clearly before the court the cause of action which leave was granted to amend.—Sanchez v. Luna, 1 N. M. 238.

[u] (N. Y. 1845) The defendant in a justice's court pleaded the general issue and for special pleas, each of which set up new matter, and the plaintiff put in a replication containing an answer to one of the special pleas, though designed as an answer to them all; and, without further pleadings, the parties went to trial on the merits before the justice, and the plaintiff recovered, and the defendant appealed to the common pleas. On the trial the court refused to hear the plaintiff's evidence, and gave judgment for the defendant, on the ground that the special pleas, which were unanswered, set up a good defense and stood admitted. *Held* erroneous, and that the common pleas should have heard and determined the cause on its merits.—Beardsley v. Jacobs, 1 Denio, 504.

[v] (Ohio, 1885) On appeal from a judgment of a justice of the peace to the common pleas, the petition need not allege that the case came into the latter court by appeal.—McCullough v. Cramblett, 1 Ohio Cir. Ct. R. 330.

[w] (Pa.) If the declaration lay the cause of action to have accrued on a day subsequent to the commencement of the suit before the justice, it is error.—(1815) Miller v. Ralston, 1 Serg. & R. 309; (1817) McLaughlin v. Parker, 3 Serg. & R. 144; (1822) Langer v. Parish, 8 Serg. & R. 134; (1824) Roud v. Griffith, 11 Serg & R. 130.

[x] (Pa. 1875) In an appeal from a justice of the peace, the affidavit alleged that the plaintiffs had purposely reduced their claim below $100 in order to give the court jurisdiction. *Held* insufficient, in not setting forth the facts to prove want of jurisdiction.—Williams v. Shields, 2 Wkly. Notes Cas. 176.

[y] (Pa. 1893) On appeal from a justice's court a statement signed by plaintiff or his attorney, and followed by a copy of note, with indorsements, etc., not signed by plaintiff or his attorney, is not such a statement as is required by Act May 25, 1887, and it will not entitle plaintiff to judgment.—Medler v. Madlinger (Com. Pl.) 12 Pa. Co. Ct. R. 473.

[yy] (Pa. 1893) The rule of court that in all cases of appeal from justices the issue shall be raised by a declaration for money had and received, and the plea of nonassumpsit thereto, and the cause shall be tried on the merits without regard to form, applies to suits against married women.—Kooker v. Williams (Com. Pl.) 3 Pa. Dist. R. 446.

[z] (Tex. 1895) On appeal from a judgment in a justice's court to the county court, it is error to strike out an oral plea to the jurisdiction, and the evidence thereunder, as the strict rules of pleading are not applicable to justice courts.—Schwartz v. Frees (Civ. App.) 31 S. W. 214.

[zz] (W. Va. 1889) Where, on appeal to the circuit court in an action commenced before a justice of the peace, the defendant files an informal plea which sets up a valid defense to the action, the circuit court should not deny him the benefit of his defense, when the plea is such that a person of common understanding may know what is intended by it.—Jones v. Browse, 32 W. Va. 444, 9 S. E. 873.

§ 689. Departure in pleadings in appellate courts from those in justice courts.

Waiver of departure between pleadings on appeal and in justice court, see post, § 691.

[a] (Ala. 1887) In an appeal from a justice's court, if the complaint filed is a departure from the original cause of action, the objection is not available on demurrer, but must be taken by motion to reject the complaint or strike it from the files.—Freeman v. Speegle, 83 Ala. 191, 3 South. 620.

[b] (Ala. 1892) On appeal from a justice's court to the city court, the proper mode of raising the question of departure from the case as made in the justice's court is by motion to reject the complaint in the city court, or to strike it from the files, and the question cannot be raised by demurrer or plea in abatement.—Louisville & N. R. Co. v. Barker, 96 Ala. 435, 11 South. 453.

[c] (Ala. 1893) Plaintiff brought attachment for rent in a justice court. On appeal to the city court, plaintiff amended a complaint by counting on three notes executed by defendant, and alleging that they were given for installments of rent for a house belonging to plaintiff. *Held* not a departure from the original suit.—Lagerfelt v. McKie, 100 Ala. 430, 14 South. 281.

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[d] (Del. 1857) Where a suit is instituted before a justice of the peace in the name of a husband by his wife, and the declaration on appeal gives the names of both husband and wife as those of the plaintiffs, the variance is fatal to the appeal, and may be taken advantage of by a motion to set aside the declaration for irregularity; but it is not a proper ground for a plea in abatement or in bar.—McDowell v. Simpson, 1 Houst. 467.

[e] (Ky. 1845) In trespass, on appeal by defendant from a justice to the circuit court, plaintiff need not allege his cause of action in the declaration in the same terms used by him in the warrant before the justice. There is no variance unless a new cause of action is described.—Blassingame v. Glaves, 45 Ky. (6 B. Mon.) 38.

[f] (Neb. 1883) Plaintiff's petition in replevin in a justice's court described the property as "one school house, about 14x24 ft. in size, composed of sod and lumber." On appeal to the district court, the petition described the property as "all the boards, planks, and lumber, and windows, benches, doors, and desks, which form a part of a certain school house, composed partly of sod and dirt and partly of lumber." *Held*, that the descriptions were substantially similar, and that there was no departure.—School Dist. No. 36, York County, v. McIntire, 14 Neb. 46, 14 N. W. 656.

[g] (Neb. 1884) In replevin in a county court, the petitioner claimed the possession of a frame building and its appurtenances, and, upon removal of the cause to the district court, the petition filed therein claimed all the lumber, materials, etc., on certain land, "being the same chattels and personal property mentioned and described in the original petition filed in this cause, which petition is hereby made a part hereof." *Held*, that the petition did not state such a different cause of action from that alleged in the original petition as to warrant the sustaining of a motion to strike it out.—Waters v. Reuber, 16 Neb. 99, 19 N. W. 687, 49 Am. Rep. 710, following School Dist. No. 36, York County, v. McIntire (1883) 14 Neb. 46, 14 N. W. 656.

[h] (Neb. 1891) In an action for work and labor, begun in justice's court, the fact that, on appeal to the district court, plaintiff alleges in his petition that defendants are partners, while no such allegation was contained in his bill of particulars in justice's court, does not constitute such a departure in pleading as to require the petition to be stricken from the files of the district court.—Baldwin v. Rhea, 33 Neb. 319, 50 N. W. 1.

[i] (Neb. 1894) While, on appeal to the district court from a justice's court, plaintiff must prosecute the same cause of action, yet he need not make the same allegations as those contained in his pleading below, so long as the identity of the original cause of action is preserved.—Levi v. Fred, 38 Neb. 564, 57 N. W. 386.

[j] (Vt. 1835) A variance between the declaration before the justice and the new declaration filed in the county court is no cause of abatement.—Way v. Wakefield, 7 Vt. 223.

[k] (Vt. 1843) The variance between the declaration in the justice court and the new declaration in the appellate court should be taken advantage of by a motion to dismiss the new declaration.—Blodget v. Skinner, 15 Vt. 716.

§ 690. Pleas puis darrein continuance.

[a] (Ala. 1835) A payment made after the rendition of a judgment by a magistrate is available on appeal without a special plea puis darrein continuance.—Hagen v. Thompson, 2 Port. 48.

[b] (Mo. 1843) On appeal from the judgment of a justice of the peace, a set-off cannot be pleaded puis darrein continuance.—Chase v. Chase, 8 Mo. 103.

[c] (N. Y. 1828) The common pleas are bound, ordinarily, to try an appeal case on the pleadings and issue joined before the justice; but, when new matter of defense arises after the justice's judgment is given, it may be pleaded puis darrein.—People v. Ontario Common Pleas, 1 Wend. 80.

[d] (N. Y. 1895) Reply not being necessary in an action before a justice of the peace, and such action, on appeal to the county court, being triable anew on the issues formed by the pleadings in the justice court, payment of a counterclaim subsequent to such an appeal may be shown on retrial in the county court, without amendment of the pleadings.—Utter v. Nelligan, 92 Hun, 185, 36 N. Y. Supp. 591.

[e] (Tenn. 1855) If plaintiff in a suit before a justice for a contract debt accepts a sealed note in satisfaction, but allows judgment also to be rendered against defendant, the latter may be allowed, on appeal to the circuit court, to plead the satisfaction by an oral plea puis darrein continuance.—Campbell v. Reeves, 35 Tenn. (3 Sneed) 52.

§ 690½. Demurrers on appeal.

[a] (Ind. 1854) In an appeal from a justice of the peace, the plaintiff, by withdrawing a demurrer sustained to a plea filed with the justice, did not, under Rev. St. 1843, render himself liable to pay costs from the time the demurrer was sustained.—Tyner v. Cory, 5 Ind. 216.

[b] (Iowa, 1859) An action before a justice of the peace, in which the plaintiff claimed to recover for the work and labor of his son, for 5½ months, at $10 per month, etc. The defendant answered in writing, denying the plaintiff's claim, and averring that he contracted with plaintiff, for the hire of the services of his son, for a specified time, and that there had been a breach of the contract, and claiming an offset in damages therefor. On appeal the plaintiff demurred in the upper court to this part of the answer. *Held*, that a decision sustaining the demurrer was erroneous, as it deprived the defendant of the right to show and set off such damages by way of defense.—Lowen v. Crossman, 8 Iowa (8 Clarke) 325.

[c] (Me. 1844) Where the defendant has pleaded an immaterial plea, tendering an issue, in an action before a justice of the peace, and an appeal has been entered to the district court without any joinder of the issue, and the defendant has refused to amend his plea, it is competent for the latter court to permit the plaintiff to demur to the plea.—Strout v. Inhabitants of Durham, 23 Me. (10 Shep.) 483.

[d] (Mo. 1892) Since statements of cause of action in justice's court are not demurrable, the circuit court, on appeal, cannot enter judgment on demurrer to the statement.—Kane v. Dauernheim, 51 Mo. App. 635.

[e] (Mo. 1894) Though the law does not contemplate a demurrer to a statement filed in justice court, either there or in the circuit court on appeal, still such a pleading, having been filed in the circuit, and having been preserved in the bill of exceptions on appeal from the circuit court, will be treated by this court as a motion to strike out the complaint because not stating a cause of action.—Anderson v. McClure, 57 Mo. App. 93.

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[f] (Nev. 1885) An objection that jurisdiction of an action transferred from a justice's court was irregularly acquired cannot be taken by demurrer, under the practice act (Comp. Laws, § 1103).—James v. Leport, 8 Pac. 47, 19 Nev. 174.

§ 691. Waiver of pleas and objections to amendment of pleading.

[a] (Del. 1843) If the declaration in an appeal from a justice of the peace does not correspond with the statement filed before the justice, this cannot be objected to after pleading to issue.—Townsend v. Steward, 4 Har. 94.

[b] (Ind. 1834) If on an appeal the defendant file additional pleas in the circuit court without objection, the filing thereof cannot be assigned for error by the plaintiff.—Tyler v. Denson, 3 Blackf. 347; Abel v. Burgett, Id. 502.

[c] (Ind. 1861) An objection that plaintiff was allowed to amend her complaint in the common pleas, on appeal from a justice, as to the name in which she sued, thereby causing a variance, cannot be raised for the first time in the supreme court.—Smith v. Allen, 16 Ind. 316.

[d] (Ind. 1875) In an action brought before a justice and appealed by defendant to the circuit court, wherein defendant amends his counterclaim so as to claim judgment against plaintiff for $700 after satisfying plaintiff's claim, and in which, on plaintiff's not objecting to the amendment, or taking any steps in relation thereto, the cause is, by agreement after issue joined upon the answer, referred to arbitrators under a stipulation that their decision is to be final, judgment to be rendered thereon, plaintiff will be deemed to have waived the objections to the amount claimed by defendant's amendment after the arbitrators have reported to the court a finding in defendant's favor for $397.—Jackson v. Swope, 49 Ind. 398.

[e] (Ind. 1879) Plaintiff in a replevin suit before a justice, in which issues are formed in the circuit court on appeal, who stands upon his demurrer to plaintiff's reply upon the overruling thereof without objecting to the rendition of the judgment on his demurrer, thereby waives his right to have such issues tried.—Roberts v. Norris, 67 Ind. 396.

[f] (Kan. 1891) Where an action is appealed from a justice of the peace to the district court, and the plaintiff, with the consent of the defendant, filed in the district court a new petition, setting up a claim exceeding $300, the jurisdictional limit of the justice, and the defendant voluntarily appears and files his answer thereto, the district court has jurisdiction to hear and determine the action upon the pleadings filed in that court, the same as if there had been no appeal.—Missouri Pac. Ry. Co. v. Lea, 47 Kan. 268, 27 Pac. 987.

[g] (Mich. 1873) The statute permitting amendments to the pleadings upon an appeal to the circuit from the justice's court does not warrant an increase of the ad damnum beyond the limit of the justice's jurisdiction. But a defendant who has stipulated for such amendments "as either party may desire," and made no objection to the plaintiff's declaration as amended, but pleaded to the merits, cannot, after verdict against him, object, in order to limit the costs, that it was not an amendment in the appeal case, but the institution of a new suit.—Evers v. Sager, 28 Mich. 47.

[h] (Neb. 1883) Where, in replevin brought in a justice's court, defendant waives a bill of particulars by not requiring it, he cannot, on appeal to the district court by plaintiff, object that a different description of the property is given by plaintiff in his petition filed in the district court from that contained in his petition filed in the justice's court.—School Dist. No. 36 of York County v. McIntire, 14 Neb. 46, 14 N. W. 656.

[i] (Neb.) On removal of an action of replevin from a county court to a district court, an objection that the petition filed in the district court describes the property differently from the bill of particulars filed in the county court, and states a different cause of action, is waived by answer.—(1883) School Dist. No. 36 of York County v. McIntire, 14 Neb. 46, 14 N. W. 656; (1884) Waters v. Reuber, 16 Neb. 99, 19 N. W. 687, 49 Am. Rep. 710.

[j] (Neb. 1885) Where, on appeal to the district court, the defendant answers the cause of action set forth in the plaintiff's petition without objection that it is not the same as was tried in the court from which the appeal is taken, he will be deemed to have waived all objections upon that ground.—Sawyer v. Brown, 17 Neb. 171, 22 N. W. 355.

[k] (Neb. 1894) On appeal from a justice of the peace, an objection that the issues are not the same as below is waived if not made before trial.—Robertson v. Buffalo County Nat. Bank, 40 Neb. 235, 58 N. W. 715.

[l] (Ohio, 1837) It is too late to allege a variance between the party plaintiff in the transcript and in the declaration after a general plea to the action.—Wilson v. Trustees of No. 16, 8 Ohio (8 Ham.) 174.

[m] (Pa. 1853) On appeal from a justice's judgment, if the parties voluntarily try an action of tort under pleadings applicable only to an action ex contractu, it is a waiver of all objections to the form of the action, and also to any variance between the form of proceeding before the justice and that tried on appeal in the common pleas.—Steckel v. Weber, 20 Pa. (8 Harris) 432.

[n] (Pa. 1892) Under rules of court that if, on appeal from a justice's court, a defendant enters a rule for a more specific statement, he shall reply thereto by affidavit as in other cases, a failure to file a sworn answer authorizes the entry of judgment in plaintiff's favor, and a notice to plead, required by the rule does not operate as a waiver of an affidavit of defense.—Horner v. Horner, 145 Pa. 258, 23 Atl. 441, 29 Wkly. Notes Cas. 420.

[o] (Tenn. 1836) On appeal from a justice, matter in abatement cannot be taken advantage of in the appellate court unless it be pleaded in writing and verified at the first term of the court to which the appeal is taken.—Grove v. Campbell, 17 Tenn. (9 Yerg.) 7.

[p] (Tex. 1892) In an action on an account in justice court, defendant pleaded in abatement, setting up his residence in another precinct. The justice sustained the plea and dismissed the suit, and plaintiffs appealed to the county court, where the plea was amended, and the case continued by consent of counsel. *Held*, that such continuance was not a waiver of the plea.—Howeth v. Clark (App.) 19 S. W. 433.

[q] (Tex. 1893) The fact that plaintiff, on appeal from a justice to the county court, has been permitted (defendant making no objection) to amend his claim by adding new items, is no ground for overruling his objection to defendant's adding new items to his counterclaim, contrary to Rev. St. art. 316.—Downtain v. Connellee, 2 Tex. Civ. App. 95, 21 S. W. 56.

[r] (Tex. 1893) On appeal from a judgment by default rendered by a justice of the peace, it is not error for the county court to strike out defendant's answer for its failure to plead in

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justice's court, notwithstanding two trials had taken place in the county court on defendant's pleading.—Galveston, H. & S. A. Ry. Co. v. Dromgoole (Civ. App.) 24 S. W. 372.

[s] (Vt. 1843) If the plaintiff in an action commenced before a justice of the peace, and appealed to the county court, files a new declaration in the county court for a different cause of action, and the defendant, without objection to its being received, takes issue under it, either upon matter of law or matter of fact, it will be considered as a waiver of the variance between the old and the new declaration.—Blodget v. Skinner, 15 Vt. 716.

§ 692. Matters admitted and to be proved and variance.

Departure between pleadings in appellate and justices' courts, see ante, § 689.

[a] (Ala. 1845) On an appeal from a justice the county court may require a defendant who has pleaded a tender to prove everything necessary to constitute a good plea of tender, including proof of the presence of the money in court.—Harbin v. Knox, 7 Ala. 675.

[b] (Del. 1836) On appeal from a justice in an action of trespass, the proof must establish a trespass prior to the commencement of the action before the justice, and not merely before filing the appeal.—Salmons v. Collins, 2 Har. 45.

[c] (Del. 1851) On appeal from a justice's court to the superior court, where the action may be tried de novo, plaintiff must show a right of action at the time when the suit was commenced below.—Norton v. Janvier, 5 Har. 346.

[d] (Ill. 1860) On appeal from a justice to the circuit court, the case is tried de novo, all formal objections being overlooked, so that it is immaterial that the note put in evidence differs from that set out in the justice's transcript.—Frye v. Tucker, 24 Ill. (14 Peck) 180.

[e] (Ind. 1859) As no replication is needed before a justice, so none is required when the case is appealed. If the plaintiff upon leave reply an offset to the defendant's counterclaim, he does not thereby admit matter in the answer not replied to.—Turner v. Simpson, 12 Ind. 413.

[f] (Iowa, 1851) A variance between the note set out in the justice's return and the one offered in evidence, which is corrected by an amended return, is no ground for a nonsuit.—Higley v. Bryan, 3 G. Greene, 284.

[g] (Iowa, 1857) Where, in an action before a justice of the peace on an account, the defendant filed a set-off of a like nature, and the transcript of the justice returned to the district court did not show any oral or written pleadings in the cause, but stated that the plaintiff did not object to the defendant's bill of particulars or set-off, and where on the trial of the cause in the district court the court ruled that the set-off was admitted by the state of the pleadings, the ruling of the court was correct.—Brock v. Manatt, 5 Iowa (5 Clarke) 270.

[h] (Iowa, 1858) On the trial of an appeal from a justice of the peace in the district court, if it appears from the transcript that before the justice the parties had a full trial, the demand of the plaintiff is not to be taken as admitted by the district court.—Heath v. Coltenback, 5 Iowa (5 Clarke) 490.

[i] (Mich. 1890) How. Ann. St. § 6928, relating to trials in justice court, which provides that when an instrument in writing, purporting to be executed by one of the parties, is declared on, it may be used in evidence without proving its execution, unless its execution has been denied by oath at the time of declaring or pleading, "if such instrument shall be * * * filed with the justice," does not relieve plaintiff, in an action on a note against the maker, on appeal to the circuit court, from proving the execution of the note, unless the return of the justice shows that the note was filed with him.—Newton v. Principaal, 82 Mich. 271, 46 N. W. 234.

[j] (Mo. 1875) A plea of the general issue by defendant in a suit by a corporation before a justice of the peace is an admission of the plaintiff's corporate capacity; and therefore, on appeal to the circuit court, the plaintiff will not be required to prove the fact of its incorporation.—Farmers' & Drovers' Bank v. Williamson, 61 Mo. 259.

[k] (Pa. 1823) Though the cause of action must appear to be the same, yet where the transcript stated that the suit was on a promissory note, and on the appeal the evidence was of a sealed instrument or bill obligatory for the sum stated in the transcript, it was *held* that the variance was not material, the cause of action being evidently the same.—Bechtol v. Cobaugh, 10 Serg. & R. 121.

[l] (Pa. 1853) On appeal from the judgment of an alderman on a scire facias alleged to have been brought upon a recognizance of bail for stay of execution, a plea of nul tiel record will prevail, if it appears that the recognizance filed with the transcript is entirely different from that stated in the writ.—Kirk v. Aechternacht, 1 Phila. 426.

§ 693. Evidence admissible under pleadings.

[a] (Ark. 1846) Where the summons issued by a justice of the peace does not designate the nature of the instrument sued upon, but it is in fact a bond, it should not be excluded from the jury as evidence in a trial on appeal to the circuit court because in his transcript the justice calls it a "promissory note."—Patterson v. Wilson, 6 Ark. (1 Eng.) 476.

[b] (Ind. 1871) Under the statutes, an appeal from a justice of the peace to the circuit court must be tried as an original case, except that the informal pleadings before a justice may stand for the more formal pleadings in an original case in a higher court. Hence, where a suit is brought before a justice of the peace against two persons on an account, and judgment is recovered against both, if one of the judgment defendants appeals, evidence showing his separate liability for the claim may be introduced on the trial of the appeal.—Carmien v. Whitaker, 36 Ind. 509.

[c] (Iowa, 1868) Where in an action before a justice of the peace the defendant appears, but files no plea or general denial of the plaintiff's claim, either in writing or orally, and a trial is had on the merits under testimony on both sides, and an appeal is taken by the defendant to the district court, the defendant has the right, on the trial of the appeal, to introduce testimony in denial of the right of the plaintiff to a recovery against him.—Richman v. Brown, 25 Iowa, 33.

[d] (Kan. 1877) On appeal each party may, without filing new pleadings, prove any cause of action or defense and introduce any evidence which might have been proper upon the trial before the justice.—Stanley v. Farmers' Bank, 17 Kan. 592.

[e] (Kan. 1890) Where a case against a railroad company, tried before a justice without a pleading by defendant, was removed to the district court, where no pleading was filed or demanded, but trial was had upon the merits,

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it was error to exclude, for want of a pleading, evidence that defendant did not own or operate the road by which the cause of action arose.—Denver, M. & A. Ry. Co. v. Cowgill, 44 Kan. 325, 24 Pac. 475.

[f] (Kan. 1895) In an action in justice court for the value of corn wrongfully seized by a sheriff under a levy, where no answer was filed and no bill of particulars of a set-off was demanded by plaintiff, and, on appeal, trial was had without new pleadings, defendant may show that, after the levy, part of the corn was used with plaintiff's consent, and that he had used part of it for his own benefit.—Frankhouser v. Neally, 54 Kan. 744, 39 Pac. 700.

[g] (Mass. 1828) Where, in trespass quare clausum fregit before a justice of the peace, defendant pleads only the general issue, evidence in the common pleas that plaintiff was not possessed of the land is precluded by St. 1783, c. 42, § 2.—Lynch v. Rosseter, 23 Mass. (6 Pick.) 419.

[gg] (Mass. 1857) Where a case is carried by appeal from a justice to the court of common pleas, and no further pleading is ordered, the same evidence is admissible there under the pleadings as would have been admissible in the court below.—Wilbur v. Taber, 75 Mass. (9 Gray) 361.

[h] (Mich. 1883) Where plaintiff's statement of his claim was sufficient in a justice's court, it was sufficient on appeal to the circuit court; and it was error to exclude as evidence a writing upon which the action was founded, which had been filed with the justice as a specification of the nature of the action.—Soper v. Mills, 50 Mich. 75, 14 N. W. 704.

[hh] (N. Y. 1848) Where a defendant, in a suit before a justice of the peace, pleads his discharge under the bankrupt act in bar, and the plaintiff goes to trial without replying to the plea, he cannot, on appeal to the court of common pleas, be permitted to prove a new promise subsequent to the discharge.—Ross v. Hamilton, 3 Barb. 609.

[i] (N. Y. 1891) A complaint in an action appealed from a justice of the peace stated that plaintiff was in possession of a farm through which the waters of the inlet to a lake were allowed to pass; that defendant raised the upper dam of the outlet of the lake, so that the waters of the lake and inlet backed up and overflowed plaintiff's farm, damaging his crops. Defendant attempted to oust the justice of jurisdiction by raising the issue of title to real estate, filing bond for removal, etc., and in addition pleaded the general issue. *Held* that, even if under the steps taken by defendant an issue as to title could not be tried on appeal to the county court, defendant was entitled, under his general issue, to show that the legislature had appropriated the dam for the use of the Erie Canal, and authorized the canal commissioners to increase its height, and to appropriate lands and water rights necessary for the purpose, and that his actions with respect thereto were under authority of the state superintendent of public works, and that consequently plaintiff's remedy, if any, was against the state.—Shaver v. Eldred, 61 Hun, 623, 15 N. Y. Supp. 930.

[j] (Ohio, 1834) The bill of particulars filed in the justice's court must be certified to the court above, on appeal, and the evidence confined to such particulars.—McCoy v. Thompson, Wright, 649.

[k] (Pa. 1892) The fact that a transcript on appeal from a justice court shows merely that the suit was brought "for timber sold" the defendant does not preclude the offer in evidence of a note given for the purchase money, when made not for the purpose of contradicting the record, but of showing that the claim was the same as that before the justice.—Bower v. Luhman, 148 Pa. 591, 24 Atl. 90, 30 Wkly. Notes Cas. 110.

[l] (Tex. 1882) In a case tried in a justice's court and appealed to the county court, plaintiff is entitled to prove payment or settlement of a counterclaim, without pleading the same in writing in either court.—Whitley v. Jackson, 1 White & W. Civ. Cas. Ct. App. § 576.

[m] (Vt. 1848) Where an action upon a promissory note is commenced before a justice of the peace and appealed to the county court, the plaintiff may, by the rules of court, file a new declaration in the form of a count for money had and received; and there will be no error in receiving under such count any evidence which would have been competent under a count declaring specially upon the note in suit.—Town of Fletcher v. Blair, 20 Vt. 124.

(d) EVIDENCE.

BURDEN OF PROOF AND SUFFICIENCY OF EVIDENCE, § 694.
EVIDENCE ADMISSIBLE, § 695.
TRANSCRIPT OR RECORD AS EVIDENCE ON APPEAL, § 696.
EVIDENCE NOT ADMISSIBLE OR GIVEN BEFORE JUSTICE, § 697.
WITNESSES, § 698.

Continuance in order to receive new evidence on appeal, see ante, § 654.
Objection to introduction of evidence on ground of want of jurisdiction on appeal, see ante, § 476.
Discovery on appeal from justice of the peace, see "Discovery," vol. 16, c. 2025, § 44 [b].

§ 694. Burden of proof and sufficiency of evidence.

Matters admitted by pleadings, see ante, § 692.
—— *to be proved on appeal, see* ante, § 692.

[a] (Ky. 1827) On appeal by the defendant, the cause is in the same condition as if brought into court by the original plaintiff, and he must prove his demand.—Suter v. Caldwell, 22 Ky. (6 T. B. Mon.) 34, 35.

[b] (Mo. 1873) On the trial of an appeal from a justice's judgment to the circuit court, plaintiff should not be allowed to recover upon any less evidence than would have been necessary if he had brought suit in the circuit court in the first instance.—Stout v. St. Louis Tribune Co., 52 Mo. 342.

[c] (Mo. 1890) In an action against a railroad company under Rev. St. 1879, § 809, for double damages for injuries to stock, the fact that the justice of the peace before whom the case was tried was a justice of the township or of the county need not be proved, where it appears by recitals in the record.—Duke v. Kansas City, Ft. S. & M. R. Co., 39 Mo. App. 105.

[d] (Wis. 1851) The transcript of a proceeding before a justice of the peace is sufficient proof of the jurisdiction of the justice on appeal to the county court.—Rector v. Druary, 4 Chand. 24, 3 Pin. 298.

§ 695. Evidence admissible.

Evidence admissible under pleadings, see ante, § 693.

[a] (Ala. 1853) On appeal where the amount in suit is less than $20, if the warrant is in

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the name of a firm as plaintiffs, not setting out the individual names of the partners, plaintiffs may introduce proof of their individual names, in order that they may be set out in the judgment entry.—Stockdale v. Riddle, 22 Ala. 678.

[b] (Ill. 1861) On appeal to the circuit court from the judgment of a justice, the defendant may give anything in evidence which goes to show that the plaintiff has no existing cause of action.—Minard v. Lawler, 26 Ill. (16 Peck) 301.

[c] (Ill. 1878) On the trial in the circuit court of an appeal from a justice's court, a deposition taken upon proper notice while the action was pending before the justice may be read in evidence.—Jarrett v. Phillips, 90 Ill. 237.

[d] (Ind. 1833) The admissions made by a party in a justice's court (the party being a competent witness by statute) on his oath cannot be proved in the appellate court, he being in court and not examined.—Carter v. Buckner, 3 Blackf. 315.

[e] (Iowa, 1850) On appeal from a justice of the peace, it is error to receive notes in evidence not marked as filed by the justice, nor otherwise identified by the transcript.—Graft v. Diltz, 2 G. Greene, 570.

[f, g] (Iowa, 1860) On the trial of an appeal from a justice's court, it may be shown that a written instrument which was the basis of the action was offered in evidence in the court below, and that the justice neglected to file it, and then it may be introduced in the trial in the appellate court.—Eggleston v. Collis, 10 Iowa, 554.

[h] (Mass. 1860) An auditor's report to the justice's court of Suffolk county may be recommitted to the auditor for amendment by an order of the superior court, after the case has been taken there by appeal, and the amended report may be used as evidence at the trial in that court.—Webber v. Orne, 81 Mass. (15 Gray) 351.

[i] (Mich. 1873) An oral admission made as evidence, merely, in a justice's court, is not a matter of record, and, while conclusive for the purpose of the trial, does not preclude an appeal, on the trial whereon it would be the subject of evidence, the same as any other oral confession.—Morrison v. Riker, 26 Mich. 385.

[j] (Mich. 1886) On appeal from a justice's court in a suit on a bond which was not filed with the justice, it is error to allow the bond to be introduced in evidence without first proving its execution.—Bauer v. Wasson, 60 Mich. 194, 26 N. W. 877.

[k] (Mich. 1890) Testimony of the improper conduct of a witness on the trial before the justice of the peace is properly admitted on the trial in the circuit court on appeal.—Hunt v. Rumsey, 83 Mich. 136, 47 N. W. 105, 9 L. R. A. 674.

[l] (Mich. 1893) In an action for the price of goods, brought in a justice's court, and appealed by defendant to the circuit court, where a bill of particulars filed by plaintiff in the circuit court is objected to as too general, plaintiff may testify that he furnished an itemized statement and bill of particulars in the justice's court, and that he is unable to make another itemized statement.—Rossman v. Bock, 97 Mich. 430, 56 N. W. 777.

[m] (Miss. 1847) The same species of evidence is admissible in the court above as was admissible before the justice of the peace, and either party may be examined under oath in the same manner as he could have been examined before the justice.—Russell v. Moore, 16 Miss. (8 Smedes & M.) 700.

[n] (Mo. 1838) Where a plaintiff in an action before a justice of the peace examines the defendant, he cannot, on appeal to the circuit court, be allowed to prove the declarations of the defendant in testifying before the justice of the peace.—Martien v. Barr, 5 Mo. 102.

[o] (Mo. 1839) On appeal from a justice of the peace the rules of evidence in the circuit court are the same as in the justice's court.—Atwood v. Reyburn, 5 Mo. 555.

[p] (N. J. 1839) An execution is not admissible in evidence on an appeal to show a sale of property, without proof of a judgment, although not objected to in the justice's court.—Glenn v. Garrison, 17 N. J. Law (2 Har.) 1.

[q] (N. J. 1842) On appeal from a judgment of a justice of the peace, the question whether documentary evidence was offered or admitted may be determined by certificate of the justice or by witnesses.—Ramsey v. Dumars, 19 N. J. Law (4 Har.) 66.

[r] (N. J. 1864) It is competent for an appellant, upon trial of the appeal, to prove that the appellee and one of his witnesses testified upon the trial below to a fact which, if true, would defeat him in the suit.—Ramsden v. Bryden, 31 N. J. Law (2 Vroom) 27.

[s] (N. Y. 1822) If a party in a justice's court serves a notice on the other party to produce a paper at the trial, or that parol evidence will be given of its contents, and parol evidence is given accordingly, such notice is available on the appeal, and will entitle the party who gave it to give the parol evidence in the appellate court if the paper be not produced.—Read v. Moor, 19 Johns. 337.

[t] (N. Y. 1845) Where the trustees of a school district had recovered a judgment before a justice of the peace against the commissioners of the town for the school moneys apportioned to their district, but withheld from them, an order made by the superintendent of common schools after the recovery of such judgment cannot be given in evidence upon the trial of the cause upon appeal in the court of common pleas.—Bennett v. Burch, 1 Denio, 141.

[u] (N. Y. 1865) An offer by the respondent to let a justice's judgment appealed from be corrected by deducting therefrom a specified sum cannot be given in evidence on the hearing of the appeal, where it is used for a purpose wholly unauthorized, and well calculated to prejudice the appellant's case, as where, previous to the introduction of the offer, the counsel for the respondent stated to the jury that the offer was made because the appellant had no confidence in his case, and neither the court nor the counsel informed the jury of the proper effect of the offer upon the question of costs.—Finney v. Veeder, 45 Barb. 388, 31 How. Prac. 14, 1 Abb. Prac. (N. S.) 366.

[v] (N. C. 1854) Where an appeal is taken from the judgment of a justice by one of two defendants, but by mistake it is sent up as the appeal of both, and on the trial admissions of the party who did not appeal were given in evidence against the defendant who did appeal, and after a trial and verdict for plaintiff the magistrate is permitted, by consent of parties, to amend his proceedings, it is error to permit the verdict to stand; for by the amendment the admissions of the dismissed party were rendered incompetent.—Wilfong v. Cline 46 N. C. 499.

[w] (Wis. 1875) The minutes of a justice of the peace of testimony taken at the trial before him are not admissible, except by stipu-

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lation, at the trial of the same cause on appeal in the circuit court, either as evidence of the facts at issue, or to impeach or sustain the credibility of a witness by showing what he testified before the justice.—Zitske v. Goldberg, 38 Wis. 216.

§ 696. Transcript or record as evidence on appeal.

Sufficiency of transcript as evidence of justice's jurisdiction, see ante, § 694.

[a] (Del. 1843) The transcript filed before a justice of the peace in an action of trespass is not evidence on an appeal; it being filed as the initiative of proceedings in the appellate court, where the cause proceeds on the pleadings had in the latter court.—Townsend v. Steward, 4 Har. 94.

[b] (Del. 1846) On the trial of an appeal, the record of the justice's judgment is not admissible in evidence; but, if read without objection, it is not sufficient ground to set aside the verdict and for a new trial.—Hudson v. Pettijohn, 4 Har. 356.

[c] (Ind. 1841) On appeal from a judgment of the justice of the peace a transcript and sci. fa. issued against bail for stay of execution are not evidence of the truth of the matters alleged in the sci. fa.—Burger v. Becket, 6 Blackf. 61.

[d] (Iowa, 1856) A return of a justice amending his transcript, being a part of the record, may be read to the jury to show the matters in issue.—Cooper v. Woodrow, 3 Iowa (3 Clarke) 189.

[e] (Mass. 1840) On an appeal taken from the decision of a justice of the peace to the court of common pleas, copies duly certified by the justice are the only competent evidence of the proceedings below.—Commonwealth v. Doty, 43 Mass. (2 Metc.) 18.

[f] (Mich. 1890) The return of the justice on an appeal is not evidence on the new trial in the circuit court.—Ockenfells v. Moeller, 79 Mich. 314, 44 N. W. 790.

[g] (N. Y. 1819) Where the justice stated in his return that the parties before him mutually admitted certain facts which he specified, it was *held* that these admissions might be embraced in the words of the act, requiring justices to state "the demands of the parties, and the issue joined," and that the return so far was admissible evidence.—Rawson v. Adams, 17 Johns. 130.

[h] (N. Y. 1819) Under the repealed statute of April, 1818, extending the jurisdiction of justices, the return of the justice in a case appealed from him to the common pleas was conclusive only as to those particulars which by the eighteenth section of the act he was required to return; and it could not be received as evidence, on a trial before a jury in the common pleas, of any other facts.—Rawson v. Adams, 17 Johns. 130.

[i] (S. C. 1896) It was not error to admit in evidence the return of the justice, under Code Civ. Proc. § 369, providing that to every judgment on appeal there shall be annexed a "return," on which it was heard, etc., and all orders and papers involving the merits and affecting the judgments, which shall be filed with the clerk, and "constitute the judgment roll."—Cothran v. Knight, 47 S. C. 243, 25 S. E. 142.

[j] (Wis. 1851) It is not necessary on appeal to introduce the affidavit on which a writ of attachment and garnishee process were issued by a justice of the peace, in order to render a transcript of the justice's docket admissible; the transcript itself being competent proof of the jurisdiction of the justice, so far as it recites facts necessary to give jurisdiction.—Rector v. Drury, 4 Chand. 24, 3 Pin. 298.

§ 697. Evidence not admissible or given before justice.

[a] (Colo. 1887) Where an action is commenced in a justice's court, and taken by appeal to the county court, it is not error in that court to refuse to exclude evidence because it was not introduced in the justice's court.—Brown v. Landon, 11 Colo. 162, 17 Pac. 515.

[b] (Ind. 1882) Where an appeal to the circuit court is taken from a justice's judgment, such court is not precluded from receiving evidence relating to the title to land merely because the justice could not receive such evidence.—Miller v. Cheney, 88 Ind. 466.

[c] (Mass. 1840) On the trial in the court of common pleas of an appeal from a justice of the peace, a defendant cannot, under Rev. St. c. 85, give in evidence as a defense his title to real estate, unless it appears by the pleading or by a statement on the justice's record that such title was concerned or brought in question before the justices.—Hunt v. Wilson, 42 Mass. (1 Metc.) 309.

[d] (Mich. 1869) When nothing appears in a justice's court to impeach the jurisdiction in a replevin case, and the affidavit has made out a proper showing, evidence on appeal that the property was of greater value than $100 will not be allowed to overthrow the jurisdiction and prevent the appeal from being decided on the merits.—Dinnen v. Baxter, 18 Mich. 457.

[e] (Mo. 1855) Where the plaintiff sued the defendant before a justice for the value of rails converted to his use, it was *held* that it was competent for the defendant to show in the district court on appeal that the land on which the rails were cut belonged to himself.—Wilson v. Petty, 21 Mo. 417.

[f] (N. H. 1851) On the trial of a cause brought before a justice of the peace and appealed, no evidence can be received that could not have been received before the justice.—Johnson v. Gould, 23 N. H. (3 Fost.) 251.

[g] (N. Y. 1846) On appeal from a judgment of a justice of the peace the defendant may give evidence drawing in question the title to lands, where the same is generally admissible under the pleadings, though such evidence could not have been received before the justice.—Whitcomb v. Green, 2 Denio, 113.

[h] (Pa. 1889) If an action is begun before a justice, in which both plaintiff's claim and defendant's offsets exceed the jurisdiction of the court, and on appeal to the common pleas both parties desire to dispose of the case on its merits, regardless of the jurisdictional amount, as if the action had been brought in court, it is too late to request the exclusion of evidence admitted for defendant without objection, on the ground that it tended to establish a demand beyond the jurisdiction of the justice.—O'Ferrall v. Moore, 127 Pa. 234, 17 Atl. 891.

[i] (S. C. 1880) On trial de novo of an appeal from a justice, the parties are not restricted to the evidence introduced before the justice.—Sternberger v. McSween, 14 S. C. 35.

[j] (Tenn. 1804) On appeal from a justice, a contract not within his jurisdiction cannot be given in evidence.—Wallen v. Lane, 1 Tenn. (1 Overt.) 74.

§ 698. Witnesses.

Witnesses in general, see "Witnesses."

[a] (Ala. 1832) While parties are allowed to give testimony in their own cause when the

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matter in controversy is not over $20, yet a defendant will not be permitted, after judgment has been rendered against him for more than $20 by a justice of the peace, to pay a part, so as to reduce the claim below that amount, and then take the case into the county court by appeal, and there on the trial de novo claim the benefit of his oath so as to swear off the balance, since on the trial de novo no evidence is admissible which would not have been admitted before the justice of the peace.—Thompson v. Jones, 2 Stew. & P. 46.

[b] (Ala. 1840) The statute authorizing either party to testify in his own behalf in appeal cases from a justice's court where the amount in controversy exceeds $20 does not apply to suits by or against corporations aggregate.—Alabama & T. R. Co. v. Oaks, 37 Ala. 694.

[c] (Ala. 1853) In appeal cases, where the amount in controversy is less than $20, the failure of the plaintiff to be present at the trial cannot deprive the defendant of his legal right to testify.—Wheeler v. Stockdale, 22 Ala. 658.

[d] (Ala. 1854) Where the demand in suit is under $20, both parties being competent witnesses for every purpose, it is discretionary with the court to permit the plaintiff to be reexamined for the purpose of rebutting the testimony of one of the defendant's witnesses.—Stein v. McArdle, 24 Ala. 344.

[e] (Ala. 1861) Code, § 2779, relating to the competency of parties as witnesses in appeal cases from a justice's court to the circuit court where the amount in controversy does not exceed $50, does not apply where pending an appeal to the supreme court the accrued interest has increased the amount beyond $50, and the cause is remanded for a second trial.—Hamblin v. McLendon, 37 Ala. 711.

[f] (Ala. 1863) In an action on an open account against an administrator, commenced in a justice's court, and removed by appeal to the circuit court, the plaintiff, by remitting all of his demand over $19.50, may become a general witness in the cause.—Deming's Adm'r v. Hamil, 38 Ala. 686.

[g] (Ark. 1854) Where competent witnesses enter into a recognizance to prosecute an appeal from a justice's court, the admission of their testimony in the appellate court is error, as they have a direct pecuniary interest in the event of the suit.—Hershy v. Clarksville Institute, 15 Ark. 128.

[h] (Ark. 1854) The statute enabling either party to make a witness of the adverse party to establish the demand sued for, or set-off, in suits before justices of the peace, applies to the same cause of action and set-off when removed into the circuit court by appeal for a trial de novo.—Drennen v. Lindsey, 15 Ark. 359.

[i] (Ark. 1856) Under the statute of this state allowing one party to call the opposite party as a witness, if such opposite party is called he is made a witness in the whole case, and not merely to establish the points sought to be proved by the party calling him, as well on appeal as in the justice's court.—Adkins v. Hershy, 17 Ark. 425.

[j] (Ind. 1859) From a judgment rendered against two defendants before a justice, where one appeals to the circuit court the one not appealing is a competent witness for the appellant.—Goodhue v. Palmer, 13 Ind. 457.

[jj] (Miss. 1847) On appeal from a justice either party may be examined under oath in the same manner as he could have been examined before the justice.—Russell v. Moore, 16 Miss. (8 Smedes & M.) 700.

[k] (Mo. 1839) Where the surety on an appeal bond is a material witness for appellant, it is error for the circuit court, after being satisfied as to the materiality of the witness, and after sufficient surety has been tendered in lieu of the original bond, to refuse to cancel such bond.—Thomas v. Alton, 5 Mo. 534.

[l] (Mo. 1845) The provision of the statute relating to justices' courts that either party to an action on a contract may call the adverse party as a witness, and, if the adverse party refuses to testify, the party calling him may testify in his own behalf, applies in the circuit court on appeal from a justice court.—Grigg v. Bodrio, 9 Mo. 223.

[m] (N. J. 1823) In order to introduce the testimony of a witness on the appeal who was not examined before the justice, his name, and the points and materiality of his testimony, must be set out in the reasons assigned for a new trial under the statute.—Hoagland v. Nevius, 7 N. J. Law (2 Halst.) 75.

[n] (N. J.) A witness not sworn before the justice could not be received in the common pleas to prove the interest of another witness who was sworn below.—(1824) Price v. Ward, 7 N. J. Law (2 Halst.) 127; (1825) Dunlop v. Patterson, 5 Cow. 243.

[o] (N. J. 1831) Though the appellant make the affidavit required by statute to enable him to examine a witness on the appeal who was not examined before the justice, yet, if it appear from the proceedings in the cause that the witness must have been known to the appellant before the time of the trial below, such witness ought not to be received on trial of the appeal.—Gulick v. Thompson, 12 N. J. Law (7 Halst.) 149.

[p] (N. J. 1834) The statute requiring a case on appeal to be tried on the same evidence which was offered before the justice means only that new witnesses shall not be introduced except to prove newly-discovered facts.—Sherron v. Humphreys, 14 N. J. Law (2 J. S. Green) 217.

[q] (N. J. 1836) On appeal either party has a right to call a witness examined below.—Nicholson v. Wood, 15 N. J. Law (3 J. S. Green) 403.

[r] (N. Y. 1824) On appeal from a justice the court at the trial is bound to discharge a surety for a prosecution, on motion, and substitute other competent security so that the first may be a witness for the appellant.—Tompkins v. Curtis, 3 Cow. 251.

[s] (Tex. 1848) The provision of the statute which gives a party the right, in a certain event, to testify in his own case before a justice of the peace, is equally applicable to that case when tried on appeal in the district court.—Hipp v. Ingram, 3 Tex. 17.

[t] (Wis. 1850) A notice that a party will be required as a witness, given under the statute relating to the swearing of parties as witnesses for a trial in justice's court, will not suffice, in case an appeal is taken, for the purposes of a trial in the appellate court. A new notice must be given.—Greene v. Holley, 2 Chand. 168, 2 Pin. 488.

[u] (Wis. 1875) On trial in the circuit court of a case appealed from a justice of the peace, such justice may be examined to show what the witness testified to on the trial before him.—Zitske v. Goldberg, 38 Wis. 216.

[v] (Wis. 1875) On trial in the circuit court of a case appealed from a justice's court, where the justice is examined to show what the witness testified to on the trial before him, he

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may refer to his minutes to refresh his memory.—Zitske v. Goldberg, 38 Wis. 216.

(e) MODE AND CONDUCT OF TRIAL.

MODE AND CONDUCT OF TRIAL IN GENERAL, § 699.
RIGHT TO OPEN AND CLOSE AND STATEMENTS OF COUNSEL, § 700.
INSTRUCTIONS, § 701.
VERDICT AND FINDINGS, § 702.
TRIAL BY COURT, § 703.
ATTACHMENT AND GARNISHMENT PROCEEDINGS, § 704.

Necessity of submission of case to jury on default in appeals, see post, § 723.

§ 699. Mode and conduct of trial in general.

Reference of case on appeal as releasing surety on appeal bond, see post, § 741.

[a] (Ill. 1859) On appeal from a justice of the peace, a trial cannot be had on the transcript of the justice of the peace without further proof.—Shook v. Thomas, 21 Ill. (11 Peck) 87.

[b] (Kan. 1875) Where a case is appealed from a justice's court to the district court, it should be tried in the district court, so far as the statute of limitations is concerned, in the same manner as if tried in the justice's court.—Sanford v. Shepard, 14 Kan. 228.

[c] (Kan. 1895) Where defendant, in an action on appeal from justice's court, stated that he would prove two defenses which were inconsistent, it was proper for the court to require him to elect on which defense he would rely, and confine his evidence thereto.—Ferguson v. Prince, 2 Kan. App. 7, 41 Pac. 988.

[d] (Mo. 1857) Trials in the circuit court of appeals from a justice of the peace must conform to the practice which prevailed before the enactment of the statute concerning practice, now in force.—Coffman v. Harrison, 24 Mo. 524.

[e] (Mo. 1875) Where a note sued upon before a justice of the peace is lost after appeal taken to the circuit court, the affidavit of loss contemplated by the statute (Wag. St. p. 81, § 10) is not required.—Lemon v. Cross, 60 Mo. 173.

[f] (N. J. 1877) On appeal the cause is tried de novo by the common pleas on its merits, and evidence admitted or excluded by the justice must be passed upon by the common pleas if offered, and judgment be given upon the proof made the same as though the cause had originally been brought in that court.—Burk v. Shreve, 39 N. J. Law (10 Vroom) 214.

[g] (N. Y. 1822) Where there was an appeal after a trial of an issue in fact, there should have been a new trial by jury, on the testimony of the same witnesses, of such issue, taken upon proper pleadings, in the court of common pleas.—Breese v. Williams, 20 Johns. 280.

[h] (N. Y. 1823) Under the act to extend the jurisdiction of justices of the peace (section 19), providing that on appeal from a justice court to the court of common pleas the latter shall proceed to hear the cause and examine the witnesses named in the return of the justice, and to hear such other witnesses as may be offered, the common pleas has no jurisdiction to refer a cause appealed from a justice court.—People v. Judges of Washington County Court of Common Pleas, 20 Johns. 363.

[i] (N. Y. 1827) Where there is a trial before the justice as to part only of the defendants, and an appeal by all, the common pleas should continue the cause and assess damages against those who did not plead below, though the defendants who did plead are acquitted in the common pleas for want of evidence.—People v. Judges of Onondaga County, 7 Cow. 492.

[j] (N. Y. 1866) Code, § 270, authorizes the county court to order a reference of a cause brought into it by appeal from a justice's court where there is an issue of fact joined, and the cause is referred by the latter court upon a written stipulation of the parties.—Hyland v. Loomis, 48 Barb. 126.

[k] (N. Y. 1888) Where two separate suits were commenced in a justice's court for trespass of cattle, in which plaintiff in one was defendant in the other, and the parties agreed that the cases should be tried together, and the cause of action in one was treated as an offset against the other, a similar manner of trying the cases should be pursued on appeal to the county court.—Carr v. Smith, 14 N. Y. St. Rep. 466.

[l] (N. C. 1875) Upon judgment being rendered against the defendant in a suit before a magistrate's court, he prayed an appeal to the superior court, but took no further steps to prosecute it. The superior court submitted the case to a jury, who found a verdict for the plaintiff in the same sum for which the magistrate had rendered judgment. *Held* not error.—Thornburg v. Herron, 73 N. C. 281.

[m] (Ohio, 1858) A suit in case before a justice for obstructing a highway may, on appeal, be prosecuted as a civil action under the Code.—Hill v. Stonecreek Tp. Sup'rs, 10 Ohio St. 621.

§ 700. Right to open and close, and statements of counsel.

[a] (Ind. 1867) In a suit before a justice of the peace upon a promissory note, the defendant pleaded affirmative defenses only, and at the beginning of his answer admitted the execution and delivery of the note. On appeal, the issues remaining the same, the defendant orally admitted the execution of the note, and disclaimed all benefit of the general issue provided by the statute, and claimed to open and close the case. *Held*, that the burden of the issue was upon the defendant, and that he was entitled to open and close the case.—Blackledge v. Pine, 28 Ind. 466.

[b] (S. C. 1884) Defendant does not admit "by his pleadings" any part of plaintiff's case, so as to have the right to open and close, by an oral admission on appeal from the justice's court; he having made no admission below, where pleadings may be oral or written.—Mitchell v. Fowler, 21 S. C. 298.

[c] (Tex. 1895) Since an action by a county judge on a county convict labor bond running in his name is necessary for the benefit of the county, it was not error to allow counsel to state on the trial on appeal to the county court that the suit was in behalf of the county.—Johnson v. Johnson (Civ. App.) 33 S. W. 682.

[d] (Tex. 1895) Where an action on county convict-labor bonds was begun in the justice's court, and the transcript of the justice, by showing judgment against sureties only, shows that the death of the principal must have been suggested in such court, it was not error on appeal to the county court to allow counsel to state that the principal was dead.—Johnson v. Johnson (Civ. App.) 33 S. W. 682.

§ 701. Instructions.

[a] (Ill. 1878) The question of the jurisdiction of a justice of the peace is one of law and fact, and on an appeal from a justice's court,

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in an action of replevin, where the jurisdiction of the court in such cases is limited to property which does not exceed in value a specified sum, it is proper to instruct the jury, left to find a general verdict, what the conclusion of law is, if they find that the value of the property exceeded such specified amount.—Kirkpatrick v. Cooper, 89 Ill. 210.

§ 702. Verdict and findings.

[a] (Pa. 1813) In trover upon an appeal from a justice of the peace the jury in the common pleas may find to a greater amount than was within the jurisdiction of the justice.—McKinley v. McCalla, 5 Bin. 600.

§ 703. Trial by court.

[a] (Ala. 1857) Though by the Code an appeal from a justice is required to be tried according to equity and justice, on an issue to be made up under the direction of the court, and tried by a jury, yet the parties may, by agreement, waive these statutory rights, and submit the case to the decision of the court.—Stein v. Jackson, 31 Ala. 24.

[b] (Ind. 1851) If neither party on appeal to the circuit court require a jury, the cause may be tried without a jury, though the amount in controversy exceed $20.—Lane v. Leet, 2 Ind. (2 Cart.) 535.

[c] (Mo. 1853) No finding of fact is necessary in the trial of appeals from justices' courts by the court without a jury.—Haase v. Stevens, 18 Mo. 476; Sickles v. Patterson, Id. 479.

[d] (Mo.) Cases which come by appeal from justices of the peace are not regulated by the Code, in respect to finding facts by the court, when the trial is without a jury, and hypothetical instructions or declarations of law by the court is the practice to be pursued in such cases.—(1853) Soutier v. Kellerman, 18 Mo. 509; (1853) Clemens & Broomfield, 19 Mo. 118; (1855) Clohecy v. Ragan, 20 Mo. 453.

[e] (Tenn. 1845) In case a motion against a sheriff for the nonreturn of an execution is commenced before a justice of the peace and carried by appeal to the circuit court, it is not necessary that the facts be submitted to a jury, but the court should hear the evidence as if the cause had been commenced in the circuit court.—Clingman v. Barrett, 25 Tenn. (6 Humph.) 20.

§ 704. Attachment and garnishment proceedings.

[a] (Ala. 1885) Where a garnishee appeals from a judgment rendered against him on his answer denying the indebtedness, the case stands in the circuit court as if there had been no judicial action on the contest, and the plaintiff must tender an issue in writing. He cannot claim a judgment by default.—Lehman v. Hudmon, 79 Ala. 532.

[b] (Ala. 1887) Where the garnishee, on an appeal from a judgment of a justice of the peace, fails to appear at the time of hearing, the court need not order a continuance, but may submit the issues to a jury, and enter judgment against him.—Lehman v. Hudmon, 85 Ala. 135, 4 South. 741.

[c] (Ill. 1856) On appeal from the judgment of a justice of the peace, further interrogatories may be propounded to a garnishee.—Oliver v. Chicago & A. R. Co., 17 Ill. (7 Peck) 587.

[d] (Ill. 1861) On appeal from the judgment of a justice the defendant may show in defense that, having been garnished on account of his indebtedness on such judgment, he has made payments on the judgments against him as garnishee, and such payment will furnish a defense pro tanto, and no notice of such defense is necessary.—Minard v. Lawler, 26 Ill. (16 Peck) 301.

[e] (Ill. 1879) On appeal from the justice of the peace in proceedings against a garnishee, the transcript of the proceedings before the justice is not competent evidence to show an indebtedness from the garnishee.—Cairo & St. L. R. Co. v. Killenberg, 92 Ill. 142.

[f] (Kan. 1889) A bond releasing garnishment proceedings in a justice court, and binding the obligor to pay any judgment which might be rendered against defendant on the final hearing of the case, binds them to pay a final judgment rendered against defendant in the district court on appeal by plaintiff; and the fact that after judgment for defendant in the justice court the garnishment proceedings could, but for the bond, have been revived by appeal or error, constitutes sufficient consideration for continuing the obligation of the bond after such judgment for defendant.—Washer v. Campbell, 40 Kan. 747, 21 Pac. 671.

[g] (Mich. 1859) A plaintiff is not at liberty to controvert the statement of a garnishee either in justice court or on appeal, but he may examine the garnishee anew in the circuit court for the purpose of a more full discovery.—Newell v. Blair, 7 Mich. 103.

[h] (Mich. 1859) A garnishee may be permitted to correct under oath in the circuit court a mistake made by him on his examination before the justice.—Newell v. Blair, 7 Mich. 103.

[i] (Mich. 1859) The examination of the garnishee before the justice, taken in writing and subscribed by him, is legitimate evidence against him on appeal.—Newell v. Blair, 7 Mich. 103.

[j] (Mich. 1859) Where the garnishee on his examination before a justice admitted that he had money in his hands collected for defendant, but stated that he had been informed that these moneys had been assigned before service of the garnishee process, he was entitled to introduce evidence of such assignment on removal of the cause to the circuit court by appeal.—Newell v. Blair, 7 Mich. 103.

[k] (Mich. 1885) A garnishee's disclosure filed in justice's court, or the justice's written minutes of his disclosure, cannot be contradicted on appeal by the oral testimony of the justice or of any one else as to what he disclosed; nor can it be so supplemented as to increase the liability admitted thereby.—Isabelle v. Iron Cliffs Co., 57 Mich. 120, 23 N. W. 613.

[l] (Mich. 1890) In garnishment proceedings before a justice the garnishee may show on appeal that a disclosure made by him, as taken down in the minutes of the justice and signed by the garnishee, was not the disclosure actually made, as the minutes of the justice did not import absolute verity.—Sutherland v. Burrill, 82 Mich. 13, 45 N. W. 1122.

[m] (Mo. 1882) On appeal from a judgment of a justice of the peace against a garnishee, the parties stipulated that any facts appearing in the transcript of said justice in this case, or in the papers transmitted to the superior court, and not inconsistent with the facts agreed to, should be considered by the court. *Held*, that the answers of the garnishee, which had been traversed by plaintiff, could not be considered as facts appearing in the case.—Clark v. Kinealy, 13 Mo. App. 104.

[n] (Tenn. 1874) A garnishee may, in the circuit court, dispute the facts recited in a justice's judgment against him, where his answer has not been reduced to writing and signed by him.—Taylor v. Kain, 67 Tenn. (8 Baxt.) 35.

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[o] (Tenn. 1888) On appeal from a justice's judgment against a garnishee, the judgment and unsatisfied execution against the debtor in the original proceedings must be produced, to enable the circuit court to render judgment against the garnishee; and proof of such judgment cannot be rested on the garnishee summons, duly served, reciting therein an unsatisfied execution against the judgment debtor, or on the justice's judgment against the garnishee, though it appears that the justice had jurisdiction of the garnishee.—Miller v. Wilson, 86 Tenn. (2 Pickle) 495, 7 S. W. 638.

[p] (Wis. 1893) The writ of attachment cannot issue in an action pending in the circuit court, on appeal by plaintiff from a justice's judgment in his favor for a sum less than that claimed by him, since such action, on appeal, is not an action ex contractu to recover money.—Zechman v. Haak, 85 Wis. 656, 56 N. W. 158.

13. REVIEW.

(a) SCOPE AND EXTENT IN GENERAL, §§ 705-714.
(b) APPEALS ON QUESTIONS OF LAW AND OF FACT, §§ 715-720.

(a) SCOPE AND EXTENT IN GENERAL.

PRESUMPTIONS IN GENERAL, § 705.
—— PROCESS AND APPEARANCE, § 706.
—— PLEADINGS, § 707.
—— CORRECTNESS OF RULINGS OR DECISION, § 708.
—— CONDUCT OF HEARING, § 709.
—— PROCEEDINGS FOR APPEAL AND TRANSCRIPT, § 710.
HARMLESS ERROR, § 711.
—— TECHNICAL DEFECTS AND ERRORS, § 712.
PARTIES ENTITLED TO ALLEGE ERROR, § 713.
DISCRETION OF LOWER COURT, § 714.

Collateral attack on title of justice to office on an appeal, see ante, § 18.
Necessity of presentation below for review on appeal, see ante, §§ 508–515.
Questions presented for review, see ante, § 636.
Scope of inquiry on trial de novo, see ante, §§ 660–664.
Scope of review as dependent on contents of transcript, see ante, § 614.
—— *on matters contained in bill of exceptions, see* ante, § 616.

§ 705. Presumptions in general.

[a] (Ala. 1847) Where it appears from the papers sent up by a justice of the peace to the circuit court that three judgments had been rendered by him against a garnishee, and the condition of the appeal bond recites that an appeal was taken in "the three different cases," but the transcript of the justice contains the papers in but one only, it cannot be intended that all the cases were consolidated by the justice.—Carter v. Pickard, 11 Ala. 673.

[b] (Ark. 1849) In an action before a justice of the peace the defendant moved that the case be dismissed because the justice had forfeited his office by accepting that of deputy sheriff, which motion was overruled. After judgment the defendant applied to the supreme court to have the judgment superseded for the same cause, but the supersedeas was refused because the transcript of the case contained no evidence of the fact that the justice had accepted the office of deputy sheriff.—State Bank v. Curran, 10 Ark. (5 Eng.) 142.

[c] (Conn. 1838) Where an action at its commencement is within the jurisdiction of a justice of the peace, every act of the court subsequently done will be presumed to have been rightfully done, till the contrary appears.—Fox v. Hoyt, 12 Conn. 491, 31 Am. Dec. 760.

[d] (Conn. 1867) There is no presumption that a court of a justice of the peace was adjourned to a certain day from the fact that an appeal was allowed on that day.—Jackson v. New Milford Toll Bridge Co., 34 Conn. 266.

[e] (Ind. 1876) In an action on a replevin bond taken before a justice, which does not exceed double the sum of which a justice has jurisdiction, the supreme court will presume that the value of the property replevied was within a justice's jurisdiction.—Tyler v. Bowlus, 54 Ind. 333, 601.

[f] (Iowa, 1872) Where the jurisdiction of a justice of the peace is by consent of the parties (Revision, § 3850) extended to a case involving a sum greater than $100, an appellate court will presume that such consent was given before the institution of the suit and the issuing of an attachment therein. The rule that courts and officers are presumed to act rightly is extended to inferior courts.—Hodge v. Ruggles, 36 Iowa, 42.

[g] (Me. 1844) In order to obtain the reversal of the judgment of a justice by a writ of error, sufficient cause for the reversal should appear either upon the record or upon legal exceptions.—Simpson v. Wilson, 24 Me. (11 Shep.) 437.

[h] (Minn. 1871) In a case where a justice has jurisdiction the same presumptions prevail as to the regularity of proceedings therein as in the case of courts of record.—Clague v. Hodgson, 16 Minn. 329 (Gil. 291).

[i] (Mo. 1880) It will be presumed, in the absence of evidence, that a justice who entered a judgment was the proper custodian of the records thereof, and the proper person to certify to a transcript thereof.—State, to Use of Lalley, v. Carroll, 9 Mo. App. 275.

[j] (Mo. 1890) Where a justice makes and certifies a copy from the docket of his predecessor in office, the act raises a presumption that he is lawfully in possession of the docket, which will continue until the contrary appears.—Powers v. Braley, 41 Mo. App. 556.

[k] (Mo. 1892) Under Rev. St. 1889, § 6337, requiring that in appeals from justices the original papers shall be sent to the circuit court, and, with the justice's transcript, shall constitute the record, where plaintiff's petition states three causes of action, and defendant alleges a counterclaim, and the judgment is for the amount of the third cause of action, but neither the other two causes nor the counterclaim are mentioned in the transcript, the court may nevertheless presume that these were tried below, and admit evidence on the first two counts.—Medart v. Baker's Eureka Hot Air & Stove Burner Mfg. Co., 51 Mo. App. 19.

[l] (Mo. 1894) Where the record shows that a person acted officially as a justice of the peace, it will be presumed, in the absence of evidence to the contrary, that he held such office at the time.—McHoney v. Kerwin, 56 Mo. App. 459.

[m] (Neb. 1884) Where the transcript of a justice's docket shows that the parties were present at the trial, the supreme court will not presume that judgment was rendered by default.—Rawalt v. Brewer, 16 Neb. 444, 20 N. W. 391.

[n] (N. J. 1884) Every intendment should be made in favor of the orders of the justices, if jurisdictional facts can be gathered therefrom.—Schomp v. Tompkins, 46 N. J. Law (17 Vroom) 608.

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[o] (Ohio, 1859) Where a justice is required to enter on his docket the fact that certain things were done in the progress of a case pending before him, in the absence of such entry it will be presumed that they were not done.—McCarty v. Blake, 2 Ohio Dec. 155.

[p] (Ohio, 1861) Where jurisdiction of the parties and subject-matter affirmatively appear, every other matter necessary to support a judgment of a justice will be presumed, unless the statute requires it to appear of record, or unless it is preliminary and necessary to the right to exercise jurisdiction.—Howell v. Jenkins, 2 Ohio Dec. 552.

[q] (Ohio, 1880) Where it appears that a justice of the peace has taken and approved bail for stay of execution, on a judgment on his docket, by which execution was stayed for the time provided by the statute, it will be presumed, on proceedings in error by the judgment debtor, to reverse said judgment, that the same was stayed at his instance.—Shafer v. Hockheimer, 36 Ohio St. 215.

[r] (Pa. 1831) In examining formal exceptions to the proceedings of justices, every fair presumption is to be made in their favor.—Cornish v. Young, 1 Ashm. 153.

[s] (Pa. 1873) The court will make every reasonable presumption in favor of a justice's proceeding consistent with the record.—Com. v. Myers, 5 Lanc. Bar, No. 2, p. 1.

[t] (Pa. 1886) In proceedings by an administrator d. b. n. c. t. a. to recover possession of premises leased from his intestate under Act March 21, 1772, if the record of the magistrate trying the case avers that the jurors were 12 "substantial freeholders" a presumption is raised that there was sufficient evidence to correct the sheriff's return; such return not showing that the sheriff had summoned "twelve substantial freeholders."—Appeal of Mullin, 5 Atl. 738.

[u] (Pa. 1895) In an action in a justice's court for failure to complete a building according to contract, plaintiff demanded $300, and the justice gave judgment for $194.05. After appeal the parties submitted the controversy to three persons, whose award was to be final. They awarded plaintiff $214. In support of exceptions by defendants, they testified that plaintiff claimed before the arbitrators $478. *Held*, that it did not appear that the sum in controversy exceeded $300.—Kuhn v. Eggers (Com. Pl.) 17 Pa. Co. Ct. R. 155, 5 Pa. Dist. R. 156.

[v] (Wis. 1862) To justify the reversal of a justice's judgment for an improper taxation of costs, error must be affirmatively shown, and no presumption will be allowed against the regularity of the proceedings.—Meyer v. Foster, 16 Wis. 294.

§ 706. —— Process and appearance.

[a] (Iowa, 1859) Suit was brought before a justice against two defendants, one of whom resided in another town in the county. The nonresident moved to dismiss, and sustained his motion by affidavit. The motion was overruled, and on error to the district court the return of the justice to the writ showed the defendant's nonresidence, but did not show where the service was made. *Held*, that the want of jurisdiction was not shown by the return, and that there was no error in affirming the judgment of the justice.—Johnson v. Ryan, 10 Iowa, 588.

[b] (N. Y. 1859) In the return day of a summons in justice's court, the president of a corporation put in an answer, and the case was adjourned. On the adjourned day, judgment was taken by default. *Held*, on appeal, that it was to be presumed that the appearance of the president was authorized, and that the judgment was regular.—Oakley v. Workingmen's Union Benev. Soc., 2 Hilt. 487.

[c] (N. Y. 1863) Where it appears in the return of a justice of the peace that he issued a summons, no informality being affirmatively shown, the court will presume that the summons was in the proper form. If there is any informality, the party objecting should make it appear.—Potter v. Whittaker, 27 How. Prac. 10.

[d] (N. Y. 1871) A short summons, being an extraordinary process, can only issue on proper preliminary proof; and, as jurisdiction is not obtained without such proof, a judgment in a justice's court is to be presumed void on appeal until the party on whom the onus is thrown supplies that proof, and a mere memorandum, "affi. short summons," on the justice's docket, is not sufficient evidence that the justice had jurisdiction.—Rue v. Perry, 41 How. Prac. 385.

[e] (N. C. 1861) Where there was a trial before a justice of the peace and an appeal, and no objection to the service of the warrant appears on the face of the proceedings, the appellate court will presume that the objection was waived.—Taylor v. Marcus, 53 N. C. (8 Jones, Law) 402.

[f] (Wis. 1863) Where the return of a justice states that the parties "appeared," this, in the absence of any qualification, must be taken to have been a general appearance, and a waiver of process.—Cron v. Krones, 17 Wis. 401.

§ 707. —— Pleadings.

[a] (U. S. 1880) Under a statute allowing justices of the peace jurisdiction in actions to recover possession of personal property claimed, the value of which, as stated in the affidavit of plaintiff, his agent or attorney, shall not exceed the sum of $200, and providing that before process shall issue the plaintiff or agent shall make proof by affidavit showing the "actual value" of the property claimed, the fact that the justice of the peace, with the consent of the parties, tried the case, and that it did not affirmatively appear by proof that there was no affidavit, does not raise a presumption in support of the judgment that there was such affidavit.—Daily v. Doe (D. C.) 3 Fed. 903.

[b] (Ark. 1892) Mansf. Dig. § 4050, provides that, in a suit before a justice where the defense is oral, the justice shall enter the substance thereof on his docket. *Held*, where the record shows that issue was joined in the justice court, but affords no means of ascertaining what it was, that the appellate court will not hold that any fact necessary to make out plaintiff's case was admitted, the defendant not being prejudiced by the failure of the justice to make the proper entries.—School Dist. No. 7 v. Reeve, 56 Ark. 68, 19 S. W. 106.

[c] (Ill. 1859) The statute of frauds, etc., is presumed to have been pleaded in an action before a justice of the peace.—Comstock v. Ward, 22 Ill. (12 Peck) 248.

[d] (Ill. 1861) Upon an appeal from a justice before whom there were no written pleadings, the plaintiff will be presumed to have averred in the verbal statement of his case that the writing upon which the suit was brought was signed by the defendant.—Griswold v. Trustees of Peoria University, 26 Ill. (16 Peck) 41, 79 Am. Dec. 361.

[e] (Ind. 1841) Where, on an appeal from a justice of the peace, his transcript stated that a plea had been filed, without showing what it was, it must be presumed to have been a statu-

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tory plea allowed in actions before justices of the peace requiring proof of the demand.—Burger v. Becket, 6 Blackf. 61.

[f] (Ind. 1854) In a cause commenced before a justice of the peace, where the record does not disclose a cause of action, it will be presumed on error that none was filed.—Beaird v. United States, 5 Ind. 220.

[g] (Iowa, 1854) In the absence of anything to the contrary, the court on appeal will presume that there was a general denial of indebtedness at a trial before a justice of the peace.—Sinnamon v. Melbourn, 4 G. Greene, 309.

[h] (Iowa, 1858) On an appeal after a trial before a justice, a general denial will be presumed to have been made unless the contrary appear.—Hall v. Denise, 6 Iowa (6 Clarke) 534; Clark v. Barnes, 7 Iowa (7 Clarke) 6.

[i] (Mich. 1870) On appeal from a justice of the peace, where an affidavit for a special return by the justice states the time of making a motion, the denial of which is alleged to be error, and the return shows the motion, but does not specify the time when it was made, it will be presumed to have been made at the time stated in the affidavit, in the absence of an application by the opposite party for a further return.—Brown v. Kelley, 20 Mich. 27.

[j] (Mich. 1896) Under How. Ann. St. § 7008, requiring a justice of the peace, in his return to the circuit court in case of appeal, to give copies of the pleadings, if in writing, where the return does not show and the record does not state whether the pleadings were written or verbal it will be presumed that they were verbal.—Kerr v. Bennett, 109 Mich. 546, 67 N. W. 564.

[k] (Minn. 1871) Where, on appeal, the transcript of a justice shows the affidavit and bond in replevin to have been duly filed, but they are not included in the return, it will be presumed that the affidavit was in due form.—Hecklin v. Ess, 16 Minn. 51 (Gil. 38).

[l] (Minn.) Where the record in a justice's court is silent upon the question of verification of the complaint, it will be presumed to have been verified.—(1872) Tyrrell v. Jones, 18 Minn. 312 (Gil. 281); (1875) Burt v. Bailey, 21 Minn. 403.

[m] (Neb. 1887) Where, in an action for money before a justice of the peace, it is shown by the docket of the justice that prior to the day of trial the defendant offered to confess judgment in favor of the plaintiff for a certain sum, which the plaintiff refused to accept, there is no presumption that the offer was not in writing, as required by Civ. Code, § 1004; and in such case the decision of the district court on a motion to tax costs to plaintiff for the reason that the judgment did not exceed the offer will not be molested.—Underhill v. Shea, 21 Neb. 154, 31 N. W. 510.

[n] (Neb. 1887) Where, in an action tried before a justice of the peace, no bill of particulars is set out in the record, but there is a finding of the justice that "there is due and owing from defendant to plaintiff, upon the account sued upon, the sum of $52.77, with interest from June 1, 1885," it will be presumed that the account was before the justice when he rendered judgment.—Bell v. White Lake Lumber Co., 21 Neb. 525, 32 N. W. 561.

[o] (Tenn. 1871) The rule that every fair presumption will be adopted in support of a justice's judgment applied where there were no written pleadings, and where the docket entries, though inaccurate, were sufficiently intelligible to identify the cause.—Hutchinson v. Fulghum, 51 Tenn. (4 Heisk.) 550.

[p] (Tenn. 1873) On appeal from the judgment in an action on an account begun before a justice of the peace, the justice's warrant showed merely an action for "a debt due by account, under $250," but did not show whether such account was an open or a liquidated account. The bonds for appeal to the circuit and the supreme courts were such as were required for appeals from judgments on liquidated accounts. *Held* that, in the absence of contrary evidence, it should be presumed that the account was a liquidated account signed by the debtor.—Mason v. Anderson, 59 Tenn. (12 Heisk.) 40.

[q] (Tex. 1895) On an appeal from a justice court, it will be presumed, in the absence of evidence to the contrary, that the pleadings are the same as those in the justice court.—Porter v. Russek (Civ. App.) 29 S. W. 72.

[r] (Tex. 1895) Though the transcript on an appeal by plaintiff from a justice court fails to show that any plea was made, it will be presumed that a general denial was entered.—Fessman v. Seeley (Civ. App.) 30 S. W. 268.

[s] (Tex. 1895) Where, on appeal from a justice, his transcript fails to show that he noted the pleadings on his docket, appearance in the transcript of a general denial filed by defendant does not raise a conclusive presumption that he filed no other pleading there, or prevent the showing by parol of what pleadings were filed there.—Howard v. Faggard (Civ. App.) 32 S. W. 188.

§ 708. —— Correctness of rulings or decision.

[a] (Ark. 1885) Where, on the pleadings, the justice of the peace could not have done otherwise than sustain the attachment, it will be presumed, in favor of his judgment, that he did so.—Giles v. Hicks, 45 Ark. 271.

[b] (Conn. 1846) In assumpsit before a justice of the peace, where the declaration contained a third count, which was outside the justice's jurisdiction, and entirely separate and distinct from the other counts, on appeal from a judgment in favor of plaintiff the county court may consider the third count as matter with which the justice had nothing to do, and presume that he correctly disregarded it on the trial before him.—Lyon v. Alvord, 18 Conn. 66.

[c] (Iowa, 1856) On an appeal from a judgment of a justice of the peace, the burden of showing that a ruling complained of was erroneous rests upon the appellant, as it is presumed that the ruling of the justice was correct.—McKinney v. Hartman, 3 Iowa (3 Clarke) 344.

[d] (Iowa, 1859) The upper court on appeal will not presume that plaintiff below was allowed to introduce an account book to prove a settled account.—Lord v. Ellis, 9 Iowa, 301.

[e] (Mich. 1859) In an action brought in justice's court under the statute giving treble damages for trespass on lands and cutting and carrying off timber, etc., where the proof given in such action without objection only shows plaintiff to own one undivided half of the premises, but no plea in abatement has been interposed, the nonjoinder of the other owner as plaintiff only goes to apportion the damages; and in error, where it is not claimed or objected that entire damages were assessed, the court will not presume that they were not apportioned.—Achey v. Hull, 7 Mich. 423.

[f] (Mich. 1873) Where the return of the justice to the appeal sets forth that the cause was tried by him without a jury on the 12th, and that he rendered judgment on the 17th, it will not be presumed, in support of the judgment,

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in the absence of anything showing that to be the fact, that the cause was not finally submitted to him until the 13th.—Harrison v. Sager, 27 Mich. 476.

[g] (Mich. 1873) Where the justice, in his return to a special appeal, states that he refuses to allow an amendment to a pleading, without giving the grounds for such ruling, it is error for the circuit court to assume that the ruling was made upon any particular and erroneous ground, when another and admissible ground is equally consistent with the return.—Albert v. Sutton, 28 Mich. 2.

[h] (Mich. 1885) Where, on appeal in an action before a justice, the testimony has not been reduced to writing, and it does not appear that either party requested it, and the justice returns that he is unable to return the whole of the testimony, the presumption is that there was sufficient evidence to support his judgment.—Gray v. Wilcox, 56 Mich. 58, 22 N. W. 109.

[i] (Minn. 1877) Gen. St. 1866, c. 65, § 106, as amended by Laws 1872, c. 66, and Laws 1873, c. 66, provides that a justice, upon request of either party to a suit, shall return a transcript of the evidence to the district court. *Held*, where no such request is made, and it is not shown by the magistrate's return that all the evidence is in fact returned, it must be presumed that there was sufficient evidence to support the judgment of the justice.—Hinds v. American Exp. Co., 24 Minn. 95.

[j] (Minn. 1882) Where the record on appeal from the judgment of a justice of the peace does not purport to contain all the evidence, nor show that either party requested a full return, it must be presumed that there was sufficient competent evidence to warrant the judgment.—Warner v. Fishbach, 29 Minn. 262, 13 N. W. 47.

[k] (Mo. 1842) On appeal from the decision of a justice of the peace refusing to consolidate suits and dismiss for want of jurisdiction, it must clearly appear, to support the appeal, that several suits were pending before the justice.—Sykes v. Planters' House, 7 Mo. 477.

[l] (Mo. 1892) In garnishment proceedings before a justice of the peace, where the answer of the garnishee alleges that the situs of the debt was outside the justice's jurisdiction, which answer is denied, and it appears from the record that a trial of the issues thus raised was had, and found against the garnishee, it will be presumed on appeal that the matters alleged in the answer were not proven on the trial.—Martin v. Chicago, R. I. & P. R. Co., 50 Mo. App. 428.

[m] (Neb. 1896) Where a transcript shows the filing before a justice of a bill of particulars, accompanied by a demand for judgment, and an acknowledgment by defendant, in writing, of the indebtedness, with a request for entry of judgment therefor, the assent of plaintiff will be presumed.—Spaulding v. Johnson, 48 Neb. 830, 67 N. W. 874.

[n] (N. J. 1808) Although a judgment rendered by a justice in the absence of defendant, without proof of plaintiff's claim, is error, yet where defendant was present it will be presumed that the justice rendered the judgment after having the plaintiff's case fully established, although the docket does not disclose the examination of any witnesses.—Fleming v. Newman, 3 N. J. Law (2 Penning.) 419.

[o] (N. J. 1828) The supreme court will not reverse the judgment of a justice on account of an omission to charge the jury upon a specific proposition stated by counsel, unless it be made clearly to appear that the proposition was warranted by the evidence, and necessarily involved in the verdict to be rendered.—Davison v. Schooley, 10 N. J. Law (5 Halst.) 145.

[p] (N. Y. 1839) In trespass in justice's court against the collector of a school district, who was alleged to have made a levy previous to a demand of payment of the taxes, a judgment in defendant's favor will not be reversed merely because it does not appear from the justice's return that it was proved that a demand was made previous to levy.—Oakley v. Van Horn, 21 Wend. 305.

[q] (N. Y. 1853) Where evidence is admitted by the justice after objection, and it appears from the return that the objection was general, and the court can see that the subject-matter of the evidence was proper, and the manner of proving such facts only was objectionable, it will presume that no objection was made to the manner of proving the fact, but that it was made to any proof of such fact.—Bellows v. Sackett, 15 Barb. 96.

[r] (N. Y. 1853) Where evidence offered before a justice is objected to and excluded, and neither the grounds of the objection nor the object of the proof is stated, and the court can see that a good objection might have been taken, it will presume that the proper objection was taken, and the decision made on that ground.—Bellows v. Sackett, 15 Barb. 96.

[s] (N. Y. 1859) In an action in a justice's court for taking personal property, the justice's return shows that he rendered a judgment for damages, with costs,—$2.74. *Held*, that the legitimate inference to be drawn from the return was that he rendered a judgment against the defendant for some amount of damages, with $2.74 costs; no claim being alleged or proved to authorize the justice to award damages to the defendant.—Slaman v. Buckley, 29 Barb. 289.

[t] (N. Y. 1887) The rule that reasonable intendments go in support of a judgment applies to a justice's judgment, because the affirmance of the judgment of the county court must depend on errors committed in that of the justice.—Village of Suspension Bridge v. Bedford, 10 N. Y. St. Rep. 850.

[u] (N. C. 1831) In reviewing a judgment rendered by a justice of the peace, every fact necessary to support it is to be taken as found, unless the contrary appears.—Haines v. Dalton, 14 N. C. 91.

[v] (Ohio, 1860) In support of the judgment of a justice, it will be presumed, on error, that every fact necessary to authorize it was proved.—Niven v. Smith, 2 Ohio Dec. 337.

[w] (Ohio, 1861) A judgment rendered by a justice under Justice Code, § 7, providing that if a debtor shall appear before a justice without process, and confess that he is indebted to another, such justice, on the application of the creditor, may render judgment thereon, will not be reversed, on petition in error filed by the judgment debtor, because the justice's docket does not show that it was rendered on the application of the creditor, as such fact will be presumed.—Wilson v. Wickersham, 2 Ohio Dec. 545.

§ 709. —— Conduct of hearing.

[a] (Mich. 1848) Under Sess. Laws 1842, p. 135, § 4, prohibiting justices from holding court in any place where intoxicating liquors are sold, it will not be presumed that spirituous liquors are sold in the barroom of a tavern where a justice court is held, unless by law every license to keep a tavern authorizes the sale thereof.—Savier v. Chipman, 1 Mich. (Man.) 116.

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[b] (Minn. 1871) Where a justice's docket recites that a jury retired under charge of a constable, were sworn, returned into court, etc., it will be presumed that they were duly kept together, agreed, and delivered their verdict in due form.—Clague v. Hodgson, 16 Minn. 329 (Gil. 291).

[c] (Mo. 1863) The statute concerning practice in justices' courts provides that on default in that court the justice shall hear the plaintiff's proofs, and judgment be rendered accordingly. Upon appeal from such judgment, the record omitting to show that the preliminary proof was made, the court will assume that the necessary proceedings were had before the justice.—Hendrickson v. St. Louis & I. M. R. Co., 34 Mo. 188, 84 Am. Dec. 76.

[d] (Neb. 1891) Where the transcript of a judgment rendered by a justice of the peace on the verdict of a jury gives the names of the jurors, and shows that no objection was made to the manner of selecting the jury, it will be presumed that the jury was selected in the mode pointed out in the statute.—Gapen v. Bretternitz, 31 Neb. 302, 47 N. W. 918.

[e] (N. Y. 1842) It is no ground for reversing the judgment of a justice of the peace that his report does not state whether the plaintiff was present or called when the verdict was rendered by the jury.—Baum v. Tarpenny, 3 Hill, 75.

[f] (N. Y. 1863) A judgment of a justice's court will not be reversed on appeal on the ground that the justice improperly denied an application for an adjournment of the cause, not giving any reasons for it at the time, unless the error affirmatively appears. It will be inferred, in the absence of anything to the contrary, that the justice openly stated his reasons for refusing the adjournment.—Decker v. Hassel, 26 How. Prac. 528.

[g] (N. Y. 1888) On appeal from a judgment in a justice's court on default, it will not be presumed that the justice did not wait an hour before proceeding to trial, in the absence of any return respecting any such matter.—Crown Point Iron Co. v. Fitzgerald, 14 N. Y. St. Rep. 427.

[h] (N. Y. 1880) It is not necessary that a justice's return should affirmatively show that the justice waited an hour after the time mentioned in the summons before proceeding with the cause in defendant's absence, as required by Code Civ. Proc. § 2893, as the court will intend that the proceedings were regular until the contrary plainly appears.—Knight v. Wilson, 55 Hun, 559, 9 N. Y. Supp. 20.

[i] (Wis. 1862) Where the return of a justice on appeal does not show that the jury left the court to consider of their verdict, the judgment of the justice will not be reversed because it does not appear that an officer was sworn to take charge of them.—Meyer v. Foster, 16 Wis. 294.

[j] (Wis. 1864) After a cause was submitted by both parties, the justice took time to consider, and made the entry on his docket that the cause was continued to a specified time and hour, but without mentioning any place. *Held*, that it would be presumed that the decision was rendered where the cause was tried.—Wheeler v. Smith, 18 Wis. 651.

[k] (Wis. 1882) A cause was adjourned by a justice to a certain day, at 3 o'clock in the afternoon, and was called on that day at 2 o'clock. At 3 o'clock the plaintiffs appeared and filed proof of publication of notice. The defendant was not present. The docket recited that an amended complaint was filed, and that thereupon judgment was rendered in favor of plaintiffs. *Held*, that it will be presumed on appeal that the case was held open without judgment for one hour after the time fixed for appearance.—Storm v. Adams, 56 Wis. 137, 14 N. W. 69.

[l] (Wis. 1883) Though the failure of a justice of the peace to enter in his docket the place, as well as the time, to which a cause pending before him is adjourned, defeats his jurisdiction, unless the parties voluntarily appear in the action subsequently, and renders all subsequent proceedings therein void, this failure must be clearly shown by the return of the justice before the judgment will be reversed on that account alone.—Witt v. Henge, 58 Wis. 244, 16 N. W. 609.

[m] (Wis. 1883) Where the docket of a justice shows that a case was called on the return day of the summons, it will be presumed that it was called at the hour named in the process.—Driscoll v. Smith, 59 Wis. 38, 17 N. W. 876.

§ 710. —— Proceedings for appeal and transcript.

[a] (Fla. 1856) In appealing from the judgment of a justice court, where the record furnishes no evidence at what time the court adjourned, the presumption at law is that in approving the bond he did his duty, and that the same was perfected within the time prescribed by the statute.—Summerlin v. Tyler, 6 Fla. 718.

[b] (Minn. 1866) Under Pub. St. c. 59, § 139, providing that, on appeal from a judgment of a justice of the peace, he shall return to the district court "all the process and other papers" relating to the suit filed with him, where this return does not include the affidavit for appeal required by Pub. St. c. 59, § 136, it will be presumed that none was filed, and the district court has no jurisdiction.—McFarland v. Butler, 11 Minn. 72 (Gil. 42); Id., 11 Minn. 77 (Gil. 44).

[c] (Minn. 1870) A written admission of service of notice of appeal will be presumed to have been made on the day of its date; and it is immaterial that the transcript does not show when the notice was filed, and that there is no evidence as to when the admission of service was indorsed on the notice.—Rahilly v. Lane, 15 Minn. 447 (Gil. 360).

[d] (Mo. 1885) The allowance of an appeal by a justice of the peace does not justify a presumption that an application had been made to set aside the default, although such an application is an essential prerequisite to the right of appeal.—Graves v. Missouri Pac. Ry. Co., 18 Mo. App. 647.

[e] (Mo. 1893) A transcript of a justice's judgment showed that the defendant prayed an appeal and signed a bond upon the day the judgment was rendered, and that the bond was approved and the appeal allowed on the following day. *Held*, that under a statute which provided that no appeal should be allowed by a justice unless bond, with surety, should be given, the presumption was that the appeal bond was not completed until the day on which it was approved.—Hammel v. Weis, 54 Mo. App. 14.

[f] (N. Y. 1824) On appeal from the judgment of the justice, appellee cannot object to the hearing on the ground that the justice had not indorsed his approbation on the appeal bond, or omitted to file it within the time required by statute, as his approval will be presumed from a subsequent filing.—Sholts v. Judges of Yates County, 2 Cow. 506.

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[g] (N. Y. 1862) A justice's return, made under section 360 of the Code of Procedure, setting out testimony in detail, should be understood as stating the whole of the evidence, in conformity with the requirement of the statute, without an express averment to that effect, unless the contrary distinctly appears.—Orcutt v. Cahill, 24 N. Y. 578.

[h] (N. Y. 1863) The return of a justice of the peace to an appeal from the judgment, under the Code, setting forth the evidence in detail, is to be considered as stating the whole testimony, unless the contrary distinctly appears.—Hance v. Cayuga & S. R. Co., 26 N. Y. 428.

[i] (Tex. 1881) A bond marked "Filed" by a justice of the peace, and appearing in the record as an appeal bond, will be presumed by the county court on appeal to have been approved by the justice.—E. L. & R. R. Co. v. Davis, 1 White & W. Civ. Cas. Ct. App. § 563.

[j] (Tex. 1885) Where the bond on appeal from a justice has been filed by him, a formal approval thereof is unnecessary, or will be presumed from the filing and the return of it to the proper court.—Whitman Agricultural Co. v. Voss, 2 Willson, Civ. Cas. Ct. App. § 548.

[k] (Tex. 1886) Within two days after the rendition of a judgment in justice court, appellant delivered to the justice an appeal bond in due form for the purpose of removing the cause to the county court. At the time the bond was delivered the justice was sick, and in a few days thereafter died. His successor in office forwarded the papers in the cause to the county court, among which was the appeal bond, but which had no file or approval mark upon it. *Held* that, the bond having been found with the papers in the cause, it would be presumed that the justice approved it when he received it.—Jones v. Wells, 3 Willson, Civ. Cas. Ct. App. § 94.

[l] (Wis. 1881) On an appeal from a justice's to a county court under Rev. St. §§ 3763, 3769, where the case is to be heard in the appellate court on the evidence taken by the justice and the proceedings in his court, it is not necessary that the justice should certify that the evidence returned as taken before him is all of the evidence in the case; but, in the absence of any motion for a further return, that fact will be presumed.—Bruins v. Downey, 51 Wis. 120, 8 N. W. 110.

§ 711. Harmless error.

Errors not considered on trial de novo, see ante, § 661.

[a] A judgment of a justice will not be reversed by reason of an error in taxing costs.—(N. Y. 1838) Fuller v. Wilcox, 19 Wend. 351; (1884) Irr v. Schroeder, 6 Civ. Proc. R. 253.

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(Ohio, 1896) Crull v. Morgan, 11 Ohio Cir. Ct. R. 537, 5 O. C. D. 274.

[b] (U. S. 1822) In Arkansas, it is no ground of reversing the judgment of a justice rendered on a specialty that neither plaintiff nor his agent appeared at the trial.—Taylor v. Hogan, Fed. Cas. No. 13,794a [1 Hemp. 16].

[c] (Ala. 1878) A judgment by a city court, where the presiding judge decided both the law and fact on waiver of a jury, will not be reversed because of erroneous rulings on defective counts filed on appeal from a justice, where there is one good count, and the judgment is right on the evidence.—Western Union Tel. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1.

[d] (Cal. 1860) Pleadings in justices' courts should be liberally construed; and, to authorize the reversal of a judgment for errors in this respect, it should appear that the defects complained of were calculated to mislead the adverse party.—Stuart v. Lander, 16 Cal. 372, 76 Am. Dec. 538.

[e] (Ind. 1873) In an action commenced before a justice of the peace, sustaining a demurrer to a good paragraph of an answer that is not a plea in abatement, an answer of set-off, or an answer of the statute of limitations, is harmless error.—Bernhamer v. Conard, 45 Ind. 151.

[f] (Ind. 1876) On a trial before a justice, any matter of defense, except the statute of limitations, set-off, or ground of abatement, may be given in evidence without a plea; hence an error of a justice in sustaining a demurrer to an answer not involving either of the excepted defenses cannot prejudice defendant, and is no ground of reversal.—Cincinnati, H & I. R. Co. v. Ridge, 54 Ind. 39.

[g] (Ind. 1881) There is no available error, in a suit commenced before a justice of the peace, in excluding matters of defense which were provable without plea.—Lawless v. Harrington, 75 Ind. 379.

[h] (Ind. 1882) In an action originating before a justice of the peace, where all the defenses specially pleaded are admissible in evidence without plea, there is no available error in overruling a demurrer to a special plea in the answer.—Powers v. Fletcher, 84 Ind. 154.

[i] (Ind. 1894) A plaintiff suing in justice court to recover real estate, as provided by Rev. St. 1894, § 7106 (Rev. St. 1881, § 5225), failed to allege that defendant was his tenant unlawfully holding over; and defendant appeared specially and moved to dismiss for want of jurisdiction in the justice. *Held* that, though the justice was without jurisdiction, it was harmless error to overrule the motion and permit plaintiff to insert the necessary allegations.—Blair v. Porter, 12 Ind. App. 296, 38 N. E. 874, 40 N. E. 81.

[j] (Kan. 1872) Though it is error for a justice to enter judgment against a defendant on an amended bill of particulars without notice to defendant of the amendment, where the amendment is immaterial the judgment will not be reversed.—Alvey v. Wilson, 9 Kan. 401.

[k] (Kan. 1880) In a trial before a justice of the peace of the truth of a garnishee's answer, under Comp. Laws, p. 709, § 44, the justice sustained a demurrer to the plaintiff's evidence. *Held* that, as his decision was not final as to the liability of the garnishee, it was immaterial whether such a demurrer was permissible or not in his court.—Fitch v. Manhattan Fire Ins. Co., 23 Kan. 366.

[l] (Kan. 1892) Plaintiff commenced an action before a justice of the peace upon an account duly verified, and no denial of the account, verified by affidavit or otherwise, was ever interposed; so that, under Justices' Code, § 84, the only judgment that could have been rendered was for plaintiff. The justice, in the absence of plaintiff, sustained a motion of defendant to dismiss the action for want of prosecution, but within five minutes thereafter, and before he entered the order of dismissal upon his docket, set it aside and overruled the motion, and set the case for trial at a later hour of the same day; and defendant's attorney had full notice thereof. The justice afterwards rendered judgment in favor of plaintiff for the amount of the account. *Held*, that no material error was committed.—Sullivan v. S. A. Brown & Co., 47 Kan. 708, 28 Pac. 1008.

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[m] (Mich. 1881) The failure of a justice of the peace to record the place of adjournment is not ground for reversal, where the person against whom the judgment is subsequently rendered was present when the adjournment was had.—Whelpley v. Nash, 46 Mich. 25, 8 N. W. 570.

[n] (Neb. 1892) Code Civ. Proc. § 1001, provides that a judgment rendered against a defendant in his absence may be set aside on condition (1) that motion therefor be made in 10 days from entry of the judgment; (2) that defendant pay or confess judgment for the costs awarded against him; and (3) that he notify the opposite party. *Held* that, where a motion to set aside a judgment made before a justice of the peace is denied by the justice, and the only reason assigned by him for such denial is that the judgment was not rendered by default, but that defendant in fact appeared on the day set for trial, his judgment will not be disturbed on appeal, though it appears that the judgment was rendered by default in defendant's absence, if it does not further appear affirmatively that defendant paid or offered to confess judgment for the costs.—Leake v. Gallogly, 34 Neb. 857, 52 N. W. 824.

[o] (N. Y. 1815) A judgment of a justice will not be reversed because he had previously expressed an opinion in the case.—McDowell v. Van Deusen, 12 Johns. 356.

[p] (N. Y.) The jury in a justice's court having found for the defendant in a case where the plaintiff was entitled to nominal damages only, the judgment of the justice should not be reversed, although the verdict was against the evidence.—(1820) Cady v. Fairchild, 18 Johns. 129; (1865) Stephens v. Wider, 32 N. Y. 351.

[q] (N. Y. 1839) A justice's judgment will not be reversed for an omission to call the plaintiff before receiving the verdict, if he is present when it is received, and does not submit to a nonsuit.—Oakley v. Van Horn, 21 Wend. 305.

[r] (N. Y. 1850) On appeal from a justice's court, a judgment will not be disturbed for error in the charge to the jury, where it is apparent, notwithstanding, that justice has been done.—Needles v. Howard, 1 E. D. Smith, 54.

[s] (N. Y. 1866) On appeal from a judgment of a justice's court, where material but incompetent evidence upon the issue was admitted on the trial, the county court will not refuse to reverse on the ground there was other evidence, sufficient and competent, to the same effect.—Decker v. Myers, 31 How. Prac. 372.

[t] (N. Y. 1867) Where a resident of a county is sued before a justice of that county by short summons, as if a nonresident, and is defaulted and appeals, the judgment of the justice is not to be reversed by the county court on affidavits showing defendant's residence.—Tanner v. Marsh, 36 How. Prac. 140.

[u] (N. Y. 1881) The issuing of an attachment by a justice of the peace on an insufficient affidavit is an error of law affecting the substantial rights of defendant, for which the judgment must be reversed.—Fritze v. Pultz, 2 Civ. Proc. R. 142.

[v] (N. Y. 1891) The judgment of a justice of the peace will not be reversed on account of the admission of incompetent evidence when there is other evidence in the case to sustain his finding; Code Civ. Proc. § 3063, requiring an appellate court to render judgment upon an appeal from a justice's court without regard to technical errors or defects which do not affect the merits.—Lockwood v. Lockwood, 60 Hun, 581, 14 N. Y. Supp. 831.

[w] (N. Y. 1891) Under the provision that in reviewing the judgment of justices of the peace "the appellate court must render judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits" (Code Civ. Proc. § 3063), where, in an action against a town supervisor for services rendered in assessing taxes, the minutes of a meeting of the town board were improperly admitted to show defendant's admission of his liability and his reimbursement by the town, such error is no ground for reversal if sufficient unobjectionable evidence to prove that fact remains.—Jackson v. Collins, 62 Hun, 618, 16 N. Y. Supp. 651.

[x] (N. Y. 1892) While the grounds of objection are not required, as a rule, to be stated on trials before justices of the peace, yet, where the trial was conducted by counsel, and certain grounds of objection were in fact stated, an objection to the admission of certain evidence not made at the trial cannot be raised on appeal, where it is clear that such evidence did not cause the rendition of the judgment.—Brewer v. Delafield, 63 Hun, 636, 18 N. Y. Supp. 329.

[y] (N. Y. 1892) In an action in a justice's court to recover the amount of a loan alleged to have been induced by the fraudulent representations of defendant as to his worth, plaintiff and two witnesses testified that the loan was made, and that it was induced by the alleged representations. *Held* that, although the justice erred in admitting the testimony of plaintiff's attorney as to defendant's representations made to him as attorney for a mercantile agency, yet such error did not require the reversal of a judgment for plaintiff, since Code Civ. Proc. § 3063, provides that, on appeal from a judgment of a justice's court, judgment shall be rendered "according to the justice of the case, without regard to technical errors or defects which do not affect the merits."—Davison v. Luckman, 63 Hun, 636, 18 N. Y. Supp. 663.

[z] (N. Y. 1893) In an action in a justice's court to recover on an open account, plaintiff was permitted to testify as to the amount of his claim, without producing his books which contained the account. *Held*, that the admission of such evidence was reversible error, and could not be justified, even under Code Civ. Proc. § 3063, which provides that technical defects or errors in investigations before a justice of the peace must be disregarded on appeal, when they do not affect the merits.—Halter v. Shaffer, 66 Hun, 636, 21 N. Y. Supp. 824.

[zz] (Pa. 1884) In a case originating before a justice of the peace, the form of action is not of controlling importance on appeal.—Dunn v. McCord, 2 Atl. 863.

§ 712. —— Technical defects and errors.

[a] (Ala. 1832) Error will not lie to reverse the judgment of an inferior court on the merits of a case because the defendant has merely stated the names of his pleas, without writing them out in full.—Clark v. Bostick, 2 Stew. & P. 66.

[b] (Ala. 1840) If the proceedings before the justice on a contract for the delivery of specific articles are regular, they should not be quashed in the county court on the ground that plaintiff declared in detinue, though a justice has no jurisdiction over actions of detinue.—Williams v. Hinton, 1 Ala. 297.

[c] (Ind. 1866) When a case has been tried before a justice of the peace upon the merits, judgment will not be reversed on account of an uncertainty in the averments of the plead-

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ings which could not have misled appellant.—Roseberry v. Shields, 26 Ind. 153.

[d] (Iowa, 1868) In an action of account before a justice of the peace, where full and formal pleadings are not required, a judgment will not be disturbed because payments have been allowed which were not formally pleaded; there being a denial of plaintiff's account, and the parties on each side, and without objection, having gone into a full investigation of the state of their accounts.—Miller v. Cassady, 25 Iowa, 323.

[e] (Kan. 1873) Where the record of a justice showed that on September 2d, the time to which a case was adjourned, he was engaged in other official business, and that "the case was not called until the Monday following, August 4th," the clerical error in the writing of "August" for "September" did not constitute an error upon the face of the record, for which the judgment should be reversed.—Kaub v. Mitchell, 12 Kan. 57.

[f] (Mich. 1843) The supreme court will overlook matters of form in proceedings before justices of the peace, and regard them according to the merits.—People v. Foote, 1 Doug. 102.

[g] (Mich. 1875) Mere irregularities in proceedings before a justice of the peace cannot be considered on special appeal.—Deitz v. Groesbeck, 32 Mich. 303.

[h] (Mich. 1894) Where, in an action by the next friend of an infant in his own name, the judgment of the justice was in favor of plaintiff, but the record shows it was in the infant's interest, the circuit court on appeal could not reverse; How. Ann. St. § 7044, empowering it to give judgment without regarding technical defects in the proceedings before the justice not affecting the merits.—Kees v. Maxim, 58 N. W. 473, 99 Mich. 493.

[i] (Mo. 1873) A plea in abatement in attachment before a justice putting in issue the truth of the grounds for attachment on the day of making the plea, instead of on the day the affidavit for attachment was made, was such an inaccuracy as might have been corrected at the proper time, and will not be interfered with on appeal to the supreme court.—Hamblin v. Dunn, 53 Mo. 137.

[j] (N. J. 1808) If the justice, in entering the finding of the jury, misuses the word "damage" for "debt," or vice versa, the court will not reverse for that reason.—Carmichael v. Howell, 2 N. J. Law (1 Penning.) 375.

[k] (N. J. 1808) Slight irregularities in pleading before justices will not be ground of reversal.—Brinley v. Wurts, 3 N. J. Law (2 Penning.) 432.

[l] (N. J. 1831) The supreme court will not reverse a judgment confessed in the court for the trial of small causes because the state of demand is defective.—Branson v. Eayre, 12 N. J. Law (7 Halst.) 127.

[m] (N. Y. 1804) Where on appeal from a judgment of a justice of the peace a return shows only a part of the oath of the constable to keep the jury as required by statute, and does not show that the remaining portion was not given, the defect will be overlooked.—Day v. Wilber, 2 Caines, 134.

[n] (N. Y. 1829) A plea of privilege by an attorney in a justice's court will be construed liberally on an appeal, and without regard to technical forms and rules.—Van Alstyne v. Dearborn, 2 Wend. 586.

[o] (N. Y. 1847) Where a summons issued on the 3d day of January, 1846, and made returnable on the 10th day of January, instant, before a justice of the peace, was by mistake dated January 3, 1845, and was personally served on the day it was issued, and the plaintiff obtained judgment without an appearance on the part of the defendant, it was *held* that the defect, having been overlooked by the justice, should be disregarded by the common pleas and the supreme court.—Arnold v. Maltby, 4 Denio, 498.

[p] (N. Y. 1869) The supreme court reviews proceedings in a justice's court liberally, and will not reverse a judgment rendered therein, except for manifest error.—McNall v. McClure, 1 Lans. 32.

[q] (N. Y. 1884) A judgment of a justice in replevin, where the summons was properly issued and personally served, will not be reversed because rendered on an insufficient affidavit and undertaking, where there is no ground for reversing on the merits.—Irr v. Schroeder, 6 Civ. Proc. R. 253.

[r] (N. Y. 1889) On appeal from a justice of the peace to the county court on questions of law only, the county court may give judgment according to the merits without regard to technical errors.—Purdy v. Dinkle, 53 Hun, 633, 6 N. Y. Supp. 158.

[s] (N. Y. 1892) The judgment of a justice's court, if in conformity with law and justice, cannot be invalidated by technical errors of no moment to the other substantial merits of the case.—Cambeis v. Third Ave. R. Co. (Com. Pl.) 1 Misc. Rep. 158, 20 N. Y. Supp. 633.

[t] (N. Y. 1893) Under Code Civ. Proc. § 3063, relating to appeals from justice's court in civil actions, which provides that the appellate court must render judgment according to the justice of the case, without regard to technical errors, it is error for the county court to reverse a judgment of a justice of the peace because he allowed plaintiff a small amount more interest than he may have been entitled to.—Kilmer v. Messling, 70 Hun, 582, 24 N. Y. Supp. 343.

[u] (N. Y. 1893) Code Civ. Proc. § 3063, providing that in appeals from justices the appellate court "must render judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits," does not authorize the affirmance of a judgment of default rendered by a justice, where there was no service on defendant.—Kingsford v. Butler, 71 Hun, 598, 24 N. Y. Supp. 1094, 23 Civ. Proc. R. 228.

[v] (N. Y. 1896) Under Code Civ. Proc. § 3063, providing that, on appeal from a justice court, "the appellate court must render judgment according to the justice of the case, without regard to technical defects which do not affect the merits," a judgment should not be reversed for technical defects in the papers, or because a verified copy of a document, instead of the original, was received in evidence.—Marble v. Towman, 5 App. Div. 613, 39 N. Y. Supp. 350.

[w] (Ohio, 1860) The judgment of a justice will not be reversed, if the bill of particulars shows a cause of action, though all the facts necessary to show a right of recovery thereon are not stated in the bill.—Niven v. Smith, 2 Ohio Dec. 337.

[x] (Tex. 1853) In proceedings before inferior tribunals, such as justices' courts, all that a revising court will look to is the substance of their acts, and not forms, and, if justice has been done between the parties, will very rarely disturb their judgments.—Kellers v. Reppien, 9 Tex. 443.

[y] (Wis. 1894) Rev. St. § 3769, as amended, providing that the circuit court shall give

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judgment on appeal from justice's court according to the merits of the case, extends, by its terms, to all cases "where there is no new trial in the appellate court," whether the trial was by justice or jury.—Silvernail v. Rust, 88 Wis. 458, 60 N. W. 787.

§ 713. Parties entitled to allege error.

Appearance in justice's court as precluding objections to jurisdiction of justice on appeal, see ante, § 267.

[a] (Ill. 1868) The rule that accepting the benefit of a judgment or decree is a release of errors does not apply to an appeal from a justice's judgment by the party prevailing, the hearing in the circuit court being de novo on the merits.—Kasting v. Kasting, 47 Ill. 438.

[b] (Iowa, 1856) In an action before a justice on a penal bond to secure the payment of attorney's fees, plaintiff filed the bill of items with the bond, and defendant procured the bill to be dismissed as bad, whereupon plaintiff proceeded on the bond and oral pleadings. *Held*, that if the justice, by his ruling on the defendant's motion, committed error against plaintiff, defendant could not complain.—Stone v. Murphy, 2 Iowa (2 Clarke) 35.

[c] (Neb. 1887) A cause was transferred to a justice of the peace, upon a change of venue, who was disqualified, by reason of bias and prejudice, to try the case. The defendant filed a motion to dismiss for said cause, which motion being overruled, he filed a motion, supported by affidavits, for a second change of venue, which was sustained. *Held*, that he could not predicate error upon the ground that his own motion was sustained.—Hitchcock v. McKinster, 21 Neb. 148, 31 N. W. 507.

[d] (N. Y. 1810) Though plaintiff in error appeared by attorney in violation of St. 10th Sess. c. 10, § 10, he could not allege it for error.—Smith v. Goodrich, 5 Johns. 353.

[e] (N. Y. 1852) Where a defendant in a justice's court, on the decision of a demurrer against him, puts in an answer, he thereby waives the demurrer, and the supreme court on appeal cannot review the decision of the justice in overruling the demurrer.—Irvine v. Forbes, 11 Barb. 587.

[f] (N. Y. 1854) Where a plaintiff voluntarily brought his suit before a justice in a district where neither he nor the defendant resided, and a trial was had (it not appearing at the trial that the parties did not reside within the district), and judgment was rendered for the plaintiff, but for a less amount than he demanded, and the plaintiff appealed, it was *held* that he could not by such appeal require the appellate court to reverse the judgment on the ground that the court had no jurisdiction on account of the nonresidence. The trial having been had without objection, it was not the duty of the justice to make any inquiry of his own motion into the residence of the parties.—Fairbanks v. Corlies, 3 E. D. Smith, 582.

[g] (N. Y. 1858) After having placed on the record the grounds for reversal on appeal from a justice, appellant is estopped to assert other grounds at the argument.—Cristman v. Paul, 16 How. Prac. 17.

[h] (N. Y. 1864) Rev. St. c. 2, art. 3, tit. 4, § 42, providing that the constable serving the original process in a justice's court should not appear and advocate for either party at the trial, does not enable a defendant, on appeal, to object that the constable who served the summons on him advocated his cause, in his absence, with plaintiff's consent.—Eldredge v. McNulty, 45 How. Prac. 440.

[i] (N. Y. 1865) A defendant in proceedings in a justice's court who does not appear before the justice on the return day of the summons is precluded from objecting on appeal to the regularity of the proceedings.—People v. Powers, 19 Abb. Prac. 99.

[j] (N. Y. 1873) Where a justice of the peace renders judgment upon the verdict of a jury, but fails to include costs in such judgment, the unsuccessful party cannot allege error on appeal for such failure, as he is not prejudiced thereby.—Schneider v. Armstrong, 1 Buff. Super. Ct. 379.

[k] (Pa. 1825) Where defendants admitted they were in court, pleaded to the declaration, and went to trial in their character of overseers of the poor, they cannot complain on appeal that they were originally sued before a justice of the peace in their individual characters.—Overseers of Roxborough v. Bunn, 12 Serg. & R. 292.

[l] (Pa. 1883) Where the record shows a judgment for an amount within the justice's jurisdiction, and that no more was demanded on the trial, one who went to trial without objection cannot, on appeal, urge that the record is defective in not showing the sum demanded.—Weidenhamer v. Bertle, 103 Pa. 448.

[m] (S. C. 1880) Only the party affected by errors and irregularities in the proceedings in a trial justice's court will be heard to object to them.—Glenn v. Shannon, 12 S. C. 570.

[n] (Tex. 1883) An appellee, in a case appealed from a justice's court, cannot object that appellant failed to notify him of his motion for new trial as required by Rev. St. art. 1621, where the motion was overruled.—Horton v. McKeehan, 1 White & W. Civ. Cas. Ct. App. § 466.

[o] (Wis. 1854) In an action before a justice of the peace an adjournment was had, on application by the defendant, before issue formally joined. *Held*, that the defendant could not be allowed to allege this as error.—Roberts v. Warren, 3 Wis. 786.

§ 714. Discretion of lower court.

[a] (Cal. 1859) Amendments to complaints are within the discretion of the justice, which cannot be reviewed without an affidavit of their materiality.—Canfield v. Bates, 13 Cal. 606.

[b] (La. 1883) A charge that a justice's court has illegally, but not arbitrarily, refused to issue its process on a call in warranty, involves a matter of legal discretion, not revisable by the supreme court.—State ex rel. Unbehagen v. Nephler, 35 La. Ann. 365.

[c] (N. Y. 1811) Where a justice has a discretion as to adjourning a cause, nothing but an abuse of such discretion will be regarded as error.—Pease v. Gleason, 8 Johns. 409.

[d] (N. Y. 1847) Error will not lie to a refusal by a justice to permit an amendment in a pleading, it being a matter within his discretion.—White v. Stevenson, 4 Denio, 193.

[e] (N. Y. 1847) Though a justice has a right to permit a defendant who has omitted to appear at the return day of the summons to plead on a day to which the cause has been adjourned, upon a proper excuse for the default being shown, still, it being a matter of discretion, the common pleas are not authorized to reverse the judgment, where the application has been refused, though they should be of opinion that the application ought to have been granted.—Sammis v. Brice, 4 Denio, 576.

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[f] (N. Y. 1851) The refusal of a justice to allow a plaintiff to give additional evidence after a nonsuit forms no ground for reversing his judgment on appeal, the matter being within the discretion of the justice.—Reed v. Barber, 3 Code Rep. 160.

(b) APPEALS ON QUESTIONS OF LAW AND OF FACT.

REVIEW ON QUESTIONS OF LAW, § 715.
REVIEW ON QUESTIONS OF FACT, § 716.
—— FINDINGS ON CONFLICTING EVIDENCE, § 717.
—— WEIGHT AND SUFFICIENCY OF EVIDENCE, § 718.
—— VERDICTS, § 719.
—— HEARING ON AFFIDAVITS ON REVIEW, § 720.

Review of questions of law or of fact, see ante, § 499.

§ 715. Review on questions of law.

[a] (U. S. 1827) In the case of a jury trial before a justice of the peace, there can be no review of the law separated from the facts.—Denny v. Queen, Fed. Cas. No. 3,807 [3 Cranch, C. C. 217].

[b] (Cal. 1888) An appeal on questions of law and fact from a justice's judgment, there having been no trial on issues of fact, must be entertained and decided by the superior court as on questions of law alone.—Fabretti v. Santa Clara County Super. Ct., 77 Cal. 305, 19 Pac. 481.

[c] (Ind. 1883) The insufficiency of the summons in a justice's court will not be considered on appeal if the specific objections to it are in no way pointed out to the appellate court.—Sargent v. Flaid, 90 Ind. 501.

[d] (Iowa, 1860) An issue of fact found by a justice will not be reviewed on error in the district court, but the remedy is by an appeal, upon which the case may be tried de novo.—Taylor v. Rockwell, 10 Iowa, 530.

[e] (Kan. 1877) The district court cannot, on petition in error, revise a judgment of a justice on a verdict of a jury, upon alleged partiality or error in the justice's rulings. The only review is by the statutory appeal.—Rice v. Harvey, 19 Kan. 144.

[f] (Kan. 1887) A ruling of the justice of the peace on the trial, in admitting or excluding testimony, cannot be reviewed by the district court on petition in error.—Hart Pioneer Nursery Co. v. Scruggs, 13 Pac. 575; Id., 36 Kan. 407, 14 Pac. 145.

[g] (La.) In appeals from decisions of justices of the peace, in cases involving the constitutionality or legality of a municipal ordinance imposing any tax, fine, or impost, the power of the court is limited to the question of the constitutionality or legality of the ordinance.—(1846) Municipality No. 3 v. Blanc, 1 La. Ann. 385; (1847) Municipality No. 1 v. Pease, 2 La. Ann. 538; (1849) Penn v. Municipality No. 1, 4 La. Ann. 13; (1850) Charity Hospital v. Lammerman, 5 La. Ann. 380.

[h] (La. 1853) The supreme court is without jurisdiction to decide an exception taken to the trial of a case before a justice of the peace on the ground that the justice was interested in the case.—Parish of West Baton Rouge v. Robertson, 8 La. Ann. 69.

[i] (La. 1890) Mandamus does not lie to compel a district judge, who has affirmed a judgment sustaining a plea to the jurisdiction, to pass upon the merits of the controversy in the suit brought before the lower court. Such merits are not before him for review on an appeal from a judgment on the plea by the inferior tribunal.—State ex rel. Freret v. King, 42 La. Ann. 77, 7 South. 72.

[j] (Me. 1850) No error of fact having been assigned, and no fact annexed to the record having been proved, the charge will be considered as an error of law; and a refusal to allow costs to the amount claimed, when some amount is allowed, is not error in law.—Reed v. Tay, 32 Me. 173.

[k] (Md. 1884) A bill of exceptions not being allowable on appeal from a justice of the peace, the supreme court cannot examine one to discover whether the title to land was involved.—Shippler v. Broom, 62 Md. 318.

[l] (Mich. 1873) Error in admitting or rejecting evidence on a trial before a justice is not reviewable on a special appeal.—Albert v. Sutton, 28 Mich. 2.

[m] (Mich. 1883) A special appeal from a judgment of a justice was properly overruled where no question of jurisdiction was involved, and the case was in a situation to be retried on its merits.—Benjamine v. Dodge, 50 Mich. 41, 14 N. W. 675.

[n] (Mich. 1887) On a special appeal to a circuit court from a judgment of a justice of the peace, the question of his jurisdiction to render a judgment for the amount recovered may be raised.—Rosevelt v. Hanold, 65 Mich. 414, 32 N. W. 443.

[o] (Mich. 1888) The action of a justice in allowing, after the evidence is all in, and the cause submitted to him, an amended declaration to be filed, setting out an assignment of the debt sued on from a former partnership to the present plaintiffs, cannot be reviewed on special appeal.—Webster v. Williams, 69 Mich. 135, 37 N. W. 62.

[p] (Mich. 1888) In an action before a justice, the admission of evidence showing that the debt declared on as accruing to plaintiffs accrued to a former partnership composed of plaintiffs and another cannot be reviewed on special appeal.—Webster v. Williams, 69 Mich. 135, 37 N. W. 62.

[q] (Mich. 1894) An objection that the justice erred in holding the declaration sufficient cannot be raised by special appeal.—Stevens v. Harris, 99 Mich. 230, 58 N. W. 230.

[r] (Minn. 1867) Upon appeal from a justice's court upon questions of law, no question of law can be raised in the district court not tried or raised before the justice, and to which an exception was taken to his ruling thereon, except objections to the jurisdiction, and that the complaint or answer does not state facts sufficient to constitute a cause of action or defense.—Bennett v. Phelps, 12 Minn. 326 (Gil. 216).

[s] (Minn. 1871) The admission of evidence by a justice against objection will not be reviewed, in the absence of an exception, on an appeal upon questions of law alone.—Witherspoon v. Price, 17 Minn. 337 (Gil. 313).

[t] (Minn. 1878) On appeal from the judgment of a justice on questions of law alone, which appeal was substituted by Laws 1865, c. 22, for the remedy by certiorari, all errors apparent on the return, jurisdictional or otherwise, and excepted to, where necessary, may be reviewed.—Craighead v. Martin, 25 Minn. 41.

[u] (Minn. 1888) On appeal from a justice on questions of law alone, the evidence being returned by the justice as provided by statute.

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appellant may make the point that there was no evidence to justify the judgment.—Palmer v. St. Paul & D. R. Co., 38 Minn. 415, 38 N. W. 100.

[v] (Minn. 1889) On an appeal from a justice on questions of law alone, the district court is not called on to consider the evidence, except so far as to determine whether from it the justice might find facts that would justify the judgment.—Croonquist v. Flatner, 41 Minn. 291, 43 N. W. 9.

[w] (N. Y. 1859) A notice of appeal from a justice's court, stating any ground on which the appeal is founded, confers jurisdiction on the county court to examine the whole case as set forth in the justice's return; and the judgment should be reversed for any substantial error, whether stated in the notice or not.—Forman v. Forman, 17 How. Prac. 255.

[x] (N. Y. 1866) One of the grounds of appeal from a justice's judgment was that the summons had no stamp, but the notice of appeal did not specify this as one of the grounds of error. *Held*, that the point involved a question of jurisdiction, and could be raised at any time during the progress of the action.—Cole v. Bell, 48 Barb. 194.

[y] (N. Y. 1872) Under section 353 of the Code of Procedure, which requires that upon appeal from a justice's court the appellant shall, within 20 days after judgment, serve a notice of appeal, "stating the grounds upon which the appeal is founded," the appellate court cannot reverse the judgment upon grounds not stated in the notice.—Avery v. Woodbeck, 62 Barb. 557, 5 Lans. 498.

[yy] (Ohio, 1886) Under Rev. St. § 6560, providing that in all cases before a justice of the peace either party may except to the opinion of the justice on any point of law, a bill of exceptions on a question of the weight of the evidence cannot be considered by a reviewing court.—Yager v. Greiss, 1 O. C. D. 296.

[z] (Ohio, 1892) On a proceeding in error from the refusal of a justice of the peace to discharge an attachment, though the reviewing court cannot consider the weight of the evidence, it may consider whether there was any evidence to sustain the ruling of the justice.—Willenger v. Bramsche, 7 Ohio Cir. Ct. R. 208.

[zz] (Ohio, 1893) Instructions given to the jury by a justice of the peace in the course of the trial of an action before him are reviewable on error.—Hirth v. Graham, 50 Ohio St. 57, 33 N. E. 90, 40 Am. St. Rep. 641, 19 L. R. A. 721.

§ 716. Review on questions of fact.

[a] (Ala. 1880) The finding of facts by a justice's court, where the amount involved is less than $20, is the same as a jury verdict, and to be disturbed only for the same reasons.—Dargan v. Harris, 68 Ala. 144.

[b] (Kan. 1878) A finding by a justice of the peace upon a question of fact is as conclusive on appeal as the verdict of a jury.—Central Branch R. Co. v. Phillipi, 20 Kan. 9.

[c] (Mass. 1808) On review of a judgment of a justice of the peace by writ of error, the appellate court cannot take any notice of an error in fact assigned, and not appearing on the record.—Winslow v. Anderson, 4 Mass. 376.

[d] (Mass. 1839) The supreme court cannot revise the judgment of a justice, on the evidence submitted to him, on a complaint to recover a militia fine.—Cousins v. Cowing, 40 Mass. (23 Pick.) 208.

[e] (N. Y.) The phrase "errors of fact" as ground for reversing the judgment in Code Civ. Proc. § 366, regulating appeals, has no reference to an erroneous finding of the court or jury upon the evidence, but refers to errors of fact not appearing from the record or evidence, such as infancy and coverture.—(1852) Adsit v. Wilson, 7 How. Prac. 64; Kassen v. Mills, 8 How. Prac. 377; (1856) Biglow v. Sanders, 22 Barb. 147.

[f] (N. Y. 1859) A nonresident, sued in a justice's court by long summons, on the return day appeared, and after stating that he did not appear in the action, that he was a nonresident, and that he declined further to plead, left the court room. The plaintiff obtained an adjournment, and on the adjourned day took judgment. The defendant appealed to the county court, and there offered affidavits to prove his nonresidence; but the court disregarded them on the ground that they should have been offered below, and affirmed the judgment. *Held*, that the defect in the process was an error in fact, which should be reviewed on appeal, under Code, § 366.—Willins v. Wheeler, 17 How. Prac. 93, 8 Abb. Prac. 116.

[g] (N. Y. 1859) On appeal from a justice's court under sections 353 and 366 of the Code, the county court must hear at the same time and pass upon all the questions,—both those of error in law and of error in fact, and of a motion for a new trial.—Cook v. Swift, 18 How. Prac. 454, 10 Abb. Prac. 212.

[h] (N. C. 1871) Decisions of justices of the peace upon questions of fact are not, under the law and practice, subject to review in the appellate court.—Street v. Bryan, 65 N. C. 619.

[i] (N. C. 1877) On appeal from a justice's judgment for $25 or less, the superior court does not revise the justice's findings of fact.—London v. Headen, 76 N. C. 72.

[j] (Ohio, 1860) On petition in error from the judgment of a justice of the peace, no statement of evidence can be considered, except such as is authorized to be inserted in the transcript.—Niven v. Smith, 2 Ohio Dec. 337.

[k] (Ohio, 1860) A petition in error does not reach the erroneous finding of a justice upon a question of fact.—Strausburgh v. Doran, 2 Ohio Dec. 402.

[l] (Ohio, 1885) A defendant properly summoned and appearing and making defense before a justice of the peace, and against whom a judgment is rendered, and who does not appeal, cannot, on a petition in error to reverse such judgment, have a retrial of the case on the facts, since, having exercised his election not to appeal, but to prosecute error, he cannot convert his petition in error to a pleading of fact, to retry the same matter on the evidence which he tried before the magistrate, and from which he took no appeal.—Bruder v. Biehl, 1 O. C. D. 51.

[m] (Ohio, 1888) An order of a justice of the peace refusing to discharge an attachment may, under Rev. St. § 6524, be reviewed by petition in error in the court of common pleas on a bill of exceptions embodying all the evidence on the hearing of the motion to discharge, together with the ruling of the justice and the exceptions thereto.—Seville v. Wagner, 46 Ohio St. 52, 18 N. E. 430.

[n] (S. C. 1891) Code, § 358, providing that appeals from trial justices to the circuit court shall be heard upon all the papers in the case, including testimony taken in writing on the trial, "and the grounds of exception made," confines the circuit court, on the hearing, to the consideration of such questions only as are raised by the exceptions.—Burns v. Gower, 34 S. C. 160, 13 S. E. 331.

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[o] (S. C. 1892) Code Proc. § 368, subd. 6, relating to appeals to the circuit court from an inferior court, provides that the provisions of the Code of Procedure relative to decisions of the court and motions for new trial are applicable to all appeals "brought up for trial as in this chapter provided." Code Proc. § 368, subd. 1, provides that the circuit court shall have power to affirm or reverse "judgments" of the inferior courts "for errors of law or fact." *Held*, that the circuit court has power to review errors of fact in an order of a trial judge granting a new trial, the Code making provision for appeals from orders granting or refusing new trials, and the word "judgment," in section 368, not being used in its technical sense of a final determination.—Redfearn v. Douglass, 35 S. C. 569, 15 S. E. 244.

[p] (Wis. 1862) On an appeal from a judgment of a justice of the peace for less than $15, the circuit court sits in review of the record, which includes the evidence, and is not bound to file a statement of the facts found by it and its conclusions of law.—Hassa v. Junger, 15 Wis. 598.

§ 717. —— Findings on conflicting evidence.

[a] (Ind. 1878) Although in replevin before a justice of the peace there be a preponderance of evidence that the property was worth more than $200, which is the limit of his jurisdiction, under 2 Rev. St. p. 605, § 10, the supreme court, on appeal from the circuit, will not disturb a finding to the contrary if there be any evidence to sustain it.—Deam v. Dawson, 62 Ind. 22.

[b] (N. Y.) The finding of a justice of the peace on a question of fact upon which the evidence was conflicting will not be disturbed.—(1847) Moak v. Foland, 3 How. Prac. 84; (1859) Barber v. Arnoux, 18 How. Prac. 285; (1886) Roosevelt v. Strohkoefer, 3 N. Y. St. Rep. 578.

[c] (N. Y.) Where there is conflicting testimony, or in a question of credibility, the finding of the justice below is not interfered with on appeal.—(1850) Decker v. Jaques, 1 E. D. Smith, 80; (1854) McLaughlin v. Barnard, 2 E. D. Smith, 372; (1854) Mellon v. Smith, Id. 462; (1855) Cannon v. Van Wagner, Id. 590.

[d] (N. Y. 1852) On appeal from the justices' courts this court will not reverse a judgment on the ground that a preponderance of evidence (although conflicting) appears to be against the verdict, when the case is not so clear as to warrant the presumption of bias, partiality, or obvious misapprehension or mistake on the part of the jury.—Easton v. Smith, 1 E. D. Smith, 318.

[e] (N. Y. 1856) A justice has the right, in the trial of a cause, to regard those admissions of the defendant which are unfavorable to his defense, and disbelieve those which are in his favor, and a judgment founded on such of these admissions as are believed will not be disturbed.—Penfield v. Jacobs, 21 Barb. 335.

[f] (N. Y. 1857) Where the amount of the accounts is a question of fact, and the evidence conflicting, the determination of the justice is necessarily as conclusive on such question of fact as upon any other, where his jurisdiction is not affected by his finding.—Parker v. Eaton, 25 Barb. 122.

[g] (N. Y. 1865) So long as there has been legal evidence on both sides of the question adjudicated upon, the county court should not reverse the judgment, even if it arrives at a conclusion as to the facts different from that adjudged by the justice.—Burnham v. Butler, 31 N. Y. 480.

[h] (N. Y. 1871) If there was sufficient evidence, if believed by a justice of the peace, to sustain a judgment, such judgment will not be reversed on appeal because it was given without sufficient evidence to sustain it. When there is a conflict in the evidence, it is for the justice to determine which is most credible; and when the judgment of a justice is sustained by positive, direct, and corroborating evidence, sufficient to uphold a judgment, it is not the duty of the reviewing court to measure in nice scales the weight of conflicting testimony.—Alford v. Stevens, 63 Barb. 29.

[i] (N. Y. 1886) Where defendant's counsel, in an action before a justice on a verbal contract, admitted: "There is a certain amount due. I don't know the amount. There is the sum of $94 to be paid,"—a judgment for that amount will not be disturbed, the evidence as to the terms of the contract being conflicting.—Meehan v. Butler, 3 N. Y. St. Rep. 556.

[j] (N. Y. 1891) Plaintiff testified that defendant agreed to move her furniture in one load for $5, and that when one-third of the property arrived at the place of delivery defendant demanded $5 therefor. Defendant gave evidence tending to show, and the justice found, that the contract was for $5 a load; that the load carried was a full load; that there was more furniture to be carried; and that defendant demanded that the whole should be carried for $5. *Held*, that the county court was bound by these findings, and erred in reversing the judgment of the justice and entering judgment for plaintiff.—Aller v. O'Reilley, 62 Hun, 619, 16 N. Y. Supp. 831.

[k] (Ohio, 1880) In proceedings in error to reverse a judgment of a justice of the peace rendered on conflicting evidence, the judgment will not be reversed, where there is evidence tending to support it.—Pittsburg, C., C. & St. L. R. Co. v. Wright, 8 Ohio Dec. 105, 5 Wkly. Law Bul. 647.

[l] (Wis. 1857) Where there is some evidence to sustain a verdict of a justice, the judge of the county court should not set it aside because in his opinion the evidence is insufficient.—Dexter v. Cole, 6 Wis. 319, 70 Am. Dec. 465.

§ 718. —— Weight and sufficiency of evidence.

[a] (Kan. 1874) Where an action has been tried before a justice of the peace, and a judgment rendered for the plaintiff, and no motion made for a new trial, the district court cannot, upon a petition in error, re-examine the evidence introduced on the trial before the justice, for the purpose of determining whether the judgment rendered by the justice is sustained by sufficient evidence or not.—Ayres v. Crum, 13 Kan. 269.

[b] (Me. 1832) The judgment of a justice of the peace upon the evidence before him is not to be reversed unless clearly against the weight of the evidence.—Bullen v. Baker, 8 Me. (8 Greenl.) 390.

[c] (Mich. 1863) The judgment of a justice cannot be reversed by the circuit court for insufficient evidence, except where there is a total want of evidence to prove some fact necessary to sustain the action.—Welch v. Bagg, 12 Mich. 41.

[d] (N. J. 1881) Where there is in the court below on one side direct testimony as to the existence of a fact, and there is no counter testimony offered upon the other side, and the testimony of the witnesses offered to prove such fact is not impeached by proof of character, or shaken upon cross-examination, or rendered suspicious by the inherent improbabilities of the story, then, upon review, the legal inference will arise that such fact ex-

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ists, and a judgment in opposition thereto will be reversed.—Cooley v. Barcroft, 43 N. J. Law (14 Vroom) 363.

[e] (N. Y. 1806) A judgment by a justice will not be reversed because the evidence to support the judgment was light.—Fisher v. Chandler, 1 Johns. 505.

[f] (N. Y. 1815) Where the whole evidence was not returned by the justice before whom a judgment was obtained on a promissory note given for a deputy sheriff's fees, and the cause was fairly submitted to the jury, who found for the plaintiff, the court will not reverse the judgment, though there is some reason to believe that a larger sum was included in the note than was warranted by law.—Woodin v. Hoofut, 12 Johns. 298.

[g] (N. Y. 1852) The county court cannot, on appeal from a justice court, review the evidence to see whether the judgment is supported thereby.—Adsit v. Wilson, 7 How. Prac. 64; Kasson v. Mills, 8 How. Prac. 377.

[h] (N. Y. 1853) Where a justice of the peace issued an attachment and summons under the nonimprisonment act, having evidence before him of intent in the defendant to dispose of property to defraud creditors, his proceedings ought not to be reversed for insufficiency of proof.—Rosenfield v. Howard, 15 Barb. 546.

[i] (N. Y. 1865) The judgment of a justice of the peace should not be reversed by the county court unless it clearly appear that the judgment of the justice could not have been justified by the evidence.—Burnham v. Butler, 31 N. Y. 480.

[j] (N. Y. 1892) In replevin, involving the title to a chattel, in which the controversy is a mere question of fact, a finding of the justice in accordance with the probabilities of the case will not be disturbed.—Phillips v. Phillips, 64 Hun, 634, 18 N. Y. Supp. 886.

[k] (N. Y. 1892) Where there is any evidence to support a judgment of a justice of the peace, the supreme court cannot disturb it as being contrary to the weight of evidence.—Bailey v. Gluth, 65 Hun, 620, 19 N. Y. Supp. 945.

[l] (N. Y. 1895) A verdict rendered in a justice's court will not be reversed on appeal to the county court, unless it was manifestly and clearly against the weight of the evidence.—Halsey v. Hart, 85 Hun, 46, 32 N. Y. Supp. 665.

[m] (Ohio, 1886) The judgment of a justice of the peace cannot be reviewed by the court of common pleas on the ground that it is against the weight of evidence.—Yager v. Greiss, 1 Ohio Cir. Ct. R. 531.

[n] (Ohio, 1894) The court of common pleas, on petition in error to reverse an order of a justice of the peace refusing to dissolve an attachment, will look into the bill of exceptions to see whether such order was sustained by the evidence.—Hoyman v. Beverstock, 8 Ohio Cir. Ct. R. 473.

[o] (Wis.) Where an appeal from the judgment of a justice of the peace is heard on the original papers and his return, under Rev. St. §§ 3767, 3768, a reversal of the judgment can only be sustained on the ground that the findings of fact by the justice are clearly unsupported by the evidence.—(1881) Campbell v. Babbetts, 53 Wis. 276, 10 N. W. 400; (1882) Neave v. Arntz, 56 Wis. 174, 14 N. W. 41.

[p] (Wis. 1888) On appeal from a justice's court, where a trial on the merits is waived in the circuit court, the same rule should be applied in reviewing the sufficiency of the evidence to support the verdict as obtains in the supreme court.—West v. Vandenbrook, 71 Wis. 469, 37 N. W. 832.

§ 719. —— Verdicts.

[a] (N. Y. 1813) In an action for a penalty before a justice, judgment for the defendant will not be reversed merely because the verdict was clearly against evidence.—Comfort v. Thompson, 10 Johns. 101.

[b] (N. Y. 1849) Where there is a conflict of evidence upon a trial in a justice's court, so far as all the questions of fact are concerned the verdict of the jury is conclusive, and cannot be reviewed elsewhere, however much against the weight of evidence.—McDonald v. Edgerton, 5 Barb. 560.

[c] (N. Y. 1854) Where, in a justice's court, there is a fair question for the jury, though their decision is against the weight of evidence, still it is conclusive; and the county court cannot, on appeal, properly disturb the verdict. It is only when the facts of a case are undisputed, or the evidence is not conflicting and is free from reasonable doubt, that the verdict of a jury in a justice's court can be set aside as contrary to or against evidence.—Bennett v. Scutt, 18 Barb. 347.

[d] (N. Y. 1856) Where there is evidence on both sides, the judgment rendered in the justice's court cannot be reversed by the county court, although the judgment or verdict of the jury was against the weight of evidence; and if, in such case, the county court reverses the judgment of the justice, the judgment of reversal will be reversed by the supreme court.—Rogers v. Ackerman, 22 Barb. 134; Biglow v. Sanders, Id. 147; Wiley v. Slater, Id. 506.

[e] (N. Y. 1861) Unless the evidence is clear, positive, and uncontradicted upon the point which it is claimed the justice's jury have wrongly decided (in this case, negligence in not keeping a turnpike in repair), their verdict should not be interfered with by the county court.—Cox v. Westchester Turnpike Road, 33 Barb. 414.

[f] (Tex. 1859) The court will not disturb the verdict of a jury in a case instituted before a justice of the peace, where there is no error in the charge of the court, unless it is plain that the law has been violated and injustice has been done.—Ogden v. Cox, 23 Tex. 22.

§ 720. —— Hearing on affidavits on review.

[a] (N. Y. 1854) Code 1852, § 366, after declaring that the appellate court, upon an appeal from a justice of the peace, shall give judgment according to the justice of the case, without regard to technical errors not affecting the merits, and that the judgment below may be affirmed or reversed in whole or in part, and as to any or all of the parties, and for errors of law or fact, provides that if the appeal is founded on an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the justice, the court may determine the alleged error in fact on affidavits, and may, in its discretion, inquire into and determine the same upon examination of the witnesses, and that "if the defendant fails to appear before the justice," and it is shown by the affidavits served, or otherwise, that manifest injustice has been done, and defendant satisfactorily excuses his default, the court may, in its discretion, set aside or suspend the judgment, and order a new trial before the same or any other justice at such time and place and on such terms as the court may deem proper. *Held*, that defendant fails to appear, within the meaning

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of such section, not only where he does not answer on the return of the summons and plaintiff takes judgment, but also where he does not attend on a day to which the case has been adjourned, and the trial proceeds without him.—Armstrong v. Craig, 18 Barb. 387.

[b] (N. Y. 1856) Affidavits in addition to the return cannot be referred to in the decision of an appeal from a justice's judgment to the common pleas.—Kilpatrick v. Carr, 3 Abb. Prac. 117.

[c] (N. Y. 1872) Where summons is served by copy, and defendant appeals from the judgment of a justice "on errors of fact to be established by affidavits and other proofs" (Code, § 366), and relies on want of authority to appear for him below, he must show such fact by affidavits or testimony.—Sperry v. Reynolds, 5 Lans. 407, reversed (1875) 65 N. Y. 179.

[d] (N. Y. 1886) Where the jurisdiction of a justice depends on the nonresidence of defendant, and defendant is not in fact a nonresident, judgment in favor of plaintiff is erroneous; and, if the proceedings before the justice show nothing on the subject, the case on appeal is within Code Civ. Proc. § 3057, providing that where an appeal is founded on an error in fact in the proceedings not affecting the merits of the action, and not within the knowledge of the justice, the court may determine the matter on affidavits, or, in its discretion, upon examination of witnesses, or in both methods.—Griffin v. Norton, 5 N. Y. St. Rep. (3 Sandf.) 812.

[e] (N. Y. 1888) Code Civ. Proc. § 3057, relating to appeals from justices' courts, which provides that "where an appeal is founded upon an error of fact in the proceedings not affecting the merits of the action, and not within the knowledge of the justice, the court may determine the matter upon affidavits," etc., does not authorize the use of affidavits on appeal to show alleged misconduct of the justice after the case was submitted to him for decision, inasmuch as the matters alleged in such affidavits, if they existed, must have been wholly within the knowledge of the justice.—Vallen v. McGuire, 49 Hun, 594, 2 N. Y. Supp. 381.

[f] (N. Y. 1890) On appeal from the judgment of a justice in a case in which he had no jurisdiction on account of the residence of the defendant, affidavits of defendant, showing the residence of the parties, are competent, under Code Civ. Proc. § 3057, providing that, upon appeal, errors in fact not affecting the merits of the action, and not within the knowledge of the justice, may be determined upon affidavits.—Larocque v. Harvey, 57 Hun, 366, 10 N. Y. Supp. 576, 19 Civ. Proc. R. 109.

[g] (N. Y. 1892) Code Civ. Proc. § 3057, providing that where an appeal is founded on an error in fact not affecting the merits of the action, "and not within the knowledge of the justice," the court may determine the matter on affidavits and on examination of witnesses, refers exclusively to appeals from justices' courts, and is not applicable to a denial of a motion for an adjournment to procure an absent witness, which is a matter "within the knowledge of the justice."—Jourdan v. Healey (Com. Pl.) 19 N. Y. Supp. 240, 22 Civ. Proc. R. 157.

[h] (N. Y. 1895) Code Civ. Proc. § 3057, providing that where an appeal from a justice of the peace is founded on an error in fact not affecting the merits of the action, and not within the knowledge of the justice, the matter may be determined on affidavits, applies to the district courts of New York City.—Jennings v. Miller (Com. Pl.) 10 Misc. Rep. 762, 31 N. Y. Supp. 814.

[i] (N. Y. 1895) Where the return shows that appellant was in court at the trial of the cause, and was examined as a witness "for the defendants," there being only one other defendant besides himself, an unauthorized appearance for appellant does not bring the case within Code Civ. Proc. § 3057, providing that an appeal founded on alleged error in fact not within the knowledge of the justice may be determined on affidavits.—Jennings v. Miller (Com. Pl.) 10 Misc. Rep. 762, 31 N. Y. Supp. 814.

14. DETERMINATION AND DISPOSITION OF CAUSE.

(a) JUDGMENT ON TRIAL DE NOVO, §§ 721-725.
(b) AFFIRMANCE, MODIFICATION, OR REVERSAL OF JUDGMENT OF JUSTICE, §§ 726-734.

Effect of failure to give notice of appeal on judgment on appeal, see ante, § 585.
Judgment against sureties on appeal bond is judgment on appeal, see post, §§ 743, 744.
—— *on dismissal of appeal, see* ante, § 644.

(a) JUDGMENT ON TRIAL DE NOVO.

IN GENERAL, § 721.
PARTIES, § 722.
ON DEFAULT OR NONSUIT, § 723.
AMOUNT OF JUDGMENT, § 724.
SETTING ASIDE JUDGMENT AND NEW TRIAL, § 725.

§ 721. In general.

[a] (Ala. 1880) After judgment by a justice of the peace and removal to the circuit court, the case is triable de novo, and the judgment of the court should not be of affirmance or reversal, but an entirely new one on the merits.—Burns v. Howard, 68 Ala. 352.

[b] (Ill. 1822) The statute regulating appeals from justices of the peace, and providing that no continuance shall be allowed to either party after the second term, does not prohibit the court from taking such cases under advisement after the trial.—Johnson v. Ackless, 1 Ill. (1 Breese) 92.

[c] (Ill. 1889) The appeal from a justice's decision on proceedings to recover a penalty or fine for violating a municipal ordinance is not to correct errors of law, but for a trial de novo, and the court has no power to determine whether the justice had jurisdiction of the subject-matter until the evidence is heard.—City of Chicago v. Kenney, 35 Ill. App. 57.

[d] (Ind. 1854) In trespass against several defendants, where one of them was not served with process, and, on trial before a justice of the peace, judgment was rendered against those who had been summoned, and, on an appeal taken by them to the circuit court, judgment was rendered not only against them, but also against the defendant not summoned, it was *held* that as to him the judgment was a nullity.—Prichard v. Campbell, 5 Ind. 494.

[e] (Iowa, 1854) If, on appeal to the district court, there is no paper on file in the case, and no statement in the justice's transcript showing the nature and amount of the plaintiff's demand, a judgment for the plaintiff is erroneous.—Sears v. Tubbs, 4 G. Greene, 409.

[f] (Iowa, 1877) A judgment rendered by the circuit court on appeal cannot be attacked collaterally on the ground that the justice of the

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peace had no jurisdiction of the subject-matter.—Finch v. Hollinger, 47 Iowa, 173.

[g] (Iowa, 1879) It is proper for the circuit court, on appeal from a justice of the peace, to render such judgment as the justice should have rendered.—Hawthorn v. Unthank, 52 Iowa, 507, 3 N. W. 518.

[h] (Ky.) Where the justice had no jurisdiction, on appeal judgment will be against the plaintiff.—(1822) Lane v. Young, 11 Ky. (1 Litt.) 40; (1827) Kirk v. Williams, 20 Ky. (4 T. B. Mon.) 413; (1827) Mitchell v. Warden, 21 Ky. (5 T. B. Mon.) 261; (1829) Stephens v. Boswell, 25 Ky. (2 J. J. Marsh.) 29.

[i] (Ky. 1830) Where the circuit court has not jurisdiction of an appeal from a justice of the peace, it is erroneous to render judgment against the appellant.—Church v. Church's Ex'rs, 27 Ky. (4 J. J. Marsh.) 13.

[j] (Ky. 1873) Under Civ. Code, § 849, requiring an action, on appeal from a justice's court, to "be tried anew," etc., in the appellate court, the latter cannot merely adjudge that the judgment "be reversed," but must either render judgment for some amount due the plaintiff, dismiss the action, or dismiss the appeal.—Bennett v. Thompson, 73 Ky. (10 Bush) 365.

[k] (Mich. 1882) On an appeal to the circuit court from a judgment rendered in a justice's court, the jurisdiction acquired is appellate, and the circuit court cannot render any judgment on such appeal which the justice's court could not have rendered.—Cross v. Eaton, 48 Mich. 184, 12 N. W. 35.

[l] (Miss. 1848) Where, in a suit before a justice of the peace, the plaintiff claimed to recover $20 for rent of a house and lot, and the defendant admitted that he owed $20 for a ground rent, but claimed to own the house himself, it was *held* on appeal that on the merits the plaintiff was entitled to recover.—Stier v. Surget, 18 Miss. (10 Smedes & M.) 154.

[m] (Mo. 1896) On appeal from a judgment in attachment rendered in a justice court, the circuit court may order the constable holding the proceeds of the attached property to pay the same to the successful party.—Springfield Engine & Thresher Co. v. Glazier, 65 Mo. App. 616, 2 Mo. App. Rep'r, 1177; Id., 2 Mo. App. Rep'r, 1341.

[n] (Neb. 1887) An offer to confess judgment, duly made in the justice's court where the action is brought, under Code Civ. Proc. § 1004, need not be renewed in the district court on appeal in order to make it available to the party making it on final judgment.—Underhill v. Shea, 21 Neb. 154, 31 N. W. 510.

[o] (N. H. 1850) Though neither the trustee nor the party defendant has appealed from the judgment of the justice of the peace charging the trustee, the court of common pleas will discharge such trustee on an appeal by the claimant if it appears that such trustee should have been discharged in the justice court.—Barker v. Garland, 22 N. H. (2 Fost.) 103.

[p] (N. J. 1809) On an appeal from the judgment of a justice to the court of common pleas, judgment is to be rendered accordingly, regardless of the judgment below.—Woodruff v. Carnes, 3 N. J. Law (2 Penning.) 505.

[q] (Vt. 1846) A trustee who appeals, in pursuance of the provisions of the statute of 1842, from the judgment of a justice of the peace charging him as trustee, cannot render a confession of judgment more than 12 days before the term of the court to which the appeal was taken, as might be done in the case of a party appellant; but the same proceedings must be had in the county court as if the suit had originally been brought there, or, in default of prosecution of the appeal by the trustee, the judgment against him must be affirmed by the county court.—Sanford v. Huxley, 18 Vt. 170.

§ 722. Parties.

[a] (Ind. 1866) A plaintiff in an action of contract commenced before a justice of the peace against two or more defendants may have judgment on appeal against a part only of the defendants.—Fitzgerald v. Genter, 26 Ind. 238.

[b] (Minn. 1859) Under Pub. St. c. 59, § 139, which provides that on appeal from a justice's court to a district court the case shall proceed in the latter court as near as may be as in actions originally brought therein, where, in a justice's court, judgment is rendered against one of two defendants, and the action dismissed as to the other, upon appeal by the defendant against whom judgment was rendered the action in the district court should proceed, and judgment may be entered, against both.—Hooper v. Farwell, 3 Minn. 106 (Gil. 58).

[c] (N. Y. 1827) Where on a trial before a justice a portion of the defendants appeal, and the defendants who appeal are acquitted, error in quashing the appeal in toto, without rendering up judgment against the defendants who did not appeal, constitutes a mistrial, and it should be set aside and the case tried de novo.—People v. Judges of Onondaga County, 7 Cow. 492.

[d] (Or. 1879) In a joint action before a justice for a wrongful conversion of property, wherein all the defendants answer, and a general verdict is rendered, judgment cannot properly be rendered against one only. But if, on appeal by him to the circuit court, all the defendants appear and defend, and the verdict is against them all, judgment may thereupon be rendered against all.—Cauthorn v. King, 8 Or. 138.

[e] (Pa. 1819) A judgment of the common pleas tried on a declaration in the name of a certain person as assignee of another, the case being brought to the common pleas by appeal from a justice's judgment in favor of the assignor to the use of the assignee, cannot be sustained, on error.—Stehley v. Harp, 5 Serg. & R. 544.

§ 723. On default or nonsuit.

Dismissal of action or nonsuit, see ante, §§ 649–651.

Judgment by default for want of sufficient plea in defense on appeal, see ante, § 688.

[a] (Ala. 1872) A judgment by default rendered by the circuit court, on trial of an appeal from a justice, against the appellee, who has not been notified of the appeal, is void, and will be reversed.—Steadman v. Seawell, 48 Ala. 519.

[b] (Ala. 1879) On appeal from a judgment rendered by a justice of the peace, although the defendant fails to appear, it is error to render judgment final by default, without the intervention of a jury, for the amount of the justice's judgment; that being vacated by the appeal, and Code, § 3121, requiring that the trial shall be de novo on the merits.—Abraham v. Alford, 64 Ala. 281.

[c] (Ark. 1844) On appeal from a judgment of a justice of the peace on an account, the circuit court cannot render final judgment on default without a writ of inquiry, or trying the

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cause on its merits.—Hamilton v. Hamphries, 5 Ark. (5 Pike) 640.

[d] (Ill. 1887) Starr & C. Ann. St. c. 79, § 34, provides that where "the plaintiff in any suit upon a contract * * * for the payment of money shall file with the justice, at the time of commencing such suit, an affidavit showing the nature of his demand," etc., "he shall be entitled to judgment in case of default," and, further, that on appeal "such affidavit shall have the same force and effect in the appellate court as if the suit had been commenced" therein. *Held*, that this does not authorize the filing of the affidavit after appeal to the circuit court so as to entitle plaintiff to judgment by default for want of an affidavit to the merits.—Mason v. Mandl, 24 Ill. App. 154.

[e] (Ind. 1850) An appellant subpœnaed an appellee, who resided in another county, to testify as a witness upon an appeal from a justice's judgment to the circuit court. On service of the subpœna the appellee demanded his fees, which were not paid. He did not appear at the trial, and the appellant claimed to have his pleas taken as true, which the court refused. *Held*, that by Rev. St. § 247, the appellant could not have compelled the appellee's attendance as a witness, he not having paid his fees when demanded, and therefore the defense set up could not have been taken as confessed.—Wayman v. Hazzard, 2 Ind. (2 Cart.) 165.

[f] (Iowa, 1871) A nonsuit of a plaintiff on appeal from justice court does not entitle the defendant to take, without proof, a judgment on a set-off pleaded by him, on which judgment has been rendered below.—Joy v. Huit, 31 Iowa, 22.

[g] (Mich. 1889) Where, on appeal from a justice, defendant had asked for time to file a set-off, and the court refused to grant it, except on the payment of costs, which defendant refused to do, and made no further defense, it was not error to enter judgment against him.—McDonald v. Weir, 76 Mich. 243, 42 N. W. 1114.

[h] (Mo. 1845) On appeal from a justice's court, judgment by default cannot be entered against the appellee unless the appeal was taken on the day of the trial, or notice has been served upon him 10 days, at least, before the first day of the term.—Pratte v. Corl, 9 Mo. 163.

[i] (N. C. 1851) There cannot properly be a final judgment by default upon an appeal from a justice of the peace, but the matter must be determined upon proofs, either by a court or by a jury.—Williams v. Beasley, 35 N. C. 112.

[j] (N. C. 1857) An action of assumpsit was brought before a justice on an unliquidated account, a judgment given against the defendant, and an appeal taken to the county court. On a default in that court, it was *held* error to give final judgment there without inquiry of damages.—Hartsfield v. Jones, 49 N. C. 309.

[k] (Pa. 1867) In a case appealed from a justice of the peace by defendants, on rule for judgment for want of a plea, *held* no other remedy was available; a judgment for want of an appearance being out of the question, since the entry of the appeal was equivalent to an appearance in propria persona.—Seidel v. Hurley, 1 Woodw. Dec. 352.

[l] (Pa. 1873) Judgment for want of an affidavit of defense on appeal to the common pleas of Schuylkill county from a justice of the peace in an action founded on contract, express or implied, can only be taken in that class of cases mentioned in Act April 14, 1851, § 14 (P. L. p. 625), extending the affidavit law to that county, and rule 49 of the common pleas of that county, relating to such judgments, applies only to such cases.—Feist v. Prince, 1 Leg. Chron. 135.

[m] (Pa. 1874) Judgment by default on failure to file an affidavit of defense on an appealed case, not taken in accordance with the rules of court in such cases, for the amount of the judgment of the justice, but for an amount to be ascertained by assessment, is of no validity, and will be set aside.—Saylor v. Morris, 2 Leg. Chron. 231.

[n] (Pa. 1877) B., the defendant in an action before a justice of the peace, was not notified by her counsel as to the time of trial on an appeal. In her absence the judgment was affirmed by the court. It appeared that she had not given her address to her counsel, and he, not knowing her residence, was unable to notify her. On a rule to open the judgment, *held*, that the attorney was not responsible for the consequences.—Harris v. Govett, 3 Wkly. Notes Cas. 560.

[o] (Pa. 1888) Under the act of May 23, 1887, a judgment for want of an affidavit of defense on an appeal from the judgment of a justice of the peace cannot be granted.—Marshall v. Neiman, 6 Pa. Co. Ct. R. 176.

[p] (Pa. 1893) Act May 25, 1887, relative to judgment for want of affidavit of defense, does not apply to a case appealed from a justice of the peace.—Craig v. Tamaqua Knitting Co. (Com. Pl.) 13 Pa. Co. Ct. R. 444.

[q] (Tex. 1889) On an appeal by the plaintiff from a justice of the peace, no judgment by default is authorized unless the defendant has entered an appearance, or been served with notice of the appeal, under Sayles' Civ. St. art. 1639, providing that no judgment by default shall be rendered against an appellee who has not entered an appearance unless notice of such appeal has been served on the appellee, his agent or attorney, at least five days before the first day of the term.—Parks v. Igo (App.) 14 S. W. 1069.

[r] (Tex. 1895) Under Sayles' Civ. St. art. 1639, providing that on appeal from a justice's court, if the appellee fails to appear on appearance day, the case shall be continued unless it be shown that notice of appeal was given, proof of service of the notice of appeal upon the appellee is a prerequisite to a default judgment against him.—Wren v. Kirsey (Civ. App.) 30 S. W. 252.

§ 724. Amount of judgment.

[a, b] On appeal from the judgment of a justice of the peace, the judgment in the appellate court must not exceed an amount within his jurisdiction.

—(Mo. 1871) Shields v. Stillman, 48 Mo. 82.

CONTRA, see

(N. Y. 1822) Palmer v. Wylie, 19 Johns. 276.

[c] An appeal from a justice's judgment in ordinary cases is triable de novo on the facts, and the recovery, even when the appeal is by the defendant, may be larger than the amount of the justice's judgment.

—(Ala. 1854) Waring v. Gilbert, 25 Ala. 295; (1860) Brooks v. Carter, 36 Ala. 682.

CONTRA, see

(Pa. 1881) Linton v. Vogel, 98 Pa. 457.

[d] Plaintiff obtained judgment in a justice's court for $20, from which defendant appealed to the circuit court, where he filed a set-off in an amount exceeding the jurisdiction of the justice after deducting plaintiff's demand. *Held*

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error for the circuit court to give affirmative judgment for defendant in such amount, its jurisdiction in the case being measured by that of the justice's court.

—(Miss. 1888) McLeod v. Gray, 4 South. 544;

(Pa. 1817) Laird v. McConachy, 3 Serg. & R. 290;

(Tenn. 1858) Gray v. Jones, 38 Tenn. (1 Head) 542.

[e] Where an action on a note is appealed from the justice's court to the circuit court, the judgment rendered in the latter court may include interest accruing since the judgment in the justice's court.

—(Ill. 1878) Guild v. Hall, 91 Ill. 223;

(Ind. 1873) Bargis v. Farrar, 45 Ind. 41;

(Pa. 1868) Trego v. Lewis, 58 Pa. (8 P. F. Smith) 463; (1881) Linton v. Vogel, 98 Pa. 457;

(Tenn. 1872) Patterson v. Sheffield, 54 Tenn. (7 Heisk.) 373.

[f] (Ala. 1843) A justice's jurisdiction being limited to $50, recovery on appeal should not exceed that sum, with interest from the rendition of the primary judgment; but, where the judgment on appeal is consequent on a verdict, it will not be reversed on error because rendered for a greater sum, with interest from the time stated. It should be set aside or corrected below.—Pruitt v. Stuart, 5 Ala. 112.

[g] (Ala. 1846) On appeal from a justice of the peace the same rules will control which govern causes in justices' courts, and judgment cannot be rendered in the appellate court for a set-off which exceeds $50, against the consent of the plaintiff.—Smith v. Fleming, 9 Ala. 768.

[h] (Ala. 1846) But if the plaintiff does not require the court thus to limit its judgment, where the jury certifies a sum greater than $50, he will, upon error, be presumed to have assented to the utmost exercise of the court's jurisdiction.—Smith v. Fleming, 9 Ala. 768.

[i] (Ala. 1872) Where, on appeal to the circuit court from the justice's court, the proof shows a larger sum due the plaintiff than is claimed in his complaint, and the defendant proves a set-off less than the amount of plaintiff's claim, the measure of recovery is the sum left after deducting the amount of the set-off from the amount claimed, and not from the greater amount proved to be due the plaintiff.—Long v. Bakefield, 48 Ala. 608.

[j] (Ala. 1892) An appellant from a judgment of a justice's court cannot complain that the circuit court rendered judgment against him in an amount exceeding the penalty of the appeal bond, where such judgment is authorized by the complaint, since the penalty in the bond is intended to limit the recovery against the sureties alone.—Casey v. Coker, 11 South. 742.

[k, l] (Colo. 1887) Plaintiffs, in an action of replevin before a justice of the peace, recovered judgment for $265. Defendant appealed to the county court, where a verdict was rendered for plaintiffs for $365, an amount in excess of the justice's jurisdiction. Plaintiff did not offer to remit the excess. *Held*, that the court should have dismissed the action.—Thornily v. Pierce, 10 Colo. 250, 15 Pac. 335.

[m] (Colo. 1893) Where, in a suit before a justice, the amount of the claim is indorsed on the summons by the justice, as provided by Gen. St. 1883, § 1938, the county court on appeal cannot enter judgment in excess of such amount.—Meyer v. Helland, 3 Colo. App. 536, 34 Pac. 482.

[n] (Ga. 1885) Where three suits in a justice's court, two of which are on notes for $100 each and 10 per cent. attorney's fees, the third being for $75 and 10 per cent. attorney's fees, are consolidated and tried together on appeal to the superior court, and a verdict rendered for plaintiff for the full amount of the three notes, a motion in arrest of judgment is properly granted as to the two larger notes and refused as to the smaller.—Searcy v. Tillman, 75 Ga. 504.

[o] (Ill.) On appeal from a judgment of a justice of the peace, the circuit court should give judgment for the amount that may be due, although that amount may exceed the jurisdiction of a justice, provided the justice had jurisdiction at the time of the commencement of the suit.—(1834) Tindall v. Meeker, 2 Ill. (1 Scam.) 137; (1835) Mitcheltree v. Sparks, Id. 198.

[p] (Ill. 1851) On appeal to the circuit court from the judgment of a justice, the jury found a verdict for the plaintiff exceeding $100. The plaintiff offered to remit and reduce the verdict to that sum. *Held*, that the circuit court was not bound to enter a judgment for the $100, and that the plaintiff was not entitled to a judgment. The proper practice in such case would be for plaintiff to move for a new trial.—People v. Skinner, 13 Ill. (3 Peck) 287, 54 Am. Dec. 432.

[q] (Ill. 1871) In a suit upon an account before a justice of the peace, the plaintiff recovered a judgment for the full amount indorsed on the summons. The defendant appealed to the circuit court, where the plaintiff recovered a judgment for the full amount of his claim with the addition of interest thereon and 10 per cent. damages for the delay in taking the appeal. *Held*, the fact that the judgment exceeded the amount indorsed on the summons by the amount allowed for interest and damages did not vitiate it.—Welch v. Karstens, 60 Ill. 117.

[r] (Ill. 1874) On appeal to the circuit court from a justice's court, recovery cannot exceed the amount of the demand indorsed on the summons in the justice's court.—Peoria & R. I. R. Co. v. McClenahan, 74 Ill. 435.

[s] (Ill. 1889) On an appeal from a justice's decision, the nature of the action is determined, in the court to which the appeal is taken, by the evidence introduced at the trial, without any reference to what the action may have been called in the justice's court; but, if the case is tort, the recovery is limited to the amount of the justice's jurisdiction.—Steele v. Hill, 35 Ill. App. 211.

[t] (Ill. 1893) On appeal from a justice of the peace in an action of replevin, the circuit court may render judgment for damages in excess of the jurisdictional limit of justices, where such excess accrued after the justice rendered his judgment, since, where the justice had jurisdiction in the first place, facts subsequently arising cannot affect that jurisdiction.—Alley v. McCabe, 35 N. E. 615, 147 Ill. 410, affirming (1892) 46 Ill. App. 368.

[u] (Ind. 1878) A plaintiff cannot recover, upon an appeal from the decision of a justice of the peace, more than the amount over which the justice had jurisdiction, and where a plaintiff who had recovered a verdict on appeal for a larger amount than that over which the justice had jurisdiction remitted the excess, and judgment was given for him for the balance, it was *held* that the verdict did not oust the jurisdiction, and the remission and judgment were proper.—Louisville, N. A. & C. R. Co. v. Breckenridge, 64 Ind. 113.

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[uu] (Kan. 1892) On appeal by defendant from a judgment of a justice of the peace, where the bill of particulars on which the case was tried before the justice, and on which it is tried de novo in the district court, only claims $20 as a reasonable attorney's fee, it is error for the district court to give judgment for a larger attorney's fee.—St. Louis & S. F. Ry. Co. v. Curtis, 48 Kan. 179, 29 Pac. 146; Same v. McMullen, 48 Kan. 281, 29 Pac. 147.

[uuu] (Md. 1878) On an appeal from a justice of the peace the defendant may recover an amount beyond the justice's jurisdiction.—Zitzer v. Jones, 48 Md. 115.

[v] (Minn. 1858) Where, on a trial in the district court of a case appealed from a justice's court, the verdict is for a sum greater than the amount laid in the declaration before the justice, a judgment cannot be entered thereon without a remittitur of the excess.—Elfelt v. Smith, 1 Minn. 125 (Gil. 101).

[vv] (Mo. 1868) Where two suits before a justice of the peace were erroneously consolidated so as to make the amount claimed more than the limit of the justice's jurisdiction, but judgment was rendered for the plaintiff for a sum within such jurisdiction, it was *held* to be error, on appeal by the defendant, to enter judgment for more than the judgment below.—Bridle v. Grau, 42 Mo. 359.

[w] (Pa.) Nothing can be recovered on an appeal which could not be recovered before a justice, except the intermediate interest.—(1807) Moore v. Wait, 1 Bin. 219; (1810) Owen v. Shelhamer, 3 Bin. 45; (1823) Wright v. Guy, 10 Serg. & R. 227.

[ww] (Pa. 1814) Where the judgment of a justice is for a sum within his jurisdiction, and, on appeal to the common pleas, judgment is given for a sum above his jurisdiction, the judgment will not be arrested, unless it appears that the cause of action was different.—McEntire v. McElduff, 1 Serg. & R. 19.

[x] (Pa. 1846) On an appeal from the judgment of a justice of the peace in an action of trover, neither party is bound by the damages stated on the docket of the justice. They are only confined to the same cause of action.—Millar v. Criswell, 3 Pa. (3 Barr) 449.

[xx] (Pa. 1849) Where an action was brought before a justice, which was within his jurisdiction, and upon appeal a declaration was filed for a sum beyond such jurisdiction, and a rule of reference was entered into, and an award made for a sum within the justice's jurisdiction, it was *held* that the judgment was not erroneous.—Hoffman v. Dawson, 11 Pa. (1 Jones) 280.

[y] (Pa. 1867) On the trial of an appeal from the judgment of a justice, plaintiff's possible recovery, in the absence of explanatory evidence, is limited by the extent of its claim before the justice.—Kurr v. Brobst, 2 Woodw. Dec. 187.

[yy] (Tenn. 1868) In cases of appeals from a justice of the peace to the circuit court, the jurisdiction of the circuit court is limited to the jurisdiction of the justice, and if the justice has no jurisdiction to render a judgment for more than a certain sum, on the matter of a set-off, the circuit court has no power to render judgment for a greater amount, and the fact that the cause was heard de novo in the circuit court, and that the plea of set-off entered in that court was not relied on in the justice's court, makes no difference.—Crow v. Cunningham, 45 Tenn. (5 Cold.) 255.

[z] (Utah, 1895) On appeal from a justice court the district court may allow interest on the sum claimed from the time the suit was brought, though the judgment, on account of such allowance, exceeds the amount for which the justice court could have rendered judgment.—McCormick Harvesting Mach. Co. v. Marchant, 11 Utah, 68, 39 Pac. 483.

[zz] (Wis. 1859) Where, on appeal, the judgment is for an amount exceeding the jurisdiction of the justice before whom the suit was originally brought, it must be reversed, unless the plaintiff will remit the excess and pay the costs of the defendant's appeal.—Dunbar v. Bittle, 7 Wis. 143.

§ 725. Setting aside judgment and new trial.

Payment of costs as requisite for setting aside dismissal of appeal, see ante, § 646.

[a] (Cal. 1887) Under Code Civ. Proc. § 980, which defines the powers of the superior court on appeal from a justice of the peace, the superior court, after a nonsuit in the trial of an appeal from a justice's court, can grant a new trial.—Massman v. Superior Court, 71 Cal. 582, 12 Pac. 685.

[aa] (Ill. 1867) In an action to recover for services in herding cattle, it appeared, on the trial in the district court on appeal from a justice's court, that on their being returned in the fall 3 head of the cattle were missing; that defendant then claimed but 55, which were returned, and plaintiff claimed that there were but 55 in all, and he offered to return another to defendant, who declined to receive it, as he believed it was not his; and that on the next day he concluded it was his, but when they searched for it in the herd it could not be found. Defendant claimed the value of the missing cattle should be allowed as a set-off, and that he should recover the balance above a sum sufficient to satisfy plaintiff's account. *Held*, that where the evidence satisfactorily showed that plaintiff received 57 head of cattle, and actually returned but 54, and there was no evidence from which it could reasonably be inferred that the missing cattle were lost by reason of defendant's negligence, a verdict in favor of plaintiff should be set aside as manifestly against the evidence.—Ray v. Bullock, 46 Ill. 64.

[b] (Ill. 1895) Where an attorney for the plaintiff, in an appeal from a justice of the peace, served a notice on the defendant in person, no attorney having appeared, and he threw the notice aside without examination, or giving his actual attorney any notice of the matter, afterwards, upon his motion to set aside the judgment entered, it was *held* that he was guilty of inexcusable negligence and inattention.—Oliver v. Gerstle, 58 Ill. App. 615.

[c] (La. 1890) Since Code Prac. art. 1129, declares that appeals from a justice of the peace to the district court are "to be tried in the appellate court de novo," the latter has the same authority to amend a judgment which it has affirmed on such an appeal as it has to amend a judgment rendered by it in the first instance; and certiorari does not lie to it on account of such amendment.—State ex rel. Ducote v. Coco, 42 La. Ann. 408, 7 South. 620.

[d] (Miss. 1878) The fact that a judgment was rendered by a justice of the peace in the absence of the defendant, caused by the plaintiff's having induced him to believe that the action would be dismissed, is ground for granting a new trial.—Barkley v. Hanlan, 55 Miss. 606.

[e] (Mo. 1890) Where plaintiff's judgment before a justice of the peace is affirmed on appeal for failure of the defendant to give notice of appeal, and the court sets aside such affirmance and reinstates the appeal, an objection thereto is waived by proceeding to trial.

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Plaintiff should refuse to proceed to preserve his exception.—Edwards v. Albrecht, 42 Mo. App. 497.

[f] (Mo. 1894) An action begun before a justice of the peace was dismissed in the circuit court for failure of the plaintiff to appear. Afterwards, in defendant's absence, and without notice to him, the court, at plaintiff's request, set aside the order of dismissal, and rendered judgment for costs against the defendant. In a proceeding to enjoin the enforcement of the latter judgment the evidence tended to show that the defendant was liable for such costs. *Held*, that no ground for equitable interference was shown.—Davis v. Wade, 58 Mo. App. 641.

[ff] (Mont. 1893) Where a verdict is rendered in favor of plaintiff in justice's court, and also on appeal in the district court, for a balance due on an account, and there is ample evidence to support the verdicts, it is an abuse of discretion in the trial court to set aside the latter verdict on the ground of the insufficiency of the evidence.—Falk v. Brown, 13 Mont. 125, 32 Pac. 492.

[g] (N. J. 1822) The common pleas have a right to set aside verdicts, and grant new trials, as well in cases of appeal as in other cases.—Squere v. Gale, 6 N. J. Law (1 Halst.) 157.

[h] (N. J. 1859) The appellate powers of the court of common pleas are fixed by statute, and the have no power to grant a new trial or reinstate a cause which they have once disposed of, by judgment on the merits or by nonsuit.—Schuyler v. Mills, 28 N. J. Law (4 Dutch.) 137.

[i] (N. C. 1877) Defendant appealed from the judgment of a justice's court to the superior court, where judgment was rendered against him; he making no defense to the action. More than a year afterwards, the court ordered the judgment set aside, and the case reopened, on the ground that the defendant had no notice of the judgment. *Held* error.—McDaniel v. Watkins, 76 N. C. 399.

[j] (Ohio, 1869) Where the defendant, on an appeal in an action before a justice of the peace for surgical services, set up a counterclaim for damages in an amount beyond the justice's jurisdiction, on which the plaintiff took issue, resulting in a judgment for the defendant on the counterclaim, *held*, that the incidents of a case of original jurisdiction in the court of common pleas followed, including the right of the plaintiffs to a second trial.—Wood v. O'Ferrall, 19 Ohio St. 427.

[k] (Pa. 1881) Where the attorney for the defendant requested the clerk to enter an appearance in an ejectment action, and it did not go upon the continuance docket before judgment and execution, the court will not reopen the judgment, especially after execution, because, even if an affidavit and a recognizance on defendant's behalf ousted an alderman's jurisdiction, defendant should have appeared at the next term of the common pleas and pleaded.—Alexander v. Jones, 13 Lanc. Bar, 43.

[l] (Pa. 1888) Where, under a rule of court on appeal from an alderman, judgment of non pros. was entered for failure to file a declaration and statement within proper time after appeal filed, and it appears that the failure arose through no default of plaintiff, but from neglect of his counsel, due to sickness, the judgment will be stricken off, but not if the default arose from mere neglect of counsel.—Sander v. Beilstine, 6 Pa. Co. Ct. R. 579.

[m] (R. I. 1888) An appeal to the common pleas from a justice's court was dismissed because the appeal bond was not duly executed. On defendant's petition for a new trial, *held*, that a new trial cannot be granted in the common pleas. Pub. St. c. 221, § 2, authorizes the supreme court to grant a new trial in a suit which has been tried or decided in the court of common pleas within one year, and this case never was tried or decided in that court.—Brayton v. Dexter, 16 R. I. 70, 12 Atl. 132.

(b) AFFIRMANCE, MODIFICATION, OR REVERSAL OF JUDGMENT OF JUSTICE.

DECISION IN GENERAL, § 726.
AFFIRMANCE, § 727.
—— GROUNDS FOR AFFIRMANCE, § 728.
MODIFICATION, § 729.
REVERSAL, § 730.
—— GROUNDS FOR REVERSAL, § 731.
—— PROCEEDINGS ON REVERSAL, § 732.
MODIFICATION OF JUDGMENT ON APPEAL AND REHEARING, § 733.
REMAND AND NEW TRIAL BEFORE JUSTICE, § 734.

§ 726. Decision in general.

[a] (Iowa, 1885) Where a justice of the peace rendered judgment for plaintiff for the amount claimed on a verdict which stated no amount, the judgment should be set aside on writ of error, and the cause remanded, and it is error to render judgment against defendant for costs.—Bartle v. Planee, 68 Iowa, 227, 26 N. W. 88.

[b] (Mich. 1878) An appeal from a justice was dismissed for being taken too late. A special appeal was then allowed on a showing that the judgment had been fraudulently antedated; and, as it appeared on this appeal that the judgment was void for being entered more than four days after the hearing, a perpetual stay of proceedings was granted.—Hall v. Howard, 39 Mich. 219.

[c] (Nev. 1884) District courts have no power to directly, and without trial, reverse or affirm judgments brought by appeal from justice's courts. Such cases must be tried anew.—State v. Fifth District Court, 18 Nev. 286, 3 Pac. 417.

[d] (N. J.) The judgment on an appeal should be specific, both as to damages and costs. Not only a reversal or affirmance is required, but such judgment as the justice ought to have given.—(1819) Hendricks v. Craig, 5 N. J. Law (2 Southard) 567; (1830) Jones v. Pitman, 12 N. J. Law (7 Halst.) 93; (1831) Woodruff v. Badgley, Id. 367.

[e] (N. Y. 1869) A judgment rendered in favor of plaintiff upon a trial in a county court, of an action coming there upon appeal from a justice's court, involving a disputed question as to an agreement by the defendant to allow plaintiff to saw a certain quantity of wood on the farm of the defendant for about two months after the lease from the defendant to the plaintiff of said premises was surrendered and given up, was sustained, as a conclusive determination of the facts, notwithstanding the objection taken by defendant on trial in the justice's court that plaintiff, by his own showing, had brought title to land in question.—Balja v. Rawley, 37 How. Prac. 120.

[f] (N. Y. 1896) Under Code Civ. Proc. § 3063, requiring an appellate court, on appeal from a justice's judgment, to render judgment according to the justice of the case, without

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regard to technical errors or defects which do not affect the merits, an appellate court should enter a single judgment for plaintiff, less costs accruing to defendant after his offer of judgment, where a justice entered one judgment for plaintiff for damages and for costs accruing prior to the offer, and a separate one for defendants for costs accruing after such offer.—Southard v. Becker (Co. Ct.) 15 Misc. Rep. 436, 37 N. Y. Supp. 927.

[g] (Ohio, 1892) The common pleas cannot, on finding that a judgment of a magistrate was not appealable, enter judgment against plaintiff in error for the amount of the magistrate's judgment, and costs on appeal. It can only dismiss the appeal.—Stoffregen v. Biederman, 6 Ohio Cir. Ct. R. 55.

[h] (S. D. 1895) On appeal from justice to county court on questions of law only, the appellate court may "set aside, affirm, or modify" the judgment appealed from, or may order a new trial in the justice court (Comp. Laws, § 6136), but cannot set aside the judgment, and render a new judgment on the merits against the opposite party.—Coughran v. Wilson, 7 S. D. 155, 63 N. W. 774.

[i] (Wis. 1871) Under Rev. St. 1855, on appeal from a justice's court, where there is no trial de novo in the appellate court, it can only affirm or reverse the judgment of the justice, in whole or in part, and cannot render judgment upon the merits.—Mock v. Erdmann, 28 Wis. 113.

[j] (Wis. 1882) Under Rev. St. § 3769, relating to appeals from justices of the peace, which provides that "in giving judgment the appellate court may affirm or reverse the judgment," the judgment of that court must be one of affirmance or reversal, and not an ordinary judgment for one of the parties.—Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62.

[k] (Wis. 1894) The failure of the circuit court to decide an appeal from justice's court at the term at which it is heard does not deprive the circuit court of jurisdiction.—Silvernail v. Rust, 88 Wis. 458, 60 N. W. 787.

§ 727. Affirmance.

Affirmance of judgment of justice on dismissal of appeal, see ante, § 644.

Liability of surety on appeal bond on affirmance of judgment, see post, § 740.

[a] (Cal. 1892) Under Code Civ. Proc. § 980, providing that, on appeal from a justice's court heard upon a statement of the case, the superior court "may review all orders affecting the judgment appealed from, and may set aside or confirm or modify any or all proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial," the superior court, on appeal by plaintiff from a judgment of a justice for defendant setting aside a judgment previously rendered for plaintiff, and dismissing the action, cannot reverse the judgment appealed from, and affirm the judgment set aside, but can only reverse said judgment and order a new trial, since the last judgment is the only one appealed from, and the former judgment does not affect it, and for the further reason that, when the judgment was set aside, it ceased to exist, and there is no such judgment to affirm.—Sherer v. Lassen County Superior Court, 94 Cal. 354, 29 Pac. 716.

[b] (Iowa, 1856) An entry of "judgment below affirmed" is "a final judgment," which may be rendered on appeal, wanting the appropriate, though not necessary, form.—Cox v. Graham, 6 Iowa (3 Clarke) 347.

[c] (Iowa, 1860) An affirmance of the justice's judgment at a special term of the district court, and before the next regular term, is an irregularity for which the judgment of the district court will be reversed.—Fisher v. Harber, 10 Iowa, 296.

[d] (Mass. 1875) Under Gen. St. c. 112, § 17, and Id. c. 114, § 15, regulating the practice on appeals to the superior court, a judgment of affirmance, rendered at the second term after the defendant's appeal, is not erroneous for want of a separate petition for leave to enter the complaint, or of notice to the appellant, or of a recital that the omission to enter the complaint at the first term was by accident or mistake.—Noyes v. Sherburne, 117 Mass. 279.

[e] (Mass. 1875) Where the record of an appeal from a justice of the peace shows the appeal to have been taken by the town, and not by a person unauthorized to represent it, the appeal is properly before the court, and a judgment of affirmance will not be disturbed.—Inhabitants of Leyden v. Sweeney, 118 Mass. 418.

[f] (Mo. 1838) On appeal from a justice of the peace, it is error for the circuit court to affirm simply. A new judgment should be entered.—Cates v. Akerd, 5 Mo. 124.

[g] (Mo. 1890) Rev. St. 1879, § 1000, provides that, in cases of appeal from the judgment of a justice, if the appellant fails to prosecute the appeal according to law, the judgment of the justice shall be affirmed. *Held*, upon appeal from a judgment of a justice in an action of replevin, that the court is not bound to affirm the judgment as entered by the justice, but may enter judgment de novo in the alternative form, as prescribed by statute, after hearing evidence as to the value of the property.—Munley v. King, 40 Mo. App. 531.

[gg] (N. Y. 1891) Code Civ. Proc. § 1319 (in chapter 12, the title of which relates only to appeals to superior city courts, the supreme court, and the court of appeals), providing that, where a judgment from which an appeal has been taken from one court to another is wholly or partly affirmed, it must be enforced by the court in which it was rendered, to the extent permitted by the determination of the appellate court, as if the appeal therefrom had not been taken, does not apply to appeals from a justice's court to the county court.—Ryan v. Parr, 61 Hun, 624, 16 N. Y. Supp. 829.

[h] (Tex. 1856) An action was instituted before a justice of the peace, and judgment rendered, from which an appeal was taken to the district court. In the latter, judgment was rendered, "that the judgment of the court below be affirmed," without stating the amount. *Held*, that a sale under it was valid.—Luter v. Rose, 16 Tex. 52.

[i] (Vt. 1859) In an appeal by defendant from the judgment of a justice of the peace, who has adjudged that the cause of action arose from the willful or malicious act or neglect of the defendant, and that the defendant ought to be confined in close jail, if the defendant neglect to enter his appeal in the county court, and the plaintiff enter the case for affirmance, and the judgment is affirmed, the adjudication of the justice as to the origin of the cause of action is also affirmed, and it is the duty of the county court to issue a certified execution.—Reynolds v. Provan, 31 Vt. 637.

[j] (Wis. 1887) A judgment by the circuit court on appeal from a judgment in a justice's court, not exceeding $15, ordering that plaintiff recover of defendant the amount of the judgment in the justice's court, viz., $14.87, with interest thereon from the rendition of said

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judgment, amounting to $3.50, making, together, $18.37; that he also recover his costs, —is a mere affirmance of the judgment below, and cannot be regarded as a new judgment, in contravention of Rev. St. §§ 3767, 3769, providing that on such appeals from judgments not exceeding $15 there shall be no new trial, but the judgment of the justice shall be affirmed or reversed in whole or in part.—Wold v. Ordway, 68 Wis. 176, 31 N. W. 759.

[k] (Wis. 1892) Rev. St. § 3768, provides, in effect, that an appeal from a justice's court "shall be tried in the appellate court as actions originally brought there," whenever "plaintiff appeals from a judgment against him, * * * if, at the time of appealing, he shall make an affidavit that he has a valid claim, as he verily believes, against the defendant, as set forth in his complaint, exceeding the sum of fifteen dollars." *Held*, that where plaintiff, in an action for $60 in justice's court, refused to give security for costs, and judgment was rendered against him for costs, and the case dismissed, it was error for the superior court, on appeal thereto and the filing of the required affidavit by plaintiff, to affirm the judgment of the justice on the ground that he had not abused his discretion, since plaintiff was entitled to have the case tried in the superior court as if originally brought there.—Steinam v. Schulte, 88 Wis. 567, 53 N. W. 844.

§ 728. —— Grounds for affirmance.

Failure to enter appeal as grounds for affirmance of judgment, see ante, § 592.

—— *to file transcript on appeal as ground for affirmance of judgment, see* ante, § 621.

—— *to give notice of appeal as ground for affirmance, see* ante, § 585.

—— *to make objection below as ground for affirmance of judgment, see* ante, § 508.

—— *to pay costs as grounds for affirmance of judgment, see* ante, §§ 543–549.

—— *to pay costs on appeal as ground for affirmance, see* ante, § 545.

[a] (Ariz. 1873) Where the only error disclosed by the justice's return is a defect in the issuance and service of the summons, which is cured by a stipulation that the summons was properly served, and there is no special assignment of errors, the district court properly affirmed the judgment, without trying the case de novo.—Irvine v. Lopez, 1 Ariz. 81, 25 Pac. 799.

[b] (Ill. 1894) Rev. St. c. 79, § 71, providing that on appeals from justice court the circuit court may, on failure of appellant to prosecute the appeal, at the election of appellee, affirm the judgment, with 10 per cent. damages, without a trial de novo, is constitutional.—Fergus v. Haupt, 54 Ill. App. 190.

[c] (Iowa) On the default of the appellant, on appeal from the judgment of a justice of the peace, the judgment may be affirmed.—(1849) Wright v. Clark, 2 G. Greene, 86; (1849) Taylor v. Barber, 2 G. Greene, 350; (1859) Atkins v. McCready, 8 Iowa (8 Clarke) 214.

[d] (Iowa, 1874) A rule of the circuit court provided that in all appeals from inferior tribunals, if the appellant failed to docket his appeal and pay the docket fees by noon of the second day of the term at which the appeal was triable, the appellee might have the appeal docketed, and the judgment affirmed. It appeared that the appellee did not pay the docket fees and procure an affirmance until the ninth day of the term; the appellant and his attorneys being in court during the time, and might have prevented the affirmance by the exercise of reasonable diligence. *Held*, that a motion to set aside the affirmance was properly overruled.—Heald v. House, 39 Iowa, 198.

[e] (Iowa, 1880) A party to an action of tort, in default in a justice's court, may appeal, and without filing any pleading in the circuit court may appear and demand that testimony be introduced so that he may cross-examine the witnesses; but, where he also makes default in the circuit court, judgment may be affirmed without again introducing evidence.—Harty v. D. M. & M. R. Co., 54 Iowa, 327, 6 N. W. 545; Berry v. Same, Id.

[f] (Mass. 1875) Where an appeal taken from a justice's judgment, in an action against a town, is not entered or prosecuted in the superior court, the judgment appealed from is properly affirmed, under Gen. St. c. 120, § 27, upon complaint of the adverse party.—Inhabitants of Leyden v. Sweeney, 118 Mass. 418.

[g] (Mo.) When an appeal from a judgment of a justice of the peace or county court is not prosecuted, the judgment will be affirmed.—(1847) Martin v. White, 11 Mo. 214; (1853) Starr v. Stewart, 18 Mo. 410; (1853) State v. Thevenin, 19 Mo. 237; (1854) Milligan v. Dunn, 19 Mo. 643.

[h] (Mo. 1865) On an appeal from a justice of the peace, where both parties appeared at the trial, the appellate court must try the case upon the merits; and the judgment cannot be affirmed upon motion, unless the appellant fails to prosecute his appeal.—McDowell v. Strong, 35 Mo. 505.

[i] (Mo. 1882) Where an appellant from the judgment of a justice gave, and appellee accepted, notice to take depositions, and the depositions were taken and filed before the return term, and the appellee issued subpœnas for witnesses on the third day of the return term, judgment cannot be affirmed for failure to prosecute the appeal.—Berry v. Union Trust Co., 75 Mo. 430.

[ii] (Mo. 1887) If the appellant refuses to prosecute the appeal, after making an unsuccessful motion to dismiss the same, the circuit court, to which an appeal is taken from a decision of a justice of the peace, may, under the Missouri statutes regulating proceedings after appeal taken, render judgment of affirmance at the first term of said court. Rev. St. 1879, § 3057, providing that, if notice is not given at least 10 days before the second term of the appellate court, the judgment may be affirmed or appeal dismissed, on appellee's motion, has no application to such a case.—Holloman v. St. Louis, I. M. & S. Ry. Co., 92 Mo. 284, 5 S. W. 1.

[j] (Mo. 1887) Whenever the appeal is reached for trial, and the appellant fails to prosecute the same, the appellee is entitled to a judgment of affirmance, whether the appeal stood for trial at the demand of either party, or at the option of the appellee only, under Rev. St. § 3056, relating to appeals from justices of the peace.—Holloman v. St. Louis, I. M. & S. Ry. Co., 92 Mo. 284, 5 S. W. 1.

[k] (Mo. 1887) Where defendant's motion that plaintiff shall be compelled to elect on which trespass he will proceed is overruled, and defendant stands on his motion, the court cannot affirm the justice's judgment appealed from without hearing the evidence. Defendant's action is not an entire failure to prosecute his appeal.—Ray v. St. Louis, I. M. & S. Ry. Co., 25 Mo. App. 104.

[l] (Mo. 1892) Under Rev. St. § 6342, requiring service of notice of appeal at least 10 days before the first day of the term when the cause is to be determined, and section 6343, providing that no appeal shall be dismissed for want of

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said notice, but when appellee appears and demands trial, and appellant fails to appear, the judgment shall be affirmed on motion, where notice is not served in time, but appellant appears and obtains a continuance, appellee is not entitled to an affirmance. Section 2930 providing that, when appeals from justices shall not be prosecuted according to law, judgment shall be affirmed, with costs, is a rule of costs, and does not enlarge appellee's rights.—Meitz v. Koetter, 51 Mo. App. 370.

[m] (Mo. 1893) Where the appeal from the justice's judgment is taken on the day of trial, which is more than 10 days before the next succeeding term of the circuit court, and the appellant fails to prosecute his appeal, the judgment should be affirmed.—Horn v. Excelsior Springs Co., 52 Mo. App. 548.

[n] (Neb. 1888) Under Civ. Code, § 1011, providing that on appeal from justices' courts, where appellant fails to deliver to the clerk of the district court on or before the second day of the term following the rendition of the judgment a transcript of the proceedings, appellee may, at the same term, file such transcript, and on motion have the appeal docketed and judgment entered as in the justice's court, such filing and motion need not be made at the same term.—Wilson v. Wilson, 23 Neb. 455, 36 N. W. 661.

[o] (Vt. 1832) The submission of a case to arbitrators after an appeal from the judgment of a justice of the peace therein does not deprive plaintiff of his right to enter his complaint for affirmance, unless there is an award made before court, or unless the terms of the submission allow a time in which to make an award, which extends beyond the term of court to which the appeal is taken.—Hayes v. Blanchard, 4 Vt. 210.

[p] (Vt. 1874) Acts 1866, No. 37, relating to appeals from judgments of justices of the peace, does not abridge the right of the appellee, secured by Gen. St. c. 31, § 64, to enter the appeal for affirmance.—Ide v. Story, 47 Vt. 62.

[q] (Wis. 1850) The return of a justice, on an appeal from his judgment, must be in conformity with the statute, and show the proceedings had before him, in order to confer jurisdiction upon the appellate court to render a judgment of affirmance, under the statute, for want of prosecution.—Hale v. Thayer, 2 Chand. 68, 2 Pin. 410.

§ 729. Modification.

[a] (Ala. 1886) An entry of judgment by default by a justice against one or more defendants not served with process, and who did not appear by attorney or otherwise, is a clerical error, which the court will correct on the appeal of the other defendants, and at their costs.—Neff v. Edwards, 81 Ala. 246, 2 South. 88.

[b] (Ga. 1877) The answer of a garnishee admitted the possession of notes belonging to the defendant, but did not admit that he had any of defendant's money in his possession, and the justice's court awarded judgment against the defendant and the garnishee personally. *Held*, that the superior court should have decided the case finally by ordering the judgment against the defendant to stand, setting aside the personal judgment against the garnishee, and ordering the notes to be brought into the superior court, and proceedings to be had thereon, as directed in Code, § 3305.—Hallett v. Blain, 58 Ga. 142.

[c] (Ill. 1861) Judgment having been rendered in justice's court against two defendants, only one of whom had been brought into court, the defendant who was served appealed the case, but failed to prosecute his appeal. *Held*, that the circuit court might affirm the judgment as to him, and reverse it as to the other who has not been served.—Stephens v. Cross. 27 Ill. (17 Peck) 35.

[d] (Kan. 1875) In an action of replevin, tried by a justice of the peace, where it is difficult to determine from the record in whose favor the justice found, or intended to find, and where the justice rendered judgment in favor of the defendant for three dollars damages, and rendered judgment in favor of the plaintiff for costs, and did not render any judgment concerning the property in controversy, and the district court, on petition in error by defendant, reversed the judgment of the justice of the peace, and then rendered judgment in favor of said defendant for his costs both in the district court and the justice's court, *held*, that the judgment of the district court would not be disturbed on the application of the plaintiff.—Cartright v. Smith, 15 Kan. 224.

[e] (Kan. 1880) Where, in replevin, the justice modified the judgment in favor of the defendant, and the district court affirmed his action, even if such modification was erroneous, the defendant could not complain, as the district court had power to make the modification.—Starr v. Hinshaw, 23 Kan. 532.

[f] (Minn. 1869) Where, in replevin, a justice enters judgment for the value of the property taken, and not for the alternative value, the district court should, upon an appeal involving questions of law alone, under Gen. St. 1866, c. 65, § 107, as amended by Laws 1868, p. 135, providing that, in such case, the appeal shall "be tried in the district court upon the return of the justice," instead of reversing the judgment, modify it, so as to make it read in the alternative.—Kates v. Thomas, 14 Minn. 460 (Gil. 343).

[g] (Minn.) Gen. St. 1878, c. 65, § 117, provides that, on appeal to the district court from the judgment of a justice of the peace on questions of law alone, "the action shall be tried in the district court on the return of the justice." Chapter 66, § 214, declares that "a trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact." *Held*, that on an appeal from the judgment of a justice on questions of law alone the judgment may be modified by correcting errors of law appearing on the return, if the erroneous part of the judgment is separable from the rest.—(1880) Watson v. Ward, 27 Minn. 29, 6 N. W. 407; (1882) Closen v. Allen, 29 Minn. 86, 12 N. W. 146; (1893) Meister v. Russell, 53 Minn. 54, 54 N. W. 935.

[h] (N. Y. 1846) Where a justice of the peace renders judgment in favor of a defendant for a sum adjudged to be due him from the plaintiff, and for costs, in a case where the judgment should have been generally for the defendant with costs, the common pleas should reverse the erroneous part, and affirm the judgment as to the residue.—Kast v. Kathern, 3 Denio, 344.

[i] (N. Y. 1862) Where a recovery in a justice's court was composed of items of damages, and there was no dispute as to the evidence, and the justice, by mistake in adding the items, rendered judgment for too great a sum, the county court may, on appeal, reverse the judgment as to the excess, and affirm it as to the correct aggregate.—Fields v. Moul, 15 Abb. Prac. 6.

[j] (N. Y. 1862) A county court has authority on appeal, under the Code, to reverse in part and affirm in part a judgment of a justice's court for entire damages, where it clearly appears that there are two or more independent causes of action, and the judgment is right as

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to one and erroneous as to the others.—Staats v. Hudson River R. Co., 23 How. Prac. 463.

[k] (N. Y. 1864) A county court, on appeal from a justice of the peace, has authority, under Code, § 366, to modify the judgment, according to the justice of the case, without regard to technical errors.—Brownell v. Winnie, 29 N. Y. 400, 86 Am. Dec. 314.

[l] (N. Y. 1884) Where, in replevin before a justice, the affidavit and undertaking are insufficient, but proper personal service was had, and judgment for plaintiff was entered on the merits, the judgment will be modified by setting aside the writ of replevin, but affirming the judgment as to the value and disposition of the property.—Irr v. Schroeder, 6 Civ. Proc. R. 253.

[m] (N. Y. 1891) Under Code Civ. Proc. § 3063, providing that the county court "may affirm or reverse the judgment of the justice in whole or in part, and as to any or all of the parties, and for errors of law or of fact," the county court, on appeal from a justice in an action where an attachment was granted by the justice after personal service of process on defendant, but on an insufficient affidavit, may affirm the judgment on the merits, and at the same time declare the attachment invalid.—Bump v. Dehany, 59 Hun, 619, 12 N. Y. Supp. 901.

[n] (N. Y. 1891) On a trial before a justice of the peace plaintiffs presented a bill of items of goods sold to defendant, amounting to $103, with credits indorsed thereon of $47, leaving a balance of $56. Plaintiffs testified, without objection, to a sale of goods to the amount of the bill, and to the credits thereon indorsed, and the jury returned a verdict for the balance. Plaintiffs remitted $6, and took a judgment for $50. The bill contained credits of "1,734 hay," and "1,890 hay," with no value carried out, and for which defendant contended no allowance had been made by the judgment. *Held*, that defendant's remedy was by an appeal to the county court for a new trial, and on an appeal on questions of law was not entitled to have the judgment modified so as to give credit for the hay; there being no data from which the judgment could be modified.—Huested v. Bliss, 62 Hun, 619, 16 N. Y. Supp. 644.

[o] (N. Y. 1894) In an action in a justice's court by an assignee a verdict was rendered in favor of the assignor, and judgment was entered thereon. The record showed the assignee as plaintiff, and there was no change of parties. *Held*, that an order of the county court, on appeal taken by plaintiff, modifying the judgment so as to read in favor of plaintiff instead of the assignor, did not prejudice defendant, as plaintiff was entitled to such modification on appeal.—McAleer v. Warren, 77 Hun, 589, 28 N. Y. Supp. 1000.

[p] (Wis. 1872) Under the practice, there can be no partial affirmance or partial reversal of a justice's judgment for costs.—Detling v. Weber, 29 Wis. 559.

[q] (Wis. 1885) Rev. St. 1878, § 3772, providing that if a justice's judgment, or any part thereof, be collected, and the judgment be afterwards reversed, the appellate court shall order the amount collected to be restored, with interest, does not apply to a case where the appellate court simply cuts down the amount of the judgment.—Sutton v. Chapman, 64 Wis. 312, 25 N. W. 207.

§ 730. Reversal.

Necessity of transcript to enable a judgment by default to be set aside by appellate court, see ante, § 615.

Reversal of judgment of justice on dismissal of appeal, see ante, § 644.

—— *on a non pros. by plaintiff on appeal, see* ante, §§ 649–651.

Effect of judgment reversed on appeal, see "Judgment," vol. 30, c. 2624, § 1497 [i].

Release of part of justice's judgment to save a reversal as release of claim on new trial after reversal, see "Release," I.

[a] (Minn. 1875) Where the justice in garnishment proceedings gives the claimant full opportunity to establish his claim, and he omits to do so, and the justice discharges the garnishee, upon an appeal by the plaintiff on questions of law alone, the appellate court may, on reversing the judgment, render judgment on the disclosure against the garnishee, and the claimant will be bound by such judgment.—Donnelly v. O'Conner, 22 Minn. 309.

[b] (Minn.) Upon an appeal from the judgment of a justice of the peace in favor of plaintiff, on questions of law alone, a simple judgment of reversal has the effect of a dismissal of the action.—(1880) Terryll v. Bailey, 27 Minn. 304, 7 N. W. 261; (1889) Daley v. Mead, 40 Minn. 382, 42 N. W. 85.

[c] (Mo. 1836) Where a case is carried up to the circuit court from a justice's court, a trial should be had de novo, and it is error to reverse the judgment below and give judgment against the party recovering below.—Duncan v. Travis, 4 Mo. 369.

[d] (N. J. 1835) On appeal from the justice's court, if the error is of such a nature as not to prevent a fair trial in the appellate court, such new trial ought to be had; but if the error ought to have arrested or put an end to the action before the justice, such should be its operation in the court above.—Johnson v. Pennington, 15 N. J. Law (3 J. S. Green) 188.

[e] (N. Y. 1881) It is the duty of the county court to reverse a judgment of a justice's court, if erroneous, although for nominal damages only.—Countryman v. Lighthill, 24 Hun, 405.

[f] (N. Y. 1896) Where a judgment rendered by a justice of the peace in an action to recover chattels or their value was merely reversed on appeal to the county court, a judgment entered on the reversal to the effect that defendant was entitled to a return of the chattels, or their value if a return could not be had, is not in accordance with the decision of the county court, and such judgment, and an execution issued thereon, will be set aside.—Frost v. Frost (Co. Ct.) 16 Misc. Rep. 430, 39 N. Y. Supp. 856.

[g] (N. Y. 1896) On appeal from a judgment of a justice court, the appellate court may order a reversal, unless respondent consent to reduce the damages to a certain amount.—Powers v. Hanford, 7 App. Div. 343, 39 N. Y. Supp. 936.

[h] (Ohio, 1877) Under Code, § 532, as amended in 1870 (67 Ohio Laws, p. 115), regulating appeals from justices' judgments, the appellate court may reverse in toto, without modifying a judgment to conform it to the verdict of the jury.—Faucett v. Meeker, 31 Ohio St. 634.

§ 731. —— Grounds for reversal.

Defective transcript as ground for reversing judgment, see ante, § 624.

[a] (U. S. 1826) If the justice of the peace had not jurisdiction of the cause, his judgment may be reversed, on appeal, though the cause was tried before him by a jury.—Cross v.

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Blanford, Fed. Cas. No. 3,429 [2 Cranch, C. C. 677].

[aa] (Ala. 1842) Where a judgment is rendered by a justice of the peace for a sum not within his jurisdiction, which is removed by appeal to a higher tribunal, the appellate court should not, on motion, vacate the judgment, but put the defendant to plead to the jurisdiction.—Bentley v. Wright, 3 Ala. 607.

[b] (Ind. 1850) Where a cause was taken by appeal from a justice of the peace to the circuit court, and the transcript of the cause showed no cause of action, it was *held* that the judgment must be reversed for want thereof.—Kaufman v. Schuder, 2 Ind. (2 Cart.) 170.

[c] (Iowa, 1846) Where defendant obtains judgment against plaintiff before a justice on a set-off, it will not be reversed because the bill of set-off cannot be found among the justice's papers.—Neil v. Neil, 1 Morris, 491.

[d] (Kan. 1873) Where a bill of particulars does not show affirmatively and clearly that the action is for trespass upon real estate, it will not require or authorize a reversal of the judgment of the district court and the justice's court, upon the ground that the justice had no jurisdiction.—Kaub v. Mitchell, 12 Kan. 57.

[e] (Kan. 1887) A judgment rendered in an action tried before a justice of the peace with a jury cannot be reversed, under section 110, c. 81, Comp. Laws 1879, for errors occurring on the trial, upon proceedings in error to the district court, where the record does not contain the evidence introduced upon the trial, or on the hearing of the motion for a new trial.—Thompson v. Post, 36 Kan. 709, 14 Pac. 164.

[f] (Minn. 1851) Under Act Minn. T. "Concerning Justices," art. 14, § 11, providing that the district judge, on the justice's return before him, "shall proceed and give judgment in the cause as the right of the matter may appear, without regarding technical omissions, imperfections, or defects in the proceedings before the justice, which did not affect the merits, and may affirm or reverse, in whole or in part, and may issue executions, as upon other judgments rendered by him," the district judge can only affirm or reverse the justice's judgment, in whole or in part, and where, in replevin, the justice acquired no jurisdiction because of a failure to take the property on the writ, the district judge, on appeal, cannot render judgment upon the merits, but must reverse a judgment for plaintiff.—St. Martin v. Desnoyer, 1 Minn. 41 (Gil. 25), following Philips v. Geesland (1849) 1 Chand. 59, 2 Pin. 120.

[g] (N. J.) Courts of common pleas cannot reverse a justice's judgment for irregularity, but must retry the case on the merits.—(1807) Clark v. Fulse, 2 N. J. Law (1 Penning.) 263; (1851) Vannoy v. Givens, 23 N. J. Law (3 Zab.) 201.

[h] (N. J. 1810) Where a defendant had been surprised, at the trial in a justice's court, by the fraudulent conduct of the plaintiff, and judgment obtained against him, the court declared the proceedings null and void.—Lowring v. Ramsay, 3 N. J. Law (2 Penning.) 630.

[i] (N. J. 1835) A judgment of a justice will be reversed, if it appears by his return that the witnesses did not sustain the plaintiff's demand.—Crane v. Brundage, 14 N. J. Law (2 J. S. Green) 602.

[j] (N. Y. 1844) A judgment rendered by a justice's jury will be reversed, if the justice has instructed the jury wrongly, though the verdict be for the defendant in an action for a penalty.—Trustees of Village of Penn Yan v. Thorne, 6 Hill, 326.

[k] (N. Y. 1849) On appeal from a justice's court, the judgment may be reversed on default.—Whitney v. Bayard, 4 N. Y. Super. Ct. (2 Sandf.) 634.

[l] (N. Y. 1852) A judgment once rendered in a justice's court, where the defendant has appeared on the trial by an authorized person, cannot be opened on appeal, upon the ground that the defendant neglected to produce certain evidence, which would have been a bar to a suit.—Bunker v. Latson, 1 E. D. Smith, 410.

[m] (N. Y. 1852) Where the justice certified that his return contained the substance of the testimony and proceedings before him, but showed no legal evidence to support his judgment, the judgment must be reversed.—Lynch v. McBeth, 7 How. Prac. 113.

[n] (N. Y. 1860) Where the justice's charge to the jury is manifestly erroneous, especially if given at request of the successful party, it is error, for which the judgment should be reversed.—Pettit v. Ide, 12 Abb. Prac. 44.

[o] (N. Y. 1885) Though a justice of the peace had no jurisdiction of the subject-matter of an action, so as to render judgment thereon, on appeal from the judgment rendered by him, the appellate court can reverse on that ground.—Jaynes v. Jaynes, 8 Civ. Proc. R. 99.

[p] (Ohio, 1861) A void judgment rendered by a justice may be reversed on error.—Place v. Welch, 2 Ohio Dec. 542.

[q] (Ohio, 1896) A judgment of a justice against a married woman, on her note given for the improvement of her estate, and which therefore is only suable in equity, may be reversed on error, though the record does not show coverture, under Acts 1878, p. 303, § 2, providing that the judgment of the justice may be reversed, vacated, or modified by the court of common pleas.—Shreve v. Parrott, 4 Ohio Dec. 373, 2 Cleve. Law Rep. 52.

[r] (Pa. 1851) After an appeal from the judgment of an alderman, in a case for taking an illegal fee, a second count was inserted for taking another illegal fee, on which second count the jury found for the defendant. *Held*, that such joinder was no cause for reversing the judgment for the plaintiff on the first count.—Miller v. Lockwood, 17 Pa. (5 Harris) 248.

[s] (Pa. 1854) Where an alderman, in an action between a single plaintiff and defendant, enters judgment against plaintiff for two penalties, it is good cause for reversal, without more.—Wilson v. Walton, 1 Phila. 517.

[t] (Pa. 1865) A judgment of an alderman will be reversed where the record does not show that evidence necessary to sustain it was offered or admitted.—Connelly v. Arundel, 6 Phila. 49.

[u] (Pa. 1888) The transcript of the judgment of a justice set forth that the plaintiff claimed on a promissory note given for an insurance policy, stating the number, and giving a list of the assessments by date and amount, noted the appearance of the parties by their respective attorneys, and stated that plaintiff's attorney offered in evidence defendant's note and the certificate of assessment, under Act May 1, 1876, making the same prima facie evidence. Defendant's attorney filed defendant's affidavit under such act, and after hearing the parties, their proofs, and allegations, there was a judgment for plaintiff. *Held* that, as the record failed to show evidence to support the judgment, the proceedings must be reversed.—Pennsylvania Mut. Fire Ins. Co. v. Lenker, 5 Pa. Co. Ct. R. 667.

[v] (Pa. 1891) Since judgment by default cannot be rendered by a justice without proof of

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plaintiff's claim, if the transcript of the record fail to show that such proof was given, it will be stricken off by the common pleas.—Barney v. Fahs (Com. Pl.) 10 Pa. Co. Ct. R. 424.

[w] (Pa. 1895) On appeal from a justice's judgment, his record showed every offer of evidence, and the objection to it; and there was an objection to each offer which should have been sustained. *Held*, that the record did not sustain a judgment for plaintiff rendered "after hearing both attorneys and examining all evidence produced."—Pearre v. White (Com. Pl.) 4 Pa. Dist. R. 504.

[x] (Utah, 1894) Comp. Laws 1888, § 3595, making the wrong overruling of an objection to the venue in justice court cause for reversal on appeal, and section 3659, giving either party on appeal to the district court the benefit of all legal objections made below, obliges the district court to reverse on finding such objection to the venue well taken.—Kansas City Hardware Co. v. Neilson, 10 Utah, 27, 36 Pac. 131.

[y] (Wis. 1861) In a suit before a justice of the peace to recover personal property valued at $14, the justice rendered no findings whatsoever, but simply ordered the defendant to deliver the property and pay the costs. *Held*, that the county court could not, on appeal, disregard this as a mere technical defect, but must reverse the judgment.—Carney v. Doyle, 14 Wis. 270.

[z] (Wis. 1873) On appeal from a justice's judgment for a less amount than $15, the circuit court will not affirm in part and reverse in part the judgment for damages; but, if it finds the plaintiff not entitled to recover the whole amount of damages awarded by the justice, it must reverse absolutely.—Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 782.

§ 732. —— Proceedings on reversal.

[a] (Ala. 1856) In an action appealed from a justice's court, founded on a contract, and for less than $20, the appellate court, reversing the judgment of the circuit court, where all the evidence is set forth in the bill of exceptions, will render the proper judgment, in the exercise of its authority. Code, § 3034.—Pike v. Bright, 29 Ala. 332.

[b] (Cal. 1857) On an appeal, on questions of law alone, from a justice's to the county court, a new trial, if ordered, is to be before the county court.—People v. Freelon, 8 Cal. 517.

[c] (Cal. 1860) In a suit in a justice's court for damages to real property, the answer put in issue the title to the property. Defendant moved for a transfer to the district court, but was refused. Judgment was given against him by the justice, and he appealed to the county court, which set aside the judgment and ordered a transfer of the case to the district court. *Held*, that the appeal vested the county court with authority to make all orders necessary for the determination of the case, and that the order for transfer was proper, necessary, and within the power of the court.—Cullen v. Langridge, 17 Cal. 67.

[d] (Cal. 1883) Where, in a justice's court, defendant, by his answer, denies the allegations of the complaint, but fails to appear at the trial, and the court, without hearing evidence, gives judgment against him, and he appeals on questions of law alone, the superior court may properly order a new trial at its bar.—Curtis v. San Francisco Superior Court, 63 Cal. 435.

[e] (Mo. 1825) On vacating a justice's judgment for irregularities, the circuit court cannot try the case de novo where the justice had no jurisdiction.—Cook v. Callaway, 1 Mo. 545.

[f] (Neb. 1880) Where the judgment of a justice of the peace is reversed in the district court, the case stands for trial de novo in that court.—Lichty v. Clark, 10 Neb. 472, 6 N. W. 760.

[g] (Neb. 1883) Code Civ. Proc. § 601, provides that when proceedings of a justice are taken on error to the district court, and there reversed, the cause shall be retained by the court for trial and final judgment. *Held*, that such provision does not apply in a case where there was a total want of jurisdiction in the justice's court.—Brondberg v. Babbott, 14 Neb. 517, 16 N. W. 845.

[h] (N. Y. 1856) The appellate court cannot, on reversing the judgment of the justice, preserve the testimony of a witness who has left the state since the trial.—Norris v. Bleakley, 1 Hilt. 90, 3 Abb. Prac. 107.

[i] (N. Y.) Where the marine court at general term reverses a judgment for the plaintiff, they should not enter judgment for the defendant, but should order a new trial, if it reasonably appears that the plaintiff can bring proof on which he can recover.—(1857) Journeay v. Brackley, 1 Hilt. 447; (1859) Howe v. Julien, 2 Hilt, 453.

[j] (N. C. 1872) Where one is deprived of land under color of judicial proceedings heard before a justice who had no jurisdiction, over the subject-matter, the superior court, on appeal, may award restitution, and allow an inquiry of damages.—Dulin v. Howard, 66 N. C. 433.

[k] (Ohio, 1855) After a reversal of the judgment of a justice, in the court of common pleas, for failure to deliver the judgment immediately on the return of the verdict, the case is properly retained by the latter court for trial.—Robinson v. Kious, 4 Ohio St. 593.

§ 733. Modification of judgment on appeal and rehearing.

Granting new trial after judgment on trial de novo, see ante, § 725.

[a] (Cal. 1886) A demurrer to a complaint having been sustained in the superior court upon appeal from a justice's court, and a motion for a new trial made and denied, it is not competent for the court afterwards to set aside the ruling upon demurrer, and make another order in the case upon a rehearing, or otherwise.—Lang v. San Francisco County Superior Court, 71 Cal. 491, 12 Pac. 306.

[b] (Cal. 1888) The court having properly decided an appeal from a justice's judgment, a subsequent order on a petition for a rehearing, setting aside its decision on the ground that it had no jurisdiction, is coram non judice, and void, as a rehearing is not authorized by Code Civ. Proc. § 980, prescribing the power of the superior court on appeal.—Fabretti v. Santa Clara County Superior Court, 77 Cal. 305, 19 Pac. 481.

[c] (Minn. 1893) On an appeal from a justice on questions of law alone the district court may, after a decision, reconsider and modify its first decision of the case.—Meister v. Russell, 53 Minn. 54, 54 N. W. 935.

[cc] (Mo. 1847) Where, on appeal from the judgment of a justice of the peace, the case is improperly tried at the return term, and a judgment rendered against the appellee, it will be set aside at any subsequent term.—Masterson v. Ellington, 10 Mo. 712.

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[d] (Mo.) Under Rev. St. 1889, § 5156, providing, on appeals to the circuit court from a judgment of a justice of the peace, that the judgment may be affirmed or the appeal dismissed, does not authorize the circuit court, after the rendition of a judgment of affirmance on default, to grant a new trial.—(1895) Schwoerer v. Christophel, 64 Mo. App. 81; (1896) Id., 2 Mo. App. Rep'r, 898.

[e] (N. Y. 1891) Where the county court, on appeal from a justice of the peace, reverses the judgment of the justice, excluding evidence offered by defendant under the answer, it cannot afterwards rehear the case on affidavits that such answer and offer of evidence were sham, and reverse its former judgment, and affirm the judgment of the justice.—Armstrong v. Sanford, 60 Hun, 356, 14 N. Y. Supp. 840.

[f] (Vt. 1861) The county court having dismissed the complaint of the appellee for the affirmance of a justice's judgment, the appeal from which the appellant had neglected to file, the appellee, at the next term of the county court, presented a petition setting forth that the appellant, by false statements and ex parte affidavits in support thereof, had induced the court erroneously and inadvertently to dismiss the complaint for affirmance, and praying that such judgment of dismissal be vacated and the suit reinstated upon the docket. The county court, on motion, dismissed the petition on the ground of a want of power to grant the prayer thereof upon the facts therein stated. *Held*, that it was competent for the county court to allow the appellant to show cause why the affirmance should not be granted, and that the present petition was in effect only a petition for a new trial, which could not be entertained by the county court, unless made at the same term in which the judgment objected to was rendered.—Foster v. Austin, 33 Vt. 615.

§ 734. Remand and new trial before justice.

Failure of justice to make return as preventing granting of new trial, see ante, § 615.

Procedendo to justice on dismissal of appeal, see ante, § 644.

[a] (Ala. 1842) Where the circuit court affirms a judgment of a justice of the peace, it is not error to remand the case to the justice to issue a writ of restitution.—Murry v. Harper, 3 Ala. 744.

[b] (Ala. 1844) Where the judgment of the justice is reversed by the circuit court, because the lands are not sufficiently described in the complaint, the cause should be remanded for the purpose of amendment.—McRae v. Tillman, 6 Ala. 486.

[c] (Cal.) If an appeal has been taken from a justice's court on questions of law and fact, the superior court must proceed with the trial of the cause de novo (Code Civ. Proc. § 976), and such court cannot reverse the judgment, and remand the cause for further proceedings.—(1885) Acker v. San Francisco County Superior Court, 68 Cal. 245, 9 Pac. 109; (1886) Id., 68 Cal. 245, 10 Pac. 416.

[cc] (Ga. 1895) Where the evidence in a case tried before the jury in a justice's court was conflicting, and counsel for the prevailing party improperly commented on facts not in evidence, a judgment of the superior court granting a new trial will not be reversed.—Curran, Scott & Co. v. Rome Iron Co., 96 Ga. 756, 22 S. E. 314.

[d] (Iowa, 1859) Where the judgment of a justice of the peace is reversed upon writ of error, the cause should be remanded to the justice, or a trial de novo awarded in the district court.—Garvin v. Wells, 8 Iowa (8 Clarke) 286.

[e] (Iowa, 1867) The district court should not render final judgment against a defendant on a writ of error, reaching only an auxiliary part of the proceedings before a justice, but remand with directions to enforce the judgment in the main proceeding.—Gourley v. Carmody, 23 Iowa, 212.

[f] (Iowa, 1877) Under Code 1873, § 3603, providing that on appeals from justices' courts the circuit court may render final judgment, or remand the case to the justice for a new trial, the case should be remanded to the justice's court in case of a reversal, if any issue of fact remains for trial and cannot be tried in the circuit court.—Swan v. Bournes, 47 Iowa, 501, 29 Am. Rep. 492.

[g] (N. H. 1838) Where a trustee, in an action before a justice of the peace, failed by accident to appear at the hour set, and his default was entered, but appeared in the course of the same day, and, in the presence of a justice and plaintiff's attorney, denied his liability, and asked for a trial, which was refused, the court of common pleas, on writ of review, will grant a new trial.—Rigney v. Hutchins, 9 N. H. 257.

[h] (N. J. 1862) If the judgment of a justice in an attachment case is removed to the supreme or circuit court, and reversed, and the record remitted to the justice, to proceed according to law, he cannot retry the case. He has no authority after reversal.—Flanagan v. Jerome, 29 N. J. Law (5 Dutch.) 391.

[i] (N. Y. 1854) Under Code 1852, § 366, providing that if the defendant fails to appear before the justice, and shows by affidavit or otherwise that manifest injustice has been done, and defendant satisfactorily excuses his default, the appellate court may set aside or suspend the judgment and order a new trial, a defendant who failed to appear at the time of trial, by reason of a belief that adjournment had been agreed to, must show that manifest injustice has been done, the facts in regard to which must be set out.—Armstrong v. Craig, 18 Barb. 387.

[j] (N. Y. 1854) A defendant cannot, on appeal from a judgment rendered against him in a justice's court, have the judgment set aside, on the ground that after his appearance the case was adjourned, and he failed to appear on the trial because he mistook the hour to which the adjournment had been ordered.—Williams v. McCauley, 3 E. D. Smith, 120.

[k] (N. Y. 1856) Where an error in entering judgment in justice's court is committed, it can only be corrected in the appellate court by a reversal and bringing a new action.—Hardy v. Seelye, 1 Hilt. 90, 3 Abb. Prac. 103.

[l] (N. Y. 1867) Where a resident of a county is sued before a justice of that county by short summons, as if a nonresident, and is defaulted, and appeals, and it is shown by affidavits or otherwise that manifest injustice has been done, and the default is satisfactorily excused, the county court, in its discretion, may set aside or suspend the judgment, and order a new trial before the justice who rendered the judgment, or some other justice in the same county. Code, § 366.—Tanner v. Marsh, 36 How. Prac. 140; Id., 53 Barb. 438.

[m] (N. Y. 1873) Code Civ. Proc. § 366, provides, in cases of appeal from justice court, that if "the defendant failed to appear before the justice," and it is shown by affidavits served or otherwise that manifest injustice has been done, and the defendant satisfactorily excuses his default, the court may, in its discretion, set aside or suspend the judgment and order a new trial. *Held*, that the appellant, on a motion for a new trial under such section, must disclose in the moving affidavits facts and circumstances which show that the default occurred through excusa-

ble mistake, where default is alleged to be due to mistake as to the hour of trial, and that the court must be informed of the grounds thereof to determine on the good faith of the excuse, and to adjudge that a default occurred through circumstances which naturally would have induced a prudent person to have been mistaken, or prevented appearance.—Samo v. Morrison, 1 Sheld. 382.

[n] (N. Y. 1873) Code Civ. Proc. § 366, provides in cases of appeal from justice court that if "the defendant failed to appear before the justice," and it is shown by affidavits served or otherwise that manifest injustice has been done, and defendant satisfactorily excuses his default, the court may, in its discretion, set aside or suspend the judgment and order a new trial. *Held*, that a motion for a new trial, under such section, would be entertained, though defendant's default in appearing occurred on a day subsequent to the return day of the summons.—Samo v. Morrison, 1 Sheld. 382.

[o] (N. Y. 1886) Under Code, § 3064, providing that, on appeal from a justice court, the appellate court may, in its discretion, set aside the judgment and direct a new trial at such time and place as it deems proper, the county court has jurisdiction to set the time for such a new trial, when it has set aside the judgment in the justice court, and has been affirmed in that action by the general term.—Velsey v. Velsey, 40 Hun, 471.

[p] (N. Y. 1889) A defendant on the return day of a summons asked the justice issuing it to wait until she could obtain a lawyer or adjourn the hearing; but, though she could not find an attorney after diligent search, the justice allowed the plaintiff to take judgment by default. *Held*, that defendant "failed to appear," within the meaning of Code Civ. Proc. § 3064, providing that, if the appeal is taken by a defendant who failed to appear before the justice either upon the return of the summons or at the time to which the trial of the action is adjourned, the appellate court may, in its discretion, set aside the judgment.—McCarthy v. Crowley, 52 Hun, 614, 5 N. Y. Supp. 675.

[q] (N. Y. 1890) In an action for trespass in a justice's court, where the admitted acts of defendant are such that the action is not vexatious, and a verdict in his favor is groundless, it will be set aside on appeal, and a new trial granted, where plaintiff shows some damages, though small.—Smith v. Bingham, 55 Hun, 612, 9 N. Y. Supp. 97.

[r] (N. Y. 1893) Plaintiff in summary proceedings, having given a stipulation in order to a speedy hearing of its appeal, obtained a reversal. When the case was again set down before the justice, plaintiff moved to set aside the stipulation, on the ground that the amendment of 1893 to Code Civ. Proc. § 1310, staying such proceedings pending appeal, applied to the case, which motion was granted. *Held*, that the supreme court could properly refuse plaintiff a mandamus to the justice to proceed with the case, asked on the ground that the statute was not retroactive, and so did not apply.—People v. Jeroloman, 139 N. Y. 14, 34 N. E. 726, affirming order (1893) 69 Hun, 301, 23 N. Y. Supp. 512.

[s] (N. Y. 1893) Code Civ. Proc. § 3064, provides that if an appeal from a judgment of a justice of the peace is taken by a defendant who failed to appear before the justice, and he shows that injustice has been done, and renders a satisfactory excuse for his default, the appellate court may set aside the judgment. *Held*, that a judgment will not be set aside where the moving affidavit does not show what the defense is to plaintiff's claim, or that there is any defense at all.—Young v. Conklin (Co. Ct.) 8 Misc. Rep. 122, 23 N. Y. Supp. 993.

[t] (N. Y. 1895) Under Code Civ. Proc. § 3064, authorizing the county court to grant a new trial on appeal from a judgment by default rendered by a justice, where appellant renders a satisfactory excuse for his default, a new trial cannot be granted unless an excuse is given by appellant for not appearing before the justice.—De Bevoise v. Ingalls, 88 Hun, 186, 34 N. Y. Supp. 413.

[u] (N. C. 1878) Where it appeared, on appeal to the superior court from a judgment of a justice of the peace, that the written answer filed by the defendant in the justice's court had been lost, it was error to remand the case to the justice that the pleadings might be perfected. It was the duty of the court to perfect the pleadings and proceed to trial.—Faison v. Johnson, 78 N. C. 78.

[v] (N. C. 1884) Where a justice refuses to set aside a judgment entered without notice to defendant, the court on appeal should not reverse the judgment, but direct the justice to enter a judgment vacating it.—McKee v. Angel, 90 N. C. 60.

[w] (Or. 1892) The reversal of a judgment in a justice's court on appeal does not entitle the parties to a remand of the case for a new trial.—Forbis v. Inman, Paulson & Co., 23 Or. 68, 31 Pac. 204.

[x] (S. C. 1831) The common pleas are not restricted to a simple affirmance or reversal of a justice's judgment, but may remand the case for a new trial, with instructions.—Harris v. Ferguson, 2 Bailey, 397.

[y] (S. C. 1888) A jury in a trial justice's court, in claim and delivery, found the property for plaintiff, "upon payment of $35 to defendant." Such verdict not being in the form required by the Code, nor in such form that by amendment the court could bring it into proper form, under Code, § 368, which provides that in cases of appeal from trial justices' courts the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects not affecting the merits, the circuit court properly sent the case back for new trial.—Du Bose v. Armstrong, 29 S. C. 290, 6 S. E. 934.

[z] (S. C. 1890) Circuit courts having only appellate jurisdiction in actions originating in trial justices' courts, a motion for a new trial in the justice court on the ground of after-discovered evidence cannot be entertained by a circuit court on appeal from the justice court.—Sams v. Hoover, 33 S. C. 401, 12 S. E. 8.

[zz] (Tex. 1873) In a case taken by plaintiff from a justice to a district court, and in which a motion for a new trial has been overruled, an original bill for a new trial may be entertained, and from an action of the court on such a bill an appeal lies to the supreme court.—Bell v. Walnitzch, 39 Tex. 132.

15. LIABILITIES ON BONDS OR OTHER SECURITIES.

SUFFICIENCY OF BOND IN GENERAL, § 735.
INSUFFICIENT, INFORMAL, AND DEFECTIVE BONDS, § 736.
UNNECESSARY OR EXCESSIVE BOND, § 737.
VOID OR DEFECTIVE APPEAL OR OTHER PROCEEDING, § 738.
ACCRUAL OF LIABILITY, § 739.
—— AFFIRMANCE OF JUDGMENT, § 740.
RELEASE OR DISCHARGE OF SURETIES, § 741.
EXTENT OF LIABILITY, § 742.

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JUDGMENT AGAINST SURETIES ON APPEAL, § 743.
—— ENFORCEMENT OF JUDGMENT, § 744.
ACTIONS, § 745.
—— JURISDICTION AND CONDITIONS PRECEDENT, § 746.
—— DEFENSES, § 747.
—— PLEADING, § 748.
—— EVIDENCE, § 749.
APPEAL AND ERROR, § 750.

§ 735. Sufficiency of bond in general.

[a] (Ark. 1892) Mansf. Dig. § 4135, provides that an appeal bond from a justice must be conditioned to perform the judgment appealed from in case of affirmance, or, if on a new trial in the circuit court judgment goes against appellant, to pay such judgment. Section 4153 provides that, if the judgment be affirmed, such judgment shall be rendered against appellant and his sureties on the bond. *Held*, where on appeal from a judgment entered on attachment before a justice of the peace, appellant executed a bond conditioned that the surety will satisfy the judgment of the circuit court to the extent of the value of the goods attached, that such bond was not a sufficient compliance with section 4135, and could not be enforced against the surety under section 4153.—Martin v. Tennison, 56 Ark. 291, 19 S. W. 922.

[b] (Ill. 1843) The letters "J. P.," affixed to the certificate of recognizance, mean justice of the peace. They are abbreviations which are well known and in common use.—Shattuck v. People, 4 Scam. 477.

[c] (Ind. 1877) The fact that, in taking an appeal to the circuit court from a joint judgment rendered against several defendants by a justice of the peace, part only of the judgment defendants execute the appeal bond, does not invalidate it, and is not ground of demurrer to the complaint in an action thereon.—Covert v. Shirk, 58 Ind. 264.

[d] (Iowa, 1859) Where an action was commenced before a justice of the peace against the makers of a joint promissory note, one of whom was served with notice, and against whom judgment was rendered for want of an appearance; and where a bond for an appeal was filed, signed by the makers of the note and another party, and recited that W., against whom the judgment was rendered, had appealed from a judgment, etc., in an action wherein A. is plaintiff and M. are defendants; and where the justice certified that defendant filed their appeal bond, with J. M. as surety, which was approved by me, and appeal allowed; and where it was objected that it was error to render judgment against M., for the reason that he was not served with notice, and there was no judgment against him before the justice, and that no sufficient appeal bond was ever filed,—it was *held* that, as M. was one of the sureties upon the appeal bond, the plaintiff was entitled to judgment against him, and that while the bond did not refer to the proceedings with critical accuracy, yet that there was no irregularity that could prejudice the appellants.—Atkins v. McCready, 8 Iowa (8 Clarke) 214.

[e] (Mass. 1862) If a recognizance contains enough upon its face to show that the case in which it was taken belonged to a general class of cases of which the court had jurisdiction, it is not necessary for it to show in detail that the case did not fall within certain exceptions to that class of cases, of which the court had no jurisdiction.—Peck v. Thompson, 87 Mass. (5 Allen) 388.

[f] (Mass. 1876) The certificate of a recognizance, to prosecute an appeal from the judgment of a justice, recited that the connusee recovered judgment against the connusor "for her title and possession in and to certain land, with the buildings thereon," describing them, in a personal action brought by the connusee against the connusor. *Held* sufficient to show that the case was under Gen. St. c. 137, §§ 5–9, and that the magistrate had authority to take a recognizance.—Martin v. Campbell, 120 Mass. 126.

[g] (N. H. 1856) It is no defense to a scire facias upon a recognizance entered into by the appellant to the adverse party, upon an appeal from the judgment of a justice of the peace, in a civil suit, that the recognizance was taken with one surety only; it appearing that the parties agreed that it should be so taken.—Dickey v. Livermore, 34 N. H. 199.

[h] (N. Y. 1851) On an appeal made in June, 1848, from the judgment of a justice of the peace to the county court, the bond was drawn as if on an appeal to the common pleas, but the appeal was made, in fact, to the county court, and tried and decided there, without objection being made to the sufficiency of the bond. *Held*, in an action on the bond, that it was sufficient in form to charge the obligors.—Teall v. Van Wyck, 10 Barb. 376.

[i] (Pa. 1829) Where bail, on an appeal from the judgment of a justice, entered into a recognizance as follows: "Now, November 21, 1826, defendant appeals from the annexed judgment against him to the next court of common pleas in and for the county of Philadelphia. Recognizance by the defendant and J. U., each in the sum of $90, conditioned that the defendant prosecute his appeal with effect,"—it was *held* by the court that the recognizance was sufficient in law to enable the plaintiff to recover upon it.—Stroud v. Ukel, 2 Ashm. 122.

[j] (Pa. 1845) The following minute made by a justice of the peace upon an appeal: "W. S. appears and enters into recognizance in double the debt and costs, as special bail in the above suit, for an appeal, according to the act of assembly of 1842,"—was *held* to be sufficient to support a scire facias, reciting a recognizance, in the form prescribed by the act.—Okeson v. Shirlock, 9 Watts & S. 142.

[k] (Pa. 1860) In an action before a justice of the peace against a constable for a false return, a recognizance, in the following words: "Defendant gives bail, which is entered on the docket, for the sum of $100, J. W. B., Bail,"—cannot be supported as a recognizance of bail for an appeal.—Meeker v. Brackney, 35 Pa. (11 Casey) 276.

[l] (Vt. 1845) A justice's record of a recognizance, on appeal, that the connusors "jointly and severally recognized in the sum of $100 for the prosecution of the appeal in due form of law," is a sufficient recognizance.—McGregor v. Balch, 17 Vt. 562.

§ 736. Insufficient, informal, and defective bonds.

[a] (Ala. 1843) Under the statutory provision that a party against whom a judgment is rendered by a justice of the peace may appeal to the circuit court, on giving bond with surety, an appeal bond which does not show that the judgment was rendered against the principal, nor the amount of the judgment, nor to what court the appeal was taken, is a nullity, and will not authorize judgment against the sureties therein, although the principal voluntarily appear in the circuit court, and judgment be rendered against him.—Wetumpka & C. R. Co. v. Bingham, 5 Ala. 657.

[b] (Ala. 1895) In an appeal from a justice's court to the circuit court, an acknowledgment that a person becomes surety "for all costs and

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damages as may be sustained by defendant by reason of the appeal" does not comply with Code, § 3399, providing that in such case the appeal bond must be on condition "to pay such judgment as may be rendered" against the appellant; hence the circuit court could not render a summary judgment against the surety.—Reynolds v. Cox, 108 Ala. 276, 19 South. 393.

[c] (D. C. 1893) Where an undertaking on appeal from the judgment of a justice of the peace to the supreme court was "to satisfy and pay all the intervening damages and costs arising on this appeal," and contained no provision whatever for submission to the appellate court, a judgment by default in the supreme court against appellant and his surety was void, as against the surety, for want of jurisdiction over his person.—Tenney v. Taylor, 1 App. D. C. 223.

[d] (Ga. 1843) In a justice's court, a surety on appeal, not signing or sealing the recognizance, is not bound by an entry of his suretyship, made by the magistrate, on his verbal authority.—Whelan v. Sherron, Ga. Dec. 54, pt. 2.

[e] (Ill. 1848) An appeal bond contained a condition to "pay and satisfy whatever judgment might be rendered by the circuit court of Hancock county, upon the dismissal or trial" of the appeal, etc., while the statute required a bond to pay whatever judgment might be rendered "by the court," upon the dismissal or trial, etc.; and the bond omitted the condition, "to prosecute the appeal with effect," required by the statute. After the entry of the appeal, the venue was changed to another county, and the judgment of the justice below was affirmed. *Held*, that the appeal bond could not be enforced.—Sharp v. Bedell, 10 Ill. (5 Gilman) 88.

[f] (Iowa, 1856) Where an appeal bond on appeal from a justice is not in form and substance such a recognizance as is provided for in Rev. St. p. 334, §§ 2, 3, judgment (page 336, § 16) cannot be rendered against the sureties on appeal.—Wilson v. Knight, 3 G. Greene, 126.

[g] (Mo. 1847) A recognizance for an appeal from the judgment of a justice of the peace is void, unless approved by the justice.—Cockrill v. Owen, 10 Mo. 287.

[h] (N. Y. 1830) In an action on an appeal bond, the misrecital of the day of the rendition of judgment is fatal.—People v. Monroe Common Pleas, 3 Wend. 426.

[i] (N. Y. 1879) On an undertaking given in an appeal from the judgment of a justice of the peace, the names of the sureties were written in the body of the instrument and subscribed to the affidavit of justification; they also acknowledging themselves before the notary to have executed the undertaking. *Held* a sufficient execution.—Weisbrod v. Marquardt, 8 Abb. N. C. 248.

[j] (N. C. 1823) The security on an appeal from a justice's court is not liable as such unless the justice signed his name as witness to such security's signature.—Picot v. Hardison, 9 N. C. (2 Hawks) 532.

[k] (Pa. 1823) A recognizance on appeal from a justice of the peace, conditioned for the payment of the debt, instead of being in the nature of special bail, is void.—King v. Culbertson, 10 Serg. & R. 325.

[l] (Pa. 1829) A recognizance in an appeal from a justice conditioned to pay "a sum sufficient to cover all costs," without stating the amount of such sum, being void, the surety is not liable thereon.—Williamson v. Mitchell, 1 Pen. & W. 9.

[m] (Pa. 1847) The statute of 1842, prescribing the condition of a recognizance to be given by an appellant from a justice of the peace, repealed that of 1810, so far as it prescribed such condition; and a recognizance entered into since the statute of 1842, conditioned as required by the former statute, is void.—Donley v. Brownlee, 7 Pa. (7 Barr) 109.

[n] (Tenn. 1834) An appeal bond from a judgment rendered by a magistrate conditioned that the appellant shall prosecute an appeal by him, prayed and obtained to the next circuit court, is insufficient to authorize a judgment rendered against the sureties in the bond, since it did not undertake that the appeal would be prosecuted with effect.—Albertson v. McGee, 15 Tenn. (7 Yerg.) 106.

[o] (Tex. 1893) Where the bond given on appeal from a justice's judgment does not comply with the statute, and plaintiff has the appeal dismissed on that ground, he cannot sue on the bond, on failure to collect the judgment, since an action could be maintained on it, if at all, only as a common-law bond, and it is not good, as such, because never agreed to or ratified by plaintiff.—Gregory v. Goldthwaite, 2 Tex. Civ. App. 287, 21 S. W. 413.

§ 737. Unnecessary or excessive bond.

[a] (Kan. 1891) Code Civ. Proc. § 577, provides that executors, administrators, and guardians who have given bond in the state are not required to give an undertaking on appeal or proceedings in error. *Held*, that this section applied to justices' courts, and that an appeal bond filed by an executor before a justice of the peace was not good as a statutory bond, nor as a common-law obligation.—Freeman v. Hill, 45 Kan. 435, 25 Pac. 870.

[b] (Me. 1856) By Rev. St. c. 116, § 10, a magistrate has no authority to require a bond on appeal conditioned for the personal appearance of an appellant, at the appellate court, or the payment of intervening damages and costs; and the bond is invalid.—Lane v. Crosby, 42 Me. 327.

[c] (Pa. 1895) A recognizance on appeal from a judgment of a justice of the peace, conditioned for the payment of the debt as well as the costs, cannot be enforced as a statutory obligation requiring bail for costs only, nor is it good as a voluntary obligation at common law.—Wattles v. Fuller (Com. Pl.) 2 Lack. Leg. N. 117.

§ 738. Void or defective appeal or other proceeding.

[a] (Ala. 1844) The omission, by a justice of the peace, to render a judgment of condemnation against a steamboat, where an appeal is taken by the owners, is not an error of which the parties to the appeal bond can complain.—Monroe v. Brady, 7 Ala. 59.

[b] (Ill. 1886) Where the supervisor of a town has appealed from a judgment against the town in a justice court, which was not appealable, the bond given on such appeal is absolutely void, and the obligors may deny its recitals.—Lamonte v. Town of Montebello, 21 Ill. App. 186.

[c] (Iowa, 1883) When an appeal has been taken from a justice of the peace after the statutory time from judgment, and an appeal bond filed, and an order dismissing the appeal made, the court has no jurisdiction to render judgment on the bond; there being in effect no appeal.—Martin v. Croker, 62 Iowa, 328, 17 N. W. 533.

[d] (Kan. 1894) Where the bond on appeal from a justice's court is not filed within the required 10 days after judgment, no appeal is

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perfected; hence an action will not lie on the bond.—McCarthy v. Holden, 54 Kan. 313, 38 Pac. 261.

[e] (Mich. 1880) Under an appeal bond from a justice court, providing that appellant should perfect and prosecute to effect his appeal, the neglect of the justice to make return to the circuit within the statutory period does not prevent recovery on the bond; the default in prosecuting the appeal resting on appellant, and not on appellee.—Nowlin v. Tibbits, 44 Mich. 77, 6 N. W. 118.

[f] (Mo. 1873) Where the record in a case coming from a justice of the peace does not show that the justice ever rendered any judgment, or that any appeal was ever taken, a judgment against the sureties on the appeal bond cannot be sustained.—Seaton v. Chicago, R. I. & P. R. Co., 51 Mo. 500.

[g] (Mo. 1873) An appeal bond filed with a justice, on a judgment by default before him, is void, unless a motion is, at the same time, made to set aside the default.—Garnet v. Rodgers, 52 Mo. 145.

[h] (Mo. 1884) Rev. St. 1879, § 3040, provides that no appeal shall be taken from a judgment before a justice, by default or nonsuit, unless, within 10 days after the judgment is entered, application to set it aside has been made and refused. *Held* that, where an appeal has been granted contrary to the provisions of such statute, the appeal bond is void as to the sureties, and that the only valid judgment to be entered by the circuit court is a dismissal of the appeal, with judgment for costs against the appellant.—Brown v. Missouri Pac. Ry. Co., 85 Mo. 123.

[i] (Mo. 1888) Where an appeal from a justice of the peace to the circuit court was dismissed on appellee's motion for want of a sufficient affidavit for an appeal, this did not estop appellee to sue on the appeal bond filed in the same cause.—Skidmore v. Hull, 33 Mo. App. 41.

[j] (Neb. 1886) A person who voluntarily becomes security for a losing party, in an action before a justice of the peace for the purpose of enabling such party to appeal, upon the failure of such appeal on account of the same not having been taken within the time limited by law, will be held to the terms of such suretyship, notwithstanding such failure of the appeal.—Adams v. Thompson, 18 Neb. 541, 26 N. W. 316.

[k] (N. Y. 1830) The dismissal of an appeal in the common pleas on the ground of variance between the judgment recited in the bond and the justice's return will not authorize a recovery on the bond for breach of its condition that the appeal shall be prosecuted with due diligence.—Beach v. Springer, 4 Wend. 519.

[l] (Ohio, 1861) Under Justice's Code, § 112, requiring that one of the conditions of an undertaking for an appeal to the common pleas shall be "that the appellant will prosecute his appeal to effect, and without unnecessary delay," there is no breach of the condition, unless, after an appeal is perfected, there is a failure to prosecute the action appealed to judgment in favor of appellant, or unless appellant unreasonably delays the prosecution; and a failure to perfect the appeal is not a breach.—Burris v. Peacock, 2 Ohio Dec. 482.

[m] (Tex. 1880) The obligors on an appeal bond from a justice's court, which is void for want of a motion for new trial, are not liable on the bond.—Hutcheson v. Wells, 1 White & W. Civ. Cas. Ct. App. § 953.

[n] (Tex. 1889) Plaintiff recovered judgment in a justice court, and defendant appealed to the county court, where the appeal was dismissed and judgment rendered against defendant and his sureties on his appeal bond for costs of both courts. The appeal was dismissed, on the ground that, the judgment appealed from not being a final judgment, the court was without jurisdiction. *Held*, that the county court not having acquired jurisdiction, and having no authority to render any other judgment than the one dismissing the appeal, the judgment rendered on the appeal bond was void.—Parrott v. Craig, 3 Willson, Civ. Cas. Ct. App. § 453.

[o] (Wis. 1850) Where an appeal from a justice of the peace is dismissed because no affidavit was filed with the justice, as required by statute, appellant and the sureties on his bond are immediately liable thereon for the amount of the judgment rendered by the justice; one of the conditions of the bond being that apppellant shall pay the amount of the judgment rendered against him before the justice, including costs of appeal, with interest, in case his appeal shall be dismissed or discontinued.—Clark v. Miles, 2 Chand. 94, 2 Pin. 432.

§ 739. Accrual of Liability.

[a] (U. S. 1840) If the appellant from the judgment of a justice of the peace of the District of Columbia die pending the appeal, and no further proceedings are had in the cause for two terms thereafter, the sureties in the appeal bond are not liable for the appellant's not having prosecuted his appeal with effect.—Jeffers v. Forrest, Fed. Cas. No. 7,251 [5 Cranch, C. C. 674].

[b] (Ill. 1890) On appeal by plaintiff from a justice of the peace the county court allowed him to join another with him, and then the cause was discontinued as to the original plaintiff, and judgment entered on a verdict for the new one. The court then issued procedendo to the justice to enforce the judgment in the case of the original plaintiff, as upon failure to prosecute the appeal; and, the execution being returned "No property found," an action was brought on the appeal bond. *Held*, that the procedendo was without jurisdiction, for in this collateral proceeding the substitution of the new plaintiff in the county court must, under Prac. Act, § 23, be deemed conclusive evidence of the identity of the cause in the county court with that before the justice; and hence there was no failure to prosecute the appeal.—Butler v. Ritter, 38 Ill. App. 189.

[c] (Ind. 1842) In an action of debt on a bond conditioned to prosecute with effect an appeal from the judgment of a justice of the peace, the breaches assigned were: (1) That the appellant wholly failed to prosecute the appeal; (2) that he failed to cause a transcript of the judgment to be filed in the clerk's office within 20 days after taking the appeal; (3) that he did not prosecute the appeal with effect, but, on the contrary, the appeal was dismissed because the transcript of the judgment was not filed in the clerk's office within 20 days, etc. *Held*, on general demurrer, that the first and third breaches were good, and the second bad.—Rock v. Gordon, 6 Blackf. 192.

[d] (Ind. 1848) Failure to file a further bond, upon being required, is a breach of an appeal bond filed according to Rev. St. §§ 159, 160, 168.—Davis v. Sturgis, 1 Ind. (1 Cart.) 213.

[e] (Ky. 1827) Where the judgment of the justice against an executor is de bonis propriis, and he appeals, and judgment is rendered against him for the same sum de bonis testatoris, the condition of the appeal bond is not

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forfeited.—Bowman v. Green, 22 Ky. (6 T. B. Mon.) 339.

[f] (Miss. 1885) Where defendant appeals from a justice of the peace, and in the appellate court dismisses his appeal, plaintiff is entitled to judgment on the appeal bond.—Pass v. Payne, 63 Miss. 239.

[g] (Pa. 1831) Bail on an appeal from a justice must surrender on or before the first day of the next term after judgment is entered against the appellant.—Siter v. Welford, 1 Ashm. 61.

[h] (Tex. 1890) Where a bond on appeal from a justice of the peace is conditioned for its prosecution to effect and for the payment of any judgment rendered against the appellant on such appeal, an order dismissing the appeal, and awarding a writ of procedendo, is a breach of the bond, rendering the sureties liable in an action thereon for the amount of the original judgment and costs, though the order was made on motion of the appellee; the appellant consenting.—Wooldridge v. Rawlings (Sup.) 14 S. W. 667.

[i] (Wis. 1879) In the absence of statutory provision for security for costs on appeal from a justice to the circuit court, if such appeal is dismissed, there is no liability attaching to a surety on the appeal bond on the dismissal of the appeal.—Sengpiel v. Spang, 47 Wis. 28, 1 N. W. 463.

§ 740. —— Affirmance of judgment.

[a] (Ill. 1843) The condition of a bond given upon an appeal from a justice of the peace to the circuit court is forfeited the moment judgment is recovered by the appellee, unless the amount thereof is immediately paid; and an action lies immediately.—Gregory v. Stark, 4 Ill. (3 Scam.) 611.

[b] (Mo. 1889) On judgment by a justice against V. & C., V. filed an affidavit of appeal in which he used the words "this appeal." The bond recited, "Whereas V. & C. have appealed, they shall satisfy." The docket entries of the justice in regard to the appeal used the plural "defendants," and on trial in the circuit court the verdict was for defendant V., but against defendant C., and the circuit court treated C. as having appealed and rendered judgment against him for the amount of the verdict. *Held*, that the judgment should also have been entered against the obligors in the appeal bond.—Milburn Mfg. Co. v. Wilfong, 33 Mo. App. 561.

[c] (Mo. 1889) In an attachment suit before a justice, judgment was rendered for plaintiff both on a plea in abatement and on the merits. Defendant appealed to the circuit court without signifying that his appeal was merely from the sustaining of the attachment. The circuit court sustained the plea in abatement, and gave judgment for plaintiff on the merits. *Held*, that it did not err in also entering judgment against defendant and his sureties on the appeal bond.—Nolte v. Farrelly, 34 Mo. App. 671.

[d] (Neb. 1896) Judgment was recovered before a justice of the peace against two makers of a promissory note, who jointly appealed to the district court. The undertaking of the surety on the appeal bond was to pay any judgment rendered against the appellants. *Held*, that the surety is liable, notwithstanding judgment in the appellate court was against only one of the appellants.—Johnson v. Reed, 47 Neb. 322, 66 N. W. 405.

[e] (N. Y. 1857) On an appeal taken from the decision of a justice, sureties entered into a bond, conditioned that if judgment should be rendered on the appeal against the appellant, and execution returned unsatisfied, the obligors would pay the amount unsatisfied, and in the county court the judgment was reversed, but, on appeal, the supreme court affirmed the judgment of the justice, *held*, that the sureties were liable for the full amount recovered in the supreme court.—Smith v. Crouse, 24 Barb. 433.

[f] (N. Y. 1875) The parties to an undertaking upon appeal from a justice's court, given pursuant to Code, § 356, covenant for the final result of the action, and if ultimately a final judgment is rendered against the appellant, upon which an execution may and is issued and returned unsatisfied, they are liable. Therefore, where the appeal to the county court resulted in a judgment in favor of the respondent, which was reversed by the general term of the supreme court, and the cause certified into the supreme court and there tried, resulting in a judgment for respondent, upon which execution was issued and returned unsatisfied, *held*, that the surety on the undertaking, given on appeal to the county court, was liable.—Humerton v. Hay, 65 N. Y. 380.

[g] (N. C. 1883) An undertaking on appeal from a justice of the peace to the superior court, conditioned that "appellant shall pay all costs that may be awarded against him on such appeal, and that if the judgment or any part thereof be affirmed, or the appeal be dismissed, the appellant shall pay the amount directed to be paid by the judgment, or the part of such amount, as to which the judgment shall be affirmed," binds the signers thereof to pay such judgment as may be rendered in the superior court against appellant, and not merely to pay the judgment only if it is ultimately affirmed as rendered in the justice's court.—Walker v. Williams, 88 N. C. 7.

[h] (Ohio, 1875) A surety on an appeal bond may stand upon the very terms of his undertaking. Where two defendants in a justice's judgment appealed, and a surety undertook that, if judgment went against them on the appeal, they would satisfy such judgment, and, on the appeal, the plaintiff obtained judgment against one only, the surety was not liable.—Lang v. Pike, 27 Ohio St. 498.

[i] (Tex. 1883) Where two defendants, against whom a joint judgment is rendered in the justice court, make a joint appeal, and the plaintiff recovers judgment against one of them alone, the sureties on the joint bond are liable for the judgment recovered.—Moore v. Gore, 2 Willson, Civ. Cas. Ct. App. § 75.

[j] (Tex. 1890) Though on appeal from a justice of the peace to the district court, in an action on a contract and to foreclose a chattel mortgage, defendants are successful to the extent of the mortgage, the sureties on their appeal bond are liable on the judgment, under Rev. St. art. 1639, which requires the appeal bond to be conditioned that the appellant shall prosecute the appeal to effect, "and" shall satisfy the judgment rendered against him.—Cotulla v. Goggan, 77 Tex. 32, 13 S. W. 742.

§ 741. Release or discharge of sureties.

Defenses to actions on bonds, see post, § 747.

[a] (U. S. 1822) Where judgment is rendered only against an appellant from a judgment of a justice of the peace, who has given security to prosecute his appeal, no scire facias can thereon issue against the security, though he is equally liable with the principal to a judgment; the provision being for the benefit of the plaintiff, and held to be waived by him.—Hodge v. Plott, Fed. Cas. No. 6,561a [1 Hemp. 14].

[b] (U. S. 1826) A bond on appeal from a judgment of a justice of the peace, conditioned

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on payment if the judgment of the justice is affirmed or more recovered on a trial de novo, is discharged, where a judgment for a less sum is recovered.—Swanson v. Ball, Fed. Cas. No. 13,676a [Hemp. 39].

[c] (Ala. 1845) A payment by sureties to the clerk of the court of the amount secured by an appeal bond, on appeal of a defendant from a judgment in justice's court, does not absolve the sureties from liability, unless the payment is with the assent of the plaintiff, or the money paid over to him.—Windham v. Coates, 8 Ala. 285.

[d] (Ala. 1845) The clerk of a court is not authorized, without the consent of the plaintiff, to receive before judgment the amount for which the sureties on defendant's bond, on appeal from a justice's court, are liable, and thus discharge them.—Windham v. Coates, 8 Ala. 285.

[e] (Del. 1856) A surety in a recognizance on an appeal from a justice of the peace is not discharged from his liability thereunder by a reference of the case without his consent, under a rule of court, after entry of the appeal.—McColley v. Hickman, 1 Houst. 234.

[f] (Ill. 1889) A bond on appeal from a judgment in trover, rendered in the justice court, is not discharged because the form of action was changed to assumpsit in a higher court.—Block v. Blum, 33 Ill. App. 643.

[ff] (Mich. 1893) A circuit judge has no power to extend the liability of a surety on a bond executed on an appeal from justice's court by a stay of execution made for that express purpose, and on his own motion.—Gildersleeve v. Adsit, 97 Mich. 606, 57 N. W. 187.

[g] (Miss. 1876) The sureties in an appeal bond, from the judgment of a justice of the peace, must interpose in the circuit court their discharges in bankruptcy acquired after the execution of the bond; and, if they do not, they cannot be relieved in chancery from a judgment upon the bond.—Jones v. Coker, 53 Miss. 195.

[h] (Mo. 1892) Where a defendant appeals from a judgment rendered against him in a justice's court, he cannot avoid a judgment against himself and his sureties in the appellate court by dismissing his appeal in that court without plaintiff's consent.—Williams v. Lewis, 47 Mo. App. 657.

[i] (N. Y. 1845) The provision requiring execution upon judgments rendered on appeals from justices' courts to be issued "within" 30 days, in order to render the sureties liable upon the appeal bond, is not abrogated by section 24 of the act concerning costs and fees, etc. (Laws 1840, p. 334), which authorizes executions only "after" 30 days.—Lipe v. Becker, 1 Denio, 568.

[j] (Ohio, 1879) The surety on a bond given on appeal from the judgment of a justice of the peace to the common pleas, where a like judgment was rendered, was not discharged by the fact that an execution thereafter levied on the judgment debtor's personal property was abandoned, because the necessary advertising fees were not paid to the officer, and possession of the property resumed by the judgment debtor.—Poll v. Murr (D. C.) 3 Wkly. Law Bul. 1141.

[k] (Wis. 1862) Where a judgment was rendered in the circuit court, on an appeal from a justice's court, against the appellant and his surety in such appeal, and execution is not issued thereon within 30 days thereafter, the surety is discharged.—Herrick v. Graves, 16 Wis. 157.

[l] (Wis. 1884) The surety in an undertaking on an appeal from a justice's court is not released by an amendment to the complaint in the appellate court, increasing the damages claimed to an amount beyond the jurisdiction of the justice.—Hare v. Marsh, 61 Wis. 435, 21 N. W. 267, 50 Am. Rep. 141.

§ 742. Extent of liability.

[a] On appeal from a justice, judgment cannot be rendered in the circuit court, against the surety on the appeal bond, for more than the penalty thereof.

—(Ark. 1866) Allen v. Grider, 24 Ark. 271;

(Mich. 1894) Vreeland v. Loeckner, 99 Mich. 93, 57 N. W. 1093.

[b] (Ark. 1889) On appeal from an order of a justice of the peace, denying a motion to quash an execution on the ground that it had been paid, judgment should be rendered against the appellant and the sureties on the appeal bond for costs only, and not for the amount of the original judgment on which such execution was issued.—Woolum v. Kelton, 52 Ark. 445, 13 S. W. 78.

[bb] (Ark. 1895) On appeal from a justice's court, the circuit court, in dismissing an attachment, cannot give judgment on the attachment bond in an amount exceeding the jurisdiction of the justice.—Norman v. Fife, 61 Ark. 33, 31 S. W. 740.

[c] (Colo. 1894) Under Gen. St. 1883, § 1990, which declares that "the security in any appeal bond shall be liable thereon for the amount of the original judgment and all costs thereon in case the said appeal be dismissed," the surety in an appeal from a justice of the peace is liable for the judgment appealed from on dismissal of the appeal, although the condition of the bond is merely that the principal obligor "shall prosecute this appeal with effect, and shall pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal," since the statutory provision enters into, and becomes a part of, the condition of the bond.—Lux v. McLeod, 19 Colo. 465, 36 Pac. 246.

[d] (Ga. 1893) On the withdrawal of a claim in the superior court, on appeal from a justice's court, claimant being appellant, no judgment can be rendered on the appeal bond except for costs; and to include in the judgment the amount due on the execution which was levied on the property is error.—Bryan v. Simpson, 92 Ga. 307, 18 S. E. 547.

[e] (Ind. 1855) Defendant, in an action before a justice, pleaded a set-off, and recovered judgment. Plaintiff appealed, but the court above dismissed the action. Defendant sued him and his surety on the appeal bond. *Held*, that he was entitled to only nominal damages, unless special damages were alleged and proven.—Reeves v. Andrews, 7 Ind. 207.

[f] (Ind. 1859) On appeal from a justice of the peace, if the bond is conditioned to pay the appellate judgment, and that judgment is for costs, the appeal having been dismissed, the obligors on the appeal bond are not liable for the original judgment, as it forms no part of the appellate judgment.—Keitzinger v. Reynolds, 11 Ind. 545.

[g] (Iowa, 1883) Under Code 1873, § 3594, providing that, on appeal from a justice, a judgment in a circuit court against an appellant shall be entered up against him and his sureties jointly, such a judgment on an appeal bond for more than the penalty is erroneous, but not void, since the court had jurisdiction of the subject-matter and of the parties.—Freeman v. Hart, 61 Iowa, 525, 16 N. W. 597.

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[h] (Iowa, 1884) Where an appeal from a justice's court is dismissed by the circuit court as not involving the jurisdictional amount, such court has jurisdiction to render judgment against the appellant and his sureties, not only for the costs of such court, but also for the amount of the judgment before the justice.—Prescott v. Bacon, 64 Iowa, 702, 21 N. W. 151.

[i, j] (Kan. 1887) Where a judgment is rendered by a justice of the peace against defendant, and he appeals to the district court, and afterwards dismisses his appeal, the sureties on the appeal bond are liable for the amount of the judgment rendered in the justice's court, and not merely for the amount of the judgment for costs rendered in the district court.—Fitzgerald v. Wellington, 37 Kan. 460, 15 Pac. 582.

[k] (Miss. 1874) Where, on appeal from a justice by defendant, the verdict is for plaintiff, the 10 per cent. damages, under Code 1871, § 1334, should be included in the judgment rendered against the principal and his sureties on the appeal bond.—Prewett v. Nash, 50 Miss. 584.

[l] (Mo. 1886) A judgment for $147 against the defendant and his surety on appeal from a justice, the penalty of the bond being $75, in a suit for a claim of $90, cannot be allowed to stand.—Pendergast v. Hodge, 21 Mo. App. 138.

[m] (Pa. 1881) The bail is responsible for all the subsequent costs, including those of an arbitration and of the execution.—Connell v. Flynn, 8 Law T. (N. S.) 42.

[n] (Tenn. 1850) On appeal from a justice of the peace by defendant, if the appellee is required, on motion, to give surety for the costs of the suit, such surety is not liable for the amount of a judgment given for appellant on his set-off.—Bolinger v. Gordon, 30 Tenn. (11 Humph.) 61.

§ 743. Judgment against sureties on appeal.

[a] On the dismissal of an appeal, the court has no authority to enter judgment on the recognizance against the appellant and his security.
—(Ark. 1846) Miller v. Heard, 7 Ark. (2 Eng.) 50;
(Mo. 1876) Hooker v. Atlantic & P. R. Co., 63 Mo. 449.

[b] Where an action on an account is tried before a justice of the peace, and appealed to the district court, the court, on affirming the judgment, should render judgment against both the principal debtor and the surety on the appeal undertaking, since the latter, by becoming surety, has submitted himself to the jurisdiction of the court.
—(Miss. 1843) Wright v. Simmons, 9 Miss. (1 Smedes & M.) 389;
(Neb. 1892) Banghart v. Lamb, 34 Neb. 535, 52 N. W. 399.

[c] (Ala. 1886) Under Code 1876, § 3125, where a justice's judgment is affirmed in the circuit court on appeal or certiorari, the latter court may enter judgment for the costs of both courts against the sureties on the appeal bond as well as the principal.—Neff v. Edwards, 81 Ala. 246, 2 South. 88.

[d] (Ark. 1874) On appeal from a justice of the peace to the circuit court, with supersedeas, the circuit court has jurisdiction to render judgment against the sureties on the appeal bond.—Callahan v. Saleski, 29 Ark. 216.

[e] (Ark. 1880) Where, on appeal from a judgment of a justice of the peace, respondent has judgment against appellant and his sureties, the failure of the clerk to include the sureties in the entry of the judgment may be cured by the entry of a nunc pro tunc judgment, at a subsequent term, without notice to the sureties.—Freeman v. Mears, 35 Ark. 278.

[f] (Iowa, 1884) Under Code 1873, § 3580, making the filing of a bond a condition precedent to appeal from a justice of the peace, and providing that if the judgment be affirmed, or if the appeal be dismissed, judgment shall be rendered against the principal and surety in the bond, and Id. § 3594, providing that any judgment in the circuit court against the appellant shall be entered up against him and his sureties jointly, where an appeal is dismissed by the circuit court as not involving the jurisdictional amount, it has jurisdiction to render judgment against appellant and his sureties.—Prescott v. Bacon, 64 Iowa, 702, 21 N. W. 151.

[g] (Miss. 1895) Where a defendant appealed from the judgment of a justice court to the circuit court, an entry by the judge of that court, in his docket, of "judgment against defendant," carried judgment against the sureties on the appeal bond.—Harper v. Barnett, 16 South. 533.

[h] (Tex.) Where defendant appeals from a judgment of a justice of the peace to the county court, and plaintiff again recovers judgment, the latter judgment is properly entered also against the sureties on defendant's appeal bond.—(1890) Cotulla v. Goggan, 77 Tex. 32, 13 S. W. 742; (1892) Franks v. Ware (Civ. App.) 24 S. W. 349.

[i] (Wash. 1890) On an appeal from a justice of the peace to the district court, the sureties, by signing the appeal bond, submit themselves to the jurisdiction of the court, and are concluded by the judgment against them without further notice.—Cline v. Mitchell, 1 Wash. St. 24, 23 Pac. 1013.

[j] (W. Va. 1891) In detinue tried on appeal by the defendants from justice's court, judgment for the property or its value may be entered against the sureties on the appeal bond, under Code, c. 50, § 172, providing that when the judgment appealed from is against the appellant for a sum of money, and an equal or greater sum is found due by the appellant, judgment shall be rendered against the appellant and the sureties on the appeal bond.—Arthur v. Ingels, 34 W. Va. 639, 12 S. E. 872, 11 L. R. A. 557.

§ 744. —— Enforcement of judgment.

Failure to enforce judgment on appeal bond as discharging sureties, see ante, § 741.

[a] (Ala. 1888) Code 1886, § 2251, providing that, if a judgment is rendered against an estate shown to have been declared insolvent, an order shall be entered that no execution shall issue thereon, but the same shall be certified to the probate court, does not prevent judgment being rendered and execution being issued thereon against the sureties on a bond taken on an appeal by the administratrix to the circuit court, from a judgment rendered by a justice of the peace, where the condition of the bond is to pay such judgment as may be rendered against the appellant.—Mount v. Stewart, 86 Ala. 365, 5 South. 582.

[b] (Mich. 1883) Comp. Laws, § 5433, providing for appeals from justices' courts, requires a bond conditioned that appellant, if judgment is against him, shall pay the amount thereof, including costs. *Held*, that an execution is not, until taxation of costs, "legally issuable," within the meaning of Comp. Laws, § 5462, forbidding the levy of an execution on the property of the surety on an appeal bond unless the execution is issued within 30 days from the time when it shall be "legally issuable."—Weiss v. Wayne Circuit Judge, 50 Mich. 158, 15 N. W. 63.

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§ 745. Actions.

[a] (Me. 1834) In an action of debt, on a recognizance to prosecute an appeal, taken before a justice of the peace, it must appear that the recognizance was returned to, and entered of record in, that court to which the appeal was allowed.—Libby v. Main, 11 Me. (2 Fairf.) 344.

[b] (Me.) In an action of debt on a recognizance to prosecute an appeal, taken before a justice of the peace, it must appear from the record that the justice had jurisdiction of the cause in which the recognizance was taken. —(1834) Libby v. Main, 11 Me. (2 Fairf.) 344; (1836) Dodge v. Kellock, 13 Me. (1 Shep.) 136.

[c] (Me. 1844) In a suit on a recognizance to prosecute an appeal from a judgment of a justice, it should appear from the record that the recognizance was entered into before the same justice who rendered the judgment.—Green v. Haskell, 24 Me. (11 Shep.) 180.

[d] (Me. 1860) To sustain an action on a recognizance taken to prosecute an appeal from a justice's judgment, it need not be recorded at length in the appellate court. The clerk's certificate upon it, showing it to have been filed before suit brought, is a sufficient record. —Leathers v. Cooley, 49 Me. 337.

[e] (Ohio, 1893) A judgment was recovered before a justice, and appeal taken, and bond given. Judgment was again rendered in the common pleas in favor of plaintiff, and error was instituted in the district court, where the judgment of the common pleas was affirmed and a petition in error filed to the supreme court. No supersedeas bond was given. Thereafter action was begun before a justice on the bond for appeal filed in the justice court. On the same day, pending the trial, the defendant filed in the proper court a supersedeas bond, and moved before the justice to dismiss the action. The motion was denied, and verdict rendered for plaintiff, who filed a transcript in the court of common pleas, and thereupon an execution issued. *Held*, that the supersedeas bond operated, and that the execution was wrongfully issued.—Wooster v. Schaaf, 4 Ohio Dec. 561, 2 Cleve. Law Rep. 379.

§ 746. —— Jurisdiction and conditions precedent.

[a] (Mich. 1880) To authorize an action upon an appeal bond, given on an appeal from a justice, appeal having been dismissed, it is not necessary that an effort be made to collect the judgment from real estate, by causing a transcript to be filed in the circuit court and an execution to issue from there, it being provided by Comp. Laws, § 5457, only that the bond cannot be prosecuted until an execution on the judgment appealed from has been returned that goods and chattels to satisfy the same could not be found.—Nowlin v. Tibbits, 44 Mich. 77, 6 N. W. 118.

[b] (N. H. 1859) Where an appeal was taken from the judgment of a justice of the peace to the court of common pleas, which had jurisdiction of the appeal, and a recognizance was entered into before the justice to prosecute the appeal in that court, and the recognizance was there forfeited, and a scire facias was afterwards brought on the recognizance in the supreme court, it was *held* that, the record being in the common pleas, the action could not be maintained in the supreme court.—State v. Kinne, 39 N. H. 129.

[c] (N. Y. 1828) On appeal from justices' judgments, whenever there is a recovery in favor of the appellee in the common pleas, the condition is absolute to pay the amount of such recovery, provided an execution has been first issued on the judgment, and the same, or any part thereof, be returned unsatisfied. A fi. fa. will satisfy the words and intent of the statute. A ca. sa., in such a case, appears not in the contemplation of the statute. The clause in the condition of the bond "that appellant will surrender his body in execution," applies only to the case where the appeal is not prosecuted with due diligence. —Allison v. Wilkin, 1 Wend. 153.

[d] (N. Y. 1830) Where an appeal to the common pleas is dismissed on account of variance between the judgment recited in the appeal bond and the justice's return, an action will not lie on the bond for the breach of a condition to pay the judgment rendered by the justice, unless an execution issue and is returned non est inventus.—Beach v. Springer, 4 Wend. 519.

[e] (Pa. 1812) An alderman has no authority to issue a scire facias on the recognizance, after judgment recovered on the appeal in the appellate court.—Smith v. Wilds, 2 Browne, 190.

[f] (S. C. 1818) An action may be brought on an appeal bond taken before a justice of the peace without final process having been issued against the party appealing.—Kirkpatrick v. McWilliams, 2 Mill, Const. 312.

§ 747. —— Defenses.

[a] (Md. 1845) In an action on an appeal bond, on an appeal from a justice of the peace, it is no defense, since Act 1829, c. 236, that the bond was executed more than 60 days after the date of the judgment therein recited, and from which the appeal was taken.—Brewer v. Smith, 3 Gill, 299.

[b] (Mo. 1847) A failure to enter judgment in the circuit court against the sureties in a recognizance for an appeal from a justice of the peace is no bar to a suit on the recognizance.—Unterrein v. McLane, 10 Mo. 343.

[c] (Neb. 1883) In an action on an undertaking for an appeal from the judgment of a justice of the peace to the district court, a defendant will not be permitted to deny that the appeal had been taken as the statute directs, nor that, in fact, no appeal lay from such judgment.—Gudtner v. Kilpatrick, 14 Neb. 347, 15 N. W. 708.

[d] (N. H. 1856) It is not a defense to a scire facias on a recognizance on appeal from a justice that, after the appeal was entered in the court of common pleas, the parties made an agreement in writing to refer the action, and have it dismissed from the docket of the court; it appearing that the agreement was not filed with the clerk until after two continuances of the cause in that court, and a trial by jury and verdict returned subsequent to the making of the agreement.—Dickey v. Livermore, 34 N. H. 199.

[dd] (Ohio, 1876) The parties purporting to have signed an undertaking for appeal from a justice's judgment are not precluded from denying the execution thereof, by the justice's approval of such undertaking and the entering thereof on his docket.—Ford v. Albright, 31 Ohio St. 33.

[e] (Pa. 1846) Where, in conformity with a well-established practice, under an agreement of 30 years standing among the members of the bar, and filed of record, a plaintiff in an action on a recognizance filed a declaration for money had and received, it was proper to reject a plea in bar, averring that the day on which the promise was made was a Sunday. —Hallowell v. Williams, 4 Pa. (4 Barr) 339.

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[f] (Pa. 1888) Any misunderstanding by the surety on a bail bond as to the liability of the bail, on appeal from a justice judgment, or any misrepresentation by the justice, not brought to the notice of the judgment creditor, cannot defeat his right to recover against the bail.—Davenport v. Searfoss, 13 Atl. 956.

[g] (Utah, 1895) It is no defense to an action on a bond on an appeal from a justice that it was delivered in violation of an understanding between the sureties and the appellant's agent that it was not to be delivered until the signature of the appellant thereto had been obtained.—Butterfield v. Mountain Ice & Cold Storage Co., 11 Utah, 194, 39 Pac. 824.

[h] (Vt. 1847) On defendant's appeal to the county court from the judgment of a justice of the peace, final judgment was rendered against him. In the original suit plaintiff had caused to be attached personal property sufficient to have paid his final judgment; but, through the negligence of the sheriff, his property was eloigned, and plaintiff had duly taken out execution on his final judgment, and perfected his right of action against the sheriff for such negligence, by causing the proper demand to be made. At the time defendant appealed he had property, other than that attached, sufficient to pay the judgment, but lost it all before final judgment was rendered against him. *Held*, that the existence of the right of action against the sheriff constituted no bar, either absolute or temporary, to plaintiff's right to bring sci. fa. against the recognizor upon the appeal, though it might be considered in mitigation of damages, to the extent of its probable value to plaintiff, had he pursued it with reasonable diligence.—Holmes v. Woodruff, 20 Vt. 97.

§ 748. —— Pleading.

[a] In an action of debt on a recognizance taken by a justice of the peace, conditioned to prosecute an appeal from his judgment to the common pleas, it must be alleged that the recognizance was returned to and made a record of that court.

—(Me. 1822) State v. Smith, 2 Me. (2 Greenl.) 62; (1833) Dodge v. Kellock, 10 Me. (1 Fairf.) 266;

(Mass. 1810) Bridge v. Ford, 7 Mass. 209; (1810) Prescott v. Tufts, Id.; (1855) Tarbell v. Gray, 70 Mass. (4 Gray) 444; (1855) Bowler v. Palmer, Id. 445, note.

[aa] In debt on a recognizance taken before a justice, conditioned for the prosecuting of an appeal, the declaration must show that the justice had jurisdiction of the action, and the condition must be set forth, and the breach alleged.

—(Me. 1822) State v. Smith, 2 Me. (2 Greenl.) 62;

(Mass. 1808) Bridge v. Ford, 4 Mass. 641; (1810) Id., 7 Mass. 209.

[b] (Cal. 1891) A complaint in an action on an appeal bond which alleges that defendant, in an action in the justice court, "appealed to the superior court of said county from said judgment," is a sufficient averment that an appeal was taken, and it is unnecessary to set out the several acts performed in taking it.—Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296.

[c] (Cal. 1893) In an action on a bond given to stay, pending appeal, execution on a justice's judgment for the return of personal property or its value, where the appeal has been dismissed by the superior court, the complaint need not allege that execution was issued and returned unsatisfied, or that notice of the dismissal of the appeal was given, or that demand was made before the action was brought, or that a delivery of the property could not be had, or that appellant had refused to obey an order of the superior court, unless a recovery is sought on such order.—Pieper v. Peers, 98 Cal. 42, 32 Pac. 700.

[d] (Del. 1856) The declaration, in an action against a surety in a recognizance, on an appeal from a justice of the peace, need not show that the justice had jurisdiction, either of the cause of action or of the person of the defendant, further than by setting forth the recovery of a judgment before him for a cause of action within his jurisdiction.—McColley v. Hickman, 1 Houst. 234.

[e] (Ill. 1849) In an action in debt on an appeal bond given before a justice of the peace, where the declaration set forth the execution and contents of the bond, and then alleged the trial of the case in the circuit court, the affirmance of the judgment, and the nonpayment thereof with reasonable certainty, it was *held* that this was sufficient, and that it was not necessary to aver that the justice had jurisdiction, or that the bond was filed in the circuit court clerk's office, as the bond became operative upon its execution, and the affirmance of the judgment completed the liability of the defendant.—Smith v. Whitaker, 11 Ill. (1 Peck) 417.

[f] (Me. 1860) To sustain an action on a recognizance taken to prosecute an appeal from the judgment of the justice, a final judgment for plaintiff must be proved.—Leathers v. Cooley, 49 Me. 337.

[g] (Mo. 1847) A recognizance for an appeal from the judgment of a justice of the peace is not a penal bond, and breaches should not be assigned in an action thereon.—Cockrill v. Owen, 10 Mo. 287.

[h] (N. Y. 1828) If a surety on an appeal bond from a justice of the peace wishes to avail himself of any deficiency in the appeal bond, he must show it specially and at large, or it will not be noticed.—Allison v. Wilkin, 1 Wend. 53.

[i] (Ohio, 1882) A petition on an appeal bond which merely states that the bond was executed and approved by the magistrate, and that the judgment was rendered in favor of appellee against the appellant, but which contains no averment that there was a suit in the magistrate's court, is demurrable.—Marks v. Harris, 6 Ohio Dec. 1101.

[j] (Vt. 1845) In debt upon a recognizance for the prosecution of an appeal from the judgment of a justice of the peace, it must appear from the declaration that the recognizance was entered into before the justice who rendered the judgment appealed from, or the declaration will be bad upon demurrer.—Needham v. Heath, 17 Vt. 223.

§ 749. —— Evidence.

[a] (Ind. 1841) In sci. fa. against bail, for stay of execution, a return of the constable to the execution against the original debtor cannot be controverted.—Burger v. Becket, 6 Blackf. 61.

[b] (Ind. 1895) In an action on a bond on appeal from a judgment of a justice of the peace, it was not necessary that the evidence show what disposition the judgment debtor had made of his property. It was sufficient to show that at the date of appeal he had sufficient property subject to execution to satisfy the judgment, and that at the determination of the appeal he was insolvent.—McFadden v. Lovitt, 13 Ind. App. 281, 41 N. E. 554.

[c, d] (Me. 1860) In an action on the recognizance on appeal from a judgment, proof of an entry of the amount of debt and costs recov-

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ered may be admitted as a record of plaintiff's judgment, though the time has elapsed within which the papers can be filed to authorize the clerk to extend and complete the record as of the time when judgment was recovered.—Leathers v. Cooley, 49 Me. 337.

[e, f] (Ohio, 1876) The fact that a person's name, given in the body of an appeal bond executed under section 12 of the justices' act, is not subscribed thereto, is presumptive evidence that he did not join in the undertaking.—Ford v. Albright, 31 Ohio St. 33.

[g] (Pa. 1843) Upon a plea of nul tiel record to a sci. fa. upon a recognizance of bail, on appeal from the judgment of a justice of the peace, the issue must be tried by inspection of the transcript and recognizance filed, and not the docket of the justice.—Bell v. Murphy, 6 Watts & S. 50.

[h] (Vt. 1845) A justice's record of a recognizance on appeal, that the connusors "jointly and severally recognized in the sum of $100, for the prosecution of the appeal in due form of law," is competent evidence, under a declaration which alleges that the condition of the recognizance was that the appellants "should prosecute their said appeal to effect, and answer and pay all intervening damages occasioned by delay to the said plaintiff, with additional costs, if judgment be affirmed."—McGregor v. Balch, 17 Vt. 562.

[i] (Vt. 1878) In debt upon a recognizance on appeal from a justice of the peace, copies of the appeal entered in the county court, containing a minute of the recognizance, are inadmissible under the plea of nul tiel record.—Murdock v. Hicks, 50 Vt. 683.

§ 750. Appeal and error.

[a] (Neb. 1886) On error to review the action of the court in overruling a demurrer to a petition upon an undertaking given on appeal from a justice's decision, where no defects are pointed out by plaintiff in error, and the petition apparently alleges all the substantial and essential facts, setting out a copy of the bond and the final judgment, and the officer's return to the execution, showing that he can find no property whereon to levy it, the judgment will be affirmed.—Pratt v. Smith, 20 Neb. 48, 28 N. W. 849.

16. REVIEW OF DECISIONS OF APPELLATE COURTS.

DECISIONS REVIEWABLE AND PROCEEDINGS FOR REVIEW, § 751.
PRESENTATION AND RESERVATION OF OBJECTIONS IN LOWER COURTS, § 752.
REVIEW IN GENERAL, § 753.
— PRESUMPTIONS, § 754.
— DISCRETION OF LOWER COURTS, § 755.
— HARMLESS ERROR, § 756.
DETERMINATION AND DISPOSITION OF CAUSE, § 757.
CERTIORARI, § 758.

Appeals from judgment of court of record in case certified from justice, see ante, § 244 [h, q].

Appeal from judgment dismissing action appealed from a justice as affecting substantial right, see "Appeal and Error," vol. 2, c. 1243, § 619 [o].

— *from judgment reversing justice's judgment and retaining cause for trial de novo, see* "Appeal and Error," vol. 2, c. 1175, § 536 [b, d].

— *in action to set aside judgment, see* "Appeal and Error," vol. 2, c. 850, § 131 [j].

— *necessity of motion for new trial to review rulings of intermediate courts, see* "Appeal and Error," vol. 2, cc. 2047, 2048, §§ 1722, 1723.

— *to supreme court of cases arising in justice court, see* "Appeal and Error," vol. 2, cc. 827–829, § 109; c. 864, § 152 [f, h]; cc. 871–875, §§ 166, 169, 170 [a].

Pecuniary limitations as affecting appeals, see "Appeal and Error," vol. 2, cc. 981–988, §§ 315–328.

Question whether defendant was deprived of his day in court, consideration in supreme court, see "Appeal and Error," vol. 3, c. 1135, § 3318 [x].

Record on appeal to the supreme court, sufficiency of showing of jurisdiction, see "Appeal and Error," vol. 3, c. 5, § 2282 [l, m, o].

§ 751. Decisions reviewable and proceedings for review.

Decisions reviewable as affected by nature, scope, and effect of decision, see "Appeal and Error," vol. 2, cc. 1391–1408, §§ 840–865.

Finality of determination as affecting review of decision, see "Appeal and Error," vol. 2, cc. 1164–1183, §§ 528–547.

[a] (Conn. 1834) If not guilty and a justification are pleaded in trespass qu. cl. fr. before a justice, where the damages demanded are seven dollars, and the justice find the defendant guilty, and assess damages, without any notice of the special plea, and the defendant appeal to the county court, and thence to the superior court, without any intermediate judicial act, this last appeal is coram non judice.—Fuller v. Topliff, 10 Conn. 60.

[b] (Ind. 1873) Where a judgment has been rendered by a justice of the peace, and the defendant has applied for an order to allow an appeal, which order has been refused, from which refusal an appeal has been taken to the supreme court, an order made in the court below, while the appeal is pending, setting off the judgment from which an appeal is sought against a like amount due on a judgment in favor of the defendant in the former judgment, and against the plaintiff in said judgment, will have no effect on the appeal.—Brooks v. Harris, 42 Ind. 177.

[c] (Ind. 1895) Under Rev. St. 1894, § 644 (Rev. St. 1881, § 632), allowing an appeal to the supreme court from the circuit court in cases originating before a justice of the peace only when the amount in controversy exceeds $50, where the amount claimed by plaintiff exceeds $50, but the amount of the verdict against defendant, added to a set-off filed by him, is less than $50, an appeal will not lie by defendant from an order retaxing costs.—Kahl v. Madison Brewing Co., 14 Ind. App. 78, 42 N. E. 492.

[d] (Iowa, 1859) An appellant, who has in other respects used all diligence to get his papers in an appeal case from a judgment of a justice, but who has neglected to take measures to compel the justice to furnish a further return of the papers which have been lost, and to have an order in the appellate court, affirming the judgment below, for want of prosecution of the appeal, set aside, is not entitled to a writ of error.—Whitmore v. Divilbis, 10 Iowa, 68.

[e] (Mich. 1869) A motion to dismiss an appeal from a justice of the peace, because the

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sureties in the appeal bond did not justify, cannot be brought up to the supreme court on a writ of error.—Conrad v. Freeland, 18 Mich. 255.

[f] (Mich. 1873) Error, and not certiorari, is the proper remedy to review a joint judgment against a principal and his sureties, upon a point on an appeal of the cause from a justice's court.—Evers v. Sager, 28 Mich. 47.

[g] (N. Y. 1842) The certificate required of the judge of common pleas, for a writ of error from his decision to the supreme court, by Laws 1836, p. 794. § 2, is regular, though obtained before the filing of the judgment record. —Moot v. Parkhurst, 2 Hill, 372.

[h] (N. Y. 1859) Where a judgment is merely reversed by the general term of the marine court, this is not an "actual determination," within Code, § 352, from which an appeal lies to the court of common pleas.—Howe v. Julien, 2 Hilt. 453.

[i] (N. Y. 1865) Where the county court refuses to dismiss an appeal from the judgment of a justice of the peace for alleged irregularity in serving notice of appeal, such refusal can only be reviewed in the supreme court by appeal from the order of the county court, denying the motion to dismiss.—Armstrong v. Smith, 44 Barb. 120.

[j] (Ohio, 1855) A judgment of the supreme court on circuit, overruling a refusal of the court of common pleas to allow a motion for a jury to try the damages in an action for forcible entry and detainer, when the decision of a justice had been overruled there on certiorari, and awarding a writ of procedendo, is no bar to a writ of error to reverse said judgment.—Aubrey v. Almy, 4 Ohio St. 524.

[k] (Tex. 1873) Appeal will not lie to the supreme court from a judgment rendered in a civil action which originated in the justice's court.—Greer v. Osborne, 37 Tex. 430.

[l] (Tex. 1882) The court of appeals has jurisdiction to entertain an appeal of a case appealed from the justice's court, where plaintiff demanded $175, the county court judgment was $32, and the costs in the justice's court were $30.25.—Jones v. Jones, 1 White & W. Civ. Cas. Ct. App. § 202.

[m] (Tex. 1895) Where an appeal from a justice to the district court is dismissed, a motion to have the judgment of dismissal set aside, and for a new trial, made within two days after the judgment is filed, is a "motion for a new trial," and gives further time for notice of appeal.—Welge v. Jackson (Civ. App.) 32 S. W. 371.

[n] (Vt. 1832) An action brought in the county court by appeal, on having an offset filed there, which could not be filed were it not for the act of 1811, is open to review by virtue of that act; and its provisions are not repealed by Act 1826, which provides that no review shall be allowed in any action brought to the county court by appeal.—Bloss v. Kittridge, 4 Vt. 272.

§ 752. Presentation and reservation of objections in lower courts.

Motion for new trial as affecting right to review of decision, see "Appeal and Error," vol. 2, cc. 2047, 2048, §§ 1722–1723.

Necessity of exceptions to ruling of appellate court, see "Appeal and Error," vol. 2, cc. 1869, 1870, §§ 1440–1441.

Presentation and reservation of issues and questions for review, see "Appeal and Error," vol. 2, cc. 1631–1634, §§ 1133–1136.

—— *of objections to appeal to appellate court, see* "Appeal and Error," vol. 2, cc. 1819–1823, §§ 1374–1381.

[a] (Ala. 1856) A defendant, after having a trial and a judgment against him before a justice, and some other proceeding there which had the effect to render the judgment nugatory, appealed to the circuit court, where the plaintiff appeared and filed his claim, and, on trial by the jury, obtained a verdict. The defendant then objected that the circuit court had no jurisdiction; the judgment from which the appeal was taken not being valid. *Held*, that this objection could not be raised for the first time on error.—Gresham v. Tucker, 28 Ala. 611.

[b] (Cal. 1855) An objection that the county court has no jurisdiction, because there was no appeal bond, as required by statute, on appeal from a justice of the peace, should be made in the intermediate court. It is too late in the supreme court.—Howard v. Harman, 5 Cal. 78.

[c] (Iowa, 1851) An objection of form to an action commenced before a justice, not raised in the district court, will not be ground for reversal in the supreme court.—Packer v. Cockayne, 3 G. Greene, 111.

[d] (Iowa, 1873) An appeal from a judgment of a justice of the peace was taken to the district court before the act creating the circuit court went into operation. The appellee afterwards filed the transcript in the circuit court and obtained judgment thereon against the defendant and his surety in the appeal bond. At the following term, defendant made application to set the judgment aside for reasons assigned, but made no objection to the jurisdiction. *Held* that, by appearing and failing to object to the jurisdiction of the circuit court, he was thereby estopped from urging it for the first time on appeal to the supreme court.—Iowa Northern Cent. Ry. Co. v. Ritter, 36 Iowa, 568.

[e] (Kan.) Where an action for the recovery of money only has been commenced before a justice of the peace, and is afterwards appealed to the district court, and the defendant, with the consent of all the parties, files an answer setting up a counterclaim exceeding $300, and the plaintiff and defendant voluntarily appear and proceed to trial, and no objection is made at any time before the trial court to the counterclaim, or to the jurisdiction of the court to hear and dispose of the same, the plaintiff cannot, in the supreme court, for the first time, object to the jurisdiction of the trial court to hear and determine such counterclaim.—(1877) Shuster v. Finan, 19 Kan. 114; (1885) Gregg v. Garverick, 33 Kan. 190, 5 Pac. 751.

[f] (Kan. 1896) When the district court, on a petition in error from a justice of the peace, reverses the judgment of the justice, it is not necessary for the aggrieved party to file a motion for a new trial in order to have the decision of the district court reviewed on petition in error.—Shaffer v. Hoenschild, 2 Kan. App. 516, 43 Pac. 979.

[g] (Ky. 1844) Where, on the trial of an appeal from a judgment of a justice of the peace, in attachment, a jury has intervened, neither party objecting, no advantage can be taken thereof in the court of appeals.—Kennedy v. Aldridge, 44 Ky. (5 B. Mon.) 141.

[h] (Mich. 1859) After a trial in the justice's court on the merits, and an appeal therefrom, and trial in the circuit court on the merits, defendants' objection that the damages claimed were beyond the jurisdiction of the justice's court is made too late, not being raised in the appellate court.—Tower v. Lamb, 6 Mich. 362.

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[i] (Mo. 1855) Where no questions of law are saved in an appeal from a justice, the judgment of the circuit court will be affirmed.—Aiken v. Todd, 20 Mo. 276.

[j] (Mo. 1855) Causes taken by appeal from a justice's court to the circuit court must be tried under the old law, and not under the new practice act of 1850; and exceptions to the evidence must be taken, and instructions asked, to entitle the parties to a review of the circuit court decision.—Terrell v. Hunter, 21 Mo. 436.

[k] (Mo. 1870) The objection made in the supreme court, for the first time, that the complaint which should have been filed in the justice court, where the action originated, does not appear in the transcript, comes too late.—Fisher v. Pacific R. R., 46 Mo. 304.

[l] (Neb. 1888) Appellant from a justice's judgment cannot assign error for failure of the district court to try the cause, where no application is made for leave to answer, or to vacate the judgment rendered, under Code, § 1011, providing for the rendition of judgment for the appellee, on failure of the appellant to file transcript with the clerk, within 30 days after judgment by the justice.—Slaven v. Hellman, 24 Neb. 646, 39 N. W. 843.

[m] (Neb. 1894) An objection that a petition in a district court, on an appeal from a justice's court, stated a new cause of action, cannot be raised for the first time on an appeal to the supreme court.—Levi v. Fred, 57 N. W. 386.

[n] (N. J. 1827) Where a justice has refused an adjournment to which a party was entitled, but the party fails to seek such relief on appeal to the common pleas, he cannot obtain it in the supreme court.—Gould v. Brown, 9 N. J. Law (4 Halst.) 165.

[o] (N. C. 1881) The correct practice in a case of a refusal of the superior court to dismiss an appeal from a justice's judgment is to reserve the exception and proceed with the trial, so that, on appeal, the supreme court may dispose of the whole case.—Spaugh v. Boner, 85 N. C. 208.

[p] (Ohio, 1860) When the parties on an appeal from a justice of the peace proceed to trial before a jury, upon the transcript of the justice, without pleadings, and, no objection being taken, there is a verdict and judgment, the judgment will not be reversed on error for such irregularity.—Hallam v. Jacks, 11 Ohio St. 692.

[q] (Pa. 1889) An objection that a justice of the peace has no jurisdiction of an action against a township for injuries caused by a defective highway may be taken for the first time in the supreme court after the trial of an appeal to the common pleas.—Hill v. Tionesta Tp., 129 Pa. 525, 19 Atl. 855.

[r] (Tex. 1891) Failure of the district court, on appeal from justice's court, to marshal assets cannot be assigned as error on appeal to the supreme court, in the absence of anything to show that such relief was asked in justice's court.—Silberberg v. Trilling, 82 Tex. 523, 18 S. W. 591.

§ 753. Review in general.

Scope and extent of review in general, see "Appeal and Error," vol. 3, cc. 1110–1153, §§ 3279–3341.

[a] (Ala. 1853) The notice to the appellee, required in appeal cases from justices of the peace, is intended solely for his benefit; and the appellant cannot complain on error that it was not given.—Martin v. Higgins, 23 Ala. 775.

[aa] (Ill. 1859) On a hearing in the supreme court to revise the judgment of a justice of the peace, by appeal, a judgment rendered on a certiorari to the justice of the peace cannot be examined.—Chicago & R. I. R. Co. v. Whipple, 22 Ill. (12 Peck) 337.

[b] (Ill. 1879) Where the jury in a justice court, as well as that in a circuit court, found the same verdict, on conflicting evidence, it will not be disturbed on appeal.—Howitt v. Estelle, 92 Ill. 218.

[c] (Ill. 1887) Defendant in replevin not having attacked the jurisdiction of the county court on appeal from a justice, and having waived proof of "the contents of the writ," the affidavit for the writ stating the value of the property at $60, a judgment for plaintiff will not be reversed on the ground that the value of the property, and consequently the jurisdiction of the justice, was not shown.—Cox v. McGuire, 26 Ill. App. 315.

[d] (Iowa, 1859) Where a defendant appeals from a justice's judgment, and appears in the district court, he cannot, on appeal from the district court's judgment, affirming the justice's judgment on plaintiff's motion therefor, for default of defendant to appear, urge error in sustaining plaintiff's motion, where he failed to demand in the district court a trial on the merits.—Atkins v. McCready, 8 Iowa (8 Clarke) 214.

[e] (Iowa, 1859) Error of a justice in overruling a motion to dismiss an action, on the ground that defendant is not a resident of the township over which the justice has jurisdiction, will not, on appeal from a judgment of the district court, approving the justice's judgment for plaintiff, be considered, when the record shows that the motion is not verified, and does not show that the defendant was not a resident of said township.—Shellenberger v. Ward, 8 Iowa (8 Clarke) 425.

[f] (Iowa, 1886) When the amount in controversy before a justice of the peace exceeds his jurisdiction, the supreme court will entirely disregard the justice's certificate of appeal, and try the case on the record from the circuit court, without regard to such certificate.—Brock v. Barr, 70 Iowa, 399, 30 N. W. 652.

[g] (Minn. 1872) Where an objection to the jurisdiction, on the ground that the justice of the peace who transferred the cause to the one who tried it did not do so by an order entered in his docket specifying the justice to whom the transfer was made, is taken in the supreme court for the first time, the party must show the omission affirmatively by the record. It is not shown by a paper in the record, purporting to be a transcript from the docket of the first justice, but not certified so to be, nor by proof of recitals in the docket of the justice trying the cause.—Barber v. Kennedy, 18 Minn. 216 (Gil. 196).

[h] (Mo. 1886) Where a judgment in default is entered in an action before a justice of the peace, and the defendant appeals to the circuit court, but fails to appear, he cannot complain that the circuit court, instead of dismissing the appeal or affirming the judgment, orders a trial de novo, upon which the plaintiff again has judgment.—Hill v. St. Louis Ore & Steel Co., 90 Mo. 103, 2 S. W. 289.

[i] (Mo. 1890) On appeal from a mayor's court to the circuit court, a recital in the record of the circuit court that "Now come the parties to this proceeding" is not conclusive as to the personal representatives of one not served in time for the mayor's court.—Leonard v. Sparks, 63 Mo. App. 585.

[j] (N. C. 1872) Although a defendant who has confessed judgment has no right, by the North Carolina statutes, to appeal from such judgment, yet where an appeal has been allowed in such case by a justice of the peace, and the

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plaintiff has failed to move to dismiss the appeal in the superior court, the supreme court may pass by the irregularities, and, regarding the proceedings as in the nature of a writ of false judgment, consider the errors assigned upon the record.—Rush v. Halcyon Steamboat Co., 67 N. C. 47.

[k] (Ohio, 1876) Where an action in a justice court is taken to the common pleas on error, and thence to the district court, a transcript filed, but not attached, to the petition in error, or made a part of the record, will not be considered.—Hartman v. White, 7 Ohio Dec. 45, 1 Wkly. Law Bul. 79.

[l] (Tex. 1856) Suit for $55 before a justice. Attachment of a mule. Leave to attach being granted on the allegation that the debtor was about to quit the state. Plea of reconvention for fraudulently obtaining leave to attach. Damages demanded $100. Verdict for defendant for $100 and judgment. On appeal, nearly the same judgment in the district court; there being evidence to warrant it. On appeal, this court refused to reverse the judgment.—Monroe v. Watson, 17 Tex. 625.

[m] (Wis. 1874) On appeal from an order of the circuit court denying a motion to reinstate an appeal from a justice's court, dismissed at a former term, the supreme court cannot consider whether the order of dismissal was prematurely made. That question could be presented here only by an appeal from the order of dismissal itself.—Pinger v. Vanclick, 36 Wis. 141.

§ 754. —— Presumptions.

Presumptions on appeal, see "Appeal and Error," vol. 8, cc. 1399–1602, §§ 3667–3806.

[a, b] (Ala. 1885) Under Code, § 3122, providing that appeals from a justice court when the sum claimed exceeds $20 shall be tried on an issue to be made up under direction of the court, the record need not show that the issue was made up under direction of the court, but, when pleas to the merits are found in the record, it will be presumed, on appeal from the upper court, that the case was tried on them without objection.—Jones v. Collins, 80 Ala. 108.

[c] (Ark. 1842) On an appeal from a justice of the peace, in an action on account, final judgment by the circuit court, the record finding that there was no appearance by the defendant, and not finding that there was a writ of inquiry, will be reversed; the presumption in favor of it being contravened by the record.—Pirani v. Allhime, 4 Ark. (4 Pike) 440.

[d] (Ark. 1850) In such case, where the appellant takes a rule upon the justice to amend his transcript, and the cause is afterwards dismissed, the supreme court will presume, in the absence of any showing to the contrary, that the appellant had the benefit of his rule, and that the justice could not amend so as to perfect the jurisdiction of the circuit court.—Heflin v. Owens, 10 Ark. (5 Eng.) 265.

[e] (Ind. 1837) On appeal from the judgment of a justice of the peace, if no objection to the irregularity of the appeal is taken in the circuit court, the supreme court will presume it to have been regularly taken.—Maxam v. Wood, 4 Blackf. 297.

[f] (Ind. 1848) An appeal may be taken from the judgment of a justice of the peace within 30 days of right, and after that time by permission of the court for certain reasons; and where an appeal is allowed after the 30 days have elapsed, and the reason therefor does not appear on the record, it will be presumed that it was allowed for legal cause.—Inhabitants of Congressional Tp. No. 7 v. Clark, Smith, 41; Inhabitants of Congressional Tp. No. 19 v. Clark, 1 Ind. (1 Cart.) 139.

[g] (Ky. 1839) Upon the trial of an appeal in the circuit court from a justice of the peace, where the warrant was for $50 due by acceptance for hardware, as the jury might give damages for the detention of the debt, and as the verdict was for $54.50, it will be presumed that the excess was for interest, not that the original demand exceeded the justice's jurisdiction.—Clagget v. Blanchard, 38 Ky. (8 Dana) 41.

[h] (N. C. 1872) Where a defendant confessed judgment before a justice on a note given to the plaintiff, as administrator, for the rent of a house, and then appealed and objected in the superior court that the plaintiff had no right of action, *held*, on appeal to the supreme court, the record showing nothing to the contrary, that it must be presumed that the plaintiff's intestate had an estate for years, and not an inheritable estate in the premises.—Rush v. Halcyon Steamboat Co., 67 N. C. 47.

[i] (Pa. 1888) Where, on appeal from a justice of the peace to the court of common pleas, the justice's jurisdiction is called in question, and, on error, no copy of the transcript is exhibited, the supreme court must assume that the plaintiff's demand was within the justice's jurisdiction.—Wise v. Allen, 13 Atl. 544.

[j] (Tex. 1891) A bond, on appeal from a justice, was made payable to but one of the appellees. The appeal was dismissed on motion of the appellee named in the bond, based on the insufficiency of the bond, but not specifying such defect. The other appellee had also moved to dismiss, on the ground that the bond was not payable to him, but the motion was not called to the attention of the court. *Held* fair to infer that such motion was not insisted on, and that the court did not dismiss the appeal because of the defect in naming the obligees.—Cason v. Laney, 82 Tex. 317, 18 S. W. 667.

§ 755. —— Discretion of lower courts.

Discretion of lower court, see "Appeal and Error," vol. 8, cc. 1603–1751, §§ 3807–3892.

[a] (Mich. 1868) The fact of excess in a justice's judgment not appearing on the record, the court will not inquire into the discretion exercised by the circuit judge in awarding costs, in order to determine on the power of the court to review it.—Mitchell v. Shuert, 16 Mich. 444.

[b] (Mich. 1889) The discretion of the circuit court, given by How. Ann. St. § 7005, to allow a party in an action before a justice of the peace to appeal, where he has failed to do so within the time prescribed by law, will not be reviewed on writ of error.—Vincent v. Bowes, 78 Mich. 315, 44 N. W. 276.

[c] (Neb. 1881) When, on appeal from a judgment of a justice of the peace, the appellee answers and goes to trial in the district court, he cannot assign it as error that he was required by the court to do so before the time required by law, although he objected at the time.—Cobbey v. Burks, 11 Neb. 157, 8 N. W. 386, 38 Am. Rep. 364.

[d] (N. Y. 1887) It is discretionary with the county court whether it will allow a defective notice of appeal from a decision of the justice of the peace to be amended, and no appeal will lie from its decision.—Reilly v. Murray, 6 N. Y. St. Rep. 720.

[e] (Ohio, 1884) Appeals from justices must be entered in the court of common pleas within

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the two first days of the next term; and, if that court has a discretionary power to enlarge the time, the refusal to exercise it cannot be controlled by the supreme court.—Price v. Orange, Wright, 568.

[f] (Vt. 1838) A petition to the county court for a new trial after default before a justice of the peace is an appeal to the discretion of the court; and, so long as the court keep within the limits of their authority, their proceedings are not subject to be revised or controlled by writ of error, certiorari, or appeal.—Houghton v. Slack, 10 Vt. 520.

[g] (Vt. 1860) No error can be predicated upon the court's refusal to set aside the judgment of a justice, in a case within the purview of Comp. St. c. 36, § 8, unless it appear that such refusal was put upon some other ground than the exercise of the discretion of the court upon the facts presented.—Downs v. Reed, 32 Vt. 785.

§ 756. —— Harmless error.

Harmless error, see "Appeal and Error," vol. 3, cc. 1923–2260, §§ 4029–4252.

[a] (Ala. 1884) On appeal from a justice's judgment to the circuit court, the appellee's counsel, in his argument to the jury, referred to the fact that his client was successful in the justice's court, and repeated such remark to the jury, and also to the court in the presence of the jury. The court rebuked the counsel, and in charging the jury withdrew from their consideration the fact of the justice's ruling. *Held*, that the conduct of the attorney, though improper, was not prejudicial.—Harsh v. Heflin, 76 Ala. 499.

[b] (Ga. 1884) Where the suit was for damages to personal property, and the verdict on appeal was within the justice's jurisdiction, the fact that the summons failed to specify the amount of damages claimed will not require a reversal.—Farkas v. Stewart, 73 Ga. 90.

[c] (Ill. 1888) In an action for services as a physician, originally brought in a justice's court, it was stipulated on appeal that the sole defense was that the services were rendered upon an express contract to effect a perfect cure, which had not been effected. After defendant had testified, plaintiff was permitted to prove, as in rebuttal, that on the trial before the justice he did not admit a special contract, and also what would be the proper treatment in the cases put to the experts, although no such matter had been introduced by defendant. *Held*, that the admission of such testimony was not prejudicial error.—Shea v. Wagner, 29 Ill. App. 193.

[d] (Ind. 1858) Where a defendant appealed from a justice, on a written offer to confess judgment, and offered no witnesses to prove his claim that he had verbally withdrawn his offer to confess, a dismissal of the appeal, instead of trial of the cause anew, was harmless error.—Lewis v. Morrison, 10 Ind. 395.

[e] (Iowa, 1851) Error in allowing a new and insufficient bond, on appeal from a justice of the peace, to be substituted in the district court, was harmless, where the principal therein succeeded in said court.—Hammitt v. Coffin, 3 G. Greene, 205.

[f] (Minn. 1890) Where, upon appeal to the district court from the judgment of a justice of the peace, no error can be found in the record, it a harmless error to dismiss the appeal, instead of affirming the judgment.—Schroeder v. Harris, 43 Minn. 160, 45 N. W. 4.

[g] (Mo. 1892) Where, after appeal from the judgment of a justice, in an action on an account, plaintiff amended his account by additional items, if error, it was harmless, since he entered a remittitur after judgment for the amount of the items so added.—Wenzell v. Erath, 48 Mo. App. 476.

[h] (W. Va. 1885) In the absence of any objection in the lower court, or showing of prejudice, a judgment rendered in an unlawful entry and detainer suit, tried on its merits in the circuit court on appeal from a justice, will not be reversed because the jury were sworn to "try the issue joined," instead of being sworn "to try whether the defendant unlawfully withholds the premises in controversy."—Chancey v. Smith, 25 W. Va. 404, 52 Am. Rep. 217.

[i] (W. Va. 1889) A summons issued by a justice in a civil suit was served by delivery of a copy to the defendant by a private individual, as shown by his affidavit, and judgment was rendered against defendant by default. On appeal to the circuit court, he moved to quash the return on the ground that the person so serving had not been appointed a special constable, and the court overruled the motion to quash. Defendant then made full defense before a jury, and there was judgment upon the verdict against him for $107.85. *Held*, that the judgment would not be reversed for error in overruling the motion to quash.—Johnson v. MacCoy, 32 W. Va. 552, 9 S. E. 887.

§ 757. Determination and disposition of cause.

Determination and disposition of cause, see "Appeal and Error," vol. 3, cc. 2372–2843, §§ 4380–4723.

[a] (Conn. 1893) Where, on appeal from a justice's court, the complaint has been amended, so as to include a distinct cause of action, a new trial will be granted on appeal, although the amount involved is small, since it affects the right of recovery, and not the amount thereof.—Allen v. Woodruff, 63 Conn. 369, 28 Atl. 532.

[aa] (Mo.) The judgment of the court above, on an appeal from a justice, must be affirmed in the supreme court, if there is no statement or bill of exceptions or error apparent on the record.—(1854) Moore v. Turner, 19 Mo. 642; (1855) Elliott v. Pogue, 20 Mo. 263; (1855) Aiken v. Todd, Id. 276; (1855) Heath v. Walther, 21 Mo. 169; (1855) Sickles v. Abbott, Id. 443; (1855) Southerland v. Warner, Id. 512.

[b] (Mo. 1857) Where a judgment for the plaintiff, obtained before a justice of the peace, has been reversed on appeal to the circuit court, the supreme court, on further appeal, will reverse the decision of the circuit court, if it appear that the justice of the peace had no jurisdiction in the case.—Glasby v. Prewitt, 26 Mo. 121.

[c] (N. Y. 1846) Where a justice rendered a judgment in favor of defendant for the sum adjudged to be due him from plaintiff, and for costs, in a case where the judgment should have been generally for defendant, with costs, though the common pleas should have reversed the erroneous part, and affirmed the judgment as to the residue, yet, as the common pleas reversed the whole judgment, the appellate court should reverse that judgment, and render such judgment as the common pleas should have done, denying costs to either party in the common pleas.—Kast v. Kathern, 3 Denio, 344.

[d] (N. Y. 1853) An affidavit to ground a motion to dismiss an appeal from the supreme court to the court of appeals, because the suit in the supreme court is a continuation of one

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commenced before a justice, must show in terms the fact that the justice was ousted of jurisdiction by the giving of the undertaking required by Code, § 56.—Lalliette v. Van Keuren, 7 How. Prac. 409.

[e] (N. Y. 1876) On appeal from a justice's court to the county court, where a new trial is to be had, and the county court refuses to pass on all questions raised at the trial before the justice, and an appeal is taken to the supreme court, the judgment will be reversed, without looking into the merits of the objections.—Maxon v. Reed, 8 Hun, 618.

[f] (Pa. 1822) On reversing a common pleas judgment, rendered on appeal from justice court, the record will be sent back for amendment only where the error is clerical and trifling.—Langer v. Parish, 8 Serg. & R. 134.

[g] (S. D. 1893) When an appeal from a justice's court has been dismissed by the circuit court for lack of a proper appeal bond, and the order affirmed by the supreme court, the jurisdiction of the circuit court over the case is at an end; and a motion made thereafter to such court by the appellant, for leave to file a new or amended bond, is properly denied.—Rudolph v. Herman, 4 S. D. 203, 56 N. W. 122.

[h] (Wis. 1853) The finding of the county court on appeal from a justice is equivalent to the verdict of a jury, and, having been entered of record, the appellate court cannot enlarge it by intendment, and, where it is insufficient, judgment will be reversed.—Heerou v. Beckwith, 1 Wis. 17.

§ 758. Certiorari.

Certiorari to appellate court, see "Certiorari," vol. 9, cc. 1718–1958.

[a, b] (N. J. 1828) When proceedings of the common pleas are removed, in a case appealed from a justice of the peace, the court may inspect the transcript sent up by the justice, in order to ascertain a fact that occurred before him.—Dancer v. Patterson, 10 N. J. Law (5 Halst.) 255.

[c] (N. J. 1851) The supreme court, on writ of certiorari to the common pleas, after an appeal, cannot review the judgment of the justice, and reverse for error by him. The writ brings up the judgment on the appeal merely.—Vannoy v. Givens, 23 N. J. Law (3 Zab.) 201.

[d] (N. J. 1854) A judgment of the common pleas for a less amount than the amount recovered before a justice of the peace may be amended on certiorari.—Cheeseman v. Cade, 24 N. J. Law (4 Zab.) 632.

[e] (N. J. 1896) Upon a certiorari directed to the court of common pleas to review a judgment of that court, founded on an appeal from the court for the trial of small causes, only the errors of the common pleas can be considered.—Moore v. Johnson, 58 N. J. Law (29 Vroom) 586, 34 Atl. 396.

(B) CERTIORARI.

1. NATURE, SCOPE, AND JURISDICTION OF REMEDY, §§ 759-761.
2. DECISIONS AND PROCEEDINGS REVIEWABLE, §§ 762-767.
3. GROUNDS, DEFENSES, AND RIGHT OF REVIEW, §§ 768-775.
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10. LIABILITIES ON BONDS AND REVIEW OF DECISIONS, §§ 829, 830.

Certiorari to compel justice to amend transcript or record, see ante, § 628.

—— *to transmit transcript or record on appeal, see* ante, § 631.

Election between appeal and certiorari, see ante, § 465.

Certiorari to review proceedings in forcible entry and detainer, see "Forcible Entry and Detainer," vol. 23, cc. 1416–1422, §§ 183–187.

Review of proceedings in justices' courts under landlord and tenant acts by certiorari, see "Landlord and Tenant," vol. 32, §§ 1206–1263, 1336–1343.

1. NATURE, SCOPE, AND JURISDICTION OF REMEDY.

NATURE AND SCOPE OF REMEDY IN GENERAL, § 759.
STATUTORY PROVISIONS, § 760.
JURISDICTION, § 761.

Amount in controversy as determining review by certiorari or appeal to jury in justice's court, see post, § 767.

Remedy by appeal or certiorari determined by amount in controversy, see ante, § 465.

§ 759. Nature and scope of remedy in general.

[a] (Del. 1840) The judgments of a justice of the peace may be reviewed both by certiorari and appeal, but not at the same time. The remedy by appeal is cumulative.—Williams v. Burchinal, 3 Har. 83.

[aa] (Miss. 1843) The certiorari is in the nature of an appeal, although the statute allows the parties to proceed in the circuit court de novo on the merits.—Hurd v. Tombes, 8 Miss. (7 How.) 221.

[b] (N. J. 1807) A court of common pleas, on certiorari from a justice, does not sit as a court of error.—Clark v. Fulse, 2 N. J. Law (1 Penning.) 263.

[c] (N. C. 1873) A recordari is a substitute for an appeal, where the party has lost his right to appeal otherwise than by his own default.—Marsh v. Cohen, 68 N. C. 283.

[d] (Or. 1886) If the judgment of the justice is void, remedy may competently be obtained by writ of review.—Prickett v. Cleek, 13 Or. 415, 11 Pac. 49.

[e] (Pa. 1867) Where a writ of certiorari is issued against a magistrate who is proceeding under a new jurisdiction, the proceeding by certiorari is summary.—Wilt v. Philadelphia & L. Turnpike Co., 1 Brewst. 411.

[f] (Pa. 1879) A certiorari is in substance a writ of error.—Strohm v. Carroll, 11 Lanc. Bar, 62.

[g] (Pa. 1885) A certiorari to a justice is in substance a writ of error, and the rules of law applicable thereto are substantially the same.—Munshower v. Evans, 2 Chest. Co. Rep. 489.

[h] (Tenn. 1844) A writ of certiorari is a substitute for an appeal.—Burt v. Davidson, 24 Tenn. (5 Humph.) 425.

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[i] (Tenn. 1852) Where the writ of certiorari is resorted to merely for the purpose of correcting an abuse of the execution issued by a justice of the peace, it is in the nature of an audita querela.—Jones v. Williams, 32 Tenn. (2 Swan) 105.

[j] (Tenn. 1854) In view of the extension of the jurisdiction of justices of the peace, by which a new trial by jury has become a matter of greater importance to the rights and interests of parties than heretofore, the courts will rather relax than render more stringent the practice regulating the remedy by certiorari, where merit exists and no real fault or negligence can be imputed to the party.—McCormack v. Murfree, 34 Tenn. (2 Sneed) 46.

[k] (Tex. 1904) The office of a writ of certiorari is simply to bring up to the district court from the justice's court the case tried by the justice, that it may be tried de novo. —Hill v. Faison, 27 Tex. 428.

[l] (Wis.) The object of the writ of certiorari is to confine inferior tribunals within their jurisdiction, not to correct errors in their execution of their proper powers.—(1860) Tallmadge v. Potter, 12 Wis. 317; (1865) Combs v. Dunlap, 19 Wis. 591.

§ 760. Statutory provisions.

[a] (Ala. 1852) Act 1850 (Pamph. Acts, p. 81), requiring a trial de novo on certiorari to the circuit court from a justice of the peace, does not apply to cases which were pending in the circuit court at the date of the passage of the act.—Mahan v. Lester, 20 Ala. 162.

[b] (Colo. 1893) The remedy by certiorari provided by Gen. St. 1883, § 1995, being in the chapter regulating justices, is exclusive, and the general provisions of the Code relative to certiorari are not applicable.—Wood v. Lake, 8 Colo. App. 284 33 Pac. 80.

[c] (Pa. 1818) Act March, 1810, § 22, which declares that the judgment of the court of common pleas shall be final on all proceedings removed by certiorari from before justices of the peace, and that no writ of error shall issue thereon, is confined to certiorari issued under it, and does not extend to a case which was removed prior to the passage of the act. —Love v. Barton, 4 Serg. & R. 269.

[d] (Tenn. 1892) Mill. & V. Code, § 3843, provides that "two justices of the peace may, within 20 days after judgment, grant a certiorari and supersedeas to remove the proceedings of a justice of the peace to the circuit court." Section 4093 provides that the proceedings of a justice, in actions of forcible entry and detainer, "may, within thirty days after the rendition of judgment, be removed to the circuit court by writs of certiorari and supersedeas, which it shall be the duty of the judge to grant, on petition, if the merits are sufficiently set forth." *Held*, that the provision of section 4093 did not affect the authority of the two justices in actions of forcible entry and detainer to grant the writ, if applied for within the shorter time permitted by section 3843. —Fisher v. Baldridge, 91 Tenn. 418, 19 S. W. 227.

[e] (Tex. 1871) Act Aug. 13, 1876, providing that all causes appealed from a justice court shall be tried de novo in the district court, and such trial shall be final, without appeal to the supreme court, applies to cases taken up by certiorari, as well as those taken up by appeal.—Nichols v. Page, 34 Tex. 333.

§ 761. Jurisdiction.

[a] (Ala. 1842) The city court of Wetumpka is a court of limited jurisdiction, and has no authority to issue a certiorari to a justice of the peace.—Gray v. Apperson, 3 Ala. 328.

[b] (Ark. 1848) In the absence of an act of the legislature authorizing it, a judgment of a justice of the peace cannot be removed to the circuit court for readjudication.—Sawyer v. Crawford, 9 Ark. (4 Eng.) 32.

[c] (D. C. 1878) A justice of the supreme court of the District of Columbia cannot grant a writ of certiorari on a judgment rendered by a justice of the peace on the verdict of a jury in a civil suit before him.—McIntosh v. Johnson, 3 MacArthur, 586.

[d] (Fla. 1855) The supreme court has not jurisdiction to issue a writ of certiorari to a justice of the peace.—Halliday v. Jacksonville & A. Plank Road Co., 6 Fla. 304.

[e] (Minn. 1879) Const. art. 6, § 5, gives the district courts original jurisdiction in "all civil cases," and "such appellate jurisdiction as may be prescribed by law." The only appellate jurisdiction to review judgments of justices of the peace given by law to the district courts is by appeal. *Held*, that the district court cannot review the judgment of a justice on certiorari.—Goar v. Jacobson, 26 Minn. 71, 1 N. W. 799.

[f] (Miss. 1827) A judge of probate cannot issue a certiorari to remove a case from a justice into the county court.—Barlow v. Esterling, 1 Miss. (Walk.) 302.

[g] (Mo. 1835) The circuit court has no power to issue a certiorari to bring up proceedings had before a justice of the peace, after a trial had before him.—Boren v. Welty, 4 Mo. 250.

[h] (Mo. 1885) On removal to the circuit court by certiorari, jurisdiction cannot be conferred by amendment and the appearance of the parties, where the justice's jurisdiction does not appear.—McQuoid v. Lamb, 19 Mo. App. 153.

[i] (N. Y. 1830) Under the statute giving the court of common pleas authority to review on certiorari the judgments of justices of the peace, the writ may be issued by that court. —People v. Onondaga Common Pleas, 4 Wend. 212.

[j] (N. Y. 1830) Notwithstanding the provisions of the Revised Statutes authorizing the removal of a justice's judgment by certiorari into the common pleas, such judgment may be removed into the supreme court by the same writ.—Comstock v. Porter, 5 Wend. 98.

[k] (N. Y. 1832) Though a commissioner should not allow a certiorari, yet, where he does so, and the supreme court directs a supplementary return, this is a ratification of the act, and the certiorari will not be quashed.—Caledonian Co. v. Trustees of Hoosick Falls, 7 Wend. 508.

[l] (N. Y. 1832) A commissioner cannot allow a common-law certiorari. Its issuing can be only by order of the court on cause shown, except when it issues ex debito justitiæ.—Bradner v. Superintendent of Poor of Orange County, 9 Wend. 433.

[m] (N. Y. 1846) A certiorari lies from the supreme court upon a justice's judgment in cases where the statute authorizes such writ to be issued from the court of common pleas. —Kellogg v. Church, 8 Denio, 228.

[n] (N. C.) The county courts have no power to direct proceedings had before a justice of the peace to be brought before them. Their jurisdiction is confined to specified and enumerated objects.—(1800) Alexander v. Bateman, 1 N. C. 248; (1821) West v. Kittrell, 8 N. C. 493.

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[o] (Pa. 1803) The supreme court has power to review the proceedings of justices of the peace in cases in which an appeal is not given.—Burginhofen v. Martin, 3 Yeates, 479.

[p] (Pa. 1867) The court of common pleas has jurisdiction to issue writs of certiorari to remove proceedings from justice's courts.—Wilt v. Philadelphia & L. Turnpike Co., 1 Brewst. 411.

[q] (Pa. 1871) Though Const. art. 5, § 8, empowers judges of the courts of common pleas to allow writs of certiorari to justices of the peace, it does not require them to do so.—McGinnis v. Vernon, 67 Pa. (17 P. F. Smith) 149.

[r, s] (Pa. 1887) Under Const. 1873, art. 5, § 10, providing that "the judges of the courts of common pleas within their respective counties shall have power to issue writs of certiorari to justices of the peace and other inferior courts not of record," the court of quarter sessions has no jurisdiction to review the proceedings before an alderman or justice of the peace on a certiorari. The common pleas' jurisdiction is exclusive.—Evans v. Commonwealth, 5 Pa. Co. Ct. R. 362.

[t] (Tenn.) Under a statute providing that two justices of the peace may grant a certiorari to remove proceedings from a justice to the circuit court, where the petition is addressed to the judge of the circuit court the justices have no power to act thereon.—(1831) Taul's Adm'r v. Collinsworth, 10 Tenn. (2 Yerg.) 579; (1832) Turner v. Farley, 11 Tenn. (3 Yerg.) 300; (1834) Duggan v. McKinney, 15 Tenn. (7 Yerg.) 21.

[u] (Tenn. 1836) Where a judgment of a justice of the peace for more than $100 was taken by certiorari to the circuit court, it was *held* that the plaintiff could not remit so much of his demand as would reduce it below $100, and thereby give the court jurisdiction.—Dixon v. Caruthers, 17 Tenn. (9 Yerg.) 30.

[v] (Tex. 1859) Upon trial of a cause brought up by certiorari to a justice of the peace, the district court has no jurisdiction of items not claimed before the justice.—Clark v. Snow, 24 Tex. 242.

[w] (W. Va. 1887) Under the provisions of Amend. Code, c. 110, the circuit court has jurisdiction to review the judgment of a justice rendered on the verdict of a jury by writ of certiorari.—Fouse v. Vandervort, 30 W. Va. 327, 4 S. E. 298.

[x] (Wis. 1840) Act Dec. 8, 1836, concerning the supreme and district courts, and defining their jurisdiction and powers, does not confer on the supreme court jurisdiction to issue certiorari to a justice of the peace.—Judson v. Hindman, 1 Pin. 94.

[y] (Wis. 1849) The supreme court has authority to grant the common-law writ of certiorari, returnable before itself, on a judgment rendered by a justice of the peace, and will grant it, on good cause shown why the application is made to it and not to the circuit court.—May v. Keep, 1 Chand. 235, 2 Pin. 301.

2. DECISIONS AND PROCEEDINGS REVIEWABLE.

IN GENERAL, § 762.
PARTICULAR PROCEEDINGS, § 763.
NATURE OF SUBJECT-MATTER, § 764.
NATURE OF DECISION, § 765.
ISSUES OF LAW OR FACT, § 766.
AMOUNT OR VALUE IN CONTROVERSY, § 767.

§ 762. In general.

[a] (Minn. 1858) Under Act Nov. 1, 1849, § 13, giving to the mayor of the town of St. Paul the ordinary powers of a justice of the peace within the corporate limits, and providing that an appeal may be taken from his judgments, his proceedings can be reviewed only by appeal. Certiorari will not lie, as in the case of proceedings by a justice of the peace.—Town of St. Paul v. The Dr. Franklin, 1 Minn. 97 (Gil. 76).

[b] (N. J. 1833) Proceedings had in a court for the trial of small causes may be brought into the supreme court by certiorari, for the purpose of receiving and correcting an error in the ruling of execution in the cause.—Krumeick v. Krumeick, 14 N. J. Law (2 J. S. Green) 39.

[c] (N. Y.) By a statute now repealed the proceedings of justices of the peace were removed into the supreme court by certiorari. By subsequent statutes an appeal to the common pleas in most cases, and certiorari to that court in a few instances, are substituted.—(1827) Wheeler v. Roberts, 7 Cow. 536; (1830) People v. Onondaga Court of Common Pleas, 4 Wend. 212.

[d] (Pa. 1872) Where a judgment rendered before a justice of one county is transferred by a transcript to the docket of a justice of another county, certiorari will lie to the justice in whose court the transcript is filed for jurisdictional defects appearing on the face of the judgment.—Adams v. Hill, 29 Leg. Int. 126.

[e] (Vt. 1883) The proceedings of justices of the peace may be reviewed on certiorari.—In re Kennedy, 55 Vt. 1.

§ 763. Particular proceedings.

[a] (Ala. 1842) The proper remedy where a justice of the peace refuses to quash an execution is by certiorari to remove the case to a higher court.—Gilleland v. Ware, 4 Ala. 414.

[b] (Cal. 1857) A justice of the peace has jurisdiction to grant appeals, and meanwhile stay proceedings. This action is not open on certiorari.—Coulter v. Stark, 7 Cal. 244.

[bb] (D. C. 1879) Since a justice of the peace acts ministerially in entering a judgment on a verdict, the jury being a substitute for the magistrate, deciding both law and fact, a writ of certiorari will not lie, for the reason that there is no act of the justice to revise or review.—Fitzgerald v. Leisman, 3 MacArthur, 6.

[c] (Ga. 1884) Certiorari, and not appeal, is the proper mode of correcting an error in a proceeding to require the strengthening of a garnishment bond.—Gregory v. Clark, 73 Ga. 542.

[d] (Mich. 1887) A writ of replevin having been improperly dismissed by a justice of the peace, and a return of the property ordered, plaintiff sued out and took all the steps required by statute to perfect a writ of certiorari under How. Ann. St. § 7031, providing that all judgments rendered by a justice of the peace, whether issue was joined or not, may be removed into the circuit or district court by either party, by writ of certiorari. The circuit court subsequently dismissed the writ as having been improvidently issued. *Held* that, as the justice had committed an error, which was substantial and affected the merits of the case, plaintiff was entitled to the writ, although a better remedy would have been a special appeal to the circuit.—Proper v. Conkling, 67 Mich. 244, 34 N. W. 560.

[e] (Mich. 1888) Certiorari will lie to review proceedings had before a justice of the peace, when a transcript of the justice's proceedings

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has been filed in the circuit court, and execution issued from such court, since the proceeding in the circuit court is a special one, not according to the course of the common law.—Wedel v. Green, 70 Mich. 642, 38 N. W. 638.

[f] (Mont. 1896) Where a justice of the peace issues an execution against a stranger to the judgment, and inserts her name in the execution as a defendant, he acts judicially, and certiorari will issue to review the proceedings.—State v. Votaw, 18 Mont. 279, 44 Pac. 962.

[g] (Nev. 1878) A justice's issuance of an execution is a ministerial act, not reviewable on certiorari.—In re Rourke, 13 Nev. 253.

[h] (N. J. 1881) A proceeding so informal that it does not apprise a defendant whether it is an action of debt in a justice's court or an information is reviewable by certiorari.—Hershoff v. City of Beverly, 43 N. J. Law (14 Vroom) 139.

[i] (N. J. 1892) The determination of a justice of the peace on a trial of facts on a motion made under Revision, p. 42, to quash a writ of attachment, is reviewable on certiorari.—Bisbee v. Bowden, 55 N. J. Law (26 Vroom) 69, 25 Atl. 855.

[j] (Ohio, 1825) Attachment before a justice of the peace may be set aside on certiorari, where defendant was a resident at the time it issued.—Hartshorn v. Wilson, 2 Ohio (2 Ham.) 27.

[k] (Tenn. 1823) Certiorari will lie to bring up an execution improperly issued, where the party has in a proper manner asked the benefit of the act, and, when brought up and the case made out, the execution will be superseded.—Elders v. Johnston, 7 Tenn. (Peck) 204.

[l] (Tenn. 1824) Certiorari will lie to bring up an execution sued out on a judgment upon a petition alleging payment.—Linebaugh v. Rinker, 7 Tenn. (Peck) 362.

[m] (Tenn. 1833) Certiorari will not lie to bring up and quash an execution issued on a judgment rendered by a justice, if it has remained dormant for one year.—Gunn v. Benson, 13 Tenn. (5 Yerg.) 221.

[n] (Tenn. 1852) Where property which is exempt from execution has been levied on under an execution issued by a justice of the peace, a proper remedy for the defendant in the execution is to remove the proceeding into the circuit court by certiorari and there have the levy quashed.—Jones v. Williams, 32 Tenn. (2 Swan) 105.

[o] (Tex. 1852) Where a justice of the peace issues an execution after the expiration of 12 months without a revival of the judgment, a certiorari to bring up the case for a new trial is not the proper remedy.—Wood v. Rich, 8 Tex. 280.

§ 764. Nature of subject-matter.

[a] (Ala. 1839) A judgment rendered on a trial of the right of property before a justice of the peace may be removed by certiorari to the county court.—Gregg v. Hinson, 9 Port. 631.

[b] (Ala. 1848) A county court cannot entertain jurisdiction of a certiorari to bring up the judgment of a justice of the peace in an action for a tort. The remedy of a party aggrieved by such judgment is by appeal to the circuit court.—Waddle v. Dumas, 13 Ala. 412.

[c] (Ga. 1885) Certiorari does not lie to proceedings before a justice of the peace binding one over to keep the peace or for good behavior. The remedy is by affidavit of illegality, or, if that will not lie, by prohibition.—Stephens v. Wallis, 75 Ga. 726.

[d] (Mass. 1809) Certiorari is the proper remedy for a review of the proceedings before a justice of the peace on a complaint to recover a fine under the militia law.—Ball v. Brigham, 5 Mass. 406.

[e] (Mass.) Certiorari lies to remove the record of the proceedings before a justice of the peace on a complaint to recover a fine for a neglect of military duty.—(1837) Gleason v. Sloper, 41 Mass. (24 Pick.) 181; (1839) Cousins v. Cowing, 40 Mass. (23 Pick.) 208.

[f] (Miss. 1879) A writ of certiorari lies under Code 1871, § 1336, to remove to the circuit court a case under the agricultural lien law (Acts 1876, p. 109), decided by a justice of the peace.—Burrow v. Sanders, 57 Miss. 211.

[g] (N. Y. 1830) Certiorari will not lie to a justice of the peace to bring up proceedings under the Revised Statutes respecting encroachments on highways.—Pugsley v. Anderson, 8 Wend. 468.

[h] (N. Y. 1879) A party to a summary proceeding before a justice of the peace may, at his election, resort to an appeal or procure a certiorari.—People v. Perry, 16 Hun, 461.

[i] (N. Y. 1881) A proceeding instituted by a city to recover a penalty imposed for the violation of an ordinance is a civil action, and, under Code of Procedure, the judgment of the justice can be reviewed by appeal only, not by certiorari.—City of Buffalo v. Schliefer, 25 Hun, 275.

[j] (Pa. 1823) Proceedings before a justice of the peace under the act of 1705 relating to swine running at large are reviewable on certiorari.—Com. v. Fourteen Hogs, 10 Serg. & R. 393.

[k] (Pa. 1829) A proceeding under Act April 13, 1807, to recover damages for injuries done by stray cattle, is a civil action within the meaning of Act March 20, 1810, § 24, providing that no writ of certiorari issued out of the supreme court to any justice of the peace in any civil suit or action shall be available to remove the proceedings had before the justice.—Frick v. Patton, 2 Rawle, 20.

[l] (Pa. 1835) A writ of certiorari does not lie from the supreme court to the mayor of the city of Philadelphia on account of a decision made by him in an action brought to recover the penalty for a breach of the ordinance relating to stalls in the market.—Spicer v. Rees, 5 Rawle, 119, 28 Am. Dec. 648.

§ 765. Nature of decision.

[a] (U. S. 1832) When the transcript of the record of a justice contains nothing in the form of a judgment, but only the assertion that he gave one, the proceedings are a nullity, and a certiorari to reverse them may be sued out.—Camp v. Price, Fed. Cas. No. 2,347a [1 Hemp. 174].

[b] (Ark. 1879) Where a justice renders judgment without evidence, the same is not void, or so irregular as to be quashable on certiorari. The error should be corrected by appeal.—St. Louis, I. M. & S. Ry. Co. v. Barnes, 35 Ark. 95.

[c] (Cal. 1888) A judgment rendered on default by a court having jurisdiction of the parties and subject-matter cannot be questioned on writ of review.—Reagan v. Justice's Court, 75 Cal. 253, 17 Pac. 195.

[d] (Cal. 1892) A justice of the peace has jurisdiction to entertain a motion to set aside service of a summons, and pass upon the truth

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of the allegations of the complaint on which jurisdiction of defendant is based, and his decision cannot be reviewed on certiorari.—History Co. v. Light, 97 Cal. 56, 31 Pac. 627.

[e, f] (Ga. 1880) Under Const. 1877 and Acts 1879, one whose appeal from a justice's judgment not exceeding $50 to a jury has been dismissed on trial thereof is precluded from the remedy by certiorari on the original judgment, even though applied for within three months from rendition thereof.—Miller v. Hensley, 65 Ga. 556.

[g] (Ill. 1886) A cause can be removed from a justice by certiorari only where an appeal would lie. Therefore, where the decision of a judge is made final, the cause cannot be carried up by certiorari.—Yunt v. Brown, 2 Ill. (1 Scam.) 264.

[h] (Ill. 1890) Where a defendant has appeared in an action before a justice of the peace, but fails thereafter to attend the proceedings therein, or to take an appeal from the judgment, a writ of certiorari will not be issued to review the judgment.—Rielly v. Prince, 37 Ill. App. 102.

[i] (Nev. 1865) Certiorari lies from the probate court to a justice's court to review a judgment rendered therein by default, or on confession when there was no answer or issue.—Paul v. Armstrong, 1 Nev. 82.

[j] (N. J. 1877) Where a justice has jurisdiction, a judgment by confession is reviewable by certiorari only, and other judgments by appeal to the common pleas. Where he has no jurisdiction, the remedies by appeal and certiorari are concurrent.—Ritter v. Kunkle, 39 N. J. Law (10 Vroom) 259.

[k] (N. Y. 1847) Where a justice returned to a certiorari that on a demurrer to a plea in abatement in the cause before him he decided that the plea was sufficient, "and discharged the defendant from arrest, and entered the proceedings in my docket as above stated, and on the margin thereof noted my costs, 50 cents," it was *held* that there was no judgment which could be affirmed or reversed.—Nellis v. Turner, 4 Denio, 553.

[l] (N. Y. 1879) The provision of 2 Rev. St. p. 391, § 15, that no certiorari shall be allowed until final determination, does not apply to those cases in which an appeal from the justice might have been, but was not, taken.—People v. Perry, 16 Hun, 461.

[m] (Or. 1887) Under Hill's Code, § 2117, providing that judgments rendered in justices' courts for want of an answer are not appealable, judgments on demurrer are appealable, and a writ of review does not lie thereto.—Kearns v. Follansby, 15 Or. 596, 16 Pac. 478.

[n] (Or. 1888) A writ of review under the Code is the proper remedy to obtain a review of a judgment of a justice of the peace rendered against plaintiff in the writ for the want of an answer.—Union County v. Slocum, 17 Pac. 876.

[o] (Pa. 1873) Where a judgment is erroneously entered up against defendant and garnishee jointly, though no appeal be taken, the garnishee, on the subsequent revival of the judgment against him, may have the judgment reviewed on certiorari.—Masters v. Turner, 30 Leg. Int. 337.

[p] (Tenn. 1874) The remedy against a justice's judgment on notes not due when the judgment was rendered is by appeal, and not by quashing the judgment as void in a proceeding in the circuit court by certiorari and supersedeas, instituted by the judgment defendant.—Simmons v. Harris, 66 Tenn. (7 Baxt.) 325.

[q] (Tex. 1855) A certiorari to a justice's court will be dismissed, if it does not appear from the justice's return that there had been a final judgment.—Kirk v. Graham, 14 Tex. 316.

§ 766. Issues of law or fact.

Review of questions of law or fact dependent on amount in controversy, see post, § 767.

[a] (Ga. 1875) When a question of fact is involved in the judgment of a justice of the peace, and the amount in controversy exceeds $50, the proper mode of having his decision reviewed is by appeal. If questions of law are alone involved, the remedy is by certiorari.—Wynn v. Knight, 53 Ga. 568.

[b] (Ga. 1883) Certiorari to review a justice's judgment will lie in all cases where facts are not in controversy.—Boroughs v. White, 69 Ga. 841.

[c] (Ga. 1883) Where, in an action in a justice court, facts are to be considered, the right of appeal should be exercised, either to the superior court or to a jury in the justice court; and, if error be committed in the latter court, certiorari will lie to the verdict.—Western & A. R. Co. v. Dyar, 70 Ga. 723.

[d] (Ga. 1883) An express company was garnished by one holding a judgment against a person whose property the express company had in its possession, subject to a foreign judgment and its charges. The plaintiff appeared by counsel, and the company by its superintendent, in the justice's court, where judgment was rendered against the garnishee, except that it was allowed to recover its charges. The company removed the case to the superior court by certiorari. *Held* that, the question involved being one of law, there was no error in overruling the plaintiff's motion in that court for dismissal.—Cruse v. Southern Exp. Co., 72 Ga. 184.

[e] (Ga.) Where the issues tried in a justice's court were of fact, a review of the same is by appeal, rather than by certiorari.—(1883) Savannah, G. & N. A. R. Co. v. Holcombe, 72 Ga. 206; (1891) Johnson v. Cummings, 88 Ga. 12, 13 S. E. 819; (1894) Samuels v. Briscoe, 94 Ga. 425, 19 S. E. 245.

[f] (Ga. 1883) Where there has been no appeal to a jury in a trial before a justice, certiorari taken from the judgment, assigning errors of judgment as to facts, will be dismissed on motion.—Goss v. Lord, 72 Ga. 206.

[g] (Ga. 1891) Where the facts are not disputed, certiorari is the proper remedy to review the judgment of a justice of the peace on questions of law.—Greenwood v. Boyd & Baxter Furniture Factory, 86 Ga. 582, 13 S. E. 128.

[h] (Ga. 1892) Where there was no question of fact before a justice of the peace, but only one of law, the remedy by certiorari is available, and the superior court should make a final disposition of the case.—North & S. St. R. Co. v. Spullock, 88 Ga. 283, 14 S. E. 478.

[i] (Ill. 1859) The question of liability of a corporation for committing a trespass would depend upon a fact as to the orders and directions of the company to commit or not the act complained of, and a certiorari, therefore, is not a proper remedy to authorize a review of the judgment of a justice of the peace in a case of trespass.—Chicago & R. I. R. Co. v. Fell, 22 Ill. (12 Peck) 333.

[j] (Mich. 1871) Upon certiorari from the circuit court to a justice of the peace, the affidavit and return must show that some question

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of law was raised and objection made on the trial. An averment that the testimony demanded a different verdict, though sufficient for a general appeal, furnishes no basis for a certiorari.—McGraw v. Schwab, 23 Mich. 13.

[k] (Pa. 1892) In trespass quare clausum fregit before a justice for injuries done by cattle, in case of alleged injustice done by the finding on the facts of the case the remedy is by appeal, and not by certiorari.—House v. Ziegler (Com. Pl.) 11 Pa. Co. Ct. R. 159.

§ 767. Amount or value in controversy.

[a] (U. S. 1873) The writ of certiorari lies from the supreme court of the District of Columbia to justices of the peace in civil actions before judgment, in all cases where the amount in controversy exceeds the sum of $50.—Coleman v. Freedman, 1 McArthur, 160.

[b] (Ala. 1851) A certiorari from the county court does not lie to review the judgment of a justice of the peace in a proceeding instituted under the act of 1841 (Clay's Dig. p. 358, § 3) to recover damages, where the amount claimed does not exceed $20.—Winn v. Freele, 19 Ala. 171.

[c] (Ga. 1874) Where the plaintiff in a suit in a justice's court for $55 damages abandons the claim as to $5 of the amount, he has the right to carry the case by writ of certiorari to the superior court for review.—Wright v. Rutledge, 51 Ga. 194.

[d] (Ga.) Certiorari is the proper remedy to review the judgment of a justice court for an amount exceeding $50, where no question of fact is involved.—(1875) Reedy v. Helms, 54 Ga. 121; (1879) Dexter v Glover, 62 Ga. 312; (1891) Greenwood v. Furniture Factory, 86 Ga. 582, 13 S. E. 128; (1895) Blalock v. Smith, 95 Ga. 557, 22 S. E. 282.

[e] (Ga. 1877) When the amount claimed in a suit in a justice's court is over $50, and either party is dissatisfied with the judgment rendered therein, the remedy is by appeal, and not by certiorari, especially when questions of fact are involved.—McDonald v. Dickens, 58 Ga. 77.

[f] (Ga. 1877) When the case is in the superior court, it is not allowable for a party to write off from his claim an amount sufficient to reduce it below $50 for the purpose of giving that court jurisdiction by certiorari.—McDonald v. Dickens, 58 Ga. 77.

[g] (Ga.) Certiorari will not lie from a justice's judgment, where the amount involved is less than $50, until after an appeal to a jury in the justice's court.—(1888) Wynne v. Darden, 80 Ga. 730, 6 S. E. 470; (1890) Thompson v. Dodd, 84 Ga. 264, 10 S. E. 739; (1890) Brooks v. Baker, 85 Ga. 515, 11 S. E. 840.

[h] (Ga. 1890) Certiorari will not lie to the judgment of a justice of the peace for $50, or under, where questions of fact are involved, or questions of both law and fact.—Central Railroad v. White, 86 Ga. 202, 12 S. E. 365.

[i] (Ga.) Where the amount involved in an action in a justice's court is less than $50, and there are questions of fact involved, the remedy in the first instance for errors is not by certiorari.—(1891) Bernstein v. Clark, 87 Ga. 148, 13 S. E. 336; (1895) Brice v. Chapman, 95 Ga. 799, 22 S. E. 525.

[j, k] (Miss. 1843) The circuit court has jurisdiction of a cause removed from a magistrate's court by certiorari, although the principal sum in controversy does not exceed $50.—Hurd v. Tombes, 8 Miss. (7 How.) 229; Same v. Germany, Id. 675.

[l] (Wis. 1853) Under the laws of this state, a party aggrieved by the judgment of a justice of the peace in an action of replevin, when the value of the property exceeds $15, must seek his remedy by appeal, and certiorari to reverse the judgment will not lie.—McCaffrey v. Nolan, 1 Wis. 361.

[m] (Wis. 1853) Appeal, and not certiorari, is the proper practice to review the decision of a justice in replevin in the county court, when the property recovered or the value and damages exceed $15.—Dykens v. Munson, 2 Wis. 245.

3. GROUNDS, DEFENSES, AND RIGHT OF REVIEW.

GROUNDS IN GENERAL, § 768.
FAILURE OR INABILITY TO DEFEND, § 769.
ACTS WITHOUT JURISDICTION, § 770.
ERRORS AND IRREGULARITIES, § 771.
DEFENSES AND GROUNDS OF OPPOSITION, § 772.
RIGHT OF REVIEW IN GENERAL, § 773.
EXISTENCE OF REMEDY BY APPEAL, § 774.
LOSS OF RIGHT TO OTHER REMEDY, § 775.

§ 768. Grounds in general.

[a] (Ga. 1875) Where a judgment of a justice of the peace is without evidence to support it, it is error to dismiss a writ of certiorari thereto.—Howard v. Strickland, 54 Ga. 112; Same v. Trout, Id.

[b, c] (N. J. 1854) Where the judgment of a justice of the peace is not docketed in the manner required by statute, the plaintiff may, on certiorari, claim judgment of the supreme court as to the validity of the docketing without waiting until his lands are sold under it.—Roller v. Roller, 46 N. J. Law (17 Vroom) 511.

[d] (N. Y. 1845) The plaintiff in a justice's court declared for the breach of a "verbal contract" in a case where the statute of frauds required a contract in writing, and the defendant pleaded specially, instead of demurring. *Held* that, a motion in arrest of judgment not being allowed in that court, the defendant could take advantage of the invalidity of the contract on certiorari, where there was a recovery before the justice.—Green v. Armstrong, 1 Denio, 550.

[e] (N. C. 1849) Where a wife joined with her husband in a bond, which was prosecuted and judgment rendered, after which, and before satisfaction, the husband died, and the wife was not present at the rendition of judgment, and the execution was levied on the wife's land, and an order of sale made by the county court, it was *held* that the wife was entitled to a writ of certiorari to the superior court.—Lassiter v. Harper, 32 N. C. 392.

[f] (N. C. 1856) Where the merits of a case tried before a justice of the peace are clearly and decidedly for the party cast in the trial, and there were circumstances tending to show fraud and collusion between the successful party and the magistrate, who were brothers, to deprive the former of a fair trial and of the right to appeal, it was *held* that a recordari should issue and new trial be had.—Lancaster v. Brady, 49 N. C. 79.

[g] (Pa. 1875) If a judgment of a justice, a transcript of which has been filed in the common pleas, was improperly entered against one of the defendants, the proper remedy therefor is by certiorari.—Rice v. Kitsleman, 1 Chest. Co. Rep. 173.

[h, i] (Tex. 1857) Where a justice of the peace refuses to issue execution on a judgment recovered against him in the same court before his appointment, and takes an assignment of

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a judgment which he himself had rendered against such judgment plaintiff, and proceeds to enforce the same, a writ of certiorari and supersedeas will lie for such plaintiff, and the two judgments may be set off in the district court.—Duncan v. Bullock, 18 Tex. 541.

[j] (Tex. 1857) The absence of a material witness at the trial is no ground for a certiorari, unless it appears that a continuance was demanded for that cause.—Robinson v. Lakey, 19 Tex. 139.

[k] (Tex. 1866) Certiorari, not an injunction, is the remedy against a judgment rendered by a justice of the peace on a promissory note not due when the suit was begun, although the plaintiff had answered that he wished it treated as a nullity. It was erroneous, but not void.—McNeill v. Hallmark, 28 Tex. 157.

[l] (Tex. 1880) The fact that petitioner's adversary made a motion for a new trial and afterwards abandoned it is no excuse for applying for certiorari to review such judgment, instead of appealing therefrom.—Miner v. Gose, 1 White & W. Civ. Cas. Ct. App. § 73.

[m] (Tex. 1884) Plaintiff's cause of action in a justice's court was not an account, within the meaning of Rev. St. art. 2266, and therefore was not admissible in evidence, although verified by affidavit, and it was shown by the petition for a writ of certiorari that defendant had a valid and meritorious defense to appellee's action, and it was not shown that defendant attempted to avail himself of his defense in the justice's court, or gave any reason why he did not do so, but it was shown by the petition that plaintiff did not prove any cause of action against him by legal evidence. *Held*, that the petition showed sufficient cause to entitle defendant to the certiorari.—Lindheim v. Davis, 2 Willson, Civ. Cas. Ct. App. § 108.

[n] (Tex. 1891) A petition for certiorari alleged that, upon a trial before the justice of the peace for the recovery of a bale of cotton, plaintiff therein proved, by true testimony, that B. ginned for him cotton raised by him on his farm, and that on B.'s premises he packed and branded the bale, took possession thereof, and rolled it to a particular place in the gin yard, from which defendant took it, without his consent, and that the justice refused to give judgment for him upon the sole ground that, as a question of law, the ginner, B., was alone entitled to possession of the bale. *Held*, that the court erred in dismissing such petition.—Carroll v. Gilbert (App.) 17 S. W. 1086.

[o] (Wis. 1849) The supreme court will allow a common-law writ of certiorari, returnable before it, to a justice of the peace, where an execution has issued on the judgment, returnable before the next term of the circuit court in that county; security being first filed with the clerk.—May v. Keep, 1 Chand. 285, 2 Pin. 301.

§ 769. Failure or inability to defend.

[a] (Ill. 1889) The statute relating to the granting of certiorari to review a judgment of a justice of the peace after the time for taking an appeal has expired provides that the application must show that the judgment was erroneous, and was not entered through the negligence of defendant. *Held*, that when, pending a suit in the county court, against a defendant that understood English imperfectly, she was approached by an officer, when about to take a train, who read to her a summons in a justice court in an action to recover on the same demand, the import of which she did not comprehend, and she wrote her attorneys, who replied that her cause was continued, and the second summons was not necessary, the writ should issue.—Heep v. Burr, 34 Ill. App. 70.

[b] (Ill. 1890) Petitioner, on being served with garnishment summons, appeared before the justice, and answered that he was not indebted to defendant. Plaintiff's attorney, wishing to contest the same, asked and obtained a continuance. Petitioner did not again appear in the case, and plaintiff obtained a default against him. Scire facias was issued and served on petitioner, but he, supposing that the answer which he had filed was sufficient, paid no attention to it. After the time for appeal had expired, execution was issued, and petitioner obtained a writ of certiorari, on a petition setting forth that he was not indebted to defendant in the garnishment action. *Held*, that the writ was properly quashed.—Rielly v. Prince, 37 Ill. App. 102.

[c] (Mich. 1891) Certiorari from the supreme court does not lie to remove an action from a justice court, where personal service was had and defendant appeared on the return day, but did not appear at the trial or appeal.—White v. Boyce, 88 Mich. 349, 50 N. W. 302.

[d] (Pa. 1888) Where defendant is summoned and appears before a justice of the peace, but neglects to present his defense, he will not be permitted to show, on certiorari to reverse the judgment, that plaintiff's claim had been adjudicated before another justice.—Pifer v. Loose, 5 Pa. Co. Ct. R. 657.

[e] (Tenn. 1851) If a justice of the peace, on the day appointed for trial, continues the case without notifying the defendant, and afterwards renders judgment against him in his absence, it is a good cause for granting a certiorari, but not for quashing the execution issued on the judgment.—West v. Williamson, 31 Tenn. (1 Swan) 277.

[f] (Tex. 1851) A. brought a suit against B. for $100. B., supposing A. would ask for but $30, made no defense, and judgment was rendered on default for $100. It being shown to the court that B. had good reason to suppose that no more than $30 would be asked for, the court granted him a writ of certiorari.—Weihl v. Davy, 6 Tex. 168.

[g] (Tex. 1853) Where the party applying for a certiorari to a justice's court made affidavit that he did not owe anything to the plaintiff in the suit which had been decided against him in that court, and that he was prevented from making his defense there, it was *held* that this was sufficient to entitle him to the writ.—Ahrens v. Giesecke, 9 Tex. 432.

[h] (Tex. 1854) The defendant in a judgment obtained before a justice of the peace cannot have a certiorari to the district court for the revision of the judgment, or a new trial thereon, for matters which might have been urged in defense, unless he can show a good excuse for not urging them.—Haley v. Villeneuve, 11 Tex. 617.

[i] (Tex. 1855) Where the petition for a certiorari alleged that the defendant (the petitioner), being about to be absent, received assurance of a continuance from the justice of the peace, who notwithstanding gave judgment against him, that he had no notice of it till too late to move to set it aside or for a new trial, that it was rendered without evidence, and that there was no justice in the plaintiff's demand, it was *held* that a motion to dismiss the certiorari was rightly overruled.—Darling v. Neill, 15 Tex. 104.

[j] (Tex. 1855) Where a party, sued on an account for "cash acknowledged," failing to attend, applied for a certiorari, alleging that

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he mistook the day of trial from an error in the copy of the citation (though he cannot state this point with certainty, said copy being destroyed), and also that the account sued on had no existence in justice, equity, or law, it was *held* that the certiorari was properly dismissed.—Inge v. Benson, 15 Tex. 315.

[k] (Tex. 1856) A party, having moved for and obtained a new trial in a justice's court, and afterwards dismissed his own motion, is not entitled to a writ of certiorari from the appellate court.—McDonald v. Cross, 16 Tex. 562.

[l] (Tex. 1856) Where a petitioner for a certiorari averred that the cause of action in the justice's court was barred by the statute, and did not show that he there pleaded the bar, which he might have done, it was *held* no ground for granting the writ.—Huntsman v. Jarvis, 17 Tex. 161.

[m] (Tex. 1857) Certiorari will not lie to remove a case which has been adjudged by a justice of the peace to the district court for any matter which might have been availed of at the trial before the justice.—Peabody v. Buentillo, 18 Tex. 313.

[n] (Tex. 1860) In an action on an account, judgment was rendered by a justice of the peace against the defendant, who carried the case on certiorari to the district court, and there pleaded payment by tender of a steer. *Held*, that there was no error in dismissing the petition for certiorari, as it did not show that the tender was made before or at the time the debt became due, or under such circumstances as to discharge it.—Arnold v. Raines, 25 Tex. Supp. 244.

[o] (Tex. 1860) A party who has neglected to urge in the justice's court matter relied upon in his application for a certiorari to remove the case into the district court will there be refused the writ; and the supreme court will also refuse it, unless it appears that the justice's court exceeded its jurisdiction in rendition of judgment.—White v. Casey, 25 Tex. 552.

[p] (Tex. 1878) A judgment obtained before a justice of the peace recited that the parties appeared ready for trial, and defendant in open court confessed that he was indebted to plaintiff in the sum claimed. Defendant sued out a certiorari to remove the case to the county court, stating that he had a good defense to the suit, which was set out, and stating that he went with his attorney to the office of the justice at the time appointed for trial, and while there a compromise was agreed on, and plaintiff agreed to dismiss the cause, without costs to defendant; that he confided in the agreement, and left the place; and that after he had done so plaintiff caused the judgment to be entered by the justice, which he did not discover until it was too late to move for a new trial in the justice court and give notice of appeal. *Held*, that defendant was entitled to a trial of the case in the county court.—Smith v. Thomas, 1 White & W. Civ. Cas. Ct. App. § 677.

[q] (Tex.) A party is not entitled to have a writ of certiorari to a justice court on account of any matter of which he might have availed himself before the justice, but which without any apparent excuse he neglected to urge.—(1881) Wilson v. Griffin, 1 White & W. Civ. Cas. Ct. App. § 1313; (1884) Houston & T. C. Ry. Co. v. Simon, 2 Willson, Civ. Cas. Ct. App. § 99.

[r] (Tex. 1893) Where a railroad, though appearing, offered no evidence in an action against it, in a justice's court, for damages resulting from its refusal to accept, for transportation over its road, a ticket tendered by plaintiff, a sufficient excuse for its failure to make a defense in such action was not shown by its petition for certiorari, alleging that, prior to the trial in the justice's court, it had no information of the character of plaintiff's claim, save such as it could obtain from an inspection of the account as filed in the justice's court; that, from an inspection of such account, it was justified in believing that the claim was based upon the refusal of its servants to accept a ticket purchased in S. from another road; that, as it knew it had no agent in S. for the sale of tickets, it had no reason to suspect that plaintiff would testify at such trial, as he did, that he purchased the ticket from its agent; and that it was surprised at such testimony.—Gulf, C. & S. F. Ry. Co. v. Coleman, 2 Tex. Civ. App. 548, 21 S. W. 936.

§ 770. Acts without jurisdiction.

[a] Certiorari is the proper proceeding to set aside a void judgment.
—(Mich. 1895) Harbour v. Eldred, 107 Mich. 95, 64 N. W. 1054;
(Wis. 1866) Crandall v. Bacon, 20 Wis. 639, 91 Am. Dec. 451.

[b] (Ala. 1893) Where, in an action in justice's court against a corporation, the return of the constable is "executed by summons," a judgment by default against defendant, which contains no entry showing who was served with notice, as required by Code 1886, § 2657, is void, and certiorari is the proper remedy.—Independent Pub. Co. v. American Press Ass'n, 102 Ala. 475, 15 South. 947.

[c] (Ga. 1871) Certiorari will lie to review the action of a justice in rendering judgment upon a claim of which he had no jurisdiction.—Marble v. Laney, 41 Ga. 624; McCardle v. Fogarty, Id. 626.

[d] (Mont. 1894) Where a justice, eight days after rendering judgment in accordance with the verdict of the jury, changes the judgment, as to costs, without having jurisdiction to do so, certiorari is the proper remedy.—State v. Case, 14 Mont. 520, 37 Pac. 95.

[e] (N. J. 1880) Certiorari may issue to a justice of the peace to determine whether the justice had authority to render any judgment between the parties, where there was a set-off filed and discontinuance had without defendant's consent; an order for hearing being made on the request of defendant at a time subsequent to that to which adjournment was had.—Drake v. Berry, 42 N. J. Law (13 Vroom) 60.

[f] (N. J. 1886) Where a judgment is rendered by a justice in trespass quare clausum in plaintiff's favor, and it appears that the title was involved, a certiorari will lie to review the judgment as one rendered without jurisdiction.—Hillman v. Stanger, 49 N. J. Law (20 Vroom) 191, 6 Atl. 434.

[g] (N. Y. 1848) Where a judgment is rendered by a justice of the peace, not residing in the same town with either of the parties nor in an adjoining town, in violation of the statute, and there has been no waiver of the error by an appearance, and an omission of the defendant to take the objection before the justice, a certiorari will lie to reverse such judgment, upon an assignment of error in fact.—Tiffany v. Gilbert, 4 Barb. 320.

[h] (N. C. 1893) Code Civ. Proc. § 545, provides that writs of recordari, etc., are hereby authorized as heretofore in use. At common law, prior to the adoption of the Code, recordari was used either as a substitute for an appeal lost without fault of the party, or as a writ of false judgment when the justice was without

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jurisdiction. *Held* that, where judgment is entered in justice's court without service of summons on defendant, recordari lies to review such judgment in the superior court.—King v. Wilmington & W. R. Co., 112 N. C. 318, 16 S. E. 929.

[i] (Pa. 1858) Where a judgment is given by a justice against a defendant without service of summons or notice to him of any kind, a certiorari will be allowed.—Stedman v. Bradford, 3 Phila. 258.

[j] (Pa. 1867) Certiorari may issue wherever a new jurisdiction is conferred upon magistrates or aldermen.—Wilt v. Philadelphia & L. Turnpike Co., 1 Brewst. 411.

[k] (Pa. 1886) Where a justice of the peace takes cognizance of a matter of which he has no jurisdiction, certiorari will lie, although an act of assembly provides that an appeal shall be the only remedy of a party aggrieved by the act of a justice.—Pagett v. Truby, 1 Pa. Co. Ct. R. 606.

[l] (Pa. 1892) Where there is no question as to the jurisdiction of a justice of the peace, in case of a wrong decision by him, the remedy is by appeal, and not by certiorari.—Ziegler v. Hons (Com. Pl.) 6 Kulp, 374.

[m] (S. C. 1880) Where the record of proceedings before a trial justice fails to show on its face that the party against whom judgment was rendered was served with process, such party is entitled to a writ of certiorari from the circuit court.—State v. Cohen, 13 S. C. 198.

[n] (Tenn. 1823) Certiorari may legally issue to remove a judgment rendered by a justice of the peace, where the amount was beyond his jurisdiction.—Arnold v. Embree, 7 Tenn. (Peck) 134.

[o] (Tenn. 1882) Certiorari lies to quash an execution issued on a judgment of a justice, who was disqualified by reason of relationship to one of the parties.—Holmes v. Eason, 76 Tenn. (8 Lea) 754.

[p] (Tex. 1864) A petition for certiorari alleged that a citation issued by the justice of the peace before whom the case was tried was published in a weekly newspaper on the 13th, 20th, and 27th of November, and that judgment was rendered on the 4th day of the succeeding month. The statute required the citation to be published at least three successive weeks before the return day. *Held* that, the service in the case being insufficient, the court below erred in dismissing the certiorari.—Hill v. Faison, 27 Tex. 428.

[q] (Tex. 1881) Certiorari lies to review a justice's judgment rendered at a time other than when a regular term of his court could be held.—Braidfoot v. Taylor, 1 White & W. Civ. Cas. Ct. App. § 174.

[r] (Tex. 1886) A petition for certiorari to review the proceedings of a justice of the peace, alleging that the justice had overruled the petitioner's plea of privilege to be sued in the county of his residence, and that he resides outside of the county where suit was brought, should be granted, under Rev. St. art. 803, allowing a certiorari where the facts stated show that the justice had no jurisdiction.—Tillman v. Hood, 3 Willson, Civ. Cas. Ct. App. § 191.

[s] (Wash. 1895) Under Code Proc. § 1621, providing that, if any person shall conceive himself injured by error in any judgment given by a justice of the peace, he may remove such judgment to the superior court, certiorari will lie to review the action of a justice of the peace in assuming jurisdiction of an action.—Woodbury v. Henningsen, 11 Wash. 12, 39 Pac. 243.

§ 771. Errors and irregularities.

[a] (Ga. 1884) Where the verdict of the jury in a justice's court failed to allow defendant credit for the partial payment by him to the officer levying a distress warrant, certiorari was his proper remedy.—White v. Mandeville, 72 Ga. 705.

[b] (La. 1883) The action of a justice of the peace in rejecting offered evidence will not be revised on certiorari, where it is not charged that he arbitrarily refused to admit such evidence.—State ex rel. Unbehagen v. Nephler, 35 La. Ann. 365.

[c] (La. 1895) Certiorari will not lie to review proceedings before a justice of the peace that are regular in form, and apparently valid.—State ex rel. Manning v. Sherrard, 47 La. Ann. 1085, 17 South. 590.

[d] (Mich.) Certiorari will not lie to review merely technical errors of a justice of the peace, which may be obviated on a new trial.—(1882) Erie Preserving Co. v. Witherspoon, 49 Mich. 377, 13 N. W. 781; (1894) Galloway v. Corbitt, 52 Mich. 460, 18 N. W. 218.

[e] (Mich. 1886) Certiorari will not lie to review a judgment of a justice on objections to the evidence, but appeal is the proper remedy.—Garvin v. Gorman, 63 Mich. 221, 29 N. W. 525.

[f] (N. J. 1832) Where the defendant was present at the trial until the case was given to the jury in the court for the trial of small causes, but was absent when the verdict was rendered and judgment entered thereon, it was *held* that this was not such an absence as would entitle the defendant to a certiorari.—Perrine v. Little, 13 N. J. Law (1 J. S. Green) 248.

[g] (N. J. 1884) Where the justice has jurisdiction of the case, the remedy for an error is appeal, and not certiorari.—Wahrman v. Horan, 46 N. J. Law (17 Vroom) 465.

[h] (N. Y. 1828) For any error that intervenes in a suit before a justice after issue joined, the remedy is by appeal, and not by certiorari.—People v. Schoharie Common Pleas, 1 Wend. 315.

[i] (N. Y. 1839) The supreme court will not, on a common-law certiorari, review the decision of a justice of the peace in refusing defendant leave to withdraw a demurrer, and to plead de novo, after judgment against him.—Miller v. Bush, 21 Wend. 651.

[j] (Tex. 1856) Where it appeared from a petition for a certiorari to remove a cause from a justice's to the district court that the petitioner had merits, and that the justice erred in not admitting evidence in his favor, petitioner was entitled to a certiorari as prayed for.—Hooks v. Lewis, 16 Tex. 551.

[k] (Tex. 1857) If a justice of the peace grant a new trial without notice to the adverse party, who does not appear at the second trial, the latter may remove the cause to the district court by certiorari.—Aycock v. Williams, 18 Tex. 392.

[l] (Tex. 1857) The admission of improper evidence at a trial before a justice of the peace is no ground for certiorari, where it is manifest from the allegations in the petition that the petitioner was not injured by the admission of the evidence.—Martin v. Nix, 19 Tex. 96.

[m] (Tex. 1858) It is ground for certiorari to a justice of the peace on the application of defendant that the justice refused to hear testimony material to the defense.—Homuth v. Zapp, 20 Tex. 807.

[n] (Tex. 1896) The failure to prove a claim against a county for a bounty on wolf scalps

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before the commissioners' court, as required by statute, does not affect the jurisdiction of a justice of the peace to entertain an action thereon, and hence, though the judgment in such action be erroneous, the error can be taken advantage of only by appeal, and not by certiorari.—Dimmit County v. Salmon (Civ. App.) 35 S. W. 752.

[o] (Wis. 1860) Refusal of a justice to receive defendant's plea, after submission of the case by the plaintiff, is not a proper subject for a writ of certiorari.—Tallmadge v. Potter, 12 Wis. 317.

[p] (Wis. 1867) A neglect by a justice of the peace to require security for costs is not jurisdictional, and cannot be reached by certiorari.—Taylor v. Wilkinson, 22 Wis. 40.

[q] (Wis. 1878) In a suit in a justice's court, a defect not going to the jurisdiction of the justice and depriving him of all authority to act is only an irregularity, as distinguished from a nullity, and cannot be corrected by a common-law certiorari.—Barnes v. Schmitz, 44 Wis. 482.

§ 772. Defenses and grounds of opposition.

[a] (Ala. 1884) It is no objection to certiorari that it was sued out to review a judgment by a justice of the peace after the expiration of the five days allowed for taking an appeal by Code, § 3654.—Grantham v. Payne, 77 Ala. 584.

[aa] (Ala. 1884) Plaintiff is not barred from suing out certiorari to review a judgment rendered by a justice of the peace by a payment thereof to such justice by the defendant; plaintiff not having accepted the money.—Grantham v. Payne, 77 Ala. 584.

[b] (Miss. 1877) Any objection to the granting of a writ of certiorari to bring a case to the circuit court from a justice of the peace on account of the want of a showing of good cause supported by affidavit, as provided by Code 1871, § 1336, is waived by appearing in the circuit court and entering upon the trial without noticing or objecting to such defect.—Moore v. Ernst, 54 Miss. 642.

[c] (N. J. 1891) A judgment in a justice's court, in a suit against a foreign corporation, of which a justice has not jurisdiction, is reviewable either by certiorari or by appeal; and the dismissal of an appeal, because the papers are not sent up by the justice, does not bar the remedy by certiorari.—Wheeler & Wilson Mfg. Co. v. Carty, 53 N. J. Law (24 Vroom) 336, 21 Atl. 851.

[d] (N. Y. 1823) Paying a judgment rendered by a justice of the peace does not prevent the issuing of a certiorari to reverse it, nor supersede one already issued.—Clark v. Ostrander, 1 Cow. 437, 13 Am. Dec. 546.

[e] (N. Y. 1847) Where a plaintiff in a justice's court is about to be nonsuited, the defendant cannot prevent the review of the judgment on certiorari by waiving his right to costs and asking to have the judgment entered without costs.—Nellis v. Tucker, 5 Denio, 82.

§ 773. Right of review in general.

[a, b] (Mich. 1895) Where a garnishee appeals from a judgment against him in a justice court, the principal debtor cannot also bring up the garnishee proceedings for review by certiorari.—Lichtenberg v. Wayne Circuit Judge, 106 Mich. 38, 63 N. W. 963.

[c] (Mont. 1896) Pending a right of appeal from a judgment of the district court quashing a writ of review to a justice's judgment denying a change of venue, certiorari will not lie to the supreme court to review the justice's judgment.—State v. Lenahan, 17 Mont. 518, 43 Pac. 712.

[d] (N. J. 1891) On certiorari from a justice of the peace the record showed that, after a mistrial by reason of a disagreement of the jury, an adjournment was had by consent, that another venire was issued forthwith, returnable at a specified time and place, and that at such time and place defendant's counsel appeared and stood by until a jury was sworn, and then arrested further proceedings by presenting the writ of certiorari. *Held*, that defendant could not object that, after the disagreement, no adjournment to any place was made, the jurisdiction over the parties both by regularity of adjournment and by general appearance having been complete.—Frost v. Chandler, 54 N. J. Law (25 Vroom) 128, 22 Atl. 1084.

[e] (N. Y. 1810) The successful party in an action before a justice of the peace may bring a certiorari, if the justice, by erroneously rejecting evidence, has diminished the amount which he was otherwise entitled to recover.—Bissell v. Marshall, 6 Johns. 100.

[f] (N. C. 1846) A recordari for the purpose of reviewing summary convictions or other proceedings before inferior tribunals, in a case of false judgment, is in the nature of a writ of error, and lies as a matter of right.—Webb v. Durham, 29 N. C. 130.

[g] (Pa. 1874) Where a justice entered judgment by default against a defendant, and within 20 days defendant entered bail for an appeal, such conduct waived irregularities in the proceeding, and 6 months afterwards, the appeal not having been prosecuted, certiorari would not lie on the ground that the record showed that service of summons had been defective.—Jones v. Delaware & H. Canal Co., 31 Leg. Int. 173.

[h] (Pa. 1892) A mere allowance of an appeal from a justice to the court of common pleas, which is never perfected, does not defeat the right of the same party to a writ of certiorari.—Wilcox v. Knoxville Borough (Com. Pl.) 2 Pa. Dist. R. 721.

[i] (Tex.) The writ of certiorari is not a writ of right, but dependent on the sound discretion of the court or judge granting it.—(1851) O'Brien v. Dunn, 5 Tex. 570; (1881) Wilson v. Griffin, 1 White & W. Civ. Cas. Ct. App. § 1313.

[j] (Tex. 1881) The right to certiorari to review a justice's judgment is not affected by failure to exercise the right to appeal therefrom.—Quinn v. Elam, 1 White & W. Civ. Cas. Ct. App. § 1108.

[k] (W. Va. 1894) The remedy by writ of certiorari to review the judgment of a justice (Code, c. 110) is not given as of right, but is awarded by the court, on proper case shown.—Harrow v. Ohio River R. Co., 38 W. Va. 711, 18 S. E. 926.

§ 774. Existence of remedy by appeal.

[a] A writ of certiorari will not lie to correct errors in the proceedings of an inferior court which could have been corrected on appeal.

—(Ark. 1856) Ex parte Allston, 17 Ark. 580;
(Fla. 1855) Halliday v. Jacksonville & A. Plank-Road Co., 6 Fla. 304;
(W. Va. 1884) Poe v. Marion Mach. Works, 24 W. Va. 517.

[b] (Ala. 1886) Certiorari does not lie to review a judgment of a justice of the peace which is invalid for want of jurisdiction; there being an adequate remedy by appeal.—Alabama G. S. R. Co. v. Christian, 82 Ala. 307, 1 South. 121.

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[c] (Ala.) Under Code 1886, § 3405, providing that on appeal from a justice of the peace the case shall be tried de novo without regard to any defect in the summons or other process, or proceedings before the justice, an appeal is not an adequate remedy where the contention is that the justice's court obtained no jurisdiction of defendant's person under the process served, and therefore certiorari will lie.—(1892) Memphis & C. R. Co. v. Brannum, 96 Ala. 461, 11 South. 468; (1893) Independent Pub. Co. v. American Press Ass'n, 102 Ala. 475, 15 South. 947.

[d] (Cal. 1854) An appeal does not lie from the judgment of a justice to the district court, and the district court cannot entertain jurisdiction on certiorari, where the error may be corrected by an appeal to the county court.—Gray v. Schupp, 4 Cal. 185.

[e] (Cal. 1857) Where an appeal has been granted by a justice, without excess of jurisdiction, certiorari will not lie.—Coulter v. Stark, 7 Cal. 244.

[f] (Cal. 1873) County courts have appellate jurisdiction in all cases arising in courts held by justices of the peace and other inferior tribunals, and they are authorized by statute to grant writs of certiorari, which power they may exercise only in cases where there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy. *Held*, that certiorari will not lie from a county court to review the judgment of a justice after the time for appeal has expired.—Faut v. Mason, 47 Cal. 7.

[g] (Ga. 1887) Defendant obtained judgment before a justice on a note of plaintiff's. Plaintiff sued out a writ of certiorari, which was refused on the ground that it was premature. *Held*, that the writ was properly refused, and that there should have been an appeal to the jury in the justice's court, and a trial, before the certiorari was brought.—Shirley v. Rounsaville, 78 Ga. 708, 3 S. E. 660.

[h] (Mich. 1882) Certiorari to a justice is a remedy that will not be encouraged where the alleged errors are such as might be obviated on a trial de novo in the circuit, and no intendments will be made in favor of errors assigned on it.—Howell v. Shepard, 48 Mich. 472, 12 N. W. 661.

[i] (Minn. 1884) The writ of certiorari will not lie where there has been an opportunity for appeal.—State v. Hanft, 32 Minn. 403, 23 N. W. 308.

[j] (N. J. 1834) Certiorari will not lie to remove a cause from a justice's to the supreme court, where plaintiff in certiorari was present at the rendition of the judgment, since Rev. Laws, p. 629, § 36, gives an appeal to the court of common pleas in such case.—Bartow v. Smyth, 14 N. J. Law (2 J. S. Green) 286.

[k] (N. Y. 1825) Where the defendant in a justice's court pleaded in abatement, upon which issue was taken, but the justice denied an adjournment to the defendant for the purpose of obtaining evidence to prove his plea, whereupon he pleaded the general issue and went to trial on the merits, on which judgment was against him, and then brought a certiorari to correct the error of refusing to adjourn, and an appeal to the common pleas upon the merits, *held*, that the appeal only would lie, and the certiorari was quashed.—Baldwin v. Goodyear, 4 Cow. 536.

[l] (N. Y. 1827) A trial as to part of the defendants puts the whole to the remedy by appeal, though some do not appear, or where some, being infants, appear by attorney; and in neither case will a certiorari lie.—Moody v. Gleason, 7 Cow. 482; People v. Judges of Onondaga County, Id. 492.

[m] (N. Y. 1888) Assuming that a police justice has the jurisdiction of a justice of the peace over suits between private parties, the statutory provisions for appeals from justices of the peace must apply to his judgments, and hence certiorari is not the proper remedy.—People v. Moore, 48 Hun, 619, 1 N. Y. Supp. 405.

[n] (N. D. 1896) Where defendant appeared by attorney before a justice of the peace on the return day, and the attorney asked to have his appearance entered on the justice's docket, and the justice refused to do so, and entered judgment against defendant as for a default, the action of the justice was reviewable on appeal on questions of law, after settling and filing a statement with the justice setting out the facts of the appearance, and hence certiorari will not lie.—Lewis v. Gallup, 5 N. D. 384, 67 N. W. 137.

[o] (Or.) Under Civ. Code, § 575, and Gen. Laws, p. 478, § 119, providing that a writ of review will lie from a justice's court to the circuit court in cases where there is no appeal, a review will not be allowed where an appeal could have been taken, but the party seeking a review neglected to take an appeal within the time limited therefor.—(1886) Ramsey v. Pettengill, 14 Or. 207, 12 Pac. 439; (1887) Summers v. Harrington, 14 Or. 480, 13 Pac. 300.

[p] (Pa. 1824) Where a suit had been instituted before a justice of the peace, and judgment rendered in favor of the plaintiff, from which the defendant appealed, but neglected to file the transcript, and subsequently a scire facias was issued against the bail, on which judgment was obtained, and execution issued and placed in the hands of a constable, who received the debt and costs from the bail, and returned the writ to the justice, with an indorsement of satisfaction on the back by the plaintiff, and afterwards the bail issued a scire facias on the original judgment, in the name of the plaintiff, against the defendant, to obtain reimbursement, on which he obtained judgment for the debt and interest, and costs of all the suits, it was *held* that the court, on certiorari, would not interfere and arrest the proceedings.—Stewart v. Thompson, 2 Ashm. 120.

[q] (Pa. 1886) A party aggrieved with the judgment of a justice of the peace cannot have both an appeal and certiorari. He must confine himself to one or the other of these remedies.—Teter v. Cook, 2 Pa. Co. Ct. R. 171.

[r] (Pa. 1887) Where a party has appealed from a judgment of a justice of the peace, he cannot thereafter take out a writ of certiorari and conduct both proceedings at the same time, but will be confined to his proceedings by appeal.—Russell v. Shirk, 3 Pa. Co. Ct. R. 287.

[s] (Pa. 1887) Where an alderman has rejected a set-off for an amount which would entitle defendant to appeal, his right to appeal is not defeated by the alderman rendering judgment for the plaintiff in an amount below such sum, and hence certiorari will not lie to retry such case.—Brown v. Lacier, 1 Wilcox, 184.

[t] (S. D. 1895) Since Comp. Laws, § 6129, authorizing one against whom a justice of the peace has rendered a judgment to appeal therefrom, permits an appeal from a default judgment, and since section 6065 authorizes a justice to set aside a judgment by default, certiorari does not lie to review a default judgment rendered by a justice.—Perrott v. Owen, 7 S. D. 454, 64 N. W. 526.

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[u] (Tenn. 1874) A judgment rendered by a justice on notes not due cannot be quashed as a void judgment by certiorari, when the proper method of bringing the question before the court is by appeal.—Simmons v. Harris, 66 Tenn. (7 Baxt.) 325.

[v] (Utah, 1886) Where a justice is acting within his general jurisdiction as to the subject-matter, but exceeds his jurisdiction as to a party by rendering judgment against him before the time to answer has expired, certiorari will not lie, since Code Civ. Proc. § 951, provides for the issue of such writ when there is no appeal, and section 854 allows any party dissatisfied with the judgment of a justice to appeal to the district court.—Ducheneau v. House, 4 Utah, 363, 10 Pac. 427.

[w] (Utah, 1890) Under section 3719, which provides that "a writ of review may be granted when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor * * * any plain, speedy, and adequate remedy at law," certiorari will not lie to review a judgment by default rendered by a justice, since an appeal lies therefrom.—Saunders v. Sioux City Nursery & Seed Co., 6 Utah, 431, 24 Pac. 532.

[x] (W. Va. 1884) Certiorari will not lie after judgment before a justice, and no effort made by the party for an appeal till after the expiration of the time for an appeal, even though the judgment was erroneous, if it appear that the justice had jurisdiction of the subject-matter and the party applying for certiorari.—Poe v. Marion Mach. Works, 24 W. Va. 517.

§ 775. Loss of right to other remedy.

[a] (Ark. 1869) Where a party neglects to appeal from the judgment rendered by a justice in a garnishment proceeding, and shows no excuse for such neglect, a writ of certiorari to bring up the record is improvidently issued.—Smith v. Parker, 25 Ark. 518.

[b] (Colo. 1894) Where plaintiff, in an action before a justice, agrees, for a consideration, to dismiss, and, notwithstanding his agreement, takes judgment without defendant's knowledge, withholding execution until too late for an appeal, certiorari, under Gen. St. § 1992 et seq., affords a remedy.—Small v. Bischelberger, 7 Colo. 563, 4 Pac. 1195.

[c] (Ga. 1887) In an action in a justice's court to recover possession of property, in which bail was required, the justice failed to comply with the statute in making out and serving the bail process, and a motion made before him to dismiss the action on this ground was sustained. *Held* that, after such judgment of dismissal, no case being in court, an appeal could not be taken, and that certiorari was the proper remedy.—Rogers v. Bennett, 78 Ga. 707, 3 S. E. 660.

[d] (Ill. 1838) Absence from the county and ignorance of the rendition of judgment by a justice of the peace against a plaintiff upon a note lodged with the justice for collection are not a sufficient excuse for not taking an appeal in the ordinary way, and do not authorize the allowance of a writ of certiorari.—Cushman v. Rice, 2 Ill. (1 Scam.) 565.

[e] (Ill. 1845) It was *held* not a sufficient ground for a certiorari to a justice that the petitioner was a poor man, that it took him several days after the rendition of judgment to procure sureties, and that he called twice at the justice's office to procure the papers for an appeal, once within 15 days and once on the last day allowed by law, but he was not in, and the petitioner was unable to find him after diligent inquiry, as it did not appear that the petitioner did not live in the same town, or might not have written to the justice, or was prevented from calling at other times.—White v. Frye, 7 Ill. (2 Gilman) 65.

[f] (Ill. 1851) A party who has not been guilty of negligence by omitting to take an appeal from the judgment of a justice of the peace in proper time is entitled to take the cause to the circuit court by certiorari.—Cook v. Hoyt, 13 Ill. (3 Peck) 144.

[g] (Ill. 1851) Negligence is not attributable to a defendant who could not take an appeal in time without omitting a paramount duty to others.—Cook v. Hoyt, 13 Ill. (3 Peck) 144.

[h] (Ill. 1865) Where a petition for a certiorari under the statute shows that the petitioner had been summoned as garnishee in a number of cases before the same justice of the peace, and was discharged after examination by the justice, and had no knowledge a judgment was rendered against him until it was too late to take an appeal, and that the judgment was unjust, there is no error in refusing to dismiss the certiorari.—McNerney v. Newberry, 37 Ill. 91.

[i] (Ill. 1886) Where a garnishee appeared before a magistrate, and after answering was told by the magistrate that he might go, as the magistrate had no further use for him, and he supposed that he was discharged, whereas in fact he was charged, it was a proper case for a certiorari.—Pierce v. Wade, 19 Ill. App. (19 Bradw.) 185.

[j] (Ill. 1891) The justice before whom a case was tried announced his judgment in the hearing of the parties, but subsequently, and by mistake, entered it for $100 less, of which plaintiff had no knowledge until after time to appeal had expired. *Held*, that there was no lack of diligence, and certiorari should be granted.—McDonald v. Williams, 41 Ill. App. 378.

[k] (Mass. 1864) A review of a judgment rendered by a justice of the peace may be granted on the ground that the party against whom it was rendered intended to appeal and thought he had appealed.—Hutchinson v. Gurley, 90 Mass. (8 Allen) 23.

[l] (Mich. 1873) A common-law certiorari to a justice of the peace will lie to review a case commenced by attachment, where no personal service is had and no appearance entered, and where the defendants had no notice of the proceedings until after the statutory remedy was gone.—Withington v. Southworth, 26 Mich. 381.

[m] (N. M. 1895) Laws 1889, c. 48, providing a distinct remedy where a justice shall wrongfully refuse to grant an appeal where it is permitted by law, does not repeal or amend Comp. Laws 1884, § 2442, authorizing a writ of certiorari where judgment is rendered by a justice of the peace, and, from any cause, a party is prevented or unable to appeal in 10 days.—Lockhart v. Woollacott, 6 N. M. 21, 41 Pac. 536.

[n] (N. Y. 1874) A common-law certiorari *held* not to be allowable to review a justice's court judgment, for the reason that the time for appealing had expired. The only mode of reviewing such judgments is by appeal, as provided by Code, § 351.—People v. Sleight, 2 Hun, 632, 5 Thomp. & C. 167.

[o] (N. C. 1849) Where a party is not deprived of his appeal by any fraud, accident, surprise, or denial by the court, he is not entitled to the aid of a writ of recordari.—Satchwell v. Rispess, 32 N. C. 365.

[p] (N. C. 1853) A. placed in the hands of a constable a warrant against two defendants,

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which was served; and after several continuances a trial was had, and a judgment given against one and for the other defendant. *Held*, that A. was not entitled to a recordari, though he was detained by sickness from attending the first day appointed for the trial, and had no notice of the other proceedings until too late for an appeal.—Elliot v. Jordan, 44 N. C. 298.

[q] (N. C. 1856) If an appeal be refused by a magistrate on frivolous ground, the remedy is by a writ of recordari.—Bailey v. Bryan, 48 N. C. 357, 67 Am. Dec. 246.

[r] (N. C. 1860) Where the president of a railroad company was informed that a suit was about to be brought against his company before a justice of the peace, and, believing that a recovery in such suit would be unjust, gave instructions to the most convenient station agent to attend the trial, and, in case of a recovery against the company, to appeal to court, and such agent was a diligent and faithful officer, but from ignorance of the law failed to procure security for the appeal, it was *held* that there was no such laches on the part of the president as deprived the company of a right to a recordari.—North Carolina R. Co. v. Vinson, 53 N. C. 119.

[rr] (N. C. 1870) Judgment was rendered by a justice against defendant in his absence and without his knowledge, and he was deprived of an appeal on account of the irregularity of his proceedings therefor. Defendant made affidavit setting forth merits, and was not chargeable with unreasonable delay in applying for relief. *Held*, that he was entitled to a recordari; the law favoring trials upon the merits.—Critcher v. McCadden, 64 N. C. 262.

[s] (N. C. 1873) On an application for a recordari, it appeared that A. was informed by a justice of the peace that B. had obtained before the justice a judgment against A., and A. at the time notified the justice of his intention to appeal, and, in order to stay proceedings pending the appeal, filed in the office of the clerk of the superior court an undertaking, before one whom he supposed to be a deputy of the clerk, who approved the same and issued a supersedeas. It further appeared that the judgment was not given against A. at the time he was informed by the justice it was so given, but was rendered after he had filed the undertaking. *Held*, that although the clerk, when informed of the act of his deputy, notified the justice and the defendant that he did not approve the undertaking, and revoked the supersedeas, and though it further appeared that 10 days' notice of the appeal had not been given, as required by Code Proc. § 536, A. was not in default, and that the judge below committed no error in granting the recordari.—Marsh v. Cohen, 68 N. C. 283.

[ss] (N. C. 1879) A writ of recordari is properly granted, where the defendant had merits, and lost his right to appeal without fault, having erroneously supposed that relief had been arranged with the plaintiff's attorney.—Carmer v. Evers, 80 N. C. 55.

[t] (N. C. 1880) On petition for writ of recordari, it appeared that the petitioner was one of the defendants against whom judgment was recovered in a justice's court, and lived in a county other than that of the justice, 40 miles from the place of trial; that he was making preparations to attend the trial, but failed to do so, and lost his appeal by reason of sickness and his consequent inability to procure the services of an agent to represent him. *Held* a proper case for the aid of such remedial process, though there was no evidence of efforts made to get an agent.—Koonce v. Pelletier, 82 N. C. 236.

[tt] (N. C. 1888) A party is not entitled to a writ of recordari as a substitute for an appeal from a justice's court which was lost by delay through the negligence of his attorney.—Boing v. Raleigh & G. R. Co., 88 N. C. 62.

[u] (Tenn. 1844) A party was *held* entitled to a writ of certiorari where he failed to give an appeal bond within the two days prescribed by statute in consequence of a remark of the justice of the peace before whom the case was tried that it could be done at a later period.—Smith v. White, 24 Tenn. (5 Humph.) 46.

[uu] (Tenn. 1847) Where a justice of the peace informed a plaintiff, against whom he had rendered a judgment for costs, that he need not appeal, and that he could sue again before a justice of the peace, it was *held* that this was a sufficient reason why the plaintiff did not appeal within the time required by law, and that it laid a proper foundation for a writ of certiorari.—Chappell v. Jones, 27 Tenn. (8 Humph.) 107.

[v] (Tenn. 1852) The remedy by writs of certiorari and supersedeas can be resorted to as a substitute for an appeal only when it is stated in the petition for the writs that an appeal has been defeated by the oppressive or erroneous act of the court or justice of the peace, by the willful or negligent act of the clerk, by the contrivance or procurement of the adverse party, by inevitable accident, or by the blameless misfortune of the petitioner. Hence it is not a sufficient reason for not appealing from the judgment of a justice of the peace that the petitioner did not know or suspect, until the time within which he might have appealed had expired, that the paper on which he was sued was a forgery.—McMurry v. Milan, 32 Tenn. (2 Swan) 176.

[vv] (Tenn. 1852) A petitioner for writs of certiorari and supersedeas to remove a cause from before a justice into the circuit court alleged the following as reasons for not appealing: That the services of a justice of the peace had been engaged to manage the suit as the friend and agent of the petitioner (he being old, blind, and ignorant), who advised him, when he attended at the proper time to appeal, not to do so, as the case would go the same way in the circuit court. The advice was taken, but the petitioner afterwards ascertained that he sat on the case and united with the other justice in giving judgment against him. *Held*, that this was a sufficient reason for not appealing, and, the petition containing matters showing merit, it was proper to grant the writs.—Allen v. Primm, 32 Tenn. (2 Swan) 337.

[w] (Tenn. 1858) Petition for certiorari and supersedeas upon a judgment by a justice. The petition showed the judgment to be unjust, and gave a good legal reason for not appealing. *Held* sufficient and timely.—Nance v. Hicks, 38 Tenn. (1 Head) 624.

[ww] (Tenn. 1867) Where a petition disclosed the fact that the petitioner had a meritorious defense to the action, that he was induced by the conduct and declarations of the justice on the trial to believe that the judgment was in his favor, and that he knew not otherwise until the officer called on him with an execution issued on a judgment against him, *held* sufficient to support the issuance of a writ of certiorari.—Evans v. Evans, 44 Tenn. (4 Cold.) 600.

[x] (Tenn. 1867) Judgment was rendered on a note given for a horse to be used in the rebel army, June 28, 1866, and execution thereon was stayed. Nearly eight months afterwards the defendant petitioned for certiorari, alleging that at the trial both the plaintiff and himself had knowledge of all the facts pertaining to

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the note, but that he himself did not know that he could prove the plaintiff's knowledge of the service for which the horse was bought, or he would have appealed, and, knowing now that he could prove that fact, has applied to remove the cause to the circuit court for a new trial. The circuit court dismissed the certiorari. *Held* not to be error.—Brinkley v. Burney, 45 Tenn. (5 Cold.) 101.

[xx] (Tenn. 1871) A justice of the peace, after rendering judgment against a surety on a note, refused to recognize the authority of the defendant's agent to ask an appeal. *Held*, that a statement by the surety that he was informed and believed that the note had been in whole or in part paid was a statement of "good and sufficient cause" for issuance of certiorari and supersedeas.—Hardin v. Williams, 52 Tenn. (5 Heisk.) 385.

[y] (Tenn. 1873) A petition for a certiorari by a widow "ignorant of the forms of law" alleged that the defendant by some unknown means came into possession of a mare belonging to the petitioner; that the latter sent her son for the animal, who brought it home, but did not disclose the manner in which he had obtained possession, petitioner being led to suppose that it was obtained by "some sort of affidavit" as to the ownership; that the son had in fact brought an action of replevin in petitioner's name before a justice of the peace, making the necessary affidavit and bond, and taking the mare under the warrant; and that petitioner did not know that a suit had been brought in her name until judgment had been rendered against her and execution issued for the penalty of the bond. She further alleged that, had she known of the suit, she would have been defended, and, in case of judgment against her, would have appealed. *Held*, that the facts presented a sufficient excuse for failure to appeal within the statutory time to justify allowing an appeal afterwards.—Fox v. Fields, 59 Tenn. (12 Heisk.) 31.

[yy] (Tenn. 1876) It is no ground for certiorari that the petitioner believed his case to be set for trial before the justice of the peace a week later than the time actually set, and that he discovered his mistake too late to appeal.—Cox v. Kent, 68 Tenn. (9 Baxt.) 492.

[z] (Tenn. 1880) A. paid half his debt to B. B., anticipating no defense to a suit, sent the claim to an agent in the county of A.'s residence, and, upon suit before a justice of the peace, judgment was rendered against B. His agent could not procure security for the prosecution of an appeal within the two days allowed by law. *Held*, that the facts showed good ground for certiorari.—Snapp v. Thomas, 73 Tenn. (5 Lea) 503.

[zz] (Tex. 1851) Where, in the petition for a writ of certiorari, the only injury complained of was that the justice refused to allow the petitioner to appeal unless he complied with an oppressive condition, and he had no right to appeal, the writ was properly dismissed.—O'Brien v. Dunn, 5 Tex. 570.

4. PROCEEDINGS TO PROCURE WRIT.

PRESENTATION BEFORE JUSTICE OF OBJECTIONS, § 776.
PARTIES, § 777.
TIME OF TAKING PROCEEDINGS, § 778.
— STATUTORY LIMITATIONS, § 779.
— ACTS WITHOUT JURISDICTION, § 780.
AFFIDAVIT OR PETITION, § 781.
— FORM AND REQUISITES, § 782.
— SUFFICIENCY OF PETITION, § 783.
— SETTING OUT ERRORS AND WANT OF JURISDICTION, § 784.
— SETTING OUT EVIDENCE, § 785.
— ALLEGATIONS AS TO DEFENSES, § 786.
— EXCUSING NEGLIGENCE OR FAILURE TO DEFEND, § 787.
— EXCUSING FAILURE TO APPEAL, § 788.
RECOGNIZANCES OR BONDS, § 789.

§ 776. Presentation before justice of objections.

[a] (Ala. 1860) After a garnishee has appeared and answered, admitting an indebtedness to the defendant, and a judgment has been thereon rendered against him, and he has transferred the cause to the circuit court by certiorari, he cannot there raise an objection for the first time either to the affidavit or to the summons of garnishment.—Gould v. Meyer, 36 Ala. 565.

[b] (Ga. 1885) Code, § 5052, provides that, when either party to a cause in a justice's court shall be dissatisfied with any decision or judgment therein, he may apply for and obtain a writ of certiorari by petition to the superior court, in which petition he shall plainly and distinctly state the errors complained of. *Held*, that the fact that some of the jurors sitting in a justice's court were not on the list of jurors furnished by the jury commissioners to the clerk of the superior court cannot be taken advantage of by certiorari after the verdict, where no objection was made before the trial.—Mitchell v. Bradberry, 76 Ga. 15.

[c] (Mass. 1839) A party fined by a justice of the peace for a neglect of duty in the militia cannot, on petition for a certiorari, take advantage of an objection which was not made at the trial before the justice, and which, if it had been there made, might have been obviated by proof.—Cousins v. Cowing, 40 Mass. (23 Pick.) 208.

[d] (Mich. 1892) Objection to the jurisdiction of a justice will not be considered on certiorari, when it was not raised in his court.—Hopkins v. Green, 98 Mich. 304, 58 N. W. 537.

[e] (Mich. 1895) In an action in justice's court, in the absence of an appearance or objection by defendant, where an affidavit in form sufficient to sustain plaintiff's claim is introduced, defendant cannot for the first time raise the question by certiorari that the preliminary service entitling plaintiff to make use of it was not made.—Forbes Lithograph Mfg. Co. v. Winter, 107 Mich. 116, 64 N. W. 1053.

[f] (Mich. 1895) On certiorari to vacate a justice's judgment, errors not urged in the justice court, but alleged in the affidavit for certiorari, may be considered.—Harbour v. Eldred, 107 Mich. 95, 64 N. W. 1054.

[g] (N. H. 1880) A judgment of a justice of the peace will not be quashed on certiorari because his decision was not announced at the close of the hearing; no objection having been made to the delay.—Richardson v. Smith, 59 N. H. 517.

[h] (N. Y. 1808) In an action before a justice of the peace, if no objection is made at the time to the form of the declaration, a defect in it cannot be taken advantage of on the return to a certiorari.—McNeil v. Scoffield, 3 Johns. 436.

[i] (N. Y. 1868) On certiorari removing a cause from a justice's court to the common pleas, no objection can be urged, in reversal of the judgment, that was not taken in the court below.—Potter v. Deyo, 19 Wend. 361.

[j] (N. Y. 1847) Where objection to a joint justification in trespass is not taken before the justice, it cannot be taken on certiorari.—Fulton v. Heaton, 1 Barb. 552.

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[k] (N. Y. 1847) Where, by a justice's return on certiorari, it did not appear that any evidence was offered showing that a certain mortgage, which was read at the trial without objection, and had been filed, was filed in the town where the mortgagor resided, or where the property was situated, as required by law, it was *held* that the objection to the defect in the evidence could not be taken in the court of common pleas.—Jencks v. Smith, 1 N. Y. (1 Comst.) 90.

[l] (Pa. 1869) When a garnishee was present in the magistrate's court at the time alleged irregularities in proceedings before the justice were committed, and he did not appeal or take certiorari within 20 days of the entry of judgment against him as garnishee, and after the first execution was issued obtained a stay by a promise of payment, he cannot deny the authority of the magistrate to enter judgment on such irregular proceedings by certiorari taken on the issue of a second execution.—Heiler v. Spangler, 1 Leg. Gaz. 84.

[m] (Pa. 1871) Where a plea in abatement was not filed before a justice of the peace, it will not be considered on certiorari.—Douglass v. Lacey, 3 Leg. Gaz. 253.

[n] (Tex. 1857) In an action on a promissory note before a justice's court, an objection to the note produced, on the ground of variance from that set forth in the justice's citation, must be made before the justice, if at all, and, if not then made, cannot be afterwards taken in the district court on certiorari.—Huston v. Clute, 19 Tex. 178.

§ 777. Parties.

Parties entitled to allege error, see post, § 814.
—— *to review by certiorari, see* ante, § 773.

[a] (Ala. 1860) The surety on the bond given on the transfer of garnishment proceedings before a justice of the peace to the circuit court by certiorari cannot become a party to the cause.—Gould v. Meyer, 36 Ala. 565.

[b] (Mich. 1880) Where judgment has been rendered in a justice court against a garnishee for property of the principal defendant in his hands, the principal defendant may sue out certiorari in his own name to review the justice's judgment.—Wilson v. Bartholomew, 45 Mich. 41, 7 N. W. 227.

[c] (N. J. 1833) Where a judgment is rendered against two in a court for the trial of small causes, and one refuses to join in certiorari, the supreme court, on the return of the certiorari, will grant a rule upon the party refusing to show cause why the other should not proceed alone.—Ballinger v. Sherron, 14 N. J. Law (2 J. S. Green) 144.

[d] (N. J. 1895) Where one of two joint judgment debtors wishes to prosecute a certiorari to reverse the judgment, on the ground that process was not served on him, he must summon the other defendant, and, if the latter refuses to join, procure an order permitting him to prosecute the writ alone.—Hulick v. Casler, 57 N. J. Law (28 Vroom) 621, 31 Atl. 223.

[e] (Pa. 1887) A writ of certiorari to a judgment in an attachment execution will not be quashed because the garnishee is not joined therein; it appearing that the time for the allowance of the writ by the garnishee has passed.—Bloom v. Alexander, 5 Pa. Co. Ct. R. 553.

[f] (Pa. 1895) Where the record shows that plaintiff in error and the person who made the affidavit for a writ of certiorari to a justice of the peace is not a party in interest, the writ and all proceedings under it will be quashed.—Kerschner v. Mountz (Com. Pl.) 4 Pa. Dist. R. 690.

[g] (W. Va. 1888) A petition for mandamus to a justice to allow an appeal from his judgment on a jury verdict cannot be sustained as a proceeding by certiorari, the justice only, and not the real parties to the action, having been made defendant.—Woodford v. Hull, 31 W. Va. 470, 7 S. E. 450.

§ 778. Time of taking proceedings.

Time for amendment of affidavit for certiorari see post, §§ 781–788.
—— *for filing certiorari bond, see* post, § 789.
—— *for filing exceptions, see* post, § 796.
—— *for filing return or record, see* post, § 793.
—— *for issuance of writ of certiorari, see* post, § 790.
—— *of service or notice of writ of certiorari, see* post, § 791.

[a] (Ala.) A certiorari to review the judgment of a justice of the peace cannot be regularly sued out after the expiration of three years from the rendition of the judgment.—(1847) Mason v. Moore, 12 Ala. 578; (1851) Enis v. Ross, 19 Ala. 239.

[aa] (Ala. 1877) When a cause is removed from a justice's court by certiorari, it should not be dismissed, because the right of appeal was not lost when the certiorari was sued out.—Washington v. Parker, 60 Ala. 447.

[b] (Ill. 1850) When a petition shows a case clearly within the provisions of the statute, a party is permitted to avail himself of the privilege of a rehearing of a decision by a justice of the peace, at any time within six months, by the aid of a writ of certiorari.—Gallimore v. Dazey, 12 Ill. (2 Peck) 143.

[c] (N. C. 1883) Motion for writ of recordari, as a substitute for an appeal from a justice's judgment, must be made at the next ensuing term of the appellate court.—Boing v. Raleigh & G. R. Co., 88 N. C. 62.

[d] (Tenn.) A certiorari must be obtained at or before the first term after the rendition of the judgment sought to be reviewed.—(1835) Tipton v. Anderson, 16 Tenn. (8 Yerg.) 222; (1869) Mason v. Hammons, 47 Tenn. (7 Cold.) 132; (1872) King v. Williams, 54 Tenn. (7 Heisk.) 303.

[e] (Tenn. 1848) A certiorari to revise the judgment of a justice of the peace must be applied for before the expiration of the first term of the circuit court occurring after the rendition of the justice's judgment, unless sufficient cause be shown for the delay; and a pending proposition, made to the attorney of record of the other party, which was not answered until after the expiration of the next term, was *held* not to be a sufficient excuse for the delay.—Newman v. Rodgers, 28 Tenn. (9 Humph.) 120.

[f] (Tenn. 1850) A writ of certiorari to remove a judgment of a justice of the peace must be applied for, so as to be returnable to the term of the circuit court which immediately succeeds the judgment of the justice, unless cogent and satisfactory reasons are shown why it was not so returned.—Johnson v. Deberry, 29 Tenn. (10 Humph.) 439.

[g] (Tenn. 1858) A petition for certiorari and supersedeas to take a cause from the justice to the circuit court, filed after the term of the circuit court next following the rendering of the judgments, will be dismissed; no reason being given for not filing it at such next term.—Lanier v. Sullivan, 38 Tenn. (1 Head) 440.

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[h] (Tenn. 1869) A judgment was rendered in July, 1865, and stay of execution was procured by the petitioners; and on April 29, 1877, they applied for a writ of certiorari to remove the cause from the justice who rendered judgment in the circuit court for a new trial. *Held*, though the grounds alleged in the petition were sufficient to have authorized a certiorari, delay barred the application.—Mason v. Hammons, 47 Tenn. (7 Cold.) 132.

[i] (W. Va. 1892) In applying to the circuit court for a writ of certiorari to the judgment of a justice, the rule is that the party must present his petition within 10 days after the judgment complained of is rendered, according to the analogy of appeals, if the case has been tried without a jury.—Bee v. Seaman, 36 W. Va. 381, 15 S. E. 173.

§ 779. —— Statutory limitations.

[a, b] (N. Y. 1827) Under Acts 48th Sess. c. 238, the affidavit for a certiorari need not be made within 30 days after the judgment before a justice, nor within any particular time.—Finch v. McDowall, 7 Cow. 537.

[c] (N. Y. 1827) Where an affidavit for a certiorari under St. 48th Sess. c. 238, was made six months after the judgment was rendered by the justice, a motion to set aside the writ as irregular will not be granted on that ground.—Williams v. Quin, 7 Cow. 539.

[d] (Pa. 1824) The provision of the statute of 1810 that no judgment of a justice of the peace shall be set aside in pursuance of a writ of certiorari, unless the same be issued within 20 days after the judgment was rendered, applies only to civil actions brought according to that act.—Caughey v. City of Pittsburg, 12 Serg. & R. 53.

[e] (Pa.) Where a justice has jurisdiction, a writ of certiorari issued after 20 days is too late.—(1831) Galley v. Davenport, 1 Ashm. 149; (1882) Garrahan v. Norton, 1 Kulp, 513; (1885) Tully v. Williamson, 3 Kulp, 388.

[f] (Pa. 1852) Plaintiff, having recovered a judgment, which became absolute by defendant's failure to question it within 20 days, appeared to a rule granted by the magistrate nearly a year after the rendition of the judgment to show cause why the judgment should not be opened. *Held*, that defendant could treat the case is finally decided by the affirmation of the original judgment, and hence avail himself of a writ of certiorari within 20 days thereafter.—Brookfield v. Hill, 1 Phila. 439.

[g] (Pa. 1869) Where the garnishee, against whom an irregular judgment has been entered by a justice of the peace, promises to pay the debt to the officer serving a first execution, he cannot take advantage of the irregularity of the judgment by certiorari, after the lapse of more than 20 days from the rendition thereof.—Heller v. Spangler, 1 Leg. Gaz. 84.

[h] (Pa. 1873) Where a certiorari is not issued within 20 days after the rendition of judgment, proceedings will be affirmed, unless it appears by the record that the justice had no jurisdiction either of the subject-matter or the parties.—French v. Pennsylvania & N. Y. Canal & R. Co., 1 Leg. Chron. 66.

[i] (Pa. 1873) An application for certiorari to a justice to bring up a judgment alleged to be void is in time, if made within 20 days after an execution has been issued on the judgment.—Masters v. Turner, 30 Leg. Int. 337.

[j] (Pa. 1879) Where a defendant appears at the hearing before a justice of the peace, certiorari must be taken within 20 days after rendition of the judgment.—Griffin v. Koch, 1 Leg. Rec. 47.

[k] (Pa. 1880) Where defendant in actions before a justice of the peace was served with summons, and had knowledge of the cause of action at the time of hearing, certiorari must be taken within 20 days from the rendition of the judgment.—Hildebrand v. Bowman, 12 Lanc. Bar, 80.

[l] (Pa. 1882) Where defendant had notice and knowledge of the judgment against him, a certiorari issued 43 days thereafter is too late.—Lehigh Val. R. Co. v. Murphy, 2 Kulp, 60.

[m] (Pa. 1888) Where a judgment is entered by default against the defendant on the return day of a summons duly served on him, a certiorari to be effectual must be issued within 20 days thereafter.—Brockway v. Tillotson, 6 Pa. Co. Ct. R. 31.

[n] (Pa. 1890) Certiorari to a magistrate cannot be sustained by affidavit of a stranger made more than 20 days after judgment rendered or execution issued.—Fenner v. McDaid (Com. Pl.) 10 Pa. Co. Ct. R. 262.

[o] (Pa. 1893) Under Act March 20, 1810, § 21, providing that "no judgment shall be set aside in pursuance of a writ of certiorari unless the same is issued within 20 days after judgment was rendered," a certiorari to a justice issued more than 5 years after entry of judgment is too late.—Strause v. Scheurman (Com. Pl.) 13 Pa. Co. Ct. R. 332.

[p] (Tenn. 1836) Where a certiorari was granted by two justices of the peace, more than 20 days after the rendition of the judgment, and was made returnable to the circuit court, it was *held* that it should be dismissed.—Dixon v. Caruthers, 17 Tenn. (9 Yerg.) 30.

[q] (Tex. 1854) An application for a certiorari must be made within the time prescribed by the statute.—Haley v. Villeneuve, 11 Tex. 617.

[qq] (Tex. 1857) Where the judgment defendant, in lieu of praying for an injunction against a judgment of a justice void for want of jurisdiction, sues for a certiorari to remove the cause to the district court, it is to the advantage of the judgment plaintiff, who cannot complain that the writ was not sued out within the statutory 90 days.—McFaddin v. Spencer, 18 Tex. 440.

[r] (Tex. 1859) The petition should be dismissed on motion, where the judgment had been stayed and more than 90 days had elapsed since its rendition before the granting of the writ.—Criswell v. Bledsoe, 22 Tex. 656.

[s] (W. Va.) Since under the Code the writ of certiorari to a judgment of a justice has the scope of an appeal, it should be applied for within the time in which an appeal can be taken, and as Code, c. 50, §§ 164–174, provide that such an appeal must be taken within 10 days after judgment, or may be granted after the expiration of 10 days and within 90 days, if appellant show good cause for not having taken the appeal within the 10 days, a writ of certiorari will be denied where the petition therefor is not filed until nearly 90 days after the judgment, and no excuse is given for the delay.—(1891) Long v. Ohio River R. Co., 35 W. Va. 333, 13 S. E. 1010; (1892) Womer v. Ravenswood, S. & G. Ry. Co., 37 W. Va. 287, 16 S. E. 488; (1893) Arnold v. Lewis County Ct., 38 W. Va. 142, 18 S. E. 476.

[t] (W. Va. 1892) An application to the circuit court for a writ of certiorari to a judgment of a justice of the peace will not relate back to the first day of the term, when it appears that on that day the action had not

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been commenced, and hence will not authorize the issuance of the writ after 10 days from the rendition of the judgment.—Womer v. Ravenswood, S. & G. Ry. Co., 37 W. Va. 287, 16 S. E. 488.

[u] (W. Va. 1893) In applying to the circuit court for a writ of certiorari to the judgment of a justice under Code, c. 110, the general rule is that petitioner must present his petition within 10 days after the judgment complained of is rendered (Code, c. 50, § 164), but the writ should be granted after 10 days, and within 90 days after the date of the judgment, when the party otherwise entitled to it shows, by his own oath or otherwise, good cause for not having applied for it within the 10 days.—State v. Larue, 37 W. Va. 828, 17 S. E. 397.

[v] (W. Va. 1894) When one is prevented, by circumstances beyond his control, from applying for a writ of certiorari to a judgment of a justice within 10 days after judgment is rendered, the writ may be awarded after the expiration of the 10 days and within 90 days, under Code, c. 50, § 174.—Krell Piano Co. v. Kent, 39 W. Va. 294, 19 S. E. 409.

[w] (Wis. 1845) Act Jan. 30, 1844, "concerning justices of the peace," does not repeal St. p. 340, art. 12, § 1, respecting the writ of certiorari in cases in which the recovery does not exceed $15; and the writ, if sued out more than 20 days after the rendition of judgment, will be dismissed.—Petitt v. Pritchard, 1 Pin. 484.

§ 780. —— Acts without jurisdiction.

[a] (Pa. 1831) The common pleas cannot on certiorari reverse a judgment rendered more than 20 days before the suing out of the writ, even if it does not appear from the record that the summons was served; the judgment being rendered without hearing and by default.—Dailey v. Bartholomew, 1 Ashm. 135.

[b] (Pa. 1858) Where a judgment is given by a justice against a defendant without service of a summons and without notice to him of any kind, a certiorari will be allowed, if applied for within a reasonable time, which, in general, is held to be within 20 days after the first knowledge of the judgment was obtained by defendant.—Stedman v. Bradford, 3 Phila. 258.

[c] (Pa.) Where the record fails to show that the justice in rendering judgment acted within the scope of his authority, the court will reverse the proceedings, though the certiorari was not taken within 20 days.—(1871) O'Malley v. Dempsey, 3 Leg. Gaz. 225; (1872) Paine v. Goodshall, 29 Leg. Int. 12; (1879) Smith v. Noone, 1 Leg. Rec. 165; (1880) Rice v. Kitzelman, 1 Chest. Co. Rep. 174; (1882) Adler v. Patrick, 1 Chest. Co. Rep. 465; (1884) Creveling v. Kindig, 3 Kulp, 217.

[d] (Pa. 1873) Where a justice has no jurisdiction of the case, certiorari must be issued within 20 days after notice of entry of judgment.—French v. Pennsylvania & N. Y. Canal & R. Co., 1 Leg. Chron. 66.

[e] (Pa. 1874) Want of jurisdiction of a justice may be set up in certiorari to an alias execution to defeat a judgment, entered by a justice nine months previously.—Torbert v. Yocum, 2 Leg. Chron. 294.

[f] (Pa. 1876) Where a justice's judgment against a married woman was void for want of jurisdiction, advantage may be taken thereof on certiorari after the expiration of 20 days from the rendition of the judgment.—Heffner v. Beahler, 1 Leg. Rec. 118.

[g] (Pa. 1880) The 20-day limitation for taking writs of certiorari does not apply when the record shows a want of jurisdiction.—Smith v. Noone, 1 Leg. Rec. Rep. 165.

[h] (Pa. 1881) If a magistrate exceeds his jurisdiction, a certiorari may issue to recover his proceedings, although more than 20 days may have elapsed from the entering of judgment. No delay in making the objection, nor consent, can give jurisdiction.—McGovern v. McTague, 13 Lanc. Bar, 119.

[i] (Pa. 1883) Where proceedings before a justice of the peace are illegal and irregular, the time allowed for certiorari will not commence to run until defendant had notice of the entry of the judgment against him.—Martin v. Wiggins, 1 Lanc. Law Rev. 141.

[j] (Pa. 1886) Where proceedings before a justice of the peace were radically defective, their reversal by the common pleas was sustained, and a writ of certiorari could properly issue after 20 days.—Appeal of Moore, 5 Atl. 621.

[k] (Pa. 1886) Where a justice failed to render judgment within 10 days after hearing, as required by Act March 22, 1877, unless there is an adjournment to a day certain, his judgment will be reversed on certiorari, notwithstanding the writ was issued more than 20 days after judgment, unless it appears that defendant had notice of the entry of judgment.—Stocker v. Hall, 2 Lehigh Val. Law Rep. 233.

[l] (Pa. 1887) Where the transcript of the judgment of a justice of the peace fails to show the legal liability of a married woman, judgment against her will be reversed on certiorari, notwithstanding more than 20 days have elapsed from the time of entering judgment and removing the record on certiorari.—Rodgers v. Carr, 2 Lehigh Val. Law Rep. 380.

[m] (Pa. 1895) Certiorari to a justice of the peace may be taken after the 20-day limitation, where the justice had no jurisdiction of the parties, and such want of jurisdiction may be shown by parol.—Neff v. Gallagher (Com. Pl.) 16 Pa. Co. Ct. R. 219.

[n] (Tenn. 1858) A petition for certiorari and supersedeas to review the judgment of a justice of the peace, on the ground that the justice had exceeded his jurisdiction, must be brought at the term of the circuit court next succeeding the judgment.—Mason v. Westmoreland, 38 Tenn. (1 Head) 555.

§ 781. Affidavit or petition.

Review dependent on affidavit or petition for writ, see post, § 807.

[a] (Mich. 1845) Under the justices' act of 1841 (Sess. Laws 1841, pp. 112, 113), before a certiorari to a justice of the peace can regularly issue from the circuit court, the affidavit to procure the allowance thereof, and the allowance of the same indorsed thereon by a judge of the supreme court, must be filed with the clerk of the circuit court; and, if issued before such affidavit and allowance are filed, the cause will, on motion, be dismissed by the circuit court for want of jurisdiction.—People v. Judges of Cass Circuit Court, 2 Doug. 116.

[b] (N. Y. 1824) Under 1 Rev. Laws, p. 396, § 17, providing that the party applying for a certiorari to a justice court shall, within 30 days after the judgment, make affidavit satisfying the officer who allows the writ that there is reasonable cause for granting it for error in the judgment, which shall be certified in the affidavit, an omission to state the verdict or judgment in the affidavit may be supplied by an additional affidavit made after the 30 days.—Philips v. Brainard, 2 Cow. 440.

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[c] (N. Y. 1827) At common law an affidavit is necessary to authorize a certiorari in civil cases.—Finch v. McDowall, 7 Cow. 537.

[d] (N. Y. 1831) 2 Rev. St. p. 256, § 175, requires that the certiorari, the affidavit on which it is allowed, and the bond given by the party obtaining the certiorari shall be served on the justice within 10 days after the allowance of the certiorari, and that the fees of the justice for making the return shall be paid, or else the certiorari shall be of no effect. *Held*, that a defendant in error, after proceeding to argument, cannot object that the affidavit on which the certiorari was obtained was not served on the justice within 10 days.—People v. Erie Common Pleas, 6 Wend. 549.

[e] (N. Y. 1831) A justice of the peace has no authority to take an affidavit to found a certiorari.—People v. Tioga Common Pleas, 7 Wend. 516.

[f] (N. Y. 1836) Where a verdict is found for the plaintiff, in a justice's court, the justice, at the request of the counsel for the defendant, who was an attorney at law, in the absence of the counsel, has no right to prepare an affidavit for the defendant preliminary to the suing out of a certiorari and other necessary papers.—People v. Suffolk Common Pleas, 18 Wend. 550.

[g] (N. C. 1874) A recordari, granted upon the application of the plaintiff, without notice to the defendant, and without any petition or affidavit setting forth the grounds upon which it should be issued, is irregular, and will be dismissed upon the hearing.—Wilcox v. Stephenson, 71 N. C. 409.

[h] (Tenn. 1804) Though, in the cases which may be revised on certiorari by the common pleas, the supreme court have authority to issue that process to a justice, yet it will not be done, except on leave first obtained on special application founded upon affidavit.—May v. Campbell's Ex'rs, 1 Tenn. (1 Overt.) 61.

[i] (Tex. 1857) The affidavit to a petition for certiorari to a justice's court may be made by the agent or attorney of the petitioner.—McAlpin v. Finch, 18 Tex. 831.

[j] (Tex. 1880) Under Rev. St. 1879, art. 303, a petition for certiorari to review a judgment of a justice of the peace will not be granted, unless the party applying, or some one for him having knowledge of the facts, make affidavit setting forth either that the justice had no jurisdiction or that injustice was done to petitioner by the final determination of the suit or proceeding, not caused by petitioner's own negligence.—Texas & St. L. Ry. Co. v. Ballouf, 1 White & W. Civ. Cas. Ct. App. § 551.

[k] (Tex. 1884) Where plaintiff obtains several judgments in justice's court, defendant cannot remove them to the county court by certiorari, by embracing them all in the same petition and bond.—Gulf, H. & S. A. R. Co. v. Ware, 2 Willson, Civ. Cas. Ct. App. § 357.

§ 782. —— Form and requisites.

[a] (Ill. 1855) To entitle a party to a certiorari to take an appeal from the judgment of a justice of the peace, the petition must show upon the oath of the party the facts required by the statute, and it is not sufficient that these facts are merely alleged as a conclusion of the party.—Russell v. Pickering, 17 Ill. (7 Peck) 31.

[b] (Ill. 1861) The petition for a certiorari to remove a case from a justice must state the facts and be verified by the oath of the party.—Harrison v. Chipp, 25 Ill. (15 Peck) 575.

[c] (Ill. 1861) A petition for a certiorari to bring up proceedings before a justice must stand on its own merits. It cannot be supported or defeated by affidavits.—Davis v. Randall, 26 Ill. (16 Peck) 243.

[d] (N. Y. 1824) An affidavit for a certiorari to a justice's court may be entitled in the cause in the court below, but not in the cause in the supreme court.—Whitney v. Warner, 2 Cow. 499.

[e] (N. C. 1871) Before an application for a writ of recordari can be entertained, the petitioner must aver that he has paid or offered to pay the justice's fees.—Steadman v. Jones, 65 N. C. 388.

[f] (Tex. 1851) The petition should be in all cases verified by the affidavit of the party asking the writ.—O'Brien v. Dunn, 5 Tex. 570.

[g] (Tex. 1851) In some states, the same rules are applied to a petition for a certiorari as to a motion for a new trial; but in Texas, where there is no appeal from the decision of a justice, less strictness is required.—King v. Longcope, 7 Tex. 236.

[h] (Tex. 1857) A petition for certiorari should state facts, and not the opinions or conclusions of the petitioner.—Peabody v. Buentillo, 18 Tex. 313.

[i] (Tex. 1857) Where a written agreement is set up as a ground on which to claim a writ of certiorari it should be set out, that the court may judge of its effect and construction and of its conformity with the allegations.—Martin v. Nix, 19 Tex. 93.

[j] (Tex. 1857) On a petition for certiorari to a justice of the peace, there must be such fullness and certainty in the statement of the facts as to show what the case really was, and that some material error or injustice has been done the petitioner, or that he has not been able to avail himself of a legitimate defense. The certainty required is a reasonable certainty.—McKensie v. Pitner, 19 Tex. 135.

[k] (Wis. 1865) Applications to the supreme court for writs of certiorari to justices of the peace will not be entertained, unless peculiar and satisfactory reasons are shown for not obtaining the same from a circuit court or judge.—Hurlbut v. Wilcox, 19 Wis. 419.

[l] (Wis. 1894) Where a notary omitted to add his name to the jurat in an affidavit for a writ of certiorari, the court may permit him to do so nunc pro tunc.—State v. Cordes, 87 Wis. 373, 58 N. W. 771.

§ 783. —— Sufficiency of petition.

Determination of sufficiency of petition on motion to dismiss, see post, § 804.

Failure to move to dismiss as waiver of insufficiency of petition, see post, § 803.

[a] (La. 1887) If no complaint is made of the legality of a city ordinance alleged to have been violated, nor of the regularity of a judgment pronounced thereunder, and there is nothing on the face of the papers showing that the charge preferred is not an offense against said ordinance, an application for a writ of certiorari will be refused.—State v. Davey, 39 La. Ann. 992, 3 South. 181.

[b] (Mich. 1859) In an affidavit for a certiorari to a justice's court, errors were alleged: (1) That the justice erred in refusing to dismiss the cause for defective service of process: (2) that the court erred in rendering judgment in favor of plaintiff and against defendant: (3) that the judgment should have been rendered in favor of defendant. *Held*, that the

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second and third allegations of error were not sufficiently specific to raise any question on the merits, and must be understood as referring only to the decision of the justice on the motion to dismiss.—Fowler v. Detroit & M. Ry. Co., 7 Mich. 79.

[c] (Tex. 1854) A plaintiff filed a petition in the district court for a certiorari to a justice, and alleged that he had sued the defendant on a note given for a horse, and that, though the defendant did not impeach the consideration of the note, yet the justice gave judgment for the defendant. *Held*, that the petition did not negative all probable defenses, and was therefore deficient.—Johnson v. Lane, 12 Tex. 179.

[d] (Tex. 1857) Where a written instrument is set up as a ground for a writ of certiorari, the writ will be refused, where the averments of the petition do not show any error of law on the part of the justice, or that there might not have been satisfactory and sufficient evidence in support of the judgment.—Martin v. Nix, 19 Tex. 93.

[e] (Tex. 1858) A petition for certiorari will be dismissed which does not allege that the facts herein stated, and which are the grounds of the petition, were proved before the justice, or does not give any reason or excuse why they were not proved.—Baldwin v. Hardin, 21 Tex. 443.

[f] (Tex. 1858) In a petition for certiorari to review the judgment of a justice in favor of plaintiff for a portion of his claim, but allowing costs to defendant, it was not necessary to allege that the defendant had made no tender in the justice's court.—Jones v. Nold, 22 Tex. 379.

[g] (Tex. 1866) Where the petition for a certiorari on a justice's judgment did not purport to state all the evidence produced on the trial, or any material error or injustice done the petitioner, or that he had been unable to avail himself of any legitimate defense, it was *held* that the writ was properly refused.—Oldham v. Sparks, 28 Tex. 425.

§ 784. —— Setting out errors and want of jurisdiction.

[a] (Ga. 1888) Under Code, § 4052, requiring a petition for certiorari to set forth plainly and distinctly the errors complained of, a petition alleging that the justice granted leave of absence to petitioner's attorneys and while they were absent rendered judgment against petitioner, but setting forth no ground of error, is fatally defective.—Western & A. R. R. v. Jackson, 81 Ga. 478, 8 S. E. 209.

[b] (Ill. 1855) A petition for a certiorari must show wherein the judgment of the justice is unjust and erroneous; and it is not sufficient that he erred in receiving or rejecting testimony, unless the petitioners are injured in the amount of the judgment.—Hough v. Baldwin, 16 Ill. (6 Peck) 293.

[c] (Ill. 1894) The petition for a writ of certiorari to a justice of the peace must show that the judgment was unjust and erroneous, and set forth wherein the injustice and error consists.—Horrell v. Horrell, 52 Ill. App. 477.

[d] (Tenn. 1850) To authorize the removal of a judgment rendered by a justice of the peace to the circuit court by writ of certiorari, the petition must show that injustice has been done the petitioner by the judgment of the justice.—Johnson v. Deberry, 29 Tenn. (10 Humph.) 439.

[e] (Tenn. 1872) Where, owing to the absence of the justice from the county, a plaintiff was prevented from taking an appeal, it was sufficient for the petition to allege that the judgment complained of was for too little, without setting forth the particulars of the claim for more.—King v. Williams, 54 Tenn. (7 Heisk.) 303.

[f] (Tex. 1849) A party applying for a certiorari to a justice of the peace must show some irregularity in the proceedings before the justice.—Cotton v. Gammon, 4 Tex. 83.

[g] (Tex. 1851) A petition for a writ of certiorari to a justice of the peace must show on its face the injury or error complained of.—O'Brien v. Dunn, 5 Tex. 570.

[h] (Tex. 1851) The petition for a certiorari, under the sixty-seventh section of the act of 1848, to organize justice's courts, etc., must show on its face the error or illegality which the petitioner complains of, or that he had not made his defense before the justice by reason of some accident which he could not control. It must be shown that there was an attempt to make available on the trial the grounds relied on for the certiorari, or the reasons why they were not presented must be alleged.—Clay v. Clay, 7 Tex. 250.

[i] (Tex. 1852) Where a certiorari is sought on the ground that defendant was sued out of his beat, the petition should show conclusively that the justice had no jurisdiction, that this had been set up and proved, or that by collusion between plaintiff and the justice the latter had assumed a jurisdiction over one whose residence to his knowledge was beyond his precinct, and not in an adjoining precinct in which there was no justice.—Pearl v. Puckett, 8 Tex. 303.

[j] (Tex. 1880) A petition for certiorari, because defendant's true name was the "Texas & St. Louis Railway Company," and the officer's return on justice's citation showed service by delivery of a true copy to W., treasurer of the "St. Louis & Texas Railroad Company," sufficiently alleges want of jurisdiction in the justice, within Rev. St. 1879, art. 303, requiring a petition for certiorari to a justice to show that fact.—Texas & St. L. Ry. Co. v. Ballouf, 1 White & W. Civ. Cas. Ct. App. § 552.

[k] (Tex. 1891) Where certiorari is prayed on the ground that the justice had no jurisdiction of defendant, the petition is properly dismissed when it fails to aver that there was any attempt to establish by evidence the plea to the jurisdiction.—Spinks v. Mathews, 80 Tex. 373, 15 S. W. 1101.

§ 785. —— Setting out evidence.

[a] (Tex. 1852) In an action for killing a mare, judgment was rendered against defendant. In his petition in a writ of certiorari, defendant alleged that he was innocent of the charge of killing the mare; that there was no evidence produced on the trial of the cause that he had killed the mare; that the evidence was merely circumstantial, and not positive, and did as strongly implicate others as it did petitioner; that since the trial of the cause he had discovered other evidence, of which he did not know at the time of trial, and that it was of the utmost importance and material to his defense; that the judgment was unjust, and contrary to law and evidence. *Held*, that the allegations were not sufficient to authorize the issue of a writ of certiorari under the act of 1848.—Perdew v. Steadham, 8 Tex. 274.

[b] (Tex. 1857) On a petition for certiorari to a justice of the peace, based upon the ground that he has decided unjustly on the merits, all the evidence which was before him should be reported, with an allegation that it has been done; but in a case where this was evidently the intention of the appellant, though without

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a distinct allegation that he has reported all the evidence, if the evidence reported shows the injustice of the judgment it will be reversed.—Phillips v. Parr, 19 Tex. 91.

[c] (Tex. 1880) A petition for certiorari to review a justice's judgment should set out the substance of the evidence adduced on the trial before the justice, in order that the merits of the application may be determined.—Miner v. Gose, 1 White & W. Civ. Cas. Ct. App. § 73.

[d] (Tex. 1884) A petition for a certiorari to a justice's court, which contains mere conclusions and general assertions as to the effect and character of the evidence, is insufficient, as the evidence itself in substance must be stated, so as to enable the judge to whom the petition is presented to determine whether or not injustice has been done the petitioner.—Galveston, H. & S. A. Ry. Co. v. Jackson, 2 Willson, Civ. Cas. Ct. App. § 174.

[e] (Tex. 1884) Where a certiorari is sought on the ground that the justice court had decided the case unjustly on the merits, the petition must set forth substantially the evidence which was before the justice, and allege that it was all the evidence adduced on the trial, and must also show that the injustice complained of was not caused by the petitioner's own fault or negligence.—Galveston, H. & S. A. Ry. Co. v. Jackson, 2 Willson, Civ. Cas. Ct. App. § 174.

[f] (Tex. 1885) A petition for a writ of certiorari from a justice's to a county court, which, after stating the issues made up for trial in the justice's court, states with fullness and certainty the evidence which was adduced, is sufficient, though it does not set out in hæc verba the written instruments in evidence, nor in totidem verbis the testimony of each witness examined at the trial.—Stuart v. Mau, 2 Willson, Civ. Cas. Ct. App. § 784.

[g] (Tex. 1890) A petition for a certiorari to a justice's court must purport to set out all the evidence received in the justice's court.—Gulf, C. & S. F. Ry. Co. v. Odom (App.) 16 S. W. 541.

[h] (Tex. 1890) A petition for certiorari to a justice's court need not set out verbatim the testimony of each witness, nor the exact contents of written documents, but it is sufficient if it states the substance of the testimony, and alleges that no other evidence was before the court.—Beard v. Miller (App.) 16 S. W. 655.

[i] (Tex. 1893) The petition for certiorari to a justice of the peace need not, in every case, set out the entire evidence produced before said justice. It is enough if it show that injustice has been done petitioner, or that he was deprived of a legitimate prosecution or defense without fault on his part.—Nelson v. Hart (Civ. App.) 23 S. W. 831.

§ 786. —— Allegations as to defenses.

[a] (Ala. 1898) Where a transcript from a justice is made a part of a petition by defendant for certiorari to review such proceedings, and the return of the constable shows affirmatively a want of proper execution of the summons, and the judgment fails to show any proof of service on defendant, such petition is not insufficient, though it fails to show that defendant has a good defense to the action.—Independent Pub. Co. v. American Press Ass'n, 102 Ala. 475, 15 South. 947.

[b] (Ill. 1895) A petition for a writ of certiorari to remove a justice's judgment into the superior court, stating that defendant was in no manner indebted to plaintiff, and had a complete defense to the claim, and that the judgment was wholly unjust and erroneous, stated mere conclusions, not entitling petitioner to the writ.—Chicago World Book Co. v. Brewer, 57 Ill. App. 526.

[c] (N. C. 1885) The writ of recordari will not issue, unless excuse for the delay is shown and also meritorious grounds.—Pritchard v. Sanderson, 92 N. C. 41.

[d] (Tenn. 1882) Petition for certiorari and supersedeas to quash execution in a justice court must state all the defenses relied on. The plea of limitations cannot be relied on, if not set forth in the petition.—Lyles v. Cox, 78 Tenn. (10 Lea) 738.

[e] (Tex. 1854) The petitioner for a certiorari to a justice of the peace must show that he had a good cause of action or ground of defense, and that the same was properly presented to the justice, or a sufficient legal excuse must be assigned for the omission.—Hope v. Alley, 11 Tex. 259.

[f] (Tex. 1857) A petition for certiorari must ordinarily show merits; but when it is to remove a cause from before a justice of the peace who has no jurisdiction to render a judgment, and to relieve from such void judgment, no merits need be shown.—Aycock v. Williams, 18 Tex. 392; McFaddin v. Spencer, Id. 440.

[g] (Tex. 1857) A petition for certiorari, after setting forth a suit and judgment against the petitioner in a justice's court for a cow or her value, stated that the petitioner "had been in peaceable and undisputed possession of the cow for three years or over, and that he proved the same to the jury, and that yet, without any contradictory or explanatory evidence by the plaintiff on that point, the verdict was rendered against him"; but it did not state that he relied on the statute of limitations at the trial. *Held*, that the petition was insufficient.—Robinson v. Lakey, 19 Tex. 139.

[h] (Tex. 1867) On a petition for a writ of certiorari, by a garnishee against whom judgment has been rendered in a justice's court, it is not sufficient to aver that the garnishee was not indebted to defendant.—Cordes v. Kauffman, 29 Tex. 179.

§ 787. —— Excusing negligence or failure to defend.

[a] (Ill. 1875) The facts required by the statute to authorize a writ of certiorari to remove a cause from a justice of the peace to the circuit court must be shown by the petition, and not merely alleged as a conclusion of the party. Where the petition states that the petitioner appeared after the time he was required by law to do so, and was informed by a clerk of the justice that no judgment had been rendered, and this statement is followed by an allegation that the judgment was afterwards rendered, this allegation is but a conclusion of the party based upon such information, and is not sufficient to show that the judgment before the justice was not the result of his own negligence.—First Nat. Bank v. Beresford, 78 Ill. 391.

[b] (Ill. 1880) A petition for a certiorari to a justice's court made the following allegations: That both parties to a suit before the justice fixed upon a certain hour for trial; that the plaintiff took judgment before said hour; that the defendant (the petitioner) was punctual, found neither the justice nor the plaintiff on hand, and was told by the clerk that the case could not be disposed of that day, as the justice had gone away; that the plaintiff had no claim against the defendant. *Held*, that it was sufficient.—Cole v. Atkinson, 6 Ill. App. (6 Bradw.) 353.

[c] (Ill. 1885) To entitle a party to certiorari it must appear from his petition that the judgment before the justice was not the result of negligence on his part, and that it was unjust

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and erroneous.—Darmstaedter v. Armour, 17 Ill. App. (17 Bradw.) 285.

[d] (Ill. 1889) A petition for certiorari which shows that the petitioner was not informed of the suit against her, or the rendition of the judgment, until three months thereafter, shows that the judgment was not the result of negligence.—Heep v. Burr, 34 Ill. App. 70.

[e] (Ill. 1894) The petition for a writ of certiorari to remove a cause from a justice of the peace into the circuit court for trial must show that the judgment before the justice was not due to negligence of petitioner.—Horrell v. Horrell, 52 Ill. App. 477.

[f] (Tenn. 1872) A petition for certiorari to bring up a judgment, etc., by reason of the loss of the execution, should be dismissed, where it fails to state that the execution was returned to the office of the justice, or that the loss was through no default of the petitioner.—Knox v. Carter, 58 Tenn. (11 Heisk.) 12.

[g] (Tex. 1883) Under Rev. St. 1879, art. 303, requiring a petition for certiorari to review a judgment of a justice of the peace to show either that the justice had no jurisdiction or that injustice was done petitioner by the final determination of the suit, not caused by his own inexcusable neglect, a petition showing a bona fide defense, an effort to avail himself thereof, and that through neglect of his counsel he was unable to interpose it, states a sufficient cause for certiorari.—Hail v. Magale, 1 White & W. Civ. Cas. Ct. App. § 853.

§ 788. —— Excusing failure to appeal.

[a] (Ala. 1852) A certiorari should not be granted to remove into the circuit court proceedings had before a justice of the peace, when the petition does not show any reason why the petitioner did not appeal from the judgment of the justice.—Wright v. Gray, 20 Ala. 363.

[b] (Ill. 1879) A petition for certiorari alleged as reasons why an appeal from the justice was not taken in the ordinary way—First, that on the trial, where the petitioner was summoned as garnishee, he was discharged, and did not know that a judgment had been rendered against him until too late to take an appeal; second, that by the false and fraudulent representations of the plaintiff the petitioner was led to believe that the judgment would not be enforced against him until too late to take an appeal. *Held*, that the reasons were wholly inconsistent with each other, and that, while the first reason assigned was sufficient to authorize the granting of the writ, the second did not show sufficient excuse for not prosecuting an appeal in the ordinary way.—O'Hara v. O'Brien, 4 Ill. App. (4 Bradw.) 154.

[c] (Ill. 1885) To entitle a party to certiorari, it must appear from his petition that he could not take an appeal in the ordinary way.—Darmstaedter v. Armour, 17 Ill. App. (17 Bradw.) 285.

[d] (Ill. 1889) A petition for certiorari which shows that the petitioner was not informed of the suit against her or the rendition of the judgment until three months thereafter shows that it was without her power to take an appeal in the ordinary way.—Heep v. Burr, 34 Ill. App. 70.

[e] (Ill. 1894) A petition for writ of certiorari to remove a cause from a justice of the peace into the circuit court for trial must show that an appeal cannot be taken in the ordinary way, and must give the reasons therefor.—Horrell v. Horrell, 52 Ill. App. 477.

[f] (Tenn. 1842) The statement in a petition for a writ of certiorari that plaintiffs were absent from the place of trial, and did not know within the time allowed by law for appealing that a set-off had been pleaded, is insufficient, though the set-off had been pleaded to an account which had been verified by the oath of plaintiffs and authenticated according to the provisions of Acts 1818, c. 25, § 1, and sent to another county for suit.—Moss v. Collins, 22 Tenn. (3 Humph.) 148.

[g] (Tenn. 1850) A petition for a writ of certiorari to a justice of the peace must show why petitioner did not exercise his right to appeal.—Johnson v. Deberry, 29 Tenn. (10 Humph.) 439.

[h] (Tenn. 1858) If a justice exceeds his authority by rendering judgment for a sum beyond his jurisdiction, this should be taken advantage of by appeal. If, being ignorant of the judgment, the party has allowed the time allowed for appeal to pass, he should state the fact as a legal excuse for not appealing, and pray for certiorari for a new trial, and not for the purpose of quashing the judgment and execution.—Mason v. Westmoreland, 38 Tenn. (1 Head) 555.

[i] (Tenn. 1872) Where a justice of the peace has rendered a judgment in excess of his jurisdiction, the defendant may bring it into the circuit court to be quashed, without giving a reason for having failed to appeal.—Houser v. McKennon, 60 Tenn. (1 Baxt.) 287; Wagstaff v. Braden, Id. 304.

[j] (Tex. 1880) Where the statute prescribes a method for appealing from a justice's judgment, a petition for certiorari to review such judgment must show an excuse for not appealing.—Miner v. Gose, 1 White & W. Civ. Cas. Ct. App. § 78.

[k] (Tex. 1883) Certiorari is additional to and independent of an appeal, and, when resorted to, the petition need not show perforce good cause why the applicant did not appeal.—Hail v. Magale, 1 White & W. Civ. Cas. Ct. App. § 852.

§ 789. Recognizances or bonds.

Bond or recognizance for stay of proceedings, see post, § 792.

Liability on bonds for certiorari, see post, § 829.

[a] (Ala. 1844) Where 16 judgments between the same parties were rendered by a justice of the peace and removed by certiorari to the county court, it was competent for the court to direct that but one bond should be executed, as the condition on which the certiorari and supersedeas should issue.—Cooper v. Maddan, 6 Ala. 431.

[b] (Ga. 1883) The attestation of the bond by a commercial notary, instead of by the magistrate, will not invalidate certiorari.—Hendrix v. Mason, 70 Ga. 523; Candler v. Mann, Id. 726.

[c] (Ga. 1884) A certiorari bond is sufficient if it shows on its face its acceptance and approval by the justice who tried the case, though there be no certificate of such acceptance and approval.—Lingo v. Harris, 74 Ga. 368.

[d] (Mich. 1890) Plaintiff obtained a writ of certiorari to remove a cause from a justice's court to the circuit court, but failed to serve his bond on the justice within 10 days after the writ issued, and the justice refused to make the return. *Held*, that the justice's refusal was proper under How. St. § 7038, providing that the certiorari, together with the bond, shall be served upon the justice within 10 days, and no certiorari shall be of any effect until these requisites have been complied with.—Sherwood v. Allegan, 80 Mich. 270, 45 N. W. 134.

[e] (N. J. 1834) The party applying for a writ of certiorari to remove a judgment of the common pleas, on appeal from a justice, to the supreme court, must present a certiorari bond, as required by Rev. Laws, p. 642, § 47.

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—Ballentine v. Weible, 14 N. J. Law (2 J. S. Green) 285.

[f] (N. M. 1895) Under Comp. Laws 1884, § 2442, authorizing the district judge to allow a writ of certiorari to a justice's judgment where an appeal could not be taken within 10 days, and fix the bond, the time of filing the bond is within the discretion of the judge.—Lockhart v. Woollacott, 8 N. M. 21, 41 Pac. 536.

[g] (N. M. 1895) Though a bond filed by plaintiff on certiorari from a justice was not in the exact statutory form, refusal of the district court to dismiss the writ will not be *held* error, where it was accepted by the clerk, and there was no motion asking for a new bond, and defendant did not suffer because the court rendered judgment against him.—Lockhart v. Woollacott, 8 N. M. 21, 41 Pac. 536.

[h] (N. Y. 1846) The filing of a bond and the return to a writ of certiorari by a justice is sufficient evidence of his approval of the sufficiency of the sureties thereon, since 2 Rev. St. § 172, does not require the justice to certify or file his approval as in case of appeal bonds.—People v. Judges of Rensselaer County Common Pleas, 2 How. Prac. 189.

[i] (N. C. 1879) A failure to give bond on a petition for a recordari is remediable, after a return of the writ, by a bond nunc pro tunc, at the discretion of the court.—Carmer v. Evers, 80 N. C. 55.

[j] (Pa. 1892) A recognisance is unnecessary to the issuing of a writ of certiorari by the common pleas to a justice of the peace.—Thomas v. Glasgow (Com. Pl.) 13 Pa. Co. Ct. R. 167, 2 Pa. Dist. R. 711.

[k] (Tex. 1849) A certiorari, when issued without a bond, will be dismissed.—Cotton v. Gammon, 4 Tex. 83.

[l] (Tex. 1857) A bond for certiorari, to which the name of the petitioner appears to have been signed by attorney, but whose authority so to sign does not appear, will be yet considered, after approval by the proper officer, prima facie the deed of the petitioner.—McAlpin v. Finch, 18 Tex. 831.

[m] (Tex. 1857) Where a certiorari bond has been lost, and the party unreasonably neglects to furnish another, after an order to that effect, the court should merely dismiss the certiorari without awarding a procedendo.—Johnson v. McKissack, 20 Tex. 160.

[n] (Tex. 1881) Where a certiorari bond described a party as "Braidford," and was signed "Braidfoot," which was the correct name, the variance was immaterial.—Braidfoot v. Taylor, 1 White & W. Civ. Cas. Ct. App. § 176.

[o] (Tex. 1893) Rev. St. art. 305, requires a bond for a writ of certiorari from the county court to a justice to be conditioned that the applicant shall perform the judgment of the county court if the same be against him. *Held*, that a further condition, that the applicant shall prosecute his suit to effect, will be stricken out as surplusage.—Nelms v. Draub (Civ. App.) 22 S. W. 995.

[p] (Tex. 1893) Where the county clerk received the bond required to be given on the issuance of a writ of certiorari to a justice, filed it, and issued the writ, and the county judge indorsed his approval on the bond, the approval of the bond by the clerk will be presumed, and the writ will not be dismissed for failure of the clerk to indorse such approval, but it should be approved nunc pro tunc.—Nelms v. Draub (Civ. App.) 22 S. W. 995.

[q] (Tex. 1893) On motion to dismiss a certiorari to a justice of the peace because the bond fails to show in what county or before what justice the judgment was rendered, where the petition fully describes the court and suit, and there is no variance between the description of the judgment in the bond and the transcript, the dismissal will be refused.—Nelson v. Hart (Civ. App.) 23 S. W. 831.

5. ISSUANCE OF WRIT AND SUPERSEDEAS.

ISSUANCE OF WRIT, § 790.
SERVICE OF WRIT OR NOTICE THEREOF, § 791.
SUPERSEDEAS OR STAY OF PROCEEDINGS, § 792.

§ 790. Issuance of writ.

[a] (Ala. 1830) Defendant in justice court obtained a certiorari to remove the case into the county court, and filed a petition, fiat, and bond. The papers were handed in by the justice, although no writ had issued. Plaintiff moved to dismiss proceedings because no writ of certiorari had been issued. Defendant moved for a second certiorari. *Held*, that the certiorari should be awarded on defendant's motion, since he was not bound to recognize any proceedings returned into court, except such as were returned in obedience to a certiorari.—Farrar v. Foote, 2 Stew. 442.

[b] (Ill. 1850) The filing of the petition for a writ of certiorari, with an order allowing the writ indorsed thereon and an appeal bond approved, will give the court jurisdiction without the issuance of the writ.—Gallimore v. Dazey, 12 Ill. (2 Peck) 143.

[c] (Iowa, 1843) By statute of 1840, cases before justices of the peace may be removed to the district courts by certiorari, on the "applicant's giving bond, with sureties, within 30 days after trial or judgment." *Held*, that the 30 days applied as well to the issuance of the writ as to the filing of the bond, and that a certiorari issued after that time, although the bond was filed before, must be dismissed.—Snyder v. Roper, 1 Morris, 229.

[d] (N. C. 1883) On petition for a writ of recordari and notice served on the adverse party, he should be allowed to be heard in opposition without having to wait until the writ was granted and returned.—Weaver v. Vein Mountain Min. Co., 89 N. C. 198.

[e] (Tenn. 1865) The removal of a cause from before a justice to a superior court by certiorari is effected when the writ is executed and returned, and is not postponed by a failure of the justice to file the papers in the case.—Uhles v. Nolen, 42 Tenn. (2 Cold.) 529.

[f] (Tex. 1884) Under Rev. St. arts. 301–307, it was the duty of the clerk, when the petition, fiat of the judge, and bond were filed with him, to issue the writ of certiorari returnable to the next term of the county court. *Held*, that it not being the duty, or even the privilege, of appellant to issue or cause to be issued the writ of certiorari, he cannot be deprived of his legal remedy, on account of the neglect or refusal of the officer to discharge his duty.—Lindheim v. Davis, 2 Willson, Civ. Cas. Ct. App. § 108.

[g] (Tex. 1886) Where, after granting a certiorari by a county court to review the proceedings of a justice of the peace, the justice delivers a proper transcript and original papers to the clerk of the county court, the county court has jurisdiction of the cause, though the clerk had issued no writ of certiorari requiring the justice to do as he did.—Beauchamp v. Schiff, 3 Willson, Civ. Cas. Ct. App. § 170.

[h] (Wis. 1853) The clerk has no authority to issue a writ of certiorari to a justice of the

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peace, until the proper officer has indorsed the allowance of it on the affidavit.—Talbot v. White, 1 Wis. 444.

[i] (Wis. 1883) A writ of certiorari apprising the justice that he is required to return the record in the cause is sufficient, though it contains no express mandate to that effect.—Witt v. Henge, 58 Wis. 244, 16 N. W. 609.

§ 791. Service of writ or notice thereof.

[a] (Ala. 1851) When defendant, against whom a judgment has been rendered by a justice of the peace, removes the cause by certiorari into the county court, a judgment of non pros. cannot be rendered against the plaintiff, unless he has been notified of the issuance of the certiorari.—Crownover v. Srygley, 19 Ala. 251.

[b] (Ala. 1851) Cases removed from justice's courts by certiorari are not embraced in the statute (Clay's Dig. p. 315, § 17), which secures to the appellee a right to notice of an appeal from the judgment of a justice of the peace.—Crownover v. Srygley, 19 Ala. 251.

[c] (Ark. 1854) Where a writ of certiorari was issued to a justice of the peace, and the sheriff, in serving the writ, read it over to him, and then returned the writ to the clerk, who had issued it, and it did not appear that the certiorari was served on the justice in any other manner, nor that the cause was ever certified into the circuit court by the justice, a judgment de novo for debt, damages, and costs in the circuit court is erroneous.—Foster v. Foster, 15 Ark. 399.

[d] (Ark. 1854) A writ of certiorari to a justice of the peace should be served upon him by delivery, and the cause should be certified by the justice into the court issuing the writ.—Foster v. Foster, 15 Ark. 399.

[e] (Ga. 1871) Section 3987, Rev. Code, requiring the plaintiff in certiorari to give the opposite party in interest written notice of the sanction of the writ, and time and place of hearing, at least 10 days before the sitting of the court to which it is returnable, applies to certioraris from the justices' courts, and is of force under the constitution of 1868.—Sparks v. Burgheim, 44 Ga. 167.

[f] (Ga. 1871) Where no notice to the opposite party has been given 10 days before the term to which a writ of certiorari is returnable, but it is agreed in writing between the parties that the decision of the court made in the certiorari shall determine certain other cases suing on the same points, this is a waiver of the notice and an agreement that the certiorari shall be decided upon its merits.—Scott v. Patrick, 44 Ga. 188.

[g] (Ga. 1889) Code, § 4059, requires that plaintiff in certiorari shall give written notice to the opposite party of the sanction of the writ, and the time and place of hearing, at least 10 days before the sitting of the court to which the same shall be returnable; and, in default of such notice, the writ shall be dismissed. Defendant sued out certiorari to the October term, 1888, but did not give the notice required by the statute until January, 1889. *Held*, that the certiorari was properly dismissed, though the magistrate was not served with the writ and petition in time to answer at the October term, and was given until the April term to answer.—Anderson v. Montgomery, 84 Ga. 50, 10 S. E. 590.

[h] (Ga. 1893) Plaintiff in certiorari sent defendant in certiorari a letter as follows: "I have been waiting for an answer from you as to whether you will agree to set aside the judgment in the Vignaux case. The certiorari has been granted, and returned to the J. P. court," etc. *Held* that the letter was not a sufficient compliance with Code, § 4059, requiring written notice to defendant, not only of the sanction of the writ, but also of the time and place of hearing.—Snyder v. Vignaux, 93 Ga. 217, 18 S. E. 435.

[i] (Minn. 1861) Under Comp. St. c. 59, § 130, requiring that a writ of certiorari issued to a justice of the peace must be served upon him within 10 days after its allowance, the fact that a writ was allowed March 2d, and not served until March 17th, is sufficient ground for its dismissal.—Bunday v. Dunbar, 5 Minn. 444 (Gil. 362).

[j] (N. Y. 1835) A certiorari to remove a justice's judgment is good, if it is served within 30 days after the rendition of judgment.—Brown v. Burdick, 18 Wend. 511.

[k] (Pa. 1886) Failure of plaintiff in error to comply with the court rules requiring notice in writing to defendant in error, and the filing of exceptions within 20 days after the term of court to which the proceedings are returnable, will authorize a judgment of non pros.—Teter v. Cook, 2 Pa. Co. Ct. R. 171.

[l] (Tenn. 1834) Where a justice issues execution on a judgment rendered by a justice of the peace of North Carolina, it is error to quash the same on certiorari and grant a supersedeas, with costs, without notice to the judgment creditor; and such judgment for costs, and a levy and sale thereunder, are void.—Hughes v. Bryan's Lessee, 14 Tenn. (6 Yerg.) 471.

[m] (Tex. 1852) Where a case is removed by the plaintiff by certiorari from a justice's court to the district court, in order to authorize a judgment against a defendant who fails to appear, he should be served with notice of the removal.—Houston v. Ward, 8 Tex. 124.

[n] (Wis. 1855) A writ of certiorari from the circuit court to a justice of the peace must be served, according to the provisions of the statute, within 10 days after its allowance; and, if this requirement be not fulfilled, the case will be dismissed, even though the justice makes his return to the writ according to the court's order.—Robson v. Nye, 4 Wis. 217.

§ 792. Supersedeas or stay of proceedings.

Liability of justice for proceeding to judgment after service of writ of certiorari, see ante, § 45.

[a] (Del. 1840) A certiorari is no supersedeas until served on the justice, and allowed by him.—Biggs v. Rickarts, 3 Har. 283.

[b] (Ga. 1853) If a certiorari is not delivered until after a sheriff has begun the enforcement of a process of execution, he may proceed.—City of Macon v. Shaw, 14 Ga. 162.

[c] (Mich. 1892) Where one attached certain logs before a justice, and after judgment the proceedings were removed by certiorari to the circuit court, suing out the certiorari and giving the statutory bond for the payment of any judgment that might be rendered in the circuit court dissolved the attachment.—Vanderhoof v. Prendergast, 94 Mich. 18, 53 N. W. 792.

[d] (N. J. 1876) After certiorari to remove the judgment and proceedings of a justice of the peace is presented to him, any further proceedings in the matter by him is a contempt of the court allowing the writ.—McQuade v. Emmons, 38 N. J. Law (9 Vroom) 397.

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[e] (N. Y. 1812) A certiorari, allowed after execution begun to be executed by the constable, is no supersedeas to it.—Blanchard v. Myers, 9 Johns. 66.

[f] (Pa. 1892) As a recognizance is required by Act June 16, 1836, in order that a certiorari from the common pleas to a justice court shall act as a supersedeas, a bond will not have that effect.—Thomas v. Glasgow (Com. Pl.) 2 Pa. Dist. R. 711.

6. RETURN AND RECORD.

IN GENERAL, § 793.
SCOPE AND CONTENTS OF RETURN OR RECORD, § 794.
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§ 793. In general.

Failure to file bond with justice as ground for refusal to make return on certiorari, see ante, § 789.

[a] (Ala. 1830) A defendant waives all informalities in the return of a justice to a writ of certiorari sued out by him, where he goes to trial thereon without objection.—McGrew v. Adams, 2 Stew. 502.

[b] (Ala. 1837) A transcript returned to a certiorari should not be received as such, unless certified by the justice and returned with the writ.—Perryman v. Burgster, 6 Port. 99.

[c] (Ark. 1861) Upon certiorari to a justice of the peace, the case is not properly before the circuit court for final adjudication until the certified transcript of the proceedings before the justice is returned.—Dicus v. Bright, 23 Ark. 107.

[d] (Minn. 1867) Under Comp. St. c. 59, §§ 127, 130, requiring a justice, on making answer to a certiorari, to return all the testimony and proceedings in the case, it will be presumed, where nothing appears to the contrary, that his return embodies all the testimony. A statement at the end of the report of testimony that "the above is all the testimony" is sufficient as a certificate, if one were necessary.—Payson v. Everett, 12 Minn. 216 (Gil. 137).

[e] (N. J. 1818) The return to a certiorari, directed to a justice of the peace, where the justice has left the state, may be by the party's taking from the docket of the justice a true copy of the record, annexing it to the writ, returning it to the court, and proving by competent evidence that it is a copy of the record.—Ball v. Van Houten, 4 N. J. Law (1 Southard) 32.

[f] (Pa. 1886) It is the duty of the plaintiff in error, in a writ of certiorari, to have the proceedings of the justice returned to the court at the next term succeeding the issuance of the writ.—Teter v. Cook, 2 Pa. Co. Ct. R. 171.

[g] (Wis. 1855) On a writ of certiorari from the circuit court to a justice of the peace, it is the duty of the justice to make his return of the testimony from his minutes and his best recollection.—Martin v. Beckwith, 4 Wis. 219.

[h] (Wis. 1883) In reviewing, on certiorari, the proceedings and judgment of a justice of the peace, the circuit court can ascertain what the justice's docket contains only by having before it a regularly certified copy of such docket; and a certificate of the justice that the paper transmitted "is a true transcript of my docket, and all the papers in the case," is not sufficient.—Witt v. Henge, 58 Wis. 244, 16 N. W. 609.

§ 794. Scope and contents of return or record.

[a] (Ga. 1884) On certiorari from a justice's court, the record must somewhere show that the certiorari bond was accepted and approved by the justice.—Hester v. Keller, 74 Ga. 369; Lowe v. Wallace, Id. 402.

[b] (Ga. 1892) The original papers in an action before a justice are not to be sent up in answer to a writ of certiorari.—Barfield v. McCombs, 89 Ga. 799, 15 S. E. 666.

[c] (Ga. 1892) Since Act Oct. 8, 1885, permits a justice's court to hold from day to day until its business is disposed of, a petition for certiorari which alleges that the regular court day was on the first Monday of the month, and that the judgment was rendered on the 12th, without alleging that the court did not sit from day to day, or that its business was disposed of before such 12th, or that for some reason it was not in legal session, does not call on the magistrate to show by his answer that his court was legally in session on that day.—Ballard Transfer Co. v. Clark, 91 Ga. 234, 18 S. E. 138.

[d] (Mich.) A justice of the peace may, in connection with his answer to a writ of certiorari, return the fact that security for costs was filed, and send up the undertaking.—(1880) McLean v. Isbell, 44 Mich. 129, 6 N. W. 210; (1881) Munroe v. Heintzman, 46 Mich. 12, 8 N. W. 571.

[e] (N. J. 1894) Notes of testimony sent up by a justice of the peace with his return to a writ of certiorari, but not in compliance with any rule in the cause, form no part of the record.—Lloyd v. Richman, 57 N. J. Law (28 Vroom) 385, 30 Atl. 432.

[f] (N. Y. 1808) On certiorari from the supreme court to a justice of the peace, the supreme court may order the justice to return the evidence.—Dodge v. Coddington, 3 Johns. 146.

[g] (Ohio, 1818) A justice's transcript on certiorari must state the cause of action, proceeding, and judgment.—Means v. Stephenson, Tapp. 283.

[h] (Pa. 1831) Under Act March 20, 1810, directing a justice on certiorari to certify the whole proceedings had before him by sending up the original precept and a copy of the judgment and execution, if any, he is not bound to send up the evidence given before him as a part of the record; but, if he does send up the evidence, it is an act of supererogation, and will not be allowed to prejudice either party.—Managers for Relief and Employment of Poor of Germantown v. Zinck, 1 Ashm. 64.

[i] (W. Va. 1892) When a writ of certiorari under the statute is awarded to a justice to review his judgment, the justice must certify and send the record as the writ finds it, and cannot, after the writ reaches him, make contemplated or intended certificates of facts and bills of exception parts of such record.—Bee v. Seaman, 36 W. Va. 381, 15 S. E. 173.

§ 795. Sufficiency of return or record.

[a] (Ala. 1847) The record or proceedings are returned, or at least considered as returned, in answer to a certiorari issued by a superior to

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an inferior tribunal, although the return itself states that a copy only had been sent up; and under the statute, where the justice, trying a forcible entry and detainer, sends up the original papers, with a transcript of the proceedings, all duly certified, the circuit court should require the appellant to assign errors, without awarding an alias certiorari to bring up copies of the original papers.—Bell v. Killcrease, 11 Ala. 685.

[b] (Ala. 1865) When an order is made under Code, § 3786, for the delivery of property to the claimant or owner, such order loses the properties of a state prosecution, and becomes, as between the parties, a civil proceeding, and may be so described on removal by certiorari into the city or circuit court.—Sullivan v. Robinson, 39 Ala. 613.

[c] (Ga. 1870) A memorandum of evidence annexed by a justice of the peace to the papers as his answer to a certiorari is insufficient, yet not a ground for dismissal of the certiorari. The justice should have been ordered to file an answer in conformity to the law.—Wells v. Flowers, 41 Ga. 327.

[d] (Ga. 1880) Where the return of a justice of the peace to a writ of certiorari adopts the statement of the counsel incorporated in his petition for the writ, and certifies the same as a fair representation of what transpired at the trial, the return is defective; but the writ will not be dismissed, as the remedy is by filing exceptions.—Star Glass Co. v. Longley, 64 Ga. 570.

[e] (N. J. 1820) The incorrectness or incompleteness of a justice's return is not a cause for quashing a certiorari.—State v. Kirby, 5 N. J. Law (2 Southard) 835.

[f] (N. J. 1828) A statement in the transcript of the justice, that the counsel of the defendant "relied on the statute of limitations as a bar to the demand of the plaintiffs, and that no evidence of a promise or acknowledgment had been proved to have been made by the plaintiffs within six years," is insufficient to show that no evidence of a promise or acknowledgment was proved, or to prove error in the court below in refusing the defendant the benefit of the statute of limitations.—Dancer v. Patterson, 10 N. J. Law (5 Halst.) 255.

[g] (N. J. 1881) On certiorari to a justice of the peace, the transcript stated that the constable returned the writ of attachment: "Mch. 29, 1879, I return * * *. Whereupon I appointed Friday, Apr. 18, 1879, to hear and determine the cause." *Held*, that it sufficiently appeared that the justice, upon the return of the attachment, appointed a day for the hearing of the cause.—Wright v. Moran, 43 N. J. Law (14 Vroom) 49.

[h] (N. J. 1881) A justice certified in his transcript that on the day of trial of an attachment suit "it appeared in evidence that notices had been posted according to law." *Held*, that it sufficiently appeared that plaintiff had proved to the satisfaction of the justice that he had advertised the attachment in the manner prescribed by statute.—Wright v. Moran, 43 N. J. Law (14 Vroom) 49.

[i] (Pa. 1873) Where the transcript of a justice on certiorari states that the claim before him was for work and services for a certain amount, and that plaintiff was sworn, it is a sufficient compliance with the statute requiring the nature of the evidence on the trial to be set out.—French v. Pennsylvania & N. Y. Canal & R. Co., 1 Leg. Chron. 66.

[j] (Wis. 1854) It is not sufficient for the justice to return to a writ of certiorari that the defendant in certiorari, being satisfied that the judgment was erroneous, has discharged the same and paid costs. He must return all the proceedings had before himself.—Cecil v. Barber, 3 Wis. 297.

§ 796. Exceptions.

[a] (Ga. 1883) Code, §§ 4062–4066, requiring that exceptions to the answer of a justice to a writ of certiorari must be in writing specifying the defects complained of, and that notice must be given to the opposite party before the case is heard, do not require that the exceptions be verified.—Rumph v. Cleveland, 72 Ga. 189.

[b] (Ga. 1892) Exceptions to the answer of a magistrate to a writ of certiorari, founded on matters not referred to in the petition and not essential to the adjudication of the errors complained of, may be overruled or disregarded.—Barfield v. McCombs, 89 Ga. 799, 15 S. E. 666.

[c] (Pa.) The courts of common pleas have a right to make a rule requiring exceptions to be filed in a limited time in all certioraris to remove the judgments of justices; and, where the judgment of a justice is affirmed in the common pleas for want of such exceptions, the supreme court will affirm the proceedings of the common pleas.—(1808) Dubosq v. Guardians of the Poor, 1 Bin. 415; (1822) Snyder v. Bauchman, 8 Serg. & R. 336.

[d] (Pa. 1822) A rule requiring exceptions to be filed within a limited time in all certioraris to remove judgments of justices applies to certioraris to remove the proceedings before two justices and a jury, under the act to enable purchasers at sheriff's sales to obtain possession.—Snyder v. Bauchman, 8 Serg. & R. 336.

[e] (Pa. 1873) On certiorari from a justice of the peace, errors not excepted to will not be noticed, unless justice requires it.—Sauser v. Werntz, 1 Leg. Chron. 249.

[f] (Pa. 1880) Where exceptions on certiorari were filed September 8th, and the argument court met September 13th, the exceptions complied with the rule of court requiring them to be filed five days before the argument day.—Commonwealth v. Savery, 1 Chest. Co. Rep. 179.

[g] (Pa. 1885) Under the rule of court exceptions must be filed on certiorari on or before the first day of the next term after that to which the proceedings are returned, and additional exceptions cannot be filed after that time.—Commonwealth v. Blessington, 3 Lanc. Law Rev. 153.

§ 797. Amendment of return and further return.

Remand of record for amendment of judgment below, see post, §§ 826, 827.

[a] (Ala. 1837) Where a case is removed from a justice of the peace to the circuit court by certiorari, the transcript cannot be amended upon motion, on affidavit showing the neglect of the justice to record fully the matters occurring on trial.—Perryman v. Burgster, 6 Port. 99.

[b] (Ala. 1837) Where a justice has omitted to perfect a record, the correct practice is to move for a rule on him to make certain amendments shown to be material.—Perryman v. Burgster, 6 Port. 99.

[c] (Del. 1846) Whether the court will not order up the original record of a justice of the peace, when, upon a certiorari, it is alleged that the record sent up is not the true record, and whether the court has not power to punish the misconduct of the justice, quære.—Prickett v. Herring, 4 Har. 865.

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[d] (Ga. 1869) When proceedings in a justice's court are brought up for review by certiorari, the justice's return to the writ cannot be amended after the cause has been heard in the court which issued the writ.—Wyatt v. Turner, 40 Ga. 36.

[e] (Ga. 1885) An amendment to the justice's answer to a certiorari, allowed on oral motion in open court, the justice being present, will not be stricken out afterwards.—Burruss v. Smith, 75 Ga. 710.

[f] (Ga. 1886) Where, on exceptions to the return of the justice to a writ of certiorari, he files an amended return, stating that he had sent up everything and given every fact he could remember at that time, there was no error in denying a motion, made long afterwards, when the case was called for trial, to send back the return for further perfecting.—Simpson v. McBride, 78 Ga. 297.

[g] (Iowa, 1857) The district court may require a justice by way of amended return to certify the costs before him.—Acres v. Hancock, 4 Iowa (4 Clarke) 568.

[h] (Mich. 1886) Where the return of a justice to certiorari is deemed insufficient on any error alleged, the district court has power to direct a further return.—Gordon v. Sibley, 59 Mich. 250, 26 N. W. 485.

[i] (N. J. 1806) Where the justice, in making return to the appellate court on certiorari, states in his transcript that plaintiff filed a plea and demand, but omits to send it up with the proceedings, the judgment will neither be reversed nor affirmed, where there is no appearance by defendant; but plaintiff must take a rule on the justice to send up the state of demand.—Farley v. Sergeant, 2 N. J. Law (1 Penning.) 141.

[j] (N. J. 1819) After a justice has made up his record, and delivered a copy to a party, upon which a certiorari is brought, he cannot alter the record and send up a different transcript.—Searing v. Lum, 5 N. J. Law (2 Southard) 683.

[k] (N. J. 1820) Where the justice's return to a writ of certiorari is incorrect or incomplete, it may be amended and completed by a new return, ordered on application of plaintiff.—State v. Kirby, 5 N. J. Law (2 Southard) 835.

[l] (N. Y. 1804) On affidavit of a clerical error in copying the record, a justice's return may be amended after errors assigned, argument, and judgment thereon.—Day v. Wilber, 2 Caines, 134.

[m] (N. Y. 1811) Where a justice, after having signed a return to a certiorari, made a supplementary return, and then made another return declaring the supplementary return incorrect, the court refused to receive the supplementary returns, and expressed their strong disapprobation of the practice of preparing returns to certioraris for justices without their request, especially by the party applying or his attorney.—Rudd v. Baker, 7 Johns. 548.

[n] (N. Y. 1823) Where, on the return to a writ of certiorari to a justice of the peace, the justice fails to state the evidence, because he had no minutes of the proceedings, and an affidavit is filed asking for an amended return as to certain evidence, the court will compel the justice to state to the best of his recollection and belief whether such evidence was given or not.—Schuyler v. Warner, 1 Cow. 59.

[o] (N. Y. 1823) The court will not entertain a motion to amend a justice's return to a certiorari, unless the affidavit on which it is founded and the return, or sworn or certified copies thereof, be furnished.—Cutler v. Gidney, 1 Cow. 571.

[p] (Ohio, 1833) On certiorari from the court of common pleas to a justice of the peace, the court cannot order the justice to certify up what was said and contended for by the parties before him, under a suggestion of diminution of the record, where such statements were not made a part of the record.—Reed v. De Wolf, Wright, 418.

[q] (Pa. 1867) On certiorari diminution of record must be alleged before the commencement of the argument.—Beyerly v. Hunger, 1 Woodw. Dec. 354.

[r] (Pa. 1879) Where, in copying the transcript returned to a certiorari, the justice inadvertently omitted part of the record, the court will allow the amended transcript to be filed.—Jervis v. McFarlan, 1 Chest. Co. Rep. 137.

[s] (Pa. 1891) If, on certiorari to bring up the record of a justice, plaintiff in error has reason to believe that the transcript has been altered, and is not a true copy of the docket entry, his remedy is to rule the justice to produce his docket for inspection.—Davenport v. Mahon (Com. Pl.) 6 Kulp, 350.

[t] (Tex. 1894) Where, after appeal from a justice to the county court, the certificate of the justice to his transcript, sent up in answer to a certiorari issued by the county court, is insufficient as to the bill of costs, the county court should grant an application of appellant for another certiorari to the justice, and not dismiss the appeal for want of sufficient certificate.—Shepard v. Duke (Civ. App.) 28 S. W. 567.

[u] (Wis. 1854) The county court has power to compel a justice of the peace to make a full and complete return to a writ of certiorari, and has no right to proceed to judgment until a return is made, sufficient to give jurisdiction of the merits of the case.—Cecil v. Barber, 3 Wis. 207.

§ 798. Conclusiveness of return or record.

[a] (Ark. 1884) Under Gantt's Dig. §§ 1196, 1197, the return of a justice of the peace to a certiorari is not conclusive.—Hickey v. Matthews, 43 Ark. 341.

[b] (Del. 1840) On certiorari, proof is allowed, against the record, of a fact which the justice is bound, but refuses, to enter on his record, as that a party appeared, or that the cause was adjourned to another day; and proof in such case is taken by depositions.—Calaway v. Calaway, 3 Har. 84.

[c] (Del. 1845) On a certiorari to a justice's judgment by confession, the court refused to allow the defendant to contradict the record by denying the confession of judgment.—Runyan v. Dickenson, 4 Har. 243.

[d] (Del. 1848) If the justice has jurisdiction of a cause of action and of the parties, his record as to the proceedings in the cause is conclusive on certiorari.—Betts v. Warren, 5 Har. 4.

[e] (Del. 1856) A judgment by default against an administrator in an action on a proved account before a justice of the peace will not be set aside on certiorari, on the ground that it does not appear that the court heard the proofs and allegations of the plaintiff, when the record states that judgment was given after the justice had examined the plaintiff's account.—Hudson's Adm'r v. Messick, 1 Houst. 275.

[f] (La. 1891) The allegations of the relator to obtain the writ cannot prevail against the minutes of the proceedings as certified to by the respondent justice of the peace, particularly in the absence of any proof of any attempt made to correct them.—State ex rel. Houston

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Cent., A. & N. R. Co. v. Riley, 43 La. Ann. 177, 8 South. 598.

[g] (Mich. 1874) Where the justice, in his return to a writ of certiorari to bring up for review his proceedings in attachment suits, states that the officer's return of service of the attachment was not in fact made until the return day, the fact that such return of service was not dated, or that the justice had erroneously entered in his docket a minute that the writ was returned on a different day, will be disregarded.—Nicolls v. Lawrence, 30 Mich. 395.

[h] (Mich. 1886) The record of a justice's judgment in his docket must control, and it cannot be contradicted by his return to a certiorari.—Weaver v. Lammon, 62 Mich. 366, 28 N. W. 905.

[i] (Mich. 1886) When the justice's return to a certiorari is as to facts and occurrences not required by the statute to be entered on the docket, the return must be taken as true.—Weaver v. Lammon, 62 Mich. 366, 28 N. W. 905.

[j] (N. J. 1894) A return of a justice to a writ of certiorari, that a certain motion was not made before him, cannot be contradicted by affidavits.—Meirs v. Bussom, 57 N. J. Law (28 Vroom) 383, 30 Atl. 433.

[k] (N. Y. 1847) The return of a justice of the peace to a certiorari, stating the fact of his relationship to one of the parties to the suit before him, sufficiently establishes the fact for the purposes of the hearing of the certiorari before the common pleas, though the matter was not proved or admitted, or even objected to, on the trial.—Post v. Black, 5 Denio, 66.

[l] (N. Y. 1865) The relator in a certiorari to review proceedings in a justice's court is concluded by the return of the justice. If the facts are not correctly stated, he should apply for a further return. He cannot correct it by affidavit or assignment of errors.—People v. Powers, 19 Abb. Prac. 99.

[m] (Pa. 1866) On certiorari, all the proceedings of the magistrate as they appear on the record are to be taken as verity.—Saul v. Geist, 1 Woodw. Dec. 306.

[n] (Pa. 1867) On certiorari, where the record is ambiguous, equivocal, or inconclusive, it may be pieced out by parol proof showing what was done before the magistrate.—Beyerly v. Hunger, 1 Woodw. Dec. 354.

[o] (Pa. 1885) Where a criminal prosecution has been brought before an alderman, which he has changed to a civil action without service of summons or notice to defendant, and he alters his transcript, so as to make it appear that the civil action was commenced by a summons regularly served, it is a falsification of the record, and parol evidence is admissible to prove the facts.—Commonwealth v. Blessington, 3 Lanc. Law Rev. 153.

[p] (Pa. 1892) On certiorari to a judgment of a justice, facts contradictory of the record cannot be considered.—Haggerty v. Wurzburger (Com. Pl.) 6 Kulp, 416.

[q] (Pa. 1892) On certiorari to review the judgment of a justice of the peace, parol evidence to impeach the record is inadmissible.—Ritter v. Keller (Com. Pl.) 12 Pa. Co. Ct. R. 239, 2 Pa. Dist. R. 519.

[r] (Pa. 1895) Parol evidence is inadmissible, on certiorari, to contradict or vary the docket of a justice of the peace as to the cause of action tried before him.—Evans v. Brobst (Com. Pl.) 11 Montg. Co. Law Rep'r, 133, 1 Lack. Leg. N. 300, 16 Pa. Co. Ct. R. 550, 5 Pa. Dist. R. 30.

[s] (Wis. 1881) On certiorari the record of a judgment in a justice's court, showing that the justice had jurisdiction, cannot be impeached by contrary statements made by him in his return.—Cassidy v. Millerick, 52 Wis. 379, 9 N. W. 165.

§ 799. Questions presented for review.

[a] (Ark. 1856) Where a case commenced before a justice of the peace is brought into the circuit court on certiorari, the court can only determine, upon inspection of the proceedings and judgment of the magistrate, whether they were valid or void, and quash or affirm.—Hill v. Steel, 17 Ark. 440.

[b] (Ark. 1860) On certiorari from a justice's court, the judgment and proceedings of the justice should be quashed or affirmed from what appears upon the papers, not upon admissions of parties in the higher court.—Miller v. McCullough, 21 Ark. 426.

[c] (Ark. 1861) Upon certiorari to a justice of the peace, matters dehors the transcript will not be considered in passing upon the validity of his judgment.—Dicus v. Bright, 23 Ark. 107.

[d] (Ga. 1879) The answer of a justice of the peace to a certiorari, when untraversed, will be the only thing considered at the hearing, in the absence of a motion for a fuller return.—Warren v. Wilson, 63 Ga. 372.

[e] (Ga. 1886) Interrogatories appended to the petition for certiorari, but not identified by the justice in whose court the case was tried, should not be considered by the superior court.—Akridge v. Watertown Steam Engine Co., 77 Ga. 50.

[f] (Ga. 1886) The superior court is governed by the return of the justice to the writ of certiorari, and not by the petition of a party.—Simpson v. McBride, 78 Ga. 297.

[g] (Ga. 1888) When complaint is made that the magistrate erred in admitting testimony over certain specified objections, but the answer of the magistrate, which is neither excepted to nor traversed, fails to disclose on what ground the testimony was objected to, or for what reason the same was ruled in, the alleged error cannot be considered.—Gartrell v. Linn, 79 Ga. 700, 4 S. E. 918.

[h] (Mich. 1871) Where neither the affidavit upon which a writ of certiorari is issued nor the return of the justice of the peace, which purports to give all the evidence in the case, shows that any objection was taken to any of the evidence introduced on the trial, or to any process, pleading, or proceeding before the justice, or that any question of law was raised on the trial, and the only error complained of is that the testimony given on the trial demanded a different verdict from the one rendered, the trial having been by a jury, and the testimony being such as to warrant the jury in finding the verdict, no question of law is presented for the circuit court to pass upon.—McGraw v. Schwab, 23 Mich. 13.

[i] (Mich. 1882) Errors in proceedings removed on certiorari from before a justice cannot be made out if they do not appear by the justice's return. Comp. Laws, § 5568.—Hobson v. People, 48 Mich. 27, 11 N. W. 771.

[j] (Minn. 1858) The district court, in its affirmance or reversal of the judgment, should be guided by what appears on the return.—Gervais v. Powers, 1 Minn. 45 (Gil. 30).

[k] (Minn. 1858) On certiorari to a justice court, the district court is confined to the facts found in the return of the magistrate, and cannot resort to facts stated in the affidavit to obtain the writ.—Taylor v. Bissell, 1 Minn. 225 (Gil. 186).

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[l] (Pa. 1790) The court must take the case as stated on the justice's return to the certiorari, without going into the merits of the original question.—Overseers of Coventry v. Cummings, 2 Dall. 114, 1 L. Ed. 312.

[m] (Pa. 1846) Unless it appears on the face of the proceedings that the justice proceeded to render judgment on plaintiff's own oath, it must be distinctly averred by way of exception and shown by proof, or it will not be considered on certiorari.—Wilson v. Wilson, 3 Clark, 419.

[n] (Pa. 1882) Where there are no material errors on the face of the record, plaintiff in certiorari will not be permitted to go behind it in order to show what was the evidence on which the justice gave judgment.—Cartright v. Rooney, 1 Kulp, 493.

[o] (Pa. 1883) Where a justice has jurisdiction, and there is no evidence of corruption, or that he has refused to hear testimony, the court, on certiorari, will not inquire how he made up his record, and will not look beyond the transcript.—Schoendman v. Glanz, 2 Lanc. Law Rev. 358.

[p] (Pa. 1884) On certiorari from an alderman, the court cannot take judicial notice of an ordinance of the city, unless the transcript of the alderman sets forth such ordinance, so as to leave no doubt that the suit was brought under it.—City of Lancaster v. Hirsh, 1 Lanc. Law Rev. 209.

[q] (Pa. 1893) A certiorari must be determined on the record as returned by the justice, though the latter is contradictory of a transcript furnished defendant by the justice before the writ issued.—Moore v. Messersmith (Com. Pl.) 12 Pa. Co. Ct. R. 575, 2 Pa. Dist. R. 483.

[r] (Pa. 1896) Matters of defense alleged in the way of exceptions to the sufficiency of the record of a justice of the peace will not be considered on certiorari.—Missemer v. Trout (Com. Pl.) 17 Pa. Co. Ct. R. 317.

[s] (Wis. 1885) A writ of certiorari to a justice of the peace does not bring up the evidence, but only the record, and that only for the purpose of enabling the circuit court to determine whether the justice had jurisdiction to render the judgment complained of. The circuit court cannot render judgment on the merits.—Smith v. Bahr, 62 Wis. 244, 22 N. W. 438; Paulsen v. Ingersoll, 62 Wis. 312, 22 N. W. 477.

7. PROCEEDINGS PRELIMINARY TO HEARING.

AMENDMENT OF PROCESS OR PLEADING, § 800.
ASSIGNMENT OF ERRORS, § 801.
QUASHING OR DISMISSAL OF WRIT, § 802.
—— TIME FOR MOTION TO DISMISS, § 803.
—— HEARING ON MOTION TO DISMISS, § 804.
JUDGMENT ON DISMISSAL, § 805.
—— EFFECT OF DISMISSAL, § 806.

§ 800. Amendment of process or pleading.

[a] (Mich. 1882) On certiorari to a justice, defects of pleading cannot be remedied; and, as a reversal by defendant would cut off plaintiff's entire claim and remedy, he who resorts to certiorari must see that he stands on a clear and unquestionable foundation.—Ritter v. Daniels, 47 Mich. 617, 11 N. W. 409.

[b] (N. Y. 1818) Under a repealed statute, the plaintiff might assign, as error in fact, such matter as the justice, whose proceedings were removed, could not return, because they did not come under his observation.—Harvey v. Rickett, 15 Johns. 87.

[c] (Pa. 1882) On certiorari to a justice of the peace, the court has no authority to permit the constable to amend his return to the summons.—Hildreth v. Reilly, 2 Kulp, 270.

[d] (Tex. 1864) The office of a writ of certiorari is simply to bring up to the district court from the justice's court the case tried by the justice, that it may be tried de novo, and it is not proper to connect the suit before the justice with any other cause of action not within his jurisdiction; and, where the petition seeks to do this, the district court may dismiss the suit, so far as the new cause of action, not within the jurisdiction of the justice, is set up, and proceed to hear and determine the case properly brought before it by the certiorari.—Hill v. Faison, 27 Tex. 428.

[e] (Tex. 1893) Under Rev. St. art. 316, where causes are brought from the justice's court to the county court by writ of certiorari, either party may plead any new matter in the latter court which was not presented in the former.—Bergstrom v. Bruns, 24 S. W. 1098.

§ 801. Assignment of errors.

[a] (N. C. 1842) Where a recordari, in the nature of a writ of error or writ of false judgment, has been sued out, according to the practice, and the plaint returned, the petitioner or plaintiff in the writ ought to assign his errors.—Leatherwood v. Moody, 25 N. C. (3 Ired.) 129.

[b] (N. C. 1842) Where no error is assigned, or none appears, the proper course is to dismiss the recordari, and award a procedendo.—Leatherwood v. Moody, 25 N. C. (3 Ired.) 129.

[c] (N. C. 1871) When the writ of recordari is used as a writ of false judgment, the plaintiff in the writ must, upon the return thereof certifying the proceedings before the justice of the peace, assign his errors, and then the proceedings will be the same as in other writs of error.—Swain v. Smith, 65 N. C. 211.

§ 802. Quashing or dismissal of writ.

Failure to give bond on certiorari as ground for dismissal of writ, see ante, § 789.

—— *to serve or give notice of writ of certiorari as ground for dismissal, see* ante, § 791.

Insufficiency of justice's return on certiorari as ground for dismissal, see ante, § 795.

Ordering new trial on certiorari as refusal to dismiss the writ, see post, § 822.

Variance between bond on certiorari and transcript as ground for dismissal, see ante, § 789.

[a] (Iowa, 1851) Where the grounds of error alleged in the affidavit for a certiorari are palpably insufficient, and do not show error before the justice, the writ may be dismissed on motion before the hearing of the case.—Elliott v. Mitchell, 3 G. Greene, 237.

[b] (Miss. 1838) A certiorari improperly awarded to a justice's court may be dismissed by the circuit court.—Leech v. Irwing, 3 Miss. (2 How.) 887.

[c] (Miss. 1891) A defeated litigant in the justice court tendered an appeal bond to the justice, who promised to approve it if all right. After the time for appeal had elapsed, the litigant learned that the justice had disapproved the bond. A writ of certiorari was issued from the circuit court, but the record on appeal failed to show that it was served, or that the papers were produced. *Held*, that it was error to dismiss the case, since process should have been

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issued to produce the original papers, and the cause delayed to await the return thereof.—Robertson v. Mhoon, 68 Miss. 712, 9 South. 887.

[d] (N. M. 1895) After a case has been taken to the district court on certiorari from a justice of the peace, the contention that the writ should be dismissed because the account sued on did not contain the full first name of plaintiff cannot be raised there for the first time by motion to dismiss, but should be, according to the practice prescribed for the district court, by plea.—Lockhart v. Woollacott, 8 N. M. 21, 41 Pac. 536.

[e] (Tex. 1851) If no merits are shown in the petition, if the writ has not been taken out and returned in time, or if the conditions on which it was granted have not been complied with, such as giving bond, in any of these cases, it ought to be dismissed.—O'Brien v. Dunn, 5 Tex. 570.

[f] (Tex. 1852) Where a certiorari is improvidently issued, and the party who succeeded in the justice's court moves to dismiss on that ground, and his motion is overruled, he may abandon the case, and rely upon having a dismissal of the certiorari on appeal or writ of error.—Perdew v. Steadham, 8 Tex. 274; Wood v. Rich, 8 Tex. 280.

[g] (Tex. 1864) Where it appeared by the transcript from a justice's court that the suit was dismissed before the petition for certiorari was filed, it was *held* that a motion to dismiss the petition and certiorari should have been sustained.—Darby v. Davidson, 27 Tex. 432.

[h] (Tex. 1887) A certiorari cannot be dismissed for a failure of the justice who tried the case to file the original papers, in view of Rev. St. art. 311, merely specifying insufficiency of affidavit or bond as causes of dismissal.—Peck v. Reed, 3 Willson, Civ. Cas. Ct. App. § 265.

[i] (Wis. 1871) On a certiorari to a justice's court, returnable to the circuit, the latter should affirm or reverse the judgment, and not dismiss the writ.—Owens v. State, 27 Wis. 456.

§ 803. —— Time for motion to dismiss.

[a] (Ala. 1833) A certiorari, brought where a writ of error is the proper remedy, will not be quashed, if the motion therefor be made after a delay of two terms. The record being before the court, and a certiorari being substantially a writ of error, the court will proceed thereon, unless the exception be taken in time.—Wheelock v. Wright, 4 Stew. & P. 163.

[b] (Ala. 1874) Where the record does not show that plaintiff had five days' written notice of the certiorari (Rev. Code, § 2778), a case commenced in a justice's court and removed by defendant by certiorari into the circuit court, should not be dismissed at the first term for want of prosecution, but should be continued until the next term, in order that the proper notice may be given.—Kane v. Gammell, 50 Ala. 492.

[c] (Mo. 1834) Justices of the peace have the first day of the term of the circuit court to make return to a certiorari. A motion to dismiss on the first day of the term for want of a return is therefore premature.—Hill v. Young, 3 Mo. 337.

[d] (Tenn. 1847) A motion to dismiss a writ of certiorari must be made at the earliest opportunity, and it comes too late after a trial on the merits.—Chappell v. Jones, 27 Tenn. (8 Humph.) 107.

[e] (Tenn. 1858) A motion to dismiss comes too late, if made with the interval of one term after the one at which the petition was presented.—Nance v. Hicks, 38 Tenn. (1 Head) 624.

[f] (Tenn. 1865) If a certiorari has been improperly obtained, or upon an insufficient ground, the party against whom it is issued must, at the return term, or, at least, at the first term after the service of the supersedeas, avail himself of the objection by rule or motion to dismiss, and his failure to do so will preclude him from objecting afterwards to such insufficiency in the petition.—Uhles v. Nolen, 42 Tenn. (2 Cold.) 529.

[g] (Tex.) A motion to dismiss a certiorari to bring a cause from a justice's court to the district court must be made at the first term.—(1853) Steinlein v. Dial, 10 Tex. 268; (1854) Mowery v. Lawson, 12 Tex. 31; (1855) Holt v. McCasky, 14 Tex. 229; (1887) Western Union Tel. Co. v. Blanton, 3 Willson, Civ. Cas. Ct. App. § 347.

[h] (Tex. 1886) A party whose exceptions to a certiorari are overruled is not entitled at a subsequent term to file a motion to dismiss the certiorari.—Park v. Sanger, 3 Willson, Civ. Cas. Ct. App. § 196.

[i] (Tex. 1887) A motion to dismiss a certiorari, made after the first term of the court to which the certiorari is returnable, will not be entertained (Rev. St. art. 311), though the grounds specified are sufficient.—Peck v. Reed, 3 Willson, Civ. Cas. Ct. App. § 265.

[j] (Tex. 1890) Where the record only shows that at the return term of a certiorari, by which a cause was removed from the justice to the county court, appellee moved to dismiss the certiorari, which motion was overruled "without prejudice," and that at the next term appellee renewed his motion to dismiss, which was sustained against appellant's objection that it came too late, the judgment of dismissal must be reversed, since the records show that the motion was made too late.—Brown v. Sphor (App.) 16 S. W. 868.

§ 804. —— Hearing on motion to dismiss.

[a] (Tenn. 1853) The whole proceedings of the magistrate, as presented in a case properly brought up by certiorari, are before the court when a motion is made to dismiss.—Edde v. Cowan, 33 Tenn. (1 Sneed) 290.

[b] (Tenn. 1858) Upon a motion to dismiss a petition for writs of certiorari and supersedeas, counter affidavits controverting the statement of the petition are not admissible.—Nance v. Hicks, 38 Tenn. (1 Head) 624.

[c] (Tenn. 1871) On the hearing of a motion to dismiss a petition for writs of certiorari and supersedeas against a justice's execution, the papers of the justice may be read to negative the allegations of the petition.—McCorkle v. Brooks, 53 Tenn. (6 Heisk.) 601.

[d] (Tex.) On motion to dismiss a certiorari to a justice of the peace, the court may look to the transcript brought up from the justice's court to aid in determining upon the motion.—(1857) Crawford v. Crain, 19 Tex. 145; (1858) Jones v. Nold, 22 Tex. 379; (1864) Darby v. Davidson, 27 Tex. 432.

[e] (Tex. 1868) In determining the sufficiency of a petition for certiorari to a justice's court on a motion to dismiss, it is not proper to regard the facts as stated by the justice in his transcript, in opposition to those set forth and sworn to in the petition.—Hearn v. Foster, 21 Tex. 401.

§ 805. Judgment on dismissal.

[a] (Tenn. 1852) Where a petition for certiorari to have execution issued by a justice declared unauthorized is dismissed, a judgment for costs and awarding a procedendo to the justice should be entered, and not a judgment for the original debt, since the validity of the former

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judgment has not been affected by the certiorari.—Jones v. Williams, 32 Tenn. (2 Swan) 105.

[b] (Tenn. 1858) On dismissal of a petition for certiorari and supersedeas, wherein the judgment of the justice is complained of, the proper judgment under Code, § 3137, is for the plaintiff against the defendant and his surety to the prosecution bond to the amount of the justice's judgment, with interest at 12½ per cent. from its date, and costs.—Allen v. Wood, 38 Tenn. (1 Head) 438.

[c] (Tenn. 1858) It makes no difference that the petition states that the defendant "appealed from the justice's judgment within the two days, and gave bond according to law, as he is advised."—Allen v. Wood, 38 Tenn. (1 Head) 438.

[d] (Tenn. 1859) On dismissing a petition for a writ of supersedeas, the proper practice under Code, §§ 3124, 3138, is to render judgment in the higher court for the amount of the justice's judgment, with interest at 12½ per cent. per annum, against the principal and sureties in the certiorari bond.—Lownes v. Hunter, 39 Tenn. (2 Head) 343.

[e] (Tex. 1853) A district court has no right, on dismissing a certiorari for insufficiency in the petition, to affirm the judgment of the justice.—Ahrens v. Giesecke, 9 Tex. 432.

[f] (Tex. 1854) The court below cannot, after dismissing a petition for a certiorari to a justice's court, render a judgment against the petitioner and his sureties for the amount of the judgment of the justice, without a hearing.—Ward v. McRimmond, 12 Tex. 314.

§ 806. —— Effect of dismissal.

[a] The quashing or dismissal of a writ of certiorari in the district court, upon motion of an appellee, after judgment below, is equivalent to a judgment that the writ ought never to have been granted, and revives the judgment of the court below.

—(Miss. 1847) Standifer v. Bush, 16 Miss. (8 Smedes & M.) 383;
(Tex. 1859) Miller v. Holtz, 23 Tex. 138.

[b] (Ga. 1878) A certiorari from a justice is a suit which, if dismissed, may be renewed within six months after the dismissal.—Smith v. Bryan, 60 Ga. 628.

[c] (Tenn. 1845) Where a joint judgment against several defendants before a justice is taken up by certiorari, which is dismissed as to all but one, plaintiff may prosecute the claim against that one in the appellate court, unless the judgment is satisfied by the other defendants.—Osborne v. Poe, 25 Tenn. (6 Humph.) 111.

[d] (Tex. 1859) The dismissal of a certiorari by a district court, because of failure on the part of a plaintiff to comply with a rule of such court ordering him to give security for costs, is not such a dismissal as revives the judgment of the court below or authorizes the issuance of execution on that judgment.—Miller v. Holtz, 23 Tex. 138.

[e] (Tex. 1859) Where the writ is dismissed on motion, because of failure to prosecute on the part of the plaintiff, such dismissal does not revive a judgment rendered in the plaintiff's favor in the justice's court.—Miller v. Holtz, 23 Tex. 138.

8. REVIEW.

SCOPE OF REVIEW, § 807.
MODE OF REVIEW IN GENERAL, § 808.
—— ADMISSION OF PAROL EVIDENCE, § 809.
—— ADMISSION OF AFFIDAVITS AND DEPOSITIONS, § 810.
—— TRIALS DE NOVO, § 811.
PRESUMPTIONS, § 812.
—— BURDEN OF PROOF, § 813.
PARTIES ENTITLED TO ALLEGE ERROR, § 814.
QUESTIONS REVIEWABLE, § 815.
REVIEW OF EVIDENCE AND QUESTIONS OF FACT, § 816.
MATTERS OF DISCRETION AND HARMLESS ERROR, § 817.

§ 807. Scope of review.

Review as dependent on making objections before justice, see ante, § 776.

—— *on transcript or return, see* ante, § 799.

[a] (Ala. 1891) The issuance of execution against sureties on a forfeited claim bond by a justice of the peace not operating as a judgment, under Code, § 3405, providing that cases brought to the circuit court by certiorari from justices' judgments must be tried de novo, such action of the justice was properly ignored.—Weedon v. Clark, 94 Ala. 505, 10 South. 307.

[b] (Ga. 1891) On writ of error from an order of the superior court dismissing certiorari from a justice of the peace, where it does not appear what ground of error, if any, was set forth in the petition for certiorari, the judgment must be affirmed, since Code, § 4065, declares that no ground of error shall be insisted upon on certiorari which is not distinctly set forth in the petition therefor.—Richards v. Little, 88 Ga. 176, 14 S. E. 207.

[c] (Mich. 1881) Objections not going to the merits will be disregarded on certiorari.—Hart v. Port Huron Tp., 46 Mich. 428, 9 N. W. 481.

[d] (Mich. 1883) On review of a justice's judgment on certiorari, the circuit court is confined to the ground of error set up in the affidavit for the writ of certiorari.—Blood v. Westbrook, 50 Mich. 443, 15 N. W. 544.

[e] (Mich. 1883) Review by certiorari of a judgment of a circuit court commissioner in summary proceedings being, by the provision of Comp. Laws, § 6721, governed by the rules applicable to certiorari to a justice of the peace, substantial justice, irrespective of mere form, should be done.—Williams v. Wilkinson, 51 Mich. 155, 16 N. W. 319.

[f] (N. Y. 1809) The supreme court does not require the same technical formality and precision in the pleadings in proceedings before justices of the peace as in that court, but will determine on them, when brought up by certiorari, according to the merits of the case.—Picket v. Weaver, 5 Johns. 122.

[g] (Pa.) Where substantial and fatal errors appear on the face of proceedings in certiorari from a justice of the peace, the court will consider them, though not specially assigned in the exceptions.—(1862) Hunter v. Weidner, 1 Woodw. Dec. 6; (1872) Paine v. Godshall, 29 Leg. Int. 12; (1883) Fraelich v. Mowrer, 1 Lanc. Law Rev. 49.

[h] (Wis. 1851) Though St. c. 88, § 223, provides that the county court, on appeal from the judgment of a justice, shall give judgment as the right of that matter may appear, without regard to technical errors or defects not affecting the merits, the court, on certiorari, cannot disregard a misjoinder of causes of action.—Hibbard v. Bell, 3 Chand. 206, 3 Pin. 190.

[i] (Wis. 1855) On a writ of certiorari to a justice of the peace, the court is to give judgment on the return of the justice as the right may appear.—Martin v. Beckwith, 4 Wis. 219.

§ 808. Mode of review in general.

[a] (Ind. 1854) Under Rev. St. 1843, when a judgment of a justice of the peace was brought

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to the supreme court by certiorari, the first duty of the court was to examine the cause as a court of error, and, if no defects appeared from the record in the justice's proceeding, to affirm the judgment, and that decision was to be certified to the justice, or judgment to be rendered for the amount of the justice's judgment and the costs taxed by him; but, if defects affecting the merits appeared in such record, then the court was to reverse the judgment, and try the cause on the merits, as in cases of appeal from such judgments.—Searl v. Richey, 5 Ind. 199.

[b] (Miss. 1843) In proceedings originating before a magistrate, and carried to the circuit court by certiorari, a judgment upon a certificate of a balance due the defendant, without a sci. fa., is correct; aliter, in an original suit.—Hurd v. Tombes, 8 Miss. (7 How.) 229.

[c] (Miss. 1891) Where, on certiorari to a justice because of his retention of and failure to approve an appeal bond, the papers are ordered sent up to the circuit court, on production of the papers it should have taken evidence as to the retention of the appeal bond and as to the solvency thereof, and, if satisfied that such retention was illegal and the bond good, should have tried the case on its merits.—Robertson v. Mhoon, 68 Miss. 712, 9 South. 887.

[d] (Pa. 1840) The common pleas have no power to direct an issue to try disputed facts arising on certiorari to a judgment of a justice of the peace.—Pool v. Morgan, 10 Watts, 53.

[e] (W. Va. 1889) Code, c. 110, § 3, provides that, upon the hearing of a writ of certiorari, the circuit court shall review the judgment, order, or proceedings of the inferior tribunal to which the writ was issued upon the merits, determine all questions arising on the law and evidence, and render such judgment upon the whole matter as law and justice may require. *Held*, that where a cause is so removed from a justice to the circuit court after verdict and judgment, the latter court will review the judgment upon the merits, and may direct a new trial before a jury, unless neither party requires a jury.—Natural Gas Co. v. Healy, 33 W. Va. 102, 10 S. E. 56.

[f] (W. Va. 1892) Under the statute, the writ of certiorari to a justice of the peace lies after judgment of the justice; and upon the hearing the circuit court will review such judgment upon the merits, determining all questions arising on the law and the evidence, and render such judgment or make such order upon the whole matter as law and justice may require; and it may, in a proper case, set the verdict of the jury aside, and award a new trial, in which case the case is to be retained in the circuit court, and disposed of as if originally brought therein.—Bee v. Seaman, 36 W. Va. 381, 15 S. E. 173.

[g] (W. Va. 1893) Where a record and judgment of a justice is removed and returned to the circuit court on writ of certiorari issued under Code 1891, c. 110, it is the duty of the clerk, upon receiving it, to docket the case as other cases are docketed, and on the hearing the circuit court should review such judgment upon the merits, and render such judgment or make such order upon the whole matter as law and justice may require; and it is error to have the case tried by a jury without having first reviewed such judgment.—Arnold v. Lewis County Ct., 38 W. Va. 142, 18 S. E. 476.

§ 809. — Admission of parol evidence.

Parol evidence on certiorari to contradict return or record, see ante, § 798.

[a] (Pa. 1825) On certiorari, where it does not appear whether the judgment is rendered against defendant in his private or official capacity as a justice of the peace, and he assigns for error an omission of the notice allowed by law to justices of the peace before a suit is begun, parol evidence may be introduced.—Fitzsimmons v. Evans, 1 Ashm. 52, note.

[b] (Pa. 1825) On certiorari, where there is reason to infer partiality or corrupt practice on the part of the justice in rendering judgment, as when he refuses to hear material testimony, parol evidence is admissible to show that fact.—Worstall v. Meadowcroft, 1 Ashm. 52, note.

[c] (Pa. 1831) The common pleas, in order to maintain the purity of the administration of justice, will examine witnesses, on certiorari to a justice of the peace, in order to discover and prevent fraud, corruption, partiality, or excess of jurisdiction.—Dumber v. Jones, 1 Ashm. 215; Knight v. Parry, 1 Ashm. 221.

[cc] (Pa. 1831) Generally, however, objections are confined to the record, and cannot be supported or contradicted by extraneous evidence.—Curran v. Atkinson, 1 Ashm. 51; Dumber v. Jones, Id. 215.

[d] (Pa. 1865) On certiorari to a justice of the peace, the court is not to look beyond the transcript. Parol evidence of what took place before the magistrate is not admissible, except to establish his want of jurisdiction, his corruption, his refusal to hear testimony, or the fact of his having given judgment on the oath of the party alone.—Road Com'rs v. Fickinger, 51 Pa. (1 P. F. Smith) 48.

[e] (Pa. 1869) The court, on certiorari to a justice, will not hear parol evidence as to the merits of the case, but only of what occurred before him.—Fisher v. Nyce, 60 Pa. (10 P. F. Smith) 107.

[f] (Pa. 1870) Where a justice of the peace has no jurisdiction of a party defendant in an action before him, parol evidence may be introduced on certiorari to show such want of jurisdiction.—Shultz v. Sweigart, 2 Lanc. Bar, No. 1, p. 1.

[g] (Pa. 1873) On certiorari from a justice, the fact that the amount of the claim of plaintiff exceeded the jurisdiction of the justice may be shown, either by the record or parol testimony.—Carey v. Branch No. 2, 1 Leg. Chron. 170.

[h] (Pa. 1874) Where the jurisdiction of a justice is attacked on certiorari, evidence may be given aliunde to determine the jurisdiction.—Torbert v. Yocum, 2 Leg. Chron. 294.

[i] (Pa. 1880) Parol evidence is sometimes received on hearing of certiorari to show what took place before the justice, and his conduct.—Commonwealth v. King, 1 Chest. Co. Rep. 203.

[j] (Pa. 1881) Where there is reason to infer partiality or corrupt practice on the part of a justice, parol evidence will be heard on certiorari to determine the rights of the parties, especially where the judgment is for such an amount that defendant cannot appeal.—Dunfee v. Vargason, 3 Pa. Co. Ct. R. 207.

[k] (Pa.) On certiorari from a justice of the peace, parol evidence is admissible to show that defendant was a married woman, and that the justice, therefore, had no jurisdiction.—(1883) Graham v. James, 13 Wkly. Notes Cas. 279. CONTRA, see (1888) Parkes v. Diehm, 5 Pa. Co. Ct. R. 146.

[l] (Pa. 1885) On certiorari from a justice of the peace, parol evidence may be introduced to show that the justice had no jurisdiction of the

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action.—Light v. Ringler, 1 Pa. Co. Ct. R. 156.

[m] (Pa. 1886) Where a disqualifying relationship of the justice to one of the parties does not appear of record, it may be proved by oral evidence on certiorari.—Spidle v. Robison, 2 Pa. Co. Ct. R. 642.

[n] (Pa. 1888) On certiorari to a judgment of a justice of the peace, parol testimony is not admissible to show that the defendant was a married woman, and that therefore the record did not affirmatively show her liability, so as to render the judgment void.—Myers v. Stauffer, 5 Pa. Co. Ct. R. 657.

[o] (Pa. 1888) On certiorari to the judgment of a justice of the peace, parol evidence is admissible to show that the debtor's claim of exemption was made in time.—Bloom v. Alexander, 5 Pa. Co. Ct. R. 553.

[p] (Pa. 1894) On certiorari to a justice, plaintiff in error can show by parol that the justice had once before given judgment against him on the same cause of action.—Beynon v. Peterson (Com. Pl.) 7 Kulp, 259.

[q] (Pa. 1894) On certiorari before the court of common pleas, parol evidence is admissible to show want of jurisdiction or fraud of the justice.—Fronheiser v. Werner (Com. Pl.) 14 Pa. Co. Ct. R. 522.

[r] (Pa. 1895) Parol evidence is admissible to show that the justice of the peace who tried the case below had previously acted as agent for collection of the claim on which the action was brought, and hence had no jurisdiction to enter judgment.—Johnson v. Green (Com. Pl.) 17 Pa. Co. Ct. R. 77.

§ 810. —— Admission of affidavits and depositions.

[a] (Ill. 1889) A garnishee, in an appeal by certiorari from the judgment of a justice of the peace, alleged that he was never served with the original writ of attachment. *Held*, that in the absence of an original attachment writ, or a showing that it is lost, affidavits to show that it was served are not admissible.—Stroner v. Prokop, 30 Ill. App. 56.

[b] (N. J. 1833) Transactions taking place between one of the parties and the justice trying the cause, out of court, if material and proper to be inquired into, must be proven before the supreme court by affidavit on certiorari.—Olcott v. Jenkins, 14 N. J. Law (2 J. S. Green) 80.

[c] (N. J. 1895) On certiorari to review the decision of a justice of the peace on a motion to quash an attachment, a rule may be granted to take affidavits of the facts on which the justice decided the case.—Stafford v. Mills, 57 N. J. Law (28 Vroom) 570, 31 Atl. 1023.

[d] (N. Y. 1823) Where, on certiorari, the justice dies before he makes return, the court will hear the case on affidavits.—Seymour v. Webster, 1 Cow. 168.

[e] (Pa.) On certiorari, depositions may be taken to show that the claim made before the justice was not within his jurisdiction.—(1863) Rhoads v. Wesner, 1 Woodw. Dec. 79; (1863) Goodman v. Moyer, 1 Woodw. Dec. 92; (1887) Cummins v. Leopard, 4 Kulp, 430.

[f] (Pa. 1866) On certiorari, where resort is had to evidence of facts, such facts must be established by depositions taken pending the certiorari.—Merkle v. Schwoyer, 1 Woodw. Dec. 291.

[g] (Pa. 1877) On certiorari to a magistrate's court, matters not shown by the record should be brought before the court by depositions, and not by affidavits.—Jones v. Pettit, 4 Wkly. Notes Cas. 14.

[h] (Pa. 1884) On certiorari from an alderman, defendant cannot prove by deposition that the summons was issued in the name of one person, and that afterwards the record was changed by the magistrate.—City v. Hirsh, 1 Lanc. Law Rev. 209.

[i] (Pa. 1887) On certiorari to a justice of the peace, his refusal to hear the evidence offered by defendant may be shown by depositions.—Henley v. Potter, 3 Pa. Co. Ct. R. 206.

[j] (Pa. 1887) On certiorari to the judgment of a justice, it is proper to show, by parol testimony or depositions, but not by affidavits, that the defendant was a married woman, provided it was not an issue passed upon by the justice.—Shefler v. Hess, 5 Pa. Co. Ct. R. 145.

§ 811. —— Trials de novo.

[a] (Ala.) On certiorari from the county court to review proceedings of a justice, the party complaining is entitled to a trial de novo.—(1824) Gayle v. Turner, Minor, 204; (1831) Boyd v. Woodfin, 3 Stew. 357.

[b] (La. 1887) It is only when, on examination of the record, the proceedings appear to be null and void, that they should be avoided, and the respondent directed to try them anew, in conformity with the provisions of the law.—State ex rel. Broussard v. Koenig, 39 La. Ann. 776, 2 South. 559.

[c] (Tenn. 1878) Certiorari for a new trial brings the case to the circuit court for a trial de novo on its merits, and presents for determination, not the validity of the justice's judgment, but the original liability.—Boyers v. Webb, 69 Tenn. (1 Lea) 696.

[d] (Tex. 1851) Cases removed from justices' courts to district courts by certiorari may be tried in the latter on the merits.—O'Brien v. Dunn, 5 Tex. 570.

[e] (Tex. 1858) An action before a justice of the peace, in which the time between the service and the trial was not long enough, is properly tried de novo upon certiorari to the district court, and judgment there in such case will be valid.—Perry v. Rohde, 20 Tex. 729.

§ 812. Presumptions.

[a] (Del. 1845) In a suit against two persons before a justice of the peace, the court, on certiorari, will not imply that they are partners, but will regard them as joint debtors, in order to support the judgment.—Kinniken v. Kinney, 4 Har. 313.

[b] (Del. 1871) By the record of a justice of the peace it appeared that the defendants had been duly summoned to appear on a certain day, and that on that day the cause was continued to a future day, and that on the latter day, the defendants not appearing, judgment was given by default against them. *Held*, on certiorari, that the court should not presume that the judgment was rendered before the hour appointed on that day.—Millaway v. Wilds, 4 Houst. 283.

[c] (Mich. 1844) If the return of a justice of the peace to a certiorari shows that the suit was commenced by writ of attachment, but does not show that any affidavit was filed, it will not be presumed that the affidavit necessary to give the justice jurisdiction was filed.—Wight v. Warner, 1 Doug. 384.

[d] (Mich. 1860) Where a justice of the peace, in return to a certiorari, certifies the evidence as follows: "I do certify the following to have been the evidence before me in

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the above-entitled cause,"—and the objection taken before him was that certain necessary facts had not been proved, it was *held* that it must be presumed that the whole evidence is returned.—Cicotte v. Morse, 8 Mich. 424.

[e] (Mich. 1879) On certiorari from a justice, it cannot be presumed that he did not have evidence to sustain his judgment upon all essential points, unless all the evidence is before the court, or his return shows affirmatively that the evidence was deficient in some essential point.—Marquette & P. Rolling Mill Co. v. Morgan, 41 Mich. 296, 1 N. W. 1045.

[f] (Mich. 1888) The affidavit for certiorari to a justice, because of an improper continuance, failed to allege that the affidavit for continuance required by How. Ann. St. § 6899, had not been filed; but the justice's return stated that the continuance was "upon showing made." *Held*, that the action of the justice must be deemed regular.—Hatch v. Christmas, 68 Mich. 84, 35 N. W. 833.

[g] (Mich. 1893) Where a justice held a cause open only until the following morning, and defendant's counsel was present, and made no objection until the following morning, when he suggested that the justice had lost jurisdiction, the court will presume, on certiorari, that the justice had valid reasons for holding the cause open.—Stoll v. Padley, 98 Mich. 13, 56 N. W. 1042.

[h] [Mo. 1885) Jurisdiction of a justice will not be presumed, on certiorari or appeal, where the transcript fails to show jurisdictional facts.—McQuoid v. Lamd, 19 Mo. App. 153.

[i] (N. J. 1791) The amount of the verdict before a justice is presumed, on certiorari, to be the sum really due, in order to ascertain whether the justice had jurisdiction.—McCauley v. Barnes. 1 N. J. Law (Coxe) 52.

[j] (N. J. 1831) The mere omission of a justice to state the place to which a cause was adjourned is not sufficient evidence, on certiorari, to show that the judgment was rendered at a different place, as the presumption is that the adjournment was to the same place.—Hull v. Martin, 12 N. J. Law (7 Halst.) 187.

[k] (N. J. 1880) From the entry on a justice's docket that the necessary advertisements in an attachment proceeding were put up, it will be presumed, on certiorari, that his certificate was made on proper proof.—Dodge v. Butler, 42 N. J. Law (13 Vroom) 370.

[l] (N. J. 1894) On certiorari to review a judgment of the justice court, the appellate court will presume that there was legal proof of the facts found in support of the judgment, where the complainant did not have the evidence made a part of the record.—Lloyd v. Richman, 57 N. J. Law (28 Vroom) 385, 30 Atl. 432.

[m] (N. Y. 1804) Where a return, on a certiorari to a justice's court, states that the jury heard the proofs and allegations then and there made, the court will intend that the parties were present.—Day v. Wilber, 2 Caines, 134.

[n] (N. Y. 1804) Where a return on a certiorari to a justice's court states that a warrant was issued in pursuance of the £10 act, and that defendant appeared and pleaded, the court will intend that the warrant was duly issued, or, if not so, that the irregularity was waived by defendant by his appearance and pleading.—Day v. Wilber, 2 Caines, 134.

[o] (N. Y. 1811) Though a justice before whom a trial is had cannot be sworn by another justice as a witness in the suit, if, by the return to the certiorari, it does not appear that any objection was made, it will be intended that he was admitted by consent.—Cobb v. Curtiss, 8 Johns. 470.

[p] (N. Y. 1812) On a return of a certiorari to a justice of the peace, it seems that the court will presume that the justice acted under a regular commission, and will not take notice of the objection that he was a priest or minister.—McInstry v. Tanner, 9 Johns. 135.

[q] (N. Y. 1847) A justice's judgment for the plaintiff on an action for goods sold and delivered will be held good on certiorari, where the return shows that the defendant did not appear, although the return does not state that the justice waited one hour before proceeding with the cause, and the declaration does not show a venue, a precise statement of the cause of action, and a formal promise to pay.—Stafford v. Williams, 4 Denio, 162.

[r] (N. Y. 1848) A judgment rendered by a justice of the peace will not be reversed on certiorari merely for the reason that the justice's return omits to state that the plaintiff was called when the jury came into court and rendered their verdict; the presumption being that the proceedings were regular.—Warring v. Loomis, 4 Barb. 484.

[s] (N. Y. 1848) If a justice, in his return to a certiorari, omits to state that he has recited therein all the evidence given before him, the court will presume that additional evidence was given sufficient to support the verdict.—Prosser v. Secor, 5 Barb. 607.

[t] (N. Y. 1850) When the return of a justice to a writ of certiorari shows no fact authorizing the issue of a summons returnable in less time than provided in the statute (2 Rev. St. [2d Ed.] p. 228, §§ 14, 15), prima facie it was issued without authority.—Allen v. Stone, 9 Barb. 60.

[u] (N. Y. 1850) Where the return of a justice to a certiorari does not state that he has returned all the evidence before him, his judgment will not be reversed on the ground that some items of account included in the judgment do not appear to be sustained by proof.—Low v. Payne, 4 N. Y. (4 Comst.) 247.

[uu] (Pa.) Where the jurisdiction of the justice evidently appears on the face of the record, no presumption will be made against the accuracy of his proceedings.—(1807) Gibbs v. Alberti, 4 Yeates, 373; (1812) Buckmyer v. Dubbs, 5 Bin. 29.

[v] (Pa.) On the hearing of a certiorari to a justice of the peace every reasonable presumption will be made in favor of his proceedings consistent with the record.—(1844) Brown v. Quinton, 3 Pa. Law J. 425, 2 Clark, 169; (1895) Evans v. Brobst (Com. Pl.) 11 Montg. Co. Law Rep'r, 133, I Lack. Leg. N. 300, 16 Pa. Co. Ct. R. 550, 5 Pa. Dist. R. 30.

[vv] (Pa. 1871) A justice is not required to enter on his docket the evidence on which his judgment is founded, but merely the kind of evidence; and it will be presumed, on certiorari, that his judgment was founded on the proof.—Duglass v. Lacey, 3 Leg. Gaz. 253.

[w] (Pa. 1879) Where two transcripts returned to a certiorari by a justice differ, the last and corrected copy will be presumed to be correct.—Jervis v. McFarlan, 1 Chest. Co. Rep. 137.

[ww] (Pa. 1881) On certiorari to set aside a magistrate's proceedings, that officer's jurisdiction must affirmatively and clearly appear; and, if it does not, no intendment or presumption will be made in their favor.—McGovern v. McTague, 13 Lanc. Bar, 119.

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[x] (Tex. 1857) It is to be presumed, on certiorari, that a judgment was properly rendered until the contrary appears.—Peabody v. Buentillo, 18 Tex. 313.

[xx] (Wis. 1855) The court of review, on a writ of certiorari, to a justice of the peace, is to make every reasonable intendment in favor of the regularity of the proceeding of the court below.—Martin v. Beckwith, 4 Wis. 219.

[y] (Wis. 1871) Every reasonable intendment will be made to sustain the jurisdiction of the justice of the peace; and, where the record is silent on the subject of a second adjournment, the court on certiorari will assume that the consent of the opposite party was obtained, or the required oath made, before such adjournment was granted.—Baizer v. Lasch, 28 Wis. 268.

[yy] (Wis. 1879) On certiorari from the circuit court, a justice of the peace made return of two distinct docket records of the case, both signed by his predecessor (who rendered the judgment) and properly certified, one of which was full in its entries to show jurisdiction. *Held* that, in the absence of anything in the return to prove the contrary, it must be presumed that both records were kept at the same time; and an affidavit, subsequently filed in the circuit court, to show that the fuller record was not made at the time nor by the justice, could not be considered.—Healy v. Kneeland, 48 Wis. 497, 4 N. W. 586.

[z] (Wis. 1881) Where the record shows that the justice adjourned the cause to a certain time at his office, and that at the time specified he called said cause, etc., but fails to state where it was called, it will be presumed that he called it at his office; and on certiorari the contrary cannot be shown by his return, or by any evidence outside of the record.—Cassidy v. Millerick, 52 Wis. 379, 9 N. W. 165.

[zz] (Wis. 1894) A justice of the peace will be *held* not to have been deprived of jurisdiction by an affidavit for change of venue for prejudice, where the transcript of his docket shows that application for change was made by one, only, of two defendants, and that it was for that reason refused, though attached to his return to a writ of certiorari was a paper showing that both defendants applied for the change, as no presumption against the absolute verity of the justice's record on the question of jurisdiction can be drawn from such paper.—State v. Roberts, 87 Wis. 292, 58 N. W. 409.

§ 813. —— Burden of proof.

[a] (N. J. 1831) Where plaintiff, in certiorari, seeks to reverse the judgment of a justice on the ground that the justice adjourned the cause for the purpose of taking time to consider his judgment, without fixing any time or place to which he so adjourned, and without notifying defendant, he must make out satisfactorily those facts.—Hull v. Martin, 12 N. J. Law (7 Halst.) 187.

[b] (Pa. 1790) To establish an exception to the judgment of a justice on certiorari, the affidavit of the party, though not conclusive, will be deemed sufficient for throwing the onus probandi upon the other party.—Vansciver v. Bolton, 2 Dall. 114, 1 L. Ed. 312.

[c] (Tenn. 1848) It is not necessary for a party who brings a case into the court by certiorari to prove the facts stated in his petition, in order to entitle him to a trial in that court, where the papers do not negative the material facts stated in the petition, although there is an absence of proof of the facts stated from the papers.—Spivy v. Latham, 27 Tenn. (8 Humph.) 708.

[d] (Tenn. 1857) Where a stay of execution purports to have been entered on the order of defendant, which is denied by him on oath in his petition for certiorari, it devolves on plaintiff to show that the justice had authority to enter defendant's name as stayor.—McDowell v. Turney, 37 Tenn. (5 Sneed) 225.

[e] (Tenn. 1872) On certiorari to quash a judgment because obtained without service, an affidavit of the justice that a duly-executed warrant was returned before him, upon which he rendered the judgment, casts upon the petitioner the burden of disproving the service.—Ezell v. Holloway, 61 Tenn. (2 Baxt.) 15.

§ 814. Parties entitled to allege error.

[a] (Ga. 1893) Where suit was brought on a promissory note in a justice's court, and plaintiff obtained judgment for the full amount sued for, it is immaterial to him that the justice may have erred in allowing a plea of non est factum to be filed after the appearance term of the case; and, although defendant may have entered an appeal to a jury in the justice's court, this does not authorize plaintiff, pending the appeal, to attempt to correct by certiorari the alleged error of the justice in allowing the plea to be filed.—Shope v. Fite, 91 Ga. 174, 16 S. E. 990.

[b] (Ga. 1893) Code, § 4052, allows the party dissatisfied with the decision in a cause tried in a justice's court to apply for and obtain a writ of certiorari for the correction of errors made on the trial; but that section does not contemplate that the party who gains his case completely and entirely in the justice's court may, by writ of certiorari, have the superior court review alleged errors committed by the justice, which resulted in no injury to the prevailing party on the trial before the justice.—Shope v. Fite, 91 Ga. 174, 16 S. E. 990.

[c] (Mich. 1893) Where the return of a justice to an action tried before him shows that both parties asked an adjournment,—defendant for 30 days, and plaintiff for 8 days,—defendant, on certiorari, cannot complain of an adjournment for 7 days on the ground that it was upon the justice's own motion, and without the consent of the parties.—Shaw v. Fortine, 98 Mich. 254, 57 N. W. 128.

§ 815. Questions reviewable.

[a] (Mich. 1871) Under Comp. Laws, §§ 3868–3884, upon certiorari from the circuit court to a justice of the peace, only questions of law, so far as they relate to the action itself, can be tried.—McGraw v. Schwab, 23 Mich. 13.

[b] (Mich. 1885) On certiorari to justice's court, all technical omissions or defects in the proceedings before him will be disregarded, and judgment will be entered on the merits.—Gray v. Wilcox, 56 Mich. 58, 22 N. W. 109.

[c] (Pa. 1868) A magistrate's errors of judgment cannot be reviewed by certiorari.—Greenleaf v. Haberacker, 1 Woodw. Dec. 436.

[d] (Pa. 1872) Only questions affecting the regularity of the proceedings in the court below can be considered on certiorari, and an order vacating an order of sequestration cannot be reviewed on the merits.—Appeal of Gidding, 4 Leg. Gaz. 114.

[e] (Pa. 1873) Upon certiorari to a magistrate, the only question before the court is that of the regularity of the proceedings as shown by the record. There can be no reversal for an error in the magistrate's judgment upon the facts or the law.—Thomas v. Philadelphia & R. R. Co., 2 Woodw. Dec. 104.

[f] (Pa. 1886) An error of law in the rejection of evidence or in the magistrate's conclu-

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sions cannot be considered on certiorari, and the court is confined strictly to questions of regularity.—Noel v. Brown, 3 Pa. Co. Ct. R. 204.

[g] (Wis. 1856) The truth or falsity of an officer's return cannot be collaterally inquired into on a certiorari.—Frederick v. Clark, 5 Wis. 191.

[h] (Wis. 1874) On a common-law certiorari to a justice of the peace, the circuit court cannot review errors of the justice, but can only inquire into his jurisdiction.—Varrell v. Church, 36 Wis. 318.

§ 816. Review of evidence and questions of fact.

Certiorari to review questions of fact and law, see ante, § 766.

[a] (Ga. 1887) A general exception to the legality of the magistrate's judgment is not to be sustained merely because the return to the certiorari sets out no evidence, the case, as to matters of evidence, being one for appeal.—Western & A. R. Co. v. Pitts, 79 Ga. 532, 4 S. E. 921.

[b] (Ga. 1892) On certiorari to a justice of the peace, where the verdict is the second one in favor of the same party, and there being some slight evidence to support it, there is no abuse of discretion in overruling the certiorari, though the verdict seems strongly against the weight of the evidence.—Steele v. Cochran, 88 Ga. 296, 14 S. E. 617.

[c] (La. 1895) Where the proceedings in a justice court were regular, the judgment will not be disturbed on certiorari for want of evidence.—State ex rel. Hogsett v. Patin, 47 La. Ann. 1533, 18 South. 507.

[d] (Mass. 1830) The judgment of the justices, that the evidence shows that the debtor is "entitled to his discharge," is not subject to revision on certiorari.—In re Hayward, 27 Mass. (10 Pick.) 358.

[e] (Mich. 1856) A cause where there are no errors in law affecting the merits cannot be revoked on conflicting proofs by the circuit court on certiorari.—Webber v. Hanke, 4 Mich. 198.

[f] (Mich. 1860) Where, in cases removed from justices' courts by certiorari, the court below has found facts upon pertinent evidence, this court will not review that finding.—Cicotte v. Morse, 8 Mich. 424.

[g] (Mich. 1862) On certiorari to a justice, if the error relates to the total want of evidence to prove some material fact, the circuit court should look into the testimony to see whether there was such evidence or not. If there was, it should not weigh it, or inquire into its sufficiency, but should affirm the judgment. If the return shows no such evidence, and it appears that all the testimony before the justice has been returned, the judgment should be reversed, on the ground that the justice erred in law in rendering the judgment he did without such evidence.—Berry v. Lowe, 10 Mich. 9.

[h] (Mich. 1863) On certiorari, questions of law only are open, and the court cannot weigh the evidence to determine whether questions of fact have been correctly decided. It is only where there is an entire absence of proof on some material fact found that such finding becomes erroneous as a matter of law.—Hyde v. Nelson, 11 Mich. 353.

[i] (Mich. 1882) A justice's judgment on the merits should not be reversed on certiorari for the admission or rejection of evidence, unless it clearly appears that the party against whom judgment was given was injured by such ruling.—Whaley v. Gale, 48 Mich. 193, 12 N. W. 33.

[j] (Minn. 1867) Findings of fact, in a trial before a justice of the peace, will not be set aside on certiorari, if there is any testimony to support them.—De Rochebrune v. Southeimer, 12 Minn. 78 (Gil. 42).

[k] (N. J. 1854) Where a justice certifies a part of the evidence in a case decided before him, and as to the rest says that, "although unable to recapitulate it, yet enough was given to warrant him in giving judgment for the plaintiff," the court above, on certiorari, cannot say upon this return that there was not evidence to warrant the judgment.—Paterson & R. R. Co. v. Ackerman, 24 N. J. Law (4 Zab.) 535.

[l] (N. Y. 1837) A court of common pleas cannot reverse on certiorari a judgment of a justice's court rendered upon contradictory evidence, though the common pleas would have arrived at a different conclusion.—Noyes v. Hewitt, 18 Wend. 141.

[m] (N. Y. 1848) On certiorari to a justice of the peace, the county court has the right to look into the evidence before the justice; and, if there appears to be a total want of evidence to support the judgment, it will be reversed.—Bort v. Smith, 5 Barb. 283.

[n] (N. Y. 1848) The admission of incompetent evidence to a point clearly established by other evidence is not ground for reversing the judgment of a justice of the peace on certiorari.—Bort v. Smith, 5 Barb. 283.

[o] (Pa. 1812) But the court, out of which a certiorari issues, may, to prevent injustice, make inquiry into the evidence given before the magistrate.—Buckmyer v. Dubbs, 5 Bin. 29.

[p] (Pa. 1889) The ownership of property sued for by a married woman cannot be inquired into on certiorari to a justice of the peace, that being a matter of fact for the determination of the justice when the case was tried.—McManaman v. Klock (Com. Pl.) 9 Pa. Co. Ct. R. 302.

[q] (S. C. 1895) The findings of fact of a trial justice in certiorari proceedings are conclusive upon the circuit and supreme courts.—Morris v. Palmer, 44 S. C. 462, 22 S. E. 726.

[r] (W. Va. 1893) Where a justice in a suit involving a matter merely pecuniary has jurisdiction of the subject-matter and of the person, and renders a bona fide judgment on the merits clearly wrong, but within the scope of his legitimate powers, the circuit court will not, upon a writ of certiorari issued in the exercise of its original supervisory jurisdiction conferred by the constitution, review and reverse such judgment, but will dismiss the writ as improvidently awarded.—Wilson v. West Virginia, C. & P. Ry. Co., 38 W. Va. 212, 18 S. E. 577.

[s] (Wis. 1856) A certiorari brings up the record merely. Only such questions as go to the jurisdiction of the inferior tribunal can be considered, and the court will not look into the evidence.—Frederick v. Clark, 5 Wis. 191.

[t] (Wis. 1857) Where the testimony was conflicting, the judgment of the justice will not be reversed on certiorari.—Persons' Adm'rs v. Burdick, 6 Wis. 63.

[u] (Wis. 1871) A common-law writ of certiorari brings up only the record (and not the evidence), and reaches only errors appearing therein which go to the jurisdiction of the inferior tribunal; and hence such writ would not reach alleged errors that the justice of the peace allowed testimony to be given when no bill of par-

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ticulars had been filed by plaintiff at the time required, or that the judgment was in excess of plaintiff's demand, or that the evidence showed the judgment to be for the debt of some person other than defendant.—Baizer v. Lasch, 28 Wis. 268.

[v] (Wis. 1875) Upon a common-law certiorari to a justice of the peace, the circuit court can review those jurisdictional questions only which are presented by the docket entries and the pleadings in the cause, and cannot examine the evidence to see whether the justice has exceeded his jurisdiction, even though such evidence has been returned with the writ.—Callon v. Sternberg, 38 Wis. 539.

[w] (Wis. 1883) On certiorari to a justice of the peace, the evidence and special rulings cannot be reviewed.—Driscoll v. Smith, 59 Wis. 38, 17 N. W. 876.

§ 817. Matters of discretion and harmless error.

[a] (Ga. 1886) Although a constable signed his name to an entry of levy by using a cross mark, yet when the answer of the justice to a writ of certiorari showed that the constable was in court, and that he returned the levy as his and recognized his mark, there was no error in refusing to sustain the certiorari on that ground.—Simpson v. McBride, 78 Ga. 297.

[b] (N. Y. 1819) On certiorari to a justice's court, the judgment will not be reversed merely because the process was in one form of action and plaintiff declared in another; and this, though the objection was taken in time in the court below and overruled.—Bowen v. Ferne, 16 Johns. 161.

[c] (Pa. 1828) Opening or refusing to open a judgment by a justice of the peace is a matter resting in his discretion, the due exercise of which will not be examined on a writ of certiorari.—Galley v. Davenport, 1 Ashm. 149.

[d] (Pa. 1844) The omission of a justice in an action of trespass for injury done to real estate to set forth on his docket the county in which the estate is situated is not sufficient ground for a reversal of his judgment on certiorari.—Brown v. Quinton, 2 Clark, 169, 3 Pa. Law J. 425.

[e] (Pa. 1852) On certiorari, the magistrate's refusal to allow the case to be again heard on its merits is not a sufficient reason for reversing the judgment; it being a matter of discretion.—O'Niel v. Whitecar, 1 Phila. 446.

[f] (Pa. 1872) In certiorari to a justice of the peace, though the transcript be defective in detailing the facts found, and judgment based thereon would be defective, yet if, by reference to the complaint attached to the record, it appears that the facts stated generally in the transcript were found true, and would have been sufficient to give the magistrate jurisdiction and to form a foundation for the judgment, if found by him in detail, the want of precision in the transcript is not a ground for reversal.—Livingood v. Moyer, 2 Woodw. Dec. 65.

[g] (Pa. 1886) Where the transcript from the justice of the peace of another county shows the cause of action and that he had jurisdiction, a judgment rendered by another justice on a sci. fa. on such transcript will not be reversed, on certiorari, because he did not set out on his docket the cause of action, and that a summons was issued and a return made in the original judgment.—Grube v. Getz, 3 Pa. Co. Ct. R. 124.

[h] (Tex. 1856) The irregular entries of continuances in the justices's court furnish no ground for a new trial in the district court on certiorari.—Huntsman v. Jarvis, 17 Tex. 161.

9. DETERMINATION AND DISPOSITION OF CAUSE.

IN GENERAL, § 818.
AFFIRMANCE, § 819.
MODIFICATION, § 820.
REVERSAL, § 821.
NEW TRIAL IN APPELLATE COURT ON REVERSAL, § 822.
NEW OR FINAL JUDGMENT, § 823.
EXECUTION, § 824.
RESTITUTION, § 825.
REMAND AND NEW TRIAL, § 826.
—— PROCEDENDO, § 827.
COSTS, § 828.

Dismissal or quashing of writ, see ante, §§ 802-804.

Judgment on certiorari against sureties on bond, see post, § 829.

—— *on dismissal, see* ante, §§ 805, 806.

§ 818. In general.

[a] (Ala. 1857) On appeal from a justice's court, the judgment may be amended at a subsequent term, nunc pro tunc, by vacating it as against a party against whom it was improperly rendered as the surety on the certiorari bond.—Dumas v. Hunter, 30 Ala. 188.

[b] (Iowa, 1849) The district court, on certiorari to a justice of the peace, may affirm his judgment or render a new one, as the right of the matter may appear.—Wright v. Phillips, 2 G. Greene, 191.

[c] (N. C. 1871) When the right of a party to a recordari, as a substitute for an appeal from a justice's judgment, depends on the facts proved or admitted before the superior court, it is the duty of the judge of that court to find and state the facts on which he proceeds to act, and if, on an appeal to the supreme court, such facts do not appear to have been found and stated, that court must overrule the decision of the court below, because the supreme court cannot try any issue of fact.—Collins v. Gilbert, 65 N. C. 135.

[d] (Tenn. 1871) A judgment rendered by a justice of the peace before the return day of the writ is not void, but erroneous; and a certiorari to retry the cause does not authorize the circuit court, without a trial, to quash the execution issued thereon.—Glover v. Holman, 50 Tenn. (3 Heisk.) 519.

[e] (Wis.) The question on certiorari from the circuit court to a justice of the peace being merely of the justice's jurisdiction, the judgment of the circuit court should simply affirm or reverse that of the justice.—(1879) Healy v. Kneeland, 48 Wis. 497, 4 N. W. 586; (1881) Bandlow v. Thieme, 53 Wis. 57, 9 N. W. 920.

§ 819. Affirmance.

Affirmance of judgment on dismissal of writ, see ante, §§ 805, 806.

New or final judgment, see post, § 823.

Scire facias against sureties on certiorari bond on affirmance of judgment, see post, § 829.

[a] (Ga. 1885) There is no error in sustaining, on certiorari, a finding in the justice's court which is warranted by the evidence.—Matthews v. Dawson, 75 Ga. 889.

[b] (Ga. 1886) Where an answer of a justice to a writ of certiorari, made two or three years after the trial in his court, in response to an order to perfect his answer, stated that he remembered something about some deed, but could not then recollect it, and in respect to a motion to continue answered that as he then recollect-

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ed the defendant announced ready, and, after adverse ruling, wished to change the announcement and continue the case, on such an answer there was no error in refusing to sustain the certiorari, on the ground that the justice erred in refusing to continue the case and compel the production of the deed.—Simpson v. McBride, 78 Ga. 297.

[c] (N. J.) Where a copy of account or state of demand does not appear on certiorari, judgment cannot be affirmed.—(1806) Addis v. Evans, 2 N. J. Law (1 Penning.) 142; (1807) Satterly v. Brown, Id. 162.

[d] (N. Y. 1817) Where the sole object of a certiorari to bring up a cause from a justice's court is to subject the defendant in error to the costs thereof, the latter is entitled to judgment. —Potter v. Smith, 14 Johns. 444.

[e] (Pa. 1793) Though a justice has received improper evidence, yet if the party might have appealed, and has entered into a recognizance in nature of special bail, and suffered a long time to elapse before he takes out his certiorari, the court will affirm the judgment.—Morton v. Plowman, 1 Yeates, 251.

[f] (Pa. 1831) On certiorari to a justice, if the proceedings are regular on the face of them, and the justice has kept within the sphere of his jurisdiction in general, the judgment must be affirmed without a re-examination of the merits. —Managers for Relief and Employment of Poor of Germantown v. Zinck, 1 Ashm 64.

[g] (Pa. 1831) On certiorari, if it appear from the face of the proceedings that the justice has usurped a jurisdiction not given to him by law, the court will not affirm the judgment, since an exception which goes to his jurisdiction is never too late.—Herrigas v. McGill, 1 Ashm. 152.

[h] (Pa. 1890) On certiorari to a justice of the peace to review a judgment for less than $5.33, which cannot be appealed from on account of the triviality of the sum in controversy, where it was doubtful from the record whether defendant, in such case, resided and was in another county when the summons was served, the judgment will not be disturbed. — Kaniper v. Kreidler (Com. Pl.) 9 Pa. Co. Ct. R. 91.

[i] (Wash. 1894) A justice of the peace vacated a judgment rendered by him in favor of one party as being premature, and such party removed the cause by certiorari to the superior court. On the hearing of the certiorari the vacating order was set aside, with costs, and a judgment was rendered affirming the first judgment of the justice, instead of remanding the cause, or retaining it for trial on the merits. *Held*, that such judgment of affirmance was erroneous, and that execution thereon should be restrained.—McEneaney v. Dart, 9 Wash. 682, 38 Pac. 764.

§ 820. Modification.

[a] (Ga. 1877) Demurrer in justice's court, where the account sued on consisted of several items, though overruled by the justice as a whole, may, in the superior court, on certiorari, be sustained as to some of the items and overruled as to others.—Hirt v. Linton, 59 Ga. 881.

[b] (Minn. 1861) Under Comp. St. c. 59, § 133, providing that on certiorari to a justice of the peace the judge of the district court may give judgment as the right of the matter may appear, etc., a mere error in computation may be corrected.—Walker v. McDonald, 5 Minn. 455 (Gil. 368).

[c] (N. Y. 1862) Where two or three independent causes of action are prosecuted in a justice's court, and the judgment is right as to one and erroneous as to the others, and that can be distinctly seen on appeal, the power of the county court to reverse as to the erroneous, and affirm as to the legal, part of the judgment, is plain, practical, and imperative.—Staats v. Hudson River R. Co., 39 Barb. 298.

[d] (Pa. 1885) Where judgment has been rendered before an alderman against husband and wife, and the record on certiorari does not make out a claim against the wife, but does show sufficient to hold the husband, the judgment will be reversed only as to the wife.—Connors v. Wonder, 1 Pa. Co. Ct. R. 577.

[e] (Wis. 1865) Where a justice of the peace has rendered judgment for costs in a sum exceeding the amount allowed by statute, and the judgment for damages is not complained of, this court, on certiorari, will reverse the judgment as to costs, and affirm the judgment as to damages, with costs in this court to the plaintiff in error.—Hurlbut v. Wilcox, 19 Wis. 419.

§ 821. Reversal.

New or final judgment, see post, § 823.

[a] (Ga. 1887) That counsel had professional business in two justices' courts on the same day, and was absent from one, believing he had leave of absence to attend to business in the other, is no cause for setting aside a judgment rendered during his absence, where it appears from the magistrate's return that he neither had leave of absence, nor any sufficient reason to think he had.—Western & A. R. Co. v. Pitts, 79 Ga. 532, 4 S. E. 921.

[b] (Iowa, 1849) The district court may reverse a judgment of a justice of the peace on certiorari.—Wilson v. Albright, 2 G. Greene, 125.

[c] (Mich. 1863) Whether the judgment of a justice of the peace should be reversed on certiorari, because such judgment is for a larger amount than that alleged in the ad damnum clause of the declaration, quære. — Pew v. Yoare, 12 Mich. 16.

[d] (Mich. 1884) A judgment of a justice of the peace cannot be reversed on certiorari, where the return shows nothing within his judicial knowledge which would affect the validity of the judgment.—Alt v. Lalone, 54 Mich. 302. 20 N. W. 52.

[e] (Minn. 1859) Where it appears from the record that in a trial before a justice of the peace the jury were guilty of gross misconduct, the district court should, on certiorari, reverse the judgment.—Snow v. Hardy, 3 Minn. 77 (Gil. 35).

[f] (N. J. 1831) If a summons is served on the defendant by being left at his house in his absence from the state on lawful business, and the justice, in his absence and before his return, hear the cause and render judgment against him, the supreme court, on certiorari, may reverse the judgment, if they are satisfied that injustice has been done the defendant.—Combs v. Johnson, 12 N. J. Law (7 Halst.) 244.

[g] (N. J. 1847) Where a question arises, on certiorari, whether certain credits are sufficiently specific to bring the case within the jurisdiction of the justice, the court will not reverse the judgment, unless the error is manifest.—Pinkney v. Ayres, 21 N. J. Law (1 Zab.) 694.

[h] (N. J. 1854) On certiorari from a justice's court, although no error appear in the proceedings, yet, if a plain case of surprise be shown, the court will, on affidavit of merits, reverse the judgment and direct a new trial.—Paterson & R. R. Co. v. Ackerman, 24 N. J. Law (4 Zab.) 535.

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[i] (N. Y. 1807) If it appears, on the return of a certiorari, from the evidence on both sides, that the plaintiff's demand is illegal, the court will set aside the judgment, though the jury found for the plaintiff.—Nicoll v. Dunlap, 2 Johns. 195.

[j] (N. Y. 1808) Where, on certiorari from the supreme court to a justice of the peace, the evidence does not appear sufficient to support the action, the judgment will be reversed.—Dodge v. Coddington, 3 Johns. 146.

[jj] (N. Y. 1810) In an action before a justice on a contract, void as being within the statute of frauds, defendant is not precluded from taking advantage of the evidence by not objecting to it at the trial, and the court, on certiorari, will reverse the judgment.—Pease v. Alexander, 7 Johns. 25.

[k] (N. Y. 1815) Where two persons are sued by a warrant in justice's court, and only one of them appears, a judgment against both, being erroneous as to the defendant who did not appear, will be reversed as to both on certiorari.—Richards v. Walton, 12 Johns. 434.

[l] (N. Y. 1838) On a common-law certiorari, if the justice had jurisdiction, his judgment will not be reversed, though it be rendered on an insufficient declaration, or defective proof.—Johnson v. Moss, 20 Wend. 145.

[m] (N. Y. 1841) If the return of a certiorari from the common pleas to a justice's court states all the evidence, and there is nothing to sustain the judgment of the justice's court, the common pleas are bound to reverse the judgment.—Baldwin v. Delevan, 2 Hill, 125.

[n] (Or. 1888) Services performed at the request of a judge of a county, acting as a committing magistrate, in taking testimony in the case of the state against another party, do not constitute a claim against the county; and a judgment rendered against the county in justice's court on such a claim, where it has not appeared and answered in the action, will be reversed on writ of review.—Union County v. Slocum, 17 Pac. 876.

[o] (Pa. 1831) The court will not set aside, on certiorari, an execution issued by a justice, unless it is in itself void.—Garrigues v. Jackson, 1 Ashm. 218.

[p] (Pa. 1864) Where a justice, on an ex parte hearing, opened judgment for apparently sufficient cause, and afterwards entered judgment for the adverse party, the proceedings will be reversed on certiorari, as in that case there would seem to be no regular judgment in favor of either party.—Larie v. Hagerty, 5 Phila. 530.

[q] (Pa. 1888) The judgment of a justice will be reversed, on certiorari, if it appears that a debtor's claim for exemption was made in time, and the justice failed to protect the exemption.—Bloom v. Alexander, 5 Pa. Co. Ct. R. 553.

[r] (Pa. 1893) Where on certiorari to a justice there is no allegation that proper service was not had, or that the amount and character of the claim was not cognizable before the justice, the judgment will not be reversed.—Strause v. Scheurman (Com. Pl.) 13 Pa. Co. Ct. R. 332.

[s] (Pa. 1894) Act March 20, 1810, § 17, provides that when one who has obtained judgment before a justice against a resident of another county desires to follow his personalty thither, the justice shall give him a transcript, and all evidence in his possession, for recovery before a justice in any county where defendant can be found, "as in cases originally brought before him." *Held*, that the common pleas court of the county to which the case is taken, having power, under Const. art. 5, § 10, to bring justices' proceedings before it, and "cause right and justice to be done," can, on certiorari to the justice in its county, set aside the judgment founded on a transcript which shows on its face lack of jurisdiction in the trial justice.—Rea v. Titman (Com. Pl.) 3 Pa. Dist. R. 458.

[t] (Tex. 1851) Where the plaintiff excepted to the legal sufficiency of the defendant's petition for a certiorari, and the record recited that, on hearing the case on the petition, answer, and record of the proceedings before the justice, the court considered that the judgment of the justice should be reversed, it was *held* that the judgment necessarily involved the overruling of the exceptions, and that they could not be considered as waived, as in cases where the final trial is on other issues.—Clay v. Clay, 7 Tex. 250.

[u] (W. Va. 1894) A judgment of a circuit court on certiorari, reversing a judgment of a justice, and granting a new trial, is a final judgment, which cannot be set aside on motion at a subsequent term, though the case is retained for retrial.—Morgan v. Ohio River R. Co., 39 W. Va. 17, 19 S. E. 588.

[v] (Wis. 1847) St. p. 340, art. 12, § 9, concerning justices of the peace, requires the district court in case of appeal from a justice, to give judgment in the case as the right of the matter may appeear, without regard to technical omissions, imperfections, or defects in proceedings before the justice which did not affect the merits, and authorizes it to affirm or reverse the judgment in whole or in part. Act Jan. 30, 1844 (amending such statute) § 4, authorizes a certiorari in all cases where an appeal is not allowed, and requires the justice to return all testimony in proceedings had before him. *Held*, that where defendant in an action before a justice pleaded the general issue and notice of set-off only, and at the trial plaintiff established the demand sued for, but judgment was given for defendant, on his being allowed to show before the justice the nonjoinder of a defendant liable with him, on certiorari, the district court properly reversed the justice's judgment and rendered judgment for plaintiff.—Clark v. Wood, 2 Pin. 29.

[w] (Wis. 1865) A judgment in justice's court, void for want of jurisdiction, will be reversed on certiorari; it being one of the principal objects of that writ to keep inferior courts and tribunals within their jurisdiction.—Combs v. Dunlap, 19 Wis. 591.

[x] (Wis. 1878) The judgment of a justice of the peace, however irregular, will not be reversed on a common-law certiorari, if he had jurisdiction to render it.—Lewis v. Larson, 45 Wis. 353.

§ 822. New trial in appellate court on reversal.

[a] (Ind. 1848) When the judgment of a justice of the peace is reversed on certiorari by the county circuit court, the cause is retained for trial on the merits, and the reversal extends as far back as is necessary to rectify the errors committed.—Brayton v. Freese, 1 Ind. (1 Cart.) 121.

[b] (Ind. 1851) Where a case is brought to the circuit court by a writ of certiorari, the court should reverse the judgment of the justices, if erroneous, but retain the cause for a new trial, as in cases of appeal.—Clark v. Dunlap, 2 Ind. (2 Cart.) 551.

[c] (Iowa, 1850) It is error to order a trial de novo in the district court, on reversing a judgment of a justice of the peace taken there

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by certiorari.—Davis v. Curtis, 2 G. Greene, 575.

[d] (N. H. 1838) Where a new trial is granted by the court of common pleas on petition of writ of review from a judgment of a justice of the peace, the trial should be brought in the court of common pleas.—Rigney v. Hutchins, 9 N. H. 257.

[e] (N. C. 1842) Where the appellate court on recordari orders the case to be put on the trial docket, this is tantamount to a refusal to dismiss the writ and granting a new trial.—Leatherwood v. Moody, 25 N. C. 129.

[f] (N. C. 1881) Where an award is enforced by a justice as a rule of court, and the party aggrieved obtains a recordari in lieu of a lost appeal, an order directing the docketing of the cause for trial in the superior court is not an adjudication in any sense upon the matters in controversy.—Moore v. Austin, 85 N. C. 179.

§ 823. New or final judgment.

Judgment on affirmance, see ante, § 819.

[a] (Ala. 1893) When, after judgment in a justice's court, the cause is taken to the circuit court on certiorari, it is proper, on entering judgment for the same party in the latter court, to add interest on the justice's judgment, though the sum exceed the jurisdiction of a justice of the peace.—Richmond & D. R. Co. v. Hutto, 102 Ala. 575, 14 South. 875.

[b] (Ark. 1846) A judgment by the circuit court on certiorari on the transcript of a justice of the peace, where it does not appear of record that the case came properly before the court, is a nullity.—Wise v. Yell, 7 Ark. (2 Eng.) 11.

[c] (Ga.) Upon the hearing of a certiorari in the superior court, in which no issues of fact are involved, and the determination of the case depends entirely upon legal questions, it is the duty of that court to render a final judgment. —(1876) Hallett v. Blain, 56 Ga. 525; (1877) Id., 58 Ga. 142; (1891) Greenwood v. Furniture Factory, 86 Ga. 582, 13 S. E. 128.

[d] (Ga. 1887) Code, § 4067, provides that "upon the hearing of a writ of certiorari, the superior court may return the same to the court from which it came, with instructions; and in all cases where the error complained of is an error in law which must finally govern the case, and the court shall be satisfied there is no question of fact involved which makes it necessary to send the case back for a new hearing, * * * it shall be the duty of the said judge to make a final decision. * * *" *Held*, that when the case involves both law and facts, and there is no dispute as to the facts, the superior court, in its discretion, may make a final disposition of it, or may remand the case for a new trial.—Rome R. Co. v. Ransom, 78 Ga. 705, 3 S. E. 626.

[e] (Ga. 1888) Code, § 4040, providing that the judge on hearing a writ of certiorari in a possessory warrant case "may remand the case or give final judgment," gives a discretion to the judge, and should govern in possessory warrant cases, rather than section 4067, which treats of certiorari in general, and provides that only when no question of fact is involved shall the court make final disposition of the case.—Bush v. Rawlins, 80 Ga. 583, 5 S. E. 761.

[f] (Ga. 1893) Though, upon the hearing of a certiorari from the verdict of a jury in a justice's court, the judge of the superior court may be satisfied that the verdict was contrary to evidence, and should be set aside, and although a precisely similar verdict in the same case on a former certiorari had been set aside on this ground, yet, as there were issues of fact involved, the court erred in rendering a final judgment for more than was found by the verdict.—Joseph v. Continental Jersey Works, 92 Ga. 542, 17 S. E. 923.

[g] (Mich. 1878) On certiorari from a circuit court, bringing up a judgment of the justice's court, where the circuit court approves the justice's judgment, in entering up judgment against defendant and his sureties in certiorari, it is proper to compute interest to the date thereof, and give judgment for the gross sum, instead of merely affirming the judgment.—McDermid v. Redpath, 39 Mich. 372.

[h] (Mich. 1889) Where a cause before a justice of the peace is brought by certiorari to the circuit court, and the court enters judgment that the judgment of the justice be in all matters "affirmed, and stand in full force and effect," and that plaintiff recover "the amount of his damages and costs recovered by him in the court below," and "have execution thereof," the entry must be taken together, and the judgment of the circuit court is the only judgment to be enforced. The judgment of the justice is affirmed and merged therein.—Peterson v. Ringelberg, 76 Mich. 107, 42 N. W. 1080.

[i] (Minn. 1858) Under the statute, on certiorari from a justice, the district court only affirms or reverses or reverses in part. He cannot disregard all formal requirements in the proceedings before the justice, and finally settle the rights of the parties as the very right of the matter may appear, and thereupon issue execution as in cases of original jurisdiction.—St. Martin v. Desnoyer, 1 Minn. 41 (Gil. 25).

[j] (Pa. 1835) On certiorari to a justice of the peace, the supreme court reversed his judgment for the plaintiff in the suit and rendered judgment for the defendant.—Atkinson v. Crossland, 4 Watts, 450.

[k] (Tenn. 1833) Where a certiorari and supersedeas are granted in a case originating before a justice of the peace, and the only defense is usury, the county court cannot discharge the supersedeas and give judgment for the principal and lawful interest, and retain the case to try the plea of usury.—Officer v. Price, 13 Tenn. (5 Yerg.) 285.

[l] (Tenn. 1871) On a review by certiorari in the circuit court of the judgment of a justice, it is error to render judgment against a garnishee on the recitals in the justice's judgment, as a written examination, signed by the garnishee, is the only legal basis for a judgment against him.—Pickler v. Rainey, 4 Heisk. (51 Tenn.) 335.

[m] (Tex. 1854) Where a suit to revive a judgment was commenced before a justice of the peace, and carried by certiorari to the district court, it is proper for the latter court to render judgment for the balance due on the former judgment and issue execution therefor. —Hotchkiss v. Chevaillier, 12 Tex. 224.

[n] (Tex. 1881) A judgment in a justice's court against a garnishee for an amount exceeding the jurisdiction of the court is not void, and the county court on a certiorari may render judgment to the limit of the justice's jurisdiction.—Erwin v. City of Austin, 1 White & W. Civ. Cas. Ct. App. § 1039.

[o] (Wis. 1849) On certiorari to a justice's judgment under the territorial statute, the district court had no power to render judgment "as the very right of the matter appeared" before the justice by the evidence returned, but could only reverse or affirm such judgment.—Phillips v. Geesland, 1 Chand. 57, 2 Pin. 120.

[p] (Wis. 1853) On a certiorari brought in the county court to a judgment of a justice in an action of replevin, ordering a return of

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the property, a judgment reversing the former one, and giving the plaintiff in error the value of the property and costs, is bad, and not authorized by Rev. St. c. 88, § 223.—Dykens v. Munson, 2 Wis. 245.

[q] (Wis. 1885) On certiorari the circuit court is only authorized to affirm or reverse the judgment of the justice, with costs, and it cannot give a new judgment for damages.—Starkweather v. Sawyer, 63 Wis. 297, 23 N. W. 566.

§ 824. Execution.

[a] (Pa. 1873) The decision of the common pleas on certiorari to a justice is final, and, if the judgment be reversed, an execution for costs may at once issue from the common pleas.—Long v. Shelly, 30 Leg. Int. 288, 21 Pittsb. Leg. J. (O. S.) 15.

§ 825. Restitution.

[a] (Ala. 1865) Where the city court on certiorari has rightly set aside and annulled the proceedings of a justice of the peace, awarding an order for the return to the claimant of property alleged to have been stolen, it has no authority to order further that the property be returned to the defendant in the writ by which the cause was brought before it.—Sullivan v. Robinson, 39 Ala. 613.

[b] (Ga. 1887) In proceedings on a possessory warrant, commenced by the executor of a deceased joint owner of the property, the magistrate having awarded possession of the property to the executor, *held*, that it was competent for the court, in reversing the magistrate's judgment on certiorari, to award possession to the purchaser.—Peebles v. Morris, 77 Ga. 536, 3 S. E. 89.

[c] (Mich. 1844) Under Laws 1841, p. 81, § 135, providing that on review by the circuit court of a judgment rendered before a justice, where it appears that the judgment has been collected, the circuit court may, upon reversal, award restitution of the amount so collected, it is within the power of the circuit court, on certiorari to review the judgment of a justice in favor of the plaintiff in replevin, to award upon reversal of the judgment a restitution of the property.—People v. Judges of Jackson Circuit Court, 1 Doug. 302.

[d] (Nev. 1865) The probate court may issue a writ of restitution on certiorari to review a justice's judgment in an ejectment action.—Paul v. Armstrong, 1 Nev. 82.

[e] (N. Y. 1813) Where a certiorari has been issued to return the proceedings before a justice, who dies before any return is made, and the supreme court on motion quashes the proceedings for irregularity, restitution may be awarded.—In re Shotwell, 10 Johns. 304.

§ 826. Remand and new trial.

Discretion of court on certiorari to give final judgment or remand the proceedings, see ante, § 823.

[a] (Ga. 1880) Under Code, § 4067, which provides that the superior court may finally dispose of a cause brought before it by certiorari to a justice's court when there is no question of fact involved, the judge of the superior court should not render a judgment finally disposing of a case before him on a certiorari where issues of fact are involved, but should remand the case for a new trial.—Sapp v. Adams, 65 Ga. 600.

[b] (Ga. 1880) A rule against a constable was erroneously dismissed by the justice upon a mere answer that he had been notified to hold the money to pay a claim put in therefor by a contestant. *Held*, on certiorari from such dismissal, that the proper judgment was to remand the case, with instructions to the justice to try it on its merits and decide it in conformity with the facts.—Smith v. Wade, 65 Ga. 753.

[c] (Ga. 1885) In an action against a railroad company for killing plaintiff's cow, it appeared on certiorari to the justice's court that the killing and value of the cow were proved, and that defendant attempted to show reasonable care and diligence on the part of its agents. *Held*, that it was proper for the superior court to order a new trial, instead of giving a final decision; the question involved being one for the jury.—Georgia R. R. v. Bird, 76 Ga. 13.

[d] (Ga. 1886) Code, § 4067, providing that the judge, on certiorari from a justice's court, "may return the same to the court from which it came with instructions," means that he may, if he has any instructions to give, and not that he must in all cases.—Akridge v. Watertown Steam Engine Co., 77 Ga. 50.

[e] (Ga. 1886) On certiorari to a justice's court, it being the duty of the court to remand for new trial on sustaining the certiorari, if the question is a mixed question of law and fact, a new trial should be ordered on sustaining the certiorari, in an action on a note, where one defendant pleaded that he was surety only, and that plaintiffs fraudulently procured him to sign, and the evidence was conflicting in reference to the question.—Holliday v. Poole, 77 Ga. 159.

[f] (Ga. 1892) Where defendant on a trial before a justice introduced no evidence, and a material part of the evidence for plaintiff was not admissible because it was parol, the court having erroneously excluded a writing which was indispensable to a recovery by plaintiff, the superior court, in sustaining a certiorari, ought not to render a final judgment, but should send the case back for a new trial, there being no presumption that the illegal evidence was not objected to.—Barfield v. McCombs, 89 Ga. 799, 15 S. E. 666.

[g] (Ga. 1893) When, on certiorari from the verdict of a jury in a justice's court, the case is remanded for a new trial, the new trial must be had by another jury, and not by the presiding justice; and if plaintiff refuses to try by jury, and the justice for that reason dismisses the case, no appeal on the judgment of dismissal lies to the superior court.—Hall v. Carlisle, 92 Ga. 318, 18 S. E. 293.

[h] (Ga. 1895) A judge of the superior court disapproving a verdict rendered in the magistrate's court, and sustaining a certiorari, should, when questions of fact are involved, send the case back to the magistrate's court for retrial.—Tison v. Savannah, F. & W. Ry. Co., 97 Ga. 366, 24 S. E. 456.

[i] (N. J. 1880) In the case of a mistrial of a cause below, the supreme court, on certiorari thereto, may, under Revision, p. 557, § 103, order a rehearing before the justice.—Drake v. Berry, 42 N. J. Law (13 Vroom) 60.

[j] (N. J. 1894) Where the return of a justice to a writ of certiorari shows the error of entering the judgment in figures instead of in words, the record may be remitted to the justice for amendment of the judgment.—Meirs v. Bussom, 57 N. J. Law (28 Vroom) 383, 30 Atl. 433.

[jj] (N. Y. 1841) A new trial will not be granted on certiorari because a justice of the peace unintentionally omitted to read certain parts of the testimony of a witness, which the jury had returned to hear; neither party calling the justice's attention to the omission.—Whitney v. Crim, 1 Hill, 61.

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[k] (Pa. 1831) When a justice's judgment is removed into the common pleas, and the plaintiff becomes nonsuit in that court, the record must be remitted to the justice. Sci. fa. will not lie to have execution on the judgment before the justice.—Welker v. Welker, 3 Pen. & W. 21.

[l] (Tenn. 1890) On the compromise of a justice's judgment, the debtor agreed to pay the fee of plaintiff's attorney. The amount tendered for the fee having been declined, the debtor filed his petition in the circuit court for writs of certiorari and supersedeas, alleging that such tender and the previous payment of the balance due under the agreement operated as a full satisfaction of the judgment, and prayed that the execution might be quashed. The court overruled the motion to quash and remanded the cause without allowing any credit whatever on the execution. *Held* error, for, whether the payments made were in law an extinguishment of the entire judgment or only a satisfaction pro tanto, the debtor should have had relief in one review or the other; and that under Mill. & V. Code, §§ 3852–3854, the circuit court should have rendered such final judgment as the case required, without remanding the cause.—Thompson v. McMillan, 89 Tenn. (5 Pickle) 110, 14 S. W. 439.

§ 827. —— Procedendo.

[a] (U. S. 1857) Where a case has been improperly taken out of the hands of a magistrate through a writ of certiorari, on a motion presented to the circuit court for the District of Columbia by way of a writ of error coram nobis, such court will issue a writ of procedendo.—Blagden v. Broadrup, Fed. Cas. No. 18,238 [2 Hayw. & H. 278].

[b] (Ala. 1854) On trial of the right of property under the statute before a justice, where the case is removed by certiorari to the circuit court, and the property is condemned, the proper practice is to certify the judgment, with a procedendo, to the justice, who thereupon will issue execution.—Derrett v. Alexander, 25 Ala. 265.

[c] (Miss. 1835) The writ of procedendo lies only where there has been a neglect or refusal of justice by an inferior court.—McGilvry v. Jackson, 5 Miss. (4 How.) 245.

[d] (N. Y. 1805) Where, after joinder in error, it is discovered that the justice has neglected to make a return to the certiorari, and has quitted the state, the court will give leave to take out execution in the court below.—Ranney v. Crary, 3 Caines, 126.

[e] (Tenn. 1837) A petition for a certiorari and supersedeas stated that a judgment had been rendered by a justice of the peace against the petitioner, which judgment he had paid, notwithstanding which an execution had issued on it, and prayed that the execution might be quashed. The process was granted, and the fact of payment tried in the circuit court, and found against the petitioner. *Held*, that a procedendo must in such case be awarded, and that the circuit court could not give judgment for the debt, and the interest allowed by statute, against the petitioner and his security.—Kincaid v. Morris, 18 Tenn. (10 Yerg.) 252.

[f] (Tenn. 1859) In a case where a petition for certiorari and supersedeas was dismissed by the circuit court, the bond having been executed before the Code took effect, a procedendo was *held* to have been properly awarded to the justice, in lieu of the judgment directed in Code, § 3138, to be given by the circuit court.—Mallett v. Hutchinson, 38 Tenn. (1 Head) 558.

§ 828. Costs.

[a] (Ala. 1826) The 15 per cent. damages given by the statute on the affirmance of justices' judgments that are carried up by appeal cannot be awarded on a certiorari bond.—Hudnall v. McCarta, Minor, 402.

[b] (Mich. 1862) On certiorari to a justice, the circuit court has no power to render judgment for plaintiff in error for the costs of the suit before the justice.—Berry v. Lowe, 10 Mich. 9.

[c] (Minn. 1858) In a case taken up from a justice by certiorari, the district court may render judgment for the fine, and for the costs of both courts, against the defendant and his sureties in the recognizance.—Baker v. United States, 1 Minn. 207 (Gil. 181).

[d] (Tenn. 1859) Where, on dismissing a petition for a writ of supersedeas, the higher court, under Code, §§ 3124, 3138, renders judgment for the amount of the justice's judgment, with interest, against the principal and sureties on the certiorari bond, it is proper also to include costs of suit.—Lownes v. Hunter, 39 Tenn. (2 Head) 343.

[e] (Tex. 1857) The statute providing for the removal of actions before justices by certiorari to the district court (Hart. Dig. art. 1753), and that, "if the judgment be affirmed, 10 per cent. damages shall be added," means that damages are to be so added in case the amount found due shall be the same as that adjudged by the justice, or more.—Lane v. Brander, 19 Tex. 160.

[f] (Tex. 1857) If the judgment in the upper court on certiorari is for a sum equal to the previous judgment, less an intermediate payment by the defendant, the plaintiff is entitled to judgment for the debt, costs, and 10 per cent. damages.—Norton v. Walker, 19 Tex. 192.

10. LIABILITIES ON BONDS AND REVIEW OF DECISIONS.

LIABILITIES ON BONDS, § 829.
REVIEW OF DECISION, § 830.

§ 829. Liabilities on bonds.

Liability of sureties on certiorari bond for costs and damages, see ante, § 828.

[a] (Ala. 1854) Where a claim suit is removed by certiorari from a justice court, and the property is found subject to the attachment, it is erroneous to render judgment for the assessed value of the property against the sureties on the certiorari bond.—Derrett v. Alexander, 25 Ala. 265.

[b] (Del. 1840) It is not a breach of the recognizance on certiorari that the party abandons his certiorari before it is served on the justice and allowed by him, as it does not become a supersedeas till then.—Biggs v. Rickarts, 3 Har. 283.

[c] (Del. 1851) After the affirmance of a justice's judgment on certiorari, a scire facias may issue in this court on the recognizance to prosecute.—Register v. Layman, 5 Har. 349.

[d] (Pa. 1889) A recognizor on a certiorari to the judgment of a justice of the peace against husband and wife is liable on his recognizance, although the judgment is reversed as to the wife.—Erdman v. Hartman, 7 Pa. Co. Ct. R. 609.

[e] (Tenn. 1858) On dismissal of a petition for a writ of certiorari to a justice, the proper judgment is against the defendant and his surety on the prosecution bond to the amount of the justice's judgment, with interest and costs.—Allen v. Wood, 38 Tenn. (1 Head) 438.

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[f] (Tenn. 1859) Where a bond has been given, with surety, to prosecute a certiorari and supersedeas with effect, and the party has, on notice from the surety under Code, § 3665, given counter security, this does not exonerate the prior surety from any legal liability which had been fixed on him before his discharge.—Kincaid v. Sharp, 40 Tenn. (3 Head) 151.

[g] (Tenn. 1867) On a rendition of a judgment by a justice of the peace, a prosecution bond was given to remove the cause by certiorari to the circuit court, by which sureties agreed to pay "all such costs and damages as may be awarded by the court on failure to prosecute." It concluded: "We agree to pay the costs aforesaid, on failure aforesaid." *Held*, that the sureties were only liable for costs on the failure of their principal, and not for the amount of the recovery.—Maxwell v. Salts, 44 Tenn. (4 Cold.) 233.

§ 830. Review of decision.

Review of decisions of intermediate court on certiorari, see "Appeal and Error," vol. 2, c. 866, § 154; cc. 1378, 1379, § 812.

[a] (Ga. 1875) Where there are facts and circumstances from which it may be inferred that a partnership, after the accession of a new partner, with his knowledge or consent, acted upon and continued a prior course of dealing with certain customers growing out of an agreement that the separate debt of one of the partners due to such customers might be set off against purchases made by them from the firm, and a new trial has been granted on the hearing of a certiorari to a judgment rendered by a justice of the peace against such customers, the supreme court will not interfere with the discretion of the judge allowing the same, unless gross error appears.—Born v. Dallas, 54 Ga. 499.

[b] (Ga. 1886) The omission of the court, on sustaining a certiorari to a justice and remanding for new trial, to give instructions to the justice, is not reversible error.—Holliday v. Poole, 77 Ga. 159.

[c] (Ga. 1886) Where the return of the justice to a writ of certiorari shows conflicting evidence, and is sufficient to uphold the finding, and the superior court approves it, the supreme court will not interfere.—Singer Mfg. Co. v. Cole, 78 Ga. 353.

[d] (Ill. 1859) A writ of certiorari to a justice of the peace is distinct and separate from an appeal; and, if the writ of certiorari should be dismissed in the circuit court, an appeal or writ of error should be prosecuted to reform that judgment.—Chicago & R. I. R. Co. v. Whipple, 22 Ill. (12 Peck) 337.

[e] (Mich. 1871) A writ of certiorari, whereupon a judgment of a justice of the peace has been brought to the circuit court, is an essential part of the record, without which the supreme court will not take jurisdiction of the cause.—Zeller v. Harris, 23 Mich. 286.

[f] (Mich. 1874) Where a justice's judgment has been reversed in the circuit on certiorari, and the cause is brought up on error, if any of the objections taken to the proceedings before the justice were such as to warrant the judgment of reversal, the plaintiff in error cannot prevail.—Bigalow v. Barre, 30 Mich. 1.

[g] (N. C. 1877) No appeal lies from the refusal of the court below to grant a motion to dismiss a petition for a writ of recordari. An appeal lies from the order of the court either granting or refusing to grant such writ.—Perry v. Whitaker, 77 N. C. 102.

[h] (Pa. 1811) The jurisdiction of the common pleas, on certiorari, under the landlord and tenant law, is not final. It may be removed to the supreme court by writ of error.—Clark v. Yeat, 4 Bin. 185.

[i] (Pa. 1891) Act April 15, 1835 (Purd. Dig. p. 807, pl. 4), gives justices of the peace jurisdiction of all actions of debt for a penalty for breach of an ordinance, in the same manner, and subject to the same right of appeal, as debts under $100. Act March 20, 1810 (Purd. Dig. p. 708, pl. 30), provides that on certiorari to a justice of the peace in any civil suit or action the judgment of the court of common pleas shall be final, and no writ of error shall issue thereon. *Held*, that an action by a borough to recover a penalty prescribed by ordinance for a breach thereof is a civil action within the meaning of the act of 1810, and no appeal lies from a judgment of the court of common pleas reversing a judgment of a justice of the peace therein.—Borough of Mahanoy City v. Wadlinger, 142 Pa. 308, 21 Atl. 823, 28 Wkly. Notes Cas. 132.

[j] (Tex. 1874) No appeal from the district court lies in a case removed by certiorari from a justice's court.—Rice v. Rasbury, 41 Tex. 421.

[k] (W. Va. 1894) Defendant on a writ of certiorari may set up in the court of appeals that the writ was not taken within 10 days after judgment, though the record does not show a motion to quash or dismiss.—Morgan v. Ohio River R. Co., 39 W. Va. 17, 19 S. E. 588.

[l] (W. Va. 1894) Where a writ of certiorari is not applied for within 10 days, but within 90 days, after the judgment, under Code, c. 50, § 174, and the record shows no excuse for not sooner applying, no presumption arises from the mere grant of the writ that good excuse was shown.—Morgan v. Ohio River R. Co., 39 W. Va. 17, 19 S. E. 588.

Justifiable Homicide.

See "Homicide," vol. 26, cc. 203–331, §§ 131–191.

Justification.

By officer acting under process or warrant, see "Sheriffs and Constables," III.

Defense to action for arrest or detention, see "False Imprisonment," vol. 23, cc. 514–518, §§ 8–10; cc. 540–551, §§ 32–42; cc. 559–561, § 48.

—— *for assault and battery, see* "Assault and Battery," vol. 4, cc. 873–875, § 10; cc. 920–923, § 40; cc. 961–965, § 58.

—— *for divorce, see* "Divorce," vol. 17, cc. 463–474, §§ 149–155; c. 610, § 361; cc. 670, 671, § 450.

—— *for false imprisonment, see* "False Imprisonment," vol. 23, cc. 598–603, §§ 90, 93; cc. 617–619, §§ 103, 104.

—— *for libel and slander, see* "Libel and Slander, III., vol. 32.

Defense to prosecution for assault and battery, see "Assault and Battery," vol. 4, cc. 1057–1060, § 131.

—— *for homicide, see* "Homicide," vol. 26, cc. 203–331, §§ 131–191, cc. 830–845, §§ 504–513; c. 924, § 566; cc. 1001–1003, § 611.

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Of sureties on appeal bonds, see "Appeal and Error," vol. 2, cc. 2360–2363, §§ 2031–2035.
—— *on appeal bonds in justices' courts, see* "Justices of the Peace," vol. 31, cc. 1601, 1602, § 555.
—— *on assignees' bond, see* "Assignments for Benefit of Creditors," vol. 4, cc. 2101, 2102, § 681.
—— *on attachment bond, see* "Attachment," vol. 5, cc. 576, 577, § 376.
—— *on bail bond, see* "Bail," vol. 5, cc. 2151–2154, §§ 44–48; cc. 2326, 2327. §§ 225–227.
—— *on injunction bonds, see* "Injunction," vol. 27, cc. 2032, 2033, § 332.

Keeping.

Disorderly house, see "Disorderly House," vol. 17, cc. 208–249.
Gaming house, see "Gaming," vol. 24, cc. 1728–1730, §§ 199–201.
In repair, see "Landlord and Tenant," vol. 32, §§ 536–566.
Intoxicating liquors for sale, see "Intoxicating Liquors," vol. 29, cc. 595–1439.
The peace, see "Breach of the Peace," vol. 8, cc. 971–986.

Keno.

See "Gaming," vol. 24, c. 1698, § 150.

Kerosene.

Inspection for prevention of fraud or for commercial purposes, see "Inspection," vol. 28, cc. 373–388, §§ 1–19.
Keeping and use as affecting right to insurance, see "Insurance," vol. 28, cc. 1445–1448, § 786; cc. 1668, 1669, § 960; cc. 1707–1710, § 985.

Key.

See "Wharves."

Kicking Cars.

Liability for injuries to servant, see "Master and Servant," III.
—— *to third persons, see* "Railroads," X.

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Kidnapping.

Scope-Note.

[INCLUDES taking by force or fraud, enticing away, or detaining another person, more particularly a child, for the purpose of secretly confining or concealing such person or removing him to another state or country, and attempts to commit such offenses, and aiding therein; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES false imprisonment (see "*False Imprisonment*"); and abduction of female for purpose of marriage, defilement, etc. (see "*Abduction*").]

Analysis.

Nature and elements of offense in general, § 1.
Threats, fraud, and violence, § 2.
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KIDNAPPING.

NATURE AND ELEMENTS OF OFFENSE IN GENERAL, § 1.
THREATS, FRAUD, AND VIOLENCE, § 2.
CONSENT OF PARENTS AND GUARDIANS, § 3.
AGE AND CONSENT OF PERSON TAKEN, § 4.
UNLAWFUL ARREST, § 5.
PLACE TO WHICH TRANSPORTED, § 6.
CONFINEMENT UNDER CLAIM OF INSANITY, § 7.
DEFENSES, § 8.
PERSONS LIABLE, § 9.
INDICTMENT OR INFORMATION, § 10.
EVIDENCE, § 11.
TRIAL AND REVIEW, § 12.
CIVIL LIABILITY, § 13.

§ 1. Nature and elements of offense in general.

[a] (U. S. 1880) Where one inveigled foreign-born children into the United States to serve him as street musicians for his profit, to the injury of their morals and subject to his control, they must be regarded as rendering him involuntary service, within the contemplation of Act June 23, 1874 (18 Stat. 251), for the protection of

†See Index for additional and more specific references to matter contained in this volume.

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persons of foreign birth against being inveigled and kidnapped in confinement or to any involuntary service.—United States v. Ancarola, 1 Fed. 676, 17 Blatchf. 423.

[b] (U. S. 1880) Where arrangements were made in Italy to transfer children to defendant in this country to earn money for him as street musicians in a city, they being of an age able to do so, and influence was brought to bear upon them by their parents and uncles and by statements of defendant to induce them to consent, this is enticement and inveiglement.—United States v. Ancarola, 1 Fed. 676, 17 Blatchf. 423.

[c] (Cal. 1882) An information charged defendant and another with the crime of attempting to take and entice away two children under the age of 12 years, with intent to detain and conceal them from a person having their lawful custody; and it was objected that the information charged two offenses, and that there was no such crime as an attempt to take and entice away a child. *Held*, that the objections were not well taken.—People v. Milne, 60 Cal. 71.

[d] (Ga. 1884) Under Code, § 4368, to be guilty of fraudulently enticing and kidnapping a child against the will of its parents, it is not necessary that the person enticing have notice of the parents' unwillingness to part with the child.—Gravett v. State, 74 Ga. 191.

[e] (N. H. 1837) An indictment at common law for assault and false imprisonment, and for kidnapping, may be sustained.—State v. Rollins, 8 N. H. 550.

[f] (N. H. 1837) Where a person who had in his custody a mulatto boy of 6 years of age, who had been placed with him by the overseers of the poor of a town, sold him to a person residing in another state, with the intention that he should be carried into that state and held in servitude until he arrived at the age of 21 years, and he carried the boy into another town, and delivered him there, *held*, that he was guilty of kidnapping.—State v. Rollins, 8 N. H. 550.

[g] (N. Y. 1862) Procuring the intoxication of a sailor with the design of getting him on shipboard without his consent, and taking him on board in that condition, is kidnapping, under our statute (2 Rev. St. p. 664, § 28); and it is immaterial whether the offender did the acts, or any of them, in person, or caused them to be done.—Hadden v. People, 25 N. Y. 373.

[h] (N. Y. 1888) Where defendant induced a female voluntarily to take passage for a foreign port, under pretense that he had there obtained employment for her, but intending to place her in a house of prostitution, and it appears that she would not have consented to go but for such false pretense, he is guilty of the offense defined in 3 Rev. St. pt. 4, tit. 2, § 28 (Pen. Code, § 211), which provides that one who, without lawful authority, inveigles another, with intent to cause him to be sent out of the state against his will, shall, upon conviction, be punished, etc.—People v. De Leon, 109 N. Y. 226, 16 N. E. 46, 4 Am. St. Rep. 444, affirming (1888) 47 Hun, 308.

[i] (N. Y. 1890) Inducing a person to go to a foreign country by the promise of work at a specified compensation, when the person making the promise knows that such compensation will not be obtained, is not an inveiglement, within Pen. Code, § 211, providing that any person is guilty of kidnapping who willfully "seizes, confines, inveigles, or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of the state, or to be sold as a slave, or in any way held to service, or kept or detained against his will."—People v. Fitzpatrick, 10 N. Y. Supp. 629, 57 Hun, 459, 8 N. Y. Cr. R. 81.

[j] (Ohio, 1885) Under Rev. St. § 6825, making the "intent unlawfully to detain or conceal" an essential element of the crime of child stealing, the intent must accompany the act of taking the child; and it is error to instruct that if the child was taken away from the mother without her consent, and against her will, such taking was unlawful, and any intention thereafter completed the crime.—Mayo v. State, 43 Ohio St. 567, 3 N. E. 712.

[k] (Va. 1829) 1 Rev. Code, c. 111, p. 427, § 28, prohibiting the "stealing" of any free person, is not invalid on the ground that there can be no larceny of persons.—Davenport v. Commonwealth, 1 Leigh, 588.

[l] (Wyo. 1896) A father, taking his child, who was of tender years, out of the state, with its consent and with the consent of its mother, who had been awarded the custody of the child in divorce proceedings, in order that the child may not be present in a criminal trial in which it had been subpœnaed as a witness, is not guilty of kidnapping.—John v. State, 6 Wyo. 203, 44 Pac. 51.

§ 2. Threats, fraud, and violence.

[a] (U. S. 1890) To inveigle another by false and fraudulent representations, or otherwise, with intent that such other should be thereby induced to leave the state of his apparent free will, is equivalent to causing him to be sent out of the state against his will, contrary to Comp. Laws Or. 1887, § 1746.—In re Kelly, 46 Fed. 653.

[b] (Ill. 1858) In an indictment for kidnapping, it is not necessary, to constitute the crime, that physical force or violence should be used on the person kidnapped. Falsely exciting her fears by threats, fraud, etc., amounting substantially to a coercion of the will, is sufficient.—Moody v. People, 20 Ill. (10 Peck) 315.

[c] (Ind. 1894) On a prosecution for kidnapping one S., it appeared that defendant, while intoxicated, met S. in the evening, and, after giving her several drinks of whisky, made arrangements with her to meet him after the other members of her family had retired, for the purpose of taking a drive. They drove to a city, where they had sexual intercourse, and remained together for five days, when, at her request, he brought her back. *Held* not to constitute kidnapping, under Rev. St. 1881, § 1915, which provides that whoever kidnaps, or forcibly or fraudulently carries off or decoys from his place of residence, or arrests or imprisons, any person, with the intention of having such person carried away from his place of residence, is guilty of kidnapping, as the case is destitute of any element of fraud.—Eberling v. State, 136 Ind. 117, 35 N. E. 1023.

[d] (N. H. 1837) In order to constitute the offense of kidnapping a child under 10 years of age, it is not necessary that actual force and violence should be used.—State v. Rollins, 8 N. H. 550.

§ 3. Consent of parents and guardians.

[a] (Ga. 1884) Where a child having a parent or guardian is kidnapped, the offense may be complete, under Code, § 4368, if the parent or guardian does not consent, without regard to the consent of the child.—Gravett v. State, 74 Ga. 191.

§ 4. Age and consent of person taken.

[a] (U. S. 1880) The service of defendant by children as street musicians, for his profit, to the injury of their morals, subject to his control, is not the rendering of a voluntary service; they being incapable of exercising will or choice

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affirmatively on the subject.—United States v. Ancarola, 1 Fed. 676, 17 Blatchf. 423.

[b] (Ga. 1885) Under Code, § 4368, relating to kidnapping, one who persuades a child of prosecutor under 18 years of age to leave her parents, and, without their knowledge or consent, go with him to another county, is guilty of kidnapping, though the child consent.—Thweatt v. State, 74 Ga. 821.

[c] (Ga. 1892) Code, § 4368, provides that, if one shall forcibly, maliciously, or fraudulently carry away a child under 18 from its parents, without her or their consent, he shall be indicted for kidnapping. *Held* that, a female 14 years old being competent to contract marriage, and the validity of her marriage not depending on the consent of her parents, it is not kidnapping for a man to take her away from her parents, against their will, for the purpose of marrying her, which marriage is actually consummated; the girl herself freely consenting, and no force or fraud being used against her or her parents.—Cochran v. State, 91 Ga. 763, 18 S. E. 16.

[d] (Mass. 1862) A child of the age of nine years is incapable of giving a valid assent to a forcible transfer of him by a stranger from the legal custody of his father to the custody of his mother, who had no right thereto; and evidence of such assent is incompetent in defense to an indictment for an assault and battery upon him in making such transfer.—Commonwealth v. Nickerson, 87 Mass. (5 Allen) 518.

[e] (N. H. 1860) Where, upon a decree of divorce, the custody of a child of four years of age was assigned to the mother, and the father afterwards with a strong hand seized the child, then in the mother's custody, and against her will carried it out of the state, it was *held* that this constituted the statute offense of unlawfully and forcibly carrying the child out of the state, and that it was not necessary to prove expressly that it was done without its consent, inasmuch as in law the child was incapable of consent.—State v. Farrar, 41 N. H. 53.

[f] (Tex. 1890) To constitute the offense of "kidnapping," under Pen. Code, art. 513, the detention must be against the consent of the person detained, and the fact that the statute provides that, if the person kidnapped is a female under 15 years of age, force is not an essential element of the offense, does not dispense with her nonconsent.—Costillo v. State, 29 Tex. App. 127, 14 S. W. 1011; Olivarez v. Same (App.) 14 S. W. 1012.

[g] (Va. 1829) A defendant, stealing a child eight years old, is guilty under 1 Rev. Code, c. 111, p. 427, § 28, though the stealing was done with the child's consent.—Davenport v. Commonwealth, 1 Leigh, 588.

§ 5. Unlawful arrest.

[a] (Cal. 1889) Where it appears that defendant was a deputy sheriff and a deputy United States marshal, and a warrant of arrest was duly issued, directed generally to any sheriff, marshal, etc., authorizing and commanding the arrest of a certain person, and such warrant was put in defendant's hands for execution, his arrest of the person named therein in a county other than that for which he was deputy sheriff, and that in which the warrant was issued, will not justify his commitment on the charge of kidnapping.—Ex parte Sternes, 82 Cal. 245, 23 Pac. 38; Id., 23 Pac. 40; Ex parte Lee, Id.

[b] (Pa. 1884) A citizen of New York, having committed a crime in Pennsylvania, in order to avoid arrest, fled to New York. By artifice and fraud he was brought back into Pennsylvania and arrested, and, after hearing upon habeas corpus, was remanded by the court of common pleas to the sheriff. Thereupon the governor of New York requested the governor of Pennsylvania to cause the release of the prisoner, and the governor of Pennsylvania, in a communication to the court of common pleas, disclaiming executive power to order such discharge, requested the court to cause the release of the prisoner. *Held*, that the prisoner should be released.—Norton's Case, 15 Wkly. Notes Cas. 395, following In re Dows (1851) 18 Pa. (6 Harris) 37.

§ 6. Place to which transported.

[a] (Cal. 1860) Act April 16, 1850, denouncing the crime of kidnapping, provides that the abduction must be accompanied with a removal into another county, state, or territory, or a design to remove the kidnapped person beyond the limits of the state. Act April 19, 1856, amendatory of and supplementary to the act of 1850, contains no provision as to the removal of the kidnapped person; the intent to detain and conceal being the gist of the offense. *Held*, that the act of 1850 was not repealed by the act of 1856.—People v. Chu Quong, 15 Cal. 332.

[aa] (Cal. 1890) Pen. Code, § 207, declares that "every person who forcibly steals, takes, or arrests any person in this state and carries him into another country, state, or county, or who forcibly takes or arrests any person with a design to take him out of this state, without," etc., is guilty of kidnapping. The evidence on which a commitment was issued showed that defendant and others went on board a schooner moored at a wharf in Los Angeles county, and by force took two sailors and carried them to the island of Santa Catalina, 20 miles from the mainland, and detained them there. *Held*, that defendant was not guilty of kidnapping, as the island is in Los Angeles county, and hence there was no design to remove the sailors from the state.—Ex parte Keil, 85 Cal. 309, 24 Pac. 742; Ex parte Miller, 24 Pac. 743; Ex parte Erewaldsen, Id.; Ex parte Anderson, Id.

[b] (La. 1886) An indictment for the forcible seizure and carrying of a person from one part of the state to another is supported by proof that the carrying was from one part of the city to another.—State v. Buckarow, 38 La. Ann. 316.

[c] (Me. 1833) To incur the penalty under St. 1821, c. 22, § 2, for carrying or transporting "out of this state any person under the age of 21 years, to parts beyond sea, without the consent of his parent, master, or guardian" the carrying must be to some foreign port or place, and not merely from one state to another.—Campbell v. Rankins, 11 Me. (2 Fairf.) 103.

[d] (N. H. 1837) Transportation to a foreign country is not necessary to the completion of the offense.—State v. Rollins, 8 N. H. 550.

[e] (N. Y. 1862) Where the intent and expectation is that the seaman kidnapped will be carried out of this state, the offense is complete, although the ship on which he is taken be not in fact destined to leave the state.—Hadden v. People, 25 N. Y. 373.

§ 7. Confinement under claim of insanity.

[a, b] (N. Y. 1893) Where two reputable physicians, appointed by the county judge at the father's instance, certify to the daughter's insanity, and their certificate is duly approved by the county judge, as prescribed by Laws 1874, c. 446, relating to the confinement of the insane, the father, who took no steps towards her restraint and removal to the hospital before such certificate and approval were placed in

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his hands, cannot be convicted on proof that the daughter was in fact sane, since, under the above section of the Penal Code, the confinement must be "without authority of law."—People v. Camp, 66 Hun, 531, 21 N. Y. Supp. 741.

[c] (N. Y. 1893) Pen. Code, § 211, provides that one who willfully seizes, confines, inveigles, or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within the state, is guilty of kidnapping. *Held*, that a father who honestly believed in the insanity of his daughter when he instituted proceedings culminating in her confinement in the state hospital for the insane is not guilty of the crime of kidnapping, though he did not exercise that care and discretion which an ordinarily prudent man would exercise under the circumstances, since malice and criminal intent are necessarily lacking.—People v. Camp, 66 Hun, 531, 21 N. Y. Supp. 741.

[d] (N. Y. 1893) The taking of the daughter to the hospital and her detention there being public, the father's conviction of the crime of kidnapping cannot be sustained under the above section, which requires the confinement to be done "secretly."—People v. Camp, 66 Hun, 531, 21 N. Y. Supp. 741, affirmed (1893) 139 N. Y. 87, 34 N. E. 755.

[e] (N. Y. 1893) Pen. Code, § 211, provides that one who willfully seizes, confines, inveigles, or kidnaps another, with intent to cause him, without authority of law, to be secretly confined or imprisoned within the state, is guilty of kidnapping. *Held*, that defendant was not guilty of such offense, where he procured an adjudication that the person alleged to have been kidnapped was insane, and, without using force, publicly conveyed her to a lunatic asylum, though she was not insane at the time.—People v. Camp, 139 N. Y. 87, 34 N. E. 755, affirming (1893) 66 Hun, 531, 21 N. Y. Supp. 741.

§ 8. Defenses.

[a] (Cal. 1891) On indictment for kidnapping, where it is shown that defendant, a constable, had a warrant authorizing him to arrest prosecutrix and bring her before a justice of the peace, and that he did not take her before the justice, but left her at a certain house, it is no defense that the warrant under which defendant acted was regular on its face, since his arresting prosecutrix, his taking her into another county, and his leaving her at the house instead of taking her before the justice, as directed by his warrant, constitute a continuous act, which was not within his authority under the warrant.—People v. Fick, 89 Cal. 144, 26 Pac. 759.

[b] (N. Y. 1888) Pen. Code, § 312, providing that the consent of the person kidnapped shall be no defense unless the person kidnapped was over 12 years of age, and the consent was not obtained by threats or duress, does not apply to cases of inveiglement.—People v. De Leon, 47 Hun, 308, affirmed 109 N. Y. 226, 16 N. E. 46.

§ 9. Persons liable.

[a] (Ga. 1894) A father cannot be charged with kidnapping his minor child, where he has not parted with his parental right to its custody.—Hunt v. Hunt, 94 Ga. 257, 21 S. E. 515.

[b] (Kan. 1889) A person who assists a mother in leaving her husband and taking away the infant child of herself and husband is not guilty of kidnapping, since she is as much entitled to the custody of the child as its father.—State v. Angel, 42 Kan. 216, 21 Pac. 1075.

[c] (Mass. 1846) Rev. St. c. 125, § 20, providing for the punishment of those who without lawful authority forcibly confine any person in this state, or carry any person out of the state against his will, applies to soldiers of another state, acting under martial law and under the military authorities of that state in time of civil war and insurrection there, who come into this state and seize and carry away the insurgent citizens of that state who are found here.—Commonwealth v. Blodgett, 53 Mass. (12 Metc.) 56.

[d] (Pa. 1876) One who harbors and conceals a child kidnapped by others is guilty as principal.—Commonwealth v. Westervelt, 11 Phila. 461, 32 Leg. Int. 346.

[e] (Pa. 1889) Act March 31, 1860 (P. L. p. 406, § 94; Purd. Dig. [Ed. 1883] p. 433), which declares that if any person shall maliciously, either by force or fraud, carry away any child with intent to deprive its parent or parents of the possession of the child, or with intent to steal any article of apparel on the person of the child, he shall be punished, etc., provided that no person claiming to be the father of an illegitimate child, or to have a right of possession of the child, shall be liable, has no application to the father of a legitimate child, who, having quarreled with his wife, has taken the child away from her.—Burns v. Commonwealth, 129 Pa. 138, 18 Atl. 756.

§ 10. Indictment or information.

Duplicity, see "Indictment and Information," vol. 27, cc. 686–688, § 379; c. 694, § 392 [c].

Joinder of counts against principal and accessory, see "Indictment and Information," vol. 27, c. 723, § 411 [q].

—— *for abduction, see* "Indictment and Information," vol. 27, c. 717, § 406 [xx].

Necessity of setting forth acts constituting offense, see "Indictment and Information," vol. 27, c. 551, § 287 [w].

Sufficiency of indictment in language of statute, see "Indictment and Information," vol. 27, c. 601, § 294 [g].

Variance in name of prosecutrix, see "Names."

[a] (Cal. 1891) Though an indictment for kidnapping alleges that defendant forcibly took the prosecutrix "for the purpose and with the intent to feloniously employ her for the unlawful use" of certain named persons, the intent is surplusage, and need not be proved.—People v. Fick, 89 Cal. 144, 26 Pac. 759.

[b] (Ga. 1884) An indictment under Code, § 4368, for kidnapping a minor child, is not insufficient because it fails to state from what place and to what place the child was taken by defendant, and by what means it was enticed away.—Dowda v. State, 74 Ga. 12.

[c] (Ind. 1889) Rev. St. § 1915, provides that whoever kidnaps or forcibly or fraudulently carries off from his place of residence, or arrests or imprisons, any person, with intent to have such person carried away from his residence, unless in pursuance of the laws of Indiana or the United States, is guilty of kidnapping. *Held*, that a count in an indictment charging that defendant did carry away forcibly from his residence one K., and that the arrest was not in pursuance of the laws of Indiana or the United States, but not alleging that it was with the intent of having such person carried away from his residence, is bad.—State v. Sutton, 116 Ind. 527, 19 N. E. 602.

[d] (Ind. 1889) A second count, charging, in addition, that the felonious and fraudulent arrest was made with the felonious and fraudulent intention of carrying K. from his residence, is good.—State v. Sutton, 116 Ind. 527, 19 N. E. 602.

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[e] (Ind. 1890) Rev. St. § 1915, provides that "whoever kidnaps, or forcibly or fraudulently carries off or decoys from his place of residence, or arrests or imprisons any person with the intention of having such person carried away from his place of residence, unless it be in pursuance of the laws of this state or of the United States, is guilty of kidnapping," etc. *Held*, that an indictment for kidnapping which fails to aver that the acts charged were not done in pursuance of the laws of the state or the United States charges no offense.—State v. Kimmerling, 124 Ind. 382, 24 N. E. 722.

[f] (Ind. 1890) An averment that defendant kidnapped the person named, "not then and there having first established a claim upon her * * * according to the laws of the state of Indiana or the laws of the United States," does not meet the exception of the statute.—State v. Kimmerling, 124 Ind. 382, 24 N. E. 722.

[g] (Ind. 1890) Under Rev. St. Ind. 1881, § 1915, which declares that "whoever kidnaps, or forcibly or fraudulently carries off, or decoys, from his place of residence, or imprisons or arrests, any person, with the intention of having such person carried away from his place of residence, * * * shall be guilty of kidnapping," an information which charges in one count a forcible carrying away of a certain female from her place of residence, and in another a fraudulent decoying of said female from her place of residence, need not charge a felonious intention in the commission of the acts alleged.—Boes v. State, 125 Ind. 205, 25 N. E. 218.

[h] (La. 1886) An indictment under Rev. St. § 805, prohibiting the forcible seizure and carrying of a person from one part of the state to another, or the imprisonment or secreting of any person, need not charge that he or she was forcibly imprisoned.—State v. Backarow, 38 La. Ann. 316.

[i] (N. C. 1885) An indictment for abduction, under Code, § 973, need not set forth the means by which the abduction was effected, nor that it was without the father's consent, nor negative the proviso as to defendant's not being a nearer blood relation to the child than the one from whom it was abducted.—State v. George, 93 N. C. 567.

[j] (Pa. 1892) Under Act March 31, 1860, § 94 (P. L. 405), inflicting a penalty for taking or decoying away a child under 10 years of age with the intent to deprive its parent or parents, or other person having the lawful charge of such child, of its possession, or with intent to steal any article of value about its person, an indictment omitting these essential ingredients of the offense is fatally defective.—Commonwealth v. Myers (Pa.) 23 Atl. 164, 29 Wkly. Notes Cas. 497.

[k] (Tex. 1848) At common law the offense of kidnapping is treated as an aggravated species of false imprisonment, and all the ingredients in the definition of the latter are necessarily comprehended in the former. The requisites in an indictment would seem to be an averment of an assault and the carrying away or transporting of the party injured from his own country into another, unlawfully and against his will.—Click v. State, 3 Tex. 282.

[l] (Wis. 1885) The intent mentioned in Rev. St. 1878, § 4387, defining the offense of kidnapping, is intended to qualify each preceding clause of the section to which it can be made applicable; and such intent must be alleged, or merely the common-law offense of false imprisonment is charged.—Smith v. State, 63 Wis. 453, 23 N. W. 879.

§ 11. Evidence.

[a] (Cal. 1891) On indictment for kidnapping, where it is shown that defendant, a constable, had a warrant authorizing him to arrest prosecutrix and bring her before a justice of the peace, and that he did not take her before the justice, but left her at a certain house, evidence is admissible that this was a house of ill fame; such evidence tending to show a motive for his failure to take her before the justice.—People v. Fick, 89 Cal. 144, 26 Pac. 759.

[b] (Ga. 1884) In a criminal prosecution for kidnapping a child, any precautions taken by the parent to prevent the decoying away of the child, and the fact that he was unwilling that it be taken away, may be put in evidence.—Gravett v. State, 74 Ga. 191.

[c] (Ga. 1884) In a prosecution for kidnapping a child, defendant cannot show that the parent treated his family harshly.—Gravett v. State, 74 Ga. 191.

[d] (Mass. 1862) Proof of entering a schoolroom and forcibly seizing a child of nine years old, placed there by the direction of his father, who had the legal custody of him, and carrying him away, without any previous knowledge on his part of the purpose in so doing, is sufficient to sustain an indictment for assault and battery upon and false imprisonment of the child, under Gen. St. c. 160, § 30, without proof that the defendants knew that they were violating the father's rights, and although the acts were done under the direction of the child's mother, and he, as soon as he knew the purpose of the seizure was to take him to her, was pleased and desirous to have the purpose carried out.—Commonwealth v. Nickerson, 87 Mass. (5 Allen) 518.

[e] (Mass. 1862) In an indictment under Gen. St. c. 160, § 30, for an assault and battery upon a child, and forcibly seizing him, with intent to send him and cause him to be sent out of the commonwealth, the intent must be proved as charged; and it is not enough simply to prove that the defendants, being employed by one who had such intent, of which they were ignorant, made the seizure, intending to put the child into the absolute control of their employer, to do as he pleased with him.—Commonwealth v. Nickerson, 87 Mass. (5 Allen) 518.

[f] (N. Y. 1848) The arrest, detention, and concealment, without legal process, of a colored person, on pretense that he is a fugitive slave, established a strong prima facie case against the party committing such violence of felonious intent under the statute against kidnapping, and justify the conclusion that an illegal disposition is designed to be made of him.—People v. Wolven, 7 N. Y. Leg. Obs. 89.

§ 12. Trial and review.

[a] (Ala. 1850) Under Clay's Dig. p. 415, § 20, making it a felony to forcibly take a child under 12 years of age, with intent to detain it from its parent, the intent is a fact to be inferred from the evidence, and falls within the exclusive province of the jury.—Oliver v. State, 17 Ala. 587.

[b] (Cal. 1891) Evidence that at the same time defendant arrested prosecutrix, and, instead of taking her before a magistrate, took her to a house of ill fame and left her, another constable arrested her husband on a charge of which he was innocent, and confined him in jail for two days, is immaterial, and its admission is harmless error.—People v. Fick, 89 Cal. 144, 26 Pac. 759.

[c] (Ill. 1858) In determining the guilt or innocence of the accused, the jury should take into consideration the condition of the person

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kidnapped, her age, education, and state of mind at the time, the object of the defendants in removing her from the state, and all the circumstances surrounding the case, as detailed in the evidence.—Moody v. People, 20 Ill. (10 Peck) 315.

[d] (Mich. 1889) Under How. Ann. St. § 9099, providing punishment for forcibly or secretly confining another against his will, or kidnapping or carrying another out of the state against his will, on a trial of the parents and grandfather of a child for taking her away from her foster parents, it is error to charge, inter alia, that defendants had no right to seek to estrange the child from her foster parents, and that if they induced her to consent to go away by allurements or promises as to the kind of clothes or home she would have, intending to destroy her love for her foster parents, or if they did anything of that kind, then they would be guilty; there being no evidence whatever of any such promises, or of any fraud, or duress, or flattery, or anything to warrant such a reference in the charge.—People v. Congdon, 77 Mich. 351, 43 N. W. 986.

[e] (N. H. 1837) An indictment alleged that the defendant kidnapped and sold a mulatto boy, etc., and detained him in imprisonment, in order to transport him to a place where slavery was tolerated, and to hold him in slavery during life. The verdict found that the defendant was guilty of selling the boy, with an expectation of his going into slavery. *Held*, that the verdict was imperfect, and a venire facias de novo was awarded.—State v. Rollins, 8 N. H. 550.

§ 13. Civil Liability.

See "Abduction," vol. 1, cc. 394–396, §§ 26–29.
Exemplary damages, see "Damages," vol. 15, c. 1899, § 195 [j].
Remedy in admiralty, see "Admiralty," vol. 1, c. 1696, § 217; cc. 1701, 1702, § 223 [c–e, g].

[a] (Mass. 1861) An action to recover damages for abduction is not maintained by proof that the defendant, by misrepresentations, threats of a criminal prosecution, and payment of money for expenses, but without using or threatening force, induced the plaintiff to go to another place and remain in concealment for a time.—Payson v. Macomber, 85 Mass. (3 Allen) 69.

[b] (Mass. 1863) The defendant in an action for harboring and secreting the minor daughter of another, and persuading her to remain absent from her father's family and service without his consent, has no ground of exception to an instruction to the jury that if the plaintiff, by his cruel, abusive and improper treatment of her, had justly alienated her affections from him to such an extent that she would not continue to live with him, he had forfeited all claim to her service and society, and could not recover damages, although the defendant requested an instruction upon this point, which was not qualified by the insertion of the word "justly"; nor has he any ground of exception to a refusal to instruct the jury that, if the plaintiff's treatment of his daughter contributed in any degree to produce the wrong complained of, the action could not be maintained.—Stowe v. Heywood, 89 Mass. (7 Allen) 118.

[c] (Mass. 1864) Defendant, in an action of tort for the abduction of plaintiff's minor child, cannot show that he acted in ignorance of plaintiff's rights, or that the child had expressed a desire to be removed, where plaintiff disavowed any claim against defendant on the ground of malice.—Rice v. Nickerson, 91 Mass. (9 Allen) 478, 85 Am. Dec. 777.

[d] (Mass. 1864) The defendant, in an action by a father for illegally abducting his minor child, is liable for reasonable and proper expenses incurred by the father in an attempt to regain possession of the child, although the defendant only obeyed the orders of a person who illegally assumed to direct the removal of the child from the father's custody.—Rice v. Nickerson, 91 Mass. (9 Allen) 478, 85 Am. Dec. 777.

[e] (N. Y. 1872) Where the agent of a children's aid society, being deceived by the false representations of a boy, 18 years of age, who gave a false name and pretended that he was an orphan, etc., sent the boy to a home in the West, *held*, that an action by the boy's parents to compel his return and for damages could not be sustained. The fact that the defendant had neglected to make inquiries as to the truth of the boy's story was not material in such an action, as the inquiries would have been fruitless; and the enticement to travel and find new homes which is held out by a children's aid society, being necessary to the conduct of the society and sanctioned by the statute incorporating it, is not an unlawful enticement or solicitation.—Nash v. Douglass, 12 Abb. Prac. (N. S.) 187.

[f] (Pa. 1838) One in loco parentis may sue in case per quod servitium, etc., for the abduction of his daughter's illegitimate child.—Moritz v. Garnhart, 7 Watts, 302, 32 Am. Dec. 762.

[g] (S. C. 1809) The plaintiff had a verdict for damages, in an action of trespass vi et armis, for the "abduction" of his daughter, who was under 21 years of age; and on motion in arrest of judgment the action was *held* to be maintainable, although it was not laid in the declaration that thereby the plaintiff lost the services of his child, and although there was no evidence of a forcible taking.—Kirkpatrick v. Lockhart, 2 Brev. 276.

Killing.

See "Homicide," vol. 26, cc. 11–1177.

Kindergarten.

See "Schools and School Districts."

Kin or Kindred.

Evidence, see "Evidence," vol. 20, cc. 284, 285, § 163.
Right of inheritance, see "Descent and Distribution," vol. 16, cc. 1428–1513, §§ 57–134.
—— *under wills, see* "Wills," VI.

Kleptomania.

Defense to prosecution for larceny, see "Larceny," vol. 32, § 54.

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Knowledge.

Actual or constructive knowledge, see "Notice."

Affecting accord and satisfaction, see "Accord and Satisfaction," vol. 1, c. 455, § 13.

—— *compromise and settlement of claims, see* "Compromise and Settlement," vol. 10, cc. 966–971, §§ 25–27.

—— *equitable estoppel, see* "Estoppel," vol. 19, cc. 2074–2084, §§ 128–135; cc. 2376–2379, §§ 273–275.

—— *laches, see* "Equity," vol. 19, cc. 347–355, §§ 200–203; cc. 447–454, §§ 239, 240.

—— *right to cancellation of contract, see* "Cancellation of Instruments," vol. 8, cc. 1797, 1798, § 27; cc. 1844–1847, § 53.

Affecting validity of assignment, see "Assignments for Benefit of Creditors," vol. 4, c. 1722, § 173; cc. 1868–1870, §§ 373, 374; cc. 2364–2366, § 1011.

—— *of contract in general, see* "Contracts," vol. 11, cc. 376–384, §§ 415–419.

—— *of election, see* "Election of Remedies," vol. 18, cc. 31, 32, § 13.

By affiant, in general, see "Affidavits," vol. 2, cc. 11, 12, § 16.

—— *in affidavit for attachment, see* "Attachment," vol. 5, cc. 454–474, §§ 245–257.

By attorney, imputation to client, see "Attorney and Client," vol. 5, cc. 1528–1534, §§ 92, 93.

By creditors of preference given to others as affecting validity of compromise, see "Compositions with Creditors," vol. 10, c. 898, §§ 29, 30.

By creditor or transferee of insolvent as to intended preference, see "Insolvency," vol. 28, cc. 112–119, § 89.

By grantee of delivery of deed, see "Deeds," vol. 16, cc. 164–166, § 133; cc. 171–173, § 138.

By grantor as affecting validity of deed procured through misrepresentations, see "Deeds," vol. 16, cc. 212–216, § 167.

By insured as affecting policy and avoidance and forfeiture thereof, see "Insurance," vol. 28, cc. 786, 787, § 247; c. 1139, §§ 545–547; cc. 1148, 1149, § 552; cc. 1309–1311, §§ 685, 686; c. 1539, § 858; cc. 1657, 1658, § 951.

By inventor as affecting anticipation, see "Patents," II. (D).

By lender as affecting right to recover loans for gambling purposes, see "Gaming," vol. 24, cc. 1583, 1584, § 37.

By maker of negotiable instrument of its transfer, see "Bills and Notes," vol. 7, c. 690, § 432.

By owner of land as affecting establishment of highways by prescription or user, see "Highways," vol. 25, cc. 1206–1208, §§ 13, 14.

—— *of use of public affecting intent to dedicate, see* "Dedication," vol. 15, cc. 2799–2804, § 21.

By parties as affecting validity of assignments, see "Assignments for Benefit of Creditors," vol. 4, cc. 1907–1912, §§ 427–429.

—— *as to defects or incumbrances in title as affecting covenant of title, see* "Covenants," vol. 14, cc. 73–79, §§ 39, 40.

By payee of representative capacity of maker of negotiable instrument, see "Bills and Notes," vol. 7, cc. 456, 457, § 265.

By purchasers of negotiable instruments, see "Bills and Notes," vol. 7, cc. 1071–1095, §§ 805–817; cc. 1101–1105, §§ 823, 824; cc. 1146–1154, §§ 866–869; "Bonds," vol. 8, cc. 160–168, §§ 101–104.

By vendor and purchaser as affecting validity of sale and rights thereunder, see "Sales"; "Vendor and Purchaser."

By witness in general, see "Witnesses," II. (A).

—— *expert witness, see* "Criminal Law," vol. 14, cc. 1740–1743, §§ 1053–1055; cc. 1756–1758, § 1065; "Evidence," vol. 20, cc. 3407–3455, §§ 2343–2363.

Carnal knowledge, see "Incest," vol. 27, cc. 35–50; "Rape."

Criminal or guilty knowledge as element of offense and affecting responsibility, see "Criminal Law," vol. 14, cc. 651, 652, §§ 37, 38; cc. 700–703, §§ 93, 95; c. 1340, §§ 746, 747; cc. 1387–1392, §§ 792–800; cc. 1464–1471, §§ 825–829; c. 1584, § 912; cc. 1782–1784, § 1083; cc. 2432, 2433, § 1707; *also*, "Burglary," vol. 8, c. 1567, § 22; "Counterfeiting," vol. 13, cc. 1155–1159, § 45; "Disorderly House," vol. 17, c. 240, § 24; c. 242, § 27; "Extortion," vol. 23, cc. 263, 264, § 5; "False Pretenses," vol. 23, cc. 681–684, § 13; cc. 733–736, § 37; cc. 773–775, § 58; "Food," vol. 23, cc. 1232–1234, § 12; "Forgery," vol. 23, cc. 1582–1584, § 108; cc. 1609–1611, § 125; "Gaming," vol. 24, cc. 1805, 1806, § 297; "Highways," vol. 25, cc. 1901–1903, § 446; "Homicide," vol. 26, c. 77, § 43½; cc. 512, 513, § 316; cc. 630, 631, § 392; "Incest," vol. 27, cc. 37, 38, § 3; "Internal Revenue," vol. 29, cc. 415–417, § 100; cc. 426, 427, § 110; "Intoxicating Liquors," vol. 29, cc. 904, 905, § 161; cc. 931–934, § 172; cc. 967–973, §§ 190–192; cc. 1015–1017, § 223; cc. 1150–1155, § 289; cc. 1184–1186, § 302; cc. 1228, 1229, § 325; cc. 1240, 1241, § 335; cc. 1416–1418, § 470; cc. 1426–1430, § 476; "Larceny," I., vol. 32; "Lotteries," IV.; "Obscenity"; "Rape," I.; "Receiving Stolen Goods."

—— *averments as to knowledge in indictments or information, see* "Indictment and Information," vol. 27, cc. 539–541, § 259; cc. 870, 871, § 549.

—— *averments as to knowledge in preliminary complaint or affidavit, see* "Criminal Law," vol. 14, cc. 1080, 1081, § 423.

Evidence of knowledge, see "Evidence," vol. 20, cc. 324–334, §§ 213–229; cc. 561–567, §§ 404, 405; c. 609, § 433; cc. 1144, 1145, § 790; c. 3131, § 2156; cc. 3135, 3136, § 2161.

Judicial notice of matters of common knowledge, see "Evidence," vol. 20, cc. 35, 36, § 4.

Of authority of agent, see "Principal and Agent," III.

—— *of partner, see* "Partnership," IV. (A).

Of cause of action, effect on limitation, see "Limitation of Actions," II. (F).

Of contents of baggage as affecting innkeeper's liability, see "Innkeepers," vol. 27, cc. 2423–2425, § 27.

Of custom, see "Customs and Usages," vol. 15, cc. 1244–1252, §§ 23, 24; cc. 1311, 1312, § 44.

Of defects and dangers as affecting liability for negligence in general, see "Negligence," I., III.

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—— *in appliances and machinery as affecting liability of master for injuries to servant, see* "Master and Servant," III. (B), (F), (G).
—— *in bridge as contributory negligence of one injured thereby, see* "Bridges," vol. 8, cc. 1148–1152, § 94.
—— *or obstructions in highway, see* "Highways," vol. 25, cc. 2017–2021, § 501.
Of falsity of representations as affecting liability for fraud or deceit, see "Fraud," vol. 23, cc. 1650–1653, § 4; cc. 1704–1713, § 20; cc. 1753–1755, § 40; cc. 1776–1778, § 51; cc. 1799–1801, § 57; cc. 1817–1820, § 69.
Of forgery of negotiable instrument affecting liability of parties on indorsement, see "Bills and Notes," vol. 7, cc. 919, 920, § 670.
Of fraud as affecting creditors' right to attack assignment, see "Assignments for Benefit of Creditors," vol. 4, c. 2387, § 1046.
—— *as affecting fraudulent conveyance, see* "Fraudulent Conveyances," vol. 24, cc. 600, 601, § 415; cc. 745–816, §§ 493–522; cc. 984–987, § 634; cc. 1011, 1012, § 654; cc. 1164–1166, § 779; cc. 1211–1213, § 817; cc. 1272–1283, §§ 857–862; cc. 1361–1369, §§ 904–907; cc. 1397–1399, § 932; cc. 1441–1445, § 957.
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Of law, necessity in case of surrender of rights, see "Action," vol. 1, c. 1101, § 6 [a].
—— *presumption, see* "Evidence," vol. 20, c. 194, § 109 [t].
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—— *as affecting bona fides of purchaser of land, see* "Vendor and Purchaser," V. (C).
—— *as affecting bona fides of purchaser of negotiable instrument, see* "Bills and Notes," vol. 7, cc. 1101–1105, §§ 823, 824; cc. 1146–1154, §§ 866–869.

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—— *of trade-mark, see* "Trade-Marks and Trade-Names."

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—— *for maritime services, see* "Maritime Liens"; "Seamen."
—— *for work on logs and lumber, see* "Logs and Logging."
—— *priorities on distribution of insolvent and bankrupt estates, see* "Assignments for Benefit of Creditors," vol. 4, cc. 2269–2273, § 902; "Bankruptcy," vol. 6, c. 584, § 536; "Corporations," vol. 12, cc. 2302–2304, § 2285; "Insolvency," vol. 28, cc. 232, 233, § 185.
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—— *injunctions against unlawful acts, see* "Injunction," vol. 27, cc. 1812–1814, §§ 174, 175; c. 1818, § 177.
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—— *for writ of assistance, see* "Assistance, Writ of," vol. 4, c. 2497, § 5 [a].
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—— *between partners, see* "Partnership," VII. (D).
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